



# The YEAR IN REVIEW

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

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## **International Legal Developments Year in Review: 2020**

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

This publication, *International Legal Developments – Year in Review: 2020*, presents a survey of important legal and political developments in international law that occurred during 2020 amid a global pandemic. The volume consists of articles from over thirty committees of the American Bar Association Section of International Law, whose members live around the world and whose committees report on a diverse range of issues and topics that have arisen in international law over the past year. Not every development in international law is included in this volume and the omission of a particular development should not be construed as an indication of insignificance. The Section of International Law committees draft their articles under extremely strict guidelines that limit the number of words that each committee has 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 limit. They made difficult decisions regarding what to include and what to cut. After the committee editors did their work, Professors Jason Palmer and Kimberly Holst, the Co-General Editors, formatted and organized the over thirty committee submissions and then transmitted the articles to an amazing team of Deputy Editors who performed substantive and technical reviews on the articles. Once the Deputy Editors completed their work and returned the articles, the Co-General Editors reviewed each article again before sending them to the diligent student editors at the Dedman School of Law at Southern Methodist University in Dallas, Texas. Both McKenzie Trimble, the Editor-in-Chief of *The International Lawyer*, and Kyle Markwardt, the *Year in Review* Managing Editor for this past academic year, and Ceijenia Cornelius, the Editor-in-Chief, and Matthew Griffeth, the Managing Editor, for this current year, performed superlatively in their respective roles. They supervised an outstanding editorial team whose individual

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names you can read in the masthead for this volume. These intrepid students checked the sources cited and reviewed each article line by line and word by word. Professor Beverly Caro Duréus, who was invaluable to the publication of this volume, served again this year as the Faculty Executive Editor, and worked closely with the Co-General Editors and with the student editors. We also appreciate the support received from Caryl Ben Basat, the Publications Officer for the ABA Section of International Law, the Division Chairs, and the other leaders of the ABA Section of International Law. Because of all the work that goes into producing the Year In Review, the final product is a useful and reliable overview of international law events during 2020. 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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Clayton Steele (Brooklyn Law School)

John Brendan Thornton (Northwestern Pritzker School of Law)

Glen Vogel (Hofstra University Frank G. Zarb School of Business)

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

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## Canada

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ADAM MAUNTAH, JACQUELINE BART, AND DANIEL O.W. SMITH\*

### **I. Unprecedented Times, Unprecedented Procedure: How the Canadian Legal System has Adapted to the COVID-19 Pandemic**

COVID-19 has engendered unprecedented hardships for all. The pandemic has forced individuals, businesses, and governments to adapt to a new global reality that no one was prepared for—the Canadian legal system was no exception. Amidst the initial chaos, the judiciary’s primary aim was to respond to rapidly evolving public health guidelines.<sup>1</sup> Yet, the same emergency measures that allowed the legal system to continue operating may have had the ancillary effect of resolving issues that traditionally plagued the legal profession.

In March 2020, the Canadian legal system was brought to a halt by COVID-19 public health measures. To deal with the crisis, novel steps were taken to safeguard both physical health and the rule of law alike. The Chief Justices of the Supreme Court of Canada (SCC), Federal Courts of Canada, and provincial courts each suspended hearings—first for a week, then a month, and finally until mid-June—as the stark scale of COVID-19’s proliferation became more apparent.<sup>2</sup>

This shutdown affected all aspects of practice: suddenly, courthouses were closed, court records were unavailable, and limitation periods were

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\* Editors: Nathania Ustun and Ramneet Sierra. Authors in order of appearance: Jordan Goodman, Associate and Jeremiah Kopp, Articling Student, McMillan LLP (Ottawa); Julia Webster, Senior Associate, Sam Levy, Associate, Jacob Mantle, Associate, Borden Ladner Gervais LLP (Toronto); Ashley Paterson, Partner and Tim Heneghan, Litigation Associate, Bennett Jones LLP (Toronto); Ramneet Sierra, J.D., LL.M, CIPP/US (Washington, D.C.); H. Scott Fairley, Partner and Margarita Dvorkina, Associate, Cambridge LLP (Toronto); Adam Mauntah, Counsel, Department of Justice (Ottawa, Canada); Jacqueline Bart, Managing Partner and Daniel O.W. Smith, Articling Student, BARTLAW LLP Immigration (Toronto).

1. *Legal and Justice System Updates*, CANADIAN BAR ASS’N (Feb. 20, 2021), <https://www.cba.org/Membership/COVID-19/Legal-Justice-Updates-Courts#resources>.

2. *Id.*

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suspended.<sup>3</sup> To keep all interested parties informed, courts regularly updated practice directions to describe the new procedural and technological changes needed to mitigate the virus' impact.<sup>4</sup> By the end of April, the Department of Justice, and courts across the country, put in place a temporary e-service process, and courts announced that hearings, once resumed, would take place virtually or over the phone.<sup>5</sup> While the SCC had recently introduced live-streaming of proceedings in an effort to open its chambers to the public, virtual appearances in the country's highest court from a home office or bedroom was a notion that would have seemed preposterous only months earlier.<sup>6</sup>

On April 16th, the Chief Justice of the SCC, Richard Wagner, issued a statement of assurance through the Canadian Judicial Council. He expressed that Canadian courts were working to limit the spread of the virus and that the rule of law prevailed.<sup>7</sup> This message, along with other steps taken by the judiciary, served to promote confidence in the legal system's capacity to continue operating. The statement was followed, on May 8th, by an announcement that Chief Justice Wagner and the Minister of Justice/ Attorney General of Canada, David Lametti, created an Action Committee on Court Operations in response to COVID-19.<sup>8</sup> The Action Committee's purpose is to provide important national leadership to support governments, courts, and court administrators trying to restore Canada's legal system to full operation.<sup>9</sup>

As the pandemic continues to evolve, given the regional differences in the severity of COVID-19, courts have taken a flexible approach employing measures tailored to the specific public health context of their respective jurisdictions. For example, the SCC conducted hearings both in person and by video conference during the first three weeks of the fall session.<sup>10</sup> But as the number of COVID-19 infections in Ottawa began to increase in October, Chief Justice Wagner directed that all counsel were to appear via

---

3. Michael Spratt, *COVID-19's profound impact on justice*, CANADIAN LAWYER (June 2, 2020), <https://www.canadianlawyermag.com/news/opinion/covid-19s-profound-impact-on-justice/330162>.

4. *Legal and Justice System Updates*, *supra* note 1.

5. *Service on the Crown*, DEP'T OF JUST. CAN. (Feb. 12, 2021), <https://www.justice.gc.ca/eng/contact/Comm3.html>.

6. *Scheduled Hearings*, SUP. CT. OF CAN. (Mar. 16, 2021), <https://www.scc-csc.ca/case-dossier/info/hear-aud-eng.aspx>.

7. Press Release, Canadian Jud. Council, Message from the Chief Justice of Canada (Apr. 16, 2020), <https://cjc-ccm.ca/en/news/message-chief-justice-canada>.

8. Press Release, Dep't of Just. Can., Chief Justice of Canada and Minister of Justice Launch Action Committee on Court Operations in Response to COVID-19 (May 7, 2020), <https://www.canada.ca/en/department-justice/news/2020/05/chief-justice-of-canada-and-minister-of-justice-launch-action-committee-on-court-operations-in-response-to-covid-19.html>.

9. *Id.*

10. *Answers to your questions in regards to the ending of the suspension period COVID-19*, SUP. CT. OF CAN. (Mar. 10, 2021), <https://www.scc-csc.ca/parties/COVID-FAQ-eng.aspx>.

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virtual hearings until the end of the calendar year.<sup>11</sup> These differing tactics have been evident across the country. From coast to coast, courts have issued numerous practice directions explaining—among other provisions—extensions to timelines in civil proceedings, special provisions for bail hearings and criminal matters, and the process for appearing by video and teleconference.<sup>12</sup>

With each additional iteration of changes, it has been increasingly clear that the legal system has been able to adapt to COVID-19 and function at a basic level. But for some, access to justice has been disrupted. Even simple changes to judicial timelines and procedures can result in significant accessibility concerns.<sup>13</sup> For example, the Ontario Court of Justice has adjourned in-person appearances in Provincial Offences court until the New Year.<sup>14</sup> While these changes may be a mere inconvenience for practitioners, they can be palpable for the parties involved who have had their matters delayed or can no longer meet with lawyers in person. The present environment may demand such adaptation, but it is important to realize that the impact of COVID-19 disproportionately affects certain groups more than others. Depending on an individual's life circumstances, the legal system is not always equal in its application, and times of crisis only magnify this disparity.<sup>15</sup> Many Canadians who have been traditionally marginalized by the legal system may feel that justice is even further out of reach.

Yet, there is still reason for optimism. While COVID-19 has exacerbated inequity by delaying judicial proceedings for some, it has also forced the Canadian legal system to adopt new technologies that have increased accessibility to the courts for others. In particular, the opportunity to broadcast legal proceedings and hold virtual hearings is promising for rural Canadians and those living in remote communities. The ability to listen to counsel from across the country and live-stream proceedings also provides a

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11. *Notice about COVID-19*, SUP. CT. OF CAN. (Mar. 10, 2020), <https://www.scc-csc.ca/court-cour/notice-avis-covid-19-eng.aspx>.

12. John Lancaster, *How COVID-19 helped push Ontario's low-tech justice system into the 21st century*, CBC NEWS (June 4, 2020), <https://www.cbc.ca/news/canada/toronto/covid-19-technology-courts-ontario-1.5596643>.

13. Jon Azpiri & Rumina Daya, *Court backlog due to COVID-19 could put justice in jeopardy*, B.C. lawyer warns, GLOB. NEWS (June 9, 2020), <https://globalnews.ca/news/7042564/bc-court-backlog-coronavirus/>.

14. *COVID-19: Notice to Counsel/Paralegals and the Public Re: Provincial Offences Act Matters in the Ontario Court of Justice*, ONT. COURT OF JUST. (Mar. 31, 2021), <https://www.ontariocourts.ca/ocj/covid-19/notice-to-public-regarding-provincial-offences-act-matters>.

15. *Riding the Third Wave: Rethinking Access to Criminal Legal Aid within an Access to Justice Framework*, DEP'T OF JUST. CAN., [https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/tr03\\_5/p2.html](https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/tr03_5/p2.html) (last accessed May 13, 2021); Kathleen Harris, *Supreme Court's chief justice calls for more diversity in Canada's legal system*, CBC NEWS (Jun. 18, 2020), <https://www.cbc.ca/news/politics/supreme-court-wagner-racism-courts-1.5617681>; Hadiya Roderique, *Black on Bay Street: Hadiya Roderique had it all. But still could not fit in*, THE GLOBE AND MAIL (Nov. 4, 2017), <https://www.theglobeandmail.com/news/toronto/hadiya-roderique-black-on-bay-street/article36823806/>.

high degree of openness and transparency, allowing the public to engage with the courts like never before.<sup>16</sup>

Over the past several months, the legal system—much like the rest of society—has withstood a great period of disruption. While the uncertainty that currently defines day-to-day life promises to continue into 2021, it is possible that present hardships will also give rise to a greater tolerance for change. If the adaptability displayed over the past months can be harnessed, the judiciary may be able to make the most of a bad situation—using creative tools and leveraging technology to build a better and more resilient legal system for everyone.<sup>17</sup>

## II. 2020 Canadian Trade Update

In 2020, the Government of Canada faced the unprecedented COVID-19 pandemic while navigating key bilateral trade relationships and attempting to preserve the rules-based trading order on the world stage. When borders closed, Canada adapted its customs procedures to meet the pandemic's logistical challenges, while continuing to develop longstanding trading relationships with the United States (under the United States-Canada-Mexico Agreement of July 1, 2020, and withstanding threatened United States aluminum tariffs) and the United Kingdom (the Canada-U.K. Trade Continuity Agreement of November 2020), and through its membership in the World Trade Organization.<sup>18</sup>

Internationally, Canada responded to political events through its export controls and sanctions regimes.<sup>19</sup> Domestically, Canadian industries actively filed complaints—launching trade remedy investigations, and the Canada Border Services Agency (CBSA) initiating a number of normal value reviews.<sup>20</sup>

### A. USMCA'S COMING INTO FORCE

The Canada-U.S. trading relationship was renewed under the Canada-United States-Mexico Agreement (CUSMA), which replaced the North

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16. Lancaster, *supra* note 12.

17. Jon Khan, *Our justice system needs to be more than a 'Zoom court'*, THE GLOBE AND MAIL (July 1, 2020), <https://www.theglobeandmail.com/opinion/article-our-justice-system-needs-to-be-more-than-a-zoom-court/>.

18. John D. Schulz, *2020 Cross-border Update: Even more confusion ahead*, LOGISTICS MGMT. (June 3, 2020), [https://www.logisticsmgmt.com/article/2020\\_cross\\_border\\_update\\_even\\_more\\_confusion Ahead](https://www.logisticsmgmt.com/article/2020_cross_border_update_even_more_confusion Ahead).

19. *Coronavirus disease (COVID-19): Border information for business*, GOV'T OF CAN. (Dec. 17, 2020), <https://www.cbsa-asfc.gc.ca/services/covid/business-affaires-eng.html#s5>.

20. Jesse Goldman & Matthew Kronby, *International trade in goods and services in Canada: overview*, BORDEN LADNER GERVAIS (June 1, 2020).

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American Free Trade Agreement. CUSMA entered into force on July 1, 2020.<sup>21</sup> Major developments include:

- (1) increasing both the *de minimis* threshold for imported goods transported by courier<sup>22</sup> and the low-value shipment threshold for commercial importations;<sup>23</sup>
- (2) updating rules of origin and verification requirements, including much stricter rules of origin for vehicles and parts that must now meet a higher regional value content requirement, a new high-wage labor value content requirement, and a new requirement to use steel and aluminum made in North America;<sup>24</sup>
- (3) eliminating investor-state dispute settlement as between the United States and Canada, with a three-year transition period from entry into force;<sup>25</sup>
- (4) reinforcing state-to-state dispute settlement by making it challenging to block the formation of panels;<sup>26</sup>
- (5) establishing more intellectual property protections, including patent term adjustments, safe harbors for internet service providers, protection for “collective marks,” geographic indications, and term increases of copyright protection to life of the author plus seventy years<sup>27</sup>; and
- (6) concessions by Canada providing additional access to certain protected markets, including textiles, dairy, poultry, eggs, and sugar. Canada also agreed to amend its dairy and wheat grading systems.<sup>28</sup>

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21. *A New Canada-United States-Mexico Agreement*, GOV'T OF CAN. (July 1, 2020), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng>.

22. Canada Border Services Agency, *Customs Notice 20-18*, GOV'T OF CAN. (May 2, 2020), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-18-eng.html>.

23. Canada Border Services Agency, *Customs Notice 20-15*, GOV'T OF CAN. (Apr. 4, 2020), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-15-eng.html>.

24. *Summary of outcomes*, GOV'T OF CAN. (Jan. 28, 2020), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/summary-sommaire.aspx?lang=eng>.

25. Marco Vigliotti, *CUSMA will not spell the immediate end to U.S. investor-state claims, warns new report*, IPOLITICS (Nov. 1, 2019), <https://ipolitics.ca/2019/11/01/cusma-will-not-spell-the-immediate-end-to-u-s-investor-state-claims-warns-new-report/>.

26. *State-to-state dispute settlement chapter summary*, GOV'T OF CAN. (Jan. 20, 2020), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/state-etat.aspx?lang=eng>.

27. *Summary of Outcomes*, *supra* note 24.

28. *Id.*



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**B. ALUMINUM TARIFFS AND PROPOSED RETALIATORY MEASURES BY CANADA**

In August, the United States re-imposed Section 232 tariffs on Canadian aluminum, arguing that “surges” of Canadian imports threatened its national security interests.<sup>29</sup> In 2018, the United States imposed similar tariffs that were lifted pursuant to a joint settlement in 2019 alongside the signing of the USMCA.<sup>30</sup> In September 2020, while Canada was preparing to impose retaliatory tariffs,<sup>31</sup> the United States lifted its aluminum tariffs but threatened to re-impose them in the future if Canadian aluminum exports exceeded certain limits.<sup>32</sup>

**C. CANADA-U.K. ROLLOVER TRADE AGREEMENT**

In November 2020, Canada and the United Kingdom completed the negotiation of the Canada-U.K. Trade Continuity Agreement (TCA) which took effect on January 1, 2021.<sup>33</sup> This “rollover” agreement continues preferential trade terms between the two countries under the Comprehensive Economic and Trade Agreement (CETA).<sup>34</sup> The TCA must be signed, ratified, and incorporated in Canada’s and the UK’s domestic law before the UK’s Brexit transition period ends on December 31, 2020.<sup>35</sup> Once in force, the TCA will be a stand-in until the negotiation of a comprehensive free trade agreement is complete.<sup>36</sup>

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29. Kevin Breuniner & Christina Wilkie, *Trump says he signed order reimposing 10% aluminum tariffs on Canada*, CNBC (Aug. 6, 2020), <https://www.cnbc.com/2020/08/06/trump-says-he-signed-order-reimposing-10percent-aluminum-tariffs-on-canada.html>.

30. *Trump lifts tariffs on Canadian aluminum, warns he may resume them*, REUTERS (Oct. 27, 2020), <https://www.reuters.com/article/us-usa-trade-canada-aluminum/trump-lifts-tariffs-on-canadian-aluminum-warns-he-may-resume-them-idUSKBN27C2TA>.

31. *Steel and aluminum*, GOV’T OF CAN. (Oct. 5, 2020), [https://www.international.gc.ca/trade-commerce/controls-contrôles/steel\\_alum-acier\\_alum.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/controls-contrôles/steel_alum-acier_alum.aspx?lang=eng).

32. *Notice of intent to impose countermeasures action against the United States in response to tariffs on Canadian aluminum products*, GOV’T OF CAN. (Aug. 18, 2020), <https://www.canada.ca/en/departement-finance/programmes/consultations/2020/notice-intent-impose-countermeasures-action-against-united-states-response-tariffs-canadian-aluminum-products.html>.

33. Press Release, Glob. Affs. Can., Canada successfully concludes talks on transitional trade continuity agreement with the United Kingdom (Nov. 21, 2020), <https://www.canada.ca/en/global-affairs/news/2020/11/canada-successfully-concludes-talks-on-transitional-trade-continuity-agreement-with-the-united-kingdom.html>.

34. *EU-Canada Comprehensive Economic and Trade Agreement (CETA)*, EUROPEAN COMM’N, <https://ec.europa.eu/trade/policy/in-focus/ceta/> (last accessed May 13, 2021).

35. *Canada-UK Trade Continuity Agreement (Canada-UK-TCA) – Economic Impact Assessment*, GOV’T OF CAN. (Dec. 8, 2020), <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cuktca-accru/ab.aspx?lang=eng>.

36. *Id.*

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**D. WTO IMPASSE**

Canada continued its work with the Ottawa Group throughout 2020, including discussions on the WTO's dispute settlement, negotiations, and transparency functions.<sup>37</sup> Canada joined the multi-party interim appeal arrangement (MPIA), an understanding of over twenty countries to use the voluntary arbitration provisions of the WTO's Dispute Settlement Understanding to preserve binding dispute settlement among participating members.<sup>38</sup>

**E. CANADA'S RESPONSE TO COVID-19 LOGISTICAL CHALLENGES**

The federal government amended legislation, policies, and procedures in response to supply chain challenges caused by the COVID-19 pandemic—including the urgent need to domestically manufacture or import personal protective equipment (PPE).<sup>39</sup> Health Canada introduced interim measures to expedite authorization for the manufacture or importation and distribution of disinfectants, PPE, and hand sanitizers.<sup>40</sup> The CBSA also introduced a number of temporary changes to customs procedures to streamline clearance procedures for PPE, reduce tariffs on essential goods, and provide relief from legislative and/or administrative timelines, fees, and penalties in response to business interruptions.<sup>41</sup>

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37. *Ottawa Group and WTO reform*, GOV'T OF CAN. (May 23, 2019), <https://www.canada.ca/en/global-affairs/news/2019/05/ottawa-group-and-wto-reform.html>.

38. *Canadian Procurement Policy and COVID-19*, BLAKES (Apr. 21, 2020), <https://www.blakes.com/insights/bulletins/2020/canadian-procurement-policy-and-covid-19-comparing>.

39. *Statement on Multi-party Interim Arrangement for appealing trade disputes through WTO*, GOV'T OF CAN. (Mar. 27, 2020), <https://www.canada.ca/en/global-affairs/news/2020/03/statement-on-multi-party-interim-arrangement-for-appealing-trade-disputes-through-wto.html>.

40. *Licensing approach to produce and distribute alcohol-based hand sanitizers: guidance document*, GOV'T OF CAN. (July 13, 2020), <https://www.canada.ca/en/health-canada/services/drugs-health-products/drug-products/applications-submissions/guidance-documents/covid-19-expedited-licensing-alcohol-hand-sanitizer.html>; See also *Hard-surface disinfectants and hand sanitizers (COVID-19) and Information for manufacturers*, GOV'T OF CAN. (Nov. 4, 2020), <https://www.canada.ca/en/health-canada/services/drugs-health-products/disinfectants/covid-19/information-manufacturers.html>.

41. Canada Border Services Agency, *Customs Notice 20-08*, GOV'T OF CAN. (Mar. 16, 2020), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-08-eng.html>; *Certain Goods Remission Order (COVID-19): SOR/2020-101*, 154 CAN. GAZETTE 11 (May 5, 2020), <https://gazette.gc.ca/rp-pr/p2/2020/2020-05-27/html/sor-dors101-eng.html>; Canada Border Services Agency, *Customs Notice 20-30*, GOV'T OF CAN. (Oct. 9, 2020), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-32-eng.html>; Canada Border Services Agency, *Customs Notice 20-10*, GOV'T OF CAN. (Mar. 19, 2020), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-10-eng.html>; Canada Border Services Agency, *Customs Notice 20-11*, GOV'T OF CAN. (Mar. 27, 2020), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-11-eng.html>; Canada Border Services Agency, *Customs Notice 20-19*, GOV'T OF CAN. (May 6, 2020), <https://www.cbsa-asfc.gc.ca/publications/cn-ad/cn20-19-eng.html>.

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The federal government extended certain legislative time periods by enacting Bill C-20, An Act respecting further COVID-19 measures, whereby certain legislative time periods may be extended.<sup>42</sup> The Minister of Finance issued an order under the Act extending the period between preliminary and final determinations, which risks violating Canada's obligations under the WTO Agreement on Subsidies and Countervailing Measures and Anti-dumping Agreement. Both of these agreements require that provisional duties are in effect for no longer than four months, subject to certain limited exceptions in the case of the Anti-dumping Agreement.<sup>43</sup>

**F. UPDATES TO EXPORT CONTROLS, ECONOMIC SANCTIONS, AND ANTI-MONEY LAUNDERING**

In 2020, Canada amended its export controls and sanctions regimes, responding to current events.<sup>44</sup> In April, Global Affairs Canada updated its suspension of issuing new export permits for controlled goods and technology destined for Turkey.<sup>45</sup> Export permit applications for all controlled goods are now reviewed on a case-by-case basis, and applications for military goods (Group 2) will be denied except where exceptional circumstances exist.<sup>46</sup> In October, Canada suspended export permits for Turkey in response to claims that Canadian technology was being used in the Nagorno-Karabakh conflict.<sup>47</sup>

In July, in response to China's national security legislation concerning Hong Kong, Global Affairs Canada announced that sensitive goods listed in Canada's Export Control List that are exported to Hong Kong would be treated as though they were destined for China and prohibited the export of sensitive military items to Hong Kong.<sup>48</sup>

In early fall, the Canadian Government enacted sanctions regulations under the Special Economic Measures Act against Belarusian officials involved in the Government of Belarus's "systemic campaign of repression" surrounding the 2020 presidential election, and its violent response to anti-government demonstrations protesting election irregularities.<sup>49</sup> The

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42. An Act respecting further COVID-19 measures, S.C., 2020 c 11 (Can.).

43. See Anti-Dumping Agreement art. 7.4, Apr. 15, 1994, 1868 U.N.T.S. 201; Agreement on Subsidies and Countervailing Measures art. 17.4, Apr. 15, 1994, 1869 U.N.T.S. 14.

44. *Coronavirus disease (COVID-19): Border information for business*, GOV'T OF CAN. (Dec. 17, 2020), <https://www.cbsa-asfc.gc.ca/services/covid/business-affaires-eng.html#s5>.

45. *Notice to Exporters – Export of items listed on the Export Control List to Turkey*, GOV'T OF CAN. (Apr. 16, 2020), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/992.aspx?lang=eng>.

46. *Id.*

47. *Statement from Minister Champagne on suspension of export permits to Turkey*, GOV'T OF CAN. (Oct. 5, 2020), <https://www.canada.ca/en/global-affairs/news/2020/10/statement-from-minister-champagne-on-suspension-of-export-permits-to-turkey.html>.

48. *Export of items listed on the Export Control List to Hong Kong*, GOV'T OF CAN. (July 3, 2020), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1003.aspx?lang=eng>.

49. Special Economic Measures (Belarus) Regulations, SOR/2020-214 (Can.).

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sanctions impose a dealings prohibition and an asset freeze on listed persons, who are also now inadmissible to Canada under the Immigration and Refugee Protection Act.<sup>50</sup>

**G. CANADIAN ANTIDUMPING AND COUNTERVAILING DUTY  
PROCEEDINGS IN 2020**

Despite allegations by domestic industries in Canada, the CBSA has yet to make a particular market situation (PMS) finding under the Special Import Measures Act. After amendments to the Special Import Measures Act and its regulations in 2018 and 2019, the CBSA may now disregard certain sales made in a foreign producer's domestic market when the CBSA finds that those sales do not permit a proper comparison with sales of the goods to an importer in Canada due to a PMS.<sup>51</sup>

In 2020, the CBSA initiated four anti-dumping and subsidiary investigations: heavy plate (HP 2020 IN); decorative and other non-structural plywood (DONP 2020 IN); wheat gluten (WG 2020 IN); and concrete reinforcing bar (RB3 2020 IN). The domestic industry complainants allege a PMS exists in Turkey (HP 2020 IN), in China (DONP 2020 IN), and in Austria, Belgium, France, Germany, and Lithuania (WG 2020 IN).<sup>52</sup>

In 2020, the CBSA also initiated the largest number of normal value reviews (seven) since the 2018 introduction of this new administrative procedure.<sup>53</sup> The CBSA administers reviews to update normal values, export prices, and/or amounts of subsidy on an exporter-specific basis.<sup>54</sup>

**III. COVID-19 Class Actions in Canada**

Since the pandemic took hold in March, over thirty COVID-19-related class actions have been launched in Canada. This section summarizes the four types of COVID-19 class action claims, discusses potential next steps

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50. See *Canadian Sanctions Related to Belarus*, GOV'T OF CAN. (July 3, 2020), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1003.aspx?lang=eng>; Immigration and Refugee Protection Act, S.C., c. 27, s. 35(1)(c) (Can.).

51. Special Import Measures Act, R.S.C., c. S-15 (Can.).

52. Canada Border Services Agency, *Certain concrete reinforcing bar – RB3 2020 IN: Notice of initiation of investigation*, GOV'T OF CAN. (Sept. 22, 2020), <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/rb32020/rb32020-ni-eng.html>; Canada Border Services Agency, *DONP 2020 IN: Decorative and other non-structural plywood: Statement of Reasons-Preliminary determinations*, GOV'T OF CAN. (Nov. 6, 2020), <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/donp2020/donp2020-pd-eng.html>; Canada Border Services Agency, *Heavy plate – HP 2020 IN: Notice of initiations of investigation* (May 27, 2020), <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/hp2020/hp2020-ni-eng.html>; Canada Border Services Agency, *Wheat gluten – WG 2020 IN: Statement of Reasons – initiation of an investigation*, GOV'T OF CAN. (Aug. 28, 2020), <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/wg2020/wg2020-in-eng.html>.

53. *Normal Value Reviews*, GOV'T OF CAN., <https://www.cbsa-asfc.gc.ca/sima-lmsi/up/menu-eng.html> (last accessed Apr. 7, 2021).

54. *Id.*

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for these cases, and considers how mass tort litigation and amendments to Ontario's Class Proceedings Act may affect how plaintiffs pursue COVID-19-related cases.<sup>55</sup>

A. TYPES OF COVID-19 CLASS ACTIONS

Class action claims in Canada relating to COVID-19 generally fall into one of four categories.

1. *Long-Term Care Home Negligence*

Negligence claims have been launched against the owners and operators of long-term care homes, which were the epicenters of the pandemic in Spring 2020. The claims—brought by residents or, in some cases, their estates—allege that the facilities failed to adequately address the threat of the virus in the pandemic's early days.<sup>56</sup> The plaintiffs allege that insufficient PPE, staffing shortages, and lax safety protocols allowed the virus to spread rapidly among residents, causing death in the worst cases.<sup>57</sup>

2. *Denial of Business Interruption Insurance*

Government-ordered closure of all “non-essential” businesses prompted many business owners to seek coverage from their insurers under business interruption policies.<sup>58</sup> Some insurers have resisted granting such claims, relying on provisions in the policies requiring that the interruption be caused by physical damage to the business or exclusion clauses that permit denial of coverage in relation to government-mandated shutdowns.<sup>59</sup>

3. *Breach of Contract / Inadequate Refunds*

With travel and live events on hiatus for months, frustrated consumers turned to the courts after requests for refunds were met with outright denials or offers of redeemable credits.<sup>60</sup> Now, airlines, ticket agencies, and sports

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55. Kristen Zaroni, *Ontario Long-Term Care Homes Hit With \$600M Class Action Lawsuit Alleging Negligence*, TOP CLASS ACTIONS (Aug. 6, 2020), <https://ca.topclassactions.com/lawsuit-settlements/coronavirus-covid-19/ontario-long-term-care-homes-hit-with-600m-class-action-lawsuit-alleging-negligence/>.

56. *Id.*

57. Taylor Blewett, *Class action lawsuit seeking \$25M for Carlingview Manor residents, families*, OTTAWA CITIZEN (Aug. 12, 2020), <https://ottawacitizen.com/news/local-news/class-action-lawsuit-seeking-25m-for-carlingview-manor-residents-families>.

58. *Business Interruption Claim Denials*, KLEIN LAWYERS LLP, <https://www.callkleinlawyers.com/business-interruption-legal-assistance-coronavirus/> (last accessed Apr. 4, 2021).

59. *Id.*

60. Press Release, WestJet, WestJet becomes first national carrier in Canada to voluntarily provide refunds to original form of payment (Oct. 21, 2020), <https://westjet.mediaroom.com/2020-10-21-WestJet-becomes-first-national-carrier-in-Canada-to-voluntarily-provide-refunds-to-original-form-of-payment>.

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teams, among others, face claims in relation to their decision to opt against granting full cash refunds.<sup>61</sup> In some cases, the claims have prompted companies to reconsider their initial position. While many airlines—including Air Canada, WestJet and Swoop—at first offered redeemable flight credits, some have relented and offered the full cash refunds that consumers had been demanding.<sup>62</sup> In Quebec, organizers of the Mont-Tremblant Iron Man triathlon now face a claim after they refused to refund entry fees for thousands of competitors.<sup>63</sup>

#### 4. *Actions Against Government*

The pace of claims against all levels of the Canadian government has remained slow. Inmates at some of Canada's penitentiaries have sued the government alleging that unsanitary living conditions and overcrowding have heightened the risk of COVID-19 exposure.<sup>64</sup> Two Ontario residents have also launched a class action against the provincial government of Newfoundland and Labrador, challenging that province's travel restrictions on the basis that such restrictions violate constitutional mobility rights under Section 6 of the *Canadian Charter of Rights and Freedoms*.<sup>65</sup>

#### B. WHAT'S NEXT?

Most of the COVID-19 class actions launched in Canada are still in their early days; defendants may be working to retain litigation counsel to devise longer-term strategies. But one procedural battle is likely to come next on the plaintiff side: carriage motions.<sup>66</sup> Carriage motions are brought when plaintiffs start multiple, competing class actions relating to a similar set of facts against a similar set of defendants to defer to a prominent proceeding and the other duplicative class actions.<sup>67</sup> Many of the hardest-hit long-term care homes are defending multiple claims brought by different plaintiffs

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61. Amanda Branch & Jasmine Godfrey, "I'd Like a Refund, Please" – *The Impact of COVID-19 on Refunds and Returns*, B&P (June 15, 2020), <https://www.bereskinparr.com/doc/i-d-like-a-refund-please-the-impact-of-covid-19-on-refunds-and-returns>.

62. *Id.*

63. Application for Class Action at 1, *Picard v. Ironman Canada Inc.*, Montreal (21 Sept. 2020) 500-06-001093-208 (C.S.) (Can. Ont.).

64. Paul Cherry, *Quebec inmate pursues attorney general in class action, says COVID-19 measures lacking*, MONTREAL GAZETTE (Apr. 21, 2020), <https://montrealgazette.com/news/quebec-inmate-pursues-attorney-general-in-class-action-says-covid-19-measures-lacking>.

65. *Class action lawsuit filed against Newfoundland and Labrador for its COVID-19 travel ban*, THE TELEGRAM (Jun. 3, 2020), <https://www.thetelegram.com/news/local/class-action-lawsuit-filed-against-newfoundland-and-labrador-for-its-covid-19-travel-ban-457129/>; Canadian Charter of Rights and Freedoms, s 6, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

66. Tim Henegham, *A Look at COVID-19 Class Actions in Canada*, JD SUPRA (Jan. 25, 2021), <https://www.jdsupra.com/legalnews/a-look-at-covid-19-class-actions-in-8022546/>.

67. *Carriage Motion*, DUHAIME'S LAW DICTIONARY, <http://www.duhaime.org/LegalDictionary/C/CarriageMotion.aspx> (last accessed Apr. 10, 2021).

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represented by different law firms.<sup>68</sup> The criteria for determination of a carriage motion are (a) the policy objectives of class proceedings legislation—access to justice, judicial economy for the parties and the administration of justice, and behavior modification; (b) the best interests of all putative class members; and, at the same time, (c) fairness to defendants.<sup>69</sup>

On the defense side, recent legislative developments may limit liability risk. In Ontario, the *Supporting Ontario's Recovery and Municipal Elections Act, 2020*<sup>70</sup> recently received Royal Assent.<sup>71</sup> The law now provides that if a business makes a “good faith effort” to act in accordance with public health guidance and applicable law, no cause of action will arise if a person is exposed to or contracts COVID-19 as a result of that business’s act or omission.<sup>72</sup> This legislative protection is unavailable if the business’s act or omission constitutes “gross negligence.”<sup>73</sup>

**C. MASS TORTS AND THE AMENDMENTS TO ONTARIO’S CLASS PROCEEDINGS ACT**

“Mass tort” cases related to COVID-19 have also been filed in Canada. Mass tort litigation involves multiple claims against a defendant or set of defendants, where individual lawsuits are streamlined (though not entirely consolidated) and damages assessments remain individualized.<sup>74</sup> Mass tort claims allow for a more individualized approach because it is unnecessary to show commonality across putative class members.<sup>75</sup>

When plaintiffs allege group harm or damage,<sup>76</sup> the lack of a multidistrict litigation framework in Canada combined with the relatively “low” bar for class action certification relative to the United States, are among the reasons why mass tort cases have often taken a back seat to class action litigation in Canada. But the unique nature of some COVID-19-related claims may not be appropriate for class treatment, particularly the long-term care cases. Proceeding by mass tort in these cases would allow each plaintiff to have their case assessed on an individual basis.<sup>77</sup>

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68. Henegham, *supra* note 66.

69. Mancinelli v. Barrick Gold Corp. 2016 ONCA 571 ¶ 13 (Can. Ont.).

70. Bill 218, An Act to enact the Supporting Ontario’s Recovery Act, 1st sess., 42nd Leg., Ontario, 2020 [Hereinafter An Act Supporting Ontario’s Recovery].

71. Sarah Sweet & Kevin A. McGivney, *Canada: Ontario Passes Bill 218 To Provide COVID-19 Liability Protection*, MONDAQ (Dec. 18, 2020), <https://www.mondaq.com/canada/operational-impacts-and-strategy/1017712/ontario-passes-bill-218-to-provide-covid-19-liability-protection>.

72. An Act Supporting Ontario’s Recovery, *supra* note 70.

73. *Id.*

74. *Mass Torts, Multidistrict Litigation (MDLs) & Class Actions*, LEVIN LAW, <https://www.levinlaw.com/legal-resources/mass-tort-class-action> (last accessed Apr. 10, 2021).

75. *Id.*

76. *Technology, legislation impacting class action vs mass tort debate in Canada*, CANADIAN LAWYER, (Mar. 18, 2021), <https://www.canadianlawyermag.com/practice-areas/personal-injury/technology-legislation-impacting-class-action-vs-mass-tort-debate-in-canada/354060>.

77. *Id.*

The recent amendments to Ontario’s *Class Proceedings Act* may also impact how plaintiffs pursue COVID-19-related cases.<sup>78</sup> The amendments introduced a requirement that the proposed class action be a “superior means” of resolving the claim relative to other types of proceedings, as well as the requirement that questions of fact or law common to the class members predominate over questions affecting only individual class members.<sup>79</sup> These changes may encourage plaintiffs and their counsel that proceeding by mass tort is more appropriate. Only class actions commenced after October 1, 2020, in Ontario are subject to the amendments to the *Class Proceedings Act*.<sup>80</sup>

#### **IV. Technocratic Dream Or Digital Nightmare: A Global and Canadian Perspective on Covid-Tracing Apps and Privacy**

Governments around the world are turning to smartphone apps to help curtail the COVID-19 pandemic and transition to life under a “new normal.” From communicating guidelines and regulations to citizens to tracking the spread of disease, the integration of digital technology into pandemic policies will allow public health authorities to share and collect information in an unprecedented way.<sup>81</sup> But these modern enhancements come with new risks of personal privacy infringements without proper implementation, as the case of Canada illustrates.

##### **A. A VERY SHORT INTRODUCTION TO CONTACT TRACING**

Government contact tracing has traditionally involved identifying an infected individual and requiring recent contacts to quarantine and submit to testing.<sup>82</sup> Contact tracing apps have accelerated this process by replacing time-consuming interview and intervention processes with an automatic exchange of data between infected individuals and their contacts.<sup>83</sup>

Early contact tracing apps in countries like South Korea and China proved effective in controlling infections but employed a degree of surveillance that would be deemed unacceptable in many countries.<sup>84</sup> Along with a comprehensive testing platform, South Korea’s strategy involved sending

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78. *Class Proceedings Act*, R.S.O 1992, c.C.6 s.5(1.1) (Can.).

79. Scott Kugler, *Major Changes To Ontario’s Class Proceedings Act*, Gowling WLG (Oct. 1, 2020), <https://gowlingwlg.com/en/insights-resources/articles/2020/major-changes-to-ontario-s-class-proceedings-act/>.

80. *Class Proceedings Act*, *supra* note 78.

81. *Digital technology for COVID-19 response*, WORLD HEALTH ORG. (Apr. 3, 2020), <https://www.who.int/news/item/03-04-2020-digital-technology-for-covid-19-response>.

82. *Contact Tracing*, CTR. FOR DISEASE CONTROL (Feb. 25, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing.html>.

83. Ashkan Soltani, Ryan Calo, and Carl Bergstrom, *Contact Tracing Apps are Not a Solution to the COVID-19 Crisis*, BROOKINGS (Apr. 27, 2020), <https://www.brookings.edu/techstream/inaccurate-and-insecure-why-contact-tracing-apps-could-be-a-disaster/>.

84. *Id.*



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phone alerts to everyone living in the community of an infected individual with a link to the individual's movements and locations visited.<sup>85</sup> South Korean authorities were also able to access confidential records, such as credit card transactions and CCTV footage.<sup>86</sup> In April 2020, South Korea required all visitors and residents arriving in the country to install a contact-tracing app that monitored compliance with quarantine requirements and mandated the wearing of tracking wristbands for violators.<sup>87</sup>

China, using the Alipay and Tencent apps, took things even further by requiring all Chinese citizens to input personal data (e.g. medical information, travel history, and COVID-19 contacts) and assigned all citizens a color-coded QR code that determined the individual's freedom to travel and remain in public.<sup>88</sup> These health apps have become an integral part of everyday life for Chinese residents. Many restaurants, hotels, and other establishments in China now require customers to display their individual codes before entering an establishment.<sup>89</sup>

Most western nations have adopted a less extreme version of these contact tracing apps based on proximity tracing, which is used to detect in-person contact using Bluetooth, GPS, or a combination of both.<sup>90</sup> GPS-derived location data works by generating location maps from the phone's movements with a user's time-stamped path and by connecting other phones that have spent time in the same location.<sup>91</sup> Bluetooth proximity trackers rely on anonymous codes shared between nearby smartphones and are therefore less invasive from a privacy perspective.<sup>92</sup>

## B. A TALE OF TWO SYSTEMS

Contact tracing apps can be centralized or decentralized. Under a centralized approach, pseudonymized and anonymized data is stored and processed on a central server, often managed by the government or national health authority.<sup>93</sup> Advocates of this approach argue that a centralized

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85. *Show evidence that apps for COVID-19 contact-tracing are secure and effective*, NATURE (Apr. 29, 2020), <https://doi.org/10.1038/d41586-020-01264-1>.

86. Justin Fendos, *How surveillance technology powered South Korea's COVID-19 response*, BROOKINGS (Apr. 29, 2020), <https://www.brookings.edu/techstream/how-surveillance-technology-powered-south-koreas-covid-19-response/>.

87. Park Han-na, *Tracking wristband launched to deter quarantine breakers*, THE KOREA HERALD (Apr. 27, 2020), <http://www.koreaherald.com/view.php?ud=20200427000967>.

88. Shining Tan, *China's Novel Health Tracker: Green on Public Health, Red on Data Surveillance*, CSIS (May 4, 2020), <https://www.csis.org/blogs/trustee-china-hand/chinas-novel-health-tracker-green-public-health-red-data-surveillance>.

89. Helen Davidson, *China's coronavirus health code apps raise concerns over privacy*, THE GUARDIAN (Apr. 1, 2020), <https://www.theguardian.com/world/2020/apr/01/chinas-coronavirus-health-code-apps-raise-concerns-over-privacy>.

90. *Science & Tech Spotlight: Contact Tracing Apps*, U.S. GOV'T ACCT. OFFICE (Jul. 28, 2020), <https://www.gao.gov/assets/710/708405.pdf>.

91. *Id.*

92. *Id.*

93. *Id.*

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database will allow authorities to immediately receive information about infected contacts and follow the spread of reported symptoms within a single network, thus aggregating more data for more robust epidemiological analysis.<sup>94</sup> But by concentrating data, this approach also concentrates on vulnerabilities around data misuse, theft, or leakage.

Decentralized systems, by contrast, are designed specifically to avoid storing information on a central database by keeping information about a user's movement on their phone.<sup>95</sup> This model is used by Apple and Google's Exposure Notification API.<sup>96</sup> In addition to using Bluetooth technology to anonymously trace close contacts of infected users, this system does not upload any data from undiagnosed users nor collect personally identifiable or location-specific data.<sup>97</sup> Google and Apple's stringent privacy requirements also ensure that public health authorities using the Exposure Notification API are inheriting these best-practice privacy policies.<sup>98</sup>

### C. CANADA'S COVID-TRACING APPS

Canada's provincial and federal adoption of COVID-tracing apps, through Alberta's *ABTraceTogether* and the Federal Government's *COVID Alert*, illustrates the important privacy, legal, and societal challenges that even developed countries face as they introduce these technologies.<sup>99</sup>

Alberta was the first Canadian province to launch its COVID-tracing app *ABTraceTogether*, using open-source code from a similar app from Singapore.<sup>100</sup> As the data on *ABTraceTogether* is defined as "health information" under Alberta's *Health Information Act* and "personal information" under Alberta's *Freedom of Information and Protection of Privacy Act*, public bodies, custodians, and private sector organizations have legal obligations to make reasonable security arrangements to protect health and

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94. Greig Paul, *UK coronavirus app expert verdict: strong privacy protection and added benefits*, THE CONVERSATION (May 7, 2020), <https://theconversation.com/uk-coronavirus-app-expert-verdict-strong-privacy-protection-and-added-benefits-138017>.

95. Tania Martin, Georgios Karopoulos, José L. Hernández-Ramos, Georgios Kambourakis, and Igor Nai Fovino, *Demystifying COVID-19 Digital Contact Tracing: A Survey on Frameworks and Mobile Apps*, WIRELESS COMMUN AND MOBILE COMPUTING (Oct. 27, 2020), <https://doi.org/10.1155/2020/8851429>.

96. P. Figliola, *Digital Contact Tracing Technology: Overview and Considerations for Implementation*, CONGRESSIONAL RESEARCH SERVICE, (May 29, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11559> [hereinafter Digital Contact Tracing].

97. *Id.*

98. *Id.*

99. *Contact tracing apps: A new world for data privacy*, NORTON ROSE FULBRIGHT (Feb. 2021), <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/d7a9a296/contact-tracing-apps-a-new-world-for-data-privacy>.

100. Steve Scherer, *In Canada, Albertans wary of 'Big Brother' with use of COVID-19 digital-tracing app*, REUTERS (May 13, 2020), <https://www.reuters.com/article/us-health-coronavirus-canada-tracing/in-canada-albertans-wary-of-big-brother-with-use-of-covid-19-digital-tracing-app-idUSKBN22P2BN>.

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personal information in their custody or control.<sup>101</sup> *ABTraceTogether* has largely met its basic privacy obligations by implementing privacy safeguards such as random anonymized user ID, an opportunity to opt-in/opt-out of data collection, and automatic rolling deletion of stored data after twenty-one days.<sup>102</sup> However, a privacy impact assessment (PIA) conducted by Alberta's Office of the Information Privacy Commissioner revealed significant data protection oversights.<sup>103</sup> These included the risk of over-collection or disclosure of Bluetooth contact logs, insufficient protections against data use for secondary purposes (law enforcement or quarantine enforcement), a design flaw inherited from the Singaporean source code that required phones to be unlocked, and actively running *ABTraceTogether* increases the risk of physical data breaches or phone theft along with the technical inconvenience of battery drainage.<sup>104</sup>

Health Canada subsequently released a Federal COVID-tracing app—*COVID Alert*—in July 2020, addressing some of the shortcomings of *ABTraceTogether*.<sup>105</sup> Based on the updated Apple-Google API, *COVID Alert* draws on the latest standards in data privacy and security, using a decentralized collection approach, Bluetooth technology, and purpose-based collection (including a fifteen-day automatic deletion of data stored), and it is voluntary to download.<sup>106</sup>

Nonetheless, there are still some remaining privacy gaps as well as technical and societal complications that have impeded widespread adoption of *COVID Alert*. For one, the app is incompatible with smartphones older than five years, potentially excluding the elderly and socioeconomically disadvantaged, who are most vulnerable to COVID-19.<sup>107</sup> Additionally, the Office of the Privacy Commissioner of Canada (OPC) has questioned the app's effectiveness given its low adoption rate.<sup>108</sup> As of September 2020, Ontario has been the only province to embrace the *COVID Alert* app. Even there, only one hundred people have reported a positive diagnosis—

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101. *ABTraceTogether: Privacy Impact Assessment Review Report*, OFF. OF THE INFO. AND PRIV. COMM'R OF ALBERTA (July 2020), [https://www.oipc.ab.ca/media/1089098/Report\\_ABTraceTogether\\_PIA\\_Review\\_Jun2020.pdf](https://www.oipc.ab.ca/media/1089098/Report_ABTraceTogether_PIA_Review_Jun2020.pdf) [hereinafter *ABTraceTogether Report*].

102. *Id.*

103. *Id.*

104. Robert Kleinman, *Digital contact tracing for COVID-19*, 192, CMAJ, 653, 654 (2020).

105. *COVID Alert: COVID-19 Notification Application Privacy Assessment*, GOV'T OF CAN. (Oct. 2020), <https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19/covid-alert/privacy-policy/assessment.html> (last updated Feb. 2021).

106. *Id.*

107. Nick Wells, *Rollout of 'COVID Alert' app faces criticism over accessibility*, THE CANADIAN PRESS (Aug. 3, 2020), <https://www.ctvnews.ca/canada/rollout-of-covid-alert-app-faces-criticism-over-accessibility-1.5049392?cache=urztwihxzglnbw%3FautoPlay%3Dtrue%3FclipId%3D104062>.

108. *Privacy review of the COVID Alert exposure notification application*, OFF. OF THE PRIV. COMM'R OF CAN. (July 31, 2020), [https://priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/rev\\_covid-app/](https://priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/rev_covid-app/).

indicating the app is used far below the required sixty percent<sup>109</sup>-eighty percent<sup>110</sup> adoption rate to be effective.

In the rush to join the digital race, Canada, like many other countries, has not yet developed a sufficiently robust legal framework to administer apps like *COVID Alert*. The OPC admonished the Canadian Government for its lack of adequate privacy laws to protect the “extremely privacy sensitive” information collected and underlined the urgent need to align Canadian laws with democratic values and individual rights.<sup>111</sup> The Federal Government has denied the Federal *Privacy Act*’s relevance to the *COVID Alert app* as the app does not collect any personal information and relies on random codes that cannot be linked back to user identities.<sup>112</sup> The Government has since proposed a new privacy law for the private sector—*The Digital Charter Implementation Act* (2020).<sup>113</sup> While this would create data privacy obligations for the private sector and provide the OPC with order-making powers, including ensuring compliance for organizations under the Consumer Privacy Protection Act, the act has not addressed data privacy issues in COVID apps at this time of writing.<sup>114</sup>

#### D. THE PATH AHEAD

While contact tracing apps are important tools in the fight against COVID-19, privacy and legal frameworks have yet to catch up to technological progress. Recent innovations show great promise for effective yet privacy-minded solutions, but Canada and other western countries will need to put in place appropriate laws and safeguards to ensure that public health does not come at the expense of individual privacy.

#### V. The Supreme Court of Canada’s Common Law Alternative to Human Rights-Based Alien Tort Claims: *Araya et al. v. Newsun Resources Ltd.*

Canada and the United States appear to be taking distinct approaches recognizing jurisdiction over human rights-based torts committed abroad.

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109. Jonathan Forani, *Low uptake and disclosure numbers plague feds’ COVID Alert app*, CTV NEWS (Sept. 2, 2020), <https://www.ctvnews.ca/health/coronavirus/low-uptake-and-disclosure-numbers-plague-feds-covid-alert-app-1.5089379>.

110. Digital Contact Tracing, *supra* note 96.

111. Sherly Falk, *Regulator Releases Guidance for Canadian Privacy Law Compliance During COVID-19*, WINSTON & STRAWN LLP, (Apr. 22, 2020), <https://www.winston.com/en/privacy-law-corner/canadian-data-privacy-regulator-releases-guidance-for-canadian-privacy-law-compliance-during-covid-19.html>.

112. *Impact Assessment Review Report*, *supra* note 101.

113. Bill C-11, An Act to enact the Consumer Protection Act, 2nd Sess., 43rd Parl. 2020 (Can.).

114. *Statement from the Privacy Commissioner of Canada following the tabling of Bill C-11*, OFF. OF THE PRIV. COMM’R OF CAN. (Nov. 19, 2020), [https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/s-d\\_201119/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/s-d_201119/).

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Cases of this kind have gradually proliferated in Canada.<sup>115</sup> At the same time, analogous litigation has been severely curtailed by the U.S. Supreme Court under the *Alien Tort Statute* (ATS).<sup>116</sup> The ATS, a long-dormant statute of the First United States Congress, was unearthed by the U.S. federal courts in 1980 as an appropriate vehicle for human rights claims under international customary law.<sup>117</sup> Now, almost thirty years later, the U.S. Supreme Court is imposing jurisdictional limitations on its extraterritorial application to alleged torts committed abroad.<sup>118</sup> In 2020, the U.S. Supreme Court agreed to consider the reach of the ATS to U.S. corporate actors for alleged human rights violations committed internationally.<sup>119</sup>

In Canada, attempts to create statutory causes of action for alleged human rights violations committed abroad have been unsuccessful,<sup>120</sup> leaving that possibility to common law. The 2020 decision in *Nevsun Res. Ltd. v. Araya* is one of a number of Canadian cases where claims have been brought based on alleged violations of international human rights norms in the course of commercial ventures abroad.<sup>121</sup> More importantly, it is also one of the few cases to survive jurisdictional challenges to a hearing on the merits, and the first case to reach and be decided by the Supreme Court of Canada affirming that such jurisdiction exists.<sup>122</sup>

*Nevsun* commenced with what became an abortive class action accompanied by a series of procedural and jurisdictional defenses, culminating in the Supreme Court's eventual remand to a trial on the merits.<sup>123</sup> The merits center on allegations by former *Nevsun* employees arising from conduct occurring between 2008 and 2012 in the Bisha Mine—a JV between *Nevsun* and the Government of Eritrea to develop an

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115. William Dodge, *Supreme Court of Canada Recognizes Corporate Liability for Human Rights Violations*, JUST SECURITY (Mar. 26, 2020), <https://www.justsecurity.org/69349/supreme-court-of-canada-recognizes-corporate-liability-for-human-rights-violations/>.

116. 28 USC § 1350; see *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

117. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

118. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009); *Sosa*, 542 U.S. at 741; *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

119. *Nestlé USA, Inc. v. Doe I*, 929 F.3d 623 (9th Cir. 2019), cert. granted sub nom., *Nestlé USA, Inc. v. Doe I*, 141 S. Ct. 188 (2020).

120. *Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, GLOBAL AFFAIRS CANADA (2019), <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other- autre/csr-strat-rse.aspx?lang=eng>; Global Affairs Canada, *Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise*, GOV'T OF CAN. (Apr. 8, 2019), <https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.html>.

121. *Nevsun Res. Ltd. v. Araya*, [2020] 443 D.L.R. (4th) 183 (Can.); see also *Piedra v. Cooper Mesa Mining Corp.*, [2012] QCCA 1455 rev'g [2011] QCCS 1996. *Recherches Internationales Quebec v. Cambior Inc.*, [1998] Q.J. 2554 (Can.).

122. See *Garcia v. Tahoe Res. Inc.*, [2017] B.C.C.A. 39 ¶¶ 127–130 (Can.); *Choc v. Hudbay Minerals Inc.*, [2013] O.N.S.C. 1414 ¶ 87 (Can.).

123. *Nevsun*, supra note 121.

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extensive gold and copper mining operation in that country.<sup>124</sup> The individual plaintiffs claimed, personally and initially, in a representative capacity for more than 1000 former employees, that they had been conscripted into a forced labor regime mandated by the Government of Eritrea.<sup>125</sup> Under that regime, the plaintiffs allegedly were required to work in conditions tantamount to slavery, accompanied by violent, cruel, inhuman, and degrading treatment at Bisha, which Nevsun allegedly condoned, and from which the company derived substantial profits.<sup>126</sup> The pleadings alleged breaches of torts already recognized in Canadian law—conversion, battery, false imprisonment, conspiracy, negligence—and, in addition, damages for breaches of customary international law prohibitions against forced labor, slavery, and various other crimes against humanity.<sup>127</sup>

Nevsun brought a series of pre-emptive applications before Justice Abrioux of the British Columbia Supreme Court in advance of a possible trial on the merits.<sup>128</sup> While Nevsun partially succeeded on a number of evidentiary issues, it did not succeed on *forum non conveniens* “given a real risk to the plaintiffs of an unfair trial occurring in Eritrea.”<sup>129</sup> Co-equally, given that customary international law was part of the law of Canada, the claims based on customary international law should only be struck, if it was “plain and obvious” that the case was bound to fail as pleaded.<sup>130</sup> Justice Abrioux concluded: “while novel . . . [the claims] should proceed to trial where they can be evaluated in their factual and legal context.”<sup>131</sup> The British Columbia Court of Appeal vindicated the provocative exercise of discretion by the motions judge.<sup>132</sup>

In the Supreme Court of Canada, a 5:4 decision affirmed the courts below.<sup>133</sup> The five Justices, led by Justice Abella, laid down a robust foundation for domestic tort claims founded in customary international law.<sup>134</sup> The Supreme Court also eliminated the applicability of the Act of State doctrine as essentially superfluous to existing Canadian common law.<sup>135</sup>

Central to this precedent overall, the Supreme Court affirmed trial court jurisdiction to entertain plaintiffs’ action for damages “under customary international law as incorporated into the law of Canada and domestic

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Nevsun*, *supra* note 121, ¶¶ 4, 7–15.

128. *Araya v. Nevsun Res. Ltd.*, [2016] 408 D.L.R. (4th) 383 ¶ 14 (Can); *Nevsun*, *supra* note 121.

129. *Nevsun*, *supra* note 121, ¶¶ 127–225, 226–296.

130. *Id.* ¶ 64.

131. *Id.* ¶ 20.

132. *Id.* ¶ 25.

133. *Id.*

134. *See id.*

135. *Nevsun*, *supra* note 121, ¶¶ 28–43.

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British Columbia law.”<sup>136</sup> The particular claims invoked under this umbrella included the use of forced labor, slavery, cruel, inhuman and degrading treatment, and crimes against humanity as breaches of customary international law constituting peremptory norms commonly referred to as *jus cogens*, from which no derogation is permitted.<sup>137</sup> All of the foregoing falls within the realm of legal norms accepted as binding by states *inter se* for adjudication by an international court, but now—breaking new ground for Canadian courts—also bind private actors under Canadian common law.<sup>138</sup>

This great leap into the hybrid realm of transnational law did not, however, extend to shaping either its specific content or its consequences in damages. As Justice Abella took care to point out, the Court’s task extended only to decide whether it was plain and obvious that the plaintiffs’ novel claims would fail.<sup>139</sup> In this limited task, the Abella majority affirmed the courts below that the plaintiffs’ claims should proceed to trial but, in doing so, provided a broader contextual foundation for such claims going forward in this and future cases.<sup>140</sup> Justice Abella rejected Nevsun’s alternative defense that the existing nominated common law torts also pleaded—conversion, battery, unlawful confinement, conspiracy, and negligence—were sufficient to address Nevsun’s claims without diving into the uncharted waters of international custom.<sup>141</sup> In fashioning a concrete bridge between international and domestic laws for remedial purposes, the majority passed the baton, noting that “the mechanism for how these claims should proceed is a *novel question that must be left to the trial judge.*”<sup>142</sup>

Central to the two dissenting opinions of Justices Brown and Rowe and Justices Côté and Moldaver was a perceived infringement on the separation of powers.<sup>143</sup> Yet, despite the sharp division of the Supreme Court in *Nevsun*, the application of international law as a tool for refashioning Canadian domestic law should not be underestimated. *Nevsun* purports to significantly expand Canadian law utilizing international law as a sword rather than a shield for purposes of creating domestic legal accountability for acts committed abroad in complicity with foreign sovereigns. The decision constitutes a benchmark precedent, setting Canadian law on a more expansive course into the hybrid sea of “transnational law.”

Where does *Nevsun* leave us? In no respect does the majority judgment posit a necessarily successful result on the merits for the *Nevsun* plaintiffs. Rather, while it is no longer open to argue that international human rights-based tort claims “plainly” and “obviously” will fail in Canada, Canadian

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136. *Id.* ¶ 60.

137. *Id.*

138. See Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.S.T.S. 993, U.N. Charter art. 7 ¶ 1.

139. *Nevsun*, *supra* note 121, ¶ 113.

140. *Id.* ¶ 26.

141. *Id.* ¶ 123.

142. *Id.* ¶ 127.

143. *Id.* ¶¶ 134–151.

courts in future cases will have their work cut out for them.<sup>144</sup> It appears, however, that U.S. jurisprudence may be continuing to go in the opposite direction. Do Canadian courts offer an alternative jurisdiction and venue to an American void? Only time will tell.

## **VI. Delivering Access to Justice: *Uber Technologies Inc. V. Heller*\***

In *Uber Technologies Inc. v. Heller*,<sup>145</sup> the courts addressed the validity of an arbitration clause between Uber and its drivers. Individuals enter into an agreement with Uber to use its software applications to provide ridesharing and food delivery services.<sup>146</sup> The Supreme Court of Canada held that the clause in that agreement requiring that Uber and its drivers submit disputes to arbitration (arbitration clause) was invalid.<sup>147</sup>

The parties to the agreement in question were Mr. Heller and a subsidiary of Uber incorporated in the Netherlands.<sup>148</sup> Under the arbitration clause, the agreement was to be governed exclusively by the laws of the Netherlands, and parties were required to submit disputes to mediation conducted according to the Mediation Rules of the International Chamber of Commerce (ICC Mediation Rules).<sup>149</sup> The parties could proceed to arbitration if they could not settle the matter through mediation.<sup>150</sup> The arbitration clause provided that the dispute “shall be exclusively and finally resolved by arbitration” under the Rules of Arbitration of the International Chamber of Commerce (ICC Arbitration Rules) and that Amsterdam would be the place of arbitration.<sup>151</sup>

Justice Abella and Justice Rowe explained the Court’s majority view that the arbitration clause was unconscionable because its terms made it exceedingly costly and difficult to invoke the dispute resolution process contemplated in it.<sup>152</sup> They first determined that the *Ontario Arbitration Act, 1991 (AA)*,<sup>153</sup> applied. The AA requires courts to stay judicial proceedings upon the motion of a party concerning a matter related to an arbitration agreement.<sup>154</sup> Uber sought such a stay.<sup>155</sup> The court can refuse to stay a

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144. *See id.* (In October 2020, the plaintiffs and the defendant company reached an out-of-court settlement.).

\* The views expressed in this article are the personal views of the author and do not represent the views or positions of the Department of Justice or the Government of Canada.

145. *Uber Tech. Inc. v. Heller*, [2020] 447 D.L.R 179 ¶ 1 (S.C.C) (Can.).

146. *Id.* ¶¶ 6–8.

147. *Id.* ¶ 99.

148. *Id.* ¶ 7.

149. *Id.* ¶¶ 8–9.

150. *Id.*

151. *Id.* (citing the decision of the Ontario Court of Appeal, [2019] O.N.C.A. 1, ¶ 11).

152. *Uber Tech.*, *supra* note 145, ¶ 39.

153. Ontario Arbitration Act, S.O. 1991, c. 17 [hereinafter AA].

154. *Id.* s. 7.

155. *Uber Tech.*, *supra* note 145, ¶ 3.



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proceeding on any of five grounds enumerated in the AA. Among these is that “[t]he arbitration agreement is invalid.”<sup>156</sup>

An arbitrator is competent to decide whether s/he can hear a dispute.<sup>157</sup> But this principle is subject to the court’s ability to rule on the question of an arbitrator’s jurisdiction.<sup>158</sup> The court may determine a challenge to that jurisdiction if the dispute is a pure question of law.<sup>159</sup> The court must refer the case to arbitration if questions of mixed fact or law are in dispute unless the relevant factual considerations require only a superficial review of the documentary evidence.<sup>160</sup>

Justices Abella and Rowe, and the judges who joined them in their decision,<sup>161</sup> determined based on the record, that if the Court allowed the question of the validity of the arbitration agreement to be determined by the arbitrator, it may never be heard.<sup>162</sup> They observed that it cost \$14,500 USD to begin an arbitration proceeding under the ICC Arbitration Rules.<sup>163</sup> This was a significant portion of the annual income Mr. Heller was estimated to earn with Uber.<sup>164</sup> They also held that the arbitration agreement was unconscionable and explained how inequality of bargaining power and an improvident contract existed in this case. Unconscionability requires both of these elements.<sup>165</sup>

There was “clearly inequality of bargaining power.”<sup>166</sup> The agreement was a standard form contract, and there was a significant difference in sophistication between the parties.<sup>167</sup> Mr. Heller also could not have been expected to appreciate the implications of agreeing to arbitrate under ICC Rules or under Dutch law.<sup>168</sup> The agreement contained no information about the costs of mediation and arbitration in the Netherlands.<sup>169</sup> The majority held that the inequality of bargaining power led to the improvident nature of the resulting bargain.<sup>170</sup> The upfront cost of entering into mediation and commencing arbitration proceedings relative to the size of an

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156. AA, *supra* note 153, s. (7)(2).

157. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34 (The Supreme Court affirmed the competence-competence principle) (Can.); *Siedel v. TELUS Comms. Inc.*, [2011] 1 S.C.R. 532, 2011 SCC 15 (examining British Columbia arbitration law) (Can.).

158. AA, *supra* note 153, s. 7(2).

159. *Id.*

160. *Uber Tech.*, *supra* note 145, ¶ 32.

161. *See id.* (Joining the majority were Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin and Kasirer.).

162. *Uber Tech.*, *supra* note 145, ¶ 47.

163. *Id.* ¶ 10.

164. *Id.* ¶ 11. (This amount was estimated at between \$20,800 and \$31,200 (CAD) per year.).

165. *Id.* ¶ 64 (citing *Nordberg v. Wynrib*, [1992] 2 S.C.R. 226, 247 (Can.); *Douez v. Facebook* [2017] 1 S.C.R. 751 (Can.)).

166. *Uber Tech.*, *supra* note 145, ¶ 93.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

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award that could have been reasonably contemplated when the agreement was entered into was disproportionate.<sup>171</sup> In addition, the designation of the Netherlands as the place of arbitration and Dutch law as governing law left Uber drivers with the impression that they would have to travel to the Netherlands to pursue a claim.<sup>172</sup>

Justice Brown concurred with the majority, but he saw their reasons as expanding the doctrine of unconscionability in a manner that was unnecessary and undesirable.<sup>173</sup> In his view, the approach of the majority would expand the reach of the doctrine without providing meaningful guidance as to its application.<sup>174</sup> Justice Brown concluded that the provision was void on public policy grounds, stating that it was “obvious” the precondition of a large upfront payment would block access to the ability of an Uber driver to have a dispute resolved.<sup>175</sup> The deference of courts to arbitral processes is based on the ability of arbitration to provide an accessible method of dispute resolution and a resolution according to law.<sup>176</sup> A clause that provides for arbitration while having the effect of precluding it diminishes curial deference for arbitration.<sup>177</sup>

Justice Côté was the lone dissenting judge. She viewed that the freedom of parties to agree to arbitration should be respected.<sup>178</sup> Also, Judge Côté wrote that the ICC Arbitration Rules allow the arbitral tribunal to conduct a hearing at any appropriate location, so it would not be necessary to travel to the Netherlands, contrary to the majority’s interpretation.<sup>179</sup> Generally, the dissent reflected a concern that the Court would return to a time when courts were hostile to arbitration and readily invalidated attempts to use it to resolve disputes.<sup>180</sup> Justice Côté would have granted the motion brought by Uber to stay the court proceedings brought by Mr. Heller so that the dispute could proceed to arbitration.<sup>181</sup> The stay would have been conditional on Uber advancing the necessary cost to begin arbitration proceedings.<sup>182</sup>

The decision of the Court provided guidance that will be useful as the utilization of arbitration agreements between businesses and individuals continues to increase in Canada.

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171. *Id.* ¶ 94.

172. *Uber Tech.*, *supra* note 145, ¶ 94.

173. *Id.* ¶ 103.

174. *Id.*

175. *Id.* ¶ 114.

176. *Id.* ¶ 117.

177. *Id.* ¶ 119.

178. *Uber Tech.*, *supra* note 145, ¶ 119.

179. *Id.* ¶¶ 274–75.

180. *Id.* ¶ 318.

181. *Id.*

182. *Id.* ¶ 199.

## VII. Canada-U.S. Asylum Agreement Found Unconstitutional

In July 2020, Canada’s Federal Court invalidated the Safe Third Country Agreement (STCA) between Canada and the United States, finding that the agreement, which requires asylum seekers to request protection in the first of the two countries they arrive in, unjustifiably violates Section 7 of the Canadian Charter of Rights and Freedoms.<sup>183</sup> The federal government has appealed the decision and recently won a motion to delay the law’s demise pending the outcome of its appeal.<sup>184</sup>

Canada and the United States agreed to the STCA in 2002, and it came into force in 2004.<sup>185</sup> The agreement, incorporated into Canadian law through the Immigration and Refugee Protection Regulations, renders ineligible claims for refugee status made by those entering Canada at an official land port of entry, with a range of exceptions for certain classes of claimants.<sup>186</sup> The exceptions include unaccompanied minors and persons who have family members with specified types of immigration status in Canada.<sup>187</sup> Importantly, the STCA does not apply to irregular entry or entry by air or sea.<sup>188</sup> Canadian officials typically turn claimants deemed ineligible under the agreement over to U.S. border officials.<sup>189</sup> The Immigration and Refugee Protection Act requires that the Governor in Council “must ensure the continuing review” of a designated safe third country’s party status to the Refugee Convention and Convention Against Torture, policies and practices with respect to claims for protection and obligations under the aforementioned treaties, and its human rights record.<sup>190</sup>

In 2008, an earlier challenge to the STCA failed at the Federal Court of Appeal.<sup>191</sup> The Court rejected administrative law arguments that the Governor In Council had overstepped its authority by designating the United States a safe third country when it was not compliant with the Refugee Convention and Convention Against Torture,<sup>192</sup> and Charter arguments under section 7 and section 15 because the asylum seeker challenging the agreement had not actually attempted to cross the border from the United States into Canada, depriving the challengers of standing.<sup>193</sup>

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183. Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship), 448 D.L.R. 4th 132 (Can. Fed. Ct.).

184. Canada (Citizenship and Immigration) v. Canadian Council for Refugees, [2020] F.C. 770 (Can. Fed. Ct.).

185. *Canada-U.S. Safe Third Country Agreement*, GOV’T OF CAN. (modified July 23, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement.html>.

186. See Immigration and Refugee Protection Regulations, SOR/2022-227 (Can.).

187. *Id.*

188. *Id.* § 159.4(1).

189. *Canadian Council for Refugees*, 448 D.L.R. 4th ¶ 91.

190. Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 102(2)–(3) (Can.).

191. *Canadian Council for Refugees v. R.*, [2008] F.C.R. 229 (Can. Ont.).

192. *Id.* ¶ 80.

193. *Id.* ¶¶ 102–04.

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In 2017, the inauguration of President Donald J. Trump coincided with a much-publicized increase in irregular border crossings from the United States into Canada.<sup>194</sup> Each of the asylum-seeking litigants, taking part in the fresh litigation against the STCA, attempted to enter Canada to claim refugee status during this surge.<sup>195</sup> A family fleeing gang violence and gender-based persecution in El Salvador coordinated with lawyers in Canada to successfully apply to the Federal Court for a stay of removal upon their arrival at the port of entry.<sup>196</sup> Nedira Jemal Mustefa, a young Ethiopian woman, attempted to make a refugee claim at a Canadian port of entry and ended up in a U.S. jail for almost a month.<sup>197</sup> Reda Yassin Al Nahass of Syria attempted with her three children to make refugee claims, at both an irregular crossing and a port of entry and managed, to secure a stay of removal with the help of Canadian counsel.<sup>198</sup> Anonymous immigration detainees in the U.S. detention system also contributed a number of affidavits describing their experiences.<sup>199</sup>

The experiences of asylum seekers facing ineligibility to claim refugee status in Canada were crucial to the Federal Court's decision to invalidate the STCA. Madam Justice Ann Marie McDonald rejected administrative law arguments similar to those made in 2008.<sup>200</sup> Also, she declined to consider arguments that the STCA violates the section 15 right to equal protection and benefit of the law by exposing women to a U.S. asylum system, which limits recognition of gender-based persecution.<sup>201</sup> She did find, however, that the STCA violates the rights against deprivation of liberty and security of the person due to the direct complicity of Canadian border officials in the detention of asylum seekers in poor conditions by U.S. authorities.<sup>202</sup> This finding comes despite repeated rulings that various stages of removal from Canada do not "engage" section 7 due, in brief, to a lack of proximity between the rights violations contemplated and the actions of the Canadian government.<sup>203</sup> The complete lack of risk assessment for asylum seekers that are returned to the U.S., combined with evidence of a strong likelihood of imprisonment by U.S. authorities upon return, allowed

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194. See Rick Rojas, *Since Trump, Quiet Upstate Road Becomes a Busy Exit from U.S.*, N.Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/nyregion/champlain-ny-canada-migrants.html?auth=login-email&login=email>.

195. See *id.*

196. Sylvia Thomson, *El Salvador Woman at the Heart of Legal Challenge to Safe Third Country Agreement*, CBC NEWS (July 8, 2017), <https://www.cbc.ca/news/canada/safe-third-country-agreement-legal-test-case-1.4195228>.

197. *Canadian Council for Refugees*, 448 D.L.R. 4th ¶¶ 19–20.

198. *Id.* ¶¶ 24–25.

199. *Id.* ¶ 31.

200. *Id.* ¶¶ 79–80.

201. *Id.* ¶ 154.

202. *Id.* ¶ 138.

203. See B010 v. Canada (Minister of Citizenship and Immigration), [2015] 3 S.C.R. 704, ¶ 75 (Can.); Tapambwa v. Canada (Citizenship and Immigration), [2019] FCA 34, ¶ 82 (Can.).

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Justice McDonald to distinguish those cases.<sup>204</sup> These Charter violations, the Court further held, do not take place in accordance with the principles of fundamental justice as their application is overbroad<sup>205</sup> and grossly disproportionate,<sup>206</sup> and they could not be justified as reasonable limits on Charter rights under section 1.<sup>207</sup> Justice McDonald noted, “[t]he evidence establishes that the conduct of Canadian officials in applying the provisions of the STCA will provoke certain, and known, reactions by US officials . . . . Canada cannot turn a blind eye to the consequences that befell Ms. Mustefa in its efforts to adhere to the STCA.”<sup>208</sup>

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204. *Canadian Council for Refugees*, 448 D.L.R. 4th ¶¶ 127–129.

205. *Id.* ¶ 131.

206. *Id.* ¶ 136.

207. *Id.* ¶¶ 148–150.

208. *Id.* ¶ 138.

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### **I. Introduction**

During 2020, Mexico attempted to navigate a global pandemic, witnessed a presidential administration wrestle with the judiciary, state leaders, and others in critical legal disputes, and ushered in several new domestic and international legal movements.<sup>1</sup> Mexico's response to COVID-19—and the flood of consequences that flowed from the response—form the basis for much of this year's *Mexico Year in Review*. This discussion is, in part, because it is hard to overstate the impact of the pandemic in Mexico. The entire country's economy has been partially closed since April 1, 2020.<sup>2</sup> How the country has legally provided for the closing of businesses—and the reopening—has impacted not only business in Mexico, but also daily life in the country.

But COVID-19 was not the only news in Mexico in 2020. President Andrés Manuel López Obrador, who was elected and took office in 2018, defended policies he implemented over the past two years.<sup>3</sup> He waged this defense, with varying levels of success, in the court of public opinion and before the Mexican Supreme Court. His administration also contended with legislative changes, including a growing call to legalize the use of marijuana in Mexico.<sup>4</sup> Finally, a 2020 *Mexico Year in Review* would be remiss not to

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1. See, e.g., Mary Sheridan, *López Obrador's bid to alter Mexican Supreme Court seen as threat to judicial independence*, WASH. POST (Apr. 27, 2021), <https://www.washingtonpost.com/world/2021/04/27/mexico-amlo-supreme-court/>.

2. WilmerHale and Creel García-Cuéllar Aiza & Enriquez, *COVID-19: Federal Government of Mexico Declares State of Emergency and Suspends "Nonessential Activities"*, WILMERHALE (April 8, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200408-covid-19-federal-government-of-mexico-declares-state-of-emergency-and-suspends-nonessential-activities>.

3. See, e.g., Carlos Jasso, *Amid women's protests, Mexican president defends his record*, NBC (Mar. 9, 2021), <https://www.nbcnews.com/news/latino/womens-protests-mexican-president-defends-record-rca374>.

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

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include a discussion of the U.S.-Mexico-Canada Agreement (USMCA), a highly anticipated trade agreement that went into effect on July 1, 2020.<sup>5</sup>

## II. Federal Measures in Response to COVID-19

Over the past year, the federal government in Mexico undertook measures aimed at slowing the spread of COVID-19 and restarting the economy.<sup>6</sup> The federal response unfolded in three “phases” that dramatically impacted lives and livelihoods in the country.<sup>7</sup>

### A. PHASE 1

Mexico confirmed its first coronavirus case in late February 2020.<sup>8</sup> Just one month later, the number of cases reportedly had risen to nearly 2,000, and twenty-eight people had died.<sup>9</sup>

On March 30, 2020, the Mexican General Health Council (*El Consejo de Salubridad General*) declared a national state of sanitary emergency.<sup>10</sup> Beginning on March 31, 2020, the country entered “Phase 1,” which prohibited all but “Essential Activities,” as defined in several *Diario Oficial de la Federación* (DOF) orders published in April.<sup>11</sup>

With these April 2020 orders, the federal government sought to clarify what activities were “essential.”<sup>12</sup> Nevertheless, because the Phase 1 directives were technically flawed, vague, and ambiguous, they caused

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5. Ana Swanson, *As New NAFTA Takes Effect, Much Remains Undone*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/business/economy/usmca-takes-effect.html>.

6. See, e.g., Campos Garza, Luciano, *Por aglomeraciones, NL da marcha atrás a restricciones en el transporte urbano*, PROCESO (Apr. 28, 2020), <https://www.proceso.com.mx/nacional/2020/4/28/por-aglomeraciones-nl-da-marcha-atras-restricciones-en-el-transporte-urbano-242082.html>.

7. Mexico: *Authorities announce three phase-plan to ease COVID-19 lockdown*, GARDA (May 13, 2020), <https://www.garda.com/crisis24/news-alerts/341951/mexico-authorities-announce-three-phase-plan-to-ease-covid-19-lockdown-may-13-update-10>.

8. Harrup, Anthony, *Mexico Confirms First Case of Coronavirus*, THE WALL STREET JOURNAL (Feb. 28, 2020), <https://www.wsj.com/articles/mexico-confirms-first-case-of-coronavirus-11582898181>.

9. México *Supera los Mil Contagios de Coronavirus; Suman Mil 94 Casos y 28 Muertos*, EL UNIVERSAL (Mar. 30, 2020), <https://www.eluniversal.com.mx/nacion/sociedad/coronavirus-30-de-marzo-mexico-supera-los-mil-contagios-de-coronavirus-suman-mil-94>.

10. *Order from the General Council of Health* (Mar. 30, 2020), available at [http://dof.gob.mx/2020/CSG/CSG\\_300320\\_VES.pdf](http://dof.gob.mx/2020/CSG/CSG_300320_VES.pdf).

11. Creel García-Cuellar Aiza & Enriquez, *COVID-19: Federal Government of Mexico Declares State of Emergency and Suspends “Nonessential Activities”*, WILMERHALE (April 8, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200408-covid-19-federal-government-of-mexico-declares-state-of-emergency-and-suspends-nonessential-activities>; Creel García-Cuellar Aiza & Enriquez, *COVID-19 Mexico Update: “Essential Activities” and Federal & State Enforcement Through April 29, 2020*, WILMERHALE (April 29, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200429-covid-19-mexico-update-essential-activities-and-federal-and-state-enforcement>.

12. WilmerHale and Creel García-Cuellar Aiza & Enriquez, *COVID-19 Mexico Update: Mexican Government Lays Out Framework for Reopening and “New Normality”*, WILMERHALE

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substantial confusion for businesses trying to determine whether their operations fit the definition of “essential.”<sup>13</sup> This was especially true for cross-border business operations that formed part of supply chains for products deemed critical under U.S. Department of Homeland Security rules.<sup>14</sup> Variations in enforcement policies among the Mexican states only added to the confusion.<sup>15</sup> For example, in April, the Baja California government closed hundreds of companies performing what it considered non-essential activities.<sup>16</sup> At the same time, other important manufacturing states, like Nuevo Leon, took a less stringent approach.<sup>17</sup>

**B. PHASES 2 AND 3**

On May 18, 2020, Mexico entered “Phase 2” which aimed to prepare the country for reopening with hygiene and social distancing mandates in place.<sup>18</sup> Less than two weeks later, on June 1, Mexico entered “Phase 3,” the final phase that the administration of President Andrés Manuel López Obrador claimed would see the gradual return to normalcy for certain regions.<sup>19</sup> This rapid move from Phase 1 to Phase 3 was widely criticized as out-of-step with public health conditions on the ground.<sup>20</sup>

During Phase 3, the government established a four-colored stoplight to convey risk levels for each region.<sup>21</sup> Each color designation permitted a certain level of activity: red (highest regional risk, least activity permitted), orange, yellow, and green (lowest regional risk, most activity permitted).<sup>22</sup>

**C. CURRENT STATE OF THE PANDEMIC IN MEXICO**

As of November 2020, many states in Mexico have seen a considerable increase in the number of COVID-19 cases.<sup>23</sup> Mexican health authorities

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(May 29, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20200529-covid19-mexican-government-lays-out-framework-for-reopening-and-new-normality>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. See, e.g., Campos Garza, Luciano, *Por aglomeraciones, NL da marcha atrás a restricciones en el transporte urbano*, PROCESO (Apr. 28, 2020), <https://www.proceso.com.mx/nacional/2020/4/28/por-aglomeraciones-nl-da-marcha-atras-restricciones-en-el-transporte-urbano-242082.html>.

18. *The New Normality: Strategy of Reopening Social, Educational, and Economic Activities*, GOVERNMENT OF MEXICO (May 13, 2010), [https://www.gob.mx/cms/uploads/attachment/file/551832/CPM\\_Plan\\_Nueva\\_Normalidad\\_\\_13may20.pdf?fbclid=IWAR2ebRAE4wuNqigaUr-U9UkUcZqzCNQzKJPxay4YadBva5QNSPkobWVBgl8](https://www.gob.mx/cms/uploads/attachment/file/551832/CPM_Plan_Nueva_Normalidad__13may20.pdf?fbclid=IWAR2ebRAE4wuNqigaUr-U9UkUcZqzCNQzKJPxay4YadBva5QNSPkobWVBgl8).

19. *Id.*

20. See, e.g., McDonald, Brent, *Mexico Is Reopening After Quarantine. Many Worry It's Too Early.*, N. Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/world/americas/coronavirus-mexico-reopening.html>.

21. *Id.*

22. *Id.*

23. *Health Alert – Mexico COVID-19 Update*, U.S. DEPARTMENT OF STATE (Nov. 13, 2020), <https://mx.usembassy.gov/health-alert-mexico-covid-19-update-11-13-2020/>.



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have reiterated calls for people to leave home only in accordance with the spotlight color assigned to each state and to follow hygiene and social distancing measures.<sup>24</sup> Despite this, as of mid-November 2020, the federal government listed only the states of Chihuahua and Durango as “red” (i.e., “maximum risk” states), where only essential economic activities and medical care are allowed.<sup>25</sup>

**D. CRITICISM AND NEXT STEPS**

Critics have argued that the Mexican government does not have an effective strategy for confronting the pandemic.<sup>26</sup> State leaders have channeled this criticism into action. On August 1, 2020, nine of Mexico’s thirty-two governors published an open letter calling for the resignation of Deputy Health Minister Hugo López-Gatell, the face of Mexico’s response to the pandemic.<sup>27</sup> And on September 7, 2020, ten of the thirty-two governors quit the national organization of governors (*Conferencia Nacional de Gobernadores* (CONAGO)), citing a lack of effective national leadership in the face of COVID-19.<sup>28</sup>

Although the pandemic and related federal response continue to evolve in Mexico, they have fundamentally altered life across the country, as well as business operations and activity. Given the ongoing rise in cases during the fall and winter months, these disruptions will likely increase until a widely available vaccine limits the virus’ spread or the pandemic begins to otherwise subside.

**III. Employment Relations During COVID-19 in Mexico**

This section identifies the legal instruments used by Mexican authorities to manage COVID-19 and their development through most of 2020, including resolutions by federal authorities on COVID-19 employment cases.

**A. LEGAL INSTRUMENTS IMPLEMENTED DURING THE PANDEMIC**

With the outbreak of COVID-19, Mexican authorities were forced to take action to protect the health of workers. On March 24, 2020, a federal decree was published issuing preventive measures to mitigate and control the health

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24. *Id.*

25. *Communications from the Ministry of Health*, GOVERNMENT OF MEXICO (Nov. 15, 2020), <https://coronavirus.gob.mx/noticias/>.

26. See, e.g., McCormick, Gladys, *The Mexican government’s response to COVID-19 is insufficient*, THE HILL (Mar. 19, 2020), <https://thehill.com/opinion/international/488538-the-mexican-governments-response-to-covid-19-is-insufficient>.

27. *Mexico Coronavirus Chief Sidesteps Calls to Resign*, ASSOCIATED PRESS (Aug. 1, 2020), <https://apnews.com/945fd2c26d4bbc594848c0b41a2ccf57>.

28. *Governors of 10 States Announce Exit from CONAGO*, 24 HORAS (Sept. 7, 2020), <https://www.msn.com/es-mx/noticias/mexico/gobernadores-de-10-estados-anuncian-su-salida-de-la-conago/ar-BB18NDHF?ocid=msedgntp>.

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risks caused by COVID-19.<sup>29</sup> On March 30, 2020, the General Health Council (*El Consejo de Salubridad General*) declared COVID-19 a health emergency due to force majeure<sup>30</sup>, which was followed by a third decree published by the Ministry of Health on March 31, 2020, mandating private companies to “immediately suspend non-essential activities from March 30 to April 30, 2020, as an extraordinary measure to respond to the health emergency.”<sup>31</sup> The suspension of non-essential activities was later extended through May 30, 2020, by means of a decree published on April 21, 2020.<sup>32</sup> Obligated to suspend activities, companies had to figure out how to keep employees healthy and identify the applicable legal standards for payment of wages and other employment-related issues.

Mexican legislation is clear on employment relations in the event of suspension of activities due to a health contingency, which generally obligate employers to pay their workers an indemnity equivalent to one day of minimum wage per each day of suspension, for a period no longer than a month, under the Mexican Federal Labor Act (LFT).<sup>33</sup> Despite this existing legal standard, federal authorities announced that employers had the obligation to pay full wages to their workers during the temporary suspension of activities, reasoning that

the LFT refers to a suspension of labor relations motivated by a health CONTINGENCY and the COVID-19 resolutions declared a health EMERGENCY. Despite the fact that the issues underlying a CONTINGENCY are undoubtedly the same as those underlying an EMERGENCY, the federal government quite purposefully used the language that did not invoke the provisions of the LFT.<sup>34</sup>

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29. *Diario Oficial de la Federación, ACUERDO por el que se establecen las medidas preventivas que se deberán implementar para la mitigación y control de los riesgos para la salud que implica la enfermedad por el virus SARS-CoV2 (COVID-19), Secretaría de Salud* (Nov. 2, 2020), [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590339&fecha=24/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590339&fecha=24/03/2020).

30. *Diario Oficial de la Federación, ACUERDO por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el virus SARS-CoV2 (COVID-19), Consejo de Salubridad General* (Nov. 2, 2020), [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590745&fecha=30/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020).

31. *Diario Oficial de la Federación, ACUERDO por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2, Secretaría de Salud* (Nov. 2, 2020), [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590914&fecha=31/03/2020&print=true](https://www.dof.gob.mx/nota_detalle.php?codigo=5590914&fecha=31/03/2020&print=true).

32. *Diario Oficial de la Federación, ACUERDO por el que se modifica el similar por el que se establecen acciones extraordinarias para atender la emergencia sanitaria generada por el virus SARS-CoV2, Secretaría de Salud* (Nov. 2, 2020), [http://dof.gob.mx/nota\\_detalle.php?codigo=5592067&fecha=21/04/2020](http://dof.gob.mx/nota_detalle.php?codigo=5592067&fecha=21/04/2020).

33. *Diario Oficial de la Federación, Ley Federal del Trabajo, Cámara de Diputados del H. Congreso de la Unión* (Nov. 2, 2020), [http://www.diputados.gob.mx/LeyesBiblio/pdf/125\\_020719.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/125_020719.pdf).

34. Solórzano, E., *Payment of Wages During the Health Contingency in México: Solidarity or Imposition?*, ABA, Section of International Law, Mexico Committee, Issue 57.

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Employers implemented different solutions to deal with the economic burden during the suspension, the most common consisting of consensual arrangements for payment of reduced wages.

On May 14, 2020, the Ministry of Health published a decree for reopening of activities, which included a Health Alert System emulating the colors of a traffic light.<sup>35</sup> Each State had the authority to decide its level of alert independently from the recommendation of the federal government and to implement the safety measures deemed appropriate. Two weeks later, the Secretaría de Economía published the Technical Guidelines for the Reopening of Economic activities, which outlined an updated list of essential activities.<sup>36</sup>

**B. VULNERABLE POPULATION**

Mexican authorities used the term “vulnerable population” to refer to a segment of the population that is older or has certain pre-existing medical conditions, subject to tighter safety restrictions.<sup>37</sup> The consensus from a legal and technical perspective was that after May 30, 2020, employers were no longer obligated to continue paying wages to the Vulnerable Population.<sup>38</sup> But federal authorities encouraged employers to continue paying salaries as a “moral” obligation.<sup>39</sup>

**C. WHAT TO EXPECT FROM JURISDICTIONAL AUTHORITIES IN MEXICO**

There have been few COVID-19 employment cases resolved in Mexican courts. That said, two court decisions granted medical personnel protection based on their human right to good health. In both cases, published in September<sup>40</sup> and October 2020,<sup>41</sup> the court used resolution 1/2020 of the

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35. *Diario Oficial de la Federación, ACUERDO por el que se establece una estrategia para la reapertura de las actividades sociales, educativas y económicas, así como un sistema de semáforo por regiones para evaluar semanalmente el riesgo epidemiológico relacionado con la reapertura de actividades en cada entidad federativa, así como se establecen acciones extraordinarias, Secretaría de Salud* (Nov. 18, 2020), [https://dof.gob.mx/nota\\_detalle.php?codigo=5593313&fecha=14/05/2020](https://dof.gob.mx/nota_detalle.php?codigo=5593313&fecha=14/05/2020).

36. *Diario Oficial de la Federación, ACUERDO por el que se establecen los Lineamientos Técnicos Específicos para la Reapertura de las Actividades Económicas, Secretaria de Economía* (Nov. 18, 2020), [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5594138&fecha=29/05/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5594138&fecha=29/05/2020).

37. *Id.* at 7.

38. *Id.* at 3.

39. *Id.*

40. *Segundo Tribunal Colegiado del Décimo Séptimo Circuito, Ponente: José Elías Gallegos Benítez. Secretario: Ezequiel Santiago Nicolás, SUSPENSIÓN PROVISIONAL EN CONTRA DE LOS EFECTOS DE LA NEGATIVA DE EXTENDER LA LICENCIA POR LACTANCIA MATERNA. SU OTORGAMIENTO NO AFECTA EL INTERÉS SOCIAL NI CONTRAVIENE DISPOSICIONES DE ORDEN PÚBLICO, Gaceta del Semanario Judicial de la Federación, Libro 78, septiembre de 2020, Tomo II, 990.* (November 2, 2020).

41. *Primer Tribunal Colegiado en Materias Penal y Administrativa del Décimo Séptimo Circuito, Ponente: José Raymundo Cornejo Olvera, SUSPENSIÓN DE OFICIO Y DE PLANO EN EL*

Inter-American Commission on Human Rights to set the legal standard. In that resolution, the Organization of American States (OAS) recommended that

when issuing emergency containment measures to address the COVID-19 pandemic, the countries of the region should apply an intersectional approach and pay particular attention to the needs and differentiated impact of those measures on the human rights of historically excluded or high-risk groups, such as older people and people of any age who have preexisting medical conditions . . . health professionals . . . .<sup>42</sup>

Because Mexican court rulings have followed the OAS's recommendations, we might expect resolutions based on international standards seeking the broadest protection of human rights for vulnerable populations in the context of the pandemic. As a result, we might also anticipate additional judicial controversies, including employment disputes.

#### **IV. Contracts: Force Majeure and Fortuitous Event**

COVID-19<sup>43</sup> has changed the way lawyers structure businesses and draft contracts. Before the pandemic, it was not common for Mexican lawyers to consider a pandemic as force majeure or a fortuitous event in their contracts. Generally, force majeure and fortuitous event clauses cover well-known events, such as hurricanes or earthquakes, and provide a valid reason for contractual nonperformance.<sup>44</sup> But during these uncertain pandemic times the key question is, can COVID-19 be understood as force majeure or fortuitous event to justify non-compliance under a contract?

In Mexico, as in many other countries, contracts are governed by the well-settled legal principle of *pacta sunt servanda*—"Legally executed contracts

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*AMPARO. PROCEDE CONCEDERLA CONTRA LA OMISIÓN DE PROPORCIONAR AL PERSONAL QUE LABORA EN LOS HOSPITALES PÚBLICOS EXPUESTO AL CONTAGIO DEL VIRUS SARS-CoV2 (COVID-19), LOS INSUMOS Y EQUIPO MÉDICO ADECUADOS PARA LA PROTECCIÓN DE SU SALUD*, *Gaceta del Semanario Judicial de la Federación, Jurisprudencia por Reiteración* (November 11, 2020), [42. Inter-American Commission on Human Rights, \*Pandemic and Human Rights in the Americas, resolution 1/2020\*, Organized American States \(Nov. 2, 2020\), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.](https://sjf.scjn.gob.mx/sjfsist/paginas/DetalleGeneralV2.aspx?Epoca=1e3e1000000000&Apendice=1000000000000&Expresion=COVID&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=8&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2022253&Hit=2&IDs=2022336,2022253,2022256,2022133,2022092,2022091,2022088,2022082&tipoTesis&Semenario=1&tabla=&Referencia=&Tema.language,“US”></a></p></div><div data-bbox=)

43. *Coronavirus disease (COVID-19)*, WHO (Oct. 14, 2020), <http://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-adetail/coronavirus-disease-covid-19>

44. Samuel M. Tony Starr et al., *What You Need to Know about Force Majeure in Light of the Coronavirus*, MINTZ (Mar. 10, 2020), [https://www.mintz.com/insights-center/viewpoints/2376/2020-03-10-what-you-need-know-about-force-majeure-light-coronavirus#\\_ftn2](https://www.mintz.com/insights-center/viewpoints/2376/2020-03-10-what-you-need-know-about-force-majeure-light-coronavirus#_ftn2).

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must be faithfully fulfilled.”<sup>45</sup> But under the Mexican Federal Civil Code and each applicable State Civil Code, no contracting party must perform the impossible.<sup>46</sup> This means that, per the applicable Mexican law, contracts can be rescinded or terminated prematurely based on the impossibility of fulfilling their purpose.

Despite the foregoing, a pandemic does not inevitably lead to the impossibility to fulfill obligations in an agreement. Yet impossibility may lay in the delay or suspension of performance of an obligation or depending on the subject matter of the agreement. For example, the Mexican government declared COVID-19 a national health emergency on the explicit basis of force majeure and immediately suspended all non-essential activities.<sup>47</sup> The federal order explicitly invoked a force majeure event for those parties who had to shut down their businesses as non-essential.<sup>48</sup> In this sense, even those parties whose contracts did not explicitly include pandemics under force majeure provisions may have had some level of uncertainty. And yet, contracting parties can still learn from COVID-19. In the future, parties should consider including the following in their force majeure clauses, when applicable: (i) all events that will not be considered force majeure or fortuitous events under the contract; (ii) a reasonable term for the affected, non-performing party to give notice to the other party, and the specific means for such notification; and (iii) depending on the subject matter of the contract, a provision for termination if the force majeure event continues for a longer period than anticipated.

Despite the foregoing, the ideal way to proceed when a force majeure event affects a contract or a contractual party, is by reviewing and analyzing the specific case at hand. Then, it will be critical to develop a tailored legal strategy, as factors specific to the situation may affect any contractual obligation or performance situation. Such factors might include (i) the relationship between the contractual parties; (ii) the subject matter of the contract and the importance of timely performance; (iii) whether a party has already performed an obligation, such as tendering a down payment; (iv) the balance of complying with the contractual obligations in a longer term compared and the cost of doing so; and (v) possible damages.

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45. *CONTRATOS. LOS LEGALMENTE CELEBRADOS DEBEN SER FIELMENTE CUMPLIDOS, NO OBSTANTE QUE SOBREVENGAN ACONTECIMIENTOS FUTUROS IMPREVISIBLES QUE PUDIERAN ALTERAR EL CUMPLIMIENTO DE LA OBLIGACIÓN, DE ACUERDO A LAS CONDICIONES QUE PRIVABAN AL CONCERTARSE AQUÉLLA, Tesis, Novena Época. Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta. Tomo XV, May 2002.*

46. General Civil Code of Mexico, Arts. 1827-28, [http://www.diputados.gob.mx/LeyesBiblio/pdf/2\\_270320.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/2_270320.pdf).

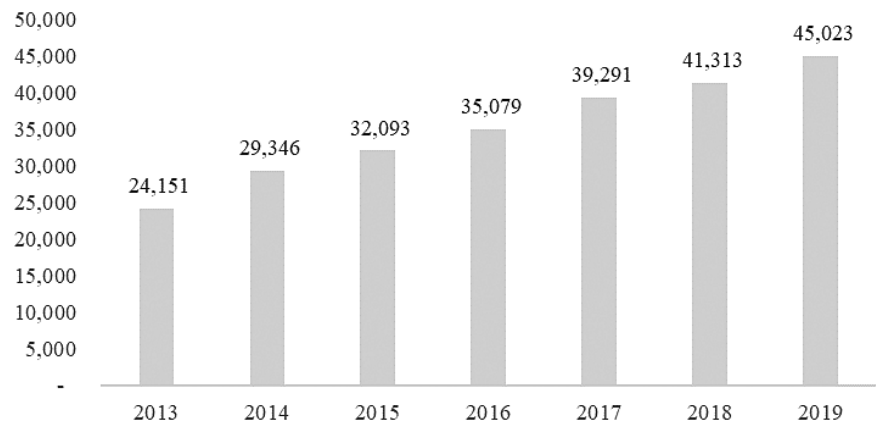
47. *ACUERDO por el que se declara como emergencia sanitaria por causa de fuerza mayor, a la epidemia de enfermedad generada por el virus SARS-CoV2 (COVID-19), Diario Oficial de la Federación [DOF] 30-03-2020 (Mex.), [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5590745&fecha=30/03/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5590745&fecha=30/03/2020) (consultada el 11 de mayo de 2021).*

48. *Id.*

## V. Real Estate and Hospitality

### A. AGREEMENTS IN MEXICO

Tourism is one of the most important activities for the Mexican economy and has grown significantly in recent years. Mexico occupied seventh place in the world ranking of international tourist arrivals in 2019, with a record of more than forty-five million arrivals.<sup>49</sup> According to estimates developed by the World Travel & Tourism Council (WTTC), the travel and tourism industry contributes to around 15.5 percent of the national gross domestic product and generates more than thirteen percent of the country's registered employment.<sup>50</sup>



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The United Nations World Tourism Organization (UNWTO) has estimated that, globally, tourist flow could be reduced by about 70 percent during 2020 due to travel restrictions imposed by national governments.<sup>52</sup> In Mexico, until October 2020, there was a sixty-five percent decrease in tourist arrivals and occupied hotel rooms, when compared to the same period in 2019.<sup>53</sup>

49. Statistical Compendium of Tourism in Mexico 2019, GOVERNMENT OF MEXICO, (2020), <https://www.datatur.sectur.gob.mx/SitePages/CompendioEstadistico.aspx>.

50. *Global Economic Impact Reports*, WORLD TRAVEL AND TOURISM COUNCIL (2020), <https://wtcc.org/Research/Economic-Impact>.

51. *See id.*

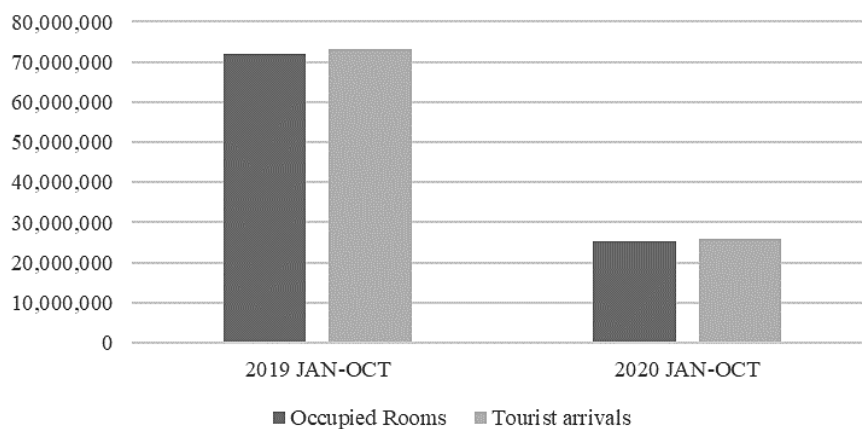
52. UN World Tourism Organization, *World Tourism Barometer, Volume 18, Issue 6* (October 2020), <https://www.e-unwto.org/doi/epdf/10.18111/wtobarometereng.2020.18.1.6>.

53. Hotel Activity, GOVERNMENT OF MEXICO (2020), <https://www.datatur.sectur.gob.mx/SitePages/ActividadHotelera.aspx>.

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	2019	2019 JAN-OCT	2020 JAN-OCT	Variation
Occupied Rooms	87,057,706	72,120,176	25,331,807	-64.9%
Tourist arrivals (domestic + international)	88,771,555	73,069,380	25,780,540	-64.7%
Average occupancy rate	60.3%	57.8%	25.7%	-55.5%

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On March 30, 2020, the Mexican General Council of Health issued a resolution declaring a health emergency under COVID-19 and stating that the Ministry of Health would take various measures to address this health emergency—including prohibiting all non-essential activities.<sup>56</sup> The Ministry of Health declared that the tourism industry was non-essential, and, consequently, hotel occupancy was limited to twenty-five percent only for guests performing activities that were considered essential. Lockdown travel restrictions were eased in July, which allowed the gradual reopening of hotels under strict health protocols.<sup>57</sup>

In this context, operators and tenants participating in various sectors in the tourism industry value chain—mainly those based on rentals and management of real estate for hotel operations—may invoke clauses of force majeure or fortuitous case in order to cancel, postpone or reduce the obligations and benefits contracted. In most hotel operating or leasing

54. *Id.*

55. *See id.*

56. *See Swanson, supra* note 5.

57. *National Guidelines Reopening of the Tourist Sector*, GOVERNMENT OF MEXICO (July 2020) [https://coronavirus.gob.mx/wp-content/uploads/2020/05/Lineamiento\\_nacional\\_reapertura\\_turismo\\_20052020.pdf](https://coronavirus.gob.mx/wp-content/uploads/2020/05/Lineamiento_nacional_reapertura_turismo_20052020.pdf).

agreements, events such as pandemics and government actions are covered by force majeure clauses.

In addition, the Mexican Federal Civil Code and some State Civil Codes feature provisions that characterize pandemics and government actions as force majeure events, opening the possibility of negotiating alternatives to the payment of rent.<sup>58</sup> For example, under the Federal Civil Code (upon which many State Codes are based), if a tenant is unable to make use of the movable or immovable property to carry out his activity during a force majeure event, the law allows him to avoid paying the agreed rent. These cases, although they may require evidence (e.g., national or local government resolutions) to support the requirement of suspension of the contractual obligation, are often easier to prove. When the lessee or operator is trying to prove force majeure, a specific and independent analysis of the operation is required to demonstrate the impact on revenues, costs, and other variables that make the business profitable.<sup>59</sup>

In any event, the tourism industry will need to consider a variety of factors to survive the pandemic. Such considerations could include the impact that each operation suffers depending on the market, the type of property affected, and the relation between the owner and the operator or tenant.

## **VI. Anti-Corruption Efforts**

According to Transparency International's 2019 Corruption Perceptions Index (which uses a scale from 1 to 100 to measure corruption, with 0 being the highest levels of corruption), Mexico scores 29 out of 100.<sup>60</sup> This score places the country in 130th place among 180 countries in the Index.<sup>61</sup> Even in the 2014 version, which was Mexico's best showing ever with a score of 35, the country did not reach the average score for the Americas region, 43.<sup>62</sup>

### **A. NATIONAL ANTI-CORRUPTION SYSTEM AND MINISTRY OF PUBLIC ADMINISTRATION EFFORTS**

In January 2020, the Coordinating Committee of the National Anti-Corruption System approved the National Anticorruption Policy, which aims to define priorities in combating corruption in Mexico.<sup>63</sup> Its principal purpose is to coordinate public and private actions to ensure effective

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58. General Civil Code of Mexico, Arts. 2431-33, *Rights and Obligations of the Tenant* (2020), [http://www.diputados.gob.mx/LeyesBiblio/pdf/2\\_270320.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/2_270320.pdf).

59. *See id.*

60. Transparency International, *Corruption Perceptions Index* (2019), <https://www.transparency.org/en/cpi/2019#>.

61. *Id.*

62. *Id.*

63. MEXICO EXECUTIVE SECRETARIAT OF THE NATIONAL ANTICORRUPTION SYSTEM, *Anticorruption National Policy* (2020), <https://www.sesna.gob.mx/politica-nacional-anticorrupcion/>.



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control of corruption, especially in preventing, investigating, and sanctioning corrupt activities.

As part of its efforts, the National Anti-Corruption System has a new tool, which is now in beta testing, called the National Digital Platform.<sup>64</sup> This tool gathers and collates information regarding public procurement, public officials involved in procurement, and private entities or individuals sanctioned and/or disqualified from participating in procurement.<sup>65</sup> The tool was also designed to allow users to report acts of corruption, but this specific function is not currently available.<sup>66</sup>

This year, the Ministry of Public Administration created the “Alerting Citizens System,”<sup>67</sup> a different platform that receives reports of corruption, instead of enabling the relevant mechanism of the National Digital Platform. This has created uncertainty regarding which is the correct mechanism to report acts of corruption.<sup>68</sup> In October 2020—possibly to encourage use of the Alerting Citizens System—the federal Ministry of Public Administration published the Whistleblowers Protection Protocol.<sup>69</sup> This protocol provides protection for whistleblowers who report acts of corruption through the Alerting Citizens System.<sup>70</sup>

Two Mexican states, Aguascalientes and Jalisco, have connected to the National Digital Platform—linking their systems that track public officials’ assets and financial interests to the National Digital Platform.<sup>71</sup>

## B. THE “MASTER SCAM”

This year witnessed the extradition of Emilio Lozoya, former director of the Mexican state-owned oil company PEMEX, for his alleged involvement in the so-called *Estafa Maestra* or Master Scam.<sup>72</sup> Lozoya is facing charges for money laundering and bribery, among others, but he has been willing to

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64. MEXICO EXECUTIVE SECRETARIAT OF THE NATIONAL ANTICORRUPTION SYSTEM, *National Digital Platform* (2020), <https://plataformadigitalnacional.org/>.

65. National Anti-corruption System Secretariat, *Increasing Transparency and Accountability: How Mexico is Opening Up and Connecting Procurement Data*, Case Study from DIGITAL BUYING GUIDE (Oct. 14, 2020) <https://www.digitalbuyingguide.org/en/case-studies/increasing-transparency-and-accountability-how-mexicos-anti-corruption-secretariat-is-opening-up-and-connecting-procurement-data/>.

66. National Digital Platform, *supra* note 64.

67. *Alerting Citizens System*, GOVERNMENT OF MEXICO (2020), <https://alertadores.funcionpublica.gob.mx/>.

68. *Compare* National Digital Platform, *supra* note 64 *with* Alerting Citizens System, *supra* note 67.

69. *Whistleblowers Protection Protocol 2020*, MINISTRY OF PUBLIC ADMINISTRATION (Oct. 19, 2020).

70. Alerting Citizens System, *supra* note 67.

71. Viridiana Saavedra, *Jalisco Conecta a la plataforma digital nacional*, EL OCCIDENTAL (Sep. 23, 2020) <https://www.eloccidental.com.mx/local/noticias-jalisco-sistema-estatal-anticorrupcion-se-conecta-a-la-plataforma-digital-nacional-5799156.html>.

72. *Emilio Lozoya: Former Mexican Oil Boos Leaves Spain to Face Charges*, BBC NEWS (July 16, 2020), <https://www.bbc.com/news/world-latin-america-53425825>.

cooperate with Mexican authorities by providing information and evidence regarding the alleged participation of high-profile politicians in the scheme.<sup>73</sup> This case is notable due to the high profile of the persons allegedly involved, including former President Enrique Peña Nieto, several members of his cabinet, governors, and congressmen.

### C. ANTI-CORRUPTION BUDGET

The federal budget for the fiscal year 2021 includes a \$3,315,741,103 MXN (more than \$160 million USD) budget for anticorruption efforts, which will be distributed among judicial, tax, public administration, and transparency authorities, the aforementioned National Anticorruption System, and the General Prosecutor.<sup>74</sup> This assignment of resources is a step forward for Mexico's fight against corruption. Before this, in the 2020 budget, \$100 million MXN was reallocated to a new Special Prosecutor's Office, which was to specialize in combatting corruption.<sup>75</sup> For 2021, this Special Prosecutor authority will have more than \$123 million MXN, but other authorities will also have resources to combat corruption within the scope of their competence.<sup>76</sup>

## VII. Notable Mexican Supreme Court Decisions

Throughout 2020, the Mexican Supreme Court ruled on three issues that are especially important for the country's public life due to their legal, political, and social significance.

First, the Mexican Supreme Court declared unconstitutional a 2014 reform to the Constitution of Baja California that had been approved by the local congress and promoted by the governor elected in 2019, Jaime Bonilla.<sup>77</sup> Under this reform, the governor's term was extended from two to five years, in violation of the federal electoral reform of 2014.<sup>78</sup> The federal measures require that the constitutions of the Mexican States guarantee that at least one local election will be held on the same date as one of the federal elections.<sup>79</sup>

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73. Alberto Nájjar, *Emilio Lozoya: 3 claves para entender el mayor escándalo de corrupción en la historia de México*, BBC NEWS (Oct. 15, 2020), <https://www.bbc.com/mundo/noticias-america-latina-53870972>.

74. *Project Decree of the Expenditure Budget of the Federation for the Fiscal Year 2021*, MEXICO MINISTRY OF FINANCE AND PUBLIC CREDIT (2020), <https://www.ppef.hacienda.gob.mx/>.

75. *Expenditure Budget of the Federation for the Fiscal Year 2020*, MEXICO MINISTRY OF FINANCE AND PUBLIC CREDIT (Dec. 11, 2019).

76. *Proyecto de presupuesto de egresos de la federación para el ejercicio fiscal 2021, Anexo 31, Diario Oficial de la Federación [DOF]* (Mex.).

77. Eduardo Murillo, *Sepulta la Suprema Corte la 'ley Bonilla' con Fallo Unánime*, LA JORNADA (May 12, 2020), <https://www.jornada.com.mx/ultimas/politica/2020/05/12/sepulta-la-suprema-corte-la-ley-bonilla-con-fallo-unanime-4116.html>.

78. Art. 116, sec. IV(n) *Constitución Política de los Estados Unidos Mexicanos*.

79. The next federal election will take place in 2021.

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Second, in October 2020, the Mexican Supreme Court upheld the constitutionality of the popular consultation<sup>80</sup> proposed by President López Obrador. The popular vote will determine whether five former presidents of the country should be investigated and tried if a further investigation reveals that they may have committed crimes.<sup>81</sup> The only precedent for this kind of trial against former presidents in Mexico was the 2002 creation of the Special Prosecutor's Office for Social and Political Movements of the Past (*Fiscalía Especial para Movimientos Sociales y Políticos del Pasado*); this effort involved inquiries into cases like the 1971 "Halconazo" and the 1968 student massacre.<sup>82</sup> Experts expect judicial proceedings may be initiated against former President Peña Nieto for corruption related to a complaint filed against Emilio Lozoya, former director of the state-owned petroleum company Pemex.<sup>83</sup>

Although the resolution prepared by Justice Luis María Aguilar argued that the popular consultation violated the human rights of the potential defendants, on October 1, 2020, the Mexican Supreme Court resolved that the popular consultation is, indeed, constitutional.<sup>84</sup> But in order to comply with the presumption of innocence of the potential defendants, the question to be asked in the popular consultation has been changed and now omits any reference by name to the potential defendants.<sup>85</sup>

The last important resolution to be issued by the Mexican Supreme Court relates to the current security crisis.<sup>86</sup> This ruling will resolve the constitutional controversy emerging from the presidential agreement under which the permanent armed forces were deployed to carry out tasks of public security within the purview of the National Guard, a strictly civil

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80. In Mexico, popular consultation is a process by which citizens vote on one or several issues of national importance.

81. Elías Camhaji, *La Suprema Corte Declara Constitucional la Consulta de López Obrador para Juzgar a los Expresidentes*, EL PAÍS, (Oct. 1, 2020), <https://elpais.com/mexico/2020-10-01/la-suprema-corte-declara-constitucional-la-consulta-de-lopez-obrador-para-juzgar-a-los-expresidentes.html>.

82. See generally *The 1971 Corpus Christi Student Massacre*, EL UNIVERSAL (Oct. 6, 2020 1:57) <https://www.eluniversal.com.mx/english/1971-corpus-christi-student-massacre-one-bloodiest-chapters-mexicos-history>; Joe Richman & Anayansi Diaz-Cortes, *Mexico's 1968 Massacre: What Really Happened?*, NPR (Dec. 1, 2008), <https://www.npr.org/templates/story/story.php?storyId=97546687>.

83. Juan Montes and José de Córdoba, *Mexico is Investigating Ex-President Enrique Peña Nieto, Top Officials Say*, THE WALL STREET JOURNAL (Feb. 19, 2020), <https://www.wsj.com/articles/mexico-is-investigating-ex-president-enrique-pena-nieto-top-official-says-11582152342>.

84. Art. 35 *Constitución Política de los Estados Unidos Mexicanos*. "The following are the rights of the citizens: [ . . . ] VIII. To vote in the popular consultations on issues of national or regional importance, which shall be subject to the following: [ . . . ] Restrictions on human rights acknowledged by this Constitution may not be subject to popular consultation [ . . . ]."

85. Camhaji, *supra* note 81.

86. Eduardo Murillo, *Postpone SCJN Determinar si Analiza Recurso contra Fuerzas Armadas en Seguridad*, LA JORNADA (Sept. 30, 2020), <https://www.jornada.com.mx/ultimas/politica/2020/09/30/pospone-scn-determinar-analisis-de-recurso-contr-fuerzas-armadas-en-seguridad-7616.html>.

organ.<sup>87</sup> The resolution is expected to be issued in 2020; however, the Mexican Supreme Court has not set a certain deadline, given that many of the authorities to be notified are not working under normal conditions because of COVID-19.

### **VIII. Marijuana in Mexico: November 2020**

The legalization of *Cannabis* has been squarely on the legislative agenda in Mexico since the Mexican Supreme Court ruled in 2018 that prohibition of adult personal use of marijuana was unconstitutional.<sup>88</sup> The Court ruled that the two complainants should be allowed to use *Cannabis* for recreational purposes based on the premise that adults have a fundamental right to “free development of the personality” without state interference.<sup>89</sup> The court ruled, however, that this right is not absolute, and consumption of certain substances may be regulated.<sup>90</sup>

This decision was the fifth such ruling on the same issue, thereby making it binding precedent.<sup>91</sup> The Mexican Supreme Court instructed the federal congress to approve laws and regulations for the legal use of marijuana and imposed a deadline of October 31, 2018.<sup>92</sup> At the time, the elected President, Andrés Manuel López Obrador, was scheduled to assume power in the next month.<sup>93</sup> He had expressed approval of legalization on the campaign trail. With his political party, MORENA (*Movimiento de Regeneración Nacional*), also having won a majority of congressional seats, it was thought that the climate was favorable, and regulations regarding legal recreational adult marijuana would be forthcoming. But that did not happen.<sup>94</sup> Instead, due to a struggle to reach consensus on legislation,

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87. Eduardo Murillo, *Postpone SCJN Determinar si Analiza Recurso contra Fuerzas Armadas en Seguridad*, LA JORNADA (Sept. 30, 2020), <https://www.jornada.com.mx/ultimas/politica/2020/09/30/pospone-scn-determinar-analisis-de-recurso-contra-fuerzas-armadas-en-seguridad-7616.html>.

88. *Inconstitucionalidad De La Prohibicion Absoluta Al Consumo Ludico o Recreativo De Maribuana Prevista Por La Ley General De Salud*, *Suprema Corte de Justicia de la Nacion*.

89. *INCONSTITUCIONALIDAD DE LA PROHIBICIÓN ABSOLUTA AL CONSUMO LÚDICO O RECREATIVO DE MARIHUANA PREVISTA POR LA LEY GENERAL DE SALUD*, Tesis, *Décima Época*, Instancia: Primera Sala. Fuente: *Gaceta del Semanario Judicial de la Federación*. Tomo: I, febrero de 2019, <https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?id=2019365&Clase=DetalleTesisBL>.

90. *History Made: Mexico's Supreme Court Strikes Down Cannabis Prohibition*, LEAFLY (Oct. 31, 2018), <https://www.leafly.com/news/politics/history-made-mexicos-supreme-court-strikes-down-cannabis-prohibition>.

91. In Mexico, the Mexican Supreme Court is required to rule five times on the same constitutional issue (5 *amparos*) before the ruling becomes binding precedent. There were two cases with the same issue brought before, and decided by, the SJCN, making the last one the fifth ruling, thus invalidating the federal law prohibiting recreational marijuana use.

92. *Mexico inches closer to Legalization*, BURNS & LEVINSON (March 12, 2021), <https://www.jdsupra.com/legalnews/mexico-inches-closer-to-legalization-8610245/>.

93. *Id.*

94. *Id.*

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Congress requested three times—and the Mexican Supreme Court granted three times—an extension of the deadline. As of this writing, the revised deadline is December 15, 2020.<sup>95</sup>

As the saying goes, “if it weren’t for the last minute, nothing would get done.”<sup>96</sup> And, so it is. On November 19, 2020, the Senate Chamber passed a bill to legalize adult-use marijuana.<sup>97</sup> The bill had been circulating and was passed with last-minute amendments. The vote was 82 to 18, with 7 abstentions.<sup>98</sup> The bill was sent from the Senate Chamber (the “Origin Chamber”) to the Deputies Chamber (the “Revisor Chamber”) for passage.<sup>99</sup> Under normal circumstances, the Revisor Chamber has 30 days to discuss, revise, and vote.<sup>100</sup> If they approve on the same terms the bill will be sent to the President for signature.<sup>101</sup> But if the Revisor Chamber modifies the legislation, it returns to the Origin Chamber, or Senate in this case, and the process begins anew.<sup>102</sup> Given the multiple delays and current deadline of December 15, 2020, they do not have the luxury of this full process, so all eyes are upon the Revisor Chamber.<sup>103</sup>

The Senate bill establishes a cannabis market in Mexico regulated by The Mexican Institute of Cannabis.<sup>104</sup> Some of the more prominent provisions include that adults 18 and older may purchase and possess up to 28 grams of marijuana and cultivate up to four plants<sup>105</sup> for personal use. Possession of more than 28 grams but fewer than 200 grams is a violation, punishable by a fine, but no jail time.<sup>106</sup> Public consumption is permitted except where tobacco use is prohibited and where people under 18 would be exposed.<sup>107</sup> In an effort to incorporate a social equity component, the bill provides that at least 40 percent of cannabis business licenses must be granted to those from indigenous, low-income, or historically marginalized communities for the first five years after enactment.<sup>108</sup>

### **IX. The United States-Mexico-Canada Agreement (USMCA)**

After several months of negotiations, challenges, adjustments, discussions, and even threats, the USMCA (known in Mexico as the Tratado entre México, Estados Unidos y Canadá “T-MEC”) entered into force on July 1,

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95. *Id.*

96. Rita Mae Brown, American writer.

97. Burns & Levinson, *supra* note 92.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Burns & Levinson, *supra* note 92.

104. *Id.*

105. Up to a maximum of six plants for households with more than one adult.

106. Burns & Levinson, *supra* note 92.

107. *Id.*

108. *Id.*

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2020<sup>109</sup> and replaced the North America Free Trade Agreement (NAFTA). For Mexico, as one of the countries with the most executed free trade agreements—12 free trade agreements with 46 countries—the enactment of the USMCA was instrumental.<sup>110</sup> The USMCA helped Mexico to maintain its privileged status as manufacturer and exporter of finished products and components for the automotive, electronic, medical, and aerospace industries, among other sectors.<sup>111</sup>

A substantial number of projects in Mexico to be funded with foreign investment capital flows were placed on hold while the USMCA negotiations took place. Certainty on the scope as to the terms and conditions of the USMCA was needed to determine whether Mexico was a destination for such foreign investments.<sup>112</sup>

A. CHAPTER 23 - LABOR AND ITS IMPACT IN MEXICO

Labor organizations in the United States have complained for years that American jobs have continued drifting south of the border, citing that wages and employee benefits are less expensive and burdensome in Mexico than in the United States and Canada.<sup>113</sup> These labor groups also claim that in Mexico there is an orchestrated effort between the federal government and employers' associations to moderate and control employees' demands and corrupt union leaders, who are often accused of not representing the best interests of the unionized labor force.<sup>114</sup> In addition, U.S. labor organizations have alleged other human rights and labor rights violations against Mexican employees.<sup>115</sup>

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109. Department of Homeland Security, *U.S. – Mexico – Canada Agreement (USMCA)*, U.S. CUSTOMS AND BORDER PROTECTION (November 25, 2020), <https://www.cbp.gov/trade/priority-issues/trade-agreements/free-trade-agreements/USMCA#:~:text=the%20USMCA%20entered%20into%20force%20on%20July%201%2C%202020>.

110. *Mexico – Country Commercial Guide Trade Agreements*, International Trade Administration (June 30, 2020), <https://www.trade.gov/knowledge-product/mexico-trade-agreements#:~:text=Mexico%20has%20more%20free%20trade,ten%20countries%20in%20Latin%20America>.

111. *United States-Mexico—rebalancing Trade Fact Sheet*, Office of the United States Trade Representative, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing> (last visited June 1, 2021).

112. *USMCA Provides Needed Certainty for Manufacturers and Jobs*, National Manufacturers' Association (Jan. 29, 2020), <https://www.nam.org/usmca-provides-needed-certainty-for-manufacturers-and-jobs-6985/>.

113. Jeff Faux, *NAFTA's Impact on U.S. Workers*, Economic Policy Institute Working Economics Blog (Dec. 9, 2013), <https://www.epi.org/blog/naftas-impact-workers/>.

114. *Id.*

115. *Id.*

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Chapter 23 recognizes the following rights, which the United States, Mexico, and Canada (the Parties), shall adopt and maintain<sup>116</sup>

- (1) freedom of association and the effective recognition of the right to collective bargaining;
- (2) the elimination of all forced or compulsory labor;
- (3) the effective abolition of child labor and, for purposes of the USMCA, a prohibition on the worst forms of child labor; and
- (4) the elimination of discrimination in respect of employment and occupation.

The Parties may not modify statutes or regulations, as implemented, to conform with Chapter 23 in a way that diminishes the labor rights of employees.<sup>117</sup> In addition, the Parties must consistently and permanently enforce all related and applicable law to ensure it is duly observed within their territories and not derogate any laws recognizing these rights.<sup>118</sup> The Parties are also obligated to verify compliance with the labor rights by their suppliers and business partners in foreign countries.<sup>119</sup> Moreover, the Parties are not allowed to import any goods produced in countries where labor rights, as defined above, are not properly observed.<sup>120</sup>

Finally, the Parties agree to collaborate to ensure strict compliance with Chapter 23's obligations and to disclose and communicate any information that is relevant for preventing violations.<sup>121</sup> As early as two weeks after the effective date of the USMCA, some unions in the United States were already complaining about the lack of compliance by Mexico to the commitments contained in Chapter 23.<sup>122</sup> To that end, such unions demanded sanctions be imposed on the violators in Mexico.

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116. USMCA United States-Mexico-Canada Agreement, *Creating more Balanced and Reciprocal North America Trade*, Office of the United States Trade Representative. (Nov. 23, 2020), <https://ustr.gov/usmca>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. James M. Stone & James Verdi, *First USMCA Labor Complaint Promises New Challenges for U.S., Mexican Manufacturers*, *THE NAT'L L. REV.* (May 16, 2021), <https://www.natlawreview.com/article/first-usmca-labor-complaint-promises-new-challenges-us-mexican-manufacturers>.

## China

GARY J. GAO, RONNIA ZHENG, YANLING ZHENG, AND LI WANG

This Article reviews some of the most significant international legal developments made in Central/East Asia and China in 2020.

### I. China-U.S. Economic and Trade Agreement<sup>1</sup>

On January 15, 2020, China and the U.S. signed the historic Economic and Trade Agreement between the United States of America and the People's Republic of China, namely the Phase One Trade Deal.<sup>2</sup> It requires mutual structural reforms and other changes to both countries' economic and trade regimes in the areas of intellectual property, technology transfer, agriculture, financial services, and currency and foreign exchange.<sup>3</sup>

The agreements on intellectual property establish one of the cornerstones of the Phase One Trade Deal. Among the provisions in this chapter, the rules on "trade secrets" did not announce both countries' steadfast commitment to enhance the protection on trade secrets.<sup>4</sup> In past decades, numerous Chinese companies from a various range of business sections were accused and charged of infringing American companies' trade secrets.<sup>5</sup> Some of these companies are industry giants, while others are middle-sized enterprises without a big name.<sup>6</sup> According to the People's Republic of China (PRC) National Guidance Center for Handling Overseas Intellectual

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1. This section was authored by Gary J. Gao and Ronnia Zheng, respectively partner and associate of Zhong Lun Law Firm ([www.zhonglun.com](http://www.zhonglun.com)), one of the largest full-service "red circle" law firms in China. Gary J. Gao heads the Compliance & Regulatory Department in Zhong Lun as a Chambers Asia-Pacific and Legal 500 consecutively recommended leading lawyer. Allen Yang, a former associate of Zhong Lun also made contribution to this article.

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

3. *Id.*

4. *See generally id.*

5. *See generally* Agence France-Presse, *U.S. Charges Five Individuals, Five Firms with Stealing Trade Secrets from DuPont to Sell to Chinese Firms*, *INDUSTRY WEEK* (Feb. 8, 2012), <https://www.industryweek.com/the-economy/regulations/article/21955879/us-charges-five-individuals-five-firms-with-stealing-trade-secrets-from-dupont-to-sell-to-chinese-firms>.

6. *See id.*



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Property Disputes, through April 2020, Chinese companies were involved in approximately 139 trade secrets infringement cases in the U.S.<sup>7</sup>

Of the 139 Chinese trade infringement cases filed in the United States, the majority of the Chinese companies were involved as defendants, and many have lost their cases.<sup>8</sup> Yet, in recent years, Chinese companies have significantly improved their awareness on intellectual rights protection and international trade compliance.<sup>9</sup> Many have realized the necessity in complying with rules if they want to operate their business around the world. Some have also developed their own cutting-edge technologies and have their own trade secrets protected. As for U.S. companies operating in China or doing business with China, they often possess comprehensive intellectual property rights. It is of mutual benefit for both countries' industry players to strengthen their compliance to better protect their trade secrets during ordinary operations and trading interactions.

On one hand, this phenomenon reflects the U.S. government's attitude to fight trade secrets infringements originating in China. On the other hand, this enforcement serves as a reminder to Chinese companies engaged in overseas trade to be vigilant and cope with the tightening compliance standards on trade secrets protection. The following sections provide an introduction on the current trade secrets regulations in China, especially the rules relating to the implementation of the Phase One Trade Deal.

**A. DEFINITION, SCOPE OF ACTORS LIABLE AND SCOPE OF PROHIBITED ACTS**

The legal definition for "trade secrets" has not been defined in the Phase One Trade Deal. Under PRC law, to constitute a trade secret, the objected information must be unknown to the public, shall possess commercial value, and has to be protected through confidential security measures.<sup>10</sup> This definition of trade secret is well-acknowledged worldwide and is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>11</sup>

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7. *Warning: Chinese Enterprises Should Strengthen Risk Prevention and Control of Overseas Trade Secret Disputes*, NAT'L OVERSEAS INTELL. PROP. DISP. RESOL. GUIDANCE CTR. (Apr. 3, 2020), *available at* <https://www.worldip.cn/index.php?m=content&c=index&a=show&catid=109&id=1239>.

8. *Id.*

9. See generally Aaron Winger, *China Makes Significant Commitments to Improve Intellectual Property Protection in Phase 1 Trade Deal*, NAT'L L. REV. (Jan. 15, 2020), <https://www.natlawreview.com/article/china-makes-significant-commitments-to-improve-intellectual-property-protection>.

10. *Zhonghua Renmin Gongheguo Fan Bu Zhengdang Jingzheng Fa* (中华人民共和国反不正当竞争法) (2019 修正) [现行有效] [*Anti-Unfair Competition Law of the People's Republic of China*] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Apr. 23, 2019), art. 9 (China).

11. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 39, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 316-317.

Article 1.3 of the Phase One Trade Deal stipulates that “all natural or legal persons can be subject to liability for trade secrets misappropriation.”<sup>12</sup> Currently, the PRC law uses the word “operator”<sup>13</sup> to refer to the liable actor. Although not explicitly regulated in the PRC statutes, the term “operator” may not only include persons who run a business in the traditional sense but can also refer to employees of a company. A primary reason that the Phase One Trade Deal focuses on the scope of actors liable for trade secrets misappropriation is that employees’ misconduct in trade secrets infringement cases is commonly seen. For instance, the employees may illegally use inside knowledge gained from their job to make profits after quitting their previous employment. It is also common that companies use “headhunters” to obtain trade secrets from candidates who have worked for their competitors.

Article 1.4 of the Phase One Trade Deal requires that prohibited acts which are subject to liability as trade secrets misappropriation provide full coverage for trade secrets theft.<sup>14</sup> The current PRC law adopts an enumerating approach and lists all the prohibited acts for which the theft of trade secrets is liable.<sup>15</sup> The legitimacy of the act is the concern when evaluating whether an act constitutes a misappropriation of trade secrets, i.e., whether there are any improper means of acquisition, inappropriate usage behaviors, or knowingly acts of misappropriation. PRC law has left leeway by listing “other improper means” in its enumeration to cover types of trade secrets misappropriation not explicitly listed. To meet the requirements under Article 1.4(2)(a) of the Phase One Trade Deal, new legislation, the Amendments to PRC Criminal Code XI, came into effect on March 1, 2021; it specifically incorporates “electronic intrusions” as an illegal way to obtain trade secrets.<sup>16</sup> This modification to existing law demonstrates PRC’s commitment to implement requirements from the Phase One Trade Deal.

## B. MEASURES IN CIVIL PROCEEDINGS

Article 1.5 of the Phase One Trade Deal requires that the burden of proof shift, as appropriate, to the accused party in a civil judicial proceeding for trade secrets misappropriation when the holder of a trade secret has produced *prima facie* evidence of a reasonable indication of trade secrets misappropriation by the accused party, including circumstantial evidence.<sup>17</sup>

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12. 2020 China-US Economic and Trade Agreement, *supra* note 2, at art. 1.3.

13. Anti-Unfair Competition Law of the People’s Republic of China art. 17.

14. 2020 China-US Economic and Trade Agreement, *supra* note 2, at art. 1.4.

15. Anti-Unfair Competition Law of the People’s Republic of China art. 9 (listing four scenarios of trade secret misappropriations).

16. *Zhonghua Renming Xingfa Xiuzhengan Shibiji* (中华人民共和国刑法修正案(十一)) [Amendments to the Criminal Law of the People’s Republic of China (11)] (promulgated by the Standing Comm. Nat’l People’s Congress, Dec. 26, 2020), art. 22 (China).

17. 2020 China-US Economic and Trade Agreement, *supra* note 2, at art. 1.5.

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This burden-shifting aligns with Article 32 of the PRC Unfair Competition Law, which states that where the

holder of the trade secret provides prima facie evidence that it has taken confidentiality measures for the claimed trade secret and reasonably indicates that the trade secret has been infringed upon, the alleged tortfeasor shall prove that the trade secret claimed by the right holder is not a trade secret as described in this Law.<sup>18</sup>

If the right holder of a trade secret provides prima facie evidence to reasonably indicate that the trade secret has been infringed upon, and provide any of the following evidence, the alleged tortfeasor shall prove the absence of such infringement:

(1) Evidence that the alleged tortfeasor has a channel or an opportunity to access the trade secret and that the information it uses is substantially the same as the trade secret. (2) Evidence that the trade secret has been disclosed or used, or is at risk of disclosure or use, by the alleged tortfeasor. (3) Evidence that the trade secret is otherwise infringed upon by the alleged tortfeasor.<sup>19</sup>

Under PRC law, the provisional measures to prevent the use of trade secrets refer to temporary behavior preservation measures. These provisional measures are evidenced in *Elli Lilly & Co.*, where Elli Lilly & Co. successfully obtained a behavior preservation injunction from the Shanghai No. 1 Intermediate People's Court against its former employee, who copied trade secrets documents to his personal storage device after quitting his job.<sup>20</sup> In the injunction, the court barred the former employee from disclosing, using or allowing others to use twenty-one trade secrets documents of Elli Lilly & Co.<sup>21</sup> This action was the first use of temporary behavior preservation measures in support of trade secrets protection in China.

C. MEASURES IN CRIMINAL PROCEEDINGS

Article 1.7 of the Phase One Trade Deal lowers the threshold for initiating a criminal investigation for misappropriation of trade secrets.<sup>22</sup> It also addresses the requirement of "great loss" as a basis for the crime of trade secrets infringement.<sup>23</sup> According to the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the*

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18. Anti-Unfair Competition Law of the People's Republic of China art. 32.

19. *Id.*

20. See *The Supreme People's Court Announces Eight Typical Cases of Judicial Protection of Intellectual Property Rights*, SUP. PEOPLE'S CT. GAZ., available at <http://gongbao.court.gov.cn/Details/401f6fd5c5fa409f95bc27551cabd2.html?sw=%E9%bb%84%e5%ad%9f%e7%82%9c> (last visited Feb. 28, 2021) (discussing *Eli Lili R&D Co., Ltd. v. Huang Mengwei*).

21. See *id.*

22. 2020 China-US Economic and Trade Agreement, *supra* note 2, at art. 1.7.

23. *Id.*

*Specific Application of Law in Hearing Criminal Cases of Intellectual Property Rights Infringement*,<sup>24</sup> if the infringement of trade secrets causes damage to the right holder in the amount of 300,000 Chinese yuan or more (reduced from 500,000 Chinese yuan), it can be considered to have caused “great loss” to the right holder.<sup>25</sup> There are four ways to calculate the amount of damages for the crime of trade secrets infringement under PRC law, namely by calculating the loss of the right holder, the profit made by the infringer, the loss of royalties, or the cost of research and development of the trade secrets information.<sup>26</sup> Article 1.7(2)(a) of the Phase One Trade Deal expands the possibility of using remedial costs as a way to calculate the amount of damages, such as the costs incurred to mitigate damage on a business operation or programs, or to re-secure computer or other system.<sup>27</sup> As part of PRC’s efforts to lower the threshold for initiating a criminal investigation for misappropriation of trade secrets, the Amendments to PRC Criminal Code XI has rephrased the requirement of “great loss” into a “gravity of the circumstances” test as a prerequisite for criminal penalties,<sup>28</sup> which will eliminate the requirements of actual loss to initiate a criminal proceeding.

Article 1.8 of the Phase One Trade Deal provides for criminal procedures and penalties.<sup>29</sup> To comply with Article 1.8 and further strengthen the protection of intellectual property rights, the Amendments to PRC Criminal Code XI not only amends the threshold for a conviction for the crime of trade secrets infringement but also strengthens the penalties.<sup>30</sup> At the same time, commercial espionage was added as a crime along with stealing, spying on, buying, or illegally providing commercial secrets for institutions, organizations, or persons abroad.<sup>31</sup>

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24. *Zuigao rénmin fayuan zuigao rénmin jiancháyuan guānyú bànli qínfàn zhǐshì chānquán xíngshì ànjàn jùti yīngyòng falu ruògān wéntí de jiěshì* (sān)

(法释〔2020〕10号 最高人民法院最高人民检察院 关于办理侵犯知识产权刑事案件具体应用法律若干问题的解释(三)) [Interpretation on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights (3), Law Interpretation No. 10 [2020]] (promulgated by the Judicial Comm. Sup. People’s Ct., Aug. 31, 2020, Sept. 14, 2020) Sup. People’s Proc. Gaz., Aug. 21, 2020, *available at* <http://www.court.gov.cn/zixun-xiangqing-254891.html> (China) [hereinafter 2020 Interpretation].

25. *China: Judicial Interpretation on Trade Secret Crimes Issued*, LIBRARY OF CONG. (Nov. 12, 2020), *available at* <https://www.loc.gov/law/foreign-news/article/china-judicial-interpretation-on-trade-secret-crimes-issued/>.

26. 2020 Interpretation, *supra* note 24, at art. 5; Aaron Wininger, *China’s Threshold for Criminal Trade Secret Misappropriation to Drop to 300,000 RMB*, CHINA L. IP UPDATE (Sept. 13, 2020), <https://www.chinaiplawupdate.com/2020/09/chinas-threshold-for-criminal-trade-secret-misappropriation-to-drop-to-300000-rmb/>.

27. 2020 China-US Economic and Trade Agreement, *supra* note 2, at art. 1.7(2)(a).

28. Amendments to the Criminal Law of the People’s Republic of China (11) art. 22.

29. 2020 China-US Economic and Trade Agreement, *supra* note 2, at art. 1.8.

30. 2020 Interpretation, *supra* note 24, at arts. 8–9; Wininger, *supra* note 26.

31. Amendments to the Criminal Law of the People’s Republic of China (11) art. 15.

**D. COMPLIANCE SUGGESTIONS ON TRADE SECRETS PROTECTION**

In general, the content of the Phase One Trade Deal is roughly within the scope of the provisions of the current PRC law on the protection of trade secrets. But due to the signing of the Phase One Trade Deal, it is foreseeable that law enforcement authorities in both countries will enhance their law enforcement efforts and tighten up enforcement sanctions. The following proposed compliance and risk control measures are therefore presented.

Chinese companies should take confidential security measures on trade secrets information in order to establish a trade secrets compliance protection system. Companies may invest in using secured techniques to limit the access and usage of trade secrets information and set up internal policies on information management procedures (including recording, preservation, usage, transfer, etc.). Recommended confidential security measures can be found in Article 7 of the *Circular of the PRC Supreme People's Court on Seeking Public Comments on the Several Issues concerning the Application of Law in the Trial of Civil Cases Involving Disputes over Trade Secret Infringement (Draft for Comment)* published on June 10, 2020.<sup>32</sup>

Companies need to identify and control the potential misappropriations of trade secrets infringement. The companies should also build up a whistleblower platform for any potential misconduct related to trade secrets infringement. Finally, companies should provide regular training to their employees. This training will help employees learn about their rights and obligations, along with recommended and prohibited behaviors. Employees' misconduct is often caused by a lack of legal consciousness and the unfamiliarity of compliance with policies and standards.

Despite the possibility of a lower threshold in the future to initiate criminal investigations of trade secrets misappropriations, it does not mean that public enforcement agencies will investigate every reported case. Therefore, companies should establish effective compliance systems and be careful about their protection of trade secrets from an early stage. The right holders of trade secrets should bear in mind that an existing civil proceeding does not deprive its legitimate rights to initiate a criminal proceeding at the same time for a full range of protection.

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32. *Zuigāo rénmin fāyuàn guānyú shenli qīnfān shāngyè mīmì jiūfēn mǐnsbì ànjàn yīngyòng fǎlu ruògān wèntí de jiěshì (zhèngqǐú yìjiàn gāo)* (最高人民法院关于审理侵犯商业秘密纠纷民事案件 应用法律若干问题的解释 (征求意见稿)) [Interpretation on Several Issues Concerning the Application of Laws in the Trial of Civil Cases Infringing on Trade Secrets (Draft for Comments)] art. 7, available at [https://www.china court.org/article/detail/2020/06/id/5289821.shtml?from=singlemessage&isappinstalled=0%20 \(last%20visited%2019:47%2011/6/2020\) \(China\).](https://www.china court.org/article/detail/2020/06/id/5289821.shtml?from=singlemessage&isappinstalled=0%20 (last%20visited%2019:47%2011/6/2020) (China).)

## II. Trademark Law Development in China<sup>33</sup>

On January 15, 2020, China and the United States entered into the Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China (2020 China-US Economic and Trade Agreement), a Phase One deal.<sup>34</sup> Enhanced intellectual property protection and enforcement is among the most significant provisions of the 2020 China-U.S. Economic Trade Agreement.<sup>35</sup> In 2020, Chinese courts and intellectual property administrative agencies have taken concrete actions to elevate protection of trademark rights to a new level and to fulfill China's obligations under the 2020 China-US Economic and Trade Agreement.

### A. THE SUPREME PEOPLE'S COURT (SPC) FOUND AGAINST TRADEMARK HOLDERS THAT REGISTERED TRADEMARKS IN BAD FAITH

The SPC (the highest court in China) recently issued representative decisions that illustrate its progressive positions on the long-standing concern of American companies, i.e., whether a legitimate trademark right owner can be insulated from trademark infringement lawsuits lodged by bad faith filers.

In the *Ellassay Case* (2014)<sup>36</sup>, the SPC held that if a party obtained a trademark registration unlawfully and then attempted to enforce its trademark rights in bad faith, courts shall dismiss its claims as abuse of civil rights.<sup>37</sup> In the *Uniqlo Case* (2018),<sup>38</sup> the SPC found the two plaintiffs registered the pirated trademark UL in bad faith. The SPC held that the plaintiffs' malicious litigation constituted abuse of judicial resources for the purpose of making illegal profits and consequently their trademark registration was unenforceable.<sup>39</sup>

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33. This section is authored by Yanling Zheng and Li Wang, respectively partner and associate of ZY Partners.

34. See generally 2020 China-US Economic and Trade Agreement, *supra* note 2.

35. See *id.* at ch. 1.

36. *Wang Sui Yong Su Shenzhen Ge Li Si Fushi Gufenyouxiang Hangzhou Yin Tai Shiji Baibuo Youxiang Qinbai Shangbiao Quan Jiu Fen 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. Guiding Case No. 82, Mar. 6, 2017 (China).

37. *Id.*

38. *Summary of the Annual Report on Intellectual Property Cases of the Supreme People's Court (2018)*, CHINA COURT (Apr. 25, 2019), <https://www.chinacourt.org/article/detail/2019/04/id/3852027.shtml>.

39. *Id.*

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In a widely commented case concerning the protection of the U.S. telephone brand TELEMATRIX,<sup>40</sup> which was selected by the SPC as one of the Chinese Courts' Fifty Model IP Cases in 2019,<sup>41</sup> the SPC affirmed two parts of the lower court's judgment. First, the infringement litigation commenced by Shandong Bittel Intelligent Technology Co., Ltd. (Shandong Bittel) based on Shandong Bittel's bad faith registration of the trademark "TELEMATRIX" constituted malicious litigation, which essentially was a type of business tort.<sup>42</sup> Second, the bad faith litigant Shandong Bittel was liable to provide certain remedies, including to publish a statement on Legal Daily to rectify the effects of the bad faith trademark registration and to pay damages in the amount of one million Chinese Yuan (RMB).<sup>43</sup> Following this SPC decision, the Beijing Higher People's Court held in *Scitec & Telematrix (Beijing) Co., Ltd. v. Shandong Bittel* that Shandong Bittel's previous infringement lawsuit against Scitec & Telematrix constituted a business tort and consequently Shandong Bittel should pay damages in the amount of five million RMB.<sup>44</sup>

**B. INCREASED DAMAGES FOR TRADEMARK INFRINGEMENT**

*1. Legislation and Judicial Policy*

The amended PRC Trademark Law (effective November 1, 2019) has increased the damages for infringement of trademark rights.<sup>45</sup> Pursuant to Article 63 of the amended PRC Trademark Law, courts may increase award damages up to five times the actual loss caused by infringement, the unlawful profits obtained from infringement, or the reasonable royalty fees, where the infringement is malicious and serious.<sup>46</sup> This amendment is an increase from the triple damage allowed under the prior law.<sup>47</sup> Also, the maximum statutory damages have been raised from three million RMB, to five million RMB.<sup>48</sup>

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40. *Jiangsu Zhongxun Digit. Elec. Co., Ltd. v. Shandong Bittel Intelligent Tech. Co., Ltd.*, SUP. PEOPLE'S CT. GAZ. 366, Dec. 12, 2019 (China).

41. See generally, *Guanyu Yinfa, Nian Zhongguo Fayuan Shida Zhisbi Chanquan Anjian He Wushi Jian Dianxing Zhisbi Chanquan Anli De Tongzhi* (关于印发2019年中国法院10大知识产权案件和50件典型知识产权案例的通知) [Notification Regarding Issuance of Chinese Courts Top Ten IP Cases and Fifty Model Cases in 2019] (published by Sup. People's Ct., Apr. 21, 2020) <http://www.court.gov.cn/zixun-xiangqing-226511.html/> (China) [hereinafter the Notification].

42. See *Jiangsu Zhongxun Digit. Elec. Co., Ltd.*, SUP. PEOPLE'S CT. GAZ. 366.

43. *Id.*

44. *Scitec & Telematrix Co., Ltd. v. Shandong Bittel Intelligent Technology Co., Ltd.*, (2019) Jing Min Shen No. 4215 Civil Ruling (Beijing High People's Ct. Apr.30, 2020) (China).

45. *Zhonghua Renmin Gongheguo Shangbiao Fa* (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 23, 2019, effective Nov. 1, 2019), art. 63, 2019 [hereinafter PRC Trademark Law].

46. *Id.* at art. 63.

47. See *id.*

48. *Id.*

On April 21, 2020, the SPC issued the Opinions on Comprehensively Strengthening the Judicial Protection of Intellectual Property Rights<sup>49</sup> (the Opinions) and called for increase of damages awarded in trademark infringement actions. The Opinions advocated for broad admission of data provided by business administration and taxation agencies, third-party databases, infringers' websites, listing documents, and industry average profits for the purpose of determining the unlawful profits obtained from infringement.<sup>50</sup> As to serious infringements, the SPC directs judges to award higher amounts of damages to deter repeated offenders.<sup>51</sup>

On April 21, 2020, the Beijing Higher People's Court also published the Guidance on the Assessment of Damages in IP Infringement and Unfair Competition Litigations and the Judicial Criteria for Statutory Damage (the Guidance).<sup>52</sup> The Guidance specifies how to evaluate the four factors relevant to the calculation of damages under Article 63 of the PRC Trademark Law.<sup>53</sup> It is worth noting that the Guidance provides for two prerequisites for the application of punitive damages<sup>54</sup> under trademark laws, namely "malicious infringement"<sup>55</sup> and "serious consequences"<sup>56</sup> and supplies definitions of the two prerequisites. As Beijing is one of the most important forums for handling complicated and controversial intellectual property litigations, the Guidance will provide U.S. companies with valuable and practical guidance when they seek damages from infringers.

## 2. Representative Cases

In *Balanced Body Inc. v. Yongkang Yilena Sports Equipment Inc.*, an action seeking protection of the U.S. fitness equipment brand MOTR, the Shanghai Pudong District Court found repeated and continuous trademark infringements by the defendant and awarded punitive damages in the amount of three million RMB, which is three times the amount of the actual damages.<sup>57</sup> The SPC selected this case as one of the Chinese Courts Top

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49. See generally *Zuigao Renmin Fayuan Guanyu Quanmian Jiaqiang Zhisbi Chanquan Sifa Baobu De Yijian* (最高人民法院关于全面加强知识产权司法保护的意見) [Opinions on Comprehensively Strengthening the Judicial Protection of Intellectual Property Rights] (Sup. People's Ct., 2020), art. 12, (China) [hereinafter the Opinions].

50. *Id.* at art. 12.

51. *Id.*

52. *Guanyu Qimhai Zhisbi Chanquan Ji Buzhengdang Jingzheng Anjian Queding Sunbai Peichang De Zhidao Yijian Ji Fading Peichang De Caipan Baizhun*

(关于侵害知识产权及不正当竞争案件确定损害赔偿的指导意见及法定赔偿的裁判标准) [Guidance on the Assessment of Damages in IP Infringement and Unfair Competition Litigations and the Judicial Criteria for Statutory Damage] (Beijing Higher People's Ct. 2020) (China), [hereinafter Guidance].

53. PRC Trademark Law, *supra* note 45, at art. 63.

54. See Guidance, *supra* note 52, at art. 1.13.

55. *Id.* at art. 1.15.

56. *Id.* at art. 1.16.

57. See generally *Balanced Body Inc. v. Yongkang Yilena Sports Equipment Inc.*, Hu 0115 Civ. Chu No. 53351 Civil Judgment (Shanghai Pudong Dist. People's Ct. Aug. 28, 2019) (China).



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Ten IP Cases in 2019,<sup>58</sup> and stated that this was a model case on how to apply punitive damages against malicious infringements<sup>59</sup>

In another high-profile case for trademark infringement and unfair competition, *Under Armour v. Uncle Martin*,<sup>60</sup> the SPC recognized the valuable reputation of the U.S. athletic brand Under Armour, criticized the infringer's free-riding on the goodwill of Under Armour, and affirmed the lower court's award of two million RMB in damages.<sup>61</sup>

Likewise, in *Honeywell v. Renywell* the defendants registered the trademark "RENYWELL" and used it extensively for years even after the registration had been invalidated as bad faith by the U.S. company Honeywell International Inc.<sup>62</sup> The Zhejiang court held that the use of a finally invalidated bad faith registration during its valid period (i.e., before the registration was invalidated) constituted trademark infringement and the plaintiff was entitled to damages resulting from such use.<sup>63</sup> The court awarded damages in the amount of three and a half million RMB, taking into consideration the good and valuable reputation of the "HONEYWELL" trademark, the bad faith of the infringer, and the scale, duration, and impact of the infringement.<sup>64</sup> Given its landmark holding that use of a registered trademark could constitute infringement and the rationale based on balancing of various factors when awarding large damages, this case was named one of 2019-2020 QBPC Annual Top Ten Cases in IP Protection and Model Cases Bridging Administrative and Judicial IP Enforcement by Quality Brands Protection Committee of China Association of Enterprises with Foreign Investment (QBPC).<sup>65</sup>

C. CRITERIA FOR DETERMINING TRADEMARK INFRINGEMENT (THE CRITERIA)

Although infringing acts can be enjoined promptly and cost-effectively through administrative actions, U.S. companies are often concerned with inconsistent enforcement of trademark laws by local intellectual property administrations.<sup>66</sup> To create uniformed enforcement standards and improve

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58. See Notification, *supra* note 41, at 2.

59. *Id.*

60. Under Armour, Inc. v. Fujian Tingfeilong Sporting Goods Co., Ltd., Zui Gao Fa Min Zhong No. 851 Civil Judgment (Sup. People's Ct. Mar.10, 2020) (China).

61. *Id.*

62. Honeywell Int'l Inc. v. Renywell Measurement Co. and Renywell Tech. Co., Zhe Min Zhong No. 1096 Civil Judgment (Zhejiang Higher People's Ct. Oct. 12, 2019) (China).

63. *Id.*

64. *Id.*

65. See generally 2019-2020 QBPC Annual Top Ten Cases in IP Protection and Model Cases Bridging Administrative and Judicial IP Enforcement, QBPC 26 (Oct. 12, 2020), <http://qbpc.org.cn/Home/Publication/view/cid/36/id/129>.

66. *Best Practices: Intellectual Property Protection in China*, THE US-CHINA BUSINESS COUNCIL, <https://www.uschina.org/reports/best-practices-intellectual-property-protection-china> (last visited Feb. 28, 2021).

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local intellectual property administrations' responses, China National Intellectual Property Administration (CNIPA) promulgated the Criteria, which became effective on June 15, 2020.<sup>67</sup> This response was the first time that CNIPA provided systematic and practical guidelines for trademark law enforcement by local government agencies. The Criteria covers almost all key issues under trademark laws, including but not limited to: illustration of trademark uses, identification of similarity of trademarks and similarity of goods and services, evaluation of likelihood of confusion, examples of typical and emerging forms of trademark infringements, and when to suspend an administration enforcement proceeding.<sup>68</sup> With the implementation of the Criteria, U.S. companies can expect a more transparent and predictable administrative route to protect their trademark rights in China.

**D. REDUCING THE BURDEN OF DOCUMENT AUTHENTICATION**

The 2020 China-US Economic and Trade Agreement requires both parties to reduce the burden of document authentication in civil judicial procedures.<sup>69</sup> Accordingly, the SPC promulgated Several Provisions of the Supreme People's Court on Evidence in Civil Litigation of Intellectual Property Rights (the IP Evidence Rules), which became effective on November 18, 2020.<sup>70</sup> The IP Evidence Rules contains detailed provisions to ease the burden of document authentication in intellectual property civil litigation.<sup>71</sup>

First, for evidence created outside China, courts shall not sustain authenticity challenges based solely on the absence of notarization or authentication if the evidence has 1) been authenticated by court judgments or arbitration awards, 2) qualifies as public publication, patent literature, or is otherwise accessible through official or public channels, or 3) can be established as authentic by other admissible evidence.<sup>72</sup>

Second, for evidence created outside China, but for which the opposing party has expressly recognized its authenticity or the proffering party has certified its authenticity through witness testimony under penalty of perjury, the court shall not support the authenticity challenge on such evidence

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67. See generally *Shangbiao Qinquan Panduan Biaozhun* (商标侵权判断标准) [Criteria for Determining Trademark Infringement] (promulgated by China National Intellectual Property Admin., June 15, 2020, effective June 15, 2020) [hereinafter the Criteria].

68. *Id.*

69. See 2020 China-US Economic and Trade Agreement, *supra* note 2, at art. 1.50.

70. See generally *Zuigao Renmin Fayuan Guanyu Zhibi Chanquan Minsbi Susong Zbengju De Ruogan Guiding* (最高人民法院关于知识产权民事诉讼证据的若干规定) [Several Provisions of the Supreme People's Court on Evidence in Civil Litigation of Intellectual Property Rights] (promulgated by Sup. People's Ct., Nov. 16, 2020, effective Nov. 18, 2020) (China) [hereinafter the IP Evidence Rules].

71. *Id.* at art. 8–10, 19.

72. *Id.* at art. 8.

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merely based on the ground of absence of notarization and/or authentication.<sup>73</sup>

Third, for power of attorney documents, if the proffering party has notarized and authenticated such document in a prior proceeding, the court may waive such formality requirements in a subsequent proceeding.<sup>74</sup>

Undoubtedly, such new evidence rules will significantly reduce the daunting burden of obtaining consular authentication of evidence and complying with other formality requirements for foreign parties. Therefore, the new rules are expected to be well-received by U.S. companies, particularly under the current Covid-19 pandemic when many offices only provide reduced services.

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<sup>73</sup>. *Id.* at art. 9.

<sup>74</sup>. *Id.* at art. 10.

## **The Year in Review an Annual Publication of the ABA Section of International Law South Asia/ Oceania & India**

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This article surveys significant legal developments in South Asia, Oceania,  
and India during the calendar year 2020.<sup>1</sup>

### **I. Climate-Related Financial Regulation**

Several jurisdictions in South Asia and Oceania have expanded their oversight of climate-related financial disclosures, signaling an increasing set of sustainability compliance requirements for entities operating in the region. Certain regulators are considering market-wide requirements, but there is a particular focus on the financial sector. Nevertheless, entities from all sectors could be affected because the increased incorporation of sustainability criteria into financial institutions' analyses, reporting, and decision-making will likely have ripple effects.

#### **A. AUSTRALIA**

In February 2020, the Australian Prudential Regulation Authority (APRA) announced plans to elaborate on climate change risk management

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

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requirements for entities regulated by the agency.<sup>2</sup> In particular, APRA has outlined plans to: (1) develop a climate-related financial risk prudential practice guide; (2) develop a climate-related financial risk vulnerability assessment, with the largest institutions implementing the assessment in 2021; (3) update environmental, sustainability, social, and governance (ESG) prudential guidance for superannuation (i.e. pension) funds;<sup>3</sup> and (4) undertake deeper assessments of those entities that participated in APRA's prior climate survey.<sup>4</sup> Although APRA notes that the guidance is not intended to create new obligations, but merely to assist in compliance with existing ones,<sup>5</sup> the clarification will likely establish new standards that APRA-regulated entities will be expected to adhere to.

COVID-19 has impacted APRA's plans, but the agency's focus areas remain largely unchanged.<sup>6</sup> While the timing for the release of assessments and guidance may be delayed, APRA has indicated that climate-related impacts will continue to be assessed.<sup>7</sup> Moreover, in the interim, APRA continues to encourage entities under its jurisdiction to adopt voluntary frameworks, such as the Final Recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD).<sup>8</sup>

**B. NEW ZEALAND**

While APRA continues to encourage the voluntary adoption of TCFD, New Zealand announced in September 2020 that the country will require many large companies to disclose climate information in line with TCFD.<sup>9</sup> The Cabinet of New Zealand intends to achieve this via an amendment to the Financial Markets Conduct Act, though disclosures would not be mandated until 2023 at the earliest.<sup>10</sup> Once the revision is implemented, banks, credit unions, investment schemes, insurers, and other financial institutions with more than \$1 billion in assets (or assets under management) will be required to report under the framework, as will any company (except

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2. Letter from Geoff Summerhayes, Exec. Bd. Member, Austl. Prudential Reg. Auth. (APRA), *Understanding and Managing the Financial Risks of Climate Change* (Feb. 24, 2020) (on file with APRA).

3. Guidance, Prudential Practice Guide SPG 530 – Investment Governance 2013, 8 (Austl.).

4. Letter from Summerhayes, *supra* note 2.

5. *Id.*

6. *Compare Corporate Plan 2019-2023*, APRA, 5 (Aug. 2019), [https://www.apra.gov.au/sites/default/files/APRA%20Corporate%20Plan%202019-23\\_0.pdf](https://www.apra.gov.au/sites/default/files/APRA%20Corporate%20Plan%202019-23_0.pdf), with *Corporate Plan 2020/24*, APRA, 8 (Aug. 2020), <https://www.apra.gov.au/sites/default/files/2020-08/APRA%27s%202020-24%20Corporate%20Plan.pdf>.

7. *Corporate Plan 2020/24*, *supra* note 6, at 9.

8. Letter from Summerhayes, *supra* note 2.

9. Press Release, James Shaw, N.Z. Gov't, *New Zealand First in the World to Require Climate Risk Reporting* (Sept. 15, 2020), <https://www.beehive.govt.nz/release/new-zealand-first-world-require-climate-risk-reporting>.

10. *Mandatory climate-related disclosures*, MINISTRY FOR THE ENV. MANATŪ MŌ TE TAIAO, <https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/mandatory-climate-related-financial-disclosures/> (last visited May 29, 2021).

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foreign exempt issuers) with debt or equity listed on the New Zealand Stock Exchange.<sup>11</sup> Altogether, the disclosure regime is expected to apply to approximately 200 organizations and account for approximately ninety percent of assets under management in the country.<sup>12</sup>

New Zealand’s External Reporting Board will develop reporting standards for companies covered by the regulation.<sup>13</sup> Disclosure will be on a “comply-or-explain” basis, whereby companies must either comply with the reporting standard or explain why not.<sup>14</sup> This model also places the onus on regulated entities to sufficiently explain the absence of any disclosures instead of requiring interested parties (such as stakeholders or regulators) to demonstrate why they should be provided.

C. SINGAPORE

The Monetary Authority of Singapore (MAS), in June 2020, also announced plans to increase guidance for climate risk management in the financial sector.<sup>15</sup> As proposed, the guidelines apply to environmental risk management more broadly, but MAS explicitly emphasizes climate in its language.<sup>16</sup> The general structure of the proposed risk management framework mirrors that of TCFD, with elements addressing governance, strategy, risk management, and metrics and targets; moreover, MAS underscores the importance of scenario analysis, stress testing, and quantitative data for understanding and managing climate risk.<sup>17</sup>

Certain aspects of the proposed guidelines remain inchoate, and MAS has sought comment on several questions—such as the extent, frequency, and form of disclosure required.<sup>18</sup> But as drafted, entities will have twelve months from issuance of the finalized guidelines to assess and implement them.

D. INTERNATIONAL PLATFORM ON SUSTAINABLE FINANCE (IPSF)

In addition to country-level developments, several Indo-Pacific countries joined the IPSF, a multilateral forum for policymakers developing sustainable finance regulatory measures around the globe.<sup>19</sup> This year, the

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11. Press Release, Shaw, *supra* note 9.

12. *Id.*

13. *Id.*

14. *Id.*

15. Consultation Paper, Proposed Guidelines on Environmental Risk Management (Banks), Monetary Auth. of Sing. (MAS), P003-2020, 3 (June 2020) (on file with MAS).

16. *See id.* at 4 (“Environmental risk is increasingly recognized as a key global risk, with climate change at the forefront of these concerns. . . [a]t the national level, tackling climate change is a key priority”).

17. *Id.* at 20–22.

18. *Id.* at 10.

19. Int’l Platform on Sustainable Fin. (IPSF), *The platform is a forum for dialogue between policymakers, with the overall aim of increasing the amount of private capital being invested in environmentally sustainable investments*, EUROPEAN COMM’N, <https://ec.europa.eu/info/business->

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IPSF's membership grew to include Indonesia, New Zealand, and Singapore (among other countries).<sup>20</sup> With these additions, the members of the IPSF represent approximately fifty percent of global greenhouse gas emissions, fifty percent of the world population, and forty-five percent of global GDP.<sup>21</sup>

The IPSF is expected to contribute substantially to the development of sustainable finance rules globally, particularly their harmonization across jurisdictions. The organization is currently working on a “common ground” taxonomy that highlights areas of overlap between member states' existing sustainable finance regimes.<sup>22</sup> As a sign of IPSF's potential for contribution to global policymaking, the organization is observed by several influential international groups—e.g., the Network for Greening the Financial System, the Organisation for Economic Co-operation and Development, and the United Nations Environmental Programme—Finance Initiative.<sup>23</sup>

All of the above developments indicate burgeoning sustainable finance regimes in the Indo-Pacific.

## II. Asian Update on Climate and Clean Energy Policies

### A. INDIA

Over ten Indian states already have electric vehicle (EV) policies in different stages of approval. The Delhi Electric Vehicles Policy 2020 was approved in August 2020.<sup>24</sup> The aim of the policy is to accelerate the pace of electric vehicle adoption across vehicle segments, especially for two-wheelers, public/shared transport vehicles and goods carriers.<sup>25</sup> The policy also for Battery Electric Vehicles (BEVs) to contribute to twenty-five percent of all new vehicle registrations by 2024 in Delhi.<sup>26</sup>

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economy-euro/banking-and-finance/sustainable-finance/international-platform-sustainable-finance\_en#documents (last visited May 29, 2021) [hereinafter IPSF].

20. See Press Release, Indonesia and Norway are Joining the International Platform on Sustainable Finance (IPSF), EUROPEAN COMM'N (Mar. 25, 2020), [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200325-press-release-ipsf-new-members\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200325-press-release-ipsf-new-members_en.pdf); Press Release, Singapore and New Zealand are Joining the International Platform on Sustainable Finance (IPSF), EUROPEAN COMM'N (June 11, 2020), [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200611-press-release-ipsf-new-members\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200611-press-release-ipsf-new-members_en.pdf).

21. IPSF, *supra* note 19.

22. Khalil Azizuddin, *EU and China to Co-Chair International Taskforce on Sustainable Finance Taxonomies*, RESPONSIBLE INVESTIGATOR (Oct. 19, 2020), <https://www.responsible-investor.com/articles/eu-and-china-to-co-chair-international-taskforce-on-sustainable-finance-taxonomies>.

23. IPSF, *supra* note 19.

24. Delhi Electric Vehicles Policy, 2020, Cab. Decision No.2796 (Aug. 7, 2020) (India), available at [https://transport.delhi.gov.in/sites/default/files/All-PDF/Delhi\\_Electric\\_Vehicles\\_Policy\\_2020.pdf](https://transport.delhi.gov.in/sites/default/files/All-PDF/Delhi_Electric_Vehicles_Policy_2020.pdf).

25. *Id.* at § 2.1.

26. *Id.*

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The State Cabinet of Telangana approved the state's Electric Vehicle and Energy Storage Policy 2020-2030.<sup>27</sup> The vision is to make Telangana a hub for Electric Vehicles & Energy Storage Systems.<sup>28</sup> It aims to do this by “reduc[ing] the total cost of mobility by increasing the adoption of Electric Vehicles in public transportation, 2 & 3 Wheelers, 4 Wheelers, Light Commercial Vehicles & Shared Transportation;”<sup>29</sup> promoting a shift to renewable energy; making the state a preferred destination for manufacturing-related electric vehicles and energy storage; to attract investments worth \$4 billion and create employment for 120,000 persons by the year 2030 through EVs related infrastructure and manufacturing activities; and others.<sup>30</sup>

India plans to channel Rs 6,000 crores from the Compensatory Afforestation Management and Planning Authority (CAMPA) fund towards afforestation, forest management, soil and moisture conservation, and wildlife-related infrastructure development.<sup>31</sup> The focus is to create jobs for tribal communities and provides income to the vulnerable population in India.

In July 2020, the Ministry of Railways announced its goal of transforming itself into a “green railway” (i.e. zero carbon emissions by 2030).<sup>32</sup> Measures include electrification of the railways' systems, improving energy efficiency, “green certification for installations/stations, fitting bio-toilets in coaches and switching to renewable sources of energy.”<sup>33</sup>

To encourage renewable energy, the Ministry of Power has extended its waiver for inter-state transmission system (ISTS) charges and losses on solar and wind-generated electricity for sale to entities, until June 30, 2023.<sup>34</sup> This waiver is applicable to power plants using solar and wind sources of energy, including solar-wind hybrid power plants.<sup>35</sup>

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27. Jayesh Ranjan & Sujai Karampuri, *Telangana Electric Vehicle and Energy Storage Policy 2020-2030*, GOV'T OF TELANGANA (2020), <https://invest.telangana.gov.in/wp-content/uploads/2020/10/TS-EV-ESS-Policy.pdf>.

28. *Id.* at 8.

29. *Id.* at 7.

30. *Id.*

31. Vishwa Mohan, *Green Fund to be Used to Create Jobs*, TIMES OF INDIA (May 15, 2020), <https://timesofindia.indiatimes.com/india/green-fund-to-be-used-to-create-jobs/articleshow/75748768.cms>.

32. Press Release, Press Info. Bureau, Indian Railways on Mission Mode of Becoming a “Green Railway” by 2030 (July 13, 2020), <https://pib.gov.in/pressreleasepage.aspx?PRID=1638269>.

33. *Id.*

34. *Power Ministry Extends ISTS Charges Waiver Till 2023*, RENEWABLE WATCH (Aug. 7, 2020), <https://renewablewatch.in/2020/08/07/power-ministry-extends-ists-charges-waiver-till-2023/>.

35. *Id.*



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**B. SINGAPORE**

As part of the Paris Agreement, Singapore submitted an update to its Nationally Determined Contribution (NDC) on March 2020 to the United Nations Framework Convention on Climate Change (UNFCCC).<sup>36</sup> The updated NDC states that “Singapore intends to peak its emissions at 65 MtCO<sub>2</sub>e around 2030.”<sup>37</sup> As per current projections, this is “a 36% reduction in emissions intensity from 2005 levels by 2030.”<sup>38</sup>

Building on its NDC, in April 2020, the government of Singapore released the Long-Term Low-Emissions Development Strategy that aspires to halve Singapore’s “emissions from its peak to 33 MtCO<sub>2</sub>e by 2050, with a view to achieving net zero emissions as soon as viable in the second half of the century.”<sup>39</sup> The strategy has three focus areas: (1) transformations in industry, economy and society such as renewable energy and greater energy efficiency; (2) adoption of low-carbon technologies such as use of low-carb fuels; and (3) effective international collaboration.<sup>40</sup>

At the Parliamentary session in August 2020, the President of Singapore announced its plans for a sustainable recovery while improving social safety nets and creating jobs.<sup>41</sup> As part of this plan, she announced efforts to reimagine cities, redesign urban mobility, and be resource-efficient in a low-carbon future.<sup>42</sup> The focus will also be on green financing and sustainable infrastructure development.<sup>43</sup>

**C. NEW ZEALAND**

New Zealand’s Zero Carbon Act 2019<sup>44</sup> provides a climate framework for New Zealand to adapt to the effects of climate change and contribute towards limiting the “average temperature increase to 1.5° Celsius above pre-industrial levels.”<sup>45</sup> The Act established a goal to “reduce net emissions

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36. *Singapore’s Update of its First Nationally Determined Contribution (NDC) and Accompanying Information*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Singapore%20First/Singapore%27s%20Update%20of%201st%20NDC.pdf> (last visited May 28, 2021).

37. *Id.*

38. *Id.*

39. Nat’l Climate Change Secretariat (NCCS), *Charting Singapore’s Low Carbon and Climate Resilient Future*, at 3 (2020), <https://www.nccs.gov.sg/docs/default-source/publications/nccsleeds.pdf>.

40. *Singapore’s Long Term Low Emissions Development Strategy*, NCCS (Apr. 1, 2020), <https://www.nccs.gov.sg/media/publications/singapores-long-term-low-emissions-development-strategy>.

41. See Chew Hui Min, *Singapore will push for sustainable growth, further strengthen social safety nets: President Halimah*, CNA (Aug. 24, 2020), <https://www.channelnewsasia.com/news/singapore/singapore-parliament-president-halimah-speech-sustainable-growth-13048236>.

42. *Id.*

43. *Id.*

44. Climate Change Response (Zero Carbon) Amendment Act 2019, 2019 No. 61 (N.Z.).

45. *Id.* sch 2, cl 4.

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of all greenhouse gases (except biogenic methane) to zero by 2050 [and] reduce emissions of biogenic methane to 24–47 per cent below 2017 levels by 2050, including to 10 per cent below 2017 levels by 2030.”<sup>46</sup>

In its updated NDC submission to the UNFCCC, New Zealand reiterated its commitment to the Paris Agreement and indicated that the Climate Change Commission will provide advice in 2021 on whether its NDC should be made consistent with the 1.5 degrees’ temperature goal.<sup>47</sup>

**D. VIET NAM**

Viet Nam submitted its updated NDC in September 2020 to the UNFCCC which broadens the coverage of emissions to include the industrial sector. Viet Nam aims to reduce its GHG emissions by nine percent compared to the business as usual (BAU) scenario and aims to reduce it by twenty-seven percent with international support.<sup>48</sup> The updated NDC clarifies the business-as-usual scenario, the base year and specific mitigation measures for energy, agriculture, LULUCF, waste, and IP sectors.<sup>49</sup>

To transition to a low-carbon economy, Viet Nam revised its Law on Environmental Protection that establishes Viet Nam’s carbon emission trading scheme which is to come into effect on January 1, 2022.<sup>50</sup>

**E. THAILAND**

Thailand’s updated NDC aims to “reduce GHG emissions by 20% from projected BAU by 2030” and could increase to twenty-five percent subject to international support.<sup>51</sup>

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46. *Climate Change Response (Zero Carbon) Amendment Act 2019*, MINISTRY FOR THE ENV’T MANATŪ MŌ TE TAIAO (Apr. 2021), <https://environment.govt.nz/acts-and-regulations/acts/climate-change-response-amendment-act-2019/>.

47. *Submission under the Paris Agreement Communication and Update of New Zealand’s Nationally Determined Contribution*, N.Z. (Apr. 22, 2020), <https://www4.unfccc.int/sites/ndcstaging/publisheddocuments/New%20Zealand%20First/NEW%20ZEALAND%20NDC%20update%2022%2004%202020.pdf>.

48. The Socialist Republic of Viet Nam, *Updated Nationally Determined Contribution*, at 4 (July 2020), [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Viet%20Nam%20First/Viet%20Nam\\_NDC\\_2020\\_Eng.pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Viet%20Nam%20First/Viet%20Nam_NDC_2020_Eng.pdf).

49. *Id.*

50. VNA, *Carbon pricing helps improve Vietnam’s image internationally: Foreign media*, VIETNAM+ (Nov. 20, 2020), <https://en.vietnamplus.vn/carbon-pricing-helps-improve-vietnams-image-internationally-foreign-media/190767.vnp>.

51. Off. of Nat. Res. and Env’t Pol’y and Plan., *Thailand’s Updated Nationally Determined Contribution*, § 2 (Oct. 2020), <https://www4.unfccc.int/sites/ndcstaging/publisheddocuments/Thailand%20First/Thailand%20Updated%20NDC.pdf>.

#### F. BANGLADESH

The government of Bangladesh, through the Sustainable and Renewable Energy Development Authority, outlined a National Solar Energy Action Plan that aims at a forty GW of renewable energy generation capacity in 2041.<sup>52</sup> The plan, to be updated every five years, recommends the establishment of large ‘solar hubs’ that would account for almost sixteen GW of generation capacity, an additional four GW from electric utilities, private developers would account for five GW and rooftop installations about twelve GW.<sup>53</sup>

### III. Pandemic and Security Concerns Affecting India Trade Relations

#### A. INTRODUCTION

The COVID-19 pandemic has ushered us into an era of increased protectionism. The World Trade Organization (WTO) has been identifying measures related to the COVID-19 pandemic undertaken by WTO Members with respect to trade in goods, services, and intellectual property. India is no exception to this trend. Along with the COVID-19 pandemic, India has also faced border skirmishes with the neighbouring country and economic behemoth, China, which has heightened security concerns in the country.

The Government of India (GOI) has increased trade barriers across sectors in its efforts to be *Atmanirbhar Bharat*—i.e., self-reliant India. This note discusses India’s trade policy in light of the pandemic and security-related concerns and its effect on India’s trade relations.

#### B. INDIAN MEASURES RELATED TO COVID-19 PANDEMIC

Like many other countries, India has taken several measures to ensure the supply of essential goods required to combat the spread of the COVID-19 pandemic. Accordingly, the Directorate General of Foreign Trade (DGFT) issued several notifications, prohibiting the export of certain medical goods and equipment including surgical masks or disposable masks, personal protective equipment (PPE), ventilators, alcohol-based sanitizers, and active pharmaceutical ingredients (APIs) that are utilized in the manufacture of key medicines.<sup>54</sup>

As per the WTO database, India has notified over thirty measures related to trade in goods concerning the COVID-19 pandemic, most of which are

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52. Syful Islam, *Bangladesh Outlines plan for up to 40 GW of renewables in 2041*, PV MAG. (Oct. 20, 2020), <https://www.pv-magazine.com/2020/10/20/bangladesh-outlines-plan-for-up-to-40-gw-of-renewables-in-2041/>.

53. *Id.*

54. *COVID-19 and trade – India*, WTO, [https://www.wto.org/english/tratop\\_e/covid19\\_e/covid\\_details\\_by\\_country\\_e.htm?country=IND](https://www.wto.org/english/tratop_e/covid19_e/covid_details_by_country_e.htm?country=IND) (last visited May 28, 2021).

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export restrictions.<sup>55</sup> But it is interesting to note that a number of trade-restrictive measures implemented by India this year have no relation to the pandemic, some of which are examined in the following section.

C. INDIAN MEASURES RELATED TO SECURITY CONCERNS

As mentioned in the introduction, India's trade policy has been impacted by the security concerns arising out of border tensions from China. Although India has not undertaken express measures to target Chinese goods, many Indian measures may be considered to implicitly target goods from China.

For instance, the GOI has amended the import policy of products like televisions, power tillers and pneumatic tires as well as prohibited the imports of air-conditioners (with refrigerants). These products are primarily imported from China. It was also reported that the Indian Government is formulating plans to impose stringent quality control measures and higher tariffs on imports from China.<sup>56</sup>

India is also an active user of trade remedial measures like anti-dumping duties, countervailing duties and safeguard measures. The Directorate General of Trade Remedies (DGTR) has applied the highest number of these measures against goods imported from China and Hong Kong.<sup>57</sup>

Further, GOI has actively implemented non-tariff measures such as requirements in relation to standards, licensing, labeling, packaging and quotas on various goods. Illustratively, the Bureau of Indian Standards (BIS) has implemented mandatory certification for several products, including steel, toys, chemicals, and petrochemicals.<sup>58</sup> Although these measures are generally applicable, many of these products are imported from China in significant quantities in comparison to other countries.

With respect to investment, the GOI amended the Foreign Direct Investment (FDI) Policy and introduced screening of investments from neighboring countries through an amendment to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019.<sup>59</sup> Pursuant to the amendment, all investments from countries sharing a land border with India

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55. *COVID-19: Measures affecting trade in goods*, WTO, [https://www.wto.org/english/tratop\\_e/covid19\\_e/trade\\_related\\_goods\\_measure\\_e.htm](https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm) (last visited May 7, 2021).

56. Shruti Srivastava, *India Plans to impose rules and tariffs on Chinese imports*, THE ECON. TIMES, <https://economictimes.indiatimes.com/news/economy/foreign-trade/india-plans-to-impose-strict-rules-and-tariffs-on-chinese-imports/printarticle/76618641.cms>.

57. Gov't of India Ministry of Com. & Indus. Dep't of Com., *Directorate General of Trade Remedies Shaping International Trade: Annual Report 2018-19*, at 17 (Apr. 4, 2019), <https://www.dgtr.gov.in/sites/default/files/Annual%20Report%202018-19.pdf>.

58. *Foreign Manufacturers Certification Scheme*, BUREAU OF INDIAN STANDARDS (last visited May 31, 2021), <https://bis.gov.in/index.php/product-certification/products-under-compulsory-certification/scheme-i-mark-scheme/>.

59. Ministry of Finance, *Foreign Exchange Management (Non-debt Instruments) Amendment Rules, Ministry of Finance*, S.O. 1278 (Apr. 22, 2020), <https://taxguru.in/rbi/foreign-exchange-management-non-debt-instruments-amendment-rules-2020.html>.

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are subject to government approval.<sup>60</sup> The amendment effectively requires government clearance for both direct and indirect investments from China and Hong Kong. Although this amendment does not explicitly name China, it is believed to primarily target China.<sup>61</sup>

GOI has also introduced government procurement restrictions by amending the General Financial Rules, 2017 that now restricts bidders from neighboring countries that share *land borders* with India from participating in certain procurement processes.<sup>62</sup> Such restrictions may be made on the grounds of “defence of India or matters directly or indirectly related thereto including national security.”<sup>63</sup>

On data-related concerns, following the border tensions with China, India implemented a ban on approximately 118 mobile applications with links to China on the grounds of national security.<sup>64</sup> Some of the banned applications include Baidu, Alipay, and some versions of the messaging app WeChat, operated by the largest Chinese internet companies, like Tencent and Ant Financial.<sup>65</sup>

#### D. IMPACT ON INDIA’S TRADE RELATIONS

As evident above, India has sought to implement a series of protectionist measures on account of the COVID-19 pandemic, security concerns or national self-interest.

In pursuit of its protectionist policies, the Indian Government also opted out of signing the Regional Comprehensive Economic Partnership (RCEP) Agreement, which includes the Association of Southeast Asian Nations (ASEAN) countries and China, Japan, Australia, South Korea, and New Zealand. India also recently implemented the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 (CAROTAR), which provides broad discretionary powers to customs officials to assess preferential tariff treatment claims and can be construed as efforts to discourage imports from countries that have free trade agreements (FTAs) with India.

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60. *Id.*

61. *India’s New FDI Rules May Open New Flashpoint With China*, THE ECON. TIMES (Apr. 20, 2020), <https://economictimes.indiatimes.com/news/international/business/indias-new-fdi-rules-may-open-new-flashpoint-with-china/printarticle/75249144.cms>.

62. Office Memorandum from Sanjay Prasad, Joint Secretary, Ministry of Fin., Order (Public Procurement No. 1), at 2 (July 23, 2020) (on file F.No.6/18/2019-PPD).

63. *Id.* at 1.

64. See Press Release, Ministry of Elec. & IT, Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order, (June 29, 2020), <https://pib.gov.in/pressrelesedetailm.aspx?PRID=1635206>; Press Release, Ministry of Elec. & IT, Government Blocks 118 Mobile Apps Which are Prejudicial to Sovereignty and Integrity of India (Sept. 02, 2020), <https://pib.gov.in/pressreleasepage.aspx?PRID=1650669>.

65. Press Release, Government Blocks 118 Mobile Apps, *supra* note 64.

E. CONCLUSION

It is a matter of fact that for the country to prosper it must remain connected globally to maximize its economic growth and innovation. This has already been confirmed by the information technology (IT) sector's contribution to India's GDP.

But India's domestic market is consumption-driven, and to make the most of its economies of scale, it must maintain a healthy trade balance, which would require it to import in order for India to export. One way to address such limitations is to consider FTAs with the largely untapped European Union, Middle East, and Eurasian Economic Union markets, which may boost exports and increase the share of manufacturing in India's GDP.

On the private investment side, while the SOPs being provided or planned for India's strategic sectors can create massive industries with competitive economies of scale, it may require incorporating sunset clauses, which specify when such SOPs come to an end. Such measures will facilitate investments from genuine companies that plan to strategically enter the market instead of dubious companies that scam bankers and the government exchequer.

Nonetheless, India needs to get serious about delivering a predictable regulatory environment with respect to investment, trade, and taxes and make it easier to enforce contracts. The Government must implement policies, and the Judiciary must deliver judgments that instill confidence among domestic and foreign companies. Such an environment will be beneficial, especially at this juncture when supply chains are being restructured due to the COVID-19 pandemic.

In light of the changing geopolitical environment, for example, Biden elected as the U.S. President or the Brexit deadline nearing, there may be developments on issues like the U.S.-China trade war or resurrection of multilateral institutions like the WTO. Such developments may require India to reorient its trade policy and consider lowering its protectionist guard and display openness to negotiating deals.

To enhance its economic position, India must consider leveraging its strengths and creating an environment conducive to businesses and global value chains.

**IV. FinTech Regulatory Updates in India in 2020**

The financial technology (FinTech) ecosystem is ever-evolving, and India has been keeping up with it by introducing various regulatory changes that have had a significant bearing on the Indian FinTech space. Some of the regulatory changes that have been brought about this year (among others) are discussed in the subsequent sections.

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A. AMENDMENT TO THE KYC MASTER DIRECTIONS - PERMITTING VIDEO-BASED CUSTOMER IDENTIFICATION PROCESS

Know Your Customer (KYC) is the process used to verify the details of a customer/client dependent on the nature of the business and transaction. The Reserve Bank of India (RBI), which is the financial regulator in India, allows a variety of government-issued identity cards to be used for KYC purposes. After a landmark judgment pronounced by the Supreme Court of India,<sup>66</sup> which addressed the right to privacy of individuals in relation to the use of India's unique identification system (referred to as "Aadhar"), RBI has amended the KYC Master Direction and stated that the voluntary usage of Aadhar number for identification purpose is permitted.<sup>67</sup> The KYC Master Directions were further amended on January 9, 2020, pursuant to which RBI has permitted a video-based customer identification process as a consent-based alternate method of establishing the customer's identity, for customer onboarding.<sup>68</sup>

B. GUIDELINES ON REGULATION OF PAYMENT AGGREGATORS (PA) AND PAYMENT GATEWAYS (PG)

The RBI, *vide* its notification dated March 17, 2020, issued guidelines to (i) regulate the activities of PAs and (ii) provide baseline technology-related recommendations to PGs.<sup>69</sup> The guidelines *inter alia* provide for (i) authorization; (ii) capital requirements; (iii) governance requirements; (iv) safeguards against money laundering (KYC / AML / CFT) provisions; (v) merchant on-boarding; (vi) settlement and escrow management; (vii) customer grievance redressal and dispute management framework; and (viii) security, fraud prevention and risk management framework, in relation to the PAs.<sup>70</sup> The guidelines also provide for security-related recommendations in relation to PGs. However, these guidelines are not applicable to the cash-on-delivery e-commerce model.<sup>71</sup>

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66. Justice K.S. Puttaswamy (Retd.) v. Union of India, (2018) 494 SCC 1, 4-5 (India).

67. Rsr. Bank of India, *Master Direction-Know Your Customer Direction*, at 14 (Feb. 25, 2016), <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/18MDKYCD8E68EB13629A4A82BE8E06E606C57E57.PDF>.

68. Rsr. Bank of India, *Master Direction-Know Your Customer (KYC) Direction, 2016*, at 8 (May 10, 2021), <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/MD18KYCF6E92C82E1E1419D87323E3869BC9F13.PDF>.

69. *Id.* §§ 3-6, 9.

70. *Id.*

71. *Id.* § 2.3.

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C. THE HON'BLE SUPREME COURT OF INDIA DECIDED TO LIFT  
THE BAN IMPOSED BY RBI FROM DEALING IN VIRTUAL  
CURRENCIES AND CRYPTO BUSINESSES IN INDIA

RBI has time and again cautioned users, holders, and traders of virtual currencies (VCs) about the potential financial, operational, legal, and security-related risks associated with trading in VCs vide several notifications issued in December 2013,<sup>72</sup> February 2017,<sup>73</sup> and December 2017.<sup>74</sup> An Interdisciplinary Committee was formed in April 2017 to devise a framework on VCs.<sup>75</sup> But no report has been published by the Interdisciplinary Committee. Finally, in 2018, RBI issued a diktat banning all banks and other entities regulated by the RBI from dealing directly or indirectly in VCs.<sup>76</sup>

The diktat issued by RBI was challenged before the Supreme Court. On March 4, 2020, the Hon'ble Supreme Court of India lifted the ban imposed by RBI, on entities under the purview of the RBI, from dealing in virtual currencies and cryptocurrencies.<sup>77</sup> RBI has taken no further action in this regard. Therefore, while trading in cryptocurrencies may not be illegal based on the previous judgment, it is still not regulated in India and remains a grey area.

D. FRAMEWORK FOR AUTHORISATION OF NEW PAN-INDIA  
UMBRELLA ENTITY (NUE) FOR RETAIL PAYMENTS

On August 18, 2020, the RBI released a draft framework to set up a new pan-India umbrella entity focusing on retail payment systems, which will change the current landscape of retail payment framework in India.<sup>78</sup> Under this framework, an entity should be a company incorporated under the Companies Act 2013 and governed by the Payment and Settlement Systems

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72. Press Release, Reserve Bank of India, RBI cautions users of Virtual Currencies against Risks (Dec. 24, 2013), <https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/IEPR1261VC1213.PDF>.

73. Reserve Bank of India, RBI cautions users of Virtual Currencies, RBI/2016-17/2054 (Issued on Feb. 1, 2017).

74. Reserve Bank of India, RBI cautions regarding risk of virtual currencies including Bitcoins, RBI/2017-2018/1530 (Issued on Dec. 5, 2017).

75. Press Info. Bureau, *Government constitutes an Inter-Disciplinary Committee chaired by Special Secretary (Economic Affairs) to examine the existing framework with regard to Virtual Currencies* (April 12, 2017, 2:43 PM), <https://www.pib.gov.in/pressreleasepage.aspx?PRID=1487645>.

76. Rsrv. Bank of India, Prohibition on dealing in Virtual Currencies, RBI/2017-18/154 (Issued on April 6, 2018).

77. Supreme Court of India, *Judgment: Internet and Mobile Ass'n of India v. Rsrv. Bank of India, W.P. (Civil) No. 528 of 2018*, (March 4, 2020), [https://main.sci.gov.in/supremecourt/2018/19230/19230\\_2018\\_4\\_1501\\_21151\\_Judgement\\_04-Mar-2020.pdf](https://main.sci.gov.in/supremecourt/2018/19230/19230_2018_4_1501_21151_Judgement_04-Mar-2020.pdf).

78. Reserve Bank of India, *Framework of authorisation of pan-India Umbrella Entity for Retail Payments* (Aug. 18, 2020), <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/FREWORKCC3A86B01E974EB3BDD6930ED922B31C.PDF>.



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Act 2007 (PSS Act).<sup>79</sup> The draft framework also provides for (i) eligible promoters and shareholding, (ii) foreign investment, and (iii) capital requirement.<sup>80</sup> The NUE will, *among other things*, set up, manage, and operate new payment systems, especially in the retail space, develop new payment methods, standards and technologies, take care of developmental objectives (e.g., awareness of payment systems).<sup>81</sup> The NUE will also operate the clearing and settlement systems, identify and manage relevant risks such as settlement, credit, liquidity, and operational and preserve the integrity of the systems.<sup>82</sup>

**E. FRAMEWORK FOR RECOGNITION OF SELF-REGULATORY ORGANIZATION FOR PAYMENT SYSTEM OPERATORS**

The RBI issued a framework on October 22, 2020, for the establishment of Self-Regulatory Organizations (SRO) for Payment System Operators (PSO).<sup>83</sup> The framework's objective is to ensure an "optimal use of regulatory resources, so that the payments industry develops standards in respect of system security, pricing practices, customer protection measures, grievance redressal mechanisms, etc."<sup>84</sup> The said framework prescribes the characteristics, eligibility criteria, functions, responsibilities, etc., of SRO.<sup>85</sup> Some of the critical functions and responsibilities of SRO include: representing its members' public discussions, interactions, or communications with RBI or other authorities; establishing minimum benchmarks, ethical, and behavioral standards; "inform[ing] RBI about any violation of law that comes to its notice;" and "establish[ing] a uniform grievance redressal and dispute resolution framework across its members."<sup>86</sup>

The securities and commodity market regulator in India has also set up several SROs that have contributed significantly to the growth of the sector and have strengthened its integrity. The RBI's initiative in this direction will hopefully have the same effect in the FinTech sector.

The aforementioned regulatory changes have facilitated the ease of doing business in India. For example, the introduction of video-based KYC has simplified and streamlined the process of onboarding new customers.<sup>87</sup> There has been a focus on increasing transparency and accountability by notifying several compliances for PAs whilst also acknowledging the

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Reserve Bank of India, Framework for recognition of a Self-Regulatory Organization for Payment System Operators, RBI/2020-21/58 (Issued on Oct. 22, 2020).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Deep Dive: Why Video-Based KYC Is Key To Seamless, Cost-Effective FI Onboarding*, PYMNTS (Dec. 10, 2020), <https://www.pymnts.com/authentication/2020/deep-dive-why-video-based-kyc-is-key-to-seamless-cost-effective-fi-onboarding/>.

importance of self-regulation, laying down the framework for recognizing SROs.<sup>88</sup> A host of opportunities have also been presented, such as the framework for NUES focusing on retail payment systems. The judiciary's interference has also renewed hopes in terms of the potential growth and development of cryptocurrencies.

## V. Survey

The article surveys significant legal developments in India in arbitration law in the year 2020.

### A. EXTENSION OF TIME PERIOD DUE TO PANDEMIC

Due to COVID-19 pandemic-related restrictions, the Indian Supreme Court, through an order dated March 23, 2020, extended the time period to initiate legal claims and judicial compliance with effect from March 15, 2020, until further orders are issued.<sup>89</sup> Subsequently, on May 6, 2020, the Court clarified that all periods of limitation under the Arbitration and Conciliation Act, 1996 (Arbitration Act) were also extended.<sup>90</sup> On July 10, 2020, the Court directed that the (a) time limit for passing an arbitral award and (b) time period to complete pleadings be extended, subject to further orders.<sup>91</sup> The orders were not modified until the year's end.

### B. INTERIM RELIEF FROM COURT AND 'FORCE MAJEURE'

Lockdown, pandemic, force majeure, and frustration of contract were unsuccessfully raised in an effort to seek urgent interim relief directly from the Indian courts under Section 9 of the Arbitration Act. The Delhi High Court interpreted the *force majeure* clause narrowly and refused an injunction against the invocation of bank guarantees. It was held that past non-performance prior to lockdown was non-condonable.<sup>92</sup> The same High Court also declined a request for an injunction on the transfer of shares pledged as security for a loan when the fall in security margin had started in December 2019.<sup>93</sup>

The Delhi High Court also held that it has no power to introduce a clause akin to a *force majeure* clause into the contracts.<sup>94</sup> In another case, the Court rejected the plea that without insisting on payment of demurrage, the cargo is released, because the buyer stood absolved from taking delivery

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88. Framework for recognition of a Self-Regulatory Organisation, *supra* note 83.

89. In Re Cognizance for Extension of Limitation, 2020 SCC Online SC 343.

90. In Re Cognizance for Extension of Limitation, 2020 SCC Online SC 434.

91. In Re Cognizance for Extension of Limitation, 2020 SCC Online SC 712.

92. Halliburton Offshore Services Inc. v. Vedanta Ltd. (2020), 3 ARB.L.R. 113 (Delhi).

93. K.L. Enterprises v. Bajaj Finance Ltd., 2020 (4) ARB.L.R. 279 (Delhi).

94. Cyquator Media Services v. Idbi Trusteeship Services, 2020 SCC Online Del. 683.

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immediately on the vessel's arrival at the Port after lockdown.<sup>95</sup> It held that the *force majeure* clause could not be invoked merely because performing the obligations was difficult.<sup>96</sup>

The Bombay High Court<sup>97</sup> refused to accept that contracts with the seller stood terminated and unenforceable because of frustration and impossibility due to lockdown. It stated that the buyer did not stand to gain from the *force majeure* clause.<sup>98</sup> It was irrelevant that the buyer would not be able to perform its obligations for its purchasers and/or it would suffer damages.<sup>99</sup>

C. SCOPE OF SECTION 9 OF THE ARBITRATION ACT

In *Avantha Holdings vs. Vistra ITCL India*,<sup>100</sup> the Delhi High Court held that emergent necessity, which cannot await the constitution of an arbitral tribunal and consideration of interim relief by a tribunal, is *sine qua non* to obtain any order from the Court at the pre-arbitration stage. Likewise, an application for interim relief from the Court, in a Japan seated arbitration, was held to be unenforceable after failure to obtain similar relief from an emergency arbitrator.<sup>101</sup>

D. ANTI-ARBITRATION INJUNCTION SUIT

The Delhi High Court gave full autonomy to the arbitral tribunal to decide questions of the Court's jurisdiction.<sup>102</sup> The Delhi High Court dismissed suits for injunctions, holding that principles pertaining to anti-suit injunctions cannot be made applicable to anti-arbitration injunction suits.<sup>103</sup> The judgment is currently under challenge in appeal.<sup>104</sup> But, the Calcutta High Court took a different view, stating that the arbitral tribunal cannot have the *sole* authority to determine jurisdiction to the exclusion of a civil court.<sup>105</sup>

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95. *Rashmi Cement Ltd. v. World Metals & Alloys*, (2020) O.M.P. (I) (COMM.)-117/2020 (Del. H.C.).

96. *Id.*

97. *Standard Retail v. G.S. Global Corp*, 2020 SCC Online Bom 704 (India).

98. *Id.*

99. *Id.*

100. *Avantha Holdings Ltd. v. Vistra Itcl India Ltd.*, 2020 SCC Online Del 1717 (India).

101. *Ashwani Minda & M/s Jay Ushin v. M/s U-Shin Ltd & M/s Minebea Mitsumi*, 2020 SCC Online Del. 72 (India).

102. *Bina Modi v. Lalit Modi*, 2020 SCC Online Del 901, ¶ 30(N) (India).

103. *Id.*

104. Adya Singh, *Dr. Bina Modi & ors. V. Lalit Modi & ors.*, WHITE CODE MEDIATION AND ARB. CENTRE (last visited May 31, 2021), <https://viamediationcentre.org/readnews/OTM3/Dr-Bina-Modi-ors-v-Lalit-Modi-ors>.

105. *Balasore Alloys vs. Medima LLC*, 2020 SCC Online Cal 1699, ¶ 10 (India).

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E. FRAUD AND ARBITRATION PROCEEDINGS

The Supreme Court frowned on allegations of “fraud” being raised to avoid arbitration proceedings. It was held that “serious allegations of fraud” can be considered only if (a) the arbitration clause or agreement itself cannot be said to exist, or (b) allegations are against the State for arbitrary, fraudulent, or mala fide conduct.<sup>106</sup> The mere fact that criminal proceedings can or have been instituted with respect to the same subject matter would not, ipso facto, make an otherwise arbitrable dispute, non-arbitrable.<sup>107</sup>

F. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The Supreme Court held that the period of limitation for enforcing a foreign arbitral award would be three years from when the “right to apply accrues.”<sup>108</sup> An application for condonation of delay under the general law of limitation can also be made for enforcement, which cannot be done in the case of a domestic award.<sup>109</sup>

The Supreme Court narrowly interpreted the expression “was otherwise unable to present his case” occurring in Section 48(1)(b) of the Arbitration Act to uphold a foreign arbitral award.<sup>110</sup> Under the said clause, a foreign award could be set aside only if a fair hearing was not given by the arbitrator or factors outside the party’s control combined in denial of a fair hearing.<sup>111</sup> Where the respondent chose not to appear before the arbitrator and did not follow timelines granted by the arbitrator for documents and legal submissions, the foreign award was held to be valid.<sup>112</sup>

A discordant note was, however, struck by the Supreme Court in *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.*<sup>113</sup> wherein a foreign award was not enforced because it opposed the fundamental policy of India relating to exports, for which permission of the Indian government was necessary.

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106. Avitel Post Studios Ltd. v. HSBC PI Holdings (Mauritius) Ltd., 2020 SCC Online SC 656, ¶ 14 (India).

107. Deccan Paper Mills vs. Regency Mahavir Properties, 2020 SCC Online SC 655 (India).

108. Government of India v. Vedanta Ltd. & Others, 2020 SCC Online SC 749, ¶ G(V)(a)(ii) (India).

109. *Id.* at 27.

110. Vijay Karia v. Prysman Cavi E Sistemi SRL, 2020 SCC Online SC 177, ¶ 55 (India).

111. *See id.* ¶ 107.

112. Centrotrade Minerals and Metals v. Hindustan Copper, 2020 SCC Online SC 479, ¶ 28[6] (India).

113. National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A., 2020 SCC Online SC 381, ¶ 63 (India).

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## **Cross-Border Real Estate**

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2020 has been a notable year due to the continuing series of reforms resulting from last year's presidential and parliamentary elections, which completely reshaped the political environment in Ukraine. Among other areas, the reforms have substantially affected portions of Ukraine's real estate legislation.

### **I. Agricultural Land Market Opening**

The greatest reform in Ukraine during 2020 was the opening of the agricultural land market. In 2002, a moratorium on alienation and change of designated agricultural land use went into effect. The moratorium was intended as a temporary measure but was prolonged multiple times by Parliament. In 2018, the European Court of Human Rights declared that the moratorium violated the right to the peaceful enjoyment of property.<sup>1</sup>

The new law, "On Amendments to Certain Laws of Ukraine on the Conditions of Turnover of Agricultural Land," will take effect on July 1, 2021.<sup>2</sup> The law provides for a gradual opening of the agricultural land market in Ukraine. For Ukrainian citizens, the market will begin to open on July 1, 2021; for Ukrainian legal entities without foreign capital, the market will open on January 1, 2024; and for foreign investors, the market opening is conditional on a nationwide referendum.<sup>3</sup> The law also provides that it is subject to the Constitutional Court of Ukraine's consideration, which may declare the law unconstitutional and render it null and void.<sup>4</sup>

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1. Zelenchuk and Tsytsyura v. Ukraine, Case: 846/16 and 1075/16, Judgement, (22 May 2018), *available at* <https://hudoc.echr.coe.int/eng/#%7B%22itemid%22:%5B%22002-11941%22%7D>.

2. Закон України "Про внесення змін до деяких законодавчих актів України щодо умов обігу земель сільськогосподарського призначення" [Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Conditions of Turnover of Agricultural Land"], issued March 31, 2020, effective July 1, 2021, No. 552-IX, *available at* <https://zakon.rada.gov.ua/laws/show/552-20?lang=EN#Text>.

3. *Id.* art. 145(15).

4. Конституційне подання щодо відповідності Конституції України (неконституційності) Закону України "Про внесення змін до деяких законодавчих актів України щодо умов обігу земель сільськогосподарського призначення" від 31 березня 2020 року [Constitutional Submission Regarding Compliance with Constitution of Ukraine (Being Unconstitutional) of the Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Conditions of Turnover

Despite the struggles and its cautious provisions, the law is a welcomed international community reform. In addition, the reform was also a necessary condition to gain the cooperation of the International Monetary Fund (IMF).<sup>5</sup>

## II. Gambling Legalization

In addition to the above-mentioned liberalization in the land market, this year Ukraine also lifted the ban on gambling activity, which had been introduced in 2009. In particular, the Ukrainian Parliament adopted a law legalizing licensed online and offline gambling.<sup>6</sup> The main impact of gambling legalization on real estate can be determined by understanding where such activities will be allowed. The law conditionally divides gambling establishments into three types with separate requirements set for each one: (1) casino gambling establishments; (2) slot machine halls; and (3) bookmaker's areas.<sup>7</sup> The highest requirements apply to casino gambling.

To be specific, casino gambling is now allowed in the listed territories: (i) in the city of Kyiv, five-star hotels (buildings or complexes) with a capacity of at least 150 rooms; (ii) in other localities, five-star and four-star hotels (buildings or complexes) with a capacity of at least 100 rooms; (iii) a country resort complex with a five-star hotel (two or more buildings outside the city), with the total area of the complex being not less than 10,000 m<sup>2</sup>; or (iv) a special territorial gaming zone created by a decision of the Cabinet of Ministers of Ukraine.<sup>8</sup> In this gaming zone, casinos are permitted in an area of more than 10,000 m<sup>2</sup> in separate buildings.<sup>9</sup>

Given the above, it is expected that the reforms will boost development of the hotel business. It is also anticipated that the criteria for awarding stars to hotels are likely to be of interest. For now, Ukraine's legislation does not recognize the Hotelstars Union stars awarding system. Instead, a 2003 national standard is still being used.<sup>10</sup> The standard applies a rather subjective definition for a five-star hotel, such as having an exclusive design,

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of Agricultural Land"], issued April 30, 2020, No. 1/30-777, *available at* [http://www.ccu.gov.ua/sites/default/files/3\\_186\\_2020\\_0.pdf](http://www.ccu.gov.ua/sites/default/files/3_186_2020_0.pdf).

5. [Letter of Intent of Ukraine to IMF and Memorandum of Economic and Financial Policies], issued June 2, 2020, *available at* [https://mof.gov.ua/storage/files/Memo\\_IMF.pdf](https://mof.gov.ua/storage/files/Memo_IMF.pdf).

6. Закон України "Про державне регулювання діяльності щодо організації та проведення азартних ігор" [Law of Ukraine "On State Regulation of Activity on Organisation and Conducting Games of Chance"], issued July 14, 2020, effective Aug.13, 2020, No. 768-IX, *available at* <https://zakon.rada.gov.ua/laws/show/768-20#Text>.

7. *Id.*

8. *Id.* art. 26(3).

9. *Id.* art. 26(4).

10. Національний стандарт України ДСТУ 4269:2003. Послуги туристичні. Класифікація готелів [National Standard of Ukraine ДСТУ 4269:2003. Tourist Services. Classification of Hotels], issued June 17, 2004, No. 768-IX, *available at* <https://dbn.co.ua/load/0-0-0-940-20>.

respectable atmosphere, the most expensive finish materials, and incontestable condition.<sup>11</sup>

Licensing of the gambling businesses has not yet kicked off. On September 23, 2020, the Cabinet of Ministers of Ukraine adopted a decree establishing the Gambling and Lottery Regulation Commission, the new licensing and regulating authority.<sup>12</sup> But more legislation is on the way to give the gambling industry a proper start.<sup>13</sup>

### III. Concessions Kick-Off

At the end of 2019, a new concessions law took effect.<sup>14</sup> The law is aimed at setting up new, transparent, and effective rules for concession activity in Ukraine. The main novelties and advantages of the law may be summarized as: (a) the possibility for foreign investors to take part in concession projects through a Ukrainian SPV;<sup>15</sup> (b) the concession term of up to fifty years;<sup>16</sup> (c) the main procedure for choosing a concessionaire is the bidding, with the competitive dialogue or direct negotiation with the tenant of the concession object being ancillary procedures;<sup>17</sup> (d) the new rules provide an opportunity to attract external financing into the projects—concessions are bankable due to the introduction of such instruments as concessioner proprietary rights pledges and automatic assignment of the claims under a project financing agreement;<sup>18</sup> and (e) the agreements may be governed by foreign law upon the decision of the parties.<sup>19</sup>

In 2020, two pilot concession projects were completed, namely the concessions of seaports Olvia and Kherson. Qatar company QTerminals won the Olvia bidding, and Risoil Ukraine won the Kherson bidding. Both have already entered into the concession agreements.<sup>20</sup> Both winners are companies with foreign capital, which confirms, among other things, that

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11. *See id.*

12. Постанова Кабінету Міністрів України “Про Комісію з регулювання азартних ігор та лотерей” [Regulation of Cabinet of Ministers of Ukraine “On Commission Regulating Games of Chance and Lotteries”], issued September 23, 2020, No. 891, *available at* <https://zakon.rada.gov.ua/laws/show/891-2020-%D0%BF#Text>.

13. В Україні з’явиться Комісія з регулювання азартних ігор та лотерей [Commission Regulating Games of Chance and Lotteries will be Established in Ukraine], *available at* <https://www.kmu.gov.ua/news/v-ukrayini-zyavitsya-komisiya-z-regulyuvannya-azartnih-igor-ta-loterej>.

14. Закон України “Про концесію” [Law of Ukraine “On Concession”] issued October 3, 2019, No. 155-IX, *available at* <https://zakon.rada.gov.ua/laws/main/155-20>.

15. *Id.* art. 22(4).

16. *Id.* art. 3(1).

17. *Id.* art. 6(1).

18. *Id.* art. 30(4).

19. *Id.* art. 44.

20. Владислав Криклій: Підписано перший договір концесії морського порту в Україні [Vladyslav Kryklii: *First sea port concession agreement has been signed in Ukraine*], *available at* <https://www.kmu.gov.ua/news/pidpisano-pershij-dogovir-koncesiyi-morskogo-portu-v-ukrayini-vladislav-kriklij>.



the bidding processes were conducted according to the best practices and highest transparency standards.

The Ministry of Infrastructure of Ukraine is now preparing new concession projects in seaports Chornomorsk, Berdiansk, Odesa, and Ismail, and railway stations in Kharkiv, Dnipro, Vinnytsia, Khmelnytskyi, Mykolaiv, Chop, and Kyiv.<sup>21</sup>

#### **IV. Privatisation Success**

2020 was also a major year in terms of the privatization of enterprises. As a refresher, the privatization of Ukraine is conducted through large-scale and small-scale privatization procedures<sup>22</sup> This past year, small-scale privatization went into high gear. The major object of small-scale privatization was the sale of the Dnipro hotel located in the heart of Kyiv.<sup>23</sup> Twenty-nine participants competed for the purchase of this building, which has an incredible location.<sup>24</sup> As a result, the price increased 13.5 times to UAH 1,111,222,000.22 (approximately USD \$39,163,000).<sup>25</sup> The whole auction was streamed online, which added to the transparency of the process.<sup>26</sup>

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Владислав Криклій: Укладено договір концесії морського порту “Ольвія” [Vladyslav Kryklii: “Olvia” sea port concession agreement is concluded], available at <https://www.kmu.gov.ua/news/ukladeno-dogovir-koncesiyi-morskogo-portu-olviya-vladislav-kriklij>.

21. Владислав Криклій: Наші наступні проекти – концесія залізнично-поромного комплексу та контейнерного терміналу морського порту “Чорноморськ” [Vladyslav Kryklii: *Our Future Projects – Concession of Railroad and Ferry Complex and Container Terminal in Seaport “Chornomorsk”*], available at <https://www.kmu.gov.ua/news/nashi-nastupni-proekti-koncesiya-zaliznichno-poromnogo-kompleksu-ta-kontejnernogo-terminala-morskogo-portu-chornomorsk-vladislav-kriklij>.

22. Закон України “Про приватизацію державного і комунального майна” [Law of Ukraine “On Privatisation of State and Municipal Property”] issued January 1, 2018, No. 2269-VIII, available at <https://zakon.rada.gov.ua/laws/show/2269-19#Text>.

23. See *id.*

24. *Successful Privatization of the Dnipro Hotel*, USUBC (July 16, 2020), <https://www.usubc.org/site/recent-news/successful-privatization-of-the-dnipro-hotel---the-state---will-receive-1-billion-111-million-111-thousand-222-hryvnias>.

25. Столичний готель Дніпро продано за 1 млрд 111 млн грн [Hotel Dnipro in the Capital Sold for UAH 1 billion 111 million], LIGA (July 15, 2020, 17:08 PM), <https://ua-news.liga.net/economics/news/za-stolichniy-gotel-dnipro-vje-dayut-1-mlrd-grn-torgi-trivayut#:~:text=%D0%9E%D0%B1%D1%94%D0%BA%D1%82%20%D0%B2%D0%B8%D1%81%D1%82%D0%B0%D0%B2%D0%BB%D1%8F%D0%B2%D1%81%D1%8F%20%D0%BD%D0%B0%20%D0%BF%D1%80%D0%BE%D0%B4%D0%B0%D0%B6,1%20%D0%BC%D0%BB%D1%80%D0%B4%20111%20%D0%BC%D0%BB%D0%BD%20%D0%B3%D1%80%D0%BD>.

26. Столичний готель Дніпро продано за 1 млрд 111 млн грн [Hotel Dnipro in the Capital Sold for UAH 1 billion 111 million], available at <https://ua-news.liga.net/economics/news/za-stolichniy-gotel-dnipro-vje-dayut-1-mlrd-grn-torgi-trivayut#:~:text=%D0%9E%D0%B1%D1%94%D0%BA%D1%82%20%D0%B2%D0%B8%D1%81%D1%82%D0%B0%D0%B2%D0%BB%D1%8F%D0%B2%D1%81%D1%8F%20%D0%BD%D0%B0%20%D0%BF%D1%80%D0%BE%D0%B4%D0%B0%D0%B6,1%20%D0%BC%D0%BB%D1%80%D0%B4%20111%20%D0%BC%D0%BB%D0%BD%20%D0%B3%D1%80%D0%BD>.

An investor can purchase different objects across a plethora of industries, including cogeneration, alcohol manufacturing, energy, pharma, electricity transmission, and mining.<sup>27</sup>

The main features of Ukrainian small privatization are that: (1) foreign investors can participate to the same extent as domestic investors;<sup>28</sup> (2) there is no need to establish a local company or open a bank account;<sup>29</sup> (3) financed purchasing is possible,<sup>30</sup> (4) auctions are held through the internationally recognized electronic system, Prozorro.Sale;<sup>31</sup> and (5) payment can be made in USD, EUR, or other exchangeable foreign currencies.<sup>32</sup> In practice, however, the most attractive assets have electronic data rooms for limited due diligence.

Large-scale privatization auctions, however, have been postponed until the COVID-19 quarantine is lifted.<sup>33</sup> In the meantime, preparation of other objects continues, and the auctions will resume as soon as the quarantine is lifted.

## V. Construction Reform

On March 13, 2020, the Cabinet of Ministers of Ukraine launched a reform of the construction industry. In particular, the reform seeks to liquidate the State Architectural and Construction Inspection (SACI) and divide its wide powers among three new bodies: the State Servicing Office for Urban Planning (permissive functions); the State Inspection for Urban Planning (supervision and control functions); and the State Agency for Technical Regulations (elaboration of construction regulations).<sup>34</sup> In addition, the licensing of construction companies will be replaced by certification performed by responsible specialists.<sup>35</sup> This change is aimed at increasing personal responsibility for construction, as the licensing system

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%20%D0%B3%D1%80%D0%BD.

27. *Small Privatization*, Фонд державного майна України, *available at* <https://privatization.gov.ua/en/product-category/mala-pryvatyzatsiya-en/>.

28. See Владислав Криклій, *supra* note 20, art. 8(1).

29. *Id.*, art. 14.

30. *Id.*

31. *Id.*, art. 15(1).

32. See *id.*, art. 23(2).

33. Закон України “Про внесення змін до Закону України “Про приватизацію державного і комунального майна” щодо парламентського контролю за приватизацією державного майна” [Law of Ukraine “On Amending the Law of Ukraine “On Privatisation of State and Municipal Property” Regarding Parliament’s Control over Privatisation of State Property”] issued September 2, 2020, No. 853-IX, *available at* <https://zakon.rada.gov.ua/laws/show/853-20#Text>.

34. Стартувала реформа галузі містобудування [Urban-Planning Reform Launched], *available at* <https://www.kmu.gov.ua/news/startuvala-reforma-galuzi-mistobuduvannya>.

35. *Id.*

did not achieve the task of procuring high quality and safety of construction in Ukraine.<sup>36</sup>

It is also anticipated that a reform requiring mandatory risk insurance for certified specialists and developers will be introduced. This should provide protection for third parties, such as residential real estate investors, who are currently practically unprotected.

In addition to the foregoing, other anticipated changes include: (1) checklists for the receipt of construction permits; (2) implementation of new features in the electronic cabinet of a developer; and (3) the launch of an administrative appeals procedure against the decisions of the above-stated bodies to the Ministry of Regional Development (such as complaints that the SACI's decisions were previously considered by the SACI itself). But to ensure practical implementation of these reforms, statutory changes still need to be adopted by the Parliament.

## **VI. Urban Planning and Land Management Changes**

On June 17, 2020, the Parliament adopted a law introducing substantial amendments to urban planning and land management legislation of Ukraine.<sup>37</sup>

Beginning July 24, 2021, land plots can be formed by urban planning documentation and not only land allocation documentation.<sup>38</sup> Therefore, it will be unnecessary for developers to provide two types of documents. Rather, the detailed territory plan or another type of urban planning document will be enough. Procedures for changing the designated use of privately owned lands were also simplified. Namely, the requirement to develop and adopt land allocation projects with authorities was abolished, subject to certain conditions.<sup>39</sup> Until January 1, 2025, detailed territory plans, being the local project-specific type of urban planning document, can prevail over a city's master plan/zoning plan, save for some exceptions.<sup>40</sup>

## **VII. Quarantine**

Lastly, Ukraine, like many other countries, has adopted certain quarantine measures to fight COVID-19. The measures were changed several times. As of November 2020, restrictions on everyday businesses activity remain in place.<sup>41</sup>

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36. *See id.*

37. Закон України “Про внесення змін до деяких законодавчих актів України щодо планування використання земель” [Law of Ukraine “On Amending Certain Legislative Acts of Ukraine Regarding Planning of Land Use”] issued June 17, 2020, No. 711-IX, *available at* <https://zakon.rada.gov.ua/laws/show/711-20#Text>.

38. *Id.* art. 6(8).

39. *Id.* art. 2(4).

40. *Id.* art. 2(20).

41. Постанова Кабінету Міністрів України “Про встановлення карантину та запровадження посиленних протиепідемічних заходів на території із значним поширенням гострої

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Mass events with twenty or more persons are prohibited, and if a gathering has less than twenty people, a distance of 1.5 meters between people must be maintained;<sup>42</sup> Cinemas and theatres may operate at fifty percent capacity;<sup>43</sup> transporting companies must keep the number of people inside a vehicle equal to or less than the number of seats;<sup>44</sup> and restaurants and bars cannot operate between 10 p.m. and 7 a.m.<sup>45</sup> In addition, shopping malls, restaurants, bars, and other entertainment facilities must not allow any visitors on weekends, but supermarkets and apothecaries, as well as address delivery services, are allowed.<sup>46</sup>

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респіраторної хвороби COVID-19, спричиненої коронавірусом SARS-CoV-2” [Regulation of Cabinet of Ministers of Ukraine “On Establishment of Quarantine and Implementation of Strengthened Anti-Epidemic Measures in the Territories with Substantial Spread of Acute Respiratory Disease COVID-19 Resulting from Coronavirus SARS-CoV-2”], issued July 22, 2020, No. 641, available at <https://www.kmu.gov.ua/npas/pro-vstanovlennya-karantynu-ta-zapr-641>.

42. *Id.* ¶ 10(6).

43. *Id.* ¶ 10(7).

44. *Id.* ¶ 10(9).

45. *Id.* ¶ 10(10).

46. *Id.* ¶ 15(1-5).

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## **International Contracts Committee**

MARTIN E. AQUILINA, MAX DELEON & STUTI MURARKA,  
WILLEM DEN HERTOOG, ANDERS FORKMAN, WILLIAM P. JOHNSON,  
AND SAMUEL G. WIECZOREK\*

### **I. Introduction**

This article describes significant contract issues and legal developments that arose during 2020. The doctrine of unconscionability in drafting an arbitration provision was front and center in *Uber v. Heller*, a decision from the Supreme Court of Canada discussed in Section II. Section III describes the impact of Covid-19 on business interruption insurance coverage. Section IV discusses creditor arrangements outside of formal insolvency proceedings under a new provision of Dutch law. Section V describes a Swedish Supreme Court case in which a choice-of-law provision in a contract among international parties forms the centerpiece. Section VI gives an overview of new franchise and distribution laws in various countries that went into effect in 2020. Finally, Section VII describes Incoterms® 2020.

### **II. The New Doctrine of Unconscionability in Canadian Contract Law**

In *Uber v. Heller*, a decision rendered by the Supreme Court of Canada (the SCC or the Court) in June 2020, Canada's highest court considered whether an arbitration clause contained in a contract between the ride service Uber and its drivers could be invalidated by applying the doctrine of unconscionability.<sup>1</sup> The ruling will affect how arbitration clauses, or at least those in standard-form contracts (also known as contracts of adhesion), will be construed by Canadian courts in the future.

#### **A. FACTUAL BACKGROUND AND PRIOR RULINGS**

The case arose from an attempt by David Heller, a Toronto-based UberEATS driver, to bring a \$400-million class action against Uber

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1. See *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

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Technologies Inc. (Uber) on behalf of Uber and UberEATS drivers in Ontario. Heller alleged that Uber violated the province's employment standards legislation by classifying Uber and UberEATS drivers as independent contractors and failing to provide them with employee benefits such as vacation, minimum wage, and overtime pay.<sup>2</sup>

Heller had entered into multiple agreements with Uber and its affiliates that allowed him to access Uber's ride and delivery software. The agreements contained "med-arb" clauses requiring disputes between the parties to be mediated and then subjected to binding arbitration pursuant to the rules of the International Chamber of Commerce (ICC Rules) if mediation did not dispose of the dispute. The agreements identified Amsterdam as the seat of mediation and arbitration and required an up-front deposit of \$14,500, in addition to other fees and costs.<sup>3</sup> In total, those fees and costs constituted the better part of the annual income earned by Heller as an Uber driver.<sup>4</sup>

Uber moved to have Heller's proceeding stayed in favor of arbitration pursuant to the applicable arbitration clauses and the International Commercial Arbitration Act<sup>5</sup> (ICAA) or, alternatively, the Arbitration Act, 1991<sup>6</sup> (Arbitration Act). Applying the ICAA, the Ontario Superior Court granted Uber's motion and stayed Heller's action in favor of arbitration.<sup>7</sup> Heller appealed. The Court of Appeal allowed the appeal and reversed the stay of proceeding, holding that if the drivers are employees, as was alleged, then the arbitration clauses illegally contracted out of an employment standard.<sup>8</sup> In addition, the Court of Appeal found the parties' arbitration agreement unconscionable at common law. In either case, the Court of Appeal invalidated the arbitration clauses under the Arbitration Act.<sup>9</sup>

**B. RULING AT THE SUPREME COURT OF CANADA**

Uber appealed the Court of Appeal's decision and the case came before a panel of nine judges of the SCC. A majority of the Court sided with Justices Abella and Rowe to invalidate the med-arb clause on the basis of the doctrine of unconscionability, one Justice wrote a concurring judgment as to the result, and another Justice dissented.<sup>10</sup>

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2. See Employment Standards Act 2000, S.O. 2000, c. 41.

3. See *Uber Tech.*, 2020 SCC at ¶ 2.

4. *Id.*

5. International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5.

6. Arbitration Act, 1991, S.O., 1991, c. 17.

7. See *Heller v. Uber Technologies Inc.*, 2018 ONSC 718, 41 D.L.R. (4th) 343.

8. See *Heller v. Uber Technologies Inc.*, 2019 ONCA 1.

9. *Id.*

10. *Uber Tech.*, 2020 SCC at ¶ 2.

1. *The Arbitration Act, 1991 as the Applicable Statute*

A threshold issue for the Court was determining whether the Arbitration Act or ICAA applied. The province of Ontario, like many others of Canada, has two arbitration statutes: the Arbitration Act and the ICAA, which is modeled after the UNCITRAL Model Law.<sup>11</sup> As its name indicates, the ICAA governs arbitrations between parties that have their places of business in different countries and that are “commercial” in nature.<sup>12</sup> As for the Arbitration Act, it essentially governs all arbitration agreements other than those governed by the ICAA.<sup>13</sup>

After considering Ontario’s twin-statute approach, the Court’s majority sided with Heller in finding that the issue before the SCC was one of labor and employment; thus, the Court determined that the Arbitration Act, and not the ICAA, applied.<sup>14</sup>

Heller argued that Uber’s med-arb clause could not be enforced because the arbitration agreement itself was invalid. Under the Arbitration Act, a court is generally required to stay a judicial proceeding where an arbitration agreement exists.<sup>15</sup> But there are exceptions to this rule, including the arbitration agreement’s lack of validity.<sup>16</sup>

Normally, the arbitral tribunal determines whether the arbitration agreement’s validity there is a “bona fide challenge” to arbitral jurisdiction that only a court can resolve. To determine whether a “bona fide challenge” exists, the court applies a two-part test.<sup>17</sup> First, the seized court must determine whether, assuming the truthfulness of the facts pleaded, there is a “genuine challenge” to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, should a stay of the judicial proceedings be granted, the jurisdictional challenge may never be addressed by the arbitrator.<sup>18</sup>

2. *Jurisdiction to Determine the Validity of The Arbitration Clause and Ruling on its Validity*

The SCC found that Heller’s challenge to the validity of the arbitration clause was genuine.<sup>19</sup> It also found that the fees required by the ICC Rules

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11. See Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I.

12. See *Uber Tech.*, 2020 SCC at ¶ 20.

13. See Arbitration Act, op. cit., s. 2.

14. See *Uber Tech.*, 2020 SCC at ¶¶ 19, 23. (In its examination of the word “commercial,” the SCC looked to official commentary supporting the view that labor or employment disputes are not covered by the term “commercial” despite their relation to business.); UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General*, U.N. Doc. A/CN.9/264, March 25, 1985, at 10–11.

15. See *Uber Tech.*, 2020 SCC at ¶ 29; Arbitration Act, op.cit., s. 7(1).

16. See *Uber Tech.*, 2020 SCC at ¶ 30; Arbitration Act, op.cit., s. 7(2).

17. *Uber Tech.*, 2020 SCC at ¶ 30.

18. See *id.* at ¶ 44.

19. See *id.* at ¶¶ 44–47.



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to constitute the arbitral tribunal to hear the jurisdictional challenge, among other factors, resulted in a real prospect that Heller’s arguments on jurisdiction would never be heard because the fees required to access the arbitral tribunal were far out of his reach. The Court, therefore, determined that systematic referral to arbitration was inappropriate and that the court of first instance should have itself determined the question of the arbitration clause’s validity.<sup>20</sup>

Next, relying on established precedent, the majority applied a two-part test to determine whether Uber’s arbitration clause was unconscionable. First, there must be evidence of inequality in the positions of the parties; second, there must be proof of an improvident bargain.<sup>21</sup>

The majority ruled that the first part of the test was met. Among other things, the majority relied on the fact that the contract was a standard form agreement that Heller had no ability to negotiate and there was manifestly a “gulf in sophistication” between the parties.<sup>22</sup> Moreover, the arbitration clause did not spell out the details of mediating and arbitrating disputes under the ICC Rules, nor did it contain an explanation of Dutch law, which governed the contract.<sup>23</sup>

The majority ruled that the second part of the test was also met. There was proof of an improvident bargain, meaning one that unduly advantages the stronger party or unduly disadvantages the weaker party.<sup>24</sup> Here, the majority found that the fees required by the ICC Rules were prohibitive to Heller based on three factors: his income, their disproportionate size as compared to any foreseeable award, and the impression that the arbitration would take place in the Netherlands.<sup>25</sup>

### 3. *The Concurring and Dissenting Judgments*

Although Justice Brown reached the same conclusion and relied on the same factual observations as the majority of the Court, he did so without invoking the doctrine of unconscionability, which he considered ill-suited for the dispute.<sup>26</sup> Rather, the Justice ruled the arbitration clause to be unenforceable given its inconsistency with the public policy imperative of protecting the integrity of the justice system and providing meaningful access to justice before an effective decision-maker. For Justice Brown,

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20. *Id.* at ¶¶ 29–47. (Arbitrators are competent to determine their own jurisdiction based on the competence-competence principle. The rule of systematic referral to arbitration means that in any case involving an arbitration agreement, a challenge to the arbitrator’s jurisdiction must first be resolved by the arbitrator.).

21. *See id.* at ¶ 65.

22. *Id.*

23. *Uber Tech.*, 2020 SCC at ¶¶ 93–94.

24. *See id.* at ¶ 74.

25. *See id.* at ¶ 94 (explaining that any representation made to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid).

26. *Id.* at ¶¶ 101–02.

ousting meaningful access to a neutral arbiter is injurious to the rule of law and thus a form of “illegality” that goes to the very root of the contract.<sup>27</sup>

Penning a dissenting judgment, Justice Côté would have upheld the arbitration clause. Her analysis emphasizes international arbitration law rather than principles of domestic contract law. According to Justice Côté, the arbitration clause was neither inconsistent with employment standards legislation, nor contrary to public policy, nor was it unconscionable based on the available evidence. Justice Côté found the relationship created by Uber’s service agreements to be commercial in nature, and therefore within the scope of the ICAA,<sup>28</sup> though she stated that her conclusion would have been the same had the Arbitration Act applied.<sup>29</sup>

### C. PRACTICAL IMPLICATIONS OF THE JUDGMENT

#### 1. *Doctrine of Unconscionability*

As a result of the Court’s judgment, the already nebulous doctrine of unconscionability is now even wider in scope. It no longer appears necessary to demonstrate either objective or constructive knowledge of a counterparty’s vulnerability, or an element of intentional “advantage-taking,” before invalidating an agreement, or parts of it, as being unconscionable.<sup>30</sup> The uncertainty created is compounded by the Court’s lack of meaningful guidance as to the application of this expansive approach. The doctrine of unconscionability now looms upon the sanctity of contract, especially in the case of standard form contracts. As Justices Brown and Côté observed, the extremely low threshold set by the majority of the Court for finding that there is an inequality of bargaining power risks exposing the terms of every standard form contract (and not just their arbitration clauses) to review to ensure that they are substantively reasonable.<sup>31</sup>

#### 2. *Uber v. Heller and the Future of Arbitration Practice*

The Court’s dissenting Justice fears *Uber v. Heller* will open the door to “ad hoc judicial moralism or ‘palm tree justice’ that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements.”<sup>32</sup> The majority of the Court counters with a less reverential view of the

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27. See Kain, Brandon, and Douglas T. Yoshida, “The Doctrine of Public Policy in Canadian Contract Law” in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation*, 2007 at 20–24.

28. *Uber Tech.*, 2020 SCC at ¶ 218.

29. See *id.* at ¶ 219. (In support of this assertion, she explains that a court may dismiss a motion for a stay of judicial proceedings if the arbitration clause is found to be null and void (where the ICAA is the applicable statute) or invalid (where the Arbitration Act is the applicable statute)); *International Commercial Arbitration Act*, op. cit., s. 8(1); *Arbitration Act*, op. cit., s. 7(2).

30. See *Uber Tech.*, 2020 SCC at ¶¶ 84–85.

31. *Id.* at ¶¶ 163, 257.

32. *Id.* at ¶ 237.

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arbitral tribunal's powers, as well as a concern for delay tactics, by suggesting a number of mitigation measures. Measures include security for costs, full indemnity costs when a party ignores arbitral jurisdiction, and damages for breach of contract (i.e., a valid arbitration clause). While it will be interesting to monitor the development of these measures, arbitration clauses in all but the most sophisticated of agreements have become relatively standardized. What sort of new "boilerplate" language will emerge from the majority's ruling remains to be seen.

Finally, there is reason to think that both the majority and dissenting judges would have been open to the argument that the arbitration clause ought to be construed under Dutch law, which may have changed the outcome here. The majority even went so far as to state, "if Uber had adduced evidence of Dutch law, then under [two recognized exceptions], this Court would have had to grant the stay in favor of an arbitrator determining the unconscionability argument."<sup>33</sup>

The question that remains is whether the failure to plead Dutch law was a considered strategy or an unfortunate oversight?

### **III. The Year of Covid-19 – Updates on Business Interruption Coverage Disputes**

The coronavirus pandemic sent several simultaneous shocks throughout the franchise world in 2020, disrupting supply chains, shifting consumer demand, and driving governments to shut down or limit businesses in the restaurant, hospitality, and service industries. In the United States alone, "by the end of August, more than 1.4 million franchise jobs were lost, and more than 32,000 franchise businesses have closed since the start of the coronavirus pandemic."<sup>34</sup> Hundreds of thousands of business owners sought relief through their "business income" or "civil authority" insurance policies, but by October 2020, insurers had closed the majority of claims without payment.<sup>35</sup> A flurry of litigation has followed. Thousands of lawsuits have challenged coverage denials in every U.S. state and against every major

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33. *See id.* at ¶ 50.

34. *Six-Month COVID-19 Impact Analysis on Franchising*, FRANCHISE (Sept. 21, 2020), [https://www.franchise.org/sites/default/files/2020-10/Six-Month%20COVID%20Impact%20on%20Franchising\\_Final.pdf](https://www.franchise.org/sites/default/files/2020-10/Six-Month%20COVID%20Impact%20on%20Franchising_Final.pdf).

35. *Business Interruption / Business Owner's Policies (BOP)*, NAT'L ASS'N OF INS. COMM'RS, [https://content.naic.org/cipr\\_topics/topic\\_business\\_interruptionbusinessowners\\_policies\\_bop.htm](https://content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm) (last updated Nov. 11, 2020).

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insurance company.<sup>36</sup> Dozens of dispositive motions have now been decided, mostly in insurers' favor, and several patterns are emerging.<sup>37</sup>

First, coverage denials have proven difficult to overcome when based on a virus exclusion in the policy. While a minority of courts have deferred substantive rulings, most courts have granted insurers' motions to dismiss and rejected policyholders' arguments for why virus exclusion clauses should not apply.<sup>38</sup> In rejecting one policyholder's argument that there could be no "reasonable expectation" that a virus exclusion would preempt COVID-19 coverage because a pandemic "is much more than a simple virus," the Central District of California captured federal courts' generally dismissive reaction to these challenges by noting the interpretation was "akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire."<sup>39</sup> On the other hand, at least one court has found a virus exclusion to be inapplicable to a policyholder's coverage action where the alleged loss was not caused directly by coronavirus contamination at the premises, but rather by a government shut-down order.<sup>40</sup>

To date, the most important issue for "business income" coverage disputes has been whether policyholders can prove "direct physical loss or damage" to their property. While relatively few courts have grappled with alleged

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36. Rachel E. Keen & Jonathan Reid Reich, *COVID-19 Shutdowns, Related Litigation Put Pressure on Business Interruption Insurers*, 10 NAT'L L. REV. (2020), available at <https://www.natlawreview.com/article/Covid-19-shutdowns-related-litigation-put-pressure-business-interruption-insurers>; Insurance Law Analytics Tool, *Covid Coverage Litigation Tracker*, PENN LAW, <https://cclt.law.upenn.edu/judicial-rulings/> (last visited Nov. 22, 2020) (tracking over 1,250 lawsuits filed as of November 2020).

37. *See id.* (Noting that of 66 tracked rulings on dispositive motions, forty-seven (seventy-one percent) have been granted and nineteen (twenty-nine percent) dismissed or deferred, and that some state court orders may not have been captured in these statistics).

38. *See, e.g.*, *Taps & Bourbon on Terrace LLC v. Certain Underwriters at Lloyd's, London et al.*, No. 2020-00375 (Ct. Common Pleas, Oct. 26, 2020); Jim Sams, *N.J. Judge Clears Path for COVID-19 Business-Interruption Suit*, CLAIMS J., <https://www.claimsjournal.com/news/east/2020/09/21/299442.htm> (last visited Nov. 22, 2020) (motion to dismiss denied after the parties agreed that a virus authority did not apply because the plaintiff alleged no "on premises" contamination); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., LTD.*, No. 620-CV-1174-ORL-22-EJK, 2020 WL 5939172, at \*4 (M.D. Fla. Sept. 24, 2020) (noting that the full insurance policy was not yet in the record to analyze.).

39. *See W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 220CV05663VAPDFMX, 2020 WL 6440037, at \*6 (C.D. Cal. Oct. 27, 2020); *see also Chattanooga Prof'l Baseball LLC, et al., Plaintiffs, v. Nat'l Cas. Co., et al., Defendants.*, No. CV-20-01312-PHX-DLR, 2020 WL 6699480, at \*3 (D. Ariz. Nov. 13, 2020) (rejecting policyholders' argument that insurers allegedly misrepresented virus exclusions to regulatory gatekeepers and should therefore be estopped from relying on them).

40. *See Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, (E.D. Va. Dec. 9, 2020). *But see Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at \*6 (W.D. Tex. Aug. 13, 2020) (rejecting a similar argument on the grounds that a virus was the ultimate cause of the loss, because "the [shutdown] Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community").

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“on-premises” coronavirus contamination, several have denied dismissal on that basis.<sup>41</sup> But while most have not directly confronted the issue, some courts have stated in dicta that more tangible structural alteration is required.<sup>42</sup>

More commonly, policyholders have alleged that they were impacted by shutdown orders, not “on-premises” contamination. In these cases, the threshold question for “business income” coverage is whether loss of use can constitute “physical loss” without physical alteration.<sup>43</sup> Decisions in state courts have been mixed, with several courts granting motions to dismiss, several denying or deferring, and one holding definitively that restaurants subject to shutdown orders suffered physical loss.<sup>44</sup> Federal courts, in contrast, have been largely unwilling to entertain business income claims based solely on shutdown orders.<sup>45</sup>

Policyholders have also sought relief through “civil authority” coverage, available when civil orders “prohibit access” to insured property because a “covered cause of loss” causes damage to “other” nearby properties.<sup>46</sup> While “on-premises” contamination is not required, there is some tension over whether policyholders may allege coverage by pleading that the general presence of coronavirus in an area creates contamination or whether they are required to cite to specific “other” properties that triggered the relevant shutdown orders.<sup>47</sup> Beyond this threshold issue, disputes have arisen as to

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41. See, e.g., *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at \*7 (W.D. Mo. Aug. 12, 2020) (denying motion to dismiss where “the presence of COVID-19 on premises, as is alleged here . . . made [the plaintiffs’] premises unsafe and unusable”); *Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at \*7 (E.D. Mich. Sept. 3, 2020) (distinguishing *Studio 417*, where “Plaintiff asserts that COVID-19 never entered its premise”).

42. See, e.g., *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-CV-00401, 2020 WL 6436948, at \*5 (S.D.W. Va. Nov. 2, 2020) (“[E]ven when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant.”).

43. See *T & E Chicago LLC v. Cincinnati Ins. Co.*, No. 20 C 4001, 2020 WL 6801845, at \*4–5 (N.D. Ill. Nov. 19, 2020) (collecting cases).

44. See *North State Deli, LLC d/b/a Lucky’s Delicatessen, et al. v. Cincinnati Ins. Co.*, et al., No. 20-CVS-02569 (N.C. Super. Ct. Oct. 7, 2020) (granting partial summary judgment in favor of policyholders); see also *Covid Coverage Litigation Tracker*, *supra* note 37 (listing dispositive rulings).

45. See *T & E Chicago LLC*, 2020 WL 6801845, at \*4–5 (collecting cases).

46. For an example of standard policy language, see *Studio 417*, 2020 WL 4692385, at \*7.

47. Compare *W. Coast Hotel Mgmt.*, 2020 WL 6440037, at \*4 (C.D. Cal. Oct. 27, 2020) (finding allegation that “the properties that are damaged are in the immediate area of the [hotels]” too conclusory to support declaratory relief), with *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at \*7 (W.D. Mo. Sept. 21, 2020) (finding allegations that the “Stay Home Orders broadly applied to the areas ‘in and around Plaintiffs’ place of business’ and, by their terms, ‘explicitly acknowledge that COVID-19 causes direct physical damage and loss to property’” sufficient to survive dismissal) (Also important is that the order was remedial, not merely prophylactic); See also *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at \*7 (N.D. Cal. Sept. 14, 2020) (dismissing claim where civil order was preventative and thus did not “establish the requisite

whether shutdown orders have “prohibited access” to insured premises sufficient to trigger coverage; outcomes in these cases have depended on the courts’ differing interpretations of the contract language, as well as the specific language of the respective civil orders and their impacts on policyholders.<sup>48</sup>

By the end of 2020, insurers have seen the existential threat of widespread coverage grow increasingly remote. While for franchise policyholders, the path to recovery has proven narrow and fraught. Courts’ mixed rulings, however, provide hope for at least some businesses to obtain limited relief with the right policy, the right circumstances, and the right venue.

#### **IV. Dutch Parliament Enacts Legislation Allowing for a Mandatory Creditors’ Arrangement Outside Formal Insolvency Proceedings**

##### **A. BACKGROUND**

On October 6, 2020, the Dutch Eerste Kamer (First Chamber, Senate) of Parliament approved the *Wet homologatie onderhands akkoord* (Bill on homologation of a private (creditors) arrangement), engagingly abbreviated as *Whoa*.<sup>49</sup> It was signed into act by King Willem-Alexander the next day<sup>50</sup> and published on November 3, 2020,<sup>51</sup> together with a decree declaring it would be operative starting January 1, 2021.<sup>52</sup>

That Act (the *Whoa*), represents a long-held (and often expressed) wish of Dutch insolvency practitioners. It supplements the two forms of formal Dutch insolvency, *faillissement* (bankruptcy)<sup>53</sup> and *surséance van betaling* (suspension of payments, moratorium).<sup>54</sup> In both the *faillissement* and the *surséance*, an arrangement, binding on all common (non-preferential) creditors, can be ordered by the court.<sup>55</sup> Outside bankruptcy, only a voluntary arrangement was possible, which by its voluntary nature could be scuppered by a hard-nosed creditor.

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causal link between prior property damage and the government’s closure order” for purposes of civil authority coverage).

48. Compare *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 1:20-CV-2939-TWT, 2020 WL 5938755, at \*6 (N.D. Ga. Oct. 6, 2020) (dismissing claim where an executive order did not mandate shutdowns), with *Cajun Conti LLC*, No. 2020-02558, p.2 (La. Dist. Ct., Orleans Parish Mar. 16, 2020) (denying motion to dismiss where the plaintiff “had to drastically change its operations to exclude sit-down patrons, which was previously the heart of its business”).

49. See *Wet homologatie onderhands akkoord*, [https://www.eerstekamer.nl/wetsvoorstel/35249\\_wet\\_homologatie\\_onderhands](https://www.eerstekamer.nl/wetsvoorstel/35249_wet_homologatie_onderhands) (last viewed Nov. 22, 2020).

50. See *id.*

51. *Id.* at Stb. 2020,414.

52. *Id.* at Stb. 2020,415.

53. See Title I *Faillissementswet* (abbrev. F.) (Dutch Bankruptcy Act).

54. Title II *Faillissementswet*.

55. See Art. 157 F. (bankruptcy); Art. 273 F. (moratorium).

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But a decreed formal insolvency can have damaging consequences to most stakeholders in a business. The Whoa aims to avoid such consequences by allowing a “private” arrangement (i.e., one outside of formal insolvency), pursuant to the Whoa requirements, to be binding upon all creditors.

The idea of the Whoa is that enterprises that are basically sound and potentially profitable (but struggle with a liquidity problem) can be spared formal insolvency, and that in the restructuring, all creditors (including banks, and tax and social security authorities) will contribute a fair share of the necessary losses. Preservation of business value and employment is first and foremost.

In the legislative process, the Dutch government, bemoaning the lack of the possibility under existing Dutch law to reach a binding pre-insolvency arrangement, pointed at the UK “Scheme of Arrangement” and US “Chapter 11” proceedings.<sup>56</sup> The proposed Whoa “is inspired by the ‘Scheme of Arrangement’ and ‘Chapter 11’ proceedings.”<sup>57</sup>

The government also pointed at EU Directive 2019/1023 (on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt),<sup>58</sup> which states as its objective that:

viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance; and that the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length.<sup>59</sup>

The Whoa itself has only four Roman-numerated articles. But it introduces or modifies twenty-five articles of the *Faillissementswet* (Dutch Bankruptcy Act), each of which can have up to ten, sometimes very verbose, sections. It is a complex piece of legislation, of which the value in practice is not easy to predict (although, as remarked above, the insolvency industry has great expectations for it).

The government sees the Whoa as a forerunner of the implementation legislation.<sup>60</sup> Following is a rough outline of the Whoa. The Whoa’s

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56. See *Memorie van Toelichting* (Explanatory Memorandum) – proposed Bill 35 294, TK nr. 3, p3.

57. *Id.* at p4.

58. See Directive (EU) 2019/1023 of the European Parliament and of the Council, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L1023&from=en> (last viewed Nov. 22, 2020).

59. See *id.*

60. See *Memorie van Toelichting* (Explanatory Memorandum) – proposed Bill 35 294, TK nr. 3, p4.

stipulations are varied and complicated and within the scope of this article, only a few salient points can be mentioned.

**B. PROVISIONS OF THE WHOA**

A debtor “who is in a situation in which it is reasonably likely that he will be unable to continue paying his debts” can offer an arrangement to his creditors and shareholders, containing a change in their rights.<sup>61</sup> In principle, this concerns all creditors whose rights are affected,<sup>62</sup> but rights of employees are excluded from the workings of the Whoa.<sup>63</sup>

The debtor and other interested parties can also request the court to appoint a “Restructuring Expert,” who will offer such an arrangement.<sup>64</sup> The Restructuring Expert will execute his duties “effectively, impartially and independently.”<sup>65</sup>

If a group company of the debtor has guaranteed its debts and is itself threatened by insolvency, creditors’ rights of those group companies can also be changed.<sup>66</sup>

The debtor or Restructuring Expert can divide creditors and shareholders into classes. This is done to separate creditors if their situation in a normal bankruptcy would be incomparable to the situation of those other creditors, and it would therefore merit a separate position in the voting on a proposed arrangement<sup>67</sup> (e.g., secured vs. unsecured creditors).<sup>68</sup> In any case, creditors with different preferences must be put in different classes.<sup>69</sup>

The debtor or Restructuring Expert can propose to a counterparty to change or terminate an agreement. If the other party does not agree, a one-sided termination is possible if the arrangement and the termination are approved by the court.<sup>70</sup>

Once the arrangement (which must satisfy a long list of requirements<sup>71</sup>) is proposed, the different classes vote on it.<sup>72</sup> A class has approved the arrangement if creditors representing two-thirds of the total debt of that class,<sup>73</sup> or shareholders representing two-thirds of the total issued capital of that class,<sup>74</sup> vote for approval.

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61. Art. 370, section 1 F.

62. Art. 369; art. 381.

63. See Art. 369.

64. Art. 371.

65. *Id.*

66. See art. 372.

67. See art. 374.

68. *Memorie van Toelichting, supra* note 60, at 48.

69. See art. 374.

70. Art. 373.

71. See art. 375 F.

72. See art. 381.

73. *Id.*

74. *Id.*



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If at least one class has been approved in the manner described above, the debtor or Restructuring Expert can ask the court to approve (homologate) the arrangement.<sup>75</sup> The court is required to approve, unless one of the following expressly mentioned circumstances occurs.<sup>76</sup>

The court *must* refuse to approve (a) if there is no risk of insolvency;<sup>77</sup> (b) if proper execution of the arrangement is not sufficiently guaranteed;<sup>78</sup> or (c) if there are other reasons not to approve.<sup>79</sup>

The court *can* refuse to approve (a) if a creditor who has voted against approval shows that he will be worse off than in a formal bankruptcy situation;<sup>80</sup> or (b) if a creditor who is a small or mid-size business<sup>81</sup> receives less than twenty percent of his claim, unless all classes have approved.<sup>82</sup>

An approved arrangement is binding upon all creditors and shareholders eligible to vote.<sup>83</sup> Appeal against the decision to approve is not possible.<sup>84</sup>

Given the complexity of the Whoa, it is not immediately clear whether it will fulfill the high expectations of insolvency practitioners. But the expectation is that, in 2021, the Covid-19 pandemic will lead to a considerable increase in Dutch businesses with liquidity problems.<sup>85</sup> The high expectations of the Whoa may result in all participants in the process—debtors, creditors, shareholders, judges, and lawyers—working to make it a success.

## V. Sweden

### A. APPLICABLE LAW IN RELATION TO SET-OFF IN INTERNATIONAL CONTRACTS

In its judgment in case number T 6032-16,<sup>86</sup> the Swedish Supreme Court was challenged to juggle a number of international conventions as well as EU and domestic law in determining what law to apply on an international sales contract where one party had entered into insolvency. The case illustrates the increasing complexity created by potentially conflicting domestic and supranational legislation.

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75. Art. 383.

76. *See* art. 384.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* article 372.

82. Art. 384.

83. Art. 385.

84. *See* art. 369.

85. Katinka Jongkind, *Twee tot drie keer meer faillissementen door coronacrisis* (June 29, 2020), <https://www.ing.nl/zakelijk/kennis-over-de-economie/onze-economie/de-nederlandse-economie/publicaties/twee-tot-drie-keer-meer-faillissementen-door-coronacrisis.html>.

86. *Högsta domstolen* [Supreme Court] T 6032-16, 2020-05-29 (Swed.), *available at* <https://www.domstol.se/globalassets/filer/domstol/hogstodomstolen/avgoranden/2020/t-6032-16.pdf>.

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In this case, a Swedish company, CeDe Group AB (CeDe), entered into an agreement with a Polish counterpart, PPUB Janson Sp J. (PPUB) regarding the supply of certain products.<sup>87</sup> A year later, PPUB was declared bankrupt, and the liquidator then demanded payment from CeDe for deliveries that had taken place prior to the bankruptcy.<sup>88</sup> CeDe disputed payment, however, invoking the right to set-off counterclaims against PPUB for damages due to failure to deliver goods as well as defects in goods delivered.<sup>89</sup> To resolve the question of set-off, the court had to first decide on applicable law.

CeDe argued that Swedish law should apply, based on the provision in the supply agreement between the parties stating “[i]n the event of a dispute concerning the interpretation of this Agreement Swedish law shall apply.”<sup>90</sup>

PPUB, on the other hand, argued that Polish law was applicable,<sup>91</sup> because the bankruptcy estate was not the same legal entity as the corporate entity that had entered into the supply agreement. Consequently, the choice-of-law provision in the supply agreement was not binding on the estate, and the provisions of EU insolvency regulation<sup>92</sup> should apply.

Among the questions that the Supreme Court decided to refer to the Court of Justice of the European Union (CJEU) for a preliminary ruling,<sup>93</sup> was whether the choice-of-law provisions in Article 4 of the insolvency regulation of May 2000 applied to claims based on delivery of goods that took place prior to the commencement of insolvency proceedings. The CJEU answered that question in the negative.<sup>94</sup>

It was thus left to the Supreme Court to decide what law should apply to the question of the set-off.<sup>95</sup> In this case, the Supreme Court had to consider three sets of legislation to determine the choice of law:<sup>96</sup> the EU Rome I Regulation;<sup>97</sup> the Swedish Act on Applicable Law in Relation to

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87. *See id.* ¶ 1.

88. *Id.* ¶ 6.

89. *See id.* ¶¶ 2–3.

90. *Id.* ¶ 6.

91. *Id.* ¶ 4.

92. *See* Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, <https://eur-lex.europa.eu/eli/reg/2000/1346/oj>, later replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R0848&from=EN>.

93. *See* Consolidated version on European Union, Oct. 26, 2012 O.J. (C326), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M/TXT&from=en> (working in accordance with Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union, consolidated versions).

94. *See* Judgment dated 21 November 2019, CeDe Group, C-198/18, EU:C:2019:1001, point 39, <http://curia.europa.eu/juris/liste.jsf?num=198/18&language=en>.

95. *See Högsta domstolen, supra* note 86, ¶ 13.

96. *Id.*

97. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593>.

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International Purchase of Goods<sup>98</sup> (which is based on the 1955 Hague Convention<sup>99</sup>); and the Swedish International Sale of Goods Act<sup>100</sup> (which is more or less a direct incorporation of the United Nations Convention on Contracts for the International Sale of Goods (CISG)). The Supreme Court concluded that all three pieces of legislation assume that the parties are free to contract on the matter of choice of law and noted that the choice-of-law provision in the supply agreement between CeDe and PPUB, although rudimentary, indicates that Swedish law shall apply to matters relating to the supply agreement and the sale of goods under it.<sup>101</sup> Nevertheless, it cannot be considered to generally govern choice of law in relation to set-off.<sup>102</sup>

The court then turned to the relationship between CISG and the Swedish Act on Applicable Law in Relation to International Purchase of Goods. Article 90 of CISG<sup>103</sup> reads “[t]his Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.” Because the Hague Convention preceded CISG, the provisions of the former could potentially have taken precedence over the latter. But because Poland is not a party to the Hague Convention, the Court ruled that CISG prevailed in the matter at hand.<sup>104</sup>

Next, the Court examined the relationship between CISG and the Rome I Regulation. Article 25.1 of the Rome I Regulation provides that the Regulation shall not “prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.”<sup>105</sup> CISG, the Supreme Court noted, was adopted by Sweden before the adoption of the Rome I Regulation.<sup>106</sup> The Court considered whether or not CISG falls under the definition of an international convention that lays down conflict-of-law rules, but ultimately the Court found that the distinction was irrelevant to the case at hand.<sup>107</sup> Either CISG should only be considered to deal with subject matter, in which case it does not conflict at all with the Rome I Regulation dealing exclusively

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98. See *Lag (1964:528) om tillämplig lag beträffande internationella köp av lösa saker*, available at [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1964528-om-tillamplig-lag-betraffande\\_sfs-1964-528](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1964528-om-tillamplig-lag-betraffande_sfs-1964-528).

99. See 1955 Hague Convention on the Law Applicable to International Sales, <https://www.unescwa.org/1955-hague-convention-law-applicable-international-sales> [hereinafter Hague Convention].

100. *Lag (1987:822) om internationella köp*, available at [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1987822-om-internationella-kop\\_sfs-1987-822](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1987822-om-internationella-kop_sfs-1987-822).

101. *Högsta domstolen*, *supra* note 866, ¶¶ 15–17.

102. *Id.* ¶ 19.

103. *Hague Convention*, *supra* note 99, art. 90.

104. *Högsta domstolen*, *supra* note 86, ¶ 26.

105. *Hague Convention*, *supra* note 99, art. 25.

106. *Högsta domstolen*, *supra* note 866, ¶ 29.

107. *Id.*

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with conflict-of-law matters, or, alternatively, it does contain conflict-of-law elements, in which case it takes precedence over the Rome I Regulation. Either way, the Court reasoned, the provisions of CISG should apply.<sup>108</sup>

But the CISG cannot be applied to the assignment of debt.<sup>109</sup> The CISG governs only “the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract.”<sup>110</sup> Moreover, the Hague Convention remains silent on the issue, leaving the Rome I Regulation as the only alternative. Applying Article 14.2 of the Rome I Regulation, the Court found that the law that governs the original claim should also determine the relationship between the assignee and the debtor, “the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor’s obligations have been discharged.”<sup>111</sup>

Turning to the matter of set-off, the Supreme Court established that the CISG does not contain any express provisions in this regard.<sup>112</sup> Interestingly, Article 7.2 of the CISG provides that “questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based. . . .”<sup>113</sup> Until recently, it was doubtful whether there were any general principles in the convention that apply to set-off,<sup>114</sup> but national higher courts appear to be reconsidering this view<sup>115</sup> and an opinion of the CISG Advisory Board supports the notion that CISG should apply in these matters.<sup>116</sup> Should CISG not apply after all, then the provisions of the Hague Convention are the first choice (but because it does not provide any provisions on set-off it is of little use in this regard) followed by the Rome I Regulation. The Rome I Regulation provides in Article 17 that in the absence of any agreement between the parties, the law that governs the primary claim shall also govern any claim of set-off against the primary claim.

In conclusion,<sup>117</sup> the Supreme Court first found that the original parties to the supply contract had agreed on Swedish law to govern the contractual relationship. The Court went on to state that the question of whether an assignee of the claim is bound by that agreement on choice of law should be determined by the law applicable to the assigned claim itself: in this case,

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108. *Id.* ¶ 32.

109. During the legal proceedings in the Swedish courts, PPUB had assigned its claim to a third party, also a Polish legal entity.

110. See *Högsta domstolen*, *supra* note 866, ¶ 33.

111. *Högsta domstolen*, *supra* note 866, ¶¶ 36–37; Hague Convention, *supra* note 979, art. 14, ¶ 2.

112. *Högsta domstolen*, *supra* note 866, ¶ 39.

113. *Id.*

114. *Id.* ¶ 39.

115. *Id.*

116. See CISG Advisory Council Opinion No 18, Set-off under the CISG, 2 February 2018, <http://www.cisgac.com/opinion-no-18/>.

117. *Högsta domstolen*, *supra* note 866, ¶¶ 45–48.

Swedish law.<sup>118</sup> The choice-of-law provision in the contract does not expressly govern the right to set-off and therefore Swedish material law should apply, either because of Article 17 in the Rome I Regulation or CISG.<sup>119</sup> Consequently, the Court ruled that Swedish law governed the matter of set-off in the case at hand.

## **VI. International Franchise Legislation Update**

The following summarizes key amendments to the franchise laws in Canada, Brazil, and Korea that occurred in 2020.

### **A. CANADA**

On September 1, 2020, amendments to the Arthur Wishart Act (Franchise Disclosure) and Ontario Franchise Regulations came into force.<sup>120</sup> Below is a summary of the key changes:

1. Franchisors can now enter into agreements with prospective franchisees prior to issuing a disclosure document so long as the agreement only (i) requires the prospective franchisees to keep franchisor's information confidential; (ii) prohibits use of franchisor's information; or (iii) designates a location or territory for the prospective franchisees.<sup>121</sup>
2. Franchisors can now accept deposits from prospective franchisees before issuing a disclosure document provided that the deposit (i) does not exceed twenty percent of the initial franchise fee, up to a maximum of CAD \$100,000; (ii) is refundable without any deductions; and (iii) is given under an agreement that does not bind the prospective franchisee to enter into a franchise agreement.<sup>122</sup>
3. Financial statements can be prepared or reviewed either in accordance with the standards for audit or review set forth (i) in the CPA Canada Handbook—Assurance/Accounting; (ii) by the Financial Accounting Standards Board of the United States; or (iii) by the International Accounting Standards Board.<sup>123</sup>
4. Franchisors are now exempt from providing disclosure documents not only to an individual who has been an officer or director of the franchisor entity but also to an entity controlled by the individual who

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118. *Id.*

119. *Id.*

120. *See* Cutting Unnecessary Red Tape Act, 2017, S.O. 2017, c. 20.

121. *See* S.O. 2000, c. 3, s. 5(1)(1.1).

122. S.O. 2000, c. 3, s. 5 (1).

123. General, O.Reg. 581/00, s. 3(1)(a) (Previously, the financial statements accompanying the disclosure document had to be prepared or reviewed in accordance with standards that were at a minimum equivalent to those set out in the CPA Canada Handbook.).

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was an officer or director of the franchisor; provided that the individual (i) has been an officer or director of the franchisor for at least six months or (ii) was formerly an officer or director for at least six months and not more than four months have passed since the individual ceased being an officer or director of the franchisor.<sup>124</sup>

5. The threshold for the exemption from providing a disclosure document in cases of a small total initial investment was increased from CAD \$5,000 to CAD \$15,000.<sup>125</sup> For purposes of this exemption, the total initial investment is determined by adding up all of the franchisee's costs associated with establishing the franchise, including: (i) the amount of any deposits or franchise fees; (ii) an estimate of the costs of inventory, leasehold improvements, equipment, leases, rentals, and all other tangible and intangible property necessary to establish the franchise; and (iii) any other costs or an estimate of costs associated with the establishment of the franchise not listed in (i) or (ii), including any payment to the franchisor, whether direct or indirect, required under a franchise agreement.<sup>126</sup>

6. The threshold for the exemption from providing a disclosure document in cases of large investment was lowered from a total initial investment of CAD \$5,000,000 to CAD \$3,000,000.<sup>127</sup>

7. When providing a statement of material change, franchisors must provide a certificate, signed by its authorized officer or director certifying that it contains no untrue information, representations or statements, and includes every material change.<sup>128</sup>

**B. BRAZIL**

The Brazilian Franchising Law was enacted on December 27, 2019 and came into effect on March 26, 2020.<sup>129</sup> Below is a summary of key changes to the prior Brazilian franchising law:

1. No consumer or employer-employee relationship exists between franchisors and franchisees or franchisors and their franchisees' employees even during training.<sup>130</sup>

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124. S.O. 2000, c. 3, s. 5 (7)(b).

125. General, O.Reg. 581/00, s. 9(2).

126. *Id.*

127. *Id.*

128. *See* General, O.Reg. 581/00, s. 7.1(2).

129. Law no. 13,996/2019, de 27 March 2020, Col. Leis. Rep. Fed. Brasil, March 2020 (Braz.).

130. Benjamin R. Reed and Antonia Scholz, *Annual Franchise and Distribution Law Developments 2020*, ABA at 308.

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2. Franchisors can now sub-lease franchise locations to its franchisees and charge rent that exceeds the amount paid by the franchisor to the master landlord, provided that: (i) franchisors make a disclosure to that effect in their franchise disclosure document; and (ii) the rent charged is not excessive.<sup>131</sup>

3. In addition to delivering the franchise disclosure document in Portuguese, franchisors must include the following information in their franchise disclosure document: (i) the terms on which franchisors shall approve transfer and renewal; (ii) all penalties and fines that the franchisor can levy on its franchisees; (iii) all mandatory purchase requirements; (iv) a list of all franchisees who were terminated or who did not renew their franchises in the last twenty-four months (instead of the last twelve months as required under the old law); and (v) franchisees' territorial protection against competition from other franchisees and franchisor-owned units.<sup>132</sup>

4. Franchisors shall pay penalties not just for failure to timely provide the franchise disclosure document to prospective franchisees, but also for failure to disclose the required information in the franchise disclosure document.<sup>133</sup>

5. Franchise disputes can now be settled by arbitration.<sup>134</sup> If the dispute resolution forum or venue is outside of Brazil, any party located outside the chosen forum jurisdiction must retain and maintain a local legal representative or attorney-in-fact, duly qualified and domiciled in the relevant jurisdiction, with powers to represent it administratively and judicially and to receive service of process.<sup>135</sup>

C. KOREA

The Enforcement Decree of the Fair Transaction in Franchise Business Act of Korea was amended in April 2020 to grant several protections to franchisees, such as (i) removing franchisees' dissemination of false information and franchisees' disclosure of their franchisor's trade secrets as grounds for immediate termination of the franchise relationship; (ii) narrowing franchisors' ability to terminate for a franchisee's failure to cure its statutory default within the cure periods, unless an order to the effect is passed by a court or a competent authority or waiting for an administrative

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131. See Hannah Vitória Macedo Fernandes and Antonio Curvello, *2020 is here and so is Brazil's new franchising law*, available at <https://www.lexology.com/library/detail.aspx?g=2d585b83-8cd4-40f8-91b2-0f43c2de70a6> (last visited, Oct. 23, 2020).

132. *Id.*

133. See Reed & Scholz, *supra* note 130, at 309.

134. See *id.*

135. See *id.*

order is impractical; (iii) imposing prohibition on penalties for early termination of franchise relationships; (iv) narrowing franchisors' ability to deny a request for renewal of the franchise agreement in certain cases—for example, where a franchisee has remodeled its franchised unit in accordance to the franchisor's specifications, franchisors must grant such franchisee sufficient time to recoup the benefits of its remodeling; and (v) requiring disclosure of the average life cycle of a franchised unit, details of operational or other assistance that the franchisor shall provide to franchisees who are unable to operate their franchises profitably, and the anticipated maximum and minimum sales projections for the first year based on the performance of the existing franchised units along with supporting information and documentation.<sup>136</sup>

#### D. OTHER INTERNATIONAL FRANCHISING DEVELOPMENTS

In April 2020, the Kingdom of Saudi Arabia issued Ministerial Decision No. 00594/1441 adopting regulations for the Commercial Franchise Law.<sup>137</sup> The law is described more extensively in the 2019 Year in Review, but in general, it requires franchisors to (i) register the franchise agreement and a disclosure statement with the Ministry of Commerce and Investment; (ii) provide prospective franchisees with a copy of the disclosure statement at least fourteen days before a franchisee signs a franchise agreement or pays any consideration to the franchisor; and (iii) provide a good cause of termination of the franchise relationship.<sup>138</sup>

Likewise, in June 2020 the Dutch Parliament adopted the Dutch Franchise Act. The law is described more extensively in the 2019 Year in Review.<sup>139</sup>

### VII. Incoterms® Rules Updated by International Chamber of Commerce

This section provides a brief update on Incoterms rules, specifically with respect to adoption of Incoterms® 2020,<sup>140</sup> which has replaced Incoterms® 2010.<sup>141</sup> The term “Incoterms” refers to a set of rules developed by the International Chamber of Commerce that provide uniform definitions for delivery terms commonly used by buyers and sellers in their sales

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136. Kendal Tyre and Iain Irvine, *International Legal and Legislative Update*, 43–44 (Oct. 2020).

137. See Merissa Murray and Eddie Chiu, *Saudi Arabia Franchise Law Update*, available at <https://www.lexology.com/library/detail.aspx?g=da1d94e8-bde8-45a8-b496-5d7b5ce949cf> (last visited Oct. 23, 2020).

138. Luana Lo Piccolo, Maurizio Gardenal, Samuel G. Wiczorek, Willem Den Hertog, and Anders Forkman, 54 ABA/SIL YIR 77–78 (2019).

139. *Id.* at 78–79.

140. See International Chamber of Commerce, *Incoterms® 2020: ICC rules for the Use of Domestic and International Trade Terms* (2019) [hereinafter Incoterms 2020].

141. See International Chamber of Commerce, *Incoterms® reg; 2010: ICC rules for the Use of Domestic and International Trade Terms* (2010) [hereinafter Incoterms 2010].



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contracts.<sup>142</sup> Incoterms rules have been around for nearly eighty-five years.<sup>143</sup> Incoterms rules have been updated throughout the years to reflect evolving customary practices of merchants engaging in international trade, leading most recently to adoption of Incoterms 2020.<sup>144</sup> While frequently used in domestic sales transactions, use of Incoterms is especially important in international trade and commerce.<sup>145</sup> Because delivery terms have long been used by merchants engaging in commercial transactions but delivery terms have been defined differently by various sources, the development of Incoterms was an attempt “to harmonize the countless variations among such [delivery] terms as they have evolved differently in different countries and settings.”<sup>146</sup> Incoterms 2020 specifically defines, updates, and explains “a set of eleven of the most commonly-used three-letter trade terms, e.g. CIF, DAP, etc., reflecting business-to-business practice in contracts for the sale and purchase of goods.”<sup>147</sup>

Incoterms 2020, like its predecessors, is not designed to replace the entire contract for sale; it merely supplements the sales contract, albeit in important ways.<sup>148</sup> Specifically, the applicable Incoterms definition establishes allocation of responsibility to complete certain tasks relating to delivery of the goods and allocation of certain costs incurred in connection with delivery of the goods.<sup>149</sup> Among other things, Incoterms 2020 addresses where and when the seller delivers the goods by virtue of the Incoterm selected who must organize carriage for the goods, and who has the responsibility to obtain insurance covering the goods against loss in transit.<sup>150</sup> It also addresses who must obtain applicable import or export licenses and which party bears what costs related to transport, delivery and storage of the goods.<sup>151</sup> Incoterms 2020 also establishes rules for allocation of risk of loss of and damage to goods during transportation of the goods from the point of origin to the point of destination.<sup>152</sup> With respect to those matters that are addressed by Incoterms 2020, the rules offer a detailed, comprehensive set of determinable rules. But there are numerous important terms or aspects of the typical contract for sale that are not addressed by Incoterms 2020, including contract formation, *force majeure*, and, importantly, passage of title to the goods, among other things.<sup>153</sup>

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142. See Incoterms 2020, *supra* note 140, at 2.

143. See William P. Johnson, *Analysis of Incoterms as Usage Under Article 9 of the CISG*, 35 U. PA. J. INT'L L. 379, 380-84 & 387-91 (2013) [hereinafter Johnson].

144. Incoterms 2020, *supra* note 140.

145. Johnson, *supra* note 143, at 380-84.

146. John W. Head, *Global Business Law, Principles and Practice of International Commerce and Investment* 150 (3d ed. 2012) [hereinafter Head].

147. Incoterms 2020, *supra* note 140, at 2.

148. See *id.* at 2-3.

149. *Id.* at 2-4.

150. *Id.* at 2.

151. *Id.*

152. *Id.* at 4-6.

153. Incoterms 2020, *supra* note 140, at 2-3.

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The 2020 iteration of Incoterms also makes some substantive changes to the rules themselves, including changes that reflect “increased attention to security in the movement of goods, the need for flexibility in insurance coverage . . . and the call by banks for an on-board bill of lading in certain financed sales . . . .”<sup>154</sup> Incoterms 2020 updates some nomenclature, opting for the term “cost” rather than “expense,” and for the term “under” rather than “as envisaged in.”<sup>155</sup> In addition, the delivery term DPU has taken the place of DAT.<sup>156</sup>

Perhaps most notably, the drafters have organized Incoterms 2020 quite differently from its predecessors, opting to use a “‘horizontal’ presentation, grouping all like articles together” and reordering articles “to better reflect the logic of a sales transaction.”<sup>157</sup>

Ultimately, clear identification in the written sales contract of the delivery term the parties have agreed to use, as well as the applicable source of the definition for that delivery term (e.g., Incoterms 2020), is critical for predictability and certainty offered by effective use of Incoterms rules.

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154. *Id.*

155. See generally Incoterms 2020, *supra* note 140; cf. Incoterms 2010, *supra* note 141.

156. Incoterms 2020, *supra* note 140, at 73; cf. Incoterms 2010, *supra* note 141, at 53.

157. Incoterms 2020, *supra* note 140.

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## International Energy and Natural Resources Law

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This Article reviews some of the most significant international legal developments made in the areas of international energy and natural resources in 2020.

### I. AFRICA

#### A. ALGERIA

In Algeria, the hydrocarbon sector is the main provider of financial resources. Although Algeria's hydrocarbon sector was governed by Law 05-07 of April 28, 2005, for fifteen years, that law did not produce the expected results and was deemed unfavorable to foreign investments.<sup>1</sup> Thus, a new law governing hydrocarbon activities was developed: Law 19-13 of December 11, 2019, which became effective following its publication in the Official Gazette on December 22, 2019.<sup>2</sup> Law 19-13 introduced several measures to encourage investments and amended the institutional, legal, and fiscal frameworks of the energy sector. Law 19-13 also clarified the respective roles of the Minister of Energy and agencies like the ALNAFT (*Agence Nationale de Valorisation des Ressources en Hydrocarbures*) and ARH (*Agence de Régulation des Hydrocarbures*); reinforced the role of the national company, Sonatrach, as a national economic actor at the service of the country's development; and diversified the available contractual forms. However, it also reaffirmed Sonatrach's monopoly on pipeline transport and maintained the mandate established in Rule 51/49 for a majority local partnership requirement in Sonatrach's agreements with foreign companies.<sup>3</sup>

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1. Market Intelligence, *Algeria's new hydrocarbon law may alter Algeria's foreign investment environment in the oil and gas sector for international oil companies*, INT'L TRADE ASS'N (Feb. 25, 2020), <https://www.trade.gov/market-intelligence/algeria-hydrocarbon-laws> ("The 2005 law featured high taxes and duties on exploration and production (E&P) activities, as well as unclear contract-sharing agreements with Sonatrach, the national oil company. Despite four amendments to the 2005 law (in 2006, 2013, 2014, and 2015), Algeria repeatedly failed to attract foreign investors. Since 2010, the number of new contracts signed dropped to an average of only two signed contracts per year.")

2. *Loi No. 19-13 du 14 Rabie Ethani 1441* (11 décembre 2019) régissant les activités d'hydrocarbures [Law No. 19-13 of 14 Rabie Ethani 1441 (December 11, 2019) on hydrocarbon activities], available at [http://www.arh.gov.dz/pdf/loi-19-13\\_version\\_fran%C3%A7aise.pdf](http://www.arh.gov.dz/pdf/loi-19-13_version_fran%C3%A7aise.pdf).

3. BIRD & BIRD LP, *Algeria withdraws the so-called "51/49 rule" for non-strategic business sectors and extends possibilities for foreign financing on targeted and structuring projects*, LEXOLOGY (Dec. 5,

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**B. ANGOLA**

A new Governance Model for the Mining Sector was established as part of the ongoing restructuring of the sector.<sup>4</sup> The new Governance Model made the following primary changes to the sector:

- (1) The Model provided for the National Agency of Mineral Resources, which was created later by Presidential Decree No. 161/20<sup>5</sup> to ensure the performance of functions previously assigned to Ferrangol E.P. and Endiama E.P., such as the granting of mining concessions; the negotiation, management and monitoring of mineral investment contracts; and the monitoring of the quality and concentrations of minerals in Angola;
- (2) The Model maintained Sodiam E.P. as the Diamond-Marketing Public Body; and
- (3) The Model created a Diamond Exchange Center.<sup>6</sup>

Also, in Order No. 13/20, the National Bank of Angola enacted new foreign exchange regulations for the diamond sector, setting forth special rules regarding access to and operations in foreign currency, as well as the contracting of financing and opening of bank accounts outside Angola.<sup>7</sup>

On the oil and gas front, the Organic Statute that restructured Angola's hydrocarbons sector by creating the National Agency for Petroleum, Gas and Biofuels (ANPG) as the new concessionaire for the petroleum sector was amended again. These latest amendments promote economic diversification, the participation of local businesses in the oil sector, the increase of domestic production, and the reduction of imports, as well as the creation of employment and the training of the Angolan workforce within the oil industry.<sup>8</sup> Most importantly, a new Legal Framework on Local Content in the Oil Sector was approved in Presidential Decree No. 271/20, aimed at promoting economic diversification and participation of local businesses in the oil sector, increasing domestic production, reducing imports, and creating employment and the training of the Angolan

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2019), <https://www.lexology.com/library/detail.aspx?g=5a5ea290-25ad-47c8-907c-fec4bd940849>.

4. MIRANDA ALLIANCE, *New Governance Model for Mining Sector Approved*, LEGAL NEWS: ANGOLA (May 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-may-2020>.

5. MIRANDA ALLIANCE, *Creation of The National Agency of Mineral Resources*, LEGAL NEWS: ANGOLA (June 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-june-2020>.

6. Miranda Alliance, *supra* note 4.

7. MIRANDA ALLIANCE, *New Foreign Exchange Regulations Approved for Diamond Sector*, LEGAL NEWS: ANGOLA (May 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-may-2020>.

8. MIRANDA ALLIANCE, *OIL & GAS New Amendment to ANPG's Organic Statute*, LEGAL NEWS: ANGOLA (May 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-may-2020>.

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workforce within the oil industry.<sup>9</sup> The statute established new rules governing Angolanization-related recruitment, employment, and training matters, as well as establishing priority for procurement of nationally produced goods and services.<sup>10</sup>

Moreover, the Angolan President approved the national mapping of fuel filling stations, identifying the filling stations existing across the country, as well as the areas where none exist.<sup>11</sup> The goals are to (1) improve the distribution network for fuels and lubricants throughout the territory by increasing storage capacity; (2) promote the entry of new players in the sector; and (3) encourage construction of new filling stations.<sup>12</sup>

### C. BENIN

Benin hopes to boost its national electricity market by allowing improved private sector involvement. To achieve these improvements, on February 4, 2020, the National Assembly adopted a new code supplementing Law No. 2006-16 of March 26, 2007. The new code, published on April 1, 2020,<sup>13</sup> ends the national energy company's monopoly over production, transmission, distribution, and marketing of electricity by opening up the sector to private operators. It also requires the Electricity Regulatory Authority (ARE) to issue operating approvals for independent producers wanting to invest in the sector.<sup>14</sup>

### D. BURKINA FASO

Three decrees have been issued in the electricity sector in Burkina Faso.

Decree n°2020-0278,<sup>15</sup> issued April 16, 2020, addresses powers, organization, and operation of the Energy Sector Regulatory Authority, as well as providing rules applicable to the ARSE (*Autorité de Régulation du Secteur de l'Énergie*). It also repeals all previous provisions to the contrary, particularly Decree No. 2017-1016/PRES/PM/ME/MCIA/MINEFID of October 26, 2017.

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9. MIRANDA ALLIANCE, *New Legal Framework on Local Content in the Oil Sector Approved*, ALERTS: ANGOLA, <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/new-legal-framework-on-local-content-in-the-oil-sector-approved> (visited Nov. 3, 2020).

10. *Id.*

11. MIRANDA ALLIANCE, *Mapping of Filling Stations*, LEGAL NEWS: ANGOLA (January-April 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-january-throughapril-2020>.

12. *Id.*

13. *Loi 2020-05 du 1 Avril 2020, portant code de l'électricité en République du Bénin* [Law No.2020-05 of April 1, 2020 on the Electricity Code of the Republic of Benin], [https://are.bj/wp-content/uploads/2017/09/LOI-N-2020-05-PORTANT-CODE-DE-LELECTRICITE-EN-REP-DU-BENIN\\_1.pdf](https://are.bj/wp-content/uploads/2017/09/LOI-N-2020-05-PORTANT-CODE-DE-LELECTRICITE-EN-REP-DU-BENIN_1.pdf).

14. *Id.*

15. *Décret n°2020-0278/PRES/PMME/MCIA/MINEFID* [Decree n°2020-0278/PRES/PMME/MCIA/MINEFID], [https://www.arse.bf/IMG/pdf/decret\\_n2020-0278-pres-pm-mecia-minefid\\_pportant\\_attri\\_organ\\_fonction\\_de\\_arse.pdf](https://www.arse.bf/IMG/pdf/decret_n2020-0278-pres-pm-mecia-minefid_pportant_attri_organ_fonction_de_arse.pdf).

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Decree n°2019-0901/PRES/PM/ME/MINEFID/MCIA<sup>16</sup> sets the level of annual electricity consumption for eligible customers and the conditions for their return to the regulated tariffs of September 18, 2019; it also repeals all previous provisions to the contrary.

Decree n°2019-0902/PRES/PM/ME/MINEFID/MCIA<sup>17</sup> sets terms and conditions of access to the electricity grid for self-producers of renewable energy as well as conditions for the buyback of their energy surplus of September 18, 2019. All previous provisions to the contrary are repealed.

E. CAMEROON

The Electricity Sector Development Fund (the FDSE) was created based on a provision of Law n° 2011/22 of December 14, 2011, which states, in article 94, that the Government has the exclusive right to determine the missions, organization, and functioning by decree.<sup>18</sup> Thus, Cameroonian President Paul Biya signed Decree No. 2020/497 on August 19, 2020, establishing the creation, organization, and operation of the FDSE.<sup>19</sup>

The FDSE is a trust account to finance the electricity sector, especially for the elaboration of development policies and strategies. Among other duties, the FDSE is responsible for monitoring and controlling operation of water storage activities for electricity generation; production, transport, distribution, import and export, and the sale of electricity; administrative, technical, financial, and accounting audits of activities in the electricity sector; Cameroon's financial contributions to international organizations in the electricity sector; and emergency interventions.<sup>20</sup>

F. CAPE VERDE

In July 2019, the Power Grid Code was published through Decree-Law No. 31/2019.<sup>21</sup> The Code defines the technical requirements for electric power generating facilities and energy storage systems that must be connected to the country's electric energy systems.<sup>22</sup> The new framework applies to the planning, construction, and operation stages, including

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16. *Décret* n°2019-0901/PRES/PM/ME/MINEFID/MCIA [Decree n°2019-0901/PRES/PM/ME/MINEFID/MCIA], [https://www.ar.se.bf/IMG/pdf/decret\\_n\\_2019-0901\\_portant\\_fixation\\_conso\\_energie.pdf](https://www.ar.se.bf/IMG/pdf/decret_n_2019-0901_portant_fixation_conso_energie.pdf).

17. *Id.*

18. Law n° 2011/22 of 14 December 2011, <http://extwprlegs1.fao.org/docs/pdf/cmr109549.pdf>.

19. Decree no. 2020/497 of 19 August 2020, <https://www.prc.cm/fr/multimedia/documents/8522-decret-n-2020-497-du-19-08-2020>.

20. *Id.* at 5.

21. MIRANDA ALLIANCE, *Power Grid Code Approved*, LEGAL NEWS: CAPE VERDE (July-December 2019), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/cape-verde-legal-news-july-throughdecember-2019-2>.

22. *Id.*

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modifications of facilities, energy storage systems, and voltage control devices.<sup>23</sup>

In addition, the draft of the Sale and Purchase Agreement for Electricity produced by Micro-Producer customers for the purposes of sale of electricity produced by micro-producer units has been approved by means of Order No. 43/019.<sup>24</sup>

#### G. CENTRAL AFRICAN REPUBLIC

Rules controlling those entitled to buy and sell gems were tightened by a decree dated September 30, 2019.<sup>25</sup> Permission to buy and sell gems now requires a clean criminal record. Also, any individual or company filing a request to open a purchase and sales counter must now provide proof of financial capacity to carry out this activity.

Also, at the end of September 2020, the Central African government signed another decree creating a corps of a dozen inspectors to be deployed on the country's mining perimeters.<sup>26</sup> This new police force is intended to facilitate the extraction process by securing mining sites and the exports by reassuring the Kimberley Process authorities.

Moreover, Central Africa is reviewing its Mining Code to achieve a complete lifting of the embargo on the marketing of diamonds mined in the country. The new Mining Code is aimed at articulating environmental preservation provisions, clarifying provisions governing permits,<sup>27</sup> and attracting foreign investors in all prospective minerals in the territory, as well as reassuring potential investors by enforcing incentive laws and regulations based on international standards.<sup>28</sup>

#### H. CHAD

Chad promulgated Law No. 036/PR/2019 on the Electric Power Sector (the Energy Law) on August 26, 2019.<sup>29</sup> The Energy Law repeals all previous provisions to the contrary, including the provisions of Law 99-014

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23. *Id.*

24. MIRANDA ALLIANCE, *Sale of Electricity Produced by Micro-Producer Units*, LEGAL NEWS: CAPE VERDE (July-December 2019), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/cape-verde-legal-news-july-throughdecember-2019-2>.

25. *Bangui donne des gages pour tenter de faire lever l'embargo*, [Bangui gives pledges in an attempt to have the embargo lifted], Africa Intelligence (Oct. 15, 2019).

26. *Bangui accélère sur la police minière pour décaisser les millions de l'UE*, [Bangui pushes forward on mining police to disburse EU millions], Africa Intelligence (Oct. 22, 2020).

27. *Bangui veut clarifier les règles sur l'environnement pour les miniers*, [Bangui wishes to clarify environmental rules to miners], Africa Intelligence (Mar. 10, 2020).

28. *Bangui veut peaufiner sa stratégie minière*, [Bangui wants to refine its mining strategy], Africa Intelligence (Jan. 28, 2020); *La Centrafrique cherche à mieux profiter de son secteur minier*, [The Central African Republic is seeking to better take advantage of its mining sector], RFI (Dec. 10, 2019).

29. Africa Energy and Utilities Tax Guide 2019, PWC, 82 (2019), <https://www.pwc.com/ng/en/assets/pdf/africa-energy-utilities-tax-guide-2019.pdf>.



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of June 6, 1999, governing the production, transmission, and distribution of electrical energy.<sup>30</sup> Several implementing decrees followed the promulgation of the Energy Law, including Decree No. 1841/PR/MPME/2019, which established conditions and procedures for the issuance of electricity production licenses (the License Decree), and Decree No. 1862/PR/MPME/2019, which governs organization and functioning of the Electricity Regulatory Authority (ARSE).<sup>31</sup>

The Energy Law specifies that generation and distribution activities are open to competition. Previously, this activity was under the monopoly of the national company (the SNE).<sup>32</sup> Generation operators must first obtain authorization, and conditions for obtaining authorization are set out in the License Decree.

The Energy Law also aims to strengthen access to electricity, in line with the government's objective to give regular access to electricity to fifty percent of Chad's population by 2030.<sup>33</sup> Today, only three percent of the population has regular access to electricity.<sup>34</sup>

In this respect, the World Bank is financing an electricity interconnection between Cameroon and Chad for 385 million euros.<sup>35</sup>

On October 8, 2020, the Chadian government announced its decision to close all illegal gold mining sites immediately, remove all miners from such sites, and repatriate thousands of foreign nationals involved in gold mining to their countries of origin.<sup>36</sup>

#### I. DEMOCRATIC REPUBLIC OF CONGO

In August 2020, President Felix Tshisekedi announced the implementation of a Global Plan to monetize natural gas production in the Democratic Republic of Congo (DRC).<sup>37</sup> He, thus, asked his ministers to present him with a new legal and financial framework to encourage natural gas production in DRC.<sup>38</sup>

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Mouhamed Kebe, *Nouvelle loi relative au secteur de l'énergie électrique au Tchad : Focus sur les principales innovations*, AFRIMAG (Mar. 16, 2020), <https://afrimag.net/nouvelle-loi-relative-au-secteur-de-lenergie-electrique-au-tchad-focus-sur-les-principales-innovations/>.

35. *Afrique centrale : favoriser l'interconnexion régionale des réseaux électriques*, LA BANQUE MONDIALE (Jun. 16, 2020), <https://www.banquemondiale.org/fr/news/press-release/2020/06/16/promoting-regional-power-interconnection-in-central-africa>.

36. *Le Tchad prend une série de mesures pour mettre fin à l'orpaillage clandestin*, TRT (Jan. 9, 2020-May 30, 2021), <https://www.trt.net.tr/francais/afrique-asiatique/2020/10/09/le-tchad-prend-une-serie-de-mesures-pour-mettre-fin-a-l-orpaillage-clandestin-1506167>.

37. *DRC: Kinshasa determined to support gas monetization projects*, MAGAZINE24.NEWS (August 17, 2020), <https://magazine24.news/2020/08/17/rdc-kinshasa-determine-a-soutenir-les-projets-de-monetisation-du-gaz/>.

38. <https://magazine24.news/2020/08/17/rdc-kinshasa-determine-a-soutenir-les-projets-de-monetisation-du-gaz/>.

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In June 2020, DRC's Ministry of Mines published an annotated version of the new Mining Code (the Code), which came into force in 2018. These annotations aim to promote understanding of the new provisions of the Code. Annotations and comments shed light on the scope of a new article, the procedure applicable to an administrative application, or highlight the main differences between the Code and the old code of 2002.<sup>39</sup>

Moreover, the DRC government just published a study on companies' non-compliance with the Code. The government announced that companies are required to comply with the Code and will be subject to sanctions for noncompliance.<sup>40</sup>

The Moratorium allowing the export of copper- and tin-related materials has been extended until April 12, 2021.<sup>41</sup> In principle, the Code prohibits the export of unprocessed materials. However, due to economic concerns, the Minister of Mines authorized the export of copper and tin sulfates until April 12, 2021.<sup>42</sup>

To negotiate a new three-year financial plan with the International Monetary Funds, the Government of DRC was required to publish three mining concession contracts.<sup>43</sup> They concern two companies: Sokimo and Miba. These contracts were signed under the chairmanship of Felix Tshisekedi.<sup>44</sup>

Also, on July 17, 2020, President Felix Tshisekedi signed an ordinance appointing members of the Board of Directors of the National Electricity Authority Regulator (the "ARE"). Mrs. Sandrine Mubenga Ngalula was appointed Executive Director of the ARE.<sup>45</sup>

## J. EQUATORIAL GUINEA

In Ministerial Order No. 1/2020, the Ministry of Mines and Hydrocarbons limited the stay of expatriate personnel working in the oil and

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39. [http://congomines.org/system/attachments/assets/000/001/943/original/Code\\_minier\\_annoté.pdf.pdf?1594890178](http://congomines.org/system/attachments/assets/000/001/943/original/Code_minier_annoté.pdf.pdf?1594890178).

40. <https://mines-rdc.cd/fr/1441>.

41. *The export moratorium on copper sulfide concentrates until April 12, 2021*, MINISTER OF MINES (October 29, 2020), <https://mines-rdc.cd/fr/2720>.

42. Mines, *Le moratoire d'exportation des concentrés de cuivre sulfure jusqu'au 12 avril 2021*, MINISTÈRE DE MINES (Oct. 29, 2020), <https://mines-rdc.cd/fr/2720>.

43. DRC: Mining contracts have been published as requested by the International Monetary Fund, MEDAFRICA TIMES (November 2, 2020), <https://medafricatimes.com/21358-drc-mining-contracts-have-been-published-as-requested-by-the-international-monetary-fund.html>.

44. *La RDC publie les contrats miniers demandés par le FMI*, RFI (Jan. 11, 2020), <https://www.rfi.fr/fr/afrique/20201101-la-rdc-publie-les-contrats-miniers-exiges-le-fmi>.

45. Beny Mpezo, *RDC : Nomination des membres du conseil d'administration et de la direction générale de l'Autorité de Régulation du secteur de l'Électricité "ARE"*, LE HAUTPANEL (Jul. 17, 2020), <https://www.lehautpanel.com/rdc-nomination-des-membres-du-conseil-dadministration-et-de-la-direction-generale-de-lautorite-de-regulation-du-secteur-de-lelectricite-are/>.

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gas sector to a maximum of three years in Equatorial Guinea.<sup>46</sup> This three-year limit affects both management personnel and technical personnel.<sup>47</sup> Furthermore, employers are now required to obtain the Ministry's prior approval to secure visas, as well as residency and work permits for their foreign staff. On an exceptional basis, the Minister may grant extensions to these rules.<sup>48</sup> Penalties are assessed on companies that fail to comply with obligations set forth in the new statute.<sup>49</sup>

**K. IVORY COAST**

A law dated May 27, 2020, ratified Ordinance n° 2018-809, dated October 24, 2018, which creates a fund dedicated to the Electricity for All Programme (PEPT).<sup>50</sup> The PEPT, which aims to enable a larger part of the population to have effective access to electricity, was initiated in 2014 by the Ministry of Mines, Petroleum Resources.<sup>51</sup> The PEPT fund resources come from State allocations and subsidies, legacies, and loans contracted by the State.<sup>52</sup>

To promote regional trade in electricity, mandatory application of the West African Power Exchange System Operations Manual and the tariff methodology for the transmission of electricity on the West African Power Exchange System network was established by a decree dated March 19, 2020.<sup>53</sup>

A new Power Purchase Agreement framework was established in a decree dated April 7, 2020,<sup>54</sup> to secure future cross-border exchanges. This effort aligns with the National Energy Policy goals of ensuring an affordable, reliable, and sustainable energy supply for all.

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46. MIRANDA ALLIANCE, *Oil and Gas Expats' Stay in EG Limited to 3-Years*, LEGAL NEWS: EQUATORIAL GUINEA (May 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/equatorial-guinea-legal-news-may-2020>.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Arrêté n°022/MPEER/CAB relatif à l'utilisation obligatoire du Manuel d'exploitation du Système d'échanges d'énergie électrique ouest-africain et à la méthodologie de tarification du transport de l'électricité sur le réseau du Système d'échanges d'énergie électrique ouest-africain* [Order n°022/MPEER/CAB on the mandatory application of the West African Power Exchange System Operations Manual and the tariff methodology for the transmission of electricity on the West African Power Exchange System network].

54. *Arrêté interministériel n°025/MPEER/MEF portant renforcement de la base commerciale des échanges d'énergie électrique* [Inter-ministerial order n°025/MPEER/MEF on the reinforcement of the commercial basis of electrical energy exchanges].

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K. MALI

On September 27, 2019, the Mali government issued an ordinance establishing a new Mining Code,<sup>55</sup> repealing the former legislation (*Loi n° 2012-015 du 27 février 2012 portant Code minier [Law n°2021-015 of February 27, 2012 on the Mining Code]*). This Mining Code introduces definitions relating to authorizations, local content, establishment agreement, mining title, authorization, gross commercial value, and market value of mining products.<sup>56</sup> The Mining Code reorganized the mining titles and tax regimes and also revised provisions relating to local content, dispute resolution, and environmental protection.<sup>57</sup>

Due to the COVID-19 pandemic, two inter-ministerial decrees<sup>58</sup> suspended traditional gold panning until September 30, 2020.

Another ordinance dated March 23, 2020,<sup>59</sup> created the National Office for Petroleum Research. This state-owned administrative body replaces the Authority for the Promotion of Petroleum Research and is responsible for researching and promoting the hydrocarbon resources of the Malian subsoil for the development of Upstream Oil.<sup>60</sup>

L. MOROCCO

On July 27, 2020, Morocco's Ministry of Energy, Mines, and the Environment submitted a draft law to the Moroccan Parliament (the Gas Law Project) that will amend the 1973 Law governing oil and gas activities in Morocco.<sup>61</sup> The Gas Law Project, which has not yet been voted on, will provide a regulatory regime for liquefied natural gas (LNG). If this law is enacted as proposed, the following activities will be subject to administrative

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55. *Ordonnance No. 2019-022/P-RM portant code minier en République du Mali* [Ordonnance No. 2019-022/P-RM on the Mining Code in the Republic of Mali], available at <https://sgg-mali.ml/JO/2019/mali-jo-2019-36.pdf>.

56. *Id.*

57. *Id.*

58. *Arrêté Interministériel n°2020-1197/M MP- MATD -MSPC-MEADD-SG portant suspension des activités d'orpaillage* [Inter-ministerial order n°2020-1197/M MP-MATD-MSPC-MEADD-SG on the suspension of gold mining activities], <https://sgg-mali.ml/JO/2020/mali-jo-2020-08.pdf>; *Arrêté Interministériel n°2020-1798/MMPMATD-MSPEC-MEADD-SG portant prorogation de la date limite de suspension des activités d'orpaillage* <https://sgg-mali.ml/JO/2020/mali-jo-2020-14.pdf>.

59. *Ordonnance n°2020-011/P-RM portant création de l'Office national de la Recherche pétrolière*, available at <https://sgg-mali.ml/JO/2020/mali-jo-2020-08.pdf>.

60. *Id.*

61. *Loi n° 67-15 modifiant et complétant le dahir portant loi n° 1-72-255 du 18 moharrem 1393 (22 Février 1973) sur l'importation, l'exportation, le raffinage, la reprise en raffinerie et en centre emplisseur, le stockage et la distribution des hydrocarbures* [Law n°67-15 amending and completing the Dahir on Law n°1-72-255 of Moharrem 18, 1393 (February 22, 1973) (on the import, export, refining, refinery and filling centre recovery, storage and distribution of hydrocarbon)].

authorization: creating facilities for liquefaction, LNG regasification, storage, loading, and unloading.<sup>62</sup>

Members of the National Electricity Regulatory Authority (ANRE) have been appointed based on various decrees and orders issued by the competent authorities. In addition to its president, the ANRE is comprised of three members appointed by decree, three members appointed by the President of the House of Representatives, and three members appointed by the President of the House of Councillors.<sup>63</sup> The work of the ANRE will, thus, be able to start from September 2020 after a four-year delay.

On December 6, 2019, the preliminary draft law No. 40-19 amending and supplementing Law No. 13-09 on renewable energy (the ENR Draft Law) was published on the website of the Secretariat General of the Government to allow interested persons to make comments and observations.<sup>64</sup> The authors of this article do not believe this law has been adopted yet. The ENR Draft Law aims to improve the legislative and regulatory framework, further enhance transparency, facilitate access to information on investment opportunities, and improve authorization procedures.<sup>65</sup>

The ENR Draft Law includes several new features. The ENR Draft Law provides for the payment of a bank guarantee for renewable energy projects to guarantee their realization.<sup>66</sup> Also, the administration must now approve any change of control in the ownership of the operator holding the authorization to carry out the project.

#### M. MOZAMBIQUE

Last December, the Council of Ministers passed Decree No. 89/2019, which revised the Petroleum Downstream Regulations that contain rules on production, import, reception, storage, handling, distribution, marketing, transportation, exportation, re-exportation, transit, and pricing of petroleum products. The Petroleum Downstream Regulations include rules such as

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62. Imane Boujnane, *Energie: un avant projet de loi pour régir les activités liées au GNL*, MEDIAS 24 (Jul 28, 2020), <https://www.medias24.com/energie-un-avant-projet-de-loi-pour-regir-les-activites-liees-au-gnl-12184.html>.

63. *Bulletin officiel n° 6907 du 10 août 2020 [Official bulletin n° 6907 of August 10, 2020], le décret n° 2-20-564 du 23 rejev 1441 (18 mars 2020) portant nomination des membres de conseil de l'ANRE [Decree n° 2-20-564 of Rajab 23, 1441 (March 18, 2020) on the appointment of members of the ANRE], les décisions du président de la Chambre des représentants n° 19/0453, n° 19/0454 et n° 19/0455 du 28 rabii II 1441 (25 décembre 2019) portant nomination des membres de conseil de l'ANRE [Decisions of the President of the House of Representatives n° 19/0453, n° 19/0454 et n° 19/0455 of Rabi II 28, 1441 (December 25 2019) on the appointment of members of the ANRE] et la décision du président de la Chambre des conseillers n° 19/200 du 22 rabii II 1441 (25 décembre 2019) portant nomination des membres de conseil de l'ANRE [Decision of the President of the House of Councillors n° 19/200 of Rabi II 22, 1441 (December 25, 2019) on the appointment of members of the ANRE].*

64. *Note de présentation relative, Département de l'Energie et des Mines, available at* [http://www.sgg.gov.ma/portals/0/AvantProjet/194/Avp\\_loi\\_40.19\\_Fr.pdf](http://www.sgg.gov.ma/portals/0/AvantProjet/194/Avp_loi_40.19_Fr.pdf).

65. *Id.*

66. *Id.*

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mandatory registration procedures applicable to petrol stations and installations and transit agents, as well as the licensing requirements for production, storage, distribution, retail, and exploitation of pipelines.<sup>67</sup>

N. REPUBLIC OF CONGO

Four important statutes supplement the legal framework applicable to the oil & gas industry in the Republic of Congo and are of particular importance to subcontracting activities and local content requirements:

- (1) Decree No. 2019-342 defines terms and conditions for the carrying out of subcontracting activities in the petroleum upstream sector (e.g., restrictions in terms of corporate forms of the entities which may engage in subcontracting activities, tendering procedures, rules on payments by petroleum companies to subcontractor companies (and by subcontractor companies to third parties) and insurance requirements);
- (2) Decree No. 2019-343 defines terms and conditions for the provision of services in the petroleum upstream sector (e.g., tendering procedures);
- (3) Decree No. 2019-344 establishes penalties for failure to comply with the provisions on Local Content in the petroleum upstream sector; and
- (4) Decree No. 2019-345 provides regulations on employment, promotion, and training of Congolese personnel in the petroleum sector (e.g., setting forth obligations imposed on contractors, subcontractors, service providers and suppliers, in terms of inter alia execution of a program-contract for recruitment and hiring of expatriate personnel).<sup>68</sup>

O. SAO TOME AND PRINCIPE

Decree No. 14/2020 regulates the price differential transfer process and the respective debt repayment contract applicable to operators engaged in the wholesale sale of petroleum products. This process is required to transfer the price differential generated by the sale of those products in favor of the State, to the Public Treasury's account.<sup>69</sup>

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67. MIRANDA ALLIANCE, *New Petroleum Downstream Regulations*, LEGAL NEWS: MOZAMBIQUE (November 2019-January 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-november-2019-through-january-2020>.

68. MIRANDA ALLIANCE, *New Oil & Gas Regulations Enacted*, LEGAL NEWS: REPUBLIC OF THE CONGO (November 2019-January 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/republic-of-the-congo-legal-news-november-2019through-january-2020>.

69. MIRANDA ALLIANCE, *Transfer of Petroleum Products Price Differential Regulated*, LEGAL NEWS: SAO TOME AND PRINCIPE (September 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/sao-tome-and-principe-legal-news-september-2020>.

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Moreover, due to COVID-19, Resolution No. 25/2020 approved the exceptional regime for making Production Sharing Agreement terms and conditions more flexible. Under this statute, a twelve-month extension of the exploration period schedule may be granted, while maintaining the other agreed terms and conditions during that period. Entities wishing to benefit from this extension should request it from the National Petroleum Agency of São Tome and Príncipe. Granting of the extension is subject to prior verification of the absence of delays, interruptions, or breach of the Agreement.<sup>70</sup>

P. SENEGAL

Although it was launched at the beginning of the year,<sup>71</sup> the 2020 Senegal licensing round, in which twelve offshore blocks are put out to offer for oil exploration, experienced successive delays of the deadline for the submission of the bids<sup>72</sup> at least in part related to the COVID pandemic. Another factor that could be causing this postponement is the long-awaited local content regulations for the petroleum sector which are expected to be approved in a near future.

Senegal adopted a new Gas Code (“the Code”) in February 2020, although it is not yet in force.<sup>73</sup> The Code facilitates the country’s power-to-gas program.<sup>74</sup> Thus, the Code aims to develop Senegal’s gas sector, increase the country’s energy independence, and reduce the cost of access to electricity.<sup>75</sup> The Code includes several innovations: it provides third parties with the right of access to gas infrastructures, it allows private sector participation in the gas sector with regulatory supervision, and it establishes financial balance within the gas sector.<sup>76</sup>

Article 5 of the Code provides that authority for a gas sector regulator will be created by a specific law, which has yet to be adopted; based on Article 58, the regulator will have a key role in determining tariffs for access to

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70. MIRANDA ALLIANCE, *Production Sharing Agreements Made More Flexible due to COVID-19*, LEGAL NEWS: SAO TOME AND PRINCIPE (September 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/sao-tome-and-principe-legal-news-september-2020>.

71. The Ministry of Petroleum and Energy has Announced an Extension to the Deadline for Submission of Applications Until 17:00 (GMT) on Sunday 30th May 2021, <https://senegallicensinground2020.com/> (last visited Nov. 3, 2020).

72. MIRANDA ALLIANCE, *Senegal 2020 Licensing Round – Update*, ALERTS: SENEGAL (October 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/alerts/senegal-2020-licensing-round-update-3>.

73. Chambers and Partners, Senegal, ENERGY: OIL & GAS 2020 (Aug. 10, 2020) <https://practiceguides.chambers.com/practice-guides/energy-oil-gas-2020/senegal/trends-and-developments>.

74. *Id.*

75. *Id.*

76. *Id.*

infrastructures, sanctions addressed to operators, and granting of licenses and concessions.<sup>77</sup>

The Taïba Ndiaye wind farm in western Senegal on the Atlantic coast was officially inaugurated on February 24, 2020, by Senegalese President Macky SALL.<sup>78</sup>

To support the development of renewable energies, based on a ministerial order dated May 28, 2020, the government provided exemptions from Value Added Tax (VAT) requirements for certain equipment used in the production of renewable energy, particularly solar, wind, and biogas.<sup>79</sup> More than four months later, however, the order had still not come into force. Parameterization in the Senegalese customs system is believed to be at the root of this delay. Before applying the exemption measure, solar equipment subject to the VAT exemption must first be parameterized in the customs informatics system. Informatics parameters have not yet been done.<sup>80</sup>

In October 2020, the Electric National Company (SENALEC) signed an agreement with a range of technical partners to develop one of the largest power plants in the region carry with a capacity of 300 megawatts.<sup>81</sup> This power plant, which should be completed by January 2023, should reduce electricity production costs by 40%.<sup>82</sup>

Senegal should soon have a new National Mining Company. On November 1, 2020, the deputies enacted Law n° 39/2020, creating a national company named the “Société des mines du Sénégal” (the Somisen)<sup>83</sup>. Somisen will aim to enhance the value of mining assets in Senegal.

## II. SOUTH AMERICA

### A. ARGENTINA

Due to the sharp decrease in the international oil price resulting from the COVID-19 pandemic and lockdowns, in May 2020, the Argentine National

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77. *Loi n°2020-06 du 7 février 2020* (Sen.) available at <http://www.droit-afrique.com/uploads/Senegal-Code-2020-gazier1.pdf>.

78. Taïba N'Diaye Wind Farm, NS ENERGY, <https://www.nsenegybusiness.com/projects/taiba-ndiaye-wind-farm-senegal/> (last visited Jun. 4, 2021).

79. Bureau Business France de Dakar, *Sénégal - Exonération de la taxe sur la valeur ajoutée (TVA) sur le matériel dédié aux énergies renouvelables*, BUSINESS FRANCE (Mar. 4, 2020), <https://www.businessfrance.fr/senegal-exoneration-de-la-taxe-sur-la-valeur-ajoutee-tva-sur-le-materiel-dedie-aux-energies-renouvelables>.

80. *Suppression de la TVA sur les équipements solaires, pourquoi ça traîne?*, AU-SENEGAL.COM (Oct. 7, 2020), <https://www.au-senegal.com/suppression-de-la-tva-sur-les-equipements-solaires-pourquoi-ca-traîne,15953.html?lang=FR>.

81. Moctar Ficou, *Vers la construction d'une nouvelle centrale électrique au Sénégal*, VIVAFRIK (Oct. 7, 2020), <https://www.vivafrik.com/2020/10/07/vers-la-construction-dune-nouvelle-centrale-electrique-au-senegal-a37692.html>.

82. *Id.*

83. Maimouna Sané, *Création de la Société des mines du Sénégal: L'Assemblée Nationale valide le projet*, SENEGO (Oct. 28, 2020), [https://senego.com/creation-de-la-societe-des-mines-du-senegal-lassemblee-nationale-valide-le-projet\\_1175932.html](https://senego.com/creation-de-la-societe-des-mines-du-senegal-lassemblee-nationale-valide-le-projet_1175932.html).



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Government issued National Decree 488/2020,<sup>84</sup> imposing a minimum price floor of USD 45/bbl on local refiners, traders, and producers for the Medano Argentine benchmark oil produced in the Province of Neuquén.<sup>85</sup>

The price floor was introduced to help local oil & gas producers continue producing and maintaining their workforce.<sup>86</sup> However, most refiners failed to abide by the price floor.<sup>87</sup> Instead, they imposed their market power and prevailing low international prices on non-integrated producers without sanctions. Despite the refusal to abide by the price floor, Provincial Governments assessed royalties on production from within their jurisdictions based on the price floor,<sup>88</sup> based on an express provision in Decree 488/2020.<sup>89</sup> Thus, royalties increased, even during an unprecedented oil crisis.<sup>90</sup> Producers filed numerous injunctions and declarative actions attempting to have Section 1 of the Decree (the provision responsible for royalty increases) declared unconstitutional. These actions are pending before the national Supreme Court.<sup>91</sup>

The price floor was enforced until the end of August 2020, after the Brent price exceeded USD 45/bbl floor for ten consecutive days.<sup>92</sup>

The Decree eliminated export duties applicable to oil exports when the Brent benchmark quotes at forty-five USD or under while also reducing the export duties to eight percent for when the Brent benchmark quotes at sixty USD or over.<sup>93</sup> When the Brent benchmark quotes between forty-five USD and sixty USD, a prorated export duty formula is used.<sup>94</sup>

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84. See Decree 488/2020 of May 18, 2020 of the National Executive Power (Arg), *Boletín Oficial de la República Argentina* (B.O.) of May 19, 2020, available at <https://www.boletinoficial.gob.ar/detalleAviso/primera/229470/20200519?busqueda=1>.

85. See *id.* at Article 1.

86. See *id.* at Article 2 which provided that, during the effectiveness of the price floor, producers shall maintain their 2019 levels of oil production and activity, with due consideration for demand drop resulting from COVID 19.

87. See Despite creole barrel, oil is not paid at 45 dollars [*Pese al barril criollo, el petróleo no se paga a 45 dólares*], Rio Negro (Arg) (Jun. 3, 2020), <https://www.rionegro.com.ar/pese-al-barril-criollo-el-petroleo-no-se-paga-a-45-dolares-1384010/>.

88. See Silvina Kristal, Creole Barrel: governors under alert for lower royalty revenue request that floor price be honored [*Barril criollo: gobernadores en alerta por menor cobro de regalías, piden respetar precio sosten*], *Ambito* (Arg.) July 23, 2020, <https://www.ambito.com/nacional/barril-criollo/gobernadores-alerta-menor-cobro-regalias-piden-respetar-precio-sosten-n5119506>.

89. See *id.* at Article 1, last paragraph.

90. See Nielsen: We face the most important crisis of the oil industry [Nielsen: “*Nos encontramos frente a la crisis más importante de la industria petrolera*”], *El Economista* (Arg), May 1, 2020, <https://eleconomista.com.ar/2020-05-nielsen-nos-encontramos-frente-a-la-crisis-mas-importante-de-la-industria-petrolera/>.

91. See Dockets CSJ 001054/2020/1-00 (TOTAL AUSTRAL S.A. SUCURSAL ARGENTINA vs. NEUQUEN PROVINCE, PROVINCIA DEL over Injunction) and CSJ 001054/2020-00 (TOTAL AUSTRAL S.A. SUCURSAL ARGENTINA vs. NEUQUEN PROVINCE over Declaration of Unconstitutionality and Payment Reimbursement), among others.

92. See *id.* at Article 1.

93. *Id.* at 10.

94. See *id.* at Article 7.

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The Decree also authorized the National Secretary of Energy to simplify the oil export registration proceedings applicable to oil types with low demand at the domestic market in case of a significant increase in export applications.<sup>95</sup>

In November 2020, National Decree 892/2020<sup>96</sup> was issued, approving the Plan for the Promotion of the Production of Argentine Natural Gas – Supply and Demand Scheme 2020-2024 (the “Plan”). Like previous similar regimes,<sup>97</sup> the Plan is aimed at attracting investments in natural gas production to meet domestic demand and generating tax savings by replacing LNG imports and more expensive liquid fuels used for power generation.<sup>98</sup>

However, it differs introduces innovated changes reflective of lessons from recurring disputes.<sup>99</sup> The Plan requires that gas suppliers and buyers enter into contracts under 75% Take or Pay - TOP and 100% Deliver or Pay - DOP conditions via a system of auctions.<sup>100</sup>

The Plan will cover a maximum volume of natural gas—initially 70 MMm<sup>3</sup>/day all year long—with additional volumes for the winter periods and will focus on supplying natural gas utilities and power generators, through CAMMESA, the wholesale power market managing company.<sup>101</sup>

The 70 MMm<sup>3</sup>/day volume will be allocated to the Austral Basin in 20 MMm<sup>3</sup>/day, to the Neuquina Basin in 47.2 MMm<sup>3</sup>/day and to the Northwest Basin in 2.8 MMm<sup>3</sup>/day.<sup>102</sup> The Plan will run for four years, beginning in December 2020 but with an additional four-year extension for natural gas produced offshore.<sup>103</sup> The price of gas at the start of the trunk pipelines will be based on a public auction with a cap price that will reflect the efficiency curve of the preceding five years.<sup>104</sup>

The National Government shall compensate natural gas producers for the share of the price of natural gas offered at the auction that is not transferred to end-users based on the passthrough mechanism provided in their license terms.<sup>105</sup> Guarantee mechanisms based on recognition of tax credits are

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95. *See id.*

96. *See* Decree 892/2020 of November 13, 2020 of the National Executive Power (Arg), *Boletín Oficial de la República Argentina* (B.O.) of November 16, 2020, available at <http://servicios.infoleg.gob.ar/infolegInternet/anexos/340000-344999/34229/norma.htm>.

97. *See* Secretary of Energy (Arg) Resolutions 24/2008, 1/2013, 60/2013, 74/2016, 46E/2017 and their respective amendments.

98. *See id.* at Article 2, §(e).

99. Oil Companies unleash gas price war with resolution 46 in the background [*Petroleras desatan guerra de precios por el gas con la resolución 46 de fondo*], *Econojournal* (Arg), April 22, 2020.

100. *See id.* at Annex, §§ 54, 66.

101. *See id.* at Article 2.

102. *See id.* at Annex, § 6.45.

103. *Id.* at Annex, § 1 (e).

104. *See id.* at Annex, § 1 (d).

105. Oil Co., *supra* note 9, at Annex, § 1 (d).

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expected to secure payment of such compensation to the adhering producers.<sup>106</sup>

To adhere to the Plan, natural gas producers must submit and commit to the following: (1) investment plans for amounts that may not be less than the proceeds from the compensation to be paid to them by the National Government,<sup>107</sup> (2) increasing domestic content with added value along their supply chain,<sup>108</sup> and (3) injecting natural gas at levels equal to or greater than the average injection of the May-June-July 2020 quarter.<sup>109</sup> Heavy penalties<sup>110</sup> are imposed for breaches to these commitments, but penalties do not apply to producers whose production is less than 2 MMm<sup>3</sup>/day, provided that they have fulfilled the committed investments.<sup>111</sup>

The Plan addresses new investments to finance projects under the Plan by requiring the Central Bank of Argentina (BCRA) to ease existing foreign exchange restrictions to allow the repatriation of foreign direct investments and to pay services or principal of foreign financial credit facilities.<sup>112</sup>

### III. ASIA

#### A. TIMOR-LESTE

Last year, an amendment to the Petroleum Activities Law was approved via Law No. 6/2019, to adapt the “domestic legal framework to the new situation resulting from the signature and ratification of the Treaty between the Democratic Republic of Timor-Leste and Australia that established the respective Maritime Boundaries in the Timor Sea and ended the Joint Petroleum Development Area and all the respective supervisory and coordination structures.”<sup>113</sup>

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106. *See id.* at Annex, § 40.

107. *See id.* at Annex, § 14.

108. *See id.* at Annex, § 98.

109. *See id.* at Annex, § 26.

110. *See id.* at Annex, §§ 20, 33. (If a producer fails to comply with the injection committed in the Winter Seasonal Period, it shall substitute the failed volumes with deliveries of volumes of its own production from other basins, with volumes purchased from other producers, with imports of natural gas at its cost, or with the payment of the equivalent of two times the failed volume at the price offered by the producer multiplied by an adjustment factor of 1.25. Also, proportional and progressive reductions in compensation payable by the National Government, including exclusion from participation in the Plan, plus an obligation to repay the amounts received during the calendar year in which the non-compliance occurred were provided. Last, in the event of a breach of a contract with the Distribution Companies, Sub-Distribution Companies and/or CAMMESA, the producer shall afford the penalties set out in the respective Agreement with respect to 100% DOP volumes.)

111. *See id.* at Annex, § 50.7.

112. *See id.* at Section 9 and the Argentine Central Bank Communication “A” 7168 of November 19, 2020.

113. MIRANDA ALLIANCE, *Second amendment to the Petroleum Activities Law*, LEGAL NEWS: TIMOR LESTE (December 2019-February 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-december-2019-through-february-2020>.

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The Government also approved Decree-Law No. 7/2020 to address large dimension public projects being implemented in the construction, petroleum, and mineral resources sectors, including the associated need to use dangerous explosives for these projects.<sup>114</sup> The new statute allows only companies licensed by the internal security agency to conduct these projects and establishes rules governing the import, transport, storage, and use of explosives for construction, petroleum, and mineral activities.<sup>115</sup>

In addition, Onshore Petroleum Operations Regulations were enacted through Decree-Law No. 18/2020.<sup>116</sup> This new statute applies to all petroleum operations involving onshore resources implemented under the Petroleum Activities Law (Law No. 13/2005) and covers exploration, appraisal, development, production, and abandonment activities.<sup>117</sup> It also applies to the transport, processing, and storage of crude oil and natural gas included in upstream operations, as well as to facilities located onshore but used in relation to offshore operations.<sup>118</sup> In addition to establishing specific rules on the operations, including safety and local content, the new framework also includes provisions addressing land access, relationship with local communities, and installation and abandonment of pipelines and facilities.<sup>119</sup>

The *Autoridade Nacional do Petróleo e Minerais* (ANPM) Regulation No. 1/2020 further amended the legal framework applicable to the downstream by modifying for the second-time Fuel Filling Stations Regulations that originally had been implemented by ANPM Regulation No. 1/2013. This amendment modifies the technical specifications and standards for Automotive Fuel Filling Stations to ensure the general safety of the population. ANPM has also revised the fees applicable to Automotive Fuel Filling Stations.<sup>120</sup>

The electricity subsector was impacted by Decree-Law No. 29/2020, in which the Government created the State-owned company “Eletricidade de Timor-Leste, E.P.” (EDTL, EP) and approved its bylaws.<sup>121</sup> EDTL, EP is responsible for proposing, monitoring, and ensuring the implementation of

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. MIRANDA ALLIANCE, *Regulation of Onshore Petroleum Operations*, LEGAL NEWS: TIMOR LESTE (March-May 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-march-through-may-2020>.

120. MIRANDA ALLIANCE, *Second Amendment to the Fuel Filling Stations*, LEGAL NEWS: TIMOR (June-August 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-june-through-august-2020>.

121. *Id.*

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the energy sector's national policy by ensuring the sustainable and integrated production, transmission, distribution, and sale of electricity.<sup>122</sup>

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122. MIRANDA ALLIANCE, *Eletricidade de Timor-Leste, E.P. created*, LEGAL NEWS: TIMOR LESTE (June-August 2020), <https://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-june-trough-august-2020>.

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

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This article summarizes important developments during 2020 in international mergers and acquisitions and joint ventures in Brazil, Canada, Chile, China, Italy, Russia, Spain, Ukraine, the United Kingdom, and the United States.

### **I. Brazil**

#### **A. CORPORATE ISSUES**

The National Department of Business Registration and Integration (DREI) simplified the procedures for registering corporate acts before the Boards of Trade by issuing Normative Instruction No. 81/2020 on June 10, 2020 (IN 81).<sup>1</sup> IN 81 reduces bureaucracy and standardizes procedures and interpretations among the twenty-seven State and Federal District Boards of Trade in Brazil.<sup>2</sup>

The most relevant changes in filing procedures are (1) the automatic registration for the incorporation, amendment, and termination of sole proprietorships, individual limited liability companies, limited liability

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1. *Secretaria Especial de Comércio Exterior e Assuntos Internacionais, Ministério da Economia*, [http://www.mdic.gov.br/images/REPOSITORIO/SEMPE/DREI/INs\\_EM\\_VIGOR/IN\\_DREI\\_81\\_2020.pdf](http://www.mdic.gov.br/images/REPOSITORIO/SEMPE/DREI/INs_EM_VIGOR/IN_DREI_81_2020.pdf) (last visited June 3, 2021).

2. *Id.*

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companies, and cooperatives for acts governed by Article 43 of IN 81, (2) the removal of the notarized signature requirements for corporate act filings, and (3) the replacement of the certified copy requirement for support documents with a simple declaration signed by a lawyer or accountant as to the authenticity and similarity between the original document and the copy.<sup>3</sup>

In addition to procedural issues, the IN 81 Attachment IV (Manual for Filings of a Limited Liability Company) item 5.3<sup>4</sup> clarified interpretation issues related to the supplemental application of certain dispositions governing corporations and limited liability companies under the sole paragraph of article 1.053 of the Brazilian Civil Code.<sup>5</sup> For instance, IN 81 provides that limited liability companies may issue preferred shares (membership interests), which certain Boards of Trade had not permitted previously.<sup>6</sup> The IN 81 also provides that the application of the Corporations Law to a limited liability company need not be stated expressly when a limited liability company adopts corporate attributes such as a Board of Directors, Fiscal Council, preferred shares, and treasury shares in its Articles of Association.<sup>7</sup> Although not permitted in many other jurisdictions, it is significant that IN 81, article 70 sole paragraph, allows companies with negative net equity to merge.<sup>8</sup>

**B. DATA PROTECTION**

Law no. 13.709/2018, the General Data Protection Law (LGPD),<sup>9</sup> enacted in 2018, and finally came into force on September 18, 2020, but the administrative sanctions it provides only apply beginning August 1, 2021. Even so, the LGPD is enforceable by public prosecutors and or private litigation; therefore, all companies must conform to the new legislation.<sup>10</sup> Because the LGPD establishes rules for collecting, handling, storing, and sharing personal data, it will significantly impact M&A transactions, from due diligence to document structuring and negotiating.<sup>11</sup>

Noncompliance with the LGPD may render an M&A transaction unfeasible because of the considerable risks for the buyer.<sup>12</sup> Moreover, the due diligence phase will be challenging for those sellers that process personal

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3. *Id.*

4. *Id.*

5. *Lei no. 10.406, de 10 de Janeiro de 2002*, COL. LEIS. FED. REP. BRASIL, Janeiro 2002 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/leis/2002/110406compilada.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/110406compilada.htm).

6. *Id.*

7. *Lei no. 6.404, de 15 de Dezembro de 1976*, COL. LEIS. FED. REP. BRASIL, Dezembro 2002 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/LEIS/L6404consol.htm#art294.0](http://www.planalto.gov.br/ccivil_03/LEIS/L6404consol.htm#art294.0).

8. *See id.* at 1.

9. *Lei no. 13.709, de 14 de Agosto de 2018*, COL. LEIS. FED. REP. BRASIL, Agosto 2018 (Braz.), [http://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13709.htm](http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13709.htm).

10. *See* article 20 of Law 14.010/2020 at [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2019-2022/2020/Lei/L14058.htm](http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2020/Lei/L14058.htm).

11. *Id.*

12. *See id.*

data subject to the LGPD because they must define which data is not essential to the transaction's evaluation and cannot be disclosed.<sup>13</sup> When protected personal data is part of a document required to be disclosed, the seller must determine the best way to disclose the document without breaching the LGPD.<sup>14</sup> Further, due diligence must examine LGPD compliance, which includes whether any data breaches occurred and the target company's reactions, and whether the target company's contracts contained provisions related to the LGPD, among others.<sup>15</sup>

Regarding deal structures, a share transfer transaction may be more advantageous because there is no transfer of data from the target to the buyer, and the data remains with the same legal entity. The transfer of data under an asset deal may require consent from all persons whose personal data is held by the target to transfer their data to the buyer.

The Share Purchase Agreement (or Asset Purchase Agreement, as applicable) must contain representations and warranties related to all LGPD matters, as well as indemnification provisions, price adjustment mechanisms, etc.

## II. Canada

### A. NAVIGATING THE COVID-19 WAVES

#### 1. *Introduction*

Canadian M&A activity experienced strong growth at the end of 2019.<sup>16</sup> Many market participants were optimistic for a strong 2020—but then, COVID-19 struck.<sup>17</sup> In Canada, deal volume fell almost fifty-seven percent in Q1 compared to Q1 2019 and declined a further twenty-five percent quarter-over-quarter in Q2.<sup>18</sup>

In addition to affecting deal volume, COVID-19 has impacted how companies approach deals, spotlighting certain terms like Material Adverse Effect (MAE) clauses. This article first briefly discusses certain sector trends in 2020 then highlights some new approaches to M&A in light of COVID-19.

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13. *Id.*

14. *Id.*

15. *Id.*

16. "Canadian M&A Report—Q1 2020," CROSBIE & COMPANY (Apr. 15, 2020), [https://www.crosbieco.com/docs/default-source/Publications-PDFs/crosbie-company-canadian-mergers-acquisitions-report-for-q1-2020---richard-betsalel-\(mergers-acquisitions-divestitures-sale-of-a-business\).pdf?sfvrsn=20ad6b10\\_7](https://www.crosbieco.com/docs/default-source/Publications-PDFs/crosbie-company-canadian-mergers-acquisitions-report-for-q1-2020---richard-betsalel-(mergers-acquisitions-divestitures-sale-of-a-business).pdf?sfvrsn=20ad6b10_7).

17. *Id.*

18. See Noor Zainab Hussain, *Canada M&A Derailed by the Novel Coronavirus Outbreak*, REUTERS (Apr. 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-canada-deals-idUSKBN21O117>.



## B. M&A SECTOR TRENDS

While some industries have been modestly impacted by the pandemic, others have been severely hit. H1 2020 witnessed twenty-four megadeals, a decrease from H1 2019, which had thirty-four recorded closed megadeals.<sup>19</sup> The largest deal in H1 2020 was in the consumer sector with Flutter Entertainment’s acquisition of The Stars Group Inc. at USD \$14.5 billion.<sup>20</sup>

In Q1, real estate was the most active sector, with one-hundred-seven announced deals valued at USD \$10.6 billion.<sup>21</sup> In Q2, precious metals and mining were the most active sectors with one-hundred-eleven and eighty-seven announced deals, respectively.<sup>22</sup> In Q3, the Canadian financial services deal activity increased fifty-nine percent compared to Q3 2019, with thirty-five transactions across the sector.<sup>23</sup>

## C. M&A TERMS AND PROCESS

COVID-19 has caused buyers and targets to consider the process and certain key terms for M&A transactions. Buyers need to consider whether a target company is permanently impacted by COVID-19 or whether only short-term effects impact value and may present opportunities. Targets need to consider whether to resist opportunistic offers and whether to implement takeover defenses, such as adopting a shareholder rights plan or “poison pill” ahead of, or in response to, any potential offer.

### 1. *Deal Timing and Process*

M&A participants need to be flexible and aware of the potential impacts of COVID-19 that delay a deal process. These include work-from-home arrangements that may affect the parties’ ability to prepare or conduct due diligence or effectively negotiate agreements. Further, as court approval is required for a plan of arrangement, and the vast majority of Canadian M&A deals for public companies are completed by a plan of arrangement, consideration must be given to any court delays.

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19. Canadian M&A Insights—Summer 2020, DUFF & PHELPS (Aug. 13, 2020), <https://www.duffandphelps.ca/-/media/assets/pdfs/publications/mergers-and-acquisitions/canada-ma-insights-summer-2020.pdf>.

20. *Id.*

21. Lei no. 13.709, *supra* note 7.

22. Canadian M&A Report—Q2 2020, CROSBIE & COMPANY (Jul. 22, 2020), [https://www.crosbieco.com/docs/default-source/publications-pdfs/crosbie-company-canadian-mergers-acquisitions-report-for-q2-2020--richard-betsalel-\(mergers-acquisitions-divestitures-sale-of-a-business\).pdf?sfvrsn=5d646b10\\_6](https://www.crosbieco.com/docs/default-source/publications-pdfs/crosbie-company-canadian-mergers-acquisitions-report-for-q2-2020--richard-betsalel-(mergers-acquisitions-divestitures-sale-of-a-business).pdf?sfvrsn=5d646b10_6).

23. See *Canadian Financial Services Quarterly Newsletter Q3—2020*, KPMG (Nov. 5, 2020), <https://assets.kpmg/content/dam/kpmg/ca/pdf/2020/11/kpmg-fs-ma-quarterly-newsletter-q3-2020-en.pdf>.

## 2. *Specific Deal Terms*

Market participants are paying attention to several deal terms in light of COVID-19. Two such customary deal terms include MAE clauses and limitations on the target business's conduct during the interim period between signing and closing. The Cineplex/Cineworld dispute is the highest-profile case in Canada dealing with an MAE clause post-COVID.<sup>24</sup> The definitive agreement was signed before the pandemic had a significant impact on deals. Subsequently, the parties to deals have become more explicit about whether COVID-19 will or will not give rise to an MAE.

Between signing and closing, targets are typically required to operate the business in the "ordinary course." For deals signed during COVID-19, the pandemic's impact must be taken into account when considering what is "ordinary course."

With both MAE and interim business covenants, targets and their counsel may argue that COVID-19 is a known factor and should not give rise to an MAE, nor should it affect what is ordinary course. But a Buyer will want some certainty that if COVID-19 disproportionately affects its target, it is not stuck purchasing a materially impaired business.

## D. CONCLUSION

Despite uncertainty regarding when the COVID-19 waves may end, the potential for deal activity remains cautiously optimistic. As deal activity is resurrected, there is not only an abundance of excess capital within private equity firms and various corporate entities but also an opportunity for buyers to earn outsized returns.

## III. Chile

Global pandemic and domestic political context have impacted M&A activity in Chile during 2020. M&A deals disclosed during January 1 and October 13 total one-hundred-fifty-three, a 25.37 percent decrease relative to the same period in 2019. The total aggregate value of USD \$3.1 billion represents a sixty-eight percent reduction relative to the same ten-month period last year.<sup>25</sup> But despite global and domestic challenges, during the first eight months of 2020, Chile received more than USD \$10 million in

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24. See Dave McNary, *Cineworld Backs Away from \$2.1 Billion Deal for Canada's Cineplex*, VARIETY (June 12, 2020), <https://variety.com/2020/film/news/cineworld-calls-off-canada-cineplex-1234633543/>.

25. *Transactional Impact Monitor Special Report*, Transactional Track Record (October 15, 2020), <https://www.ttrecord.com/en/publications/market-reports/monthly-report-latin-america/Andean-Region-Transactional-Impact-Monitor-Vol-3/1994/>.

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foreign direct investment, an eleven percent increase relative to the same period in 2019.<sup>26</sup>

Government efforts and the legislative agenda in Chile during 2020 mainly focused on implementing emergency and support measures for small and medium enterprises (SMEs), protecting employment, raising investment, and facilitating credit.

A. TAX MEASURES

Law No. 21,225 exempted loans from stamp tax between April 1 and September 30, 2020,<sup>27</sup> while Law No. 21,256 approved the (1) temporary reduction of the Corporate Tax rate for taxpayers under the SME Regime of the Income Tax Law from twenty-five percent to ten percent, (2) refund of the excess of value-added tax (VAT) credit on the acquisition of goods or use of services in certain cases, and (3) extension of the instant depreciation mechanism for investments in fixed assets until December 31, 2022.<sup>28</sup>

B. ECONOMIC STIMULUS MEASURES

The government increased the amount of the Guarantee Fund for SME (FOGAPE, its Spanish acronym) up to USD \$3 billion, enabling banks and financial institutions to grant leveraged loans in an amount of USD \$25 billion, which eased the conditions for SMEs to apply for these credits to finance working capital.<sup>29</sup>

The Financial Market Commission (CMF, its Spanish acronym) adopted several interim measures to mitigate adverse economic effects and allow more flexibility in the financial system. Some of these measures include regulatory exceptions for bank provisions for consumer loans granted to SMEs and individuals related to (i) deferrals of up to three installments of mortgage loans and (ii) extensions of maturity dates for up to six months.

Further, to expedite the issuance of public debt, the CMF issued General Rule No. 443, which streamlines the registration of public offerings of bonds and notes by temporarily exempting issuers from filing certain financial and corporate documentation.<sup>30</sup>

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26. Press Release, October 8, 2020, *Agencia de Promoción de la Inversión Extranjera*, available at <https://investchile.gob.cl/foreign-investment-in-chile-up-by-11-in-first-eight-months-of-the-year/>.

27. Law No. 21,225, Apr. 2, 2020, D.O. (Chile).

28. Law No. 21,256, Sept. 2, 2020, D.O. (Chile).

29. Press Release, October 8, 2020, *Agencia de Promoción de la Inversión Extranjera*, available at <https://investchile.gob.cl/foreign-investment-in-chile-up-by-11-in-first-eight-months-of-the-year/>.

30. General Rule No. 443, June 15, 2020, *Comisión para el Mercado Financiero*, [http://www.cmfcile.cl/normativa/ncg\\_443\\_2020.pdf](http://www.cmfcile.cl/normativa/ncg_443_2020.pdf).

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Law No. 21, 276, published on October 19, 2020,<sup>31</sup> introduced several changes to the financial market regulatory regime. Among other amendments, it (1) authorized insurance companies to invest in securities not registered with the CMF or securities with a rating below that previously required by the law, (2) established an automatic registration system for debt securities, and (3) reduced the advance notice period for announcing shareholders' meetings.<sup>32</sup>

C. ANTITRUST MEASURES

In April 2020, the National Economic Prosecutor's Office (FNE, its Spanish acronym) issued a public statement regarding cooperation agreements between competitors.<sup>33</sup> Although the FNE stated that the pandemic situation does not exempt the compliance of the competition law, the FNE acknowledged that such agreements would be—in certain cases—an efficient tool to facilitate the supply of goods and provision of services to national consumers.<sup>34</sup> In connection with the above, the Competition Court published Decree No. 21/2020,<sup>35</sup> pursuant to which the Court ruled that during the state of catastrophe and in qualified cases, certain acts or agreements subject to a non-contentious consultation procedure—other than concentration operations—may be implemented by the parties while the Court's review is still pending. Such authorization specifically applies to acts or agreements that seek efficiencies that exceed anti-competitive risks and relate to goods or services that are indispensable to maintain the supply chain, the continuity of transportation services, or the delivery of medicines or medical supplies, among others.<sup>36</sup>

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31. Law No. 21,276, October 19, 2020, *Diario Oficial*, <https://www.bcn.cl/leychile/navegar?idNorma=1150716&idVersion=2020-10->.

32. *Id.*

33. Public Statement, *Fiscalía Nacional Económica*, available at <https://www.fne.gob.cl/wp-content/uploads/2020/04/Declaraci%C3%B3n-P%C3%ABlica-FNE-030420.pdf>.

34. Public Statement, *Fiscalía Nacional Económica*, available at <https://www.fne.gob.cl/wp-content/uploads/2020/04/Declaraci%C3%B3n-P%C3%ABlica-FNE-030420.pdf>.

35. Decree No. 21/2020, *Tribunal de Defensa de la Libre Competencia*, [https://www.tdlc.cl/nuevo\\_tdlc/wp-content/uploads/2020/04/Auto-Acordado-21-2020.pdf](https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/2020/04/Auto-Acordado-21-2020.pdf).

36. *Id.*

#### IV. China

##### A. FOREIGN INVESTMENT IN CHINA HAS ENTERED INTO THE FAST TRACK – INTERPRETATION OF THE NEW IMPLEMENTING REGULATIONS OF THE FOREIGN INVESTMENT LAW OF THE PEOPLE’S REPUBLIC OF CHINA (PRC)

On December 31, 2019, the Implementing Regulations of the Foreign Investment Law of the PRC (Regulations),<sup>37</sup> an important administrative regulation facilitating the implementation of the Foreign Investment Law of the PRC (the Foreign Investment Law),<sup>38</sup> was officially published. It came into force on January 1, 2020, together with the *Foreign Investment Law*. We highlight a few key issues contained in the Regulations below.

###### 1. *Abolishing the Approval or Filing Requirements for the Establishment or Change of Foreign-Invested Enterprises*

For the past forty years, establishing and changing foreign-invested enterprises in China has followed an approval and filing system administered by the Ministry of Commerce. The newly implemented Foreign Investment Law and Regulations simplify prior requirements. The registration of foreign-invested enterprises is now governed by the market regulation authority in the State Council or by its authorized counterparts in local governments.<sup>39</sup> The newly created “one-stop” approval/registration process significantly shortens the required processing time, increases the efficiency of administrative procedures, and reduces the burden on the investors and enterprises.

###### 2. *Compulsory Publication of Governmental Regulatory Documents to Improve Transparency*

Governmental regulatory documents control the management of foreign investment. The new Regulations clarify that governmental regulatory documents that are not published in accordance with the relevant laws must not be used as the basis of public administration.<sup>40</sup> The Regulations also require that such regulatory documents undergo a legality review.<sup>41</sup> These provisions are essential to improving the transparency and practicality of foreign investment administration.

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37. Implementing Regulations of the Foreign Investment Law of the PRC, (published on the China’s National People’s Congress (NPC) website on Dec. 31, 2019, effective Jan. 1, 2020), <http://www.npc.gov.cn/npc/c30834/202001/e72e9a2fdb6d45eeab2c8893d99a0ed6.shtml>.

38. Foreign Investment Law of the PRC, (adopted by the NPC on Mar. 15, 2019, effective Jan. 1, 2020), <http://www.npc.gov.cn/npc/c30834/201903/121916e4943f416b8b0ea12e0714d683.shtml>.

39. *Law no. 21, 276, supra* note 31, art. 37.

40. *Id.* art. 7.

41. *Id.* art. 26.

3. *Enhanced Protection of the Intellectual Property and Trade Secrets of Foreign Investments*

According to Article 22 of the Foreign Investment Law, the State must protect the lawful Intellectual Property (IP) rights and interests of foreign investors, foreign-invested enterprises, and relevant rights holders.<sup>42</sup> The Regulation clearly requires that the State reinforce punishment for the infringement of IP rights and constantly strengthen the protection of IP rights.<sup>43</sup>

4. *The Validity and Enforceability of Policy Commitments*

In the past, foreign investors and enterprises have in practice signed investment agreements involving preferential treatments with local governments in China, but the validity and enforceability of such policy commitments have always been controversial. Article 25 of the Foreign Investment Law requires that local governments honor their legitimate policy commitments to foreign investors and enterprises.<sup>44</sup>

5. *Compensation and Remedies for the Expropriation of Foreign Investment*

Article 20 of the Foreign Investment Law establishes the principle that fair and reasonable compensation should be provided in a timely manner in the event of the expropriation of a foreign investor's investment that was justified as in the public interest.<sup>45</sup>

The Foreign Investment Law is viewed as concluding the practical experience of foreign investment legal pluralism over forty years of reform and opening up in China.<sup>46</sup> It adapts to the new era's new requirements and establishes a new basic administration framework for foreign investment in China. Formulating and completing the supporting regulations to crystallize the legal system established by the *Foreign Investment Law* is of great significance. Considering the comprehensive openness of such new mechanisms, plenty of questions and challenges may arise during the implementation process. Thus, progressions and further improvements are to be expected.

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42. *See id.*

43. *See id.* art. 23.

44. *Id.*, art. 25.

45. *Id.*, art. 20.

46. As mentioned in the press conference regarding the relevant issues of *the Implementing Regulations of the Foreign Investment Law* convened by the principal of the Ministry of Justice, Ministry of Commerce, and the National Development and Reform Commission on December 31, 2019.

## V. Italy

### A. PANDEMIC AND M&A UNDER ITALIAN LAW

As we all know, the COVID-19 pandemic has had and continues to have a severe impact on legal transactions, including M&A transactions. Italian law provides certain remedies to confront the adverse consequences of COVID-19.

The first remedy uses contractual law Material Adverse Change (MAC) clauses derived from the common law countries' mergers and acquisition practices. There is no specific definition or regulation of MAC clauses under Italian law and the content of MAC clauses is left to contractual practice and individual negotiation. Until now, MAC clauses were not drafted in much detail, unless the transaction required it, perhaps including references to events beyond the parties' control, such as Acts of God or governmental actions, etc., as well as certain specific economic and financial thresholds or targets. MACs were generally connected or tied to a condition precedent, or a right of withdrawal, or a representation allowing a party (usually the buyer) to claim an agreement was unenforceable or otherwise to terminate it. Nevertheless, the enforcement of MAC clauses is relatively uncommon because the clauses are often drafted too broadly and are unlikely to survive a judicial challenge.

One of the consequences of the current pandemic on the M&A practice will be that MAC clauses will definitively now be drafted in far more detail, even in smaller transactions.

The Italian Civil Code has some provisions that may allow a party to cope with the problems posed by the pandemic. The first is unconscionability,<sup>47</sup> which is the right of a contractual party to demand that a court terminate an agreement if unpredictable events beyond the parties' control render performance of the agreement too burdensome unless such increased burden is a customary normal risk related to the agreement.<sup>48</sup> The other party may avoid termination by offering to amend the agreement terms to produce a more appropriate result.<sup>49</sup> It should be noted that this remedy has little success in the U.S. courts whenever claimed.<sup>50</sup>

Although they represent a very narrow path, a couple of remedies could be the "supervening impossibility of performance"<sup>51</sup> and the "partial supervening impossibility of performance."<sup>52</sup> In the former, a party is released from performance if it has become impossible. However, it must return any consideration received and cannot require that the other party perform under the agreement. In the latter, the other party is entitled to

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47. See Italian Civil Code art. 1467.

48. *Id.*

49. *Id.*

50. *Id.*

51. See *id.* Italian Civil Code Article 1463.

52. See *id.* Italian Civil Code Article 1464.

proportionally reduced performance and to terminate the agreement if it rejects reduced performance by its counterparty.<sup>53</sup> Another remedy is the one provided for by Article 1461 of the Italian Civil Code, according to which a party may suspend its performance of an agreement in the event the economic or financial situation of the other party has deteriorated, absent a fair and adequate guarantee. All of the above remedies provided by the Italian Civil Code are far more rigid and narrow in scope and enforcement compared to a MAC clause. However, in the appropriate cases, they represent a useful alternative remedy to a MAC clause.

With respect to the caselaw, to date, we have no decisions on M&A cases. In other cases, mainly on provisional remedies related to commercial agreements (e.g., leases), the courts have taken the position that (i) there is no right to a fixed percentage of reduction of the performance in case of impossibility of performance (whether partial or not), (ii) any reduction, if any, will be determined by the court, and (iii) the nonperformance of certain obligations (e.g., payment) during the lockdown period imposed by the government falls within the scope of the force majeure defense. Consequently, such nonperformance events are excused and do not represent a breach of the agreement. However, such events do not cancel the obligations that must be resumed and performed once the lockdown has ended.

## **VI. Russia**

In 2020, the most important amendments to the Russian legislation and developments in the practice of Russian courts include (i) a new requirement to notarize the resolutions of the sole participant of a company, and (ii) a clarification of the rules relating to participants' rights to withdraw from an LLC.

On December 25, 2019, the Presidium of the Supreme Court of the Russian Federation adopted the Review,<sup>54</sup> supported by the Federal Chamber of Notaries,<sup>55</sup> which eliminated uncertainty about the obligation of a sole participant of a limited liability company (LLC) to notarize its resolutions. The Presidium stated that the requirement to notarize general meeting minutes for LLC participants also applies to resolutions of the sole participant. In addition, the Review clarified that minutes of general meetings of LLC participants establishing alternative certification methods

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53. Italian Civil Code Article 1256.

54. See [‘Review of judicial practice on some issues of application of companies’ legislation’] (approved December 25, 2019, by the Presidium of the Supreme Court of the Russian Federation) <https://www.vsrp.ru/documents/all/28639/>.

55. See [‘Letter of Federal Chamber of Notaries On application of some provisions of the Review of judicial practice on some issues of application of companies legislation, approved by the Presidium of the Supreme Court of the Russian Federation on December 25, 2019’] (No. 121/03-16-3 issued January 15, 2020), [https://7fc3b773-ddd1-47c7-a4ee-c808d8ab674e.usrfiles.com/ugd/7fc3b7\\_737485ed9813426eaa8d9f03bd3d26ad.pdf](https://7fc3b773-ddd1-47c7-a4ee-c808d8ab674e.usrfiles.com/ugd/7fc3b7_737485ed9813426eaa8d9f03bd3d26ad.pdf).



(other than notarization) must be certified by a notary. This requirement applies to the sole participant's resolutions as well.

In terms of participants' right to withdraw from an LLC, the Federal Law also adopted changes to<sup>56</sup> allow an LLC charter to grant participant withdrawal rights to a particular participant (not all of them), which must be included in the LLC charter or meet the criteria provided in the charter. Another significant development related to withdrawal rights was further explained in a ruling from the Supreme Court of the Russian Federation<sup>57</sup> providing that all legislative rules concerning restrictions on transferring participatory interests in charter capital to third parties may be amended or expressly excluded by a company's charter. An example includes a charter provision that the participants in a company do not have preemptive rights to purchase the participatory interest of the other participants or that preemptive rights may be exercised at a price provided in the charter (e.g., at a non-market price, the nominal value of the participatory interest, etc.). If provided under the company's charter, all restrictions or changes concerning the legislative procedure for transferring participatory interests should be balanced against the LLC participants' right to withdraw from the company. Therefore, if a withdrawal right is expressly excluded in a company's charter, any restrictions on the right to transfer participatory interests (such as the preemptive right to purchase a participatory interest at a non-market price, a requirement to obtain consent from other LLC participants before transferring a participatory interest, or a prohibition on the disposition of participatory interests to third parties) may be established for reasonably short periods (such as an economically predictable payback period or a technology development period). If such restrictive provisions are not limited by a reasonable and economically justified timeframe, the Russian courts may invalidate them.

## VII. Spain

### A. NEW FOREIGN INVESTMENT REGULATION

Foreign investments had been liberalized in Spain since 2003, with certain exceptions in specific sectors (e.g., defense). However, as in many other European jurisdictions, in March 2020 (as a result of COVID-19 and following the EU general guidelines), Spain approved legal amendments

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56. [Federal Law 'On amending the Federal Law on Limited Liability Companies in terms of improving the procedure for entering into the Unified State Register of Legal Entities information about the withdrawal of a participant of a limited liability company from the company'] (No. 252-FZ issued July 31, 2020, effective August 11, 2020) (Russia), *published in Rossiyskaya Gazeta*, August 05, 2020, available at <https://rg.ru/2020/08/05/vihod-dok.html>.

57. *See* Ruling of the Supreme Court of the Russian Federation, Case: No. 306-ES19-24912 (June 11, 2020), [http://vsrf.ru/stor\\_pdf\\_ec.php?id=1894410](http://vsrf.ru/stor_pdf_ec.php?id=1894410).

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under which certain “direct foreign investments” now require prior governmental authorization.<sup>58</sup>

“Direct foreign investment” is an investment that meets the following two requirements:

- (a) It is carried out by a foreign investor resident in a country outside the EU or the EFTA, or by a resident in the EU/EFTA whose beneficial ownership is held by a non-resident.
- (b) The investor reaches a holding equal to or greater than 10% of the capital of a Spanish target company or, as a result of the transaction, acquires the control of said company according to the terms of the Spanish Antitrust Act.<sup>59</sup>

Direct foreign investments are subject to authorization in both of these scenarios:

- (a) The investment affects one of Spain’s “principal strategic sectors,” namely those related to public order, public security, and public health. In practice, the challenge is identifying the activities included in each of these sectors.
- (b) The investor (i) is controlled by a third-party government; (ii) participates in sectors that affect the public order, public security, or public health of another EU Member State; or (iii) represents a serious risk owing to its engagement in criminal or unlawful activities that may affect public order, public security, or public health.<sup>60</sup>

A simplified authorization procedure exists for transactions where the foreign investment is for an amount between \_1 and \_5 million and for transactions where it can be proved that before March 18, 2020, there was an agreement between the parties or a binding offer in which the price was fixed in a determined or determinable way.<sup>61</sup> Foreign investments for less than \_1 million are considered temporarily exempt and are not subject to prior authorization.<sup>62</sup>

Unless the transaction follows the simplified procedure, the investment must be authorized by the Spanish Council of Ministers, acting on a report from the Board of Foreign Investments. The approval may be subject to the fulfillment of certain conditions. According to the law, the Council of Ministers has six months to issue a decision following receipt of an

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58. See Spanish Act on Foreign Investments art. 7bis, Act n°19/2003, as amended, *available at* <https://www.boe.es/buscar/act.php?id=BOE-A-2003-13471>, effective on March 18, 2020.

59. See Spanish Antitrust Act art. 7.2, Act n°15/2007, as amended, *available at* <https://www.boe.es/buscar/act.php?id=BOE-A-2007-12946>.

60. See *id.*

61. Second transitional provision of Spanish Royal Decree-law 11/2020 on measures to tackle the social and economic impact of COVID-19, *available at* <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4208>, effective on April 2, 2020.

62. *Id.*

authorization request by the General Directorate for International Trade and Investment.

Despite initial uncertainty about how this new regime would affect and potentially slow down foreign investment in Spain, the first impression is far more positive than expected. The Spanish authorities have proved to be collaborative and efficient in the procedures. They have not been overly restrictive in their interpretation of investments falling within the new regime's scope. Based on our experience to date, investments are authorized in a short period. Most transactions following the simplified procedure take no more than a few weeks to be processed.

As a temporary measure, from November 19, 2020, until June 30, 2021, investments made in Spanish listed companies or unlisted companies (in this case, if the value of the investment exceeds EUR 500 million) by residents of EU/EFTA countries other than Spain or by residents in Spain with a beneficial owner in an EU/EFTA country will also be subject to authorization if the investor becomes the holder of participation equal to or greater than ten percent of the capital of a Spanish company or acquires the control of the company and the Spanish target company conducts its business in a strategic sector.<sup>63</sup>

## VIII. Ukraine

Foreign investment screening has become a significant part of national policies around the world. Some countries have respective regimes in place for many years; some jurisdictions are just about to introduce the screenings.

Ukraine is a major industrial state, which has inherited significant industrial assets from the USSR-empire and belongs to the category of jurisdictions that have not implemented respective regimes. However, this is expected to change during the coming year.

### A. THE STATUS QUO

Despite popular opinion, Ukraine remains one of the most open countries for foreign direct investment (FDI). Unlike other mature jurisdictions, there are no regulatory barriers to foreign capital. Strategic global and financial investors have been taking advantage of this freedom during the entire history of independent Ukraine. Various economic sectors of Ukraine benefit from foreign capital.

The only real obstacle, i.e., the regulatory barrier for FDI, is merger control, which is exercised by the Antimonopoly Committee of Ukraine (the Agency). Apart from the very usual competition considerations, in the aftermath of the Russian-Ukrainian tensions, the Agency was vested with the

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63. Transitional provision of Royal Decree-law n°34/2020 on urgent measures to support business solvency and the energy sector, and on tax-related measures, to tackle the health crisis caused by COVID-19, effective Nov. 19, 2020, *available at* <https://www.boe.es/buscar/act.php?id=BOE-A-2020-14368>.

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“unnatural” powers to block transactions involving parties on the domestic sanctions list.

The Ukrainian sanctions list<sup>64</sup> was introduced following the annexation of Crimea by Russia in 2014 and focuses mainly on major Russian businesses and individuals who had been involved in the Russian-Ukrainian conflict.<sup>65</sup>

As usual, politics, discretion, and vested interests were involved, which can lead to a situation where the Agency is widely (mis-) used by politicians as a tool to block transactions. These decisions sometimes have nothing to do with real competition or national security. A situation developed where the Agency lacked efficient legal instruments to block transactions, which led to negative consequences for Ukrainian national security.

This situation has opened a discussion to implement a separate screening regime based on best global practices, similar to CFIUS.

This initiative has coincided with discussions on opening the Ukrainian agricultural land market, which has been under a moratorium for many years, and foreign capital was not welcomed to invest in Ukrainian agricultural land.<sup>66</sup> President Zelenskiy has promised to lift the ban,<sup>67</sup> but the questions of whether and under which conditions foreign capital will get access to the land market are still open. A foreign investment screening regime is a potential response.

**B. THE FUTURE:**

The Cabinet of Ministers of Ukraine has developed a draft law on foreign investments in business entities of strategic importance for the national security.<sup>68</sup>

- (1) The draft law proposes a mechanism to control foreign investment in a wide range of industries, in particular, including defense, telecommunications sectors, and many others.
- (2) The document covers a *broad list of transactions (including foreign-to-foreign)* that must be reported for screening purposes and possible further evaluation (e.g., transactions on establishment/change of control

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64. See [Law of Ukraine “On Sanctions”] (No. 1644 – VII issued August 14, 2014), *available at* <https://zakon.rada.gov.ua/laws/show/2210-14/ed20200213#Text>.

65. Timur Bondaryev, *Ukrainian Sanctions List and Merger Control – Atomic Bomb for Global Transactions?*, (Feb. 2018), <http://competitionlawblog.kluwercompetitionlaw.com/2018/02/20/ukrainian-sanctions-list-merger-control-atomic-bomb-global-transactions/>.

66. See *Ukraine Parliament Extends Ban on Agricultural Land Sales*, VOICE OF AM. (Dec. 7, 2017), <https://www.voanews.com/europe/ukraine-parliament-extends-ban-agricultural-land-sales>.

67. Mathias Williams, *Ukraine president plans land reform, large privatizations*, REUTERS (Sept. 2, 2019), <https://www.reuters.com/article/us-ukraine-president/ukraine-president-plans-land-reform-large-privatizations-idUKKCN1VN102>.

68. See [Draft Law of Ukraine “On Foreign Investments in Business Entities of Strategic Importance for the National Security of Ukraine”], *available at* [https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=70997](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70997).

over companies of strategic importance, direct/indirect acquisitions (= ten percent), management appointment, etc.)

(3) The document provides for a *mandatory notification* (filing) by an investor, following this screening phase, the Ministry grants approval.

(4) If a transaction raises particular concerns, the Ministry will send the files to a specially created inter-departmental commission. The commission will apply specific criteria to determine whether the transaction may proceed.

(5) If the transaction also triggers antitrust filing obligation, respective *merger clearance* may be granted only after approval of the transaction by the commission.

The scope of regulation is not only limited to state-owned [entities].<sup>69</sup> Thus, stock (votes) acquisitions or transfers of control over private and public companies that may impact national security must be checked for compliance with national security interests. According to various estimates, there are approximately 400 companies of strategic importance in Ukraine that potentially fall into the new regime.<sup>70</sup>

## IX. United Kingdom

On March 12, 2020, some eleven days before the UK went into lockdown, Brigadier Acquisition Company Limited (Brigadier) launched a recommended cash offer for Moss Bros Group plc (MB).<sup>71</sup> Established in 1851, MB is one of the UK's leading menswear shops, specializing in suits and dress wear for formal occasions.<sup>72</sup> Completion of the transaction was subject to a number of customary terms and conditions, including the absence of material adverse changes in the business, assets, financial or trading positions or profits, operational performance, or prospects of MB.<sup>73</sup>

On March 23, 2020, MB provided a trading update<sup>74</sup> in which it highlighted the potential impact of COVID-19 as one of several risks to the future performance of the business. The company also stated that it expected that the effects of COVID-19 would significantly reduce revenue and profitability for the year ending January 30, 2021.<sup>75</sup> But it was too early

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69. See Communications Department of the Secretariate of the CMU, Draft Law on the Circulation of Agricultural Land Protects National Interest of Ukraine, STATE SITES OF UKRAINE (Jan. 13, 2020), <https://www.kmu.gov.ua/en/news/zakonoproekt-pro-obig-sg-zemel-zahishchaye-nacionalni-interesi-ukrayini>.

70. See *Ukraine to introduce foreign investment screening mechanism*, Ukrinform (June 3, 2021), <https://www.ukrinform.net/rubric-economy/3174655-ukraine-to-introduce-foreign-investment-screening-mechanism.html>.

71. RNS number 8618F., available at <https://www.londonstockexchange.com/news-article/market-news/recommended-cash-acquisition-of-moss-bros/14457784>.

72. *Id.*

73. Avellum, *supra* note 71.

74. RNS number 1144, available at <https://www.investegate.co.uk/moss-bros-group--mosb-/rns/trading-statement/202003230700091144H/>.

75. *Id.*

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to determine the precise quantum.<sup>76</sup> Prior to the announcement of the trading update, MB had been trading as expected.<sup>77</sup>

On April 22, 2020, MB announced<sup>78</sup> that Brigadier had informed MB that Brigadier sought a ruling from the Panel on Takeovers and Mergers (the Panel) to invoke a condition and to lapse the offer on account of the impact on MB of the COVID-19 pandemic and related UK Government measures. MB lodged a submission with the Panel setting out why it believed there were no grounds for allowing those conditions to be invoked.<sup>79</sup>

On May 19, 2020, the Panel released its ruling<sup>80</sup> on the matter concluding that Brigadier had

not established that the circumstances which give rise to its right to invoke the relevant conditions are of material significance to it in the context of its offer as required by Rule 13.5(a) of the Takeover Code and, therefore, that Brigadier should not be permitted to invoke any of the [r]elevant [c]onditions at this time.<sup>81</sup>

The UK City Code on Takeovers and Mergers (Code)<sup>82</sup> explicitly provides that, except for any acceptance condition, “[a]n offeror should not invoke any condition . . . so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances which give rise to invoke the condition . . . are of material significance to the offeror in the context of the offer.”<sup>83</sup>

The Panel considered the meaning of this rule on appeal during WPP Group plc’s 2001 offer for Tempus Group plc.<sup>84</sup> The particular condition in question was also a MAC condition— “WPP was of the view that there had been a material adverse change in the prospects of Tempus” following the events of 9/11 in the United States.<sup>85</sup> The Panel concluded that the test of “material significance” was not met and its decision stated that “meeting this test requires an adverse change of very considerable significance striking at

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76. *Id.*

77. *Id.*

78. See RNS number 4199K, *available at* <https://www.investegate.co.uk/moss-bros-group--mosb-/rns/offer-update/202004220700024199K/>.

79. *Id.*

80. See Panel Statement 2020/4 dated 19 May 2020, *available at* <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2020/05/Panel-Statement-2020-4.pdf>.

81. *Id.* at 1.

82. *Available at* <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf?v=7Nov2019>.

83. Panel Statement 2020/4, *supra* note 81.

84. As noted in Practice Statement No. 5, Rule 15.5(a) – Invocation of conditions – dated 28 April 2004, last amended 19 September 2011, at page 1.

85. The Takeover Panel, Decision 2001/15 on Offer by WPP Group PLC for Tempus Group PLC, ¶ 1 (Nov. 6, 2001), <https://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/12/2001-15.pdf>.

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the heart of the purpose of the transaction in question, analogous . . . to something that would justify frustration of a legal contract.”<sup>86</sup>

The Moss Bros case reminds us once again that in the UK, the materiality threshold for the invocation of protective conditions in public M&A transactions governed by the Code is very high, and that once a firm offer has been made an offeror must complete the transaction unless the acceptance or regulatory approval conditions were not satisfied.

## **X. United States**

Actions taken by, relating to, or involving the Committee on Foreign Investment in the United States (CFIUS) represented the most significant developments in the United States for cross-border M&A transactions in 2020.<sup>87</sup>

CFIUS is an inter-agency committee, for which the Secretary of the Treasury serves as Chair, which 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.<sup>88</sup> 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.<sup>89</sup>

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded the scope of jurisdiction and powers of CFIUS.<sup>90</sup> Specifically, FIRRMA provided CFIUS with new powers to review transactions involving certain strategically sensitive real estate in the United States and non-controlling investments in U.S. businesses involving certain critical technology, critical infrastructure, or sensitive personal data (TID US Businesses).<sup>91</sup> In addition, FIRRMA strengthened requirements concerning the use of mitigation agreements.<sup>92</sup>

On October 11, 2018, the Treasury Department promulgated two sets of FIRRMA-related implementing regulations. The first set of regulations was largely administrative and served to amend the existing CFIUS regulations to implement certain FIRRMA provisions that took effect immediately upon being signed into law.<sup>93</sup> The other set of regulations enumerated procedures and requirements relating to a pilot program expanding CFIUS jurisdiction

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86. The Panel has subsequently clarified that whilst the standard to invoke a condition is a high one, the test does not require an offeror to demonstrate frustration in the legal sense. *Ibid*, page 2.

87. James Jackson, Cong. Rsch. Serv., RL33388, The Committee on Foreign Investment in the United States (CFIUS) (Feb. 14, 2020).

88. 50 U.S.C. § 4565 (2015); Exec. Order No. 11858, 40 Fed. Reg. 20,263 (May 9, 1975).

89. 50 U.S.C. § 4565(d)(2).

90. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 2177–2207 (2018) (codified at 50 U.S.C. § 4565).

91. *Id.*

92. *Id.*

93. 83 Fed. Reg. 51,316 (Oct. 11, 2018).

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over certain non-controlling foreign investments in companies and requiring that mandatory declarations be filed with CFIUS relating to foreign investments in such companies.<sup>94</sup>

On January 17, 2020, the Treasury Department issued two additional FIRRMA-related final rules, both of which entered into effect as of February 13, 2020. One final rule set forth the scope, process, and procedures relating to the national security review by CFIUS of certain transactions involving the purchase, lease, or concession of certain strategically sensitive real estate in the United States (e.g., certain airports, maritime ports, military installations and specific geographic areas in or around those sites) to a foreign person.<sup>95</sup> The other final rule expanded CFIUS' jurisdiction to review certain non-controlling investments in TID US Businesses and established criteria that would trigger mandatory filing requirements.<sup>96</sup> In addition, both final rules created a new voluntary declaration filing option that is shorter and less detailed than the standard voluntary notice option.<sup>97</sup>

On April 29, 2020, the Treasury Department issued an interim final rule on filing fees. Pursuant to this notice, which entered into effect on May 1, 2020, a fee structure was established that ranges from zero for transactions valued at under \$500,000 up to \$300,000 for transactions valued at or above \$750,000,000.<sup>98</sup>

Finally, on September 15, 2020, the Treasury Department published a final rule that modified the criteria that trigger mandatory filing requirements.<sup>99</sup> Pursuant to this final rule, which took effect on October 15, 2020, mandatory declarations must be filed with CFIUS if a U.S. export license or authorization would be needed to transfer the relevant critical technology to any of the foreign parties involved in the investment transaction.<sup>100</sup> This requirement is subject to certain limited exceptions (e.g., the critical technology could be transferred pursuant to certain license exceptions under the Export Administration Regulations – TSU, ENC, and STA).<sup>101</sup>

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94. 83 Fed. Reg. 51,322 (Oct. 11, 2018).

95. 85 Fed. Reg. 3,158 (Jan. 17, 2020) (to be codified at 31 C.F.R. Part 802).

96. 85 Fed. Reg. 3,112 (Jan. 17, 2020) (to be codified at 31 C.F.R. Parts 800 and 801).

97. 85 Fed. Reg. 3,158, 3,175 (to be codified at 31 C.F.R. Part 802, Subpart D; 85 Fed. Reg. 3,112, 3,140 (to be codified at 31 C.F.R. Part 800, Subpart D).

98. 85 Fed. Reg. 23,736 (Apr. 29, 2020) (to be codified at 31 C.F.R. Parts 800 and 802).

99. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 57,124, 57,124 (Sept. 15, 2020) (to be codified at 31 C.F.R. pt. 800).

100. *Id.*

101. 85 Fed. Reg. 57,124 (Sept. 15, 2020) (to be codified at 31 C.F.R. Part 800).



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## **International Transportation Law**

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This Article updates selected international legal developments in 2020 in International Transportation Law.

### **I. Maritime Law**

#### **A. COVID-19 ISSUES**

As of May 2020, more than forty cruise vessels had confirmed COVID-19 infections, and the Center for Disease Control (CDC) issued and kept issuing *No Sail Orders* (NSO). Lawsuit infection spread as fast as the virus — in a line of cases ranging from individual lawsuits, to mass actions and class actions, for causes and remedies ranging from actual infection injury, to Negligent Infliction of Emotional Distress (NIED)—joining the overcrowded company of the asbestos “Fear Cases.” In fact, the COVID-19 “Fear Cases” draw on the rules developed by the Supreme Court in the asbestos “Fear Cases” trilogy: *Gottshall*,<sup>1</sup> *Metro North*,<sup>2</sup> and *Ayers*.<sup>3</sup>

The *Gottshall* court analyzed three “tests” for granting a NIED remedy, and ruled that the “zone of danger” test was the only good one:

for determining who may recover for negligent infliction of emotional distress limits recovery for emotional injury to those plaintiffs who sustain physical impact as a result of defendant’s negligent conduct or who are placed in immediate risk of physical harm by that conduct.” (emphasis supplied).<sup>4</sup>

*Metro North* added that a worker could not recover for negligently inflicted emotional distress from asbestos exposure without physical symptoms of the disease.<sup>5</sup> The Court held that the critical factor was whether the physical contact with asbestos that accompanied the emotional distress amounted to a

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\* James Henry Bergeron, Attilio M. Costabel (Maritime Law Sections A-C), Peng Xianwei (Maritime Law Section D), James Border (Maritime Law Section D), Jason Drouyor (Aviation Law Section A), Greg Maddaleni (Aviation Law Section B).

1. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994).

2. Metro North Commuter R. Co. v. Buckley, 21 U.S. 424 (1997).

3. Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003).

4. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994).

5. *Metro North*, 21 U.S. at 424.

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‘physical impact’ under the “first prong” of the “zone of danger” test as defined by *Gottsbll*.<sup>6</sup>

*Metro North* made only an indirect reference to the ‘second prong’ from *Gottsbll*: whether the plaintiff is placed in immediate risk of physical harm.<sup>7</sup> The concurrent opinion of J. Ginsburg remedied the vagueness, making it clear that the plaintiff’s claim failed because he did not present objective evidence of severe *emotional distress* (not of the feared illness).<sup>8</sup> In J. Ginsburg’s words: “[h]owever, he sought no professional help to ease his distress, and presented no medical testimony concerning his mental health.”<sup>9</sup>

Later, J. Ginsburg made a last fix by delivering the opinion in *Norfolk & Western Ry. Co. v. Ayers*,<sup>10</sup> and answering the question of whether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under FELA without proof of physical manifestations of the claimed emotional distress. The answer is a qualified no: “it is incumbent upon such a plaintiff to prove that his alleged fear is genuine and serious.”<sup>11</sup> The latest version of the Trilogy Rule thus appears to be that under the “second prong” of the “zone of danger” test, the plaintiff is not required to prove having contracted the very same illness that was feared but has to supply strict and credible evidence of symptoms of fear.<sup>12</sup>

1. *The Trilogy for Cruise Lines*

Having this clear, now comes *Weissberger v. Princess Cruise Lines, Ltd.*<sup>13</sup> The GRAND PRINCESS, operated by Princess Cruise Lines, Ltd. (Princess) departed San Francisco for Hawaii on February 21, 2020, with 3,533 people on board. As of March 6th, twenty-one passengers out of forty-six<sup>14</sup> tested had been found positive, and numbers were climbing. When the ship docked at Oakland on March 9th, plaintiffs Ronald and Eva Weissberger (the Weissbergers), still on the ship, filed a lawsuit against Princess, alleging negligence and gross negligence, and seeking NIED damages based on their fear of contracting COVID-19 while quarantined on the ship. The Weissbergers did not test positive or manifest symptoms for COVID-19. Numerous other lawsuits soon followed, virtually identical, involving plaintiffs seeking to recover on fear of contracting COVID-19 while onboard.

Princess filed a motion to dismiss arguing that the plaintiffs failed to allege that they were in the “zone of danger” for contracting COVID-19 and,

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6. *Gottsbll*, 512 U.S. at 547.

7. *Metro North*, 21 U.S. at 430.

8. *Id.*

9. *Metro North*, 21 U.S. at 2125.

10. *Norfolk & Western*, 538 U.S. at 135.

11. *Id.*

12. *Id.*

13. *Weissberger v. Princess Cruise Lines, Ltd.*, 2020 WL 3977938, at \*1 (U.S.D.C CD California) (Jul. 14, 2020).

14. *Id.*

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alternatively, that the plaintiffs failed to state a claim because they did not allege that their emotional distress manifested in any physical symptoms.<sup>15</sup>

The *Weissberger* court granted the defendant's motion on the basis of *Metro North's* rendition of prongs one and two of the "zone of danger" test.<sup>16</sup> The plaintiffs argued that, by proceeding under the second prong, they did not need to demonstrate that they manifested symptoms of COVID-19, but that it was sufficient that they experienced a "near miss" with the disease.<sup>17</sup> Conversely, Princess argued that, under *Metro-North*, the plaintiffs' claims were barred regardless of what prong of the zone of danger test they proceeded under—that to recover on a disease-based emotional-distress claim, the plaintiff must allege either that they contracted that *same* disease or that they exhibit symptoms of it.<sup>18</sup>

The court sided with Princess: "The Court agrees that, under *Metro-North*, the Plaintiffs in this case cannot recover for NIED based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease."<sup>19</sup> And, to be clear, the court added:

For one, Plaintiffs' proposed reading of *Metro-North* would lead to bizarre results. Under *Metro-North*, a passenger aboard the *Grand Princess* who was merely exposed to an individual with COVID-19 could only recover under the first prong of the zone of danger test if they either contracted COVID-19 or manifested symptoms of it. Yet under Plaintiffs' proposed interpretation, that same passenger could recover without manifesting any symptoms whatsoever so long as they cleverly pled their claim under the second prong of the test. This result is nonsensical and "means that it would be possible to sneak in through the back door what the Court [in *Metro-North*] expressly forb[ade] from coming in through the front." In short, the exception would swallow the rule.<sup>20</sup>

The court's wording seems to confirm that the plaintiffs must allege either that they contracted that *same* disease or that they exhibit symptoms of it, a requirement of the first, not the second prong, which the court seemed to consider an "exception" rather than an alternative.<sup>21</sup> The court's opinion then concludes in a manner even more perplexing:

the Court finds that Plaintiffs fail to state a claim because they fail to allege that they were within the zone of danger. As Plaintiffs have disembarked the *Grand Princess*, there is no longer a risk of contracting

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15. *Id.*

16. *Id.* at \*3.

17. *Id.*

18. *Id.*

19. *Weissberger*, 2020 WL 3977938, at \*3.

20. *Id.*

21. *Id.*

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COVID-19 on the ship. The Court thus grants Defendant's Motion with prejudice, as leave to amend would be futile.<sup>22</sup>

This appears to contradict the facts as reported that the Weissbergers were *still quarantined onboard* when they filed their lawsuit and therefore still in the "zone of danger," with the result that the dismissal was granted on failure to state a claim.

The Weissberger order was issued in chambers on July 14, 2020. Just two months later, on September 17, 2020, the same judge for the Central District of California, R. Gary Klausner, in a companion case out of the same cruise as Weissberger, granted the plaintiffs' Motion for Leave to Amend. In *Geraldine Drake et al v. Princess Cruise Lines Lt*,<sup>23</sup> plaintiffs Geraldine Drake, Mario Batz, Brian Kirby, and Aurora Kirby, having been quarantined on board (just as the Weissbergers), filed lawsuit against Princess on April 24, 2020, about a month after all the passengers had disembarked.<sup>24</sup> Geraldine Drake and Brian Kirby alleged contracted COVID-19 at an unspecified point, while Mario Batz and Aurora Kirby did not allege having contracted the virus.<sup>25</sup> Pending before the court were Defendant's Motion to Dismiss and Plaintiffs' Unopposed Motion for Leave to Amend.

Judge Klausner granted the plaintiffs' leave to file a First Amended Complaint and denied as moot Defendant's Motion to Dismiss, without giving any reason, other than the plaintiffs' motion being not opposed.<sup>26</sup> The result was at odds with *Weissberger*. The plaintiffs had all disembarked when the lawsuit was filed and two of the plaintiffs admitted having not contracted the disease.<sup>27</sup> Under the grounds of the *Weissberger* decision, the case would have been thrown out as futile.

But plaintiffs and courts were learning. In *Hook v. Holland America Line N.V.*<sup>28</sup>, a fact pattern satisfied both *Metro North* and J. Ginsburg that led to a plaintiffs' victory. Kenneth and Nora Hook, passengers on the MV ZAANDAM of Holland America Lines (HAL), in the midst of the COVID-19 crisis, suffered from contracting COVID-19 (Kenneth) and manifested COVID-19 symptoms, such as sore throat, cough, rash, and fatigue (Nora). The plaintiffs sued HAL on two counts: that HAL acted negligently by allowing the ZAANDAM to sail, by failing to reasonably screen passengers and crew, by failing to timely and effectively implement precautions, and by

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22. *Id.*

23. *Geraldine Drake et al v. Princess Cruise Lines Lt*, 2020 WL 6541984, at \*1 (USDC Cal. Sep. 17, 2020).

24. See *Covid-19 Pandemic on Grand Princess*, WIKIPEDIA (last edited Mar. 11, 2021), [https://en.wikipedia.org/wiki/COVID-19\\_pandemic\\_on\\_Grand\\_Princess](https://en.wikipedia.org/wiki/COVID-19_pandemic_on_Grand_Princess).

25. *Geraldine Drake*, 2020 WL 6541984, at \*1.

26. *Id.*

27. *Id.*

28. *Hook v. Holland America Line N.V.*, 2020 WL 6504325, (U. S. D.C., W.D. Washington at Seattle, Nov. 5, 2020).

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unreasonably promoting the consumption of alcohol.<sup>29</sup> Nora Hook sued for NIED.

The court found that the Plaintiffs adequately alleged that HAL had actual and/or constructive notice of the COVID-19 pandemic and that Nora Hook sufficiently alleged a claim for NIED.<sup>30</sup> In the case of Nora Hook, the complaint alleged that she suffered symptoms associated with COVID-19, therefore the allegations were enough to satisfy even the *Weissberger* judge.<sup>31</sup>

On April 8, 2020, during these individual actions, a putative class action was filed in the Central District of California, under the style of *Robert Archer et al. v. Carnival Corporation and PLC et al.*<sup>32</sup> Before the court was Plaintiffs' Motion to Certify Class and Appoint Class Representatives and Class Counsel, a motion Judge Klausner denied.<sup>33</sup> This time, the judge did not have to struggle with impact, "zone of danger" or bystander issues. The contracts of passage contained a class-action-waiver clause which defendants promptly raised. Proceeding in chamber, Judge Klausner found that the waiver was good and enforceable.<sup>34</sup>

Almost contemporaneously with the filing of *Archer v. Carnival*, another COVID-19 related class action was filed in Florida on April 7, 2020, this time in connection with a Mediterranean cruise on the MV COSTA LUMINOSA, under the style of *Turner v. Costa Crociere S.P.A.*<sup>35</sup> The causes of action and demands were almost the same: (1) negligence, (2) negligent infliction of emotional distress, (3) intentional infliction of emotional distress, (4) misleading advertising, and (5) negligent misrepresentation.<sup>36</sup>

The named defendants were Costa Crociere S.P.A., and Costa Cruise Lines Inc., the latter being a Florida domestic corporation and the former a foreign corporation, incorporated in Italy and "domesticated" in Florida, that is registered with the Florida Division of Corporations, and admitted doing business in Florida.<sup>37</sup> As such, Costa Crociere S.P.A was amenable to

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29. On a colorful note, the complaint alleges that when the ship arrived at Valparaiso, she was not allowed to dock, was circled by Coast Guard and Police, yet the HAL kept calling her a "healthy ship" allowing passengers to roam free and responding to the virus impact by offering wine.

30. *Hook*, 2020 WL 6504325, at \*2.

31. The recount of the ordeal of the family is horrifying and it may be instructive for a human understanding of these cases to read the complaint *available at* [https://plus.lexis.com/document/?pdmfid=1530671&crd=24a46780-af67-4c31-ba22-0b46b3de61bc&pdcontentfullpath=%2Fshared%2Fdocument%2Fbriefs-pleadings-motions%2Furn%3AcontentItem%3A607T-XVD1-F528-G2FB-00000-00&pdcontentcomponentid=109140&pdworkfolderlocatorid=NOT\\_SAVED\\_IN\\_WORKFOLDER&prid=A13acbe2-e535-4a02-a39e-8d176439984e&ecomp=ZT4k&earg=SR1](https://plus.lexis.com/document/?pdmfid=1530671&crd=24a46780-af67-4c31-ba22-0b46b3de61bc&pdcontentfullpath=%2Fshared%2Fdocument%2Fbriefs-pleadings-motions%2Furn%3AcontentItem%3A607T-XVD1-F528-G2FB-00000-00&pdcontentcomponentid=109140&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=A13acbe2-e535-4a02-a39e-8d176439984e&ecomp=ZT4k&earg=SR1).

32. *Archer v. Carnival Corporation and PLC*, 2020 WL 6260003 (U.S.D.C. CD California 2020).

33. *Id.* at \*2.

34. *Id.* at \*5.

35. *Turner v. Costa Crociere S.P.A.*, 2020 WL 5868148, (U.S.D.C S.D. Fla 2020).

36. *Id.*

37. *Id.*

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be sued in Florida under general jurisdiction, even if the complained breaches and torts had been committed abroad.<sup>38</sup>

But as in *Archer*, the passage tickets contained a poison pill: a forum selection clause mandating that all actions be brought into Italian courts.<sup>39</sup> The Florida court enforced the clause with extensive reasons: that the passenger's claims fell within the scope of the clause, enforcement of the clause was not precluded by federal law prohibiting limitations of liability in maritime contracts, the passenger lacked standing to challenge the clause on behalf of putative class members who were minors, that enforcement of the clause was not fundamentally unfair, that Italy was an available forum as a factor favoring enforcement—that public interest factors weighed in favor of enforcement, and that a passenger could reinstate his lawsuit in Italy without undue prejudice, as a factor favoring enforcement.<sup>40</sup>

In theory, this would not be the death of the case, as a procedural device of class action now exists in Italy as well with Law 31/2019, whose effective date was delayed to November 19, 2020, due to virus restrictions and is still in its infancy.

**B. CRUISE PASSENGERS CLAIMS**

*1. Duty To Warn Related to Sexual Assaults*

In last year's edition of YIR, we reported an important decision of the Eleventh Circuit on sex assaults on board a ship. *K.T. v. Royal Caribbean Cruises, Ltd.*,<sup>41</sup> found that the cruise line was responsible for the rape of a minor passenger by other passengers under the theory of liability of failure of duty to warn. *K.T.* also found that the duty existed because, in the words of the court, "These shipboard incidents are reported by Defendant itself, directly to the Secretary of Transportation and/or the Federal Bureau of Investigation." These allegations are sufficient to show that Royal Caribbean was aware of prior incidents of sexual assault aboard its vessels.<sup>42</sup>

This year the Southern District of Florida has followed, applied and reconfirmed *K.T.* in *Doe (K.U.) v. Royal Caribbean Cruises Ltd.*,<sup>43</sup> adding an interesting twist. In *Doe (K.U.)* the complaint alleged that the passenger "was visibly intoxicated, disoriented and crying while sitting in a passenger cabin hallway aboard the vessel" before she was sexually assaulted by another passenger.<sup>44</sup> Plaintiff added, "that a crewmember approached Plaintiff in her disoriented state but failed to offer her any assistance, which resulted in her

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38. *Id.*

39. *Id.*

40. *Id.*

41. *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041 (2019).

42. *Id.* at 1050.

43. *Doe (K.U.) v. Royal Caribbean Cruises Ltd.*, 2020 WL 5215067 (USDC, S.D. Florida, Miami Division, 2020).

44. *Id.*

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being sexually assaulted by another passenger shortly thereafter.”<sup>45</sup> The plaintiff then asserted claims for Negligent Failure to Warn (Count I), Negligent Security (Count II), and General Negligence (Count III).<sup>46</sup>

Royal Caribbean moved to dismiss the amended complaint in its entirety for failure to state a claim, which the court denied, holding the allegations were sufficient to show that Royal Caribbean was aware of prior incidents of sexual assault aboard its vessels.<sup>47</sup> Citing *K.T.* repeatedly, the court added “it would be absurd to suggest that a multi-billion-dollar business like Royal Caribbean was not aware of congressional reports about the problem of sexual assaults aboard its cruise ships.”<sup>48</sup>

The interesting addition of *Doe (K.U.)* to *K.T.* is the claim that a crewmember’s failure to offer assistance *resulted* in the sexual assault by another passenger.<sup>49</sup> The court denied the motion to dismiss and gave the defendants time to answer the complaint, so we do not know whether a factor of duty to intervene, with accompanying issues of causation, will be added to the specific duty to warn of sexual assault dangers.<sup>50</sup>

## 2. *Discovery - Evidence of Prior Incidents*

In *Sweeney v. Carnival Corporation*,<sup>51</sup> a cruise ship passenger died because of injuries sustained while riding an all-terrain vehicle during a shore excursion in St. Lucia and his estate sued Carnival for a failure to warn. The plaintiff’s estate filed a motion to compel answer to interrogatory about other incidents in which cruise ship passengers were killed or injured during all-terrain vehicle excursions, in order to prove Carnival’s knowledge of dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit, and consequent breach of that duty.<sup>52</sup> In particular, Plaintiff’s Interrogatory Number 9 asked to “provide the following information on all incidents of Carnival Cruise passengers who suffered/reported injury when participating in All-Terrain Vehicle (ATV) excursion tours within Carnival’s entire shore excursion portfolio from 11/01/2015 to 11/01/2018.”<sup>53</sup>

Carnival opposed the interrogatory; nevertheless, it supplied information about the specific excursion in St Lucia. <sup>54</sup> The plaintiff argued that notice need not be tied to one specific spot or location to give rise to a duty to

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Doe (K.U.)*, 2020 WL 5215067, at \*2.

50. *Id.*

51. *Sweeney v. Carnival Corporation*, 2020 WL 4718436, (U.S.D.C. S.D. Florida, Miami Division, 2020).

52. *Id.* at \*3.

53. *Id.*

54. *Id.*



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warn, as long as risk-creating conditions are similar.<sup>55</sup> The court allowed the interrogatory by confirming the existence of the duty and holding the purpose of the interrogatory permissible because nothing about the specific St. Lucia ATV excursion would negate that Carnival should have warned about the dangers inherent in taking an ATV excursion anywhere in the world as a part of a cruise.<sup>56</sup> The court reached this conclusion by relying on *K.T. v. Royal Caribbean Cruises*.<sup>57</sup>

The court made it clear that its order was only and exclusively on discovery but could not resist the temptation to add its own salacious comment:

The Undersigned is surprised (and somewhat bewildered) that Carnival says that there were no other prior ATV incidents at the St. Lucia ATV location during the three-year period. This reaction does not mean that the Undersigned views Carnival’s representation to be inaccurate. But it does mean that I think it prudent for Carnival to double-check the accuracy of its earlier “no-prior-incidents” response.<sup>58</sup>

This case is a healthy alert to defendants and plaintiffs and a signal that *K.T.* may become the standard test of the duty to warn theory of liability.<sup>59</sup>

### 3. *Evidence/Res Ipsa Loquitur*

In *Tesoriero v. Carnival Corporation*,<sup>60</sup> a cruise ship passenger, who was injured when a chair in her cabin collapsed, brought an action against the cruise line, seeking to recover for her injury and alleging that the cruise line had failed to inspect and maintain the cabin furniture, or else warn her of the danger the chair posed.

The Southern District of Florida granted the defendant summary judgment on the grounds that the evidence demonstrated that “no reasonable inspection could have discovered the dangerous condition without first deconstructing the cabin chair.”<sup>61</sup> On appeal, the passenger raised the alternative argument that the collapse of the chair created Carnival’s liability under the doctrine of *res ipsa loquitur* (RIL), which, plaintiffs argued, obviates the need for notice.<sup>62</sup>

The Eleventh Circuit addressed the issue as a matter of first impression, holding that a passenger who relies on RIL bears the burden of showing that the cruise line had notice of the risk-creating condition, abrogating a long line of cases that held otherwise.<sup>63</sup> The court started noting that the

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55. *Id.*

56. *Id.*

57. *Sweeney*, 2020 WL 4718436, at \*1.

58. *Id.*

59. *Id.*

60. *Tesoriero v. Carnival Corporation*, 965 F.3d 1170 (2020).

61. *Id.* at 1177.

62. *Id.* at 1178.

63. *Id.* at 1184.

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doctrine of RIL is not unique, but neither is it routine in the admiralty context, citing a conflict of opinions in the circuit.<sup>64</sup>

“Res ipsa loquitur,” the court said, “leads only to the conclusion that the defendant has not exercised reasonable care, and is not itself any proof that he was under a duty to do so,” adding that “*res ipsa loquitur can allow a jury to infer from circumstantial evidence that the defendant must have breached its duty—but it cannot show that a defendant must have had that duty in the first place.*”<sup>65</sup>

For the moment, this is the Eleventh Circuit’s position on RIL as seen in the context of maritime law.<sup>66</sup>

C. DEATH ON HIGH SEAS ACT (DOHSA)

In *Patricia LaCourse v. PAE Worldwide Incorporated*,<sup>67</sup> the Eleventh Circuit decided a wrongful death case brought by the widow of Matthew LaCourse, a retired Air Force Lieutenant Colonel employed as a civilian by the Department of Defense, against PAE Worldwide Incorporated for failing to properly service and maintain the F-16 that her husband was flying when it crashed into the Gulf of Mexico more than twelve nautical miles offshore, causing his death.

The wrongful-death action with jury demand was filed in Florida state court, alleging state-law claims for negligence, breach of warranty, and breach of contract, and was removed to federal court.<sup>68</sup> One of the main issues before the court was to decide whether and to what extent the Death on the High Seas Act, 46 U.S.C. §§ 30301–08, was applicable.<sup>69</sup> The plaintiff argued that DOHSA did not apply because the asserted “wrongful act, neglect, or default”—PAE’s negligent maintenance of the F-16—did not occur on the high seas.<sup>70</sup> The plaintiff also challenged federal jurisdiction because of lack of a “maritime nexus,” with reference to the principle derived from *Executive Jet*,<sup>71</sup> that an airplane accident may be in admiralty jurisdiction when the airplane performs the function of a ship, of which it would be considered the equivalent.

Citing *Offshore Logistics v Tallentire*,<sup>72</sup> the court disagreed, reaffirming that the occurrence of a death on the high seas is a sufficient condition for DOHSA’s application—without any further maritime-nexus element. The court also denied the breach-of-warranty and breach-of-contract claims—both of which were initially brought under Florida’s Wrongful Death Act, Fla. Stat. § 768.16, on the ground that where DOHSA applies it “preempts

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64. *Id.* at 1181–82.

65. *Id.*

66. See *Tesoriero*, 965 F.3d at 1181–82.

67. No. 19-13883, D.C. Docket No. 3:16-cv-00170-RV-HTC, 17 November 2020.

68. *LaCourse v. PAE Worldwide Inc.*, 980 F.3d 1350, 1354 (11th Cir. 2020).

69. *Id.* at 1352.

70. *Id.* at 1355.

71. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249 (1972).

72. *Offshore Logistics v. Tallentire*, 106 S.Ct. 2485 (1986).

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all other forms of wrongful death claims.”<sup>73</sup> This case is a healthy reminder of a simple tenet of maritime law, that under *Offshore Logistics*, DOHSA § 30308 preserves only state-court jurisdiction—not state substantive wrongful-death law—and where DOHSA applies, it preempts all other wrongful-death claims under state or general maritime law.<sup>74</sup>

**D. MV RICH FOREST: LATENT DEFECT AS AN EXEMPTION FOR  
CARRIER LIABILITY DEVELOPMENTS IN CHINESE MARITIME  
LAW**

On December 24, 2019, the Supreme Court of China issued its (2019) ZGFMS no. 4594 civil ruling,<sup>75</sup> which upheld a carrier’s defense of latent defect in a marine cargo claim case. The standard of applying the latent defect defense is high, and it is not easy to persuade a court (especially the Supreme Court) to accept it. <sup>76</sup> The Chinese Maritime Code (1993, hereafter referred to as CMC) is the main legal basis of codified maritime laws in China and Chapter IV (carriage of goods by sea) of CMC is modeled on the Hague-Visby Rules.<sup>77</sup> Art. 51 of the CMC provides that: “The carrier shall not be liable for the loss of or damage to the goods occurred during the period of carrier’s responsibility arising or resulting from any of the following causes: . . . (11) Latent defect of the ship not discoverable by due diligence.”<sup>78</sup>

In recent years, the most famous case whereby a Chinese court upheld the carrier’s defense of latent defect in cargo claim cases was the *MV MOL COMFORT* case. On June 17, 2013, a modern 8,110 TEU container ship, the *MV MOL COMFORT* (ex *APL Russia*), built in 2008 by MHI Nagasaki Shipyard split in two while on transit from Singapore to Jeddah (Saudi Arabia).<sup>79</sup> The crew escaped the sinking ship on two life rafts and a lifeboat.<sup>80</sup> This accident caused a series of cargo claim litigations in Chinese court against the owners. Finally, in *United Gulf Factory for Plastic Products Co Ltd v. Mitsui Osk Lines Ltd.*, the High People’s Court of Zhejiang Province decided that:

the respondent (MITSUI OSK LINES LTD) had exercised due diligence to make the vessel seaworthy before and at the beginning of

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73. *LaCourse*, 980 F.3d at 1358.

74. *Id.*

75. Judgment (in Chinese) available at <http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXS4/index.html?docId=0e2763dced264f5d8d3aab8a01163b34>, and Chinese translation will be available at Chinese Maritime & Commercial Law Reports published by Informa Law.

76. *Id.*

77. Nick Yuan & Hector Fan, China: Shipping Laws 2020, ICLG (2020).

78. Chinese Mar. Code Art. 51.

79. *MOL Comfort Casualty Report*, ROYAL INSTITUTION OF NAVAL ARCHITECTS, [https://www.rina.org.uk/mol\\_comfort\\_accident.html](https://www.rina.org.uk/mol_comfort_accident.html) (last visited May 20, 2021).

80. See *MOL Comfort Casualty Report*, available at [https://www.rina.org.uk/mol\\_comfort\\_accident.html](https://www.rina.org.uk/mol_comfort_accident.html).

the voyage and did not overload the vessel, nor could NKK find any defects through a daily inspection, the trial court held that the loss of the vessel was caused by a latent defect of the vessel not discoverable by exercising due diligence. Pursuant to the Chinese Maritime Code, the carrier was not liable for such a loss.<sup>81</sup>

In December 2013, MV RICH FOREST carried a cargo of logs from the Solomon Islands to the port of Jingjiang in China. On January 20, 2014, *en route* to Guam, Japan there was an accident involving the seawater rupture of a cooling pipe for the auxiliary engine.<sup>82</sup> Between 0145 and 1350, the crew tried various methods to plug the leak but failed to stop the seawater from continuing to flow inward. Electromechanical equipment and generators malfunctioned, and the ship tilted four degrees. The ship rocked and bobbed violently due to bad weather, and finally, the master announced the abandonment of the vessel.<sup>83</sup> Search and rescue vessels were mobilized to save the MV RICH FOREST, but by January 30, 2014, no trace of it could be found. Rescue efforts ceased with a presumed total loss of the vessel. A total of 1,689 logs in 4,348.053m<sup>3</sup> were also deemed a total loss.<sup>84</sup>

The cargo insurer compensated the cargo receiver for the loss of cargo and then launched a subrogation claim against the carrier. The carrier invoked several defenses, its main defense being that the accident was caused by a latent defect of the vessel. During litigation, both the insurer and the carrier engaged expert opinion, and the court entrusted another expert to conduct an independent analysis.

Ultimately, the Supreme Court decided that the loss was caused by a latent defect and that the carrier should be exempted from cargo loss liability by reason that:

the ship involved in the case carried out “leak checking of all pipelines” and “load testing” in January 2012 when it was docked for repair, and the seawater pipes in the relevant parts were replaced or changed, the seawater cooling pipes were carefully checked, and the seawater pipes without obvious wear and corrosion were not replaced. After the repair was completed, all pipes of the auxiliary engine were re-checked and load tests were done and the results were normal. The “Expert Opinion” also states that the next special docking inspection of the vessel was scheduled for March 2014, i.e., two months after the accident. One month before the accident, the chief engineer and second engineer carried out daily maintenance such as rust removal and cleaning of the relevant seawater pump, piping system and seawater valve in accordance with the inspection cycle and content as specified by the SMS system. Taking into account that the weather was bad at the time of the accident, there were big winds and high waves, and the three

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81. *See* Chinese Maritime & Commercial Law Reports, [2018] 2 CMCLR 9.

82. *Id.*

83. *See id.*

84. MOL Comfort Casualty Report, *supra* note 80.

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PSC inspections of the vessel in June 2012, January 2013 and May 2013 did not have any detention record, the court does not support the assertion of the insurer that the carrier could have detected the latent defects of the pipeline by a more cautious and reasonable way.<sup>85</sup>(emphasis supplied)

As noted, it is rare for the carrier to succeed in defense of latent defect, and such cases rely heavily on their factual basis and expert assessment. Although still a case-by-case matter, this judgment will be a guiding signal that Chinese courts might apply similar reasoning in the future.

E. TAXATION: BEPS AND INTERNATIONAL TRANSPORTATION BY SEA

The Organization for Economic Cooperation and Development (OECD) has been engaged, at the behest of the G20, in an extensive project to address perceived abuses and gaps in the taxation of multinational enterprises.<sup>86</sup> This project, the Base Erosion and Profit Shifting Project (BEPS), has resulted in fifteen separate Action Plans,<sup>87</sup> including one to address changes arising from the digital economy.<sup>88</sup> The “problem” that the digitization action plan addresses is the absence of an ability of source states to tax income derived by foreign enterprises in the absence of a physical presence or permanent establishment, resulting in countries enacting, or proposing, digital service taxes targeting revenues from internet advertising and other income from digitally provided services.<sup>89</sup>

To build on the work authorized by the G20 and avoid implementation of unilateral measures, the OECD issued a policy note approved by the Inclusive Framework on BEPS<sup>90</sup> and developed a work program to achieve an international consensus solution to the tax challenges of digitization.<sup>91</sup> This project, sometimes referred to as BEPS 2.0, consists of two “Pillars”:

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85. *Id.*

86. G20 Leaders Declaration, Los Cabos, Mexico, June 19, 2012, at para. 48, *available at* <http://www.g20.utoronto.ca/2012/2012-0619-loscabos.pdf>.

87. OECD (2015), *Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris.

88. OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241046-en>.

89. *Id.*

90. See OECD (2020), *Progress Report July 2019-July 2020*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2019-july-2020.pdf> (Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note, as approved by the Inclusive Framework on BEPS on 23 January 2019, OECD 2019).

91. OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS*, OECD Publishing, Paris. <http://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm>.

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The OECD's proposal consists of revised nexus and profit allocation rules (Pillar One) and a Global Anti-Base Erosion Proposal (GloBE) (Pillar Two) to ensure "enough" tax is paid somewhere.<sup>92</sup>

Pillar One is broader than digital businesses and will change the taxation of all international business with combined revenues greater than \$750 million.<sup>93</sup> It establishes a new nexus standard that is not dependent on physical presence but is largely based on sales in all consumer transactions, granting taxing rights to market jurisdictions.<sup>94</sup> Originally, only extractive industries were excluded from its application.<sup>95</sup>

Extending source-based taxation to international transportation directly conflicts with the international norm of residence-only taxation, which recognizes that the income of international transportation is earned through the employment of labor and capital largely outside the jurisdiction of any country.<sup>96</sup> This international norm is included in the OECD, United Nations, and United States model tax conventions as well as the "vast majority" of the 3,500 bilateral tax treaties currently in force.<sup>97</sup> Implementation of the OECD Pillar One proposal would require substantial modification to all these conventions, most likely through implementing a multilateral instrument.<sup>98</sup>

But following the Pillar One consultation, the OECD/G20 Inclusive Framework on BEPS issued the Pillar One Blueprint,<sup>99</sup> a consensus statement that it would be "inappropriate to include airline and shipping businesses in the scope of the new taxing right."<sup>100</sup> This conclusion and the logic behind it was clearly set forth in the Pillar One Blueprint issued in October 2020.<sup>101</sup> The international transportation income that is beyond

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92. *Id.*

93. OECD, PUBLIC CONSULTATION DOCUMENT, SECRETARIAT PROPOSAL FOR A "UNIFIED APPROACH" UNDER PILLAR ONE 7 (2019) [hereinafter Public consultation document].

94. *Id.* at 5.

95. OECD (2019), *Public consultation document, Secretariat Proposal for a "unified Approach" under Pillar One*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf>.

96. OECD, TAX CHALLENGES ARISING FROM DIGITALISATION – REPORT ON PILLAR ONE BLUEPRINT: INCLUSIVE FRAMEWORK ON BEPS 56 (2020) [hereinafter Pillar One].

97. OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*. OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/beba0634-en>.

98. Pillar One, *supra* note 96 § 3.3.

99. OECD (2020), *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*. OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/beba0634-en>.

100. OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy – January 2020*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris, [www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf](http://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf) [hereinafter Two-Pillar Approach].

101. *Id.* at 156–164.

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the scope of Pillar One would be subject to residence taxation under Article 8 of the OECD MC (or other applicable treaty).<sup>102</sup>

The OECD also issued the Pillar Two Blueprint concerning the minimum tax, or GloBE, proposals.<sup>103</sup> These proposals have two separate aspects.<sup>104</sup> The first is a top-up minimum tax (the “Income Inclusion Rule” or IIR) at a rate yet to be determined.<sup>105</sup> This is designed to ensure that large multinational groups pay a minimum level of tax.<sup>106</sup> The second, an undertaxed payment rule (UTPR) that serves as a backstop to the Income Inclusion Rule by denying deductions or introducing source-based taxation in certain circumstances.<sup>107</sup>

Although certain taxpayers have been excluded from the application of Pillar Two,<sup>108</sup> unlike Pillar One, there currently is no consensus regarding the application of Pillar Two to international transportation generally and international shipping specifically.<sup>109</sup> The consequence of including shipping within Pillar Two would be, from a residence country standpoint, the undermining of existing tax policies developed to encourage domestic shipping, such as tonnage taxes, all of which have previously been deemed not harmful by the OECD.<sup>110</sup> Further, given the tax regimes applicable to shipping, the possibility exists that income earned by a subsidiary could be subject to the IIR in its jurisdiction of residence as well as that of its parent.<sup>111</sup> These considerations have been noted by the OECD and are discussed in the Pillar Two Blueprint.<sup>112</sup> Applying the UTPR to payments received for shipping services undermines residence only taxation of shipping under Article 8 OECD MC.<sup>113</sup>

At the time of writing, both Blueprints are the subject of a public consultation initiated in October 2020 with input requested by December

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102. *Id.* at 164.

103. OECD (2020) *Tax Challenges Arising from digitalization – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <https://doi.org/10.1787/abb4c3d1-en>.

104. *Id.* at 15.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* § 2.3 (These include investment funds, pension funds, governmental entities, international organizations, and non-profit organizations).

109. Two-Pillar Approach, *supra* note 100, at p.110.

110. OECD (2004), *Consolidated Application Note – Guidance in Applying the 1998 Report to Preferential Tax Regimes*, Chapter VIII: Shipping, <https://www.oecd.org/tax/harmful/30901132.pdf>.

111. *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint*, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT UNDERTAXED PAYMENTS RULE (2020), <https://www.oecd-ilibrary.org/docserver/abb4c3d1-en.pdf?expires=1621013336&id=id&accname=guest&checksum=4769113E08521043F30142CEAF7F8D1F>.

112. *Tax Challenges Arising from digitalization*, *supra* note 103, at 111.

113. *Id.*

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14, 2020.<sup>114</sup> A meeting will be held in mid-January 2021 to discuss the comments received and the Inclusive Framework on BEPS is working towards reaching a conclusion by mid-2021.<sup>115</sup>

## II. Aviation Law

### A. THE COVID-19 RESPONSE

It would be an understatement to say the aviation industry experienced a turbulent year. Worldwide travel restrictions, bans, and fears concerning a global pandemic have led to air carriers canceling thousands of flights with some carriers grounding and outright retiring part of their fleet.<sup>116</sup> As of November 24, 2020, the International Civil Aviation Organization (ICAO) estimated that passenger capacity for 2020 has dropped by fifty-one percent, with an estimated \$389 billion to \$391 billion loss in gross revenue.<sup>117</sup> While not an exhaustive list, here are some notable measures undertaken to respond to the global pandemic that aim to assist the domestic and international aviation sector.<sup>118</sup>

On March 16, 2020, the Federal Aviation Administration (FAA) announced a limited waiver for the minimum use requirement for John F. Kennedy International Airport (JFK), New York LaGuardia Airport (LGA), and Ronald Reagan Washington National Airport (DCA).<sup>119</sup> Commonly known as slots, carriers are required to receive prior authorization before scheduling a landing or departure at an airport.<sup>120</sup> Some airports require a carrier to dedicate a certain volume of traffic before such authorization is given, leading to the practice of “ghost flights” with little to no passengers for the sole purpose of meeting minimum use requirements.<sup>121</sup> Swift action was undertaken to prevent such practices by announcing a waiver of

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114. OECD (2020) *Public Consultation Document on the Reports on the Pillar One and Pillar Two Blueprints, OECD/G20 Inclusive Framework on BEPS*, OECD Publishing, Paris, <http://www.oecd.org/tax/beps/public-consultation-document-reports-on-pillar-one-and-pillar-two-blueprints-october-2020.pdf>.

115. See *Coronavirus Fears Lead to Cancel Flights And Concerns within The Travel Industry*, NPR (March 3, 2020, 10:55 AM), <https://www.npr.org/2020/03/04/812026357/coronavirus-fears-lead-to-canceled-flights-and-concerns-within-the-travel-indust>.

116. *Id.*

117. Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis, International Civil Aviation Organization (Nov. 24, 2020), <https://www.icao.int/sustainability/Documents/COVID-19/ICAO%20COVID%202020%2011%2024%20Economic%20Impact.pdf>.

118. *Orders Limiting Operations at John F. Kennedy*, 85 Fed. Reg. 58, 16989 (March 25, 2020).

119. FAA Notice of Limited Waiver of the Minimum Slot Usage Requirements, 85 FR 15018 (Mar. 16, 2020).

120. Paul Sillers, *Ghost flights: Why our skies are full of empty planes*, CNN (Mar. 12, 2020), <https://www.cnn.com/travel/article/airport-slots-ghost-flights/index.html>.

121. Ghost flights: Why our skies are full of empty planes, CNN (Mar. 12, 2020) <https://www.cnn.com/travel/article/airport-slots-ghost-flights/index.html>.



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minimum usage requirements.<sup>122</sup> Although originally set to expire on May 31, 2020, this measure has been extended multiple times and is presently extended through March 27, 2021.<sup>123</sup>

On March 27, 2020, the Coronavirus Air, Relief, and Economic Security (CARES) Act was passed and signed into law.<sup>124</sup> CARES provided domestic carriers with access to loans and loan guarantees.<sup>125</sup> CARES also provided for a tax holiday that would benefit both domestic and foreign air carriers—most notably, relief from excise taxes.<sup>126</sup> Grants were created to provide financial assistance for paying employees' wages, salaries, and benefits.<sup>127</sup> Additionally, "grants-in-aid" were made available to airports to assist in preparing for and responding to the global pandemic.<sup>128</sup>

On April 3, 2020, the Department of Transportation (DOT) issued an enforcement notice reminding air carriers of their obligations to passengers whose flights were canceled due to COVID-19 travel restrictions.<sup>129</sup> DOT became concerned about an increase in complaints regarding passengers being denied a refund in favor of vouchers or credits for future travel.<sup>130</sup> DOT clarified its position by stating that the standard determining refund is whether the flight disruption was caused by no fault of the passenger, not whether it was within or outside the carrier's control.<sup>131</sup> Although this may have technically placed some carriers in violation, DOT recognized the extenuating circumstances and announced that it would allow carriers an opportunity to become compliant before taking any enforcement action.<sup>132</sup> Carriers in violation would still have to meet certain requirements such as notifying passengers that they have the option of a refund who were only provided a voucher or credit.<sup>133</sup>

**B. DEVELOPMENTS IN CANADA DRONE REGULATION**

2020 has been the first full year that the new Canada drone regulations have been in force.<sup>134</sup> Last year, Canada introduced Regulations Amending

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122. FAA Notice of Limited Waiver of the Minimum Slot Usage Requirements, 85 FR 15018 (Mar. 16, 2020).

123. Extension of Limited Waiver of the Minimum Slot Usage Requirement, 85 FR 63335 (Oct. 7, 2020).

124. See Coronavirus Air, Relief, and Economic Security (CARES) Act, Public Law 116-136.

125. CARES Act, Public Law 116-136, § 4003(b)(1) and (2).

126. CARES Act, Public Law 116-136, § 4007.

127. CARES Act, Public Law 116-136, § 4112.

128. CARES Act, Public Law 116-136, Division B – Emergency Appropriations for Coronavirus Health Response and Agency Operations, Federal Aviation Administration, Grants-In-Aid for Airports.

129. U.S. Department of Transportation, *Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel* (April 3, 2020).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Canadian Aviation Regulations, SOR/96-433, Sec. 900.01 (Can.).

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the Canadian Aviation Regulations (Remotely Piloted Aircraft Systems).<sup>135</sup> In March 2020, Transport Canada released a new and dedicated drone chapter to its Aeronautical Information Manual (the AIM).<sup>136</sup> First, it is important to summarize the main aspects of the current regulations.<sup>137</sup> Once these main aspects have been reviewed, it is possible to address new clarifications coming from the dedicated AIM chapter.<sup>138</sup>

The current regulations divide drones into three weight-based classifications: drones under 250g (~0.5 lbs), 250g-25kg (0.5-55lbs) and over 25kg.<sup>139</sup> Drones in the first (lightest) category are not subject to regulation.<sup>140</sup> This classification includes many toy or hobby drones.<sup>141</sup> Drones in the second (middle) classification are considered “small drones” and fall under these regulations.<sup>142</sup> The altitude limitation of small drones is 122 meters (400 ft.).<sup>143</sup> Drones in the third (heaviest) classification also fall under these regulations and requires that the pilot obtain a special flight operations certificate.<sup>144</sup>

The 2019 Canadian regulations also focus on how the drones are used: basic operations and advanced operations.<sup>145</sup> Basic operations are “conducted outside of controlled airspace, more than thirty meters (100 feet) away (horizontally) from bystanders, and more than three nautical miles from an airport (or more than one mile of a heliport).”<sup>146</sup> To conduct basic operations, the minimum age is fourteen years old and requires a basic operations certificate.<sup>147</sup> Advanced operations are conducted within the same physical parameters but within controlled airspace.<sup>148</sup> The minimum age for advanced operations is sixteen years old. Advanced operations have further requirements in addition to an advanced pilot certificate, including completion of an online knowledge exam, completion of a flight review with a Transport Canada-approved trainer.<sup>149</sup>

AIM is a single source document that Transport Canada updates to guide pilots and other aircraft personnel regarding applicable rules, regulations,

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135. *Id.*

136. Transport Canada Aeronautical Information Manual (TC AIM), *RPA – Remotely Piloted Aircraft* 431–56 (Mar. 26, 2020).

137. Canadian Aviation Regulations, *supra* note 134.

138. Transport Canada Aeronautical Information Manual, *supra* note 136, at 431–56.

139. Matt Clark, Christina Isnardi & Lisa Ellman, *Canada’s New Drone Regulations Take Effect: How They Compare to the U.S. Regulations* (June 25, 2019), <https://www.hldrondeblog.com/2019/06/canadas-new-drone-regulations-take-effect-how-they-compare-to-the-u-s-regulations/>.

140. *Id.*

141. *Id.*

142. *Id.*

143. Canadian Aviation Regulations, *supra* note 134, § 901.25.

144. *Id.* § 903.02.

145. Clark et al, *supra* note 139.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

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and procedures for Canadian aircraft operations.<sup>150</sup> The new dedicated chapter for drones in 2020 focuses on these items specific to drones.<sup>151</sup> The chapter is organized between drones under 250 g (“micro drones”) and drones above 250g but below 25kg (“small drones”).<sup>152</sup> It does not address drones over 25kg.<sup>153</sup> Within the section on small drones, it further details the specifics regarding basic operations and advanced operations.<sup>154</sup> These include the requirements needed for each type of operation and, for advanced operations, guidance on flying near people and over people.<sup>155</sup>

Other key highlights in the section include what governs micro drones.<sup>156</sup> As mentioned earlier, micro drones are not regulated by the Canadian Aviation Regulations (CAR) specific to drones (Part IX).<sup>157</sup> Instead, micro drones are governed by CAR 900.06, which states that a drone or other aircraft cannot be handled negligently to endanger aviation safety or other people.<sup>158</sup> The AIM chapter also addresses requirements for night operations (which include requiring specific equipment on the drone).<sup>159</sup> And, the chapter addresses privacy.<sup>160</sup> Privacy is not regulated from CAR Part IX but rather from other Canadian laws and regulations, including the Privacy Act, the Personal Information Protection and Electronic Documents Act, and provincial privacy legislation.<sup>161</sup> Finally, the chapter addresses what is meant by being “part of the operation.”<sup>162</sup> Individuals considered part of the operation are not considered bystanders, and the thirty-meter horizontal limit does not apply.<sup>163</sup> To be considered part of the operation, the individual needs to be advised of the operation and allowed to leave the area prior to its commencement.<sup>164</sup>

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150. Transport Canada Aeronautical Information Manual, *supra* note 136, at 431–56.

151. *Id.*

152. *Id.* at 437.

153. *Id.*

154. *Id.* at 458–61.

155. *Id.* at 461.

156. Kathryn McCulloch, *New direction to drone pilots in Transport Canada’s Aeronautical Information Manual* (April 22, 2020), <http://www.dronelawcanada.com/new-direction-to-drone-pilots-on-operational-safety-and-compliance-with-the-cars-in-transport-canadas-aeronautical-information-manual/>.

157. *Id.*

158. *Id.*

159. Transport Canada Aeronautical Information Manual, *supra* note 136, at 454.

160. McCulloch, *New direction to drone pilots in Transport Canada’s Aeronautical Information Manual*, <http://www.dronelawcanada.com>.

161. Transport Canada Aeronautical Information Manual, *supra* note 136, at 437.

162. McCulloch, *supra* note 160.

163. *Id.*

164. Transport Canada Aeronautical Information Manual, *supra* note 136, at 447.

## **International Anti-Money Laundering**

ALBERT JANET\*

### **I. Introduction**

With the fourth and fifth AML Directives, the European Union has strengthened its legal framework to combat money laundering and terrorist financing.<sup>1</sup> These two directives have now been transposed in most European countries.<sup>2</sup> France provides a paradigmatic example of how such legislation can be implemented – albeit slightly after the deadline – in a Member State.

The important statute, which was enacted, at least in part, to transpose the fifth AML directive, is law no. 2019-486 of May 22, 2019, relating to the growth and transformation of companies, known as the “PACT” law.<sup>3</sup> It forms the basis for another act, the ordinance of February 12, 2020,<sup>4</sup> which reinforced the national AML/CFT system. This ordinance was promulgated along with two implementing decrees.

The ordinance of February 12, 2020, provides for the transposition measures of the fifth AML directive, which had entered into force on July 10, 2018, and had set a transposition deadline of eighteen months, which

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1. See Council Directive 2015/849, 2015 O.J (L 141/73); see also Council Directive 2018/843, 2018 O.J. (L 156/43).

2. See *id.*; See also *Anti-Money Laundering Directive IV (AMLD IV) – Transpositional Status*, EUROPEAN COMMISSION (Oct. 5, 2020), [https://ec.europa.eu/info/publications/anti-money-laundering-directive-4-transposition-status\\_en](https://ec.europa.eu/info/publications/anti-money-laundering-directive-4-transposition-status_en); *Anti-Money Laundering Directive V (AMLD V) – Transpositional Status*, EUROPEAN COMMISSION (June 2, 2020), [https://ec.europa.eu/info/publications/anti-money-laundering-directive-5-transposition-status\\_en](https://ec.europa.eu/info/publications/anti-money-laundering-directive-5-transposition-status_en).[https://ec.europa.eu/info/publications/anti-money-laundering-directive-5-transposition-status\\_en](https://ec.europa.eu/info/publications/anti-money-laundering-directive-5-transposition-status_en) (The 4th AML directive was transposed in all EU countries, but infringement proceedings are pending against 5 Member States (Czech Republic, Denmark, Ireland, Italy, and Romania) due to the lack or delay of the transposition measures or their incompleteness. The full transposition status is 89% (24 Member States). The 5th AML directive was transposed in 19 Member States (the full transposition status is 70%). No transposition measures were communicated by Cyprus. Partial transposition measures were communicated by Belgium, the Czech Republic, Hungary, Ireland, Netherlands, Poland and Spain. Status: 25 November 2020.).

3. *Loi 2019-486 du 22 mai 2019 relative à la croissance et la transformation de entreprises* [Law 2018-486 of May 22, 2019 on Business Growth and Transformation], *Journal Officiel de la République Française* [J.O.] [OFFICIAL GAZETTE OF FRANCE] Feb. 13, 2020.

4. *Ordonnance 2020-115 du 12 février 2020 relative à la croissance et la transformation des entreprises* [Ordinance 2020-15 of February 12, 2020 on Strengthening the National System for Combating Money Laundering and the Financing of Terrorism], *Journal Officiel de la République Française* [J.O.] [OFFICIAL GAZETTE OF FRANCE] Feb. 12, 2020.

expired on January 10, 2020.<sup>5</sup> The ordinance also aimed to complete the transposition of the fourth AML directive. It allowed for an increased level of efficiency by extending the scope of persons involved in the fight against AML/CFT, by strengthening the due diligence obligations of entities subject to the fight against FT money laundering, and by making the register of beneficial owners of legal entities and trusts a key point in the preventive measures against money laundering and terrorist financing.<sup>6</sup>

This article will address some aspects of the new legal arsenal set up by the French legislators to continue fighting money laundering and drying up terrorist financing channels.

## **II. The Failure to Identify Beneficial Owners is Severely Punished in France**

With the new legislation, the obligation to identify beneficial owners is an obligation not only on companies but also on the beneficial owners themselves.<sup>7</sup> White collar crime frequently misuses legal entities. Among the various existing corporate forms, those that ensure maximum anonymity for their beneficial owners are favored by offenders and therefore give rise to the most frequent abuses.

Since February 12, 2020, anonymity is losing ground in an effort to combat money laundering.<sup>8</sup> The obligation to declare the beneficial owner testifies to an effort to find the individual behind the corporate veil. It is essentially the third EU Directive, which has introduced the obligation to identify the beneficial owner for the entities subject to anti-money laundering measures, before being extended to companies by the fourth Directive, and to the beneficial owners themselves by the effect of the fifth Directive. In accordance with the requirements of this directive, the new ordinance introduces two new things. The duty to identify the beneficial owners – which concerns both companies and beneficial owners – and new incrimination attached to breaches of this duty.<sup>9</sup>

On the one hand, the obligation to obtain and keep accurate and up-to-date information on their beneficial owners does not provide for any criminal penalties. On the other hand, failure to file the document relating to the beneficial owner with the Commercial Register, as well as the filing of a document containing inaccurate or incomplete information, is punishable by six months imprisonment and a fine of EUR 7,500.<sup>10</sup>

Whereas the fourth directive in article 30, section 1 merely set out an obligation to maintain adequate, accurate, and up-to-date information on their beneficial owners, the 5th directive goes further and adds to article 30,

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Code monétaire et financier* [Monetary and Financial Code] 574-5.

section 1, paragraph 1 of the fourth directive that Member States must ensure that breaches are punished by effective, proportionate, and dissuasive measures.<sup>11</sup> The fifth directive had reaffirmed after the fourth that,

The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise be able to hide their identity behind a corporate structure. The globally interconnected financial system makes it possible to hide and move funds around the world, and money launderers and terrorist financiers as well as other criminals have increasingly made use of that possibility.<sup>12</sup>

Financial engineering can certainly pursue tax or legal optimization objectives. But if no such objective can be demonstrated, the complexity or the opacity of the legal make-up will undoubtedly lead to the presumption that it is disguised money laundering. The company's defense may consist in demonstrating that it respected its due diligence obligations and that it solicited—but in vain—its beneficial owner to obtain the information that would enable it to satisfy its obligation to declare the beneficial owner to the register. It can also use a civil injunction to this effect and may become suspicious if it does not. Companies will also need to report to the clerk in charge of the register of the Commercial Court any discrepancies which they may observe between the information recorded in the commercial registry—to which they have access—and the information on beneficial owners in their possession.<sup>13</sup> This new regulation imposes a proactive approach on individuals and companies. It confirms the usefulness of compliance measures to create an environment that must become “hostile to criminals seeking shelter for their finances through non-transparent structures.”<sup>14</sup>

### **III. French Courts Struggle to Define the Proper Degree of Identification of Beneficial Owners**

Since April 1, 2018, millions of French companies have been required to declare their beneficial owners (*i.e.* individuals who benefit from the company's activity or who exercise influence over it). The process consists first in identifying these beneficial owners, then in completing the documents proposed by the commercial court registrars, and finally in paying the corresponding fees. The question that arises in this respect is how far the declarant must go in terms of precision, and more specifically whether the percentage of capital or voting rights held must be indicated.

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11. Directive 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.

12. *Id.*

13. See *id.* § 4; *Code monétaire et financier* [Monetary and Financial Code] 561-47.

14. See Directive (EU) 2018/843, *supra* note 11.

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This question has no definitive answer, neither in the European text nor in the transposition text.<sup>15</sup> Hence, two interpretations are possible. Either one considers that it is sufficient to indicate that a person is a beneficial owner without specifying to what degree, for example by indicating that he or she directly holds more than twenty-five percent of the capital such that he or she exercises control over the company;<sup>16</sup> or the situation of the beneficial owner should be detailed, indicating the percentage of shares held or mentioning a shareholders' agreement under which he or she has the power to appoint a majority of the company's directors. The consequences are not insignificant because the information given is accessible to many people, especially because (EU) Directive 2018/843 requests that this information be accessible "to any member of the general public".<sup>17</sup>

It has been observed that the registrars in charge of maintaining the register of beneficial owners tend to request information that is not expressly required by applicable law (including requests for information on the percentage of shares held by the beneficial owner). In case of disagreement between the registrar and the declarants about the extent of the information to be transmitted, the judge in charge of supervising the commercial registry is called upon to rule on that matter. By mid-2020, while few court decisions had been handed down on the content of these declarations, some guidance has been provided.

In a first set of decisions, the judges considered that the obligations of the declarants should reach a certain level of detail. One decision of May 18, 2018 states that,

with regard to the objectives pursued by national and European legislation, the specification of the percentage of capital and/or voting rights held above the 25% threshold is essential to explain in concrete terms the methods of control or the benefit derived by the beneficial owner and, incidentally, to ensure the effectiveness of the control and verification by the competent authorities of the information contained in the declarations.<sup>18</sup>

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15. Directive 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 (Article 30 of the 20 May 2015 Directive merely stated that corporate and other legal entities incorporated are required to obtain and hold "adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held.").

16. See *Code monétaire et financier* [Monetary and Financial Code] 561-1 (Fr) (This corresponds to the definition given by the Monetary and Financial Code 561-1, which states that a beneficial owner is a person who directly or indirectly holds more than 25% of the company's capital or voting rights, or who exercises, by any other means, a power of control over the company.).

17. See Directive (EU) 2018/843, *supra* note 11.

18. *Tribunal de Commerce* [commercial court] Bobigny, May 18, 2018, 2018S07031.

The challenge is to distinguish the different situations between that of a partner holding only a blocking minority and that of a majority partner who is in a position to control the company. The court also specified that “the obligation to identify the beneficial owner cannot be deemed to have been met with regard to the transparency objective in the absence of the indication of the exact percentage of capital and/or voting rights held by the beneficial owner in the reporting company.”<sup>19</sup> In a similar decision, the judges considered that “the determination of the beneficial owner consists in . . . requiring that the natural person be required to disclose the precise percentage of capital or voting rights held in the reporting company.”<sup>20</sup> But at the date of this decision, the law did not require the indication of the precise percentage held. To obtain this kind of information, the registrars may request the disclosure of information contained in shareholders’ agreements to better ascertain the situation of a beneficial owner. The confidentiality of these agreements could be threatened by these requirements for disclosure.<sup>21</sup>

Another court decision adopted a more restrictive interpretation of the reporting obligations. A judgment of the Marseilles Regional Court of 25 June 2019 held that the legal provision on beneficial owners “simply provides for reference to a threshold of 25% of the share capital without any further details, and without a specific percentage.”<sup>22</sup> Thus, the court clerk who had rejected the declaration for lack of precision had made an interpretation which was “certainly in accordance with the spirit of the law” but which had “gone beyond what the law strictly provided for.”<sup>23</sup>

Thus, there is still some vagueness on the question of the precision of the declaration to which beneficial owners are bound. This uncertainty stems from the different possible interpretations of the text of the law and will no doubt be removed when the French Supreme Court (*Cour de cassation*) is called upon to rule on this issue.

#### **IV. Fundraising in the Form of Initial Coin Offerings Trigger New Risks Of Abuse**

TRACFIN, the French intelligence unit in charge of the fight against illegal financial transactions<sup>24</sup> has wished to draw the attention of the public to the dangers of fundraising in the form of Initial Coin Offerings (ICO’s).<sup>25</sup>

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19. *Id.*

20. *Cour D’Appel* [CA] [regional court of appeal] Lyon, *3ème chambre* A, Sept. 12, 2019, 19/02040.

21. B. Dondero, *Le degré d’identification du bénéficiaire effectif*, *JCP Entreprise et Affaires* n° 36, 2 September 2020, 1330.

22. Directive (EU) 2018/843, *supra* note 11.

23. *Id.*

24. The acronym means *Traitement du Renseignement et Action contre les Circuits FINANCIERS clandestins*. The agency is part of the French Ministry of Finance and is responsible for the fight against tax and customs frauds, as well as against financial crimes.

25. See France’s Financial Intelligence Unit, TRACFIN Annual Report 2018, at 68 (2018).



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During an ICO, a company issues tokens as a source of funding. Investors subscribe to tokens and can thus access products or services from this company. Through the purchase of tokens, investors do not acquire any ownership in the company, but acquired tokens can be traded on a secondary market.<sup>26</sup> This form of financing is a viable alternative to traditional funding for tech startups, or companies that do not have easy access to traditional bank financing due to their small size, the nature of their business, or the sector in which they operate.

The value of the tokens depends on the expected profitability of the project, and the more lucrative the project, the more profitable the token will be. There is therefore a strong speculative dimension to the issuance and purchase of tokens, which is illustrated by the possible loss of the entire investment since the existence of a secondary market is not always guaranteed.

In France, a law was enacted on May 22, 2019,<sup>27</sup> known as the “PACTE” law. It provides that issuers who carry out an initial coin offering may apply for a visa from the market regulatory authority (AMF).<sup>28</sup> This visa is optional, but only initial coin offerings that have received AMF approval may be marketed directly to the public in France. If the issuing company wants to receive the visa, it may draw up a white paper at the time of the ICO, containing the technical, financial and commercial characteristics of the project on which the issuance of the token is based. This document must provide the public with all useful information concerning the proposed offering and the issuer. The information document may be drawn up in English (or in another language), provided that it be accompanied by a summary in French.<sup>29</sup> The document, as well as promotional communications relating to the public offering, shall present content that is accurate, clear and not misleading.<sup>30</sup> It must specify the risks related to the offering and must comprise a commitment to provide the subscribers annually with information on the use made of the assets collected.<sup>31</sup> Additionally, the token issuer must be a legal entity established or registered in France.<sup>32</sup> This visa is granted if the document is complete and comprehensible to investors and if the draft promotional communications intended for the public after granting the visa seem adequate.

If, after having granted its visa, the stock market regulatory authority notes that the offering no longer complies with the content of the information document, it may order that all communications concerning the offering which refer to its visa be terminated, and it may withdraw its visa

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26. *ICO Vs IPO: Dey Differences*, COINTELEGRAPH, <https://cointelegraph.com/ico-101/ico-vs-ipo-key-differences> (last visited Mar. 30, 2021).

27. Loi 2019-486, *supra* note 3.

28. *Id.*

29. *Code monétaire et financier* [Monetary and Financial Code] 552-4.

30. *Id.*

31. *Id.*

32. *Code monétaire et financier* [Monetary and Financial Code] 552-5.

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permanently or until the issuer again complies with the conditions of the visa.<sup>33</sup> Furthermore, if false or misleading information is subsequently released by the issuer in connection with the granting of the visa or its scope, the stock market regulator may make a public statement mentioning these facts and the persons responsible for these communications.<sup>34</sup>

At the end of this process, two lists are established: a “white list” containing the ICO’s that have received the visa from the regulatory authority (the AMF issues its approval to an ICO and not to a token issuer), and a black list.<sup>35</sup> If issuers disseminate false or misleading information during the ICO or if they falsely advertise that they have obtained the visa, they can be punished by a six-month prison sentence and a fine of \_7,500.<sup>36</sup>

This important development marks an improvement towards a greater safety of ICOs, which tend to be misused for fraudulent purposes.<sup>37</sup> TRACFIN gives an example of how an ICO can be a tool to defraud investors: a person organizes an ICO to finance the creation of a token and dozens of individuals invest in the project—with the help of promoters who receive commissions to promote this investment. The total amount of the investment is then received by the issuer from accounts held abroad or by a company with no economic link to the project, managed by an acquaintance of the issuer. Although some informational elements are available and a white paper has been drafted, the project does not present any technical and economic reality: no company issuing the ICO has been identified, the members of the team dedicated to the launch of this new token have no experience in providing such services and the rights attached to the tokens have not been clearly identified. Moreover, the price evolution of the token has the characteristics of a “pump and dump” type of market manipulation, consisting of artificially inflating the asset price through a massive purchase of assets to attract investors. The managers resell their pumped assets when they have reached their highest value. The price then falls sharply, deceiving the second wave of investors.<sup>38</sup>

In this case, the launch of an ICO in connection with opaque investments involving foreign accounts is a warning signal. A company managed by someone close to the issuer but with no connection with the project itself is also suspicious, as is the lack of information relating to the technical reality of the project, or the pump and dump type manipulation of the market. This illustrates the need for governmental agencies to keep one step ahead of financial criminals, by constantly updating their technical and legal arsenal in the rapidly changing landscape of crypto assets.

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33. *Id.* at 552-6.

34. *Id.*

35. The white list containing the ICO’s that have obtained the AMF approval is very limited, with only 3 issuers as of October 2020.

36. *Code monétaire et financier* 574-5, *supra* note 10.

37. TRACFIN Annual Report, *supra* note 25 at 69.

38. Symposium, Jiahua Xu and Benjamin Livshits, *The Anatomy of a Cryptocurrency Pump-and-Dump Scheme*, USENIX SECURITY SYMPOSIUM, 3 (2018).

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## **International Antitrust**

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This Article reviews some of the most significant international legal developments made in the area of antitrust law in 2020.

### **I. Argentina**

#### **A. ANTITRUST REGULATIONS**

The Argentine Antitrust Law<sup>1</sup> was enacted in 2018. The year 2020 served as a test of the application of new regulations issued by the Antitrust Commission.<sup>2</sup>

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1. Law No. 27,442, May 5, 2018, 33671/18 B.O. (Arg.).

2. See *Guidelines on Defense of Competition for Associations and Business Chambers and Colleges and Professional Associations*, COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA (Dec. 2018); *Argentine Merger Control Guidelines*, COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA (Dec. 2018), [https://www.argentina.gob.ar/sites/default/files/english\\_version\\_guidelines\\_0.pdf](https://www.argentina.gob.ar/sites/default/files/english_version_guidelines_0.pdf); see also *Guidelines for the Analysis of Cases of Exclusionary Abuse of Dominance*, COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA (May 2019), [https://www.argentina.gob.ar/sites/default/files/guias\\_abuso\\_posicion\\_dominante\\_ev.pdf](https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf).

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During the past year, the Antitrust Commission also issued the Guidelines for Market Studies.<sup>3</sup> These Guidelines set out internal guidance and procedures for conducting market investigations. They also establish the methodology that external consultants should follow for market studies commissioned by the Antitrust Commission. The Antitrust Commission is expected to issue three additional areas of guidance in the coming year concerning (1) M&A notification and exceptions;<sup>4</sup> (2) market investigations; and (3) the implementation of the Leniency Program.

In addition, in March 2020, the Supermarkets' Shelf Law<sup>5</sup> was issued. The law creates a Code of Good Commercial Practices of Wholesale and Retail Distribution. Although the law is not directly related to antitrust, it addresses practices considered abusive under the Antitrust Law and Consumer Protection Law. In the event of a violation, sanctions under the Antitrust Law apply.

In November 2020, a bill was proposed that, if the Argentine Parliament approves, would amend the Antitrust Law to (i) make the mandatory pre-closing notification system of economic concentrations operational within ninety days after the publication of the law in the Official Gazette; (ii) allow the Executive Power to designate members of the National Competition Authority, eliminating the two-tier procedure involving both the Parliament and Executive Power; (iii) eliminate the controversial Section 29, which allows the Antitrust Authority to approve agreements that, though absolutely restrictive of competition, are not detrimental to the general economic interest; and (iv) clarify that a defendant who participates in the Leniency Program is immune from imprisonment, so long as the criminal investigation was not initiated before leniency was requested.<sup>6</sup>

## B. CONDUCT INVESTIGATIONS

In the context of the COVID-19 health emergency, the Secretariat of Trade has undertaken measures aimed at guaranteeing the supply of and access to essential food, hygiene, and healthcare products. As part of these efforts, it fixed maximum prices for more than 2500 mass consumer goods

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3. *Guidelines for Market Studies*, COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA (Mar. 6, 2020), [https://www.argentina.gob.ar/sites/default/files/lineamientos\\_generales\\_para\\_estudios\\_de\\_mercado.pdf](https://www.argentina.gob.ar/sites/default/files/lineamientos_generales_para_estudios_de_mercado.pdf).

4. *See Draft of Guidelines for the Notification of Economic Concentrations*, COMISIÓN NACIONAL DE DEFENSA DE LA COMPETENCIA (February 2019), [https://www.argentina.gob.ar/sites/default/files/traducccion\\_ingles\\_guia\\_notificacion\\_1.pdf](https://www.argentina.gob.ar/sites/default/files/traducccion_ingles_guia_notificacion_1.pdf).

5. Miguel del Pino & Santiago del Río, *New Supermarket Shelf Law in Argentina*, MARVAL, O'FARREL, & MAIRAL (Mar. 18, 2020), <https://www.marval.com/publicacion/nueva-ley-de-gondolas-en-argentina-13544&lang=en>.

6. Miguel del Pino & Santiago del Río, *The Public Competition Enforcement Review: Argentina*, THE L. REVS. (Apr. 8, 2021), <https://thelawreviews.co.uk/title/the-public-competition-enforcement-review/argentina#:~:text=ON%2030%20November%202020%2C%20a,2021%20and%2028%20February%202021>.

and pharmaceutical products.<sup>7</sup> It also ordered the Antitrust Commission to initiate market investigations to identify potential anti-competitive practices. Those investigations are mainly in the meat cattle, pharmaceutical, and medical liquid oxygen markets.

## II. Australia

### A. LEGISLATIVE DEVELOPMENTS

In July 2020, the Australian Competition and Consumer Commission (ACCC) released draft legislation that would establish a mandatory news media bargaining code of conduct. The code is intended to address bargaining power imbalances between Australian news businesses and digital platform services (Google and Facebook).<sup>8</sup> The draft code has drawn considerable public debate, including criticism from Google and Facebook.<sup>9</sup>

### B. MERGERS

As of June 30, 2020, the ACCC decided 108 mergers without market inquiries.<sup>10</sup> As of November 26, 2020, the ACCC conducted informal public inquiries for twenty-eight mergers: fifteen were unopposed, three were subjected to divestitures, and ten were either withdrawn or no decision was rendered.<sup>11</sup> The ACCC formally authorized one merger, *Gumtree/Cox Australia*, after concluding the merger would not substantially lessen competition.<sup>12</sup>

The ACCC lost two significant contested merger cases:

- In *Vodafone/TPG*, the ACCC alleged that absent the merger, TPG would have rolled out Australia's fourth mobile network and become a

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7. Market Intelligence, *Argentina Consumer Goods*, INT'L TRADE ADMIN. (June 30, 2021), <https://www.trade.gov/market-intelligence/argentina-consumer-goods> (last visited May 28, 2021).

8. *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020*, ACCC (Dec. 9, 2020), <https://www.accc.gov.au/system/files/Exposure%20Draft%20EM%20-%20NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%20BILL%202020.pdf> (last visited May 20, 2021).

9. See, e.g., Mel Silva, *Australia's News Media Bargaining Code: an update*, GOOGLE (Nov. 15, 2020), <https://blog.google/around-the-globe/google-asia/australia/australias-news-media-bargaining-code-update/>; see also Will Easton, *An Update About Changes to Facebook's Services in Australia*, FACEBOOK (Aug. 31, 2020), <https://about.fb.com/news/2020/08/changes-to-face-books-services-in-australia/>.

10. *Sailing Steady in Rough Seas: Mergers in 2020*, GILBERT & TOBIN (Nov. 23, 2020), <https://www.gtlaw.com.au/insights/sailing-steady-rough-seas-mergers-2020>.

11. See generally *Public Informal Merger Reviews*, ACCC <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews> (last visited May 20, 2021).

12. *Determination: Application for merger Authorisation*, ACCC (Apr. 30, 2020), [https://www.accc.gov.au/system/files/public-registers/documents/Determination%20-%2030.04.20%20-%20PR%20-%20MA1000019%20Gumtree%20Cox\\_0.pdf](https://www.accc.gov.au/system/files/public-registers/documents/Determination%20-%2030.04.20%20-%20PR%20-%20MA1000019%20Gumtree%20Cox_0.pdf).

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competitive operator, but the court found that to be “extremely unlikely.”<sup>13</sup>

- In *Pacific National/Aurizon*, the appellate court overturned a decision involving interstate rail linehaul services, holding the acquisition would not substantially lessen competition, even though the prospect of new entry absent the acquisition was only speculative.<sup>14</sup> The ACCC is applying for special leave to appeal.<sup>15</sup>

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The ACCC has not brought new criminal cartel proceedings this year, but there have been developments in existing matters:

(1) Guilty pleas in the *Wallenius Wilhelmsen*<sup>16</sup> cartel and *BlueScope – Jason Ellis* obstruction matters;<sup>17</sup>

(2) Progress in committal proceedings in the banking cartel case relating to an institutional share placement;<sup>18</sup> and

(3) pre-trial hearings in the Country Care case.<sup>19</sup>

The ACCC also commenced civil actions for alleged cartel conduct in the overhead crane industry<sup>20</sup> and alleged resale price maintenance in the wholesale supply of sporting products.<sup>21</sup>

D. DOMINANCE

Two market power cases were also brought during the last year. In December 2019, the ACCC brought proceedings against Tasmanian Ports Corporation, its first case “under the amended misuse of market power

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13. *Vodafone Hutchison Australia Pty Ltd v ACCC* [2020] FCA 117, ¶ 10 (13 Feb. 2020) (Austl.).

14. *ACCC v. Pac. Nat'l Pty Ltd.* [2020] FCAFC 77, ¶ 263 (6 May 2020) (Austl.).

15. See *ACCC Applies to the High Court for Special Leave to Appeal Pacific National Merger Decision*, ACCC (June 26, 2020), <https://www.accc.gov.au/media-release/accc-applies-to-the-high-court-for-special-leave-to-appeal-pacific-national-merger-decision>.

16. See *Wallenius Wilhelmsen Pleads Guilty to Criminal Cartel Conduct*, ACCC (June 18, 2020), <https://www.accc.gov.au/media-release/wallenius-wilhelmsen-pleads-guilty-to-criminal-cartel-conduct>.

17. *Ex BlueScope GM Jason Ellis Pleads Guilty to Obstructing Cartel Investigation*, ACCC (Sept. 1, 2020), <https://www.accc.gov.au/media-release/ex-bluescope-gm-jason-ellis-pleads-guilty-to-obstructing-cartel-investigation>.

18. Pamela Williams, *Investment Bankers Back in the Spotlight as Cartel Case Resumes*, AUSTL. FIN. REV. (July 2, 2020, 12:01 AM), <https://www.afr.com/companies/financial-services/investment-bankers-back-in-the-spotlight-as-cartel-case-resumes-20200701-p557zh>.

19. *List of Orders*, Commonwealth Cts. Portal, [https://www.comcourts.gov.au/file/FEDERAL/P/VID224/2019/order\\_list](https://www.comcourts.gov.au/file/FEDERAL/P/VID224/2019/order_list) (last visited May 20, 2021).

20. *Action Against TasPorts for Alleged Misuse of Market Power*, ACCC (Dec. 9, 2020), <https://www.accc.gov.au/media-release/action-against-tasports-for-alleged-misuse-of-market-power>.

21. *FE Sports Allegedly Engaged in Resale Price Maintenance*, ACCC (Oct. 14, 2020), <https://www.accc.gov.au/media-release/fe-sports-allegedly-engaged-in-resale-price-maintenance>.

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provision.”<sup>22</sup> In November 2020, Epic Games commenced proceedings against Apple in the Federal Court, alleging misuse of market power.<sup>23</sup>

### III. Brazil

#### A. LEGISLATIVE DEVELOPMENTS

Brazil undertook legislative efforts in reaction to the COVID-19 pandemic. The Administrative Council for Economic Defense (CADE) implemented internal regulatory changes to allow public servants and commissioners to do their work remotely. Congress enacted Law No. 14.010, which temporarily suspended provisions of the Antitrust law (Law No. 12.529) that required the review of certain commercial agreements among competitors.<sup>24</sup> The temporary suspension was valid until December 31, 2020.

#### B. MERGERS

CADE evaluated 454 merger cases in 2020, an increase over the same period in 2019.<sup>25</sup> The average time for appraisal of non-fast track merger cases increased because of the pandemic.<sup>26</sup>

Key merger cases in 2020 included Fiat/PSA<sup>27</sup> and Delta/LATAM (JV),<sup>28</sup> both unconditionally cleared by the General Superintendence (GS). The Tribunal pulled for reassessment which is still ongoing. CADE also conditionally cleared mergers between Nike/SBF Group<sup>29</sup> and Boehringer/Hypera.<sup>30</sup>

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22. *Action Against TasPorts*, *supra* note 20.

23. *Applications for File*, COMMONWEALTH CTS. PORTAL, <https://www.comcourts.gov.au/file/Federal/P/NSD1236/2020/actions> (last visited May 20, 2021).

24. *Lei No. 14.010, de 10 de Junho de 2020*, D.O.U. 10.6.2020 (Braz.).

25. *Impact of COVID-19 on Global Merger Control Reviews*, LATHAM & WATKINS, at 16 (May 12, 2020), <https://www.lw.com/thoughtLeadership/lw-impact-of-COVID-19-global-merger-control>.

26. *See id.*

27. Fiat Chrysler Automobiles NV and Peugeot SA, Opinion n° 08700.002193/2020-18., SEI/CADE (2021), [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?mYbVb954ULaAV-MRKzMwwbd5g\\_PuAKStTINGP-jtcH5MdmPeznqYAOxKmGO9r4mCfjITXxQMN01pTgFwPLudA\\_z003MSs8hTCV-wqtVKw6USsMFqqg\\_xa7qgw28N\\_YUr%22](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?mYbVb954ULaAV-MRKzMwwbd5g_PuAKStTINGP-jtcH5MdmPeznqYAOxKmGO9r4mCfjITXxQMN01pTgFwPLudA_z003MSs8hTCV-wqtVKw6USsMFqqg_xa7qgw28N_YUr%22).

28. Delta Air Lines, Inc. and Latam Airlines Group SA, Vote Reporter n° 08700.003258/2020-34, SEI/CADE (2020). [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLu9u7akQAh8mpB9yNNnjjHelD0UP6Rkku0Y290H4ec3ji3hAntgg7dmzhg\\_U7RIzPP\\_xr\\_lAT-tV3zm-qqkNokhskEr1xOccaCeFPj](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLu9u7akQAh8mpB9yNNnjjHelD0UP6Rkku0Y290H4ec3ji3hAntgg7dmzhg_U7RIzPP_xr_lAT-tV3zm-qqkNokhskEr1xOccaCeFPj).

29. Administrative Council for Economic Defense, *Case Law Bulletin – Merger or Acquisition 08700.000627/2020-37* yr. 1, vol. 4 (2020), <http://en.cade.gov.br/CaseLawBulletin042020.pdf>.

30. *Antitrust in Brazil-3rd Quarter 2020, Advocacia Jose Del Chiaro* (2020), <https://www.ajdc.com.br/2020/10/19/antitrust-in-brazil-1-3rd-quarter-of-2020/>.



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As of this writing, Tribunal members identified five merger cases<sup>31</sup> for reassessment, a significant increase. CADE has not blocked any merger cases and has assessed only two gun-jumping infractions.<sup>32</sup>

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Leniency agreements “significantly dropped in 2020 due to Covid,”<sup>33</sup> with only two agreements signed from March 1st to September 30th<sup>34</sup>, and six or seven others expected to be signed by year’s end.<sup>35</sup>

In 2020, CADE began an inquiry of big tech’s potential acquisitions of nascent competitors over the last ten years.<sup>36</sup> It also continued various probes, including investigations of wellness platform Gympass’ exclusivity agreements,<sup>37</sup> Android’s mobile operating system dominance,<sup>38</sup> and Google’s allegedly exploitative practices in the news segment.<sup>39</sup> Additionally, CADE settled with Bradesco regarding data portability and access by third parties.<sup>40</sup>

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31. *Brazil Global Merger Control Handbook*, DLA Piper at 1 (June 2020), <https://www.dlapiper.com/en/us/insights/publications/2019/02/global-merger-control-handbook/>; Administrative Council for Economic Defense, No. 08700.001134/2020-14 (Mar. 12, 2020), [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_processo\\_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5Uuj6rLqPEJuTUu08mg6wxLt0JzWxCOR9mNcMYP8UAjTVP9dxRfPBcQLTz332U54gvxZNRPIKigL9yM\\_HfTirGHiRzxU9mAMQ](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5Uuj6rLqPEJuTUu08mg6wxLt0JzWxCOR9mNcMYP8UAjTVP9dxRfPBcQLTz332U54gvxZNRPIKigL9yM_HfTirGHiRzxU9mAMQ); *Case Law Bulletin*, *supra* note 29; Administrative Council for Economic Defense, No. 08700.0032584/2020-34 (July 14, 2020), [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_processo\\_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5Uuj6rLqPEJuTUu08mg6wxLt0JzWxCOR9mNcMYP8UAjTVP9dxRfPBcRAGRwLy0m-Sl4SoiFpkk9r1WJLXukevfvoCdHEVxLFI](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0c62g277GvPsZDAxAO1tMiVcL9FcFMR5Uuj6rLqPEJuTUu08mg6wxLt0JzWxCOR9mNcMYP8UAjTVP9dxRfPBcRAGRwLy0m-Sl4SoiFpkk9r1WJLXukevfvoCdHEVxLFI); *CADE’s Tribunal Discusses the Recall of Cases Analyzed by the General Superintendence*, Grinberg Cordovil Advogados (Jan. 22, 2021), <https://gcalaw.com.br/en/cades-tribunal-discusses-the-recall-of-cases-analyzed-by-the-general-superintendence/>.

32. *Spotlight: Merger Review in Brazil*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=0c7b610b-022b-4a9a-841b-4865945713d3> (last visited Jun. 1, 2021).

33. Shin Jae Kim & Renatta Muzzi Gomes de Almeida, *Compliance in Brazil*, CHAMBERS, <https://chambers.com/content/item/3925>.

34. Villela et al., *The Cartels and Leniency Review: Brazil*, L. REVS. (Mar. 2, 2021), <https://thelawreviews.co.uk/title/the-cartels-and-leniency-review/brazil>.

35. Kim, *supra* note 33.

36. See Org. for Econ. Coop. and Dev. [OECD], *The Concept of Potential Competition*, at 7 (June 10, 2021), [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2021\)22&docLanguage=EN](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2021)22&docLanguage=EN).

37. Camila Martin, *Delivery Platforms and Exclusivity Clause: How Should CADE Act?*, BAPTISTA LUZ (July 7, 2021), [https://baptistaluz.com.br/institucional/clausula-de-exclusividade-cade/#\\_ftnref6](https://baptistaluz.com.br/institucional/clausula-de-exclusividade-cade/#_ftnref6).

38. Cristianne Saccab Zazur et al., *Brazil*, PINHEIRO NETO ADVOGADOS, at 7 (2020), [https://www.pinheironeto.com.br/Documents/Artigos/VerticalAgreements\\_2020.pdf](https://www.pinheironeto.com.br/Documents/Artigos/VerticalAgreements_2020.pdf).

39. *Id.*

40. Administrative Council for Economic Defense, *Bradesco enters into an agreement with CADE regarding an investigation of anticompetitive practice against GuiaBolso* (Oct. 7, 2020), <http://en.cade.gov.br/bradesco-enters-into-an-agreement-with-cade-regarding-an-investigation-of-anticompetitive-practice-against-guiaibolso>.

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In 2020, CADE ruled on fifteen anticompetitive conduct proceedings, imposing 83,063,399.63 BRL (USD \$15,439,304.82)<sup>41</sup> in fines,<sup>42</sup> ninety percent of the 2019 total.

#### D. COURT DECISIONS

In a controversial decision, the Federal Supreme Court (STF) ruled that courts should rely on the merits of CADE's decision on economic matters.<sup>43</sup> If this interpretation holds, courts would only be permitted to review CADE's decisions on procedural grounds, not on the merits.

In September 2020, the Superior Court of Justice (STJ) resumed the *White Martins* trial, which considers whether CADE has jurisdiction to assess and sanction foreign-to-foreign transactions.<sup>44</sup>

In June 2020, the STJ dismissed CADE's appeal of a Federal Appellate Court judgment that annulled a conviction involving terminal handling charges.<sup>45</sup> The STJ is expected to render another decision on this topic in a different case, which will consider whether CADE has jurisdiction to review regulatory and decision-making acts of agencies.

### IV. Canada

#### A. LEGISLATIVE DEVELOPMENTS

On May 21st, the Competition Bureau (Bureau) released a model timing agreement aimed at providing the Bureau with additional time and information in merger reviews involving the "efficiencies defense," which permits companies to rely on potential merger efficiencies to offset competition concerns.<sup>46</sup>

On April 8th, the Bureau announced its approach to COVID-19-related competitor collaborations—broadly consistent with its existing Competitor

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41. Currency Converter, Wise, <https://wise.com/us/currency-converter/brl-to-usd-rate> (last visited May 28, 2020, 8:37 PM) (Exchange rate of 1 USD = 5,38 BRL).

42. *CADE en numeros* (CADE in numbers), CADE, <http://cadenumeros.cade.gov.br/QvAJAXZfc/opensoc.htm?document=painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true>.

43. *Comal Combustiveis Automotivos LTDA v. CADE*, Supremo Tribunal Federal [S.T.F.J.] (May 28, 2019), <https://jurisprudencia.stf.jus.br/pages/search/sjur405281/false>.

44. *STJ Judges decide if CADE can analyze deals closed abroad*, CONSULTOR JURIDICO (Sept. 23, 2020), <https://www.conjur.com.br/2020-set-23/stj-julga-cade-analisar-negocios-fechados-exterior?imprimir=1>.

45. Myller Kairo Coelho de Mesquita, *Judiciary Legitimizes SSE/THC2 at a Decisive Moment in CADE*, PORTOSENÁVIOS (Sept. 9, 2020), <https://www.portosenavios.com.br/artigos/artigos-de-opiniao/judiciario-legitima-o-sse-thc2-em-momento-decisivo-no-cade>.

46. *Competition Bureau releases model timing agreement for mergers involving claimed efficiencies*, COMPETITION BUREAU (May 21, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/05/competition-bureau-releases-model-timing-agreement-for-mergers-involving-claimed-efficiencies.html>.

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Collaboration Guidelines (CCGs)—as well as an expedited procedure for businesses seeking related guidance.<sup>47</sup>

On July 29th, the Bureau released revised CCGs for comment.<sup>48</sup> Among its more controversial proposals, the Bureau suggested it might assess “no poach” agreements criminally in certain circumstances.

**B. MERGERS**

On February 24th, the Bureau closed its review of a merger between Quebec’s two largest scrap metal processors, accepting a “failing firm” defense.<sup>49</sup>

In April, the Bureau provided details regarding its decision to clear a merger between two providers of refrigerated intermodal services on efficiency grounds. This review was the first conducted under a draft form of the Bureau’s above-noted model timing agreement.<sup>50</sup>

**C. ABUSE OF DOMINANCE**

In February, the Bureau obtained court orders to advance its investigation into several agricultural manufacturers and wholesalers’ alleged refusal to supply a new-entrant online retailer.<sup>51</sup>

On April 2nd, the Bureau closed its inquiry into a branded pharmaceutical company’s refusal to grant another manufacturer access to drug samples needed for testing and regulatory approval of a generic version of the branded company’s drug.<sup>52</sup> While access was ultimately granted without the Bureau imposing a formal remedy, the Bureau warned that such industry conduct could attract financial penalties in the future.

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47. *Competition Bureau statement on competitor collaborations during the COVID-19 pandemic*, COMPETITION BUREAU (Apr. 8, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html>.

48. *Competition Bureau invites feedback on updated Competitor Collaboration Guidelines*, COMPETITION BUREAU (Jul. 29, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/07/competition-bureau-invites-feedback-on-updated-competitor-collaboration-guidelines.html>.

49. *See Competition Bureau statement regarding the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc.*, COMPETITION BUREAU (Apr. 29, 2020), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html>.

50. *Competition Bureau outlines its assessment of CN’s acquisition of H&R*, COMPETITION BUREAU (Apr. 22, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-outlines-its-assessment-of-cns-acquisition-of-hr.html>.

51. *Id.*

52. *Competition Bureau warns pharmaceutical industry that any further obstruction to the manufacture of generic alternatives will not be tolerated*, COMPETITION BUREAU (Apr. 2, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-warns-pharmaceutical-industry-that-any-further-obstruction-to-the-manufacture-of-generic-alternatives-will-not-be-tolerated.html>.

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**D. CARTELS**

There were few reported developments regarding cartels in 2020. Public enforcement remained centered on domestic matters. In June, two engineering firms agreed to pay a total of C\$2.2 million to settle criminal cases involving municipal bid-rigging in Quebec.<sup>53</sup>

**E. COURT CASES**

On April 14, the Ontario Superior Court of Justice certified a C\$1 billion class action alleging a foreign exchange price-fixing conspiracy.<sup>54</sup> This action followed the defendant banks settling of several proceedings with U.S. and Canadian enforcers concerning their traders' activities.<sup>55</sup>

**V. China**

**A. LEGISLATIVE DEVELOPMENTS**

In 2020, the State Administration for Market Regulation of China (SAMR) released five sets of anti-monopoly guidelines, including *Guidelines on Application of Leniency Program in Horizontal Monopoly Agreement Cases*,<sup>56</sup> *Guidelines on Undertakings' Commitments in Anti-Monopoly Cases*,<sup>57</sup> *Anti-Monopoly Guidelines on Intellectual Property Rights*,<sup>58</sup> *Anti-Monopoly Guidelines on the Automobile Sector*<sup>59</sup> and *Guidelines on Antitrust Compliance*.<sup>60</sup> In addition,

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53. *SNC-Lavalin to pay \$1.9 million in fourth Québec bid-rigging settlement*, COMPETITION BUREAU (Jun. 19, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/06/snc-lavalin-to-pay-19-million-in-fourth-quebec-bid-rigging-settlement.html>; *Génius Conseil Inc. to pay \$300,000 in fifth Québec bid-rigging settlement*, COMPETITION BUREAU (Jun. 19, 2020), <https://www.canada.ca/en/competition-bureau/news/2020/06/genius-conseil-inc-to-pay-300000-in-fifth-quebec-bid-rigging-settlement.html>.

54. *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646, 1650 (Can. Ont.).

55. *Id.* at ¶¶ 85–89.

56. *Guowuyuan Fanlongduan Weiyuanbui Hengxiang Longduan Xieyi Anjian Kuanda Zhidu Shiyong Zhiban* (国务院反垄断委员会横向垄断协议案件宽大制度适用指南) [Guidelines for the Application of Leniency System in Horizontal Monopoly Agreement Cases] (promulgated by the Anti-Monopoly Commission of the State Council, Jan. 4, 2019) SAMR, Sept. 18, 2020, [http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918\\_321856.html](http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321856.html).

57. *Guowuyuan Fanlongduan Weiyuanbui Longduan Anjian Jingyingzhe Chengnuo Zhiban* (国务院反垄断委员会垄断案件经营者承诺指南) [Guidelines for Promises of Operators in Monopoly Cases] (promulgated by the Anti-Monopoly Commission of the State Council, Jan. 4, 2019) SAMR, Sept. 18, 2020, [http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918\\_321855.html](http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321855.html).

58. *Guowuyuan Fanlongduan Weiyuanbui Guanyu Zhibichanquan Lingyu de Fanlongduan Zhiban* (国务院反垄断委员会关于知识产权领域的反垄断指南) [Anti-monopoly Guidelines in the Field of Intellectual Property] (promulgated by the Anti-Monopoly Commission of the State Council, Jan. 4, 2019) SAMR, Sept. 18, 2020, [http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918\\_321857.html](http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321857.html).

59. *Guowuyuan Fanlongduan Weiyuanbui Guanyu Qiche ye de Fanlongduan Zhiban* (国务院反垄断委员会关于汽车业的反垄断指南) [Anti-monopoly Guidelines on the Automobile Industry] (promulgated by the Anti-Monopoly Commission of the State Council,

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SAMR promulgated the *Interim Regulations on the Review of Concentration of Undertakings*,<sup>61</sup> consolidating multiple existing regulations and rules relating to merger review.

**B. MERGERS**

As of October 31, 2020, SAMR approved four mergers with conditions<sup>62</sup> and 354 without conditions.<sup>63</sup>

In *Danaber / GE Healthcare*, SAMR required Danaber and the combined entity to divest several businesses related to micro carriers, particle verification standards, chromatographic media, chromatographic equipment, and molecular identification.<sup>64</sup> These divestitures were intended to address horizontal overlaps.<sup>65</sup>

In *Infineon / Cypress*, Infineon, Cypress and the combined entity were found to have several horizontal overlaps.<sup>66</sup> SAMR required the parties to continue to supply Chinese customers with certain products on fair, reasonable, and non-discriminatory (FRAND) terms, among other remedies.<sup>67</sup>

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Jan. 4, 2019) SAMR, Sept. 18, 2020, [http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918\\_321860.html](http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321860.html).

60. *Jingyingzhe Fanlongduan Hegui Zhinan* (经营者反垄断合规指南) [Antitrust Compliance Guide for Operators] (promulgated by the Anti-Monopoly Commission of the State Council, Sept. 11, 2020) SAMR, Sept. 18, 2020, [http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918\\_321796.html](http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321796.html).

61. *Jingyingzhe Jizhong Shencha Zanxing Guiding* (经营者集中审查暂行规定) [Interim Provisions on the Review of Concentration of Business Operator] (promulgated by the Department of Regulations; Anti-Monopoly Bureau, Oct. 23, 2020) SAMR, Oct. 27, 2020, <http://gkml.samr>.

62. *Conditional Approval/Prohibition of Concentration Cases*, SAMR., [http://www.samr.gov.cn/fldj/tzgg/ftjtz/](http://www.samr.gov.cn/fldj/tzgg/ftjtz/ftjtz/) (last visited May 16, 2021).

63. *Unconditionally Approve the Announcement of the Case of Concentration of Undertakings*, SAMR, <http://www.samr.gov.cn/fldj/ajgs/wtjzajgs/> (last visited May 16, 2021).

64. *Shichang Jiang Zongju Guanyu Fujia Xianzbixing Tiaojian Pizhun Danna He Gongsishougou Tongyongdianqi Yiliao Shengmingkexue Shengwu Zhiyaoye Wu An Fanlongduan Shencha Jueding De Gonggao* (市场监管总局关于附加限制性条件批准丹纳赫公司收购通用电气医疗生命科学生物制药业务案反垄断审查决定的公告) [Announcement of the State Administration for Market Regulation on the Anti-Monopoly Review Decision on Approving Danaber's Acquisition of General Electric's Medical Life Sciences Biopharmaceutical Business with Additional Restrictive Conditions] (promulgated by the Anti-Monopoly Bureau) SAMR, Feb. 28, 2020, [http://www.samr.gov.cn/fldj/tzgg/ftjtz/202002/t20200228\\_312297.html](http://www.samr.gov.cn/fldj/tzgg/ftjtz/202002/t20200228_312297.html).

65. *Id.*

66. *Shichang Jiang Zongju Guanyu Fujia Xianzbixing Tiaojian Pizhun Yingfeiling Keji Gongsishougou Sai Pula Si Bandaoti Gongsiguan An Fanlongduan Shencha Jueding De Gonggao* (市场监管总局关于附加限制性条件批准英飞凌科技公司收购赛普拉斯半导体公司股权案反垄断审查决定的公告) [Approval of Additional Restrictive Conditions by the State Administration for Market Regulation Infineon Technologies Acquires Cypress Semiconductor Announcement of the Decision on Anti-Monopoly Review of the Equity Case] (promulgated by the Anti-Monopoly Bureau) SAMR, Apr. 8, 2020, [http://www.samr.gov.cn/fldj/tzgg/ftjtz/202004/t20200408\\_313950.html](http://www.samr.gov.cn/fldj/tzgg/ftjtz/202004/t20200408_313950.html).

67. *Id.*

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In *NVIDIA / Mellanox*, SAMR required the combined entity to avoid tying, continue to supply certain products on FRAND terms, and continue using an open-source approach to peer-to-peer communication software, among other remedies.<sup>68</sup>

C. ADMINISTRATIVE ENFORCEMENT

As of October 31, 2020, SAMR concluded seven horizontal agreement cases and four abuse of dominance cases during the year.<sup>69</sup>

In a case involving the active pharmaceutical ingredient calcium gluconate active (“API”), SAMR imposed a total of RMB 325.5 million in fines against three API companies for abuse of collective dominance.<sup>70</sup> SAMR also imposed fines on several companies and individuals for obstructing its investigation into the API case.<sup>71</sup>

D. JUDICIAL JUDGEMENTS

In the past year, China’s courts, including the Supreme People’s Court (SPC), have adjudicated several important antitrust cases involving the refusal to purchase bio-diesels, the jurisdiction of standard-essential patents (SEPs), and the exclusive supply of APIs.

First, in *Yunnan Yingding Bio-Energy Co. v. Sinopec*,<sup>72</sup> the plaintiff sued Sinopec for refusing to distribute biodiesels in accordance with China’s Renewable Energy Law. In November 2019, the SPC dismissed the request

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68. *Shichang Jiang Zongju Guanyu Fujia Xianzhixing Tiaojian Pizhun Yingweida Gongsishougou Mai Lao Sike Ji Youxiang Guquan An Fanlongduan Shencha Jueding De Gonggao* (市场监管总局关于附加限制性条件批准英伟达公司收购迈络思科技有限公司股权案反垄断审查决定的公告) [Approval of Additional Restrictive Conditions by the State Administration for Market Regulation Nvidia’s Acquisition of the Equity of Meluosi Technology Co., Ltd. Announcement of Antitrust Review Decision] (promulgated by the Anti-Monopoly Bureau) State Administration for Market Supervision, Apr. 16, 2020, [http://www.samr.gov.cn/fldj/tzgg/ftjzp/202004/t20200416\\_314327.html](http://www.samr.gov.cn/fldj/tzgg/ftjzp/202004/t20200416_314327.html).

69. *Administrative Penalty Cases*, SAMR, <http://www.samr.gov.cn/fldj/tzgg/xzcf/index.html> (last visited May 17, 2021).

70. *Shichang Jiang Zongju Fabu Putaotangsuai Gai Yuanliaoyao Longduan An Xingzhengchufa Jueding Shu* (市场监管总局发布葡萄糖酸钙原料药垄断案行政处罚决定书) [Administrative Penalty Decision for Calcium Gluconate API Case] (promulgated by the Anti-Monopoly Bureau) SAMR, Apr. 14, 2020, [http://www.samr.gov.cn/fldj/tzgg/xzcf/202004/t20200414\\_314227.html](http://www.samr.gov.cn/fldj/tzgg/xzcf/202004/t20200414_314227.html).

71. *The State Administration of Market Supervision released Shandong Kanghui Pharmaceutical Co., Ltd., Weifang Puyunhui Pharmaceutical Co., Ltd. and related personnel refused Decision on Administrative Punishment for Obstructing Antimonopoly Investigation and Illegal Acts*, SAMR, [http://www.samr.gov.cn/fldj/tzgg/xzcf/202004/t20200414\\_314229.html](http://www.samr.gov.cn/fldj/tzgg/xzcf/202004/t20200414_314229.html) (last visited May 17, 2021).

72. *Yunnan Ying Ding Shengwunengyuan Gufenyouxiang Yu Zhongguoshibia Xiaoshou Youxiang* (云南盈鼎生物能源股份有限公司与中国石化销售有限公司) [Yunnan Yingding Bio-Energy Co. Ltd. v. Sinopec] (Sup. People’s Ct. 2019) (China) (available at <https://www.iphouse.cn/cases/detail/g8vodq3ym2n1j4ym48ojwk5r90x74epz.html>).

for retrial and confirmed the judgments of lower courts rejecting the plaintiff's claims.<sup>73</sup>

Second, in *ZTE v. Conversant Wireless Licensing S.a.r.l.*,<sup>74</sup> ZTE, a Chinese telecommunication company, filed a lawsuit in Shenzhen Intermediate People's Court against Conversant Wireless Licensing S.a.r.l. (Conversant") to determine FRAND royalty rates covering certain alleged SEPs owned by Conversant. Conversant contested the court's jurisdiction because Conversant had no business entity in China. Finding jurisdiction, the SEP held that Chinese courts have jurisdiction if, within China: the SEP is granted, the SEP is practiced/used, or the licensing contract is executed or performed.

Third, in *Yangtze River Pharmaceutical Group v. Hefei Industrial Pharmaceutical Institute Co. Ltd.*, Yangtze River Pharmaceutical Group and its subsidiary sued Hefei Industrial Pharmaceutical Institute Co., Ltd. and its subsidiaries, claiming that the defendant abused its dominance in the Bei Xue (wycium deloratadine tablets) API market.<sup>75</sup> The court invalidated exclusivity clauses in the defendant's long-term supply contract, after finding Hefei charged unfairly high prices and imposed unreasonable transaction terms.<sup>76</sup> The court also ordered the defendant to pay over RMB 68 million in damages.<sup>77</sup>

## VI. European Union

### A. LEGISLATIVE DEVELOPMENTS

The COVID-19 pandemic led the European Commission (EC) to issue a temporary aid framework to support the economy<sup>78</sup> and to provide companies with guidance on collaborating to supply necessary goods.<sup>79</sup> The EC continued to consider the implications of big data and big tech, encouraging flagship legislation to regulate gatekeeper platforms and

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73. *Id.*

74. See China Supreme People's Court Civil Ruling in *ZTE v. Conversant Wireless Licensing S.a.r.l.* (August 21, 2020), (in Chinese): [http://www.ipeconomy.cn/index.php/index/news/magazine\\_details/id/1394.html](http://www.ipeconomy.cn/index.php/index/news/magazine_details/id/1394.html).

75. Changjiang Yiyao Jituan Su Hefei Gongye Yiyao Yanjiuyuan Youxiang (长江医药集团诉合肥工业医药研究院有限公司) [*Yangtze River Pharmaceutical Group v. Hefei Industrial Pharmaceutical Institute Co. Ltd.*] (Nanjin Interm. People's Ct. March 18, 2020) (available at <http://www.zggpjz.com/a/dianxinganli/20200410/5585.html>).

76. *Id.*

77. *Id.*

78. *State Aid Rules and Coronavirus, Competition Policy*, EUROPEAN COMMISSION, [https://ec.europa.eu/competition-policy/state-aid/coronavirus\\_en](https://ec.europa.eu/competition-policy/state-aid/coronavirus_en) (last visited May 16, 2021).

79. Temporary Framework for Assessing Antitrust Issues Related to Business Cooperation in Response to Situations of Urgency Stemming from the Current COVID-19 Outbreak, 2020 O.J. (CI 116) 1, 1.

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provide new tools to take enforcement actions before markets tip,<sup>80</sup> promoting enforcement changes to better review so-called killer acquisitions,<sup>81</sup> and initiating an inquiry into the Internet of Things.<sup>82</sup> In parallel, the EC progressed its reviews of the antitrust rules covering the distribution of goods,<sup>83</sup> R&D, and production agreements,<sup>84</sup> while renewing the antitrust exemption for liner shipping consortia<sup>85</sup> and supporting efforts of EU national agencies to promote compliant cooperation on sustainability. In addition, EU legislation setting a framework for Member-States to screen foreign direct investment went into effect.<sup>86</sup>

**B. MERGERS<sup>87</sup>**

As high-profile reviews go, the EC opened an in-depth examination of Google's proposed acquisition of Fitbit. In a different sector, the EC cleared Alstom's proposed acquisition of rival Bombardier subject to divestments, a deal that is reminiscent of Alstom's failed attempt to merge with Siemens.

**C. Anti-Competitive Practices**

In 2020, the EC imposed fines totaling about 278 million (~\$330 million) on car closure systems and ethylene procurement cartels. The EC also fined NBCUniversal 14.3 million (~\$17 million) for restricting its licensees from selling merchandise beyond their allocated territories or customers.<sup>88</sup>

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80. *Single Market – New Complementary Tool to Strengthen Competition Enforcement*, EUROPEAN COMMISSION, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> (last visited May 16, 2021).

81. *The Future of EU Merger Control*, EUROPEAN COMMISSION (Sept. 11, 2020), [https://ec.europa.eu/commission/commissioners/2019-2024/vegtager/announcements/future-eu-merger-control\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vegtager/announcements/future-eu-merger-control_en).

82. *Antitrust: Commission Launches Sector Inquiry into the Consumer Internet of Things*, EUROPEAN COMMISSION (July 16, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1326](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1326).

83. *Review of the Vertical Block Exemption Regulation*, EUROPEAN COMMISSION, [https://ec.europa.eu/competition-policy/public-consultations/closed-consultations/2018-vber\\_en](https://ec.europa.eu/competition-policy/public-consultations/closed-consultations/2018-vber_en) (last visited May 16, 2021).

84. *Review of the two Horizontal Block Exemption Regulations*, EUROPEAN COMMISSION, [https://ec.europa.eu/competition/consultations/2019\\_hbers/index\\_en.html](https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html) (last visited May 16, 2021).

85. Commission Regulation 2020/436, 2020 O.J. (L 90) 1,2 (EC).

86. Regulation 2019/452, 2019 O.J. (L 79) 1,1.

87. *See Mergers*, EUROPEAN COMMISSION, <https://ec.europa.eu/competition/mergers/news.html>.

88. European Commission Press Release IP/20/157, Commission fines NBCUniversal 14.3 million for restricting sales of film merchandise products (Jan. 30, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_157](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_157).



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**D. ABUSE OF A DOMINANT POSITION**

The EC opened investigations into Apple's App Store Rules<sup>89</sup> and Apple Pay,<sup>90</sup> Amazon's Buy Box and Prime label, and adopted formal charges against the latter over its use of data collected from independent sellers.<sup>91</sup> Meanwhile, Google continued its legal challenges against three EC decisions imposing multi-billion fines in connection with its Shopping, AdSense, and Android search services. Google also was the target of complaints to the EC about its holiday-rental search services.<sup>92</sup> Finally, the EC accepted commitments from Broadcom to resolve preliminary concerns regarding exclusivities and incentives for the supply of chipsets for TV set-top boxes and modems.<sup>93</sup>

**E. COURT DECISIONS**

In its first ruling on this issue, the EU Court of Justice clarified that reverse-payment patent settlements may restrict competition "per se," so long no pro-competitive effects are shown, and the parties' incentives are clear.<sup>94</sup>

**VII. India**

**A. LEGISLATIVE AND INSTITUTIONAL DEVELOPMENTS**

Amidst the COVID-19 pandemic, the Competition Commission of India (CCI) has embraced technology by introducing e-filings<sup>95</sup> and allowing

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89. European Commission Press Release IP/20/1073, Commission opens investigations into Apple's App Store rules (June 16, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1073](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073).

90. European Commission Press Release IP/20/1075, Commission opens investigation into Apple practices regarding Apple Pay (June 16, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1075](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075).

91. European Commission Press Release IP/20/2077, Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices (Nov. 10, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077).

92. Paul Stevens, HomeToGo files antitrust complaint against Google (Aug. 20, 2020), <https://shorttermrentalz.com/news/hometogo-antitrust-complaint-google/>.

93. European Commission Press Release IP/20/1852, Commission accepts commitments by Broadcom to ensure competition in chipset markets for modems and set-top boxes (Oct. 7, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1852](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1852).

94. Court of Justice of the European Union Press Release No 8/20, The Court of Justice clarifies the criteria governing whether a settlement agreement with respect to a dispute between the holder of a pharmaceutical patent and a manufacturer of generic medicines is contrary to EU competition law (Jan. 30, 2020), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200008en.pdf>.

95. See CCI, Measures in view of threat of CORONAVIRUS / COVID-19 pandemic (Apr. 20, 2020), [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Notice20042020.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Notice20042020.pdf).

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virtual meetings and hearings.<sup>96</sup> CCI has also issued guidance addressing competitor collaboration during COVID-19.<sup>97</sup>

CCI published a market study on e-commerce focusing on consumer goods, accommodation services, and food services. The report advises self-correction practices and sets out CCI's enforcement and advocacy priorities.<sup>98</sup>

Draft legislation with significant amendments to the existing framework has been published for public comments following recommendations made by the Competition Law Review Committee in 2019.<sup>99</sup> Comments have also been invited to propose amendments that would (i) do away with prescribed standards for assessing non-compete restrictions by freeing parties to consider them holistically,<sup>100</sup> and (ii) ease the acquisition of shares pursuant to public bid/purchase on a stock exchange.<sup>101</sup>

CCI has revised its guidance notes on short form notifications, including clarifying when to provide information on complementary activities.<sup>102</sup>

**B. CARTELS AND OTHER ANTI-COMPETITIVE AGREEMENTS**

Given the economic situation due to COVID-19, CCI refrained from imposing monetary penalties in a cartel case.<sup>103</sup> It also held that merely having participating firms share common directors or owners does not constitute collusion in the bidding process.<sup>104</sup>

The National Company Law Appellate Tribunal (NCLAT) dismissed an appeal against CCI's first leniency decision.<sup>105</sup> NCLAT also refused to

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96. See CCI, Standard Operating Procedure for Virtual Hearings (Oct. 6, 2020), [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/SOP.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/SOP.pdf).

97. CCI, Advisory to business in times of COVID-19 (Apr. 19, 2020), [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Advisory.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf).

98. See CCI, Market Study on E-Commerce in India: Key Findings & Observations (Jan. 8, 2020), [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf).

99. See Competition Law (Amendment) Bill, 2020 (Feb. 12, 2020), *available at* [https://www.taxmanagementindia.com/file\\_folder/folder\\_5/Draft\\_Competition\\_Amendment\\_Bill\\_2020.pdf](https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf).

100. CCI, Inviting public comments regarding examination of non-compete restriction under regulation of combinations (May 2020), [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/PublicComments-Non-Compete.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/PublicComments-Non-Compete.pdf).

101. See CCI, Inviting public comments on the amendment to the combination regulations relating to acquisition of shares pursuant to a public bid or on a stock exchange (Nov. 2020), [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Combination-Regulation-Market-Purchases-For-Public-Comments.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Combination-Regulation-Market-Purchases-For-Public-Comments.pdf).

102. See CCI, Press Release, Notes to Form I (updated Mar. 27, 2020), [https://www.cci.gov.in/sites/default/files/press\\_release/PR492019-20.pdf](https://www.cci.gov.in/sites/default/files/press_release/PR492019-20.pdf). Revised Notes to Form I, [https://www.cci.gov.in/sites/default/files/page\\_document/Form1.pdf](https://www.cci.gov.in/sites/default/files/page_document/Form1.pdf).

103. CCI, Chief Material Manager, South Eastern Railway v. Hindustan Composites Ltd. & Ors., Reference Case No. 03 of 2016 (Jul. 10, 2020).

104. CCI, Ved Prakash Tripathi v. Director General Armed Forces Medical Services & Ors., Case No. 44 of 2019 (May 14, 2020).

105. NCLAT, Western Electric and Trading Company v. CCI, Competition Appeal No. 37 of 2017 (Feb. 17, 2020).

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interfere with CCI's dismissal of a complaint against taxi aggregators Ola and Uber for an alleged hub and spoke cartel and resale price maintenance.<sup>106</sup>

CCI ordered an investigation against e-retailers Amazon and Flipkart for alleged vertical restraints.<sup>107</sup> The investigation is presently stayed.<sup>108</sup>

**C. ABUSE OF DOMINANCE**

CCI dismissed allegations that WhatsApp abused its dominant position in “internet-based messaging applications” to manipulate a digital payments space.<sup>109</sup> It separately ordered an investigation against Google for unfair business practices with respect to its payments app, Google Pay.<sup>110</sup>

NCLAT upheld CCI's abuse of dominance findings against Adani Gas, but reduced the penalty from four percent to one percent of relevant turnover.<sup>111</sup>

**D. MERGER CONTROL**

CCI continues to seek behavioral and structural remedies and has even required the transfer of technology rights as a condition for granting merger approval.<sup>112</sup> In *ZF/WABCO*, CCI required structural remedies but did not appoint a monitoring trustee, leaving it to the parties (and counsel) to self-monitor.<sup>113</sup>

CCI approved the acquisition of 9.99 percent shareholding in India's leading telecom player while characterizing the transaction as an active investment and strategic tie-up.<sup>114</sup> In *Suzuki/Toyota*,<sup>115</sup> it held that cross-shareholdings amongst competitors with a view to pursue permissible competitor collaboration does not trigger competition concerns.

CCI continues to take stern action against gun-jumping where parties fail to notify interconnected transactions.<sup>116</sup>

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106. See NCLAT, *Samir Agarwal v. CCI & Ors.*, Appeal No. 1 of 2019 (May 29, 2020).

107. CCI, *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Amazon Seller Services Private Limited*, Case No. 40 of 2019 (Jan. 13, 2020).

108. See Karnataka HC, *Amazon Seller Services Private Limited v. CCI*, Writ Petition No. 3363 of 2020, (Feb. 14, 2020); *Flipkart Internet Private Limited v. CCI*, Writ Petition No. 4334 of 2020 (Feb. 27, 2020).

109. CCI, *Harshita Chawla v. WhatsApp Inc. & Facebook Inc.*, Case No. 15 of 2020, (Aug. 18, 2020).

110. CCI, *In Re: XYZ v. Alphabet Inc. & Ors.*, Case No. 07 of 2020, (Nov. 11, 2020).

111. NCLAT, *Adani Gas Limited v. CCI and Faridabad Industries Association, TA (AT) (Competition) No. 33 of 2017* (Mar. 5, 2020).

112. CCI, *Outotec OYJ and Metso OYJ*, Combination No. C-2020/03/735, (June 18, 2020).

113. CCI, *ZF Freidrichshafen AG*, Combination No. C-2019/11/703, (Feb. 14, 2020).

114. See CCI, *Jaadhu Holdings LLC*, Combination No. C-2020/06/747, (June 24, 2020).

115. CCI, *Suzuki Motor Corporation and Toyota Motor Corporation*, Combination No. C-2019/10/692 (Nov. 26, 2019).

116. CCI, *Proceedings against Canada Pension Plan Investment Board and ReNew Power Limited under Chapter VI of the Competition Act*, (Nov. 21, 2019).

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In *Eli Lilly*,<sup>117</sup> NCLAT reversed CCI's earlier decision on the implementation of the *de minimus* target-based exemption, and held that only the assets/turnover of the transferred business needs to be considered.

E. NOTABLE COURT DECISIONS

NCLAT held that a follow-on action for damages can be filed after the Supreme Court's final disposal of a case. Such actions would not be barred by any statute of limitation, even though there they were not filed at the initial appellate stage.<sup>118</sup>

**VIII. Japan**

A. LEGISLATIVE DEVELOPMENTS

Following the June 2019 amendment to the Antimonopoly Act reforming Japan's leniency program,<sup>119</sup> the Japan Fair Trade Commission (JFTC) published a series of operational rules and guidelines on handling leniency applications.<sup>120</sup> In addition, while attorney-client privilege is not recognized in Japan, the amendment to the Antimonopoly Act introduced rules prohibiting the JFTC from using confidential communications between a company and its external legal counsel in its leniency program investigations.<sup>121</sup> This amendment and the new rules/guidelines associated therewith went into effect on December 25, 2020.

B. MERGERS AND ACQUISITIONS

In August 2020, following a Phase I review and taking into consideration certain remedies proposed by the parties,<sup>122</sup> the JFTC cleared the integration of Z Holdings Corporation (which owns Yahoo Japan) and LINE Corporation. For the fiscal year ending March 31, 2020, among the

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117. *Eli Lilly & Company v. CCI*, No. 3 of 2017(Mar. 22, 2020) (NCLAT).

118. *See Food Corp. of India v. Excel Corp. Care & Ors.*, No. 1 of 2019, (Jun. 3, 2020) (NCLAT).

119. Press Release, Japanese Fair Trade Comm'n, Enactment of the Act to Amend the Antimonopoly Act (June 19, 2019), <https://www.jftc.go.jp/en/pressreleases/yearly-2019/June/19061907.html>.

120. Press Release, Japanese Fair Trade Comm'n, Amendments of the Rules/Guidelines with the Amendment of the Antimonopoly Act (Determination Procedure etc.) (June 25, 2020), <https://www.jftc.go.jp/en/pressreleases/yearly-2020/June/200625.html>.

121. Press Release, Japanese Fair Trade Comm'n, Guidelines on Treatment of Objects Recording Confidential Communications between an Enterprise and an Attorney (June 2020), <https://www.jftc.go.jp/en/pressreleases/yearly-2020/June/20062602>.

122. Press Release, Japanese Fair Trade Comm'n, The JFTC Reviewed the proposed managerial integration of Z Holdings Corporation and LINE Corporation (August 4, 2020), <https://www.jftc.go.jp/en/pressreleases/yearly-2020/August/200804.html>.

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300 cases cleared by the JFTC following a Phase I review,<sup>123</sup> four were contingent upon implementing certain remedies. Among such measures, companies undertook to eliminate and prohibit exclusive conditions and file periodic reports with the JFTC for a three-year period.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In February 2020, the JFTC filed a petition with the Tokyo District Court for an emergency interim order against Rakuten, Inc., the largest e-commerce operator in Japan. The motion claimed that Rakuten's mandatory shipping plan would constitute an abuse of a superior bargaining position<sup>124</sup> and should be suspended. Rakuten eventually made the shipping plan optional, after which the JFTC withdrew its petition.

In 2020, the JFTC approved five commitment plans, including one submitted by Amazon Japan.

**IX. Korea**

A. LEGISLATIVE DEVELOPMENTS

On June 10, 2020, the Korea Fair Trade Commission (KFTC) announced an amendment to the Monopoly Regulation and Fair Trade Law (FTL),<sup>125</sup> which (1) allows the Prosecutor's Office to independently launch criminal cartel investigations;<sup>126</sup> (2) doubles the maximum revenue percentages on which administrative fines are based; and (3) introduces a new size-of-transaction test for merger filings.<sup>127</sup>

On September 28, 2020, KFTC announced draft legislation that would require online platform operators (i) prepare and provide written contracts to vendors specifying key terms and conditions and (ii) notify sellers in advance of any contract term or restriction, suspension, or termination of any of their services.<sup>128</sup>

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123. Press Release, Japanese Fair Trade Comm'n, Major Business Combination Cases in Fiscal Year 2019 (July 22, 2020), <https://www.jftc.go.jp/en/pressreleases/yearly-2020/July/2007221.pdf>.

124. Press Release, Japanese Fair Trade Comm'n, The JFTC has Filed a petition for an Urgent Injunction against Rakuten, Inc. (February 28, 2020), <https://www.jftc.go.jp/en/pressreleases/yearly-2020/February/200228.html>.

125. Press Release, Korean Fair Trade Comm'n, Publication of Draft Bill for Overhaul of the Monopoly Regulation and Fair Trade Law (June 10, 2020), [http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpptype=1&report\\_data\\_no=8582](http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpptype=1&report_data_no=8582).

126. *Id.* (referring to price fixing, market allocation, and bid rigging).

127. If passed, the new threshold may require filings for mergers that do not meet the existing worldwide assets/sales revenues and Korean sales revenues thresholds.

128. Press Release, Korean Fair Trade Comm'n, Publication of Draft Bill for Fair Online Platform Intermediary Transaction Act (Sept. 28, 2020), [http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpptype=1&report\\_data\\_no=8746](http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpptype=1&report_data_no=8746).

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**B. MERGERS**

On April 4, 2020, KFTC unconditionally approved Jeju Air's proposed acquisition of Eastar Air, applying the failing firm defense in recognition of the impact of COVID-19 on the airline industry.<sup>129</sup>

On May 20, 2020, KFTC conditionally cleared Borealis AG's acquisition of DYM Solutions. KFTC imposed behavioral remedies including (i) requiring that semi-conductive compounds be offered on FRAND terms for five years and (ii) mandating that a third-party company (a co-developer of DYM Solution's extra high-voltage semi-conductive compounds) be provided all relevant manufacturing technology.<sup>130</sup>

**C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES**

On September 22, 2020, the Seoul Central Prosecutor's Office indicted seven pharmaceutical companies and ten executives/employees for their alleged involvement in a bid-rigging cartel for vaccine procurement.<sup>131</sup>

The KFTC also continued to actively investigate local bid-rigging cartels, including cases involving ready-mix concrete companies,<sup>132</sup> hospital CT scanners,<sup>133</sup> and educational software.<sup>134</sup>

**D. DOMINANCE**

In its first such case, the KFTC fined Naver for abusing its dominant position and engaging in unfair trade practices by (i) altering its search algorithm for its shopping and video search services to feature preferred products and services first, and (ii) preventing partnering real estate

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129. Press Release, Korean Fair Trade Comm'n, Merger Review of Jeju Air's acquisition of Eastar Air (April 23, 2020), [http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report\\_data\\_no=8536](http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=8536).

130. Press Release, Korean Fair Trade Comm'n, Merger Review of Transaction between Borealis and DYM Solutions (May 5, 2020), [http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report\\_data\\_no=8561](http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=8561).

131. *Bid-rigging Cartel Regarding Government's Vaccine Procurement*, CHOSUN DAILY (Sept. 22, 2020), [https://www.chosun.com/national/court\\_law/2020/09/22/XV2JVEHLZ5G3VD7AQ46XZPPREE/](https://www.chosun.com/national/court_law/2020/09/22/XV2JVEHLZ5G3VD7AQ46XZPPREE/).

132. Press Release, Korean Fair Trade Comm'n, Sanction on Remicon Bid-rigging (May 15, 2020), [http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report\\_data\\_no=8558](http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=8558).

133. Press Release, Korean Fair Trade Comm'n, Sanction on CT Bid-rigging (March 13, 2020), [http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report\\_data\\_no=8500](http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=8500).

134. Press Release, Korean Fair Trade Comm'n, Sanction on Software Bid-rigging (July 8, 2020), [http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report\\_data\\_no=8616](http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rptype=1&report_data_no=8616).

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information content providers from entering into agreements with Naver's competitors.<sup>135</sup>

On February 9, 2020, the Seoul High Court overturned the KFTC's findings that Siemens abused its dominant position against independent service organizations in the CT/MRI equipment maintenance and service markets.<sup>136</sup>

## **X. South Africa**

### **A. LEGISLATIVE DEVELOPMENTS**

The issue of Buyer Power<sup>137</sup> and Price Discrimination<sup>138</sup> Regulations and Buyer Power Guidelines<sup>139</sup> followed amendments to the Competition Act in February 2020.

In response to COVID-19, the Minister of the Department of Trade, Industry and Competition (the Minister) issued block exemptions for the healthcare,<sup>140</sup> retail property,<sup>141</sup> banking,<sup>142</sup> and hotel<sup>143</sup> sectors. The Minister also issued Tribunal Rules requiring COVID-19 Excessive Pricing Complaint Referrals to be heard on an urgent basis.<sup>144</sup>

### **B. MERGERS**

An expansion of public interest conditions imposed in mergers continued in South Africa, particularly for larger foreign acquirers.<sup>145</sup>

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135. Press Release, Korean Fair Trade Comm'n, Sanction on Naver Real Estate's Elimination of Competitors (Oct. 6, 2020), [http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report\\_data\\_no=875](http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=875).

136. *The Court Finds 'Siemens Did Not Engage in Unfair Trade Practice', Revokes Correction Order and Administrative Fine*, YONHAP NEWS (Feb. 9, 2020), <https://www.yna.co.kr/view/AKR20200206176100004>.

137. Regulations on Buyer Power made by Minister under Competition Act, GN 168 of GG 43018 (13 Feb. 2020).

138. Buyer Power Guidelines, GN 545 of GG 43341 (22 May 2020).

139. *Id.*

140. Covid-19 Block Exemption for the Healthcare Sector, GN 349 of GG 43114 (19 Mar. 2020).

141. Covid-19 Block Exemption for the Retail Property Sector, GN 358 of GG 43134 (24 Mar. 2020).

142. Covid-19 Block Exemption for the Banking Sector, GN 355 of GG 43127 (23 Mar. 2020).

143. Covid-19 Block Exemption for the Hotel Industry, GN 422 of GG 43175 (27 Mar. 2020).

144. Regulation on Competition Tribunal Rules for Covid-19 Excessive Pricing Complaint Referrals, GN 448 of GG 43205 (Apr. 3, 2020).

145. *See* Simba (Pty) LTD & Pioneer Food Group LTD, LM108Sep19 (Competition Comm'n of S. Afr. March 5, 2020), <https://www.comptrib.co.za/case-detail/8953; K2020704995> (South Africa) (PTY) LTD & Comair LTD (In Business Rescue), LM137Oct20 (Competition Comm'n of S. Afr. Oct. 29, 2020), <https://www.comptrib.co.za/case-detail/19368>; Samreen Ahmad, *Wipro Consumer Care forays into South Africa with Canway acquisition*, BUS. STANDARD (Jan. 17, 2020), ([https://www.business-standard.com/article/companies/wipro-consumer-care-forays-into-south-africa-with-canway-acquisition-119120301489\\_1.html](https://www.business-standard.com/article/companies/wipro-consumer-care-forays-into-south-africa-with-canway-acquisition-119120301489_1.html)) [<https://perma.cc/383S->

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The Tribunal prohibited the *We Buy Cars* merger, finding the merger removed a potential competitor and substantially reduced competition in the car buying market.<sup>146</sup>

**C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES**

The Tribunal dismissed a number of cartel referrals after the Commission failed to adduce sufficient evidence.<sup>147</sup> The Tribunal criticized the Commission for relying on intuition and inference, rather than evidence, to pursue these cases.

The Commission successfully used the outcomes of market inquiries to secure commitments. Mobile network operators undertook to reduce data pricing following the Data Services Market Inquiry,<sup>148</sup> and grocery retailers agreed not to enforce lease exclusivities following the Grocery Retail Market Inquiry.<sup>149</sup>

**D. ABUSES OF DOMINANCE**

The Commission received 1,734 COVID-19-related complaints between March and November 2020. These complaints resulted in thirty-five

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25FV]; Press Release, Competition Tribunal S. Afr., Tribunal Approves Foschini's Acquisition of Jet, with Conditions (Sept. 23, 2020), (<http://test.comptrib.gendel.com/info-library/case-press-releases/tribunal-approves-foschinis-acquisition-of-jet-stores-with-conditions>) [<https://perma.cc/MM9T-CD32>]; Press Release, Lanxess, LANXESS to sell its stake in chrome ore mine in S. Afr. to Clover Alloys (Nov. 18, 2019), (<https://lanxess.com/en/Media/Press-Releases/2019/11/LANXESS-to-sell-its-stake-in-chrome-ore-mine-in-South-Africa-to-Clover-Alloys>) [<https://perma.cc/62U5-CCN8>]. Press Release, Competition Tribunal S. Afr., Tribunal prohibits Naspers' planned merger with WeBuyCars (Mar. 27, 2020), (<https://www.comptrib.co.za/case-detail/8539>) [<https://perma.cc/PEH8-2SW5>].

146. See Press Release, Competition Tribunal S. Afr., Tribunal Dismisses Cement Indus. Cartel case against NPC (Dec. 5, 2019), <https://www.comptrib.co.za/case-detail/6418>; Press Release, Competition Tribunal S. Afr., Tribunal Dismisses Cartel Case against I&J due to Lack of Evidence (Sept. 6, 2020), <https://www.comptrib.co.za/case-detail/8569>; Press Release, Competition Tribunal S. Afr., Tribunal Finds "Simply No Evidence" Against Five Bloemfontein Comps. Accused of Price Fixing, Tender Collusions (May 4, 2020), <https://www.comptrib.co.za/case-detail/7681>; Press Release, Competition Tribunal S. Afr., Tribunal Dismisses "Parliament Travel Tender Collusion Case" Against Tourvest Holdings, Trigon Travel, (Jan. 16, 2020), <https://www.comptrib.co.za/case-detail/7427>.

147. Press Release, Competition Tribunal S. Afr., Tribunal Approves Consent Agreement Between Commission and MTN on Reduction of Data Prices (June 25, 2020), <https://www.comptrib.co.za/case-detail/9108>; Press Release, Competition Tribunal S. Afr., Tribunal Approves Vodacom, Competition Comm'n Settlement (Mar. 25, 2020), <https://www.comptrib.co.za/info-library/case-press-releases/outcome-of-cases-heard-by-the-tribunal-25-march-2020>.

148. Press Release, Competition Tribunal S. Afr., Tribunal Confirms Comm'n & Shoprite Checkers Consent Agreement Concerning Long-Term Exclusive Lease Agreements (Oct. 13, 2020), <https://www.comptrib.co.za/case-detail/9148>.

149. Slide Presentation, *Update on Covid-19 Cases and Investigations, Competition Comm'n S. Afr.* at slide 8, COMPETITION COMM'N S. AFR. (Oct. 20, 2020), <http://www.thedtic.gov.za/wp-content/uploads/CC-COVID-19.pdf> [<https://perma.cc/7YUK-8XFG>].



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settlement agreements, none of which involved admissions of guilt.<sup>150</sup> In the *Dis-Chem*<sup>151</sup> and *Babelegi*<sup>152</sup> excessive pricing matters, the Tribunal and CAC applied a liberal interpretation of dominance to account for the exceptional circumstances created by COVID-19.

E. COURT DECISIONS

The Constitutional Court in *Pickfords* found that section 67(1) of the Competition Act 89 of 1998 does not impose an absolute time-bar for prosecuting a case where the conduct concluded three years prior to the start of an investigation. The Court found that such delay could be condoned by the Tribunal.

**XI. United Kingdom**

A. LEGISLATIVE DEVELOPMENTS

The UK formally exited the European Union on January 31, 2020, when the European Union (Withdrawal Agreement) Act 2020 came into effect.<sup>153</sup> The agreed transitional period expired on December 31st, 2020, after which, broadly speaking, EU law ceased to directly apply in the UK.

Consequently, from January 2021, UK competition authorities may commence parallel proceedings in cases the European Commission would previously have solely addressed under the EU Merger Regulation or Articles 101/102.

B. MERGERS

Statistics suggest that the Competition and Markets Authority (CMA) has become more interventionist. Of thirteen cases referred for a Phase 2 investigation during the financial year 2019 -2020, three cleared unconditionally, two were prohibited, five required remedies, and three were abandoned.<sup>154</sup>

Some CMA prohibitions have been controversial. For example, the Sabre/Farelogix deal, involving two US companies, was prohibited after it received

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150. *Id.* at 15.

151. Press Release, Competition Tribunal S. Afr., Competition Tribunal Fines Dis-Chem R1.2 Million for Excessive Pricing of Face Masks During Covid-19 Pandemic (July 7, 2020), <https://www.comptrib.co.za/case-detail/9112>.

152. Press Release, Competition Tribunal S. Afr., Babelegi Guilty of Excessive Pricing During Covid-19 Crisis, Fined R76K (June 1, 2020), <https://www.comptrib.co.za/case-detail/9098>.

153. Competition Commission of South Africa v. Pickfords Removals SA (Pty) LTD 2020 (10) BCLR 1204 (CC) at para. 38, 47 (S. Afr.). See European Union (Withdrawal Agreement) Act 2020 c. 1 (UK).

154. *Merger Inquiry Outcome Statistics*, COMPETITION & MKTS AUTH. (Apr. 7, 2021), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/977571/Merger\\_Outcomes\\_to\\_March\\_2021.csv/preview](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977571/Merger_Outcomes_to_March_2021.csv/preview).

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US clearance.<sup>155</sup> The CMA concluded it had jurisdiction, given Farelogix supplied technology to American Airlines, which included an interline component with British Airways. As a result of this decision, Sabre and Farelogix terminated their merger agreement.<sup>156</sup>

The CMA has increasingly imposed procedural fines. For example, it fined JD Sports and its parent £300,000 regarding the acquisition of Footasylum (albeit the fine was subsequently withdrawn).<sup>157</sup> The CMA maintained JD Sports infringed its interim enforcement order requiring the businesses to be managed separately pending a final determination.<sup>158</sup>

C. ANTITRUST

Exceptional measures were introduced due to COVID-19. The Government made temporary exclusion orders under the Competition Act 1998 covering groceries providers, health services providers, the dairy sector, and Isle of Wight ferries.<sup>159</sup>

The CMA continued actively to pursue anti-competitive behavior, imposing fines in eleven cases during 2020, more than in previous years.

For example, the CMA fined ComparetheMarket £17.9 million for the use of “most-favoured nation” provisions.<sup>160</sup> The clauses prevented home insurers from quoting lower prices on rival price comparison websites.<sup>161</sup>

The CMA continued to pursue infringement decisions for online sales restrictions, particularly in the music sector. For example, Fender and Roland were fined £4.5 million and £4 million for resale price maintenance regarding online sales of guitars and electronic drum kits respectively.<sup>162</sup>

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155. Anticipated Acquisition by Sabre Corporation of Farelogix Inc., Final Report at 385 (Competition & Mkts. Auth. Apr. 9, 2020), [https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final\\_Report\\_-\\_Sabre\\_Farelogix.pdf](https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf).

156. Press Release, Sabre Corp., Sabre Corp. Issues Statement on its Merger Agreement with Farelogix (May 1, 2020), <https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix/>. See Anticipated Acquisition by Sabre Corp. of Farelogix Inc., Final Report at 75, 352, 385 (Competition & Mkts. Auth. Apr. 9, 2020), [https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final\\_Report\\_-\\_Sabre\\_Farelogix.pdf](https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf).

157. Practical Law Competition, *JD Sports Withdraws Appeal Against CMA Fine for Breach of Initial Enforcement Order in JD Sports Fashion/Footasylum Merger Following CMA Withdrawal of Penalty Notice*, THOMSON REUTERS (Oct. 15, 2020), [https://uk.practicallaw.thomsonreuters.com/w-027-9421?transitionType=default&contextData=\(Sc.Default\)](https://uk.practicallaw.thomsonreuters.com/w-027-9421?transitionType=default&contextData=(Sc.Default)).

158. *Id.*

159. Department for Bus., Energy, & Indus. Strategy, *Competition law exclusion orders relating to coronavirus (COVID-19)*, U.K. (May 21, 2020), <https://www.gov.uk/guidance/competition-law-exclusion-orders-relating-to-coronavirus-covid-19>.

160. Press Release, Competition & Mkts. Auth., CMA Fines ComparetheMarket £17.9m for competitive Law Breach (Nov. 19, 2020), <https://www.gov.uk/government/news/cma-fines-comparethemarket-17-9m-for-competition-law-breach>.

161. *Id.*

162. See Online Resale Price Maintenance in the Guitar Sector, Case #50565-3 at 153, 166 (Competition. & Mkts. Auth. Jan. 22, 2020), <https://assets.publishing.service.gov.uk/media/>

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The Court of Appeal also confirmed that the CMA had correctly found that Ping's ban of online sales of its golf clubs constituted a "per se" restriction of competition.<sup>163</sup>

The CMA continued to seek disqualification for company directors that infringed competition law. Such disqualifications were applied in estate agents price fixing cases<sup>164</sup> and pharmaceutical market sharing cases.<sup>165</sup>

The Government announced a plan to set up a Digital Markets Unit to enforce a new code governing the behavior of online platforms like Google and Facebook.<sup>166</sup> This followed a CMA online platforms market study finding existing laws did not effectively regulate concerns such as weak competition and the degree of control that users have over the use of their personal data.<sup>167</sup>

## **XII. United States**

Despite disruption from the COVID-19 pandemic, antitrust issues have remained high on the political and enforcement agenda throughout 2020. In addition to the ongoing work of the antitrust agencies in reviewing major transactions and prosecuting cartels, there has been a focus on antitrust enforcement in the digital economy in Congress, and federal and state antitrust enforcement agencies, resulting in the initiation of landmark litigation against Google, and likely other cases to come.<sup>168</sup>

The House Judiciary Committee's Antitrust Subcommittee conducted an in-depth investigation of digital markets in 2020, including holding a series

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5e79d8aed3bf7f52efedfcad/20200320\_50565-3\_-\_DECISION.pdf; *see also* Online Resale Price Maintenance in the Electronic Drum Sector at 167, 183 (Competition & Mkts. Auth. June 29, 2020), [https://assets.publishing.service.gov.uk/media/5f171ab43a6f40727ebfb440/Non-confidential\\_infringement\\_decision.pdf](https://assets.publishing.service.gov.uk/media/5f171ab43a6f40727ebfb440/Non-confidential_infringement_decision.pdf).

163. Ping Europe LTD v. Competition and Markets Authority [2020] EWCA Civ 13 [2], [3], [128] (Eng.), [https://assets.publishing.service.gov.uk/media/5f171ab43a6f40727ebfb440/Non-confidential\\_infringement\\_decision.pdf](https://assets.publishing.service.gov.uk/media/5f171ab43a6f40727ebfb440/Non-confidential_infringement_decision.pdf).

164. Press Release, Competition & Mkts. Auth., Estate Agent Dirs. Disqualified for Roles in Illegal Cartel (June 15, 2020), <https://www.gov.uk/government/news/estate-agent-directors-disqualified-for-roles-in-illegal-cartel>.

165. Press Release, Competition & Mkts. Auth., Pharm. Co. Dir. Disqualified for Competition Law Breaches (June 4, 2020), <https://www.gov.uk/government/news/pharma-company-director-disqualified-for-competition-law-breaches>.

166. Press Release, Dep't for Bus., Energy & Indus. Strategy, New Competition Regime for Tech Giants to Give Consumers More Choice and Control Over Their Data, & Ensure Bus. Are Fairly Treated (Nov. 27, 2020), <https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated>.

167. *See* Online Platforms and Digital Advertising Market Study Final Report at 209-10, 322, 324 (Competition & Mkts. Auth. July 1, 2020), [https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final\\_report\\_Digital\\_ALT\\_TEXT.pdf](https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf).

168. Brian Fung, *The US Government Sues Google for Alleged Anticompetitive Abuses in Search*, CNN (Oct. 21, 2020), <https://www.cnn.com/2020/10/20/tech/doj-google-antitrust-case/index.html>.

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of hearings and culminating in the publication of a landmark report (House Report).<sup>169</sup> The House Report found that the large tech firms—Amazon, Facebook, Apple, and Google—each possess significant market power, and that each company has expanded and exploited that power in anticompetitive ways.<sup>170</sup> The House Report makes a variety of broad-ranging recommendations, including separating digital platforms from commerce<sup>171</sup> and discouraging mergers resulting in thirty percent or more market share or acquisitions of nascent competitors.<sup>172</sup> The Report also recommends new regulations in the areas of non-discrimination, data portability, and interoperability, including an access regime for platforms that are essential facilities.<sup>173</sup>

Shortly after the release of the House Report, the U.S. Department of Justice Antitrust Division (DOJ), in conjunction with eleven state Attorneys General, filed a long-expected lawsuit against Google in federal district court.<sup>174</sup> The complaint alleges that Google has unlawfully maintained monopolies in the search and search advertising markets through anticompetitive and exclusionary practices.<sup>175</sup> Such practices include requiring Google to be the preset default search engine on mobile devices and computers worldwide, prohibiting the preinstallation of competitor search engines, and bundling Google apps.<sup>176</sup> The European Commission made similar allegations against Google in 2018, resulting in a fine of \_4.34 billion for abusing the dominance of its Android mobile phone operating system.<sup>177</sup> Google has responded that the DOJ’s lawsuit is “deeply flawed” and “would do nothing to help consumers,” arguing that it “would artificially prop up lower-quality alternatives, raise phone prices,” and hinder consumer access to desired search services.<sup>178</sup>

2020 was a Presidential election year in the U.S., with a change of administration forthcoming in January 2021. It is uncertain at the time of writing whether the Democratic party will control Congress; if they do,

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169. Staff of House Subcomm. on Antitrust, Commercial & Admin. Law of the Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets* 6 (2020).

170. *Id.* at 6.

171. *Id.* at 378–79.

172. *Id.* at 388, 396.

173. *Id.* at 382, 384.

174. Press Release, Dep’t of Justice, *Justice Dep’t Sues Monopolist Google For Violating Antitrust Laws* (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> (The DOJ is joined in the action by the states of Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas.).

175. *Id.*

176. *Id.*

177. Press Release, Eur. Comm’n, *Antitrust Comm’n Fines Google \_4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google’s Search Engine* (July 18, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_4581](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581).

178. Press Release, Google, *A Deeply Flawed Lawsuit That Would Do Nothing To Help Consumers* (Oct. 20, 2020), <https://blog.google/outreach-initiatives/public-policy/response-doj>.

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there is the potential for major legislative changes in the antitrust laws over the next several years.

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## **International Tax**

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This article examines selected international legal developments relating to tax law in 2020.

### **I. Introduction—Yesterday’s Tools are Today’s Traps: Multinational Changes for Hybrid Entities and Instruments**

At an earlier stage in the development of tax laws, businesses generally obtained financing through instruments that were readily classified as either debt or equity, and engaged in cross-border transactions through entities that for the most part were treated as fiscally opaque or fiscally transparent in all relevant jurisdictions.<sup>1</sup> With the passage of time, however, some hybrid financial instruments and hybrid financial entities have been developed through the utilization of more sophisticated structures that have a wider variety of characteristics, which led to instruments or entities combining both debt and equity aspects while also sometimes being treated

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1. See generally *United States - Taxation of cross-border mergers and acquisitions*, KPMG (Mar. 24, 2021), <https://home.kpmg/xx/en/home/insights/2021/03/united-states-taxation-of-cross-border-mergers-and-acquisitions.html>.

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as fiscally transparent and opaque, depending on the jurisdiction.<sup>2</sup> While these trends have the laudable effect of facilitating the financing of business activities through a wider range of mechanisms, they also generate both tax arbitrage opportunities and difficulties regarding the correct tax classification of the income, expenses, or entity involved, because it is not always easy to pin down the preponderant nature of the financing or the entity as the case may be.

In many jurisdictions, the tax legislation in force was enacted before the development of these new hybrid financial instruments and entities. Therefore, courts and tax authorities have had to take the lead in determining the distinctions between debt and equity or in classifying hybrid entities whereby multinational enterprises exploit opportunities arising out of gaps and mismatches between different countries' tax systems. Double tax conventions played an important role in this context, especially regarding Articles 23A(1) and 23B(1) of the Organization for Economic Co-operation and Development (OECD) Model Tax Convention, which deals with the methods to eliminate double taxation, via the exemption and/or credit method.<sup>3</sup> But there has been a sense among tax authorities that more tools are needed to prevent base erosion and profit shifting through the use of hybrid instruments and entities.

In July 2013, the OECD released its Action Plan on Base Erosion and Profit Shifting (the BEPS Action Plan).<sup>4</sup> The BEPS Action Plan identified hybrid mismatch arrangements as a source of base erosion and profit shifting concern (Action 2). In 2015, the OECD released a final report on Neutralising the Effects of Hybrid Mismatch Arrangements, which contained recommendations for neutralizing the effects of hybrid mismatch arrangements (Final Report).<sup>5</sup> The recommendations included changes both to domestic law as well as to bilateral model treaty considerations.<sup>6</sup>

In general, the Final Report sets out recommendations for rules to address mismatches in tax outcomes where they arise in respect to payments made under a hybrid financial instrument or payments made to or by a hybrid entity.<sup>7</sup> The recommendations take the form of linking rules that align the tax treatment of an instrument or entity with the tax treatment in the counterparty jurisdiction. In general, the recommendations seek to avoid taxpayers relying on hybridity in order to reduce or avoid tax otherwise payable.

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2. *Id.*

3. Org. for Econ. Coop. and Dev., *Model Tax Convention on Income and on Capital: Condensed Version*, OECD Publishing, Nov. 21, 2017, 17, [http://dx.doi.org/10.1787/mtc\\_cond-2017-en](http://dx.doi.org/10.1787/mtc_cond-2017-en).

4. Org. for Econ. Coop. and Dev., *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, July 2013, <http://dx.doi.org/10.1787/9789264202719-en>.

5. Org. for Econ. Coop. and Dev., *Neutralising the Effects of Hybrid Mismatch Arrangements Action 2: 2015 Final Report*, OECD Publishing, at 3–4, July 2013, <http://dx.doi.org/10.1787/9789264202719-en>.

6. *Id.*

7. *Id.* at 11.

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To date, none of the countries in this summary have fully implemented all of the Final Report's recommendations. To some extent, however, the OECD's work on hybrid mismatches has had an impact on the tax laws and treaties of most of these countries.

## **II. Country/Region Reports**

### **A. BRAZIL**

Brazil has adopted unilateral measures to amend pertinent legislation dealing with the tax treatment of debt and equity. In Law 12,973/2014, for example, two new paragraphs were inserted into Article 10 of Law 9,249/1995, expanding the exemption afforded to dividends attributable to the earnings resulting from financial instruments classified as involving debt and preventing the deduction of these payments by the payer.<sup>8</sup> Law 12,973/2014 also added Article 38-B to Decree-Law 1,598/1977, establishing the deduction of payment at the source and taxation of the beneficiary.<sup>9</sup>

It is also important to highlight that in recent years, influenced by the evolution of accounting pronouncements issued in harmony with international standards, Brazilian tax authorities and administrative courts have been applying a substance-over-form approach, aiming to establish the most expansive legitimate tax treatment of corporate structures and contractual arrangements.<sup>10</sup>

Although Brazil has followed the OECD recommendations by adapting its legal system to this new reality of providing more legal certainty regarding the tax treatment attributed to hybrid financial instruments, the problems that may arise out of the implementation of increasingly sophisticated structures and/or complex contracts that do not follow the traditional classification of debt and equity have not been resolved. In Brazil, constitutional and legal principles and guarantees which govern income taxation still have to be analyzed with special attention to the determination of the taxable basis, the ability to pay taxes, and the freedom of taxpayers to utilize legitimate structures and transactions which are not developed with the exclusive purpose of avoiding taxation.<sup>11</sup> As a result, Brazilian constitutional and legal principles and guarantees which govern taxation function as a limitation on the countermeasures that can be enacted to prevent possible future abuses. In this context, it is necessary for Brazil to continue implementing new measures to accompany the evolution of the market, both unilateral and bilateral (or multilateral), in order to harmonize the taxation of these instruments, which would prevent both double taxation

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8. *Lei No. 12.973, de 13 de Maio de 2014*, art. 9º, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.05.2014 (Braz.).

9. *Id.* at art. 2º.

10. Org. for Econ. Coop. and *Dev & Receita Federal do Brasil, Transfer Pricing in Brazil: Towards Convergence with the OECD Standard*, OECD Publishing Paris, ¶ 625, 2019, [www.oecd.org/tax/transfer-pricing/transfer-pricing-in-brazil-towards-convergence-with-the-oecd-standard.htm](http://www.oecd.org/tax/transfer-pricing/transfer-pricing-in-brazil-towards-convergence-with-the-oecd-standard.htm).

11. *See generally id.*



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and double non-taxation. Until these vexing issues are resolved through adjustments to laws and treaty provisions, the utilization of hybrid instruments in the country may constitute a trap rather than an opportunity.

**B. CANADA**

Although Canada has signed the OECD Multilateral Instrument (MLI), it has reserved in Article 3 provisions concerning hybrid entities.<sup>12</sup>

The approach under Canadian taxation law to characterizing non-Canadian entities that do not fit squarely within Canadian commercial law concepts (*e.g.*, corporations, partnerships, trusts) thus remains unchanged. The prevailing approach has been summarized by the Canada Revenue Agency as having two steps:

- “(1) Determine the characteristics of the foreign business association under foreign commercial law; [and]
- (2) Compare these characteristics with those of recognized categories of business associations under Canadian commercial law in order to classify the foreign business association under one of those categories.”<sup>13</sup>

The two-step approach is generally consistent with Canadian case law, although the courts have not explicitly separated the two steps.<sup>14</sup> The effect is that if a non-Canadian entity, for example, has the characteristics of a Canadian partnership, that entity will be treated as a partnership for the purposes of applying Canada’s tax laws and tax treaties.

Canada’s general approach to classifying non-Canadian entities, however, is altered by the context of the Canada-United States Tax Convention (1980).<sup>15</sup> The Canada-U.S. Treaty includes specific rules addressing the entitlement of hybrid entities to treaty benefits. Article IV(6) is a relieving rule; it provides (in general terms) that an amount of income, profit or gain is considered to be derived by a resident of a contracting state where it is derived through an entity considered fiscally transparent in that state (but not resident in the other state) and, by reason of the fiscal transparency, the amount is treated the same way in the hands of the resident as it would be

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12. See Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Nov. 24, 2016, <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf> [hereinafter MLI]; Can. Dep’t of Foreign Aff., *Status of List of Reservations and Notifications Upon Deposit of the Instrument of Ratification* (Aug. 29, 2019), <https://www.oecd.org/tax/treaties/beps-ml-position-canada-instrument-deposit.pdf>.

13. Can. Revenue Agency, *INCOME TAX TECH. NEWS* 38, Sept. 22, 2008, at 10.

14. See *e.g.*, *Backman v. R.*, 2001 SCC 10, [2001] 1 R.C.S. 367, 380 (Can.); *Spire Freezers Ltd. v. R.*, 2001 SCC 11, [2001] 1 R.C.S. 391, 399 (Can.).

15. Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, Can.-U.S., Sept. 26, 1980, SC 1984, c 20 [hereinafter Canada-U.S. Treaty].

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treated if derived by the resident directly.<sup>16</sup> For example, if a Canadian corporation pays a dividend to a limited liability corporation (LLC) governed by US law., Article IV (6) could apply such that the U.S. resident members of the LLC would be considered to have received the dividend. Such an outcome is helpful as it allows the U.S. resident members of the LLC (and only such members) to obtain treaty benefits—in this case, a reduced rate of Canadian withholding tax on the dividend.<sup>17</sup>

Conversely, Article IV (7) denies treaty benefits in certain cases. Article IV(7)(a) generally provides that an amount of income, profit or gain is not considered to be derived by a resident of a contracting state where the amount is derived from an entity that is considered transparent by the source state but not the recipient state.<sup>18</sup> For example, Article IV(7)(a) could apply to deny treaty benefits where U.S. entities are partners in a Canadian limited partnership that receives a dividend but is treated as a corporation for U.S. tax purposes. Article IV(7)(b) applies where the source state treats the entity from which an amount is derived as fiscally opaque, and the recipient state treats that entity as fiscally transparent. For example, Article IV(7)(b) could apply to deny treaty benefits where a Canadian unlimited liability corporation (treated as a pass-through entity by the U.S.) pays a dividend to a U.S. resident recipient.

It remains to be seen whether Canada will adopt Article 3 of the MLI. The effect of paragraph 1 of that Article is in some ways similar to Article IV (6) under the Canada-U.S. Treaty, and thus could be beneficial to the extent that it allows treaty benefits in similar situations under Canada's other tax treaties.

### C. CHINA

#### 1. *China's General International Tax and MLI Position*

China has risen as an economic growth engine and major world power. An outgrowth of its economic advances is China's escalating transition from being a passive acceptor of international norms to leading as a discourse driver in international tax fronts and outreaches.<sup>19</sup> China's investment-friendly and revenue-oriented tax treaty framework is heavily colored by various priorities of the Chinese economy.<sup>20</sup> Albeit not an OECD member, China has been fairly proactive by signing the MLI in June 2017 while waiting for the prescribed ratification by the National People's Congress.

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16. *Id.* at art. IV(6).

17. *See* Income Tax Act, R.S.C. 1985, c 1 (5th Supp.) (Can) (Canadian withholding tax applies to dividends at a rate of twenty-five percent.); *see also* Canada-U.S. Treaty, *supra* note 15, at art. X (The Canada-U.S. Treaty reduces the rate of such tax to five percent or fifteen percent, depending on the circumstances.).

18. Canada-U.S. Treaty, *supra* note 15, at art. IV(7).

19. *See* Tianlong Larence Hu, *China Tax Treaty and Policy – Development and Updates*, SSRN (Aug. 11, 2013), ch. 8.1, <https://ssrn.com/abstract=2642597>.

20. *Id.*

The MLI is expected to assist China in tackling increasing regulatory complexities and avoiding the administrative inconvenience of bilaterally negotiating tax treaties with over 100 contracting states.<sup>21</sup>

### 2. *Covered Tax Agreement*

China's State Tax Administration (STA) included 102 out of 107 bilateral tax agreements in the list for the Covered Tax Agreements upon MLI signature.<sup>22</sup> The excluded five treaties include China's treaty with Chile and China's treaty with India.<sup>23</sup> The China-Chile treaty concluded in 2015 has incorporated many BEPS Action Plan recommendations such as the principal purpose test (PPT) and a limitation on benefits (LOB) clause and is thus already in compliance with the MLI.<sup>24</sup> It is speculated that a China-India bilateral arrangement that meets with minimum standards will be in place in the future given the enormous economic significance of China and India as emerging economies.<sup>25</sup>

China's three tax arrangements with Hong Kong, Macau, and Taiwan (not effective) are not included in the covered tax agreement because China validates those three regions differently from sovereign jurisdictions. Due to the recent change and the development of the special economic and trade significance and status of Hong Kong, the tax arrangement between China and Hong Kong represents a higher level of prominence in regulating and streamlining treaty networks of each other. The two competent authorities will need to negotiate to embrace relevant commitments that both pledge in the MLI.

### 3. *Hybrid Mismatches*

China only opted into Article 4 (Dual Resident Entities) in Part II (Hybrid Mismatches), which will modify the tie-breaker rule adopted by current CTAs. Such a projected change will likely encourage discretionary authority of Chinese tax administrators when there is no prevailing, uniform rule for contracting states to invoke. Since 2015, SAT has adopted the current procedure for granting treaty benefits by requiring non-resident companies to self-assess, which might be subject to audit at any time afterward by the Chinese tax administrators.

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21. *Action 15 Multilateral Instrument*, OECD, <https://www.oecd.org/tax/beps/beps-actions/action15/> (last visited May 29, 2021).

22. See People's Republic of China, STATE ADMIN. OF TAX'N, Status of List of Reservations and Notifications at the Time of Signature of China, <http://www.oecd.org/tax/treaties/beps-mli-position-china.pdf>.

23. Na Li, *The Impact of the Multilateral Instrument on China*, 24 ASIA-PACIFIC TAX BULLETIN 6, (Nov. 23, 2018), <https://www.ibfd.org/sites/ibfd.org/files/content/pdf/China-The-impact-of-the-multilateral-instrument-on-China.pdf>.

24. *Id.*

25. *Id.*

#### D. EUROPEAN UNION

Hybrid mismatch arrangements were (and to some extent, still are) one of the most popular instruments in international tax planning in the European Union (EU). To tackle the use of hybrid mismatch arrangements and introduce the minimum standards of the Final Report, the EU adopted the Anti-Tax Avoidance Directives (ATAD I and ATAD II).<sup>26</sup> The implementation of ATAD II is particularly relevant and is discussed here using the Netherlands and Luxembourg as sample jurisdictions.

##### 1. *Hybrid Mismatches In General*

In short, ATAD II tackles hybrid arrangements resulting in mismatched outcomes (a double deduction or a deduction without inclusion<sup>27</sup>) between associated enterprises, between head offices and their permanent establishments, or between two or more permanent establishments of the same entity in the context of structured arrangements.

As prescribed by ATAD II, the Dutch and Luxembourg anti-hybrid rules became effective on January 1, 2020 (except for the reverse hybrid rule which will come into force on January 1, 2022). In both jurisdictions, ATAD II and the Report provide guidance for their domestic anti-hybrid rules.<sup>28</sup>

The Netherlands and Luxembourg both implemented the ATAD II primary rule and secondary rule to prevent double deductions or deductions without inclusions as well as a rule to tax reverse hybrids. If the primary rule is not applied for any reason, the secondary rule will take effect. In Luxembourg, in certain cases, only the primary rule applies.<sup>29</sup> In the case of double deductions, the primary rule denies the deduction of a payment in the investor jurisdiction.<sup>30</sup> If a deduction is allowed in the investor jurisdiction, the secondary rule requires the payer jurisdiction to disallow the deduction.<sup>31</sup> In the case of a hybrid mismatch resulting in a deduction without inclusion, the primary rule requires the payer jurisdiction to deny

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26. Council Directive 2016/1164, 2017, O.J. (L. 193) (EU) (laying down rules against tax avoidance practices that directly affect the functioning of the internal market) [hereinafter ATAD I]; Council Directive 2017/952, 2018, O.J. (L. 144) (E.U.) (amending Directive 2016/1164 as regards hybrid mismatches with third countries) [hereinafter ATAD II].

27. In Luxembourg, the term “inclusion” is defined as an amount that is included as ordinary income in the taxable base in the recipient state of the payee. The income is considered as “included” in Luxembourg if it forms part of the taxpayer’s total revenue (not necessarily effectively taxed). In the Netherlands, “inclusion” means, in short, that the amount is included as taxable income, subject to a profits tax.

28. ATAD II, *supra* note 26, ¶¶ 5, 7, 28.

29. Lux. Income Tax Law as amended by Bill N. 7466 of 20 Dec. 2019, Art. 168ter (A889) (Off. Gazette No. 889 of 23 Dec. 2019) [hereinafter ITL].

30. *Wet implementatie tweede EU-richtlijn antibelastingontwijking van 18 december 2019*, Stb. 2019, 508, 12aa(1)(g) (Neth.) (Dutch Corporate Income Tax Act 1969 as amended by the Implementation of the Second EU Anti-Tax Avoidance Directive Act) [hereinafter CITA]; ITL *supra* note 29, at art.168ter.

31. CITA, *supra* note 30, at art. 12aa(4); ITL *supra* note 29, at art. 168ter.

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the deduction.<sup>32</sup> Under the secondary rule for deductions without inclusions, if the payment is deductible in the payer jurisdiction, then the payment should be included in the taxable income of the payee.<sup>33</sup>

The reverse hybrid rule applies if an entity, which is incorporated or established in the Netherlands or Luxembourg, is transparent for Dutch or Luxembourg tax purposes and qualifies as non-transparent for tax purposes in the jurisdiction of one or more entities holding directly or indirectly an interest of fifty percent or more in such entity. Under the reverse hybrid rule, the Netherlands or Luxembourg will treat such entity as fiscally opaque and subject it to corporate income tax.<sup>34</sup>

Both in the Netherlands and Luxembourg, the taxpayers should document how they apply the anti-hybrid rules.<sup>35</sup>

## 2. *Exceptions to the Hybrid Mismatch Rules*

In both the Netherlands and Luxembourg, domestic anti-hybrid rules do not apply if the mismatch is not caused by hybrids, e.g., if:

- (1) the payment is not included in the taxable base in the residence state because there is no profit tax or because the recipient is tax-exempt or entitled to a special tax regime; or
- (2) the mismatch outcome arises solely from differences in transfer pricing legislation/adjustments.

The Dutch implementation additionally includes controlled foreign corporation income in taxable income in certain limited cases as a result of which the anti-hybrid rules do not apply.<sup>36</sup> But the US GILTI rules should not qualify for this inclusion.<sup>37</sup>

With respect to the reverse hybrid rule, the Dutch implementation provides for an exemption for regulated collective investment vehicles with a diversified portfolio.<sup>38</sup> Similarly, the Luxembourg implementation excludes certain types of collective investment vehicles (widely held, diversified, and subject to investor-protection regulation in the country where they were established such as UCITs or RAIFs) from the reverse hybrid rule.<sup>39</sup>

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32. CITA, *supra* note 30, at art. 12aa(1)(b); ITL *supra* note 29, at art. 168ter.

33. CITA, *supra* note 30, at art. 12ab; ITL *supra* note 29, at art. 168ter.

34. CITA, *supra* note 30, at art. 1(3)(12); ITL *supra* note 29, at art. 168quater.

35. CITA, *supra* note 30, at art. 12ag; ITL *supra* note 29, at art. 168ter.

36. *Kamerstukken II* [Dutch Parliamentary Paper], 2018/19, file 35241, no. 3, 59 (Neth) (explanatory memorandum).

37. *Id.* at 33.

38. CITA, *supra* note 30, at art. 1(13).

39. ITL, *supra* note 29, at art. 168quater.

### 3. *Associated Enterprises / Structured Arrangements*

The Dutch rules for associated enterprises<sup>40</sup> generally concern enterprises related through direct and indirect interests of twenty-five percent or more (up and down). If such interest is held by an individual or entity and one or more entities, then all these entities, including the taxpayer, will be treated as associated enterprises. The Dutch explanation of associated enterprises is stricter than ATAD II requires, allowing a fifty percent interest threshold for certain types of mismatches. The Luxembourg implementation also follows the fifty percent interest threshold, only applying the twenty-five percent interest threshold for hybrid mismatches involving payments under financial instruments.<sup>41</sup>

The interests of persons acting together have to be aggregated when determining whether the above thresholds are met. For an explanation of “acting together,” the Dutch rules refer to the Dutch collaborating group (*samenwerkende groep*) concept,<sup>42</sup> an existing concept under Dutch law. Under the Luxembourg interpretation, the concept of acting together is explained as follows: an investor owning less than a ten percent interest in an investment fund is not considered as acting together with another investor in the same fund unless it is proved otherwise.<sup>43</sup>

Associated enterprises are entities that are part of the same consolidated group for accounting purposes and entities that exercise a significant influence on the management of the other entity.<sup>44</sup> Neither the Netherlands nor Luxembourg have provided any clarification regarding the definition of “significant influence.”

A structured arrangement means an arrangement involving a hybrid mismatch where the mismatched outcome is priced into the terms of the arrangement or an arrangement that has been designed to produce a hybrid mismatch outcome unless the taxpayer or an associated enterprise could not reasonably have been expected to be aware of the hybrid mismatch and did not share in the value of the tax benefit resulting from the hybrid mismatch.<sup>45</sup>

### 4. *Other Aspects*

With the implementation of ATAD II, the 2005 CV/BV Decree was revoked in the Netherlands.<sup>46</sup> The CV/BV Decree had allowed a reduced dividend withholding rate under the U.S./Netherlands tax treaty for CV/BV

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40. CITA, *supra* note 30, at art. 12ac(2).

41. ITL, *supra* note 29, at art. 168ter.

42. CITA, *supra* note 30, art. 12ac(2)(b)/(c).

43. ITL, *supra* note 29, at art. 168ter, ¶ 18.

44. *Id.*

45. CITA, *supra* note 30 at art. 12ac(1)(f); ITL, *supra* note 29 at art. 168ter.

46. *Intrekking van het CV/BV- Besluit en heroverweging van het Besluit IFZ 1997/204M* 3 december 2019, Stert. 2019, 66196 (Neth.).

(limited partnership/ private limited liability company) structures.<sup>47</sup> As of January 1, 2020, dividend distributions from a Dutch entity held by a reverse hybrid CV to its U.S. parent will be taxed in the Netherlands (unless a domestic withholding tax exemption applies).<sup>48</sup>

Application of the new domestic anti-hybrid rules may result in double taxation. For example, consider a Dutch entity with a U.S. disregarded entity parent where the income of the Dutch entity mainly consists of payments from the U.S. parent company. The Dutch entity will be considered a hybrid entity. Therefore, if the Dutch entity claims deductions that are also deductible at the U.S. level, the deduction may be denied under the Dutch anti-hybrid rules due to a double deduction. If the deduction at the Dutch entity level is denied, it may lead to a potential overkill. The Dutch Secretary of Finance stated this outcome is a result of proper interpretation of anti-hybrid rules and there are no ATAD II provisions preventing such a result.<sup>49</sup> Hopefully, policy will be developed to mitigate this potential overkill.

### 5. *Conclusion*

The implementation of ATAD II is still in its early stages. Some issues require additional guidance or clarification. Most likely, further domestic regulations will be issued to provide guidance on the interpretation and application of the new rules. A uniform approach towards the interpretation and application of ATAD II throughout the whole EU would be beneficial for taxpayers.

## E. JAPAN

### 1. *Japan's Policy on BEPS Action Plan*

The Japanese government, in general, has been proactive toward the BEPS Action Plan and has implemented many of the OECD's recommendations. Japan signed the MLI on June 7, 2017, followed by ratification of such instrument being completed with the OECD on September 26, 2018.<sup>50</sup> With the important exception of the United States, which has not signed (and currently does not intend to sign), the MLI covers forty-five existing Japanese tax treaties once all of the counterparty countries have entered into and ratified the MLI.<sup>51</sup>

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47. *Id.*

48. *Id.*

49. Baker McKenzie, *Dutch Anti-Hybrid Rules 2020*, LEXOLOGY (Dec. 31, 2019), <https://www.lexology.com/library/detail.aspx?g=20f73630-f76f-489b-ae30-8757269b693f>.

50. *Members of the OECD/G20 Inclusive Framework on BEPS*, OECD (Feb. 2021), <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>.

51. *Japan: Individual - Foreign tax relief and tax treaties*, PWC (Mar. 3, 2021), <https://taxsummaries.pwc.com/japan/individual/foreign-tax-relief-and-tax-treaties>.

2. *Japan's Legislation and Treaty Policy on Hybrid Arrangements*

Japan opted into Article 3 of the MLI, under which income derived from an entity that is transparent from the perspective of Japanese tax law will be eligible for treaty benefits to the extent that a relevant partner or member of the entity is a resident of the treaty partner country.<sup>52</sup> With respect to the hybrid mismatch arrangements, Japan introduced legislation adopting a linking rule and denying an exclusion for dividends received from twenty-five percent owned non-Japanese companies as long as they are deductible in the payer country.<sup>53</sup>

3. *Shionogi Case: Scope of Tax-Free Reorganization In Case of Transfer of Share of Foreign Partnership*

Under Japanese tax law, treatment of a foreign partnership has been unclear for years. This year, a case involving a Japanese pharmaceutical company set an important precedent with respect to the scope of tax-free reorganization of a holding structure involving a foreign partnership. In that case, Shionogi & Co., Ltd. (the Taxpayer) formed a joint venture in 2001 with Glaxo Smith Klein (GSK) in order to develop anti-AIDS virus drugs for HIV treatment. The legal form of the joint venture was a Cayman Islands Special Limited Liability Partnership (CILP), with the Taxpayer and GSK each owning fifty percent evenly. After Pfizer had joined the two, the joint venture was reorganized such that the Taxpayer contributed its share of the CILP interest as a limited partner into a U.K. subsidiary in exchange for its corporate shares. The Japanese tax authority found the transaction to be taxable, recognizing a transfer of assets from inside Japan to outside Japan thereby resulting in loss of Japanese taxation on domestic assets and made an assessment on the alleged realized capital gain in the amount of approximately \$500 million.<sup>54</sup>

The central issue is whether the contributed asset, namely, the Taxpayer's share of the CILP interest as a limited partner, is viewed as located outside Japan, for which tax-free treatment would be afforded (as it is viewed outside the ambit of Japanese taxation). The Japanese tax authority regarded the contributed asset as being located inside Japan given that the CILP interest was registered in the Taxpayer's books and records and administered at the Taxpayer's headquarters located in Japan. The Tokyo District Court, in its decision dated March 11, 2020, disagreed and ordered the cancellation of the assessment. The court characterized the Taxpayer's share of the CILP interest, as an "integral/inseparable combination of (i) a share of the

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52. MLI, *supra* note 12 at art. 3.

53. *Changes in the Japanese Tax Laws Following the OECD-BEPS Project – The 2015 Tax Reform Proposal*, PWC (Feb. 25, 2015), <https://www.pwc.com/jp/en/taxnews-beeps/assets/beeps-news-issue-18-en.pdf>.

54. Press Release, Shionogi & Co., Ltd., Judgment of the Complaint for the Rescission of Tax Reassessment by the Osaka Regional Taxation Bureau, (May 6, 2021) (on file with Shionogi).



partnership assets, and (ii) contractual status as a (limited) partner.”<sup>55</sup> It went on to state that the origin of value of the share of the partnership laid in the partnership assets, as opposed to the contractual status. Accordingly, the court decision continued, the location of the contributed asset—the share of the partnership—is identified by where the primary partnership assets are located, namely, where data of clinical tests and other valuable intangible assets are stationed, which is outside Japan (i.e., the office of the U.S. affiliate of GSK).<sup>56</sup> Thus, the transfer of the CILP interest was held to be eligible for tax-free treatment, essentially based on the understanding that the capital gain had not accrued in Japan. This case has a significant practical impact, as cross-border joint ventures organized as foreign partnerships are prevalent and certain enterprises will likely contemplate reorganization in order to cope with rapid changes in today’s economic environments. The case has been appealed and is currently pending before the Tokyo High Court.

#### F. MAURITIUS

Mauritius does not have anti-avoidance laws dealing specifically with hybrid entities and instruments. Any cases of tax abuse such as transactions whose sole or dominant purpose is to obtain a tax benefit are dealt with under Mauritius’ general anti-avoidance rules.<sup>57</sup>

The Mauritius Income Tax Act 1995 (Mauritius ITA) also provides specific anti-avoidance rules relating to interest on debentures issued by reference to shares, excessive remuneration or share of profits, excessive remuneration of shareholders or directors, benefits to shareholders, excessive management expenses, and leases for other than adequate rent.<sup>58</sup>

Mauritius has taken other steps to align its laws with evolving international norms. Mauritius’s former Global Business Regime provided an ideal tax environment for international companies to set up their investment vehicles in Mauritius with limited substance requirements. Although the Global Business Regime promoted Mauritius as an International Financial Center for investment in Africa, the ring-fenced treatment of global business companies from “pure” domestic companies resulted in a “harmful” tax regime rating by the OECD.<sup>59</sup>

As part of Mauritius’ commitments to implement tax good governance principles, the country joined the Inclusive Framework in November 2017<sup>60</sup> and committed to implementing the BEPS minimum standards. Reforms were made to tax regimes deemed harmful by the OECD. The Global Business Regime mentioned above has been abolished on 1 January 2019,

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55. *Id.*

56. *Id.*

57. The Income Tax Act [ITA], § 90 (1995) (Mauritius).

58. *Id.* §§ 84–88.

59. Org. for Econ. Coop. and Dev., *Harmful Tax Practices - 2017 Progress Report on Preferential Regimes*, OECD iLIBRARY (Nov. 2017), <http://dx.doi.org/10.1787/9789264283954-en>.

60. *Members of the OECD/G20 Inclusive Framework on BEPS*, *supra* note 50.

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subject to grandfathering rules. Mauritius received an overall rating of “Compliant” following the 2017 Peer Review.<sup>61</sup>

Mauritius also committed to the BEPS Action 14 minimum standard and signed the MLI as of February 1, 2020.<sup>62</sup> Out of the forty-six Double Tax Avoidance Agreements, Mauritius designated forty-four DTAs to be Covered Tax Agreements (CTAs) and has opted for the minimum standards of the MLI relating to Treaty Abuse and Mutual Agreement Procedure (MAP).<sup>63</sup>

Mauritius opted only for the Principal Purpose Test in its CTAs and not the simplified Limitation of Benefit provision.<sup>64</sup> Article 7(4) of the MLI was applied to all its CTAs except for the tax treaty with Germany.<sup>65</sup> Article 16 MAP and Article 17 Corresponding Adjustments were adopted by Mauritius in their entirety.<sup>66</sup>

#### G. NIGERIA

Nigeria joined the OECD/G20 Inclusive Framework on BEPS in 2016, thereby committing to the implementation of the four minimum standards, namely the work on harmful tax practices (Action 5), tax treaty abuse (Action 6), country-by-country (CbC) reporting (Action 13), and dispute resolution mechanisms (Action 14).<sup>67</sup>

Since then, Nigeria has implemented domestic reforms<sup>68</sup> in line with the BEPS project and is in compliance with the four minimum standards highlighted above.<sup>69</sup> This has equipped the country to tackle tax avoidance, ensure coherence of local laws with international tax rules, and encourage a

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61. MLI, *supra* note 12, at art. 3.

62. Mauritius Revenue Authority, *Multilateral Convention to Implement the Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, 2–3 (Mar. 2020), <https://www.mra.mu/download/MLI.pdf>. [hereinafter MRA].

63. *Double Taxation Agreements*, MAURITIUS REVENUE AUTH., <https://www.mra.mu/index.php/taxes-duties/international-taxation/double-taxation-agreements> (last visited May 20, 2021).

64. MRA, *supra* note 62, at 7.

65. *Id.* at art. 7. (The benefits of a CTA may still apply subsequent to consultations between the contracting jurisdictions: the competent authority should be satisfied that the treaty benefit would be appropriate in the absence of the transaction or arrangement considering all the facts and circumstances.)

66. MRA, *supra* note 62, at 10.

67. See Lolade Ososami, *BEPS in Nigeria and Implications for Cross-Border Taxation*, INT’L TAX REP., Oct. 9, 2018, <https://www.internationaltaxreport.com/double-taxation/beps-in-nigeria-and-implications-for-cross-border-taxation-132040.htm>.

68. Income Tax (Country by Country Reporting) Regulations, 2018 No. 2 (2018) 105:6 O.G., B69–80 (Nigeria); Income Tax (Transfer Pricing) Regulations (2018) (Nigeria); Companies Income Tax (Significant Economic Presence) Order, No. 9 (2020) 107:21 O.G., B113–15 (Nigeria); See also *Finance Act 2019 Changes*, BDO TAX NEWS, <https://www.bdo.global/en-gb/microsites/tax-newsletters/corporate-tax-news/issue-54-march-2020/nigeria-finance-act-2019-changes> (last visited May 15, 2021).

69. Org. for Econ. Coop. and Dev., *supra* note 59 (The OECD/G20 Inclusive Framework on BEPS has over 135 countries.).

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more transparent tax environment. Nigeria also signed the MLI on August 17, 2017, although no further action has been taken to ratify or enforce the MLI since signing.<sup>70</sup>

There are no proposed anti-hybrid rules in Nigeria; neither has the country signed on to the anti-hybrid provision of the MLI (Action 2). But the OECD recognizes that general anti-avoidance rules could be effective tools to manage cases of unintended double non-taxation using hybrid mismatch arrangements, although they may not always provide a comprehensive response to the arrangement.<sup>71</sup> The general anti-avoidance provisions in Nigeria are included in the following sections of key tax legislation:

- (1) Section 22 of the Companies Income Tax Act, Cap C21, Laws of the Federation of Nigeria (LFN), 2004 (as amended);<sup>72</sup>
- (2) Section 17 of the Personal Income Tax Act, CAP P8, LFN 2004, 2004 (as amended);<sup>73</sup>
- (3) Section 15 of the Petroleum Profit Tax Act, CAP P13, LFN 2004 (as amended)<sup>74</sup> etc.<sup>75</sup>

It should be noted that adopting anti-hybrid rules may not be an immediate priority for the Nigerian government considering that there have not been material occurrences of companies within the country engaging in such complex tax avoidance structures. As such, the four minimum standards and the BEPS project recommendations on transfer pricing remain the core focus of tax authorities within the country for now.

## H. SOUTH AFRICA

South Africa's Income Tax Act 58 of 1962 (South African ITA) contains specific legislation with respect to hybrid equity instruments<sup>76</sup> and hybrid debt instruments.<sup>77</sup> The South African ITA contains further specific provisions limiting interest deductions,<sup>78</sup> transfer pricing provisions<sup>79</sup> and a general anti-avoidance rule (GAAR).<sup>80</sup>

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70. *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, OECD (Apr. 20, 2021), <http://www.oecd.org/tax/beps/beps-ml-signatories-and-parties.pdf>.

71. *Hybrids Mismatch Arrangements: Tax Policy and Compliance Issues*, OECD, at 13 (Mar. 2012), [https://www.oecd.org/tax/aggressive/HYBRIDS\\_ENG\\_Final\\_October2012.pdf](https://www.oecd.org/tax/aggressive/HYBRIDS_ENG_Final_October2012.pdf).

72. Companies Income Tax Act (2004) Cap. (C21), § 22 (Nigeria).

73. Personal Income Tax Act (2004) Cap. (P8), § 17 (Nigeria).

74. Petroleum Profit Tax Act (2004) Cap. (P13), § 15 (Nigeria).

75. *fcis* See also Capital Gains Tax Act (2004) Cap. (C1) (Nigeria); Value Added Tax Act (2004) Cap. (V1) (Nigeria).

76. Income Tax Act 58 of 1962 § 8E (S. Afr.).

77. *Id.* § 8F.

78. *Id.* § 23.

79. *Id.* § 31.

80. *Id.* § 103.

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South Africa is not a member country of the OECD but has observer status. Under the OECD/G20 Inclusive Framework on BEPS, South Africa is one of the 135 countries collaborating to put an end to tax avoidance strategies that exploit gaps and mismatches in tax rules.<sup>81</sup>

South Africa signed the MLI on July 6, 2017, but as of April 20, 2021, the country had not deposited its Instrument of Ratification, Acceptance or Approval.<sup>82</sup> As part of the minimum set of standards required, the MLI includes rules dealing with hybrid mismatches (BEPS Action point 2).

In the Second and Final Report on BEPS for the Minister of Finance as prepared by the Davis Tax Committee (September 2016) (the DTC), certain recommendations have been made.<sup>83</sup> The DTC was formed on July 17, 2013 to inquire into the role of South Africa's tax system on the promotion of: inclusive economic growth, employment creation, development and fiscal sustainability, while also taking into account the long terms objectives of the National Development Plan.<sup>84</sup> The DTC also stated that it was required to address concerns about BEPS, especially in the context of corporate tax, as identified by the OECD and G20.<sup>85</sup> "This report sets out the DTC's position as of May 16, 2016."<sup>86</sup>

The DTC made specific recommendations on hybrid entity mismatches for South Africa.<sup>87</sup> The DTC acknowledged that South Africa's legislation on hybrid entities (see above) is still behind that of G20 members and that further reform is required to ensure that tax planning schemes utilizing hybrid entities as a mechanism for double non-taxation are curtailed.<sup>88</sup> This will require two things:

- (1) Further refinement of domestic rules related to treatment of hybrid entities<sup>89</sup>; and
- (2) Specific DTA anti-avoidance clauses<sup>90</sup> that should be in line with best international best practice.<sup>91</sup>

In conclusion, it is likely that there will be further developments in South Africa in this complex area of tax law.

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81. *International Collaboration to End Tax Avoidance*, OECD, <https://www.oecd.org/tax/beps/> (last visited May 15, 2021).

82. See *Signatories to BEPS Tax Treaty*, *supra* note 70.

83. Davis Tax Committee, EXECUTIVE SUMMARY OF SECOND INTERIM REPORT ON BASE EROSION AND PROFIT SHIFTING (BEPS): OECD BEPS PROJECT FROM A SOUTH AFRICAN PERSPECTIVE: POLICY PERSPECTIVES AND RECOMMENDATIONS FOR SOUTH AFRICA (2016).

84. Davis Tax Committee, SECOND INTERIM REPORT ON BASE EROSION AND PROFIT SHIFTING (BEPS) IN SOUTH AFRICA I (2016).

85. *Id.* at 1.

86. *Id.*

87. SECOND INTERIM REPORT ON BEPS IN SOUTH AFRICA, *supra* note 84 at 22.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 24.

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I. UNITED STATES

Although the United States was not a signatory to the MLI and posed numerous objections to the OECD BEPS Project, the United States has adopted provisions recommended by both in its domestic law. Many of these statutory changes occurred in late 2017, but the IRS has finalized numerous regulations related to the issues in 2020. This summary focuses particularly on those changes that dealt with hybrid instruments or hybrid entities.

1. *Hybrid Entities and Hybrid Transactions*

Section 267A of the Internal Revenue Code of 1986, as amended (the Code), as introduced by the Tax Cuts and Jobs Act,<sup>92</sup> denies certain interest or royalty deductions involving hybrid transactions or hybrid entities. “Interest” for these purposes includes traditional interest on debt instruments but also includes the time-value-of-money component on sale-repurchase agreements (treated as debt), redeemable ground rent treated as interest, and the time-value-of-money component on swaps with significant nonperiodic payments (other than cleared swaps and non-cleared swaps subject to a margin or collateral requirements).<sup>93</sup>

The Regulations generally disallow a deduction for interest or royalties if the payment (i) creates a “disqualified hybrid amount,” meaning that it produces a deduction no-inclusion (D/NI) outcome as a result of a hybrid or branch arrangement; (ii) creates a “disqualified imported mismatch amount,” meaning that it produces an indirect D/NI outcome as a result of the effects of an offshore hybrid or branch arrangement being imported into the U.S. tax system; or (iii) is made pursuant to a transaction a principal purpose of which is to avoid the purposes of the Regulations under Code section 267A and it produces a D/NI outcome.<sup>94</sup> Thus, the Regulations do not address D/NI outcomes that are not the result of hybridity.

The Regulations provide that a payment of interest or royalties is made pursuant to a hybrid transaction if there is a mismatch in the character of the instrument or arrangement such that the payment is not treated as interest or a royalty, as applicable, under the tax law of a “specified recipient.”<sup>95</sup> Examples of such a payment (a specified payment) include a payment that is treated as interest for U.S. tax purposes but, for purposes of a specified recipient’s tax law, it is treated as a distribution on equity or a return of principal. When a specified payment is made pursuant to a hybrid transaction, it is generally a disqualified hybrid amount to the extent that the specified recipient does not include the payment in income.<sup>96</sup>

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92. Amendment of 1986 Code, Pub. L. No. 115-97, 131 Stat 2126 (2017).

93. Treas. Reg. § 1.267A-5(a)(12).

94. *Id.* § 1.267A-1(b).

95. *Id.* § 1.267A-2(a)(2).

96. *Id.* § 1.267A-2(a)(1).

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Code section 267A can also apply to payments to reverse hybrids, where a D/NI result is created because the recipient of the payment is treated as transparent in the jurisdiction where it was created, but not transparent in the jurisdiction of the investor.<sup>97</sup>

The application of Code section 267A by its terms is not limited to any particular category of persons, other than the general limitation of applying to payments to related parties.<sup>98</sup> The Regulations narrow the scope of Code section 267A so that it applies only to deductions of “specified parties.” A specified party means any of: (i) a tax resident of the United States, (ii) a controlled foreign corporation (CFC) for which there is one or more United States shareholders that own (within the meaning of Code section 958(a)) at least ten percent of the stock of the CFC, or (iii) a US taxable branch (which includes a U.S. permanent establishment of a tax treaty resident).<sup>99</sup>

For the purposes of testing whether a D/NI outcome results and the extent of the D/NI outcome, a tax resident or taxable branch includes a specified payment in income to the extent that, under tax law of the jurisdiction receiving the payment, the tax resident or taxable branch includes the payment in its income or tax base at the full marginal rate imposed on ordinary income (within thirty-six months after the end of the specified party’s taxable year), and the payment is not reduced or offset by certain items (such as an exemption or credit) particular to that type of payment.<sup>100</sup>

## 2. *IRC § 163(j): The U.S. Interest Barrier*

If a payment escapes disallowance under Code section 267A, the payment may still be disallowed deduction or deduction may be limited under Code section 163(j). The deduction for any business interest expense (BIE) is limited to the sum of (1) business interest income; (2) thirty percent of the adjusted taxable income of the taxpayer for the taxable year; and (3) any “floor plan financing interest” of the taxpayer for the taxable year.<sup>101</sup>

BIE means any interest paid or accrued on indebtedness properly allocable to a trade or business.<sup>102</sup> Interest also includes amounts such as the time-value-of-money component for swaps (other than traded swaps and swaps with margin or collateral requirements),<sup>103</sup> substitute interest payments on sale-repurchase and securities lending transactions,<sup>104</sup> and other payments that are economically equivalent to interest if a principal purpose of structuring the transaction is to reduce an amount that would have otherwise

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97. *Id.* § 1.267A-2(d).

98. I.R.C. § 267(a).

99. Treas. Reg. § 1.267A-5(a).

100. *Id.* § 1.267A-3(a)(1).

101. I.R.C. § 163(j)(1).

102. *Id.* § 163(j)(5).

103. Treas. Reg. § 1.163(j)-1(b)(22)(ii).

104. *Id.* § 1.163(j)-1(b)(22)(iii)(C).

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been subject to the limitation.<sup>105</sup> Under the Regulations, any expense is economically equivalent to interest to the extent that the expense is (i) deductible by the taxpayer; (ii) incurred in a transaction in which the taxpayer secured the use of funds for a period of time; (iii) substantially incurred in consideration of the time value of money; and (iv) not otherwise classified as interest under the Code section 163(j) Regulations.<sup>106</sup>

3. *New Deduction for Dividends from Non-U.S. Sources*

A U.S. corporation that is a U.S. shareholder of a ten percent owned non-U.S. corporation (other than a PFIC) may now take a deduction from the foreign source portion of any dividend received from the ten percent owned non-U.S. corporation.<sup>107</sup> But no deduction for a foreign source dividend is allowed if the non-U.S. corporation was entitled to a deduction for the payment of the dividend.<sup>108</sup> This rule prevents non-U.S. corporations from creating hybrid instruments that would be treated as equity from a U.S. perspective (to obtain the foreign source dividend deduction) but would be treated as debt from a non-U.S. perspective (to obtain a deduction for the distributions made).

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105. *Id.* § 1.163(j)-1(b)(22)(iv)(A)(1).

106. *Id.* § 1.163(j)-1(b)(22)(iv)(A)(1).

107. I.R.C. § 245(a).

108. *Id.* § 245(e).

## **International Art and Cultural Heritage Law**

LOIS E. WETZEL, JACQUELINE CHEZAR, DAVID BRIGHT, AND  
KEVIN RAY\*

This article surveys significant legal developments in international art and cultural heritage law during 2020.

### **I. *Barnet v. Ministry of Culture & Sports of the Hellenic Republic***

In June 2020, the United States Court of Appeals for the Second Circuit ruled that the commercial activity exception to the Foreign Sovereign Immunities Act (FSIA)<sup>1</sup> did not apply to Sotheby's suit against Greece because Greece's act of sending a letter contesting ownership of a bronze figurine was not taken in connection with a commercial activity. The following provides an overview of *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*,<sup>2</sup> as well as a summary of the court's analysis and a brief note on the decision's significance.

#### **A. FACTUAL BACKGROUND**

The case centers around a small, bronze horse sculpture of Greek origin crafted during the Geometric Period (the Figurine). The Figurine had been in the private collection of the Barnet Family since 1973, when the family purchased it from antiquities dealer Robin Symes. In 2017, trustees of the 2012 Saretta Barnet Revocable Trust consigned the figurine to Sotheby's to be sold in an auction scheduled for May 14, 2018.<sup>3</sup> The Ministry of Culture and Sports of the Hellenic Republic (the Ministry, or Greece) saw the catalog for the May 2018 auction and was suspicious of the lot for the Figurine because of its Greek origin and questionable provenance.<sup>4</sup> The Ministry researched the provenance of the Figurine and sent a formal letter to Sotheby's on May 11, 2018, contesting the sale and the purported

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2. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1602–1611 (1976).

3. *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193 (2d Cir. 2020).

4. *Id.* at 195.



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ownership of the Figurine. The letter asserted Greece's ownership interest in the Figurine, requested that it be withdrawn from the auction, and cited various legal tools that the Ministry reserved to use to assert its rights in the Figurine.<sup>5</sup> As a result of the letter, Sotheby's withdrew the Figurine from the auction.<sup>6</sup> While the Ministry continued to investigate the provenance of the piece, Sotheby's and the Barnet Family (collectively Plaintiffs) jointly filed a claim against the Ministry in the United States District Court for the Southern District of New York, seeking a declaratory judgment that the Barnet Trust was the rightful owner of the Figurine.<sup>7</sup> As a threshold matter, the district court had to determine whether it had jurisdiction over Greece or whether the foreign sovereign was immune pursuant to the FSIA.<sup>8</sup>

**B. LEGAL FRAMEWORK AND PROCEDURAL POSTURE**

Sovereign immunity is a long-standing doctrine under which domestic courts will, in certain circumstances, decline to exercise jurisdiction over a foreign state unless the state consents to jurisdiction.<sup>9</sup> Until the mid-twentieth century, the United States adhered to a theory of absolute immunity, affording a foreign sovereign immunity no matter the private or public nature of the state action.<sup>10</sup> But the advent of a rapidly expanding global market, in which sovereigns were increasingly participating, altered this practice. Seeking to hold foreign states accountable for incidents arising from their "purely commercial operations," courts began to impose limits on absolute immunity and routinely exercised jurisdiction over sovereigns where commercial activities were implicated.<sup>11</sup> This imposition of limits on immunity became known as the restrictive approach to sovereign immunity.<sup>12</sup> To encourage consistency in jurisdictional determinations of the U.S. judiciary under the restrictive approach, Congress enacted the FSIA, which provides the sole basis for obtaining jurisdiction over a foreign sovereign in the United States.<sup>13</sup> The Act seeks to protect the rights of both

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5. *Id.* (The Ministry was on high alert due to the reputation of Mr. Symes as someone with a history of engaging in transactions of dubious legality, as well as the gaps in provenance.).

6. *Id.*

7. *Id.* at 196.

8. *Id.*

9. *Barnet*, 961 F.3d at 196.

10. See H.R. REP. NO. 94-1487, at 8 (1976).

11. The concept that evolved into the theory of absolute immunity was originally articulated in U.S. case law by Chief Justice Marshall in *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 125 (1812) ("[T]he law of nations . . . requires the consent of a sovereign, either express or implied, before he can be subjected to a foreign jurisdiction.").

12. See, e.g., *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976) (referencing the judicial practice of imposing a commercial activity exception to the broad grant of immunity usually afforded a foreign sovereign in U.S. courts.).

13. See generally Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Att'y Gen. (May 19, 1952), reprinted in *Alfred Dunhill*, 425 U.S. at app. 2, 711-15 (for background on trend of restrictive theory of immunity).

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foreign states and litigants in United States courts.<sup>14</sup> Thus, the FSIA sets out a presumption of immunity for foreign states and prescribes explicit exceptions or scenarios in which a foreign sovereign may be subject to the jurisdiction of U.S. courts.<sup>15</sup>

Once a defendant demonstrates that it is a foreign sovereign for purposes of the FSIA, a plaintiff has the burden of presenting evidence that an exception applies and that immunity should not be granted.<sup>16</sup> In *Barnet*, the Ministry moved to dismiss the action on the grounds that the court lacked jurisdiction over the foreign sovereign under the FSIA.<sup>17</sup> Plaintiffs countered that jurisdiction was proper under the third clause of the FSIA’s “commercial activity” exception, known as the “direct-effect” clause. The direct-effect clause provides:

A foreign government shall not be immune from the jurisdiction of courts of the United States . . . in any case in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.<sup>18</sup>

Plaintiffs argued that the district court had jurisdiction over Greece, asserting that the act of Greece sending a letter interrupting the sale was commercial activity that caused a direct effect in the United States.<sup>19</sup> The district court agreed with Plaintiffs, denying Greece’s motion to dismiss and holding that the direct-effect clause was satisfied.<sup>20</sup> Greece appealed on the sole issue of whether Greece sending the letter was an act “taken in connection with a commercial activity.”<sup>21</sup>

### C. THE COURT’S ANALYSIS

On appeal, the Second Circuit began its analysis by identifying the three elements that must be met to satisfy the direct-effect clause. For the clause to be satisfied, the suit must be: “(1) based upon an act outside the territory of the United States; (2) that was taken in connection with a commercial activity of [Greece] outside the United States; and (3) that caused a direct effect in the United States.”<sup>22</sup>

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14. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

15. H.R. REP. NO. 94-1487, at 7–8 (1976) (stating objectives for enactment of the FSIA).

16. *See, e.g.*, 28 U.S.C. § 1604.

17. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 113 (2d Cir. 2017).

18. *Barnet*, 961 F.3d at 196. (Under the FSIA, political subdivisions and agencies or instrumentalities of the foreign sovereign, like that of the Ministry, are treated as the foreign sovereign.); *see also* 28 U.S.C. § 1603(a)–(b).

19. § 1605(a)(2).

20. *Barnet v. Ministry of Culture and Sports of the Hellenic Republic*, 391 F.Supp. 3d 291, 293 (S.D.N.Y. 2019).

21. *Id.*

22. *Barnet*, 961 F.3d at 196.

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The Second Circuit explained that the first element instructs the court to find the “core” action taken by Greece that is outside the United States and from which relief is sought.<sup>23</sup> Concurring with the district court, the Second Circuit identified the core predicate act as Greece sending a letter to Sotheby’s, asserting ownership of the Figurine.<sup>24</sup>

The crux of the Second Circuit’s analysis went to the second element, which requires the court to determine whether the core predicate act performed by the foreign sovereign was taken in connection with a commercial activity of the foreign sovereign outside the United States.<sup>25</sup> Pursuant to precedent that defines commercial activity as an activity that could be performed by a private party,<sup>26</sup> the district court had analyzed whether sending a letter asserting ownership comprised an act that could be undertaken by a private party. According to the Second Circuit, the district court erred in this part of the analysis by treating Greece’s act of sending the letter as both the predicate “act” and the related “commercial activity” that is required by the direct-effect clause.<sup>27</sup> The Second Circuit clarified that the core predicate act (i.e., Greece sending the letter asserting ownership of the Figurine) could not be the commercial activity required by the second element because “a single act cannot be undertaken in connection with itself.”<sup>28</sup> Rather, the Second Circuit found it “apparent” that Greece sent the letter “in connection with” Greek legislation nationalizing historical artifacts and pursuant to enforcing those patrimony laws.<sup>29</sup>

According to the court, the question then was whether the adoption and enforcement of patrimony laws is a commercial activity as opposed to a sovereign act.<sup>30</sup> The Second Circuit explained the patrimony laws at issue and emphasized that such laws declare those artifacts owned by the state to be “*extra commercium*,” or outside the purview of commerce.<sup>31</sup> The Second Circuit relied on its own precedent to hold that nationalizing property is a distinctly sovereign act, explaining that in claiming ownership of the Figurine, Greece was acting in a sovereign capacity to administer and enforce its patrimony laws.<sup>32</sup>

Because the FSIA instructs that the commerciality of an activity should be determined by reference to the “nature” of the activity rather than by reference to its “purpose,” the Second Circuit, without analysis, determined that the nature of Greece’s activity was the enactment and enforcement of

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23. *Id.*

24. *Id.*

25. *Id.* at 197.

26. *Id.*

27. *Id.*

28. *Barnet*, 961 F.3d at 196.

29. *Id.*

30. *Id.*

31. *Id.* at 198.

32. *Id.*

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laws declaring the figurine state property.<sup>33</sup> The Second Circuit explained that such activity is not the type a private party would engage in when partaking in trade, traffic, or commerce, nor is it activity that resembles private commercial transactions.<sup>34</sup> The Second Circuit then rejected Plaintiffs' argument that Greece was not acting in a sovereign capacity because it had not actually physically seized the Figurine, emphasizing that the FSIA does not require that a foreign state "invade the [U.S.]" and "seize disputed property" so as to maintain its immunity from suit.<sup>35</sup>

Finding support from Second and Ninth Circuit precedent, the court took the position that even arguably commercial activities performed by a foreign sovereign maintain their sovereign nature when the activity is undertaken in a strictly sovereign capacity or under a sovereign framework.<sup>36</sup> While Greece was, to some extent, participating in the market by contesting the sale and purported ownership of the Figurine, the Second Circuit declined to find that Greece was doing so "in any traditional sense" and it was not "'otherwise [competing] in the marketplace like a private' antiquities dealer."<sup>37</sup> The Second Circuit then acknowledged that a private party could send a letter contesting a sale and that merely claiming ownership is not uniquely sovereign, but the court prioritized the fact that claiming ownership through nationalization and enforcement of patrimony laws is particular to a sovereign.<sup>38</sup>

Thus, the Second Circuit concluded that "Greece's act of sending the letter was not in connection with a commercial activity outside of the United States." Without addressing the third element of the direct-effects clause, the Second Circuit reversed the holding of the district court and remanded with instructions to dismiss the action for lack of subject matter jurisdiction.<sup>39</sup>

#### D. SIGNIFICANCE/IMPLICATIONS

The *Barnet* decision is significant for several reasons. First, the decision sets precedential safeguards for foreign sovereigns as they communicate with

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33. *Barnet*, 961 F.3d at 200 (citing *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) ("Expropriation is a decidedly sovereign—rather than commercial—activity.") and relying on *Nelson*, 507 U.S. at 361).

34. § 1603(d); *Barnet*, 961 F.3d at 201.

35. *Barnet*, 961 F.3d at 199.

36. *Id.*

37. *Anglo-Iberia Underwriting Management v. P.T. Jamsostek*, 600 F.3d 171 (2d Cir. 2010) (where the court found the activities of an Indonesia-owned health insurer were sovereign in nature because the services were available as default insurer option under Indonesia's national social security program); *Hilao v. Estate of Marcos*, 94 F.3d 539 (9th Cir. 1996) (where the court held that the Philippines were exercising a distinctly sovereign police power when it froze, seized, and sold various assets around the world to repatriate money that had allegedly been stolen by the country's former president).

38. *Barnet*, 961 F.3d at 199 (citing *Anglo-Iberia*, 600 F.3d at 177).

39. *Id.*

art market players pursuant to national obligations to protect the nation's cultural heritage.<sup>40</sup> Until *Barnet*, an auction house had never before brought suit against a foreign sovereign for communications regarding contested artifacts.<sup>41</sup> The decision gives shape to how the third clause of the FSIA's "commercial activity" exception, the "direct-effect" clause, might apply in such contexts.<sup>42</sup> Furthermore, the decision upholds the uniquely sovereign nature of vesting and then defending title to antiquities in the State, without need for the State to first reduce the antiquity to physical possession.<sup>43</sup>

## II. *Cassirer v. Thyssen-Bornemisza Collection Foundation*

In a decision handed down on August 17, 2020, the United States Court of Appeals for the Ninth Circuit concluded an ongoing dispute over the ownership of a painting by Camille Pissarro, which had been stolen by the Nazi regime.<sup>44</sup> The case highlights the difficulty for Jewish descendants to recover Nazi-looted artwork when a chain of title has been established. Notably, the Ninth Circuit concluded its decision by admonishing the Kingdom of Spain for refusing to return the Pissarro masterpiece despite its public declarations of commitment to the Washington Conference Principles on Nazi-Confiscated Art.<sup>45</sup>

The descendants of Lilly Cassirer and the United Jewish Federation of San Diego County (Cassirer, or Plaintiffs) appealed the final judgment of the Central District Court of California in their dispute with the Thyssen-Bornemisza Collection Foundation (TBC, or Defendant). The lower court found that TBC did not have actual knowledge the painting was stolen when it acquired the painting from the Baron Hans Heinrich Thyssen-Bornemisza (Baron) in 1993 and held in favor of the Defendant.

This dispute began in 2005 when Plaintiffs filed an action against the Kingdom of Spain and TBC seeking restitution of the Pissarro piece, *Rue St.-Honore, Apres-Midi, Effet de Pluie*. A Nazi agent stole the painting from the Cassirers' great-grandmother, Lilly Cassirer, in 1939. In a 2013 ruling,

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40. *Id.*

41. See *Global Marine Exploration, Inc. v. Republic of France*, No. 420-cv-181-AW-MJF, 2020 U.S. Dist. LEXIS 215362, \*11–12 (N.D. Fla. Nov. 16, 2020) (suggesting the protections afforded to sovereigns may even extend beyond mere communications: the *Barnet* decision was recently cited by the United States District Court for the Northern District of Florida for support in holding that a sovereign entering into contracts relating to shipwreck recoveries is not necessarily commercial when undertaken by a sovereign with a sovereign agenda).

42. Kate Brown, *Sotheby's Just Lost Its Lawsuit Against Greece Over an 8th-Century BC Horse Statue*, ARTNET NEWS (June 10, 2020), <https://news.artnet.com/art-world/barnet-case-sothebys-1883349>.

43. See *Global Marine*, 2020 U.S. Dist. LEXIS 215362, at \*11–12. Since Sotheby's filed its case in the United States Southern District of New York, a small gallery out of Florida has undertaken similar efforts in the same district against Italy in a case concerning a bust of Alexander the Great. See *Safari Gallery, Inc. v. Italian Republic*, No. 1:2019-cv-10507.

44. See *Barnet*, 961 F.3d at 193.

45. See *Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 Fed. App'x. 452, 455 (9th Cir. 2020).

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the Ninth Circuit addressed questions of sovereign immunity and jurisdiction.<sup>46</sup> More recently, the matter was before the Ninth Circuit in 2017 when Plaintiffs appealed the district court's grant of summary judgment in favor of TBC.<sup>47</sup> In that ruling, the court reversed the district court's conclusion, finding that genuine issues of material fact remained as to whether TBC knew the painting was stolen when acquiring it.<sup>48</sup> On remand, following a bench trial, the district court entered judgment in favor of TBC. In this final chapter of the Cassirers' efforts to recover the painting, the Ninth Circuit methodically addressed each of the issues and affirmed the district court's ruling in favor of TBC, ending the Cassirers' long battle for restitution of the artwork.<sup>49</sup>

First, the Ninth Circuit quickly dismissed the Plaintiffs' request for *en banc* review of its 2017 decision, in which the court held that Spanish law, specifically Spain's Historical Heritage Law<sup>50</sup> and Spain Civil Code Article 1956 (Article 1956),<sup>51</sup> governed the substantive claims in this matter.<sup>52</sup> The court held that the Plaintiffs had not identified any new factual or legal developments that would permit the Court to reconsider its prior findings.<sup>53</sup>

Second, the Ninth Circuit found the district court applied the correct legal standard under Article 1956 in determining that TBC did not have actual knowledge that the painting was stolen when purchasing it from the Baron.<sup>54</sup> The Cassirers' appeal argued that the district court should have applied an alternative test to find that the recipient of stolen property, in this case TBC, was willfully blind and thus, had actual knowledge the property was stolen when it was purchased.<sup>55</sup> The two alternative tests to show proof of willful blindness asserted by the Cassiers are (1) a high risk or likelihood test, in which it can be proven that it is highly probable in light of existing circumstances that the property had an illicit origin, and (2) a "perfectly imagined" test, which considers whether the recipient of the property could have perfectly imagined the possibility that it was stolen.<sup>56</sup> Cassirer argued

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46. See *id.* at 457 n.3; see also *Washington Conference Principles on Nazi-Confiscated Art*, DEP'T OF STATE (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>.

47. See *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1055 (9th Cir. 2009).

48. See *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 955 (9th Cir. 2017).

49. *Id.* at 981.

50. *Id.* at 456–57.

51. See del Patrimonio Histórico Español [Spanish Historical Heritage] (B.O.E. 1985, 16) (Spain).

52. See Spanish Civil Code, [C.C.] [Civil Code] art. 1956 (Spain).

53. *Cassirer*, 824 Fed. App'x. at 455.

54. *Id.*

55. *Id.* at 455; see also *Alfred Dunhill*, 425 U.S. at 706 (1976) (Referencing the judicial practice of imposing a commercial activity exception to the broad grant of immunity usually afforded a foreign sovereign in U.S. courts.).

56. *Cassirer*, 824 Fed. App'x. at 455.

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that the perfectly imagined test should have been applied in this case because it has a lower standard of proof.<sup>57</sup>

The Ninth Circuit first set forth its view that the two alternative tests did not have different standards of proof and, as such, a failure to apply one test over the other would not lead to a different result.<sup>58</sup> In coming to this conclusion, the court opined that both tests require an evaluation of circumstantial evidence and objective indications of prior theft, as well as subjective knowledge of the recipient of the stolen property.<sup>59</sup>

The Ninth Circuit also concluded that, in the event these tests do rely on a different standard of proof, the district court's failure to apply the perfectly imagined test had not harmed the Plaintiffs' case.<sup>60</sup> The court relied on the fact that the Spanish Supreme Court has not applied the perfectly imagined test for willful blindness in deciding analogous cases that involve stolen artwork or "a receiver who purchased stolen goods from a seller that had an invoice reflecting that he had purchased the stolen goods from an established and well-known art gallery."<sup>61</sup>

Third, the Ninth Circuit found that while "parts of the record suggest that the Baron may have had knowledge the Painting was stolen when he purchased it," the district court's finding that the Baron lacked actual knowledge that the painting was stolen was adequately supported by sufficient evidence in the record, including inferences that may be drawn from historical facts, and, therefore, was not clearly erroneous.<sup>62</sup> The Ninth Circuit specifically pointed to evidence the Baron had purchased the painting at fair market value from a reputable art gallery in New York.<sup>63</sup> The Court held that, even if the Baron's knowledge could be imputed to TBC, it did not cause TBC to have actual knowledge.<sup>64</sup> The Court also rejected the Cassirers' argument that the district court's finding "that the Baron did not possess the Painting in good faith under Swiss law satisfies the actual-knowledge requirement under Article 1956."<sup>65</sup> The Court reasoned that "lack of good faith under Swiss law does not equate to having actual knowledge of the theft under Spanish law."<sup>66</sup>

Finally, the Ninth Circuit held that the district court's conclusion that TBC lacked actual knowledge that the painting was stolen was also not clearly erroneous.<sup>67</sup> Again, the court found that the record contained

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57. *Id.* (expressly stating that it was not convinced that these in fact comprised two separate tests for willful blindness. "We are not convinced that the perfectly imagined and high risk or likelihood tests are different tests for willful blindness.").

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Cassirer*, 824 Fed. App'x. at 455-56 (reviewing cases).

63. *Id.* at 456.

64. *Id.*

65. *Id.* at 457.

66. *Id.*

67. *Id.*

sufficient evidence that TBC lacked actual knowledge that the painting was stolen, and it held that the district court's finding on this matter was supported by inferences that may be drawn from facts in the record.<sup>68</sup>

While neither the district court nor the Ninth Circuit were able to provide Cassirer with restitution of the stolen Picasso painting, the district court concluded their final ruling on the matter by noting the unfortunate hypocrisy of the Spanish government in repeatedly, publicly embracing the moral (albeit non-binding) underpinnings of the Washington Conference Principles on Nazi-Confiscated Art, while refusing to return the painting to Cassirer.<sup>69</sup>

### **III. Jeff Koons, Appropriation, and French Copyright Infringement**

Jeff Koons has worked as an artist for more than four decades, becoming prominent in the art world during the 1980s and maintaining a high profile since that time. He is known for size and scope, both with respect to his works and the opinions of those works. His pieces have been collected by Ileana Sonnabend, Eli and Edythe Broad, and Stefan Edlis and Gael Neeson. He has exhibited at museums including the Walker Art Center, MCA Chicago, the Guggenheim, and the Whitney. Beginning in the 1990s, Koons has also become known for being a frequent defendant in copyright infringement litigation.

In *Rogers v. Koons*, the United States Court of Appeals for the Second Circuit affirmed a judgment that Koons' sculpture, *String of Puppies*, had infringed on the copyright of photographer Art Rogers.<sup>70</sup> The Court was unpersuaded by Koons's reliance on the defense of fair use and his claim that the work was a parody.<sup>71</sup>

In *United Features Syndicate v. Koons*, the United States District Court for the Southern District of New York granted summary judgment for United Features, finding that Koons' sculpture, *Wild Boy and Puppy*, had infringed on the Plaintiff's copyright of the "Garfield" comic strip through an unauthorized reproduction of Odie, a character from that strip.<sup>72</sup> In that case, Koons was again unsuccessful in his reliance on the defense of fair use and claim that the work was a parody.<sup>73</sup>

In *Campbell v. Koons*, which was decided in the same year as *United Features Syndicate*, the Southern District of New York again granted summary judgment, finding that Koons' sculpture, *Usbering in Banality*, had infringed

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68. *Cassirer*, 824 Fed. App'x. at 457.

69. *Id.*

70. *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-GAF, 2012 WL 12875771, at \*11 (C.D. Cal.).

71. *Rogers v. Koons*, 960 F.2d 301, 313-14 (2d Cir. 1992).

72. *Id.* at 311.

73. *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 384-85 (S.D.N.Y. 1993).



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on the copyright of photographer Barbara Campbell.<sup>74</sup> Once again, Koons was unsuccessful in his reliance on fair use and parody.<sup>75</sup>

In *Blanch v. Koons*, Koons finally prevailed in a copyright infringement action.<sup>76</sup> The United States Court of Appeals for the Second Circuit ruled that he had sufficiently transformed an advertisement such that Koons's work qualified as fair use of the original work.<sup>77</sup> Beginning in 2018, however, Koons was again on the losing end, this time on copyright infringement matters that were brought outside of the United States.

In 2018, a French court ruled that Koons' sculpture *Faits d'Hiver* had copied an advertisement for a clothing company.<sup>78</sup> The court rejected Koons's claims for parody as an exception to infringement and freedom of expression.<sup>79</sup>

Then, on December 17, 2019, the Paris Court of Appeal affirmed a 2017 decision by the High Court of Paris, finding that Koons's sculpture, *Naked*, infringed on the copyright of the heirs of French artist Jean-Francois Bauret.<sup>80</sup> Prior to his death in 2014, Mr. Bauret was a French photographer who had made his career taking photographs for advertising campaigns.<sup>81</sup> Mr. Bauret also created black and white photographic nudes.<sup>82</sup> While these nudes were not used for commercial advertising purposes, his nude portraits were known to collectors.<sup>83</sup>

In 1970, Mr. Bauret produced a black and white photograph titled *Children*.<sup>84</sup> The print of the photograph is kept at the French National Library and was included in a monograph that was published in 1984.<sup>85</sup> While no print of the photograph was sold, Mr. Bauret agreed in 1975 to edit the photograph into a postcard.<sup>86</sup>

Shortly after Mr. Bauret's death, his heirs discovered an article that had been posted online in January 2014.<sup>87</sup> This article described Koons's sculpture *Naked* as having similarities to *Children*.<sup>88</sup> Like *Children*, *Naked*

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74. *Id.* at 379.

75. *Campbell v. Koons*, No. 91 Civ. 6055, 1993 WL 97381, at \*3 (S.D.N.Y. Apr. 1, 1993).

76. *Id.*

77. *Blanch v. Koons*, 467 F.3d 244, 259 (2d Cir. 2006).

78. *Id.*

79. *Tribunaux de grande [TGI]* [ordinary court of original jurisdiction] Paris, Nov. 8, 2018, 15/02536.

80. *Id.*

81. *Cour d'appel [CA]* [regional court of appeal] Paris, civ., Dec. 17, 2019, 17/09695.

82. Benjamin Sutton, *Jeff Koons Was Accused of Plagiarizing a French Clothing Brand's Advertisement*, ARTSY (Sep. 26, 2018), <https://www.artsy.net/news>.

83. *Cour d'appel [CA]* [regional court of appeal] Paris, civ., Dec. 17, 2019, 17/09695.

84. *See id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Leonidas Kalai, *Jeff Koons Loses Appeal in Copyright Case over Naked Sculpture*, ARTCRITIQUE (Dec. 29, 2019), <https://www.art-critique.com/en/2019/12/jeff-koons-loses-appeal-in-copyright-case-over-naked-sculpture/>.

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portrays a young boy and a young girl, both of whom are naked, holding each other by the shoulders.<sup>89</sup> Unlike *Children, Naked* portrays the young boy holding flowers out to the young girl (*Children* portrays them holding hands with the hands that are not on each other's shoulders).

While Koons's *Naked* had never been exhibited to the public in France, Mr. Bauret's heirs learned that it was to be present in Paris as part of a traveling exhibition, from November 26, 2014, through April 27, 2015, at the National Center of Art and NFG.<sup>90</sup> The heirs believed that the estate's copyright had been infringed, and by and through their counsel, they sent a letter to Koons on October 20, 2014.<sup>91</sup> The letter sought compensation for damages, to prevent the exhibition of *Naked*, to prevent its reproduction, and for the recall of any copies of it.<sup>92</sup> The heirs did not receive a response to the letter, so they then sent correspondence to the Paris exhibitor on November 25, 2014, the day before the exhibition's opening.<sup>93</sup>

*Naked* was withdrawn from the exhibition due to damage it incurred during shipment, but images of it were included in media for and about the exhibition.<sup>94</sup> Those images were removed from subsequent exhibition media.<sup>95</sup>

Mr. Bauret's heirs filed suit for copyright infringement and compensation on January 22, 2015.<sup>96</sup> On March 9, 2017, the Paris tribunal de grande instance found that the defendants had committed acts of counterfeiting *Children* by reproducing and disseminating the image of *Naked* in the works of the exhibition, and by reproducing and distributing that image online.<sup>97</sup> The tribunal prohibited the defendants from further reproduction and dissemination and ordered monetary damages.<sup>98</sup>

The judgment was appealed twice: May 12, 2017, and July 18, 2017.<sup>99</sup> On February 6, 2018, the appeals were joined.<sup>100</sup> The court stated that the only facts likely to constitute an infringement of *Children* are the reproductions of the image of *Naked* in the works of the exhibition and the presentation of *Naked* in various reports broadcast in France and online.<sup>101</sup>

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89. *Id.*

90. *Cour d'appel* [CA] [regional court of appeal] Paris, civ., Dec. 17, 2019, 17/09695.

91. Kalai, *supra* note 87.

92. Morgan Shaaf, *Jeff Koons Condemned (Once Again) by The Paris Court of Appeal for Plagiarism*, BAYLOS (Jan. 21, 2020), <https://baylos.com/en/news/jeff-koons-condenado-una-vez-mas-por-plagio-por-la-cour-d-appel-de-paris#:~:text=in%20this%20post%2C%20we%20echo%20an%20interesting%20French,the%20time%20of%20the%20facts%2C%20an%20exhibition%20>.

93. *Id.*

94. *Id.*

95. Kalai, *supra* note 87.

96. *Id.*

97. Shaaf, *supra* note 91.

98. *Cour d'appel* [CA] [regional court of appeal] Paris, civ., Dec. 17, 2019, 17/09695.

99. *Id.*

100. *Id.*

101. *Id.*

The court stated that the quality of author of *Children* is not contested, nor is the quality of the current copyright holders, following his death.<sup>102</sup> It determined that the judgment should be upheld that *Children* was an original work entitled to copyright protection.<sup>103</sup>

The court noted article L122-4 of the intellectual property code provides that “any representation or reproduction, in whole or in part, made without the consent of the author or of his successors in title or successors in title is illegal. It is the same for translation, adaptation or transformation, arrangement or reproduction by any art or process.”<sup>104</sup> The court also noted that it is up to the judge to seek a fair balance between the rights of freedom of artistic expression and copyright.<sup>105</sup> The court further clarified that it is up to the judge to explain in the event of a conviction, how the search for that fair balance called for conviction in the case.<sup>106</sup>

The court stated that the unauthorized use of *Children* by Koons, which infringed the rights of Mr. Bauret and his heirs, was necessary for the exercise of his freedom of artistic expression and justified the appropriation made of a protected work.<sup>107</sup> Notwithstanding this determination, the court found that the search for a fair balance between the freedom of expression of Koons and the copyright of Mr. Bauret, as vested in his beneficiaries, required that the infringement be upheld.<sup>108</sup> The court also established that the parody exception was not applicable to this case<sup>109</sup> and awarded Bauret’s heirs approximately \$26,600 in damages.<sup>110</sup>

#### **IV. Problems of Provenance: The Gilgamesh Dream Tablet**

Among all areas of collecting, acquiring antiquities is perhaps the most fraught. While there is considerable risk of fakes or forgeries, the greatest risk derives from uncertain (sometimes false, frequently scant, or nonexistent) provenance, rampant looting, and the illicit export of objects from their countries of origin. Parallel cases arising from the importation and sale of a cuneiform tablet known as the Gilgamesh Dream Tablet (the Tablet) exemplify these challenges.

##### **A. PARALLEL CASES**

On May 18, 2020, two separate, but parallel, actions were initiated in the United States District Court for the Eastern District of New York. In the first, the U.S. Attorney for the Eastern District of New York filed an *in rem*

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102. *Id.*

103. *Id.*

104. *Cour d’appel* [CA] [regional court of appeal] Paris, civ., Dec. 17, 2019, 17/09695.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Cour d’appel* [CA] [regional court of appeal] Paris, civ., Dec. 17, 2019, 17/09695.

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forfeiture action (the Forfeiture Complaint), seeking civil forfeiture under 19 U.S.C. § 1595a(c)(1)(A) of the Tablet, which had been seized in September 2019 from the collection of the Museum of the Bible (the Museum), located in Washington, D.C.<sup>111</sup> At the time of the filing of the complaint, the Tablet was held in a U.S. Customs and Border Protection storage facility in Queens, New York. The Tablet had been acquired by Hobby Lobby Stores, Inc. (Hobby Lobby) in a private sale from Christie's, an international auction house, in 2014, and it was on loan to the Museum, of which Hobby Lobby is a major benefactor.

The second action (the Sale Complaint) was filed by Hobby Lobby, which brought suit against Christie's, asserting claims of fraud and breach of express and implied warranties arising from the private sale of the Tablet.<sup>112</sup> In both its answer to the Forfeiture Complaint and in the Sale Complaint, Hobby Lobby maintained that it was an innocent purchaser of the Tablet, undertaking appropriate due diligence and reasonably relying on representations allegedly made to it by Christie's.

The Tablet is a six-inch by five-inch clay tablet on which a portion of the Gilgamesh epic is incised in wedge-shaped cuneiform script. The Gilgamesh epic takes its name from its eponymous hero and is comprised of a group of ancient Mesopotamian tales that have sometimes been characterized as “the odyssey of a king who did not want to die.”<sup>113</sup> The Gilgamesh tales are written in Akkadian,<sup>114</sup> an ancient, extinct Semitic language. The fullest extent version of the epic, twelve inscribed clay tablets, was discovered in 1853 in the library at Ninevah.<sup>115</sup> Even this group of tablets is nevertheless incomplete. In its Forfeiture Complaint, the United States describes the section of the tale that is inscribed on the tablet:

the protagonist describes his dreams to his mother, and she interprets them as foretelling the arrival of a friend. She tells the protagonist, ‘You will see him, and your heart will laugh.’ The names of the hero, Gilgamesh, and the character who becomes his friend, Enkidu, are replaced in this tablet with the names of the deities Sin and Ea.<sup>116</sup>

In its Sale Complaint, Hobby Lobby states that the Tablet “was likely created during the First Sealand Dynasty, circa early sixteenth century, B.C., in the middle Babylonian period. Sealand refers to a province in the far

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111. *Id.*

112. Complaint, U.S. v. One Cuneiform Tablet Known as the “Gilgamesh Dream Tablet” (E.D.N.Y. May 7, 2020) (No. 20 Civ. 2222) [hereinafter Forfeiture Complaint].

113. Hobby Lobby Stores, Inc. v. Christie's Inc. (E.D.N.Y. May 19, 2020) (No. 20 Civ. 2239) [hereinafter Sale Complaint].

114. *Gilgamesh, Mesopotamian Mythology*, BRITANNICA (last visited May 20, 2021), <https://www.britannica.com/topic/Gilgamesh>.

115. *Akkadian Language, Ancient Language*, BRITANNICA (last visited May 20, 2021), <https://www.britannica.com/topic/Akkadian-language>.

116. *Hormuzd Rassan, Assyriologist*, BRITANNICA (last visited May 19, 2021), <https://www.britannica.com/biography/Hormuzd-Rassam>.

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south of Babylonia, a swampy region between the mouths of the Tigris and Euphrates rivers in modern-day Iraq.”<sup>117</sup>

Both complaints agree that cuneiform tablets have been highly sought after by individual and institutional collectors since the Nineteenth century.<sup>118</sup> The Forfeiture Complaint, however, emphasizes the risks of illicit trafficking in Iraqi antiquities—specifically cuneiform tablets. The complaint stated that “[c]uneiform tablets have been the subject of substantial looting in Iraq. Hundreds of thousands of objects are estimated to have been looted from archaeological sites throughout Iraq since the early 1990s. Cuneiform tablets comprise one of the most popular types of looted Iraqi artifacts on the antiquities market.”<sup>119</sup>

Hobby Lobby noted that “[s]ince 1990 [the date of the First Gulf War], [various U.S.] laws and regulations have, among other things, made illegal the importation of ancient cuneiform objects removed from Iraq after August 1990.”<sup>120</sup> The buyer further observed that:

To comply with applicable United States’ [sic] import laws, prudent, law-abiding cuneiform collectors are careful to deal only in objects with an ownership history dating prior to 1990, establishing that the object was outside of Iraq and not stolen as of that date. Consequently, a provenance that documents the chain of title of Iraqi-origin cuneiform to a date prior to August 1990 is critical to a collector’s ability to demonstrate lawful ownership of and transferable title to an object.<sup>121</sup>

**B. LEGAL FRAMEWORK OF IRAQI ANTIQUITIES**

The core issue at the heart of both cases is the legal and factual question of whether the Tablet was imported into the United States “contrary to law.” The basic principle is laid out in the U.S. civil forfeiture statute, which states that “merchandise which is introduced or attempted to be introduced into the United States contrary to law . . . shall be seized and forfeited if it . . . is stolen, smuggled, or clandestinely imported or introduced.”<sup>122</sup> The question of whether such importation is contrary to law is further expounded in 18 U.S.C. § 2314, which provides that “[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise . . . of the value of \$5,000 or more, knowing the same to have been stolen, converted, or taken by fraud” violates the law. More particularly, as it relates to antiquities and certain other cultural property, such property is considered “stolen” for purposes of both the civil forfeiture

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117. Forfeiture Complaint, *supra* note 111, at 2.

118. Sale Complaint, *supra* note 112, at 5.

119. *Id.* at 4.

120. Forfeiture Complaint, *supra* note 111, at 2.

121. Sale Complaint, *supra* note 112, at 4.

122. *Id.*

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statute and 18 U.S.C. § 2314 “if it was taken without official authorization from a foreign country whose laws establish state ownership of such cultural property.”<sup>123</sup>

With respect to cuneiform tablets and other Iraqi antiquities, both U.S. and Iraqi law place restrictions on the export and import of certain Iraqi cultural property. The U.S. Iraq Stabilization and Insurgency Sanctions Regulations, Section 576.208 prohibits:

the trade in or transfer of ownership or possession of Iraqi cultural property or other items of archeological, historical, cultural, rare scientific, and religious importance that were illegally removed, or for which a reasonable suspicion exists that they were illegally removed, from the Iraqi National Museum, the National Library, and other locations in Iraq since August 6, 1990.<sup>124</sup>

The legal landscape for potential collectors of Iraqi antiquities is further complicated by the fact that Iraq, like many archeologically rich nations, has a cultural patrimony law (originally dating from 1935) that deems all antiquities, defined as man-made objects that are at least 200 years old, found in Iraq to be property of the state. In circumstances where private ownership of Iraqi antiquities is authorized under Iraqi law, export from Iraq is nevertheless prohibited.<sup>125</sup>

Within such a legal framework, where most private ownership and all legal export from Iraq are prohibited, legal importation of Iraqi antiquities into the U.S. is extraordinarily difficult, at least for those objects that have no clear provenance outside of Iraq before 1990. The ability to show a clear provenance within Iraq from where the antique was legally exported is crucial, and that is where the Tablet’s past, present, and future difficulties lie.

### C. AN UNRELIABLE PROVENANCE

The Tablet made its first documented appearance in London around 2001, where it was among a number of other encrusted and unconserved artifacts viewed by a U.S. antiquities dealer (the Dealer) at the London apartment of Jordanian antiquities dealer Ghassan Rihani, who died later that year. In the Spring of 2003, the Dealer and a cuneiform expert met with members of Rihani’s family at the London apartment and viewed a number of cuneiform tablets, including the Tablet. The Dealer and an expert were of the opinion that the various cuneiform tablets were likely to be literary objects, rather than more commonplace business documents, and purchased them from the Rihani family for \$50,350. Around 2005, the Dealer shipped the Tablet to Princeton, New Jersey, where a scholar studied it for several weeks.

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123. 19 U.S.C. § 1595a(c)(1)(A).

124. Forfeiture Complaint, *supra* note 111, at 4.

125. *Id.*; *see also* 31 C.F.R. 576.208.

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In 2007, the Dealer sold the Tablet (along with a translation prepared by the cuneiform expert) for \$50,000, but the Dealer did not initially provide the buyers with a provenance for the Tablet. When the buyers requested a provenance, the Dealer reportedly fabricated one—what the complaints term the “False Provenance Letter.” That provenance letter made no mention of Rihani, but instead claimed that the Tablet had been outside of Iraq and part of a 1981 auction by Butterfield & Butterfield in San Francisco. The False Provenance Letter further asserted that the Tablet had been deaccessioned from a small, unidentified museum, and had been part of Lot 1503, which the Butterfield & Butterfield 1981 auction catalog described as a “box of miscellaneous ancient bronze fragments.”<sup>126</sup>

One of the buyers published the Tablet in a catalog, offering it for sale and stating that the Tablet’s provenance was clean and that it had been in the possession of a single U.S. owner for twenty-five years. The Tablet was then published in a catalog by Michael Sharpe Rare & Antiquated Books, which stated that the Tablet would be accompanied by a translation, authentication, and “a clear provenance.”<sup>127</sup>

In December 2013, a subsequent owner of the Tablet contacted the London office of the Auction House, wishing to consign the Tablet for a private sale. Christie’s offered the Tablet to the Museum, and in March 2014 a representative of the Museum viewed the Tablet in London. In July 2014, Hobby Lobby purchased the Tablet from Christie’s in a private sale for the purchase price of \$1,674,000. Also in July 2014, Christie’s shipped the Tablet to its New York office, and later hand delivered it to Hobby Lobby in Oklahoma City.

On July 22, 2014, the Museum’s registrar emailed the Auction House, noting that the invoice did not include either a date for the Tablet or its country of origin. The registrar also requested a copy of the auction listing for the Museum’s files. Communications between the Museum and Christie’s over questions and clarifications of the Tablet’s provenance continued until at least October 2017.

**D. LOOKING AHEAD**

In an unusual move for a civil forfeiture case—especially one in which the Museum has cooperated with government’s investigation—Hobby Lobby filed a Claim of Interest in June, 2020, seeking the return of the Tablet to Hobby Lobby. The Claim of Interest enabled Hobby Lobby to serve discovery on Christie’s in the forfeiture action, while Hobby Lobby was stymied in Christie’s litigation. In that action, relying upon the language of its sale contract, Christie’s moved to compel arbitration, a motion Hobby Lobby opposed. Both the Christie’s arbitration motion, and Hobby Lobby’s opposition are currently pending.

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126. Forfeiture Complaint, *supra* note 111, at 5.

127. *Id.* at 7.

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In this pandemic year, a curious stasis seems to settle over much of life, lawsuits included. While it is possible that facts may emerge to show that the Tablet was lawfully exported from Iraq and lawfully imported into the U.S., the history of this artifact's provenance suggests otherwise. What is likely to emerge from these parallel cases is an unusually detailed case study on the challenges of provenance for ancient objects, and, perhaps, a cautionary tale for collectors.

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## Life Sciences & Health Law

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This article examines selected international legal developments relating to life sciences and health law in 2020.

### I. Australia

#### A. VOLUNTARY ASSISTED DYING

The discussion of voluntary assisted dying continues to evolve in Australia.<sup>2</sup> Victoria was the first state to pass voluntary assisted dying laws in 2019. The Voluntary Assisted Dying Act 2017 became effective June 19, 2019.<sup>3</sup> This Act provides a safe legal framework for people who are suffering to end their lives.<sup>4</sup> To avoid death tourism, the 2020 amendments of this law require that the person seeking voluntary assisted dying to be an Australian citizen or permanent resident and ordinarily be a resident in Victoria for the last 12 months.<sup>5</sup> Western Australia passed legislation this year to enable voluntary assisted dying as a choice as well.<sup>6</sup> This legislation is currently in its implementation phase and will most likely be enacted in mid-2021.<sup>7</sup> Queensland is set to vote on voluntary assisted dying soon, and the legislation is currently undergoing consultation.<sup>8</sup> Queensland will have a “conscience vote,” where elected politicians can vote with their “conscience”

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1. Contributors to the 2020 YIR Life Sciences and Health Law Committee are: Adalberto López López (CAAM Legal, Mexico), Yevgeniya Ocheretko (Arzinger Law Firm, Ukraine), Carly M. Toepke, editor (University of Texas School of Law), Arina Zadorozhna (Arzinger Law Firm, Ukraine) José Alan Zamarripa Miramontes (CAAM Legal, Mexico) with special thanks to Rocky Ruperto (Avant Mutual, Australia).

2. *Voluntary Assisted Dying*, VIC. STATE GOV'T, <https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/end-of-life-care/voluntary-assisted-dying> (last visited. Nov. 4, 2020).

3. *Voluntary Assisted Dying Act 2017* (Vic), 61 (Austl.), amended 19 June 2020.

4. *Voluntary Assisted Dying*, *supra* note 2.

5. *Voluntary Assisted Dying Act 2017* (Vic) pt 2 ¶ 9(1) (Austl.).

6. *Voluntary Assisted Dying*, GOV'T OF WA DEP'T OF HEALTH, <https://ww2.health.wa.gov.au/voluntaryassisteddying> (last visited. Nov. 4, 2020).

7. *Id.*

8. Ben Smee, *Queensland Election: Labor Pledges to Allow Vote on Voluntary Assisted Dying*, THE GUARDIAN (Oct. 18, 2020), <https://www.theguardian.com/australia-news/2020/oct/19/queensland-election-labor-pledges-to-allow-vote-on-voluntary-assisted-dying>.

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rather than toeing the party line.<sup>9</sup> Politicians normally make a conscience vote on topics that are heavily ethical or controversial, especially when there are active campaigns on both sides of the issue.

**B. MANDATORY HEALTH PRACTITIONER REPORTING**

Under the Health Practitioner Regulation National Law,<sup>10</sup> healthcare practitioners are required to notify regulators of certain types of conduct of a healthcare practitioner who is their patient.<sup>11</sup> In 2020, the law changed to make the hurdle “higher” for doctors treating other health professionals (not only doctors but nurses, psychologists, etc.), so that they are less likely to be obligated to report a health practitioner being treated to the regulator if they are seeking help (because they are no longer “putting the public at substantial risk of harm”).<sup>12</sup> This is a positive change to the National Law in that it allows the treating practitioner to consider the treatment as mitigating the risk, and therefore not meet the threshold to report their patient practitioner.<sup>13</sup> One risk that this change averts is that health practitioners avoid seeking treatment in fear that they will be reported by their treating provider to the regulator.<sup>14</sup>

**II. Mexico**

**A. CANNABIS REGULATION<sup>15</sup>**

On July 27, 2020, the Secretary of Health (*SSA*) submitted a draft of a cannabis medical use regulation, namely Rules for the Sanitary Control of the Production, Research and Use of Medical Cannabis and its Pharmacological Derivates (*Reglamento en Materia de Control Sanitario para la Producción, Investigación y Uso Medicinal de la Cannabis y sus Derivados Farmacológicos; Medical Use Rules*) to the National Commission for Regulatory Improvement (*CONAMER*).<sup>16</sup> The Medical Use Rules follow the Mexican Supreme Court’s mandate to regulate medical cannabis,<sup>17</sup> although its publication has been delayed since mid-2017.

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9. *Id.*

10. *Health Practitioner Regulation National Law Act*, 2009 (Cth) (Austl.).

11. *Mandatory Notifications About Health Practitioners*, AVANT (Mar. 16, 2020), <https://www.avant.org.au/Resources/Public/Mandatory-notifications-about-health-practitioners/>.

12. *Id.*

13. Rocky Ruperto, Hannah Shiel & Ushma Narsai, *Where is the Harm? Mandatory Reporting Requirements for Treating Practitioners*, 21 *MED. TODAY* 55–58 (2020).

14. *Id.*

15. Information current through October 21, 2020.

16. Luis Armendariz, *Mexico Cannabis Update #19*, CAAM LEGAL (Aug. 10, 2020), <https://www.caamlegal.mx/web/wp-content/uploads/2020/09/MexicoCannabisUpdate-19.pdf>.

17. Suprema Corte (@SCJN), TWITTER (Aug. 14, 2019, 3:28 PM), <https://twitter.com/SCJN/status/1161751594330779648> (“La Corte amparó a un niño con discapacidad que necesita THC para mejorar su salud. Se le ordenó a la Secretaría de Salud armonizar las disposiciones

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On September 9, 2020, the deadline passed again for drafting medical cannabis rules in Mexico.<sup>18</sup> Nevertheless, the competent authority published no official communication by that date. On September 21, 2020, Margarita Garfias (whose son's case motivated the mentioned Supreme Court's mandate) was notified that the deadline was extended an additional 70 business days.<sup>19</sup>

The Medical Use Rules' object includes the regulation of cannabis-based medication. Medication is defined as “[a]ny substance or mixture of substances of natural or synthetic origin that has therapeutic, preventive, rehabilitative, or palliative care effects and that is presented in pharmaceutical form and identified as medication by its pharmacological activity, physical, chemical, and biological characteristics containing cannabis or its pharmacological derivatives.”<sup>20</sup> Under these rules, authorized doctors will prescribe medication, registering any cannabis-related prescription to patients, following traceability principles.<sup>21</sup>

Furthermore, it is important to note that the Medical Use Rules do not include any specific regulation for hemp products, such as CBD oil or less than one percent THC tinctures.<sup>22</sup> Also, no “pharmaceutical form” or “pharmacological activity” definition has been provided within the Medical Use Rules, nor in the Mexican General Health Law (*Ley General de Salud; LGS*)<sup>23</sup> and/or its ancillary regulation. This gap results in a legal loophole for CBD products, such as oil and tinctures, which usually are not required to be treated as a medication, due to their general palliative use.

Additionally, medical cannabis use is actually regulated by articles 234, 235 through 245, and 290 of LGS, and there is no clear specification of whether CBD or THC shall be considered as a pharmaceutical compound.<sup>24</sup> This results in continuing uncertainty regarding these products. Therefore, it is unclear if 1% THC products will be subject to the Medical Use Rules, and consequently, to prior medical prescription.

If these products are considered to be medication by Federal Commission for the Protection of Sanitary Risks (COFEPRIS) or SSA in the near future,

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sobre el uso terapéutico de la cannabis en un plazo de 180 días hábiles y garantizarle un tratamiento médico integral.”).

18. *Rules for Medical Cannabis in Mexico*, HOBAN LAW GRP. (Sept. 10, 2020), <https://hoban.law/2020/09/rules-for-medical-cannabis-in-mexico/>.

19. Margarita Garfias (@Mar\_Garfias), TWITTER (Sept. 23, 2020 9:27 PM), [https://twitter.com/Mar\\_Garfias/status/1308956121101672451](https://twitter.com/Mar_Garfias/status/1308956121101672451) (“El día de ayer se nos notificó lo que expongo en el video, @COFEPRIS @SSalud\_mx siguen vulnerando derechos de las y los pacientes.”).

20. *Draft Regulations Published for the Regulation of Cannabis (Marijuana) in Mexico*, GREENBERG TRAURIG (Aug. 26, 2020), <https://www.gtlaw.com/en/insights/2020/8/draft-regulations-published-for-the-regulation-of-cannabis-marijuana-in-mexico#main-content/>.

21. *Id.*

22. Armendariz, *supra* note 16.

23. *Ley General de Salud [LGS]*, *Diario Oficial de la Federación [DOF]* 07-02-1984, *últimas reformas* DOF 19-02-2020 (Mex.).

24. *Id.*

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access to <1% THC products will be burdened by legal provisions.<sup>25</sup> Such measures will probably encourage the use of illegal CBD products (currently found in the market), compromise users' health, and diminish products' quality.

This cannabis-based products classification loophole will force importers and/or producers to file a preliminary, non-binding technical classification request before COFEPRIS prior to a product's import or sale, to know the sanitary treatment each product shall have.<sup>26</sup>

The regulation of cannabis and its derivatives for medical purposes has taken longer than legally foreseen as well as what patients and users want. The next months will show the outcome of this important industry for Mexico and the rest of the world.

### III. New Zealand

#### A. VOLUNTARY ASSISTED DYING

New Zealand just had a referendum on Voluntary Assisted Dying—the first country in the world to do so.<sup>27</sup> The binding New Zealand End of Life Choice referendum was held on October 17, 2020.<sup>28</sup> This referendum was on the question of whether the End of Life Choice Act 2019 should be enforced, legalizing voluntary euthanasia for those terminally ill with less than six months to live.<sup>29</sup> Further requirements for voluntary euthanasia/voluntary assisted dying are that the person is 18 years or older, is a New Zealand citizen or permanent resident, is in an advanced state of irreversible decline, experiences unbearable suffering that cannot be relieved, and is competent to make an informed decision.<sup>30</sup> The final result of the referendum was that approximately sixty-five percent of voters supported the End of Life Choice Act being enforced.<sup>31</sup>

#### B. MARIJUANA

A different October 2020 referendum regarding the Cannabis Legalisation and Control Bill failed 50.7% to 48.4%.<sup>32</sup> The Bill's purpose was to reduce cannabis-related harm to individuals, families, and

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25. Armendariz, *supra* note 2.

26. *Id.*

27. End of Life Choice Act 2019, ¶ 2 (N.Z.); Charlotte Graham-McLay, *New Zealand to Vote in Referendum on Euthanasia*, THE GUARDIAN (Nov. 13, 2019), <https://www.theguardian.com/society/2019/nov/13/new-zealand-to-vote-in-referendum-on-euthanasia-cannabis>.

28. *2020 New Zealand Euthanasia Referendum*, WIKIPEDIA (Mar. 20, 2021), [https://en.wikipedia.org/wiki/2020\\_New\\_Zealand\\_euthanasia\\_referendum](https://en.wikipedia.org/wiki/2020_New_Zealand_euthanasia_referendum).

29. End of Life Choice Act, p 1, s 5 (N.Z.).

30. *Id.*

31. *Referendum Results*, ELECTIONS, [https://electionresults.govt.nz/electionresults\\_2020/referendums-results.html](https://electionresults.govt.nz/electionresults_2020/referendums-results.html) (last visited Nov. 12, 2020).

32. *Id.*

communities.<sup>33</sup> The Bill would have allowed people to possess and consume cannabis in limited circumstances and provide legal access to cannabis that meets quality and potency requirements.<sup>34</sup>

#### **IV. Poland**

##### **A. ABORTION**

Poland had one of the most restrictive abortion laws in Europe, but this year a high court tightened it up even more with a recent, binding decision.<sup>35</sup> On October 22, 2020, a Polish Constitutional Court ruled, in an unappealable decision, that aborting fetuses with congenital defects violates the Polish constitution.<sup>36</sup> This ruling held unconstitutional the 1993 statute that had decriminalized abortion in cases where there was a medical indication that the fetus would suffer irreversible impairment or an incurable, life-threatening illness.<sup>37</sup> The result of this case is that the only abortions allowed are those when the woman's life is at risk or in cases of incest or rape. This ruling has led to large protests throughout Poland.<sup>38</sup> These protests stem from the opinion that the conservative government is using the "stacked court to bypass debates in parliament."<sup>39</sup> This shift has implications on the Polish government and its connection to the Catholic Church.<sup>40</sup> Protestors say that abortion is a symbol of these protests and these protests are about more than abortion but also the freedom and the imposition of the Catholic Church ideals on the government and personal freedoms.<sup>41</sup>

#### **V. Switzerland**

##### **A. TESTOSTERONE LIMITS IN SPORTS**

The Swiss Federal Supreme Court upheld a 2019 Court of Arbitration for Sport (CAS) decision by dismissing the appeal regarding the testosterone

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33. *Sensible Drug Law Reform*, GREEN, [https://www.greens.org.nz/cannabis\\_referendum](https://www.greens.org.nz/cannabis_referendum) (last visited May 17, 2021).

34. *Id.*

35. *Trybunał Konstytucyjny* [Constitutional Tribunal] Judgment K 1/20 (Oct. 22, 2020) (Pol.); *Poland delays implementing abortion ruling amid protests*, N.Y. POST (Nov. 3, 2020), <https://nypost.com/2020/11/03/poland-delays-implementing-abortion-ruling-amid-protests/>.

36. Adam Easton, *Poland abortion: Top court bans almost all terminations*, BBC NEWS (Oct. 23, 2020), <https://www.legalbluebook.com/bluebook/v21/rules/18-the-internet-electronic-media-and-other-nonprint-resources/18-2-the-internet#2%E2%80%9393citations-to-internet-sources>.

37. Act for Family Planning and the Protection of the Fetus (1993) art. 4a (Pol.).

38. "This is war" – inside Poland's abortion protests, THE TAKE (Nov. 16, 2020), <https://www.aljazeera.com/podcasts/2020/11/16/poland-abortion-protests>.

39. *Id.* at 1:01.

40. *Id.*

41. *Id.*

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limits for certain women's track events.<sup>42</sup> These regulations block women with a certain level of testosterone from competing in limited race events of 400 meters to a mile to preserve the integrity of the women's competition. It does not affect the 200-meter sprint, however.<sup>43</sup> The original claim comes from Caster Semenya, a South African athlete, alleging a violation of the prohibition of discrimination.<sup>44</sup> The Federal Supreme Court decided that the CAS decision is compatible with the guarantee of human dignity because it does not require female athletes to undergo the treatment to lower testosterone levels.<sup>45</sup> This is in balance with the pillar of fairness in sport on which competition is based.<sup>46</sup>

## VI. UKRAINE

With the presidential and parliamentary elections and the change of the government in late 2019 followed by the COVID-19 pandemic, 2020 has been a fruitful year for the Life Sciences and Healthcare sphere in Ukraine. Numerous legislative amendments have been adopted in 2020,<sup>47</sup> as newly elected parliament and government aim to show that they can implement the long-awaited reforms quickly. Even though not all of the adopted initiatives are fully supported by the citizens, industry, and foreign partners, as of today, the key trends in Ukrainian Life Sciences & Health sector are described in the following sections.

### A. MEDICAL FINANCING REFORM

Medical reform started in 2018 has allowed private clinics and individual doctors to access public funds and successfully compete with state-owned medical institutions for patients.<sup>48</sup> Such competition, in turn, has stimulated

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42. *Tribunal Fédéral* [TF] [Federal Supreme Court] Aug. 25, 2020, 4A\_248/2019, 4A\_398/2019 (Switz.).

43. Press Release, Swiss Fed. Sup. Ct., DSD Regulations: Caster Semenya's appeal against decision of the Court of Arbitration for Sport dismissed (Sept. 8, 2020), at 1.

44. *Id.* at 2.

45. *Id.*

46. *Id.*

47. On Amendments to Certain Laws of Ukraine Aimed at Improving the Availability of Medicines, Medical Devices, and Auxiliary Products Purchased by a Person Authorized for Procurement in the Sphere of Health Care, No. 531-IX, Mar. 17, 2020 (Ukr.); About modification of some laws of Ukraine concerning elimination of artificial bureaucratic barriers and corruption causing factors in the field of health care, No. 644-IX, June 2, 2020 (Ukr.); On Amendments to Certain Legislative Acts of Ukraine Concerning Strengthening the Protection and Protection of Rights to Trademarks and Industrial Designs and Combating Patent Abuse, No. 815-IX, July 21, 2020 (Ukr.); On Amendments to Certain Laws of Ukraine Concerning the Treatment of Coronavirus Disease (COVID-19), No. 539-IX, Mar. 30, 2020 (Ukr.).

48. About the state financial guarantees of medical attendance of the population, No. 2168-VIII, Oct. 19, 2017 (Ukr.).

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the development of public clinics and lead to the improvement in the quality of medical services in Ukraine.<sup>49</sup>

Further, the Ukrainian pharmaceutical sector is developing as well. For example, German company STADA AG acquired Rx and Ukrainian Biopharma's consumer health business.<sup>50</sup>

#### B. COMPETITION PRACTICES

Pharmaceutical companies defended their commercial practices regarding the motivation of the distributors at courts while the Antimonopoly Committee of Ukraine (AMCU) insisted that providing retro-bonuses and other types of off-invoice discounts is an anti-competitive practice. In the *Roche* case,<sup>51</sup> the Supreme Court of Ukraine has already supported the company's position, while similar cases are still pending consideration (e.g., GlaxoSmithKline<sup>52</sup> and its distributors).

The AMCU has also started paying more attention to misleading information, especially relating to claims on treatment of COVID-19, which was disseminated by several local companies. Significant fines have been imposed, and industry-wide recommendations have been issued to prevent further violations.<sup>53</sup>

#### C. PUBLIC PROCUREMENT PROCEDURES & MARKET ACCESS

In 2020, State Enterprise "Medical Procurement of Ukraine" (SOE) started purchasing medicines on behalf of the Ministry of Health of Ukraine.<sup>54</sup> The transfer of the purchasing function to a specialized entity has increased transparency of the procurement process, boosted competition, and allowed for up to fifty percent savings in comparison with previous years.<sup>55</sup> Additionally, a new simplified registration procedure was

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49. Carlos Avila, *Implementing health financing policies to overhaul the healthcare system in Ukraine*, JHMHP (Mar. 25, 2021), <https://jhmhp.amegroups.com/article/view/6656/html>.

50. Press Release, STADA, STADA to Become a Major Pharma Player in Ukraine by Acquiring Biopharma's Pharmaceutical Prescription and Consumer Health Business (Feb. 12, 2019).

51. Верховний суд України [Supreme Court of Ukraine] Mar. 3, 2020, Case No. 910/13306/18 (Ukr.).

52. Господарський суд м. Києва [Economic Court of Kyiv] Apr. 13, 2020, Case No. 910/4801/20 (Ukr.).

53. ІНФОРМАЦІЙНИЙ ДАЙДЖЕСТ [ANTITRUST COMMITTEE OF UKRAINE] (Nov. 27, 2020), [https://amcu.gov.ua/storage/app/sites/1/uploaded-files/%D0%94%D0%B0%D0%B9%D0%B4%D0%B6%D0%B5%D1%81%D1%82\\_%D0%90%D0%9C%D0%9A%D0%A3\\_%D0%86-%D0%86%D0%86\\_%D0%BA%D0%B2%D0%B0%D1%80%D1%82%D0%B0%D0%BB\\_2020.pdf](https://amcu.gov.ua/storage/app/sites/1/uploaded-files/%D0%94%D0%B0%D0%B9%D0%B4%D0%B6%D0%B5%D1%81%D1%82_%D0%90%D0%9C%D0%9A%D0%A3_%D0%86-%D0%86%D0%86_%D0%BA%D0%B2%D0%B0%D1%80%D1%82%D0%B0%D0%BB_2020.pdf).

54. Yevhen Hrytsenko, *Fight for life: how Ukraine is fixing medical procurement and serving patients better*, OPEN CONTRACTING P'SHIP (Feb. 22, 2021), <https://www.open-contracting.org/2021/02/22/fight-for-life-how-ukraine-is-fixing-medical-procurement-and-serving-patients-better/>.

55. *Id.*



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introduced for medicines procured by SOE: new medicines may be registered in less than sixty days in comparison with the standard procedure, which may take over a year.<sup>56</sup>

A Managed Entry Agreements (MEA) mechanism has been introduced into Ukrainian law in March 2020. And even though several subordinate regulations are still pending approval, it is expected that starting in 2021, Ukrainian patients will be able to receive innovative medicines under beneficial conditions provided in MEAs between the manufacturers and the state.<sup>57</sup>

**D. IP REGULATION TRANSFORMATIONS**

Important changes in IP regulations were introduced in 2020. Ukraine implemented the experimental use exemption of patent infringement (a variation of the Bolar exemption) to promote the entry of generic drugs into the market.<sup>58</sup> In addition, some other high-impact substantive changes in the industrial design and trademark laws were introduced.<sup>59</sup>

IP disputes in the health sector remain widespread considering the high level of competition for objects of IP rights (e.g., *Teva v. Synthron Copaxone*<sup>60</sup>).

**E. DEVELOPMENT OF TRANSPLANTATION & CLINICAL TRIALS**

Appropriate conditions for a comprehensive, functioning transplantation system are being developed: the order of transportation of organs for transplantation purposes as well as the order on the establishment of the Ukrainian Transplant Coordination Center have been approved, and the launch of the registries of patients and donor organs is anticipated in 2021.<sup>61</sup>

Changes to the clinical trials regulation are expected that will provide: better regulations on insurance; involvement of children in clinical trials; simplification of the procedure of clinical trials alignment; and elimination of other regulatory barriers (regarding taxation, continuation of treatment with the test drug after clinical trials, decriminalization of minor violations in the sphere of clinical trials, etc.).<sup>62</sup>

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56. On Amendments to Certain Laws of Ukraine Aimed at Improving the Availability of Medicines, Medical Devices, and Auxiliary Products Purchased by a Person Authorized for Procurement in the Sphere of Health Care, No. 531-IX, Mar. 17, 2020 (Ukr.).

57. *Id.*

58. Elimination of Artificial Bureaucratic Barriers, *supra* note 47.

59. Protection of Rights to Trademarks, *supra* note 47; On Amendments to Certain Legislative Acts of Ukraine Concerning the Reform of Patent Legislation, No. 816-IX, July 21, 2020 (Ukr.).

60. Північний апеляційний господарський суд [Northern Appeal Economic Court] Oct. 12, 2020, Case No. 910/16863/18 (Ukr.).

61. On the establishment of a specialized state institution Ukrainian Transplant Coordination Center, Sept. 23, 2020 (Ukr.).

62. On Amendments to Certain Legislative Acts of Ukraine Concerning Clinical Trials of Medicinal Products, No. 4036, Feb. 5, 2016 (Ukr.).

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**F. LIBERALIZATION OF LEGAL REGULATION AS A RESPONSE TO COVID-19**

The following changes have been implemented in response to the COVID-19 pandemic:

- permission for off-label use and expanded possibilities for use of unregistered medicines and medical devices;<sup>63</sup>
- exemption from customs duties and VAT for some medicines and medical devices;<sup>64</sup>
- expanded possibilities of electronic interaction with regulatory bodies;<sup>65</sup>
- automatic renewal of GMP and GDP certificates permits till the end of 2021;<sup>66</sup>
- shortened period for approval of COVID-related clinical trials;<sup>67</sup>
- permission for online sales of medicines.<sup>68</sup>

**VII. United States**

**A. VARIOUS COVID-19 REGULATION UPDATES**

The Californian governor signed three bills (S.B. 1383, S.B. 1159, and A.B. 685) into law relating to COVID-19 in the workplace. <sup>69</sup> Both S.B.1159<sup>70</sup> and A.B. 685 are intended to prevent COVID-19 outbreaks at work. <sup>71</sup> S.B. 1159 creates the presumption that certain critical workers' illnesses or deaths from COVID-19 are work-related, entitling them to workers' compensation. This includes firefighters, peace officers, patient care or custodial work in a health facility, registered nurses, and other health

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63. On Amendments to Certain Laws of Ukraine Concerning the Treatment of Coronavirus Disease (COVID-19), No. 539-IX, Mar. 30, 2020 (Ukr.).

64. On approval of the list of medicines, medical devices and/or medical equipment, necessary for the implementation of measures aimed at preventing the emergence and spread, localization and elimination of outbreaks, epidemics, and pandemics of coronavirus disease (COVID-19), which are exempt from import duties and transactions with the import of which on the customs territory of Ukraine is exempt from the value-added tax, No. 224, Mar. 20, 2020 (Ukr.).

65. On Approval of the Procedure for Acceptance of Documents Submitted by Applicants to the State Enterprise, State Expert Center of the Ministry of Health of Ukraine for the Quarantine Period, No. 48 Mar. 30, 2020 (Ukr.).

66. Regarding the recognition of the validity of documents issued by the regulatory authorities of the European Economic Area, Great Britain regarding the production of medicinal products, May 12, 2020 (Ukr.).

67. On Amendments to Certain Laws of Ukraine Concerning the Treatment of Coronavirus Disease (COVID-19), No. 539-IX, Mar. 30, 2020 (Ukr.).

68. Online Sales of Medicines Became Allowed in Ukraine, CRANE IP (Apr. 10, 2020).

69. See S.B. 1383, 2020 Leg. (Cal. 2020); S.B. 1159, 2020 Leg. (Cal. 2020); A.B. 685, 2020 Leg. (Cal. 2020).

70. Cal. S.B. 1159.

71. See Cal. S.B. 1159; Cal. A.B. 685.

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care workers.<sup>72</sup> S.B. 1383 focuses on leave allowance for family care.<sup>73</sup> And finally, A.B. 685 requires employers to provide specified notifications of potential COVID-19 exposure within one business day of the potential exposure.<sup>74</sup>

In an Illinois civil rights and freedom of speech case, the Illinois Republican Party sued for a preliminary injunction against Governor Pritzker's Executive Order,<sup>75</sup> arguing that the accommodation for free exercise contained in the executive order violates the Free Speech Clause of the First Amendment.<sup>76</sup> The Seventh Circuit responded with "not so fast."<sup>77</sup> Pritzker's EO43 is designed to address a serious public health crisis, but there was a distinction made for the exercise of religion with only recommended measures instead of mandatory ones.<sup>78</sup> To illustrate, the Illinois Republican Party contended that under EO43, a group of 100 churchgoers may gather but a group of 100 gathered to discuss politics would be in violation of the Order.<sup>79</sup> In its decision, the Seventh Circuit found that the Supreme Court's Religion Clause was not violated because EO43 gives more leeway to exercise religion, not restrict it, and therefore accommodates the Religion Clause.<sup>80</sup> Consequently, the Seventh Circuit denied the injunction.<sup>81</sup>

Along a similar vein of COVID-19 related restrictions, a Pennsylvania federal court held that Governor Tom Wolf's COVID-19 mitigation order violated the First and Fourteenth Amendments to the U.S. Constitution.<sup>82</sup> This order restricted commercial gatherings to a certain percentage but treated social, political, and other gatherings differently.<sup>83</sup> The court held that the First Amendment does not permit a specific numeric cap on some gatherings while imposing a general occupancy limit on other gatherings.<sup>84</sup> This opinion follows other federal court decisions that struck down COVID-19 gathering limits that were more restrictive than the occupancy percentage limits.<sup>85</sup>

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72. See Cal. S.B. 1159 at 3212.87(a)(2)-(11).

73. See Cal. S.B. 1383.

74. See Cal. A.B. 685.

75. Ill. Exec. Order 2020-43 (June 26, 2020).

76. *Illinois Republican Party v. Pritzker*, 20-2175, 2020 WL 5246656, at \*761-62 (7th Cir. Sept. 3, 2020).

77. *Id.* at \*764.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at \*760.

82. *County of Butler v. Wolf*, 2:20-CV-677, 2020 WL 5647480, at \*891 (W.D. Pa. Sept. 22, 2020).

83. *Id.* at \*907.

84. *Id.* at \*902.

85. *Id.* at \*903.

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In Ohio, H.B. 606 was signed into law, shielding businesses, health care providers, and schools from tort liability for reopening to the public.<sup>86</sup> It “has been the responsibility of individuals going into public places to avoid exposure to individuals who are sick. The same is true today: those individuals who decide to go out into public places are responsible for taking those steps they feel are necessary to avoid exposure to COVID–19, such as social distancing and wearing masks.”<sup>87</sup> This legislation is retroactive to the declared state of emergency (March 9, 2020) and will expire September 30, 2021.<sup>88</sup>

**B. HEALTHCARE & PHARMACEUTICALS**

The U.S. Food and Drug Administration lost its fight against an injunction to block the FDA’s restrictions on patients’ ability to purchase mifepristone, the “abortion pill,” at retail pharmacies.<sup>89</sup> The FDA approved this drug on September 28, 2000, as the first non-surgical drug, when taken with misoprostol, that could cause early termination of intrauterine pregnancy.<sup>90</sup> The FDA put several restrictions on the drug, including that it only be administered in a hospital, clinic, or medical office, under the supervision of a healthcare provider.<sup>91</sup> The American College of Obstetricians and Gynecologists, among other organizations supporting reproductive rights, argued that their patients were hindered from enforcing their own abortion rights due to the pandemic.<sup>92</sup> The “In-Person Requirements” to obtain the mifepristone forces patients to leave their homes, obtain transportation, and enter a medical facility, which could expose patients to COVID-19.<sup>93</sup> The court granted the preliminary injunction to temporarily bar the enforcement of the In-Person Requirements until thirty days after the Secretary of the Department of Health and Human Services declares the COVID-19 public health emergency is over.<sup>94</sup>

The Trump administration’s regulations also aimed to do away with anti-discrimination protections for LGBTQ patients, which were written into the Affordable Care Act (ACA), using the 2020 Rule to implement the changes.<sup>95</sup> These changes included the repeal of the “definition of ‘on the basis of sex’ which—as a reminder—explicitly prohibited discrimination

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86. See H.B. 606, 45 Leg. (Ohio 2020).

87. *Id.*

88. *Id.*

89. Am. College of Obstetricians and Gynecologists v. U.S. Food and Drug Administration, No. CV TDC-20-1320, 2020 WL 3960625, at \*233 (D. Md. July 13, 2020).

90. See *id.* at \*189.

91. See *id.* at \*190.

92. See *id.* at \*195.

93. See *id.*

94. See *id.* at \*233.

95. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 CFR § 37160 (2020).

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based on sex stereotyping and gender identity.”<sup>96</sup> The 2020 Rule also expressly incorporated Title IX’s religious exemption, meaning that the statute’s prohibition on sex discrimination could be ignored if inconsistent with the organization’s religious tenets.<sup>97</sup> It was argued in the D.C. federal court that these proposed changes were “arbitrary and capricious” and without medical or reasoned policy foundation.<sup>98</sup> The court granted the injunction in part.<sup>99</sup> The court enjoined the enforcement of the two provisions, the elimination of sex stereotyping and gender identification from the prior rule’s definition of “discrimination on the basis of sex” and the exemptions from nondiscrimination that certain religious entities could invoke.<sup>100</sup>

The Second Circuit affirmed a law in New York that required opioid distributors to pay a tax toward a fund that supported health programs outside its jurisdiction.<sup>101</sup> This Opioid Stewardship Act<sup>102</sup> was enacted to address the substantial costs of the opioid public health crisis in New York.<sup>103</sup> The Stewardship Act requires opioid manufactures and distributors to pay \$100 million a year for six years, a cost that is *not* allowed to be passed on to the consumers.<sup>104</sup>

C. TOBACCO, MARIJUANA, ETC.

When the Department of Health and Human Services (the Department) established emergency rules prohibiting the sale of flavored nicotine vapor products that were aimed at protecting the youth, but broadly expanding the sale and advertisement of flavored nicotine vapor products to *anyone*, business owners sought an injunction.<sup>105</sup> The Michigan Court of Appeals found for the business owners and granted the injunction. The Supreme Court of Michigan denied the appeal.<sup>106</sup> The injunction was found to be properly granted based on the Department being unable to show that a delay in this order would make any relevant difference in preserving the public’s health, welfare, or safety;<sup>107</sup> the irreparable harm caused to the businesses by

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96. *See id.*

97. *Whitman-Walker Clinic, Inc. v. U.S. Dept. of Health and Human Services*, No. CV 20-1630 (JEB), 2020 WL 5232076, at \*43 (D.D.C. Sept. 2, 2020).

98. *Id.* at \*16.

99. *Id.* at \*61.

100. *Id.* at \*45.

101. *Ass’n for Accessible Meds. v. James*, 974 F.3d 216 (2d Cir. 2020).

102. N.Y. Pub. Health Law § 3323 (McKinney) (“Opioid Stewardship Fund”).

103. *James*, 974 F.3d at 218.

104. Opioid Stewardship Fund, *supra* note 102.

105. *Slis v. State*, 956 N.W.2d 569, 577 (Mich. App. May 21, 2020) (Slis I), *appeal denied*, 948 N.W.2d 82 (Mich. Sept. 18, 2020) (mem.) (Slis II).

106. *Slis II*, 948 N.W.2d at 82.

107. *Slis I*, 956 N.W.2d at 595.

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this ban;<sup>108</sup> and the harm to the businesses would outweigh the harm should a preliminary injunction be issued.<sup>109</sup>

In a case against a cigarette manufacturer, a widow of a smoker, who died of lung cancer caused by smoking 1-3 packs of cigarettes a day for 50 years, filed a suit for negligence and strict liability, and she won a judgment of \$2.125 million.<sup>110</sup> In a cross-appeal, the plaintiff sought a new trial for punitive damages, an issue not presented at the jury trial.<sup>111</sup> The defendant manufacturer argued that the jurors violated their oath with the \$2.125 million award and conflated compensatory damages with punitive damages.<sup>112</sup> To that argument, the Eleventh Circuit responded “[if] bad arguments could blush, this one would be radiantly red.”<sup>113</sup> The court remanded the case for a trial on the punitive damages based on the negligence and strict liability claims.<sup>114</sup>

#### D. MARIJUANA & DRUGS

The Nebraska Supreme Court ordered the removal of a proposition to legalize medical marijuana from the November general ballot because it violated the “single subject rule.”<sup>115</sup> Under the Nebraska Constitution, this Rule requires that each “[i]nitiative measures shall contain only one subject.”<sup>116</sup>

Vermont’s House of Representatives passed a bill to legalize and tax recreational cannabis use.<sup>117</sup> Sales would be regulated by the new Cannabis Control Board and would be subject to a 14% excise tax, a six percent state sales tax, and a local sale tax.<sup>118</sup> Other states that have legalized marijuana in some form, either medical or recreational, in 2020 were New Jersey, Arizona, South Dakota, Montana, and Mississippi.<sup>119</sup>

Oregon became the first state to decriminalize possession of hard drugs under Measure 110.<sup>120</sup> Measure 110 made the personal non-commercial possession of a controlled substance no more than a Class E violation (maximum fine of \$100) and established a drug addiction treatment and

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108. *Id.* at 598.

109. *Id.*

110. *Sowers v. R.J. Reynolds Tobacco Co.*, 975 F.3d 1112, 1117 (11th Cir. Sept. 15, 2020).

111. *Id.*

112. *Id.* at 1128.

113. *Id.*

114. *Id.* at 1139.

115. *State ex rel. Wagner v. Evnen*, 948 N.W.2d 244, 250 (Neb. 2020).

116. *Id.* at 253.

117. Vt. Stat. Tit. 7, §§ 861-909.

118. *Id.*

119. Lia Eustachewich, *Legal weed 2020: States that legalized marijuana, mushrooms on Election Day*, N.Y. POST (Nov. 4, 2020), <https://nypost.com/2020/11/04/legal-weed-2020-states-that-legalized-marijuana-on-election-day/>.

120. Hillary Back, *Oregon Votes Pass Measure 110 to Decriminalize Hard Drugs*, LAWCOMMENTARY (Nov. 10, 2020), <https://www.lawcommentary.com/articles/oregon-voters-pass-measure-110-to-decriminalize-hard-drugs>.

recovery program funded, in part, by Oregon's marijuana tax revenue in excess of \$45 million and state prison savings stemming from the decriminalization itself.<sup>121</sup>

#### E. PRODUCT LIABILITY

Based on the claim that their baby powder may contain cancer-causing asbestos, Johnson & Johnson settled for approximately \$100 million to end over 1,000 lawsuits.<sup>122</sup> Although the company claimed that the talc product was safe based on scientific research, it nevertheless changed the formula to include cornstarch in 2019.<sup>123</sup> In October 2019, the Food and Drug Administration claimed to have found trace levels of asbestos in the product.<sup>124</sup> After that, thousands of lawsuits were filed. These settlements come after \$750 million in punitive damages and \$37.2 million in compensatory damages were awarded against Johnson & Johnson in a February jury verdict for cancer blamed on asbestos in the talc-based baby powder.<sup>125</sup> There are still approximately 20,000 talc-related lawsuits pending against Johnson & Johnson.<sup>126</sup> On a related note, Imerys Talc America, Johnson & Johnson's talc supplier, filed for Chapter 11 Bankruptcy.<sup>127</sup> The U.S. trustee asked that the Bankruptcy court reject the Chapter 11 action to protect against fraud and abuse.<sup>128</sup>

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121. *Id.*

122. Daniel Cassady, *Johnson & Johnson To Pay \$100 Million In Baby Powder Settlement*, FORBES (Oct. 5, 2020), <https://www.forbes.com/sites/danielcassady/2020/10/05/johnson—johnson-to-pay-100-million-in-baby-powder-settlement/#82c4de472c9c>.

123. Jef Feely, *J&J to Pay More Than \$100 Million to End Over 1,000 Talc Suits*, BLOOMBERG (Oct. 5, 2020), <https://www.bloomberg.com/news/articles/2020-10-05/j-j-to-pay-more-than-100-million-to-end-over-1-000-talc-suits>.

124. Cassady, *supra* note 122.

125. Chris Dolmetsch, *J&J Ordered to Pay \$750 Million in Punitive Damages Over Talc*, BLOOMBERG (Feb. 6, 2020), <https://www.bloomberg.com/news/articles/2020-02-06/j-j-ordered-to-pay-750-million-in-punitive-damages-over-talc>.

126. Cassady, *supra* note 122.

127. *In re Imerys Talc Am., Inc.*, 602 B.R. 248, 250 (D. Del. 2019).

128. Rose Krebs, *Trustee Flags Gaps In J&J Talc Supplier's Ch. 11 Plan*, LAW360 (Oct. 5, 2020), <https://www.law360.com/articles/1316715/trustee-flags-gaps-in-j-j-talc-supplier-s-ch-11-plan>.

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## **International Arbitration**

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This article surveys significant legal developments in international arbitration in 2020.

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## I. North America

### A. UNITED STATES

#### 1. *Arbitration Developments in U.S. Courts*

##### a. Arbitration Agreements

In its sole arbitration case this term, the U.S. Supreme Court resolved a historical circuit split concerning whether a party to an international arbitration agreement governed by the New York Convention may compel arbitration against a non-signatory by applying state law principles of contract, agency, and corporate law traditionally applied in domestic arbitrations governed by Chapter 1 of the Federal Arbitration Act (FAA).<sup>2</sup> In *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC*, the Court unanimously held that state law principles may be applied to determine whether a non-signatory can invoke or be bound by an arbitration agreement.<sup>3</sup> The Court concluded that Article II(3) of the New York Convention does not expressly preclude “the application of domestic laws that are more generous in enforcing arbitration agreements,” and that “[t]his silence [was] dispositive.”<sup>4</sup> The Court held that GE, a non-signatory to the arbitration agreement, could invoke the state law doctrine of estoppel to compel arbitration.<sup>5</sup>

Justice Sotomayor’s concurrence emphasized that lower courts should apply state law principles to permit non-signatories to enforce arbitration agreements consistently with the “principle of consent to arbitrate.”<sup>6</sup>

##### b. Delegation of Arbitrability

In *Jock v. Sterling Jewelers Inc.*, the Second Circuit addressed whether absent members of a class arbitration authorized arbitrators to certify a class.<sup>7</sup> The parties’ arbitration agreement was governed by the American Arbitration Association rules (AAA Rules).<sup>8</sup> The AAA Rules contain supplementary rules permitting an arbitrator to determine, as a threshold matter, when arbitration can proceed on behalf of a class.<sup>9</sup> Based on this, the

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2. See generally *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 139 S. Ct. 2776 (2019). Compare *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38, 40–45 (1st Cir. 2008), and *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 380 (4th Cir. 2012), and *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 413–14 (4th Cir. 2000), with *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 998 (9th Cir. 2017), and *Outokumpu Stainless USA, LLC v. Convertteam SAS*, 902 F.3d 1316, 1320 (11th Cir. 2018), *rev’d sub nom.* *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 139 S. Ct. 2776 (2019).

3. *GE Energy Power Conversion Fr. SAS Corp.*, 140 S. Ct. at 1642.

4. *Id.* at 1645.

5. *Id.* at 1648.

6. *Id.*

7. *Jock v. Sterling Jewelers, Inc.*, 942 F.3d 617, 622 (2d Cir. 2019).

8. *Id.* at 623.

9. *Id.* at 623–24.

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court determined that despite absent class members not affirmatively opting in to arbitration, incorporation of the AAA Rules nonetheless provided the absent class members' consent "to the arbitrator's authority to decide the threshold question of whether the agreement permits class arbitration."<sup>10</sup> The arbitration agreement expressly delegated "[q]uestions of arbitrability" and "procedural questions" to the arbitrator, which the court found was consistent with Supreme Court precedent and governing Ohio law.<sup>11</sup>

In *MZM Construction Company, Inc. v. New Jersey Building Laborers Statewide Benefit Funds*, the Third Circuit similarly considered the "mind-bending" question of arbitrability, this time on the narrow issue of whether it was for the court or the arbitrator to decide if a valid agreement to arbitrate exists when one party challenged the underlying contract but made no specific claims with respect to the arbitration provision itself.<sup>12</sup> Noting that this case presented the additionally complicated issue of a delegation provision that expressly reserved "the authority to decide whether an [a]greement exists" to the arbitrator,<sup>13</sup> the court nevertheless found that Section 4 of the FAA, which requires the court to be "satisfied" that an agreement to arbitrate exists, "tilt[ed] the scale in favor of a judicial forum when a party rightfully resists arbitration on grounds that it never agreed to arbitrate at all."<sup>14</sup>

c. Enforcement of Awards

i. Partiality as a Ground for Vacatur

Courts continued to weigh in on the issue of arbitrator bias and the standard for "evident partiality." In *Monster Energy Co. v. City Beverages LLC*, Monster initiated a JAMS-administered arbitration and ultimately obtained an award in its favor.<sup>15</sup> After Monster moved to confirm the award, City Beverages sought vacatur under the FAA based on "evident partiality."<sup>16</sup> The Ninth Circuit held that vacatur was warranted because the arbitrator's "failure to disclose his ownership interest" in JAMS "coupled with the fact that JAMS ha[d] administered ninety seven arbitrations for [plaintiff] Monster over the past five years," creating a "reasonable impression of bias."<sup>17</sup> The Ninth Circuit's test for partiality requires a party to demonstrate a "reasonable impression of partiality" only, but other circuits have required that a "reasonable person would have to conclude that an

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10. *Id.* at 623.

11. *Id.* at 624-26 (noting that *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) "leaves undisturbed the proposition . . . that an arbitration agreement may be interpreted to include implicit consent to class procedures").

12. *MZM Constr. Co. Inc., v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 392 (3d Cir. 2020).

13. *Id.* at 396.

14. *Id.* at 401.

15. *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1133 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (2020).

16. *Id.* at 1133-34.

17. *Id.* at 1132, 1138.

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arbitrator was partial to one party to the arbitration.”<sup>18</sup> As the Supreme Court denied *certiorari* in June 2020, circuits remain split on this standard.

A few months later, the U.S. District Court for the District of Columbia issued its decision in *Pao Tatneft v. Ukraine*, denying Ukraine’s attempt to vacate an arbitral award for evident partiality on the alleged basis that the president of the arbitral tribunal failed to disclose that he had accepted a “prestigious and lucrative appointment” from the law firm representing Tatneft in a “major investment arbitration.”<sup>19</sup> Critically, the court concluded that to prevail in the context of a *foreign* arbitral award issued under UNCITRAL Arbitration Rules, “Ukraine would need to demonstrate both that [the arbitrator’s] failure to disclose the . . . appointment somehow violated UNCITRAL Rules and that there was substantial prejudice flowing from any alleged violation,” *i.e.*, the disclosure “would have been disqualifying.”<sup>20</sup> The court made clear that a challenge to “impartiality in a proceeding to enforce a foreign arbitration award is higher than the FAA’s evident partiality standard” that applies to domestic arbitration awards, and concluded that Ukraine had not met this higher burden.<sup>21</sup>

ii. Jurisdiction Over Enforcement Actions

In *Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, the Tenth Circuit joined the Second, Third, Fourth, and Ninth Circuits<sup>22</sup> in holding that “the proper jurisdictional inquiry” in an action to enforce an arbitral award looks to whether plaintiff’s “injury” arbitration proceeding itself.<sup>23</sup> While the Supreme Court has not yet addressed the inquiry for specific personal jurisdiction in an action to enforce a foreign arbitral award, this is one additional circuit that has considered the issue and reviews the connection between the forum and the defendant’s conduct in the underlying dispute.

d. Coronavirus and Arbitration

In a departure from normal circumstances this year, courts contended with the impact of the COVID-19 pandemic and considered arguments, on many occasions raised by sovereign defendants, that the novel coronavirus

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18. *See, e.g.,* *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 325 (6th Cir. 1998) (quoting *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)).

19. *Pao Tatneft v. Ukraine*, No. CV 17-582 (CKK), 2020 WL 4933621, at \*5 (D.D.C. Aug. 24, 2020), *appeal docketed*, No. 20-7091 (D.C. Cir. Nov. 4, 2020).

20. *Id.* at \*8 (emphasis added).

21. *Id.* at \*6, 8.

22. *See, e.g.,* *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 101 (2d Cir. 2006); *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178–79 (3d Cir. 2006); *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,”* 283 F.3d 208, 214–15 (4th Cir. 2002); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Hamarain Co.*, 284 F.3d 1114, 1123–24 (9th Cir. 2002).

23. *Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 970 F.3d 1269, 1287 (10th Cir. 2020).

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warranted delay in enforcement proceedings. In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the defendant Egypt sought a stay of U.S. proceedings to enforce an ICSID award given its pending application to annul the award.<sup>24</sup> In light of the “massive fiscal crisis exacerbated by the ongoing global COVID-19 pandemic,” the court granted the stay, finding that the “balance of hardships” favored Egypt.<sup>25</sup>

By contrast, in *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, where the defendant Guatemala was already granted one extension to arrange for payment of an arbitral award “in light of the difficulties presented by the COVID-19 pandemic,” the court dismissed a request for an additional extension.<sup>26</sup> The court reasoned that Guatemala failed to “offer any good reason why the Republic took no action in the several months that passed after the Court entered final judgment and before the pandemic began.”<sup>27</sup>

## 2. 28 U.S.C. § 1782

In 2020, an emerging circuit split regarding the availability of discovery under 28 U.S. Code § 1782 for use in private international arbitrations deepened. The Fourth Circuit held that § 1782 applies to private international arbitrations, while the Seventh Circuit, joining the Second and Fifth Circuits, found that § 1782 does not authorize discovery for private foreign arbitrations.<sup>28</sup>

On March 30, 2020, the Fourth Circuit ruled in *Servotronics* that a private international commercial arbitral tribunal seated in the United Kingdom qualified as a “foreign tribunal” for purposes of § 1782, and that the statute, accordingly, permits U.S. discovery for use in the arbitration.<sup>29</sup> The Court’s ruling turned on its determination that private arbitration was a “product of government-conferred authority” under both U.S. and UK law.<sup>30</sup>

By contrast, in *Servotronics*, a case involving the same underlying arbitration, the Seventh Circuit interpreted § 1782 narrowly to exclude private foreign arbitrations.<sup>31</sup> The Court observed that construing § 1782 broadly would lead to the illogical result that parties in private foreign arbitrations would have greater access to federal court discovery assistance in the United States than parties to U.S. domestic arbitrations, and thus concluded that § 1782 referred to “a state-sponsored, public or quasi-

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24. *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, No. CV 18-2395 (JEB), 2020 WL 2996085, at \*4 (D.D.C. June 4, 2020).

25. *Id.*

26. *TECO Guat. Holdings, LLC v. Republic of Guat.*, No. CV 17-102 (RDM), 2020 WL 2934951, at \*1, \*2 (D.D.C. June 2, 2020).

27. *Id.* at \*2.

28. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020).

29. *Id.*

30. *Id.* at 212–13 (rejecting Boeing’s argument that the arbitral panel at issue “deriv[ed] its authority not from the government, but from the parties’ agreement”).

31. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 690 (7th Cir. 2020).

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governmental tribunal” and not a private foreign arbitration.<sup>32</sup> A certiorari petition filed by Servotronics in December 2020 is pending.<sup>33</sup>

In June 2020, the Second Circuit in *Hanwei Guo v. Deutsche Bank* reaffirmed its precedent and determined that “foreign or international tribunal” under § 1782 excluded private foreign arbitrations.<sup>34</sup> Having found that the tribunal at issue, which was constituted under the auspices of the China International Economic and Trade Arbitration Commission, “derive[d] its jurisdiction exclusively from the agreement of the parties” and “function[ed] essentially independently” from the Chinese government, the Second Circuit concluded that the tribunal was not “state-sponsored” and therefore did not constitute a “foreign or international tribunal” within the meaning of § 1782.<sup>35</sup>

## B. MEXICO

In 2020, the international arbitration community in Mexico focused on developments in the renewable energy sector, with the López Obrador administration’s energy authorities fully deploying a political and regulatory strategy aimed at, among other things, strengthening the state-owned utility *Comisión Federal de Electricidad* (CFE).

The strategy includes a decree issued by the National Energy Control Center (CENACE)<sup>36</sup> and a policy issued by the Ministry of Energy (SENER)<sup>37</sup> (the Policies), which are intended to, among other things, change market dispatching rules. The Policies grant CFE’s power plants priority to dispatch first, prevent new projects from entering into

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32. *Id.* at 695–96.

33. *Petition for Writ of Certiorari, Servotronics, Inc. v. Rolls-Royce PLC*, 2021 WL 1072280, 12–15 (Mar. 22, 2021) (No. 20-794) (offering three reasons to grant review: 1) the Circuits are split; 2) the issue is narrowly defined in this case; and 3) the Seventh Circuit supposedly misapplied “[t]ime-honored canons of statutory construction” when it concluded that the phrase “tribunal” was ambiguous under the statute.)

34. *Guo v. Deutsche Bank Sec.*, 965 F.3d 96, 100 (2d Cir. 2020) (reaffirming its decision in *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999)); *see also* *Republic of Kaz. v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999) (holding that “foreign tribunal” under § 1782 did not include private international arbitral tribunals).

35. *Guo*, 965 F.3d at 107–08.

36. *ACUERDO para garantizar la eficiencia, Calidad, Confiabilidad, Continuidad y seguridad del Sistema Eléctrico Nacional, con motivo del reconocimiento de la epidemia de enfermedad por el virus SARS-CoV2 (COVID-19)* [National Electric System Covid-19 Guarantee], GOBIERNO DE MEXICO CENACE [Mexican National Center for Disease Control] (April, 29 2020) [hereinafter *CENACE Covid-19 Guarantee*], [https://www.cenace.gob.mx/Docs/16\\_MARCO%20REGULATORIO/SENYMEM/\(Acuerdo%202020-05-01%20CENACE\)%20Acuerdo%20para%20garantizar%20la%20eficiencia,%20Calidad,%20Confiabilidad,%20Continuidad%20y%20seguridad.pdf](https://www.cenace.gob.mx/Docs/16_MARCO%20REGULATORIO/SENYMEM/(Acuerdo%202020-05-01%20CENACE)%20Acuerdo%20para%20garantizar%20la%20eficiencia,%20Calidad,%20Confiabilidad,%20Continuidad%20y%20seguridad.pdf).

37. *ACUERDO por el que se emite la Política de Confiabilidad, Seguridad, Continuidad y Calidad en el Sistema Eléctrico Nacional* [AGREEMENT by which the Policy of Reliability, Security, Continuity and Quality in the National Electric System is issued], DIARIO OFICIAL DE LA FEDERACIÓN [DOF] (May 15, 2020) [hereinafter *SENER Agreement*], [https://dof.gob.mx/nota\\_detalle.php?codigo=5593425&fecha=15/05/2020](https://dof.gob.mx/nota_detalle.php?codigo=5593425&fecha=15/05/2020).

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commercial operation for an undefined term, and open the door for regulators to curtail existing power plants.<sup>38</sup>

Such sudden changes from the major 2013 reforms quickly raised the alarm of industry stakeholders, risking over \$6.4 billion in investment with the CENACE decree—a considerable portion of which is of foreign origin—for projects that were pre-operational,<sup>39</sup> and a larger sum for projects already in operation with the SENER policy.

While stakeholders have been generally successful in seeking protection from the Mexican courts against the effects of the Policies, companies have also explored investment arbitration under bilateral or multilateral investment treaties to which Mexico is a party.

C. CANADA

In *Uber Technologies Inc. v. Heller*, a majority of the Supreme Court of Canada held that challenges to arbitral jurisdiction may be made to the court where there is a real prospect that referring such a challenge to an arbitrator could result in the challenge never being resolved.<sup>40</sup> The arbitration agreement in question provided that disputes under the agreement were to be arbitrated in the Netherlands and that the plaintiff was to pay an upfront fee.<sup>41</sup> The majority found that the agreement made arbitration “realistically unattainable” for the plaintiff and therefore unenforceable.<sup>42</sup>

In *9354-9186 Québec Inc. v. Callidus Capital Corp.*, the unanimous Supreme Court of Canada held that third-party litigation funding is not *per se* illegal.<sup>43</sup>

In *International Air Transport Association v. Instrubel, N.V.*, the Supreme Court of Canada upheld a Quebec Court of Appeal decision permitting the enforcement of a foreign arbitral award in Canada, resulting in the seizure of funds held in Switzerland, where such funds were collected by an entity.<sup>44</sup>

D. NAFTA/USMCA

The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020.<sup>45</sup> Chapter 14 of USMCA deals with Investments,<sup>46</sup> and supersedes Chapter 11 of the North American Free Trade Agreement

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38. *See id.*; *CENACE Covid-19 Guarantee*, *supra* note 36.

39. *En riesgo inversiones por US\$ 6,400 millones en renovables: ASOLMEX, AMDEE* [Investments of US \$ 6.4 billion in renewables at risk: ASOLMEX, AMDEE], *ENERGÍA A DEBATE* (May 7, 2020), <https://www.energiaadebate.com/energia-limpia/en-riesgo-inversiones-por-us-6-400-millones-en-renovables-asolmex-amdee/>.

40. *Uber Technologies Inc. v. Heller*, 2020 SCC 16, ¶ 46 (Can.).

41. *See generally id.* at 4.

42. *Id.* at ¶ 97.

43. *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, ¶ 94 (Can.).

44. *See generally* *Int'l Air Transp. Ass'n v. Instrubel, N.V.*, 2019 SCC 61 (Can.).

45. Press Release, Michael R. Pompeo, Secretary of State, Entry into Force of the United States-Mexico-Canada Agreement (July 1, 2020), <https://2017-2021.state.gov/entry-into-force-of-the-united-states-mexico-canada-agreement/index.html>.

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(NAFTA), which allowed for investor-State arbitration.<sup>47</sup> USMCA continues to allow NAFTA Chapter 11 arbitration for “legacy investments” until July 1, 2023.<sup>48</sup> NAFTA arbitrations filed before July 1, 2020, may continue notwithstanding USMCA’s entry into force, and arbitrations relating to “legacy investments” that commence after that date may continue under NAFTA even if they have not concluded by July 1, 2023.<sup>49</sup>

For those investors and investments lacking “legacy” NAFTA protection, USMCA generally offers limited arbitration rights. It allows no right of arbitration for U.S. or Mexican investors against Canada, and it prohibits Canadian investors and their investments from raising claims against the U.S. or Mexico.<sup>50</sup> For most U.S. and Mexican investors, arbitration rights are limited in Annex 14-D to circumscribed claims for violations of the national-treatment and/or most-favored-nation-treatment obligations (but not including claims with respect to the establishment or acquisition of an investment) and for direct (but not indirect) expropriation.<sup>51</sup> Investors seeking arbitration under Annex 14-D are also required to exhaust local remedies in the domestic courts of the Respondent state until they obtain a final decision, or until thirty months have elapsed.<sup>52</sup> For U.S. and Mexican investors with a “covered government contract” in specified industry sectors, broader NAFTA-style arbitration rights are available under Annex 14-E.<sup>53</sup> To date, no arbitration claims have been filed under USMCA Chapter 14.

## II. ICSID

In June, an International Centre for the Settlement of Investment Disputes (ICSID) tribunal issued an award in *Strabag SE v. Libya* holding that Libya must pay €74.9 million in damages to Strabag SE (Strabag), an Austrian construction firm whose property was lost or damaged during and after the 2011 revolution in Libya.<sup>54</sup>

The bulk of Strabag’s claims were based on contracts relating to road and infrastructure projects that a joint venture company, which was sixty percent owned by Strabag’s subsidiary and forty percent owned by the Libyan Investment and Development Company, entered into before 2011 with

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46. United States-Mexico-Canada Agreement ch. 14, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 30, 2018), <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf> [hereinafter USMCA].

47. North American Free Trade Agreement ch. 11, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

48. USMCA, art. 14.C.1-3 & 6; *see also id.*, art. 14.2.3. (Note that Annex 14-C of the USMCA is not applicable to arbitration claims against Mexico or the United States that fall within the ambit of Annex 14-E (related to “Covered Government Contracts”).

49. *Id.*, art. 14.C.4-5.

50. *Id.*, art. 14.2.4; *see also id.*, art. 14.D.1.

51. *Id.*, art. 14.D.3.1(a)-(b).

52. *Id.*, art. 14.D.5.1(a)-(b).

53. *Id.*, Annex 14-E.

54. *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 1-3 (June 29, 2020).

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three Libyan government entities.<sup>55</sup> Libya argued that the tribunal lacked jurisdiction over those claims under the umbrella clause in the Austria-Libya bilateral investment treaty because none of the parties to those contracts were parties to the arbitration, but the tribunal rejected that argument, holding that “an array of public authorities had a major hand in the conclusion and performance of the contracts,” such that Libya “did, indeed, ‘enter into’ the obligations in the disputed contracts within the meaning of [the umbrella clause] of the Treaty.”<sup>56</sup> The tribunal also rejected Libya’s argument that the parties’ disputes must be litigated in Libyan courts—which is what the contracts provided—because the widespread violence and disorder since 2011 had left Strabag with “no viable mechanisms for settling disputes with the Libyan State entities involved here other than resorting to Treaty arbitration.”<sup>57</sup>

### III. Europe

#### A. ENGLAND & WALES

In March 2020, the Court of Appeal held in *A v. C* that under Section 44 of the Arbitration Act 1996, which gives the Court powers “in support of arbitral proceedings,” it can make orders against non-parties to an arbitration.<sup>58</sup> In this case, the court found it could order that an English non-party witness could be deposed in support of a New York-seated arbitration.<sup>59</sup>

In October 2020, *Enka v. Chubb* resolved English law’s view of the proper law of the arbitration agreement.<sup>60</sup> The Supreme Court held that where parties have not expressly chosen the law governing the arbitration agreement but have expressly or impliedly chosen the law governing the contract containing the arbitration agreement, that choice will — generally — apply to the arbitration agreement because it is the parties’ implied choice.<sup>61</sup> If there is no express or implied choice of the law of the arbitration agreement, it will generally be most closely connected with the curial law.<sup>62</sup>

In November 2020, the Supreme Court also clarified in *Halliburton v. Chubb* that an arbitrator’s duty of disclosure is a legal duty in English law, which requires disclosure of matters that might reasonably give rise to justifiable doubts as to the arbitrator’s impartiality.<sup>63</sup> The scope and duty of disclosure will be affected by the custom and practice of the relevant field/

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55. *Strabag*, ICSID Case No. ARB(AF)/15/1, Award ¶¶ 5, 8.

56. *Id.*, ¶¶ 138, 187.

57. *Strabag*, ICSID Case No. ARB(AF)/15/1 at ¶¶ 5, 8.

58. *A and B v. C, D and E* [2020] EWCA (Civ) 409 [para. 6] (Eng.).

59. *Id.*

60. *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38 [¶ 2] (appeal taken from EWCA).

61. *Id.*

62. *Id.*

63. *Halliburton Company v. Chubb Bermuda Insurance Ltd.* [2020] UKSC 48 [para. 55].



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industry. That duty, however, does not override the arbitrator's duty of privacy and confidentiality owed in another arbitration.<sup>64</sup> Failure to disclose relevant matters is a factor to take into account in assessing a real possibility of bias.<sup>65</sup>

Finally, the London Court of International Arbitration issued its new rules for 2020, which further aim to improve efficiency and predictability.<sup>66</sup>

## B. IRELAND

In anticipation of Brexit, the Irish government continues to promote Ireland as an international arbitration seat, including by supporting the Legal Services Brexit Initiative. The initiative highlights Ireland's arbitration capabilities and position as an English-speaking common law jurisdiction in the EU Bloc.

Further, a notable High Court decision on arbitration clauses was both timely and on point. In *Narooma Ltd v. HSE*, Ireland's Health Service Executive (HSE) entered into a contract for the urgent acquisition of ventilators during the COVID-19 pandemic.<sup>67</sup> After becoming concerned about the plaintiff (and alleged representations about its status as agent/distributor for the Chinese manufacturer), HSE refused to proceed with the contract.<sup>68</sup> The disputes clause stated, "Both Parties, by mutual consent, resolve to refer any dispute to [arbitration]."<sup>69</sup> The plaintiff claimed there was no valid arbitration clause because this language was merely an agreement to agree whether to refer a dispute to arbitration. The contract was based on a template downloaded from the internet and neither party received legal advice on it.<sup>70</sup>

The Court held that the clear meaning of the words was that the parties had resolved to refer any dispute to arbitration (the only meaning consistent with the context and commercial purpose).<sup>71</sup> As Article 8 of the Model Law is in force in Ireland via Section 8 of the Arbitration Act, the Court referred the parties to arbitration.<sup>72</sup>

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64. *Id.*

65. *Id.*

66. London Court of International Arbitration Rules (2020), [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx) [hereinafter LCIA Rules].

67. *Narooma Ltd. v. HSE* [2020] IEHC 315, ¶¶ 2–3 (Ir.).

68. *Id.* ¶ 4.

69. *Id.* ¶ 52.

70. *Id.* ¶¶ 8–9.

71. *Id.* ¶ 101.

72. *Id.* ¶¶ 57–58.

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C. FRANCE

On October 8, 2020, the International Chamber of Commerce (ICC) announced the adoption of the 2021 ICC Arbitration Rules (“ICC Rules”),<sup>73</sup> which will enter into force on January 1, 2021. Notable revisions include the addition of Article 11(7), which requires each party to “promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.”<sup>74</sup> Article 11(7) marks a step toward more transparency in third-party funding arrangements, bringing the ICC Rules in line with the IBA Guidelines on Conflicts of Interest in International Arbitration and the 2018 Hong Kong International Arbitration Centre (HKIAC) Rules.

Also noteworthy are the new Article 7(5),<sup>75</sup> which allows the joinder of additional parties after the constitution of a tribunal, and Article 12(9),<sup>76</sup> which empowers the ICC Court to appoint each member of the tribunal, notwithstanding any agreement by the parties on the method of constitution, “in exceptional circumstances . . . to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.”<sup>77</sup>

The 2021 ICC Rules also contain two new provisions applying to investment arbitrations based on treaties. Article 13(6), aimed at ensuring the tribunal’s neutrality, provides that no arbitrator shall have the same nationality as any party to an arbitration, unless the parties agree otherwise.<sup>78</sup> The new Article 29(6)(c) also codifies the ICC Court’s established practice of not allowing emergency arbitrations for investor-State disputes.<sup>79</sup>

In the *Sheikh Faisal v. CFF* and *Sorelec v. Libya* decisions, the Paris Court of Appeal, deciding on annulment applications, reaffirmed its position that in matters involving allegations of corruption, it has the power to review *de novo* all legal and factual elements necessary to establish the unlawfulness of agreements and to assess whether the recognition or enforcement of awards would manifestly, effectively, and specifically violate international public policy.<sup>80</sup> In line with its previous case law,<sup>81</sup> the Court ruled that arbitral awards shall be annulled where it is established by a set of serious, precise,

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73. *ICC Unveils Revised Rules of Arbitration*, INT’L CHAMBER OF COMMERCE (Aug. 10, 2020), <https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/>; see also 2021 Arbitration Rules, INT’L CHAMBER OF COMMERCE <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/rules-of-arbitration-2021/> (last visited Jun. 4, 2021).

74. *Id.* art. 11(7).

75. *Id.* art. 7(5).

76. *Id.* art. 12(9).

77. *Id.*

78. *Id.* art. 13(6).

79. *Id.* art. 29(6)(c).

80. *Cour d’appel [CA]* [regional court of appeal] Paris, 1e ch., June 30, 2020, 17/22515; *Cour d’appel [CA]* [regional court of appeal] Paris, 1e ch., Nov. 17, 2020, 18/02568.

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and concordant indicia that the agreement under scrutiny was obtained through corruption.<sup>82</sup>

In the *Kout Food Group* decision, the Paris Court of Appeal ruled that, absent any express choice-of-law provision, the law of the arbitration seat will govern the validity of the arbitral award.<sup>83</sup> This was an express divergence from the London High Court, which denied enforcement of the award on the ground that the arbitration agreement was governed by the law applicable to the contract.<sup>84</sup>

**D. GERMANY**

On January 16, 2020, the *Oberlandesgericht Frankfurt am Main* (OLG) (Higher Regional Court Frankfurt) (OLG) issued a controversial decision, providing the arbitration community with an obiter dictum on the consequences of dissenting opinions in arbitral awards.<sup>85</sup> The OLG opined that a dissenting opinion by the minority arbitrator violates the procedural *ordre public*, which results in the risk of annulment of the award.<sup>86</sup> The reasoning behind this is that generally, except for the German Federal Constitutional Court and some State Constitutional Courts, judges in Germany are prohibited from rendering dissenting opinions because they are bound to uphold the secrecy of deliberations (*Beratungsgeheimnis*).<sup>87</sup> The decision is subject to an appeal to the Bundesgerichtshof (German Federal Supreme Court).

COVID-19 has accelerated the use of technology solutions, which have been adopted by the arbitration community in Germany. In addition to existing flexibility in departing from in-person hearings in favor of videoconferencing,<sup>88</sup> the Deutsche Institution *für Schiedsgerichtsbarkeit* (German Arbitration Institute) announced<sup>89</sup> further distinct procedures for the administration of pending and future arbitrations, including (i) an

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81. *Cour d'appel* [CA] [regional court of appeal] Paris, 1e ch., Apr. 10, 2018, REV. ARB., 2018(3), at 574–81; *Cour d'appel* [CA] [regional court of appeal] Paris, 1e ch., Feb. 21, 2017, 15/01650.

82. *Cour d'appel* [CA] [Regional Court of Appeal] Paris, 1e ch., Nov. 17, 2020, 18/02568.

83. See *Cour d'appel* [CA] [Regional Court of Appeal] Paris, 1e ch., June 23, 2020, 17/22943 (Fr.)

84. See *Kabab-Ji SAL v. Kout Food Group*, [2020] EWCA (Civ) 6, ¶ 16.

85. *Oberlandesgericht* [OLG] [Higher Regional Court] Jan. 16, 2020, 26 Sch. 14/18 (Ger.), <https://openjur.de/u/2261758.html>.

86. *Bürgerliches Gesetzbuch* [BGB] [Civil Code], § 1059, ¶ 2, sentence 2 translation available at [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html) (Ger.).

87. OLG, *supra* note 85.

88. German Arbitration Institute, 2018 DIS Arbitration Rules at Annex 3, ¶ G (March 1, 2018), available at <https://www.disarb.org/en/tools-for-dis-proceedings/dis-rules>.

89. *Announcement of Particular Procedural Features for the Administration of Arbitrations in View of the Covid-19, Pandemic*, GERMAN ARBITRATION INSTITUTE, (July 1, 2020) available at <https://www.disarb.org/en/about-us/update-covid-19>.

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automatic extension of time limits,<sup>90</sup> and (ii) exclusive transmission of communications and invoices by e-mail.<sup>91</sup>

E. RUSSIA

In June 2020, new Russian procedural legislation entered into force and introduced some critical amendments aimed at protecting sanctioned Russian entities struggling to secure their rights in foreign jurisdictions, including:

- A default rule that Russian state commercial courts have exclusive jurisdiction over disputes (i) involving entities under foreign sanctions or (ii) originating from anti-Russian sanctions;<sup>92</sup>
- “Barriers to access to justice” for a sanctioned person as a new ground for unenforceability of a prorogation agreement in favor of a foreign court or an arbitration agreement with a seat outside Russia;<sup>93</sup>
- The possibility of obtaining anti-suit injunctions in Russia in respect of foreign arbitration or court proceedings commenced in violation of this change in law, which can trigger liability up to the amount in dispute.<sup>94</sup>

The legislation does not define barriers to access to justice, but according to public deliberations on the law and emerging court practice, this may include any difficulties in paying arbitration charges or hiring a lawyer, or any other difficulties related to participation in the proceedings.<sup>95</sup> Russian courts apply this novelty to arbitration agreements concluded even before the law entered into force.<sup>96</sup>

F. SPAIN

In June 2020, the Constitutional Court rendered a judgment on an appeal based on the infringement of fundamental rights, reinforcing its doctrine on the scope of the courts’ control of arbitral awards.<sup>97</sup> The judgment ultimately strengthens arbitration as a dispute resolution mechanism. As minimum court intervention in favor of party autonomy is inherent to arbitration, an annulment action must be understood as a process of external control over the award’s validity that does not allow a review of the award’s

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90. *Id.* §§ 4, 9.

91. *Id.*

92. *Arbitrazhno-Protssesualnyi Kodeks Rossiiskoi Federatsii* [APK RF] [Code of Arbitration Procedure] art. 2481, ¶ 1 (Rus.).

93. *Id.* ¶ 4.

94. *Id.* art. 2482, ¶ 10.

95. *Extension of Exclusive Jurisdiction of Russian Courts Over the Disputes With Russian Sanctioned Entities: Potential Unenforceability of Prorogation Agreements and Anti-Suit Injunctions*, ALRUD (June 10, 2020), <https://www.alrud.com/publications/5efb161e8b4b1e5752512f2a/>.

96. *Id.*

97. S.T.C., June 15, 2020 (B.O.E., No. 46) (Spain).

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merits.<sup>98</sup> Public order as a pretext for analysis of the merits of the award must be subject to the constitutional canons of reasonableness and non-arbitrariness.<sup>99</sup> Otherwise, it would distort arbitration and ultimately violate the will of the parties.<sup>100</sup>

G. UKRAINE

In 2020, the Ukrainian Parliament took its first steps toward adopting the long-awaited Law on Mediation<sup>101</sup> and initiated changes to the Law on Arbitration (*Treteisky*) Courts,<sup>102</sup> aimed at greater transparency and wider use of domestic arbitration (*Treteisky*) courts.

In cooperation with USAID, the Ukrainian government also took steps toward establishing an International Commercial Court within the Ukrainian court system.<sup>103</sup> Once instituted, the court is expected to be narrowly specialized and have jurisdiction over disputes with foreign elements.<sup>104</sup>

In September, domestic Ukrainian arbitration institutions—ICAC and MAC at the UCCI—amended the Rules to address the impacts of quarantine restrictions and to enhance the effectiveness of arbitrating disputes and the enforceability of awards.<sup>105</sup>

This year, Ukrainian courts have taken a uniform approach in recognizing awards rendered in favor of Russian companies: awards can be enforced in Ukraine only after the creditor is removed from the sanctions list.<sup>106</sup>

H. SWITZERLAND

To preserve its position as one of the most advanced and popular venues for international arbitration, Switzerland enacted extensive amendments to its international arbitration laws, which will go into effect on January 1,

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98. *Id.*

99. *Id.*

100. *Id.*

101. Draft Law on Mediation, 2020 (No. 3504), *available at* [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?id=&pf3516=3504&skl=10](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=3504&skl=10).

102. Draft Law on Changes to the Law of Ukraine on Arbitration (*Treteisky*) Courts, 2020, (No. 3460), *available at* [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?id=&pf3511=68803](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=68803).

103. *On the New International Commercial Court from Ivan Lishchyna*, UKRAINIAN BAR ASSOCIATION (Aug. 04, 2020), <https://uba.ua/eng/news/7757/>.

104. *Id.*

105. *The Ukrainian Chamber of Commerce and Industry (the UCCI) Approved the Amendments to the Rules of the International Commercial Arbitration Court (the ICAC) and the Ukrainian Maritime Arbitration Commission (the UMAC)*, INT'L COM. ARBITRATION COURT, <https://icac.org.ua/en/novyny-ta-publikatsiyi/tpp-ukrayiny-zatverdyla-zminy-do-reglamentiv-mkas-i-mak-pry-tpp-ukrayiny/> (last visited Mar. 28, 2021).

106. *Avia-Fed-Service JSC v. Artem SJSHC*, Resolution of the Supreme Court, Case No. 824/174/19 (June 25, 2020), *available at* <https://reyestr.court.gov.ua/Review/90143722>.

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2021.<sup>107</sup> International arbitration is now exclusively regulated by Chapter 12 of the Federal Statute on Private International Law, which clarifies that an arbitration is “international” if at least one party to the arbitration agreement had its seat or domicile outside of Switzerland at the time the arbitration agreement was concluded.<sup>108</sup> Parties may, however, opt out and can voluntarily submit to the rules governing domestic arbitrations. The new rules also provide for state courts to appoint and replace arbitrators in case the parties failed to agree on specific procedures for doing so in the arbitration agreement.<sup>109</sup> The written form requirements for arbitration agreements have also been modernized to account for all forms of modern communication that may prove the existence of an arbitration agreement.<sup>110</sup> Finally, the new rules provide for challenges to arbitral awards to be decided by the Swiss Federal Court, and arbitral awards can be challenged regardless of the amount in dispute.<sup>111</sup> Moreover, the revised law codifies other legal remedies against a final award, most importantly the so-called Revision, which allows the reopening of arbitration proceedings in limited circumstances.<sup>112</sup> A request that an award be set aside can also now be filed in English in addition to the official languages of Switzerland; but, the decision will be rendered in one of the official languages.<sup>113</sup>

I. SWEDEN

On February 4, 2020, the Supreme Court of Sweden requested a preliminary ruling<sup>114</sup> from the Court of Justice of the European Union (CJEU) on whether the CJEU’s *Achmea* ruling<sup>115</sup> requires that it set aside two arbitral awards rendered in *PL Holdings v. Poland* under Poland’s BIT with the Belgium-Luxembourg Economic Union. Specifically, the Supreme Court of Sweden has asked the CJEU whether Articles 267 and 344 of the Treaty on the Functioning of the European Union, as interpreted in *Achmea*, hold that an arbitration agreement between an E.U. Member State and investor is invalid in the context of an intra-E.U. BIT if the Member State freely accepts the investor’s request for arbitration and does not object on jurisdiction.<sup>116</sup>

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107. Vanessa Alarcon Duvanel, King & Spalding, *Switzerland Updates Its Arbitration Law*, JDSUPRA, <https://www.jdsupra.com/legalnews/switzerland-updates-its-arbitration-law-8213272/> (last visited Apr. 4, 2021).

108. *Loi Fédérale sur le droit international privé* [LDIP] [The Federal Act on Private International Law], *Systematische Sammlung des Bundesrechts* [SR] [systematic compilation of federal law] Dec. 17, 1987, SR 291, art. 176.

109. *Id.* art. 179.

110. *Id.* art. 178.

111. *Id.* art. 191.

112. Duvanel, King & Spalding, *supra* note 107.

113. *Id.*

114. *Högsta Domstolen* [HD] [Supreme Court] 2020-02-04 Ö 1569-19 (Swed.).

115. Case C-284/16, *Slowakische Republik v. Achmea BV*, 2017 E.C.R. 1.

116. *See* ICLG.COM, <https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/sweden> (last visited Jun. 4, 2021).

The case is on appeal from the Svea Court of Appeal, which in 2019 largely upheld the two awards after finding that *Acbmea* did not prohibit States and investors within the EU from agreeing to arbitrate a specific dispute based on the intentions of the parties (concluding that Poland's conduct in the arbitration evidenced such an agreement) and that Poland's *Acbmea*-based objection to the validity of the arbitration agreement was untimely and thus waived under the Swedish Arbitration Act.<sup>117</sup>

The Supreme Court of Sweden is currently awaiting the CJEU's preliminary ruling, which could have significant ramifications for parties in intra-E.U. BIT arbitrations.

#### **IV. Pacific Rim**

##### **A. AUSTRALIA**

In 2020, *Eiser Infrastructure v Spain*, arising from Spain's renewable energy reforms, was Australia's most significant decision.<sup>118</sup> The Federal Court of Australia granted leave to enforce two arbitral awards against Spain under the ICSID Convention. The court held that in ratifying the ICSID Convention, Spain submitted to the jurisdiction of Australian courts with respect to enforcement of ICSID awards and waived its sovereign immunity under Australian law.<sup>119</sup> This decision considered the first step of recognizing and enforcing arbitral awards but did not consider the execution of judgments against the Spanish, sovereign-owned assets.<sup>120</sup> Because execution may still be subject to sovereign immunity limitations, this decision could prove a pyrrhic victory for the investors.

##### **B. CHINA AND HONG KONG**

In August 2020, Guangzhou Intermediate People's Court held that if a foreign arbitration institute made an arbitral award within the territory of China, the arbitral award may be considered a Chinese award involving foreign matters.<sup>121</sup> This ruling allowed parties to petition a Chinese court to enforce the award based on Chinese law and settled a long-standing debate, confirming that China-seated awards made by a foreign arbitration institution shall be regarded as locally enforceable Chinese awards.<sup>122</sup> This

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117. *Hovrätt* [HovR] [Court of Appeals] 2019-02-22 Ö 8538-17 (Swed.).

118. *Eiser Infrastructure v. Kingdom of Spain* [2020] FCA 157 (Austl.).

119. *Id.* ¶¶ 209, 211.

120. *Id.* ¶¶ 6, 67.

121. 布兰特伍德工业有限公司、广东闽安龙机械成套设备工程有限公司申请承认与执行法院判决、仲裁裁决案件一审民事裁定书 [Brentwood Industries, Inc. v. Guangdong Fa-anlong Mechanical Equipment Manufacture Co. Ltd.] <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4> (Guangzhou Int. People's Ct., Aug. 6, 2020) (China).

122. *See id.*

decision will clear the way for foreign institutions to conduct arbitrations in China.

In October 2020, the Hong Kong Court of Final Appeal decided that Hong Kong courts could grant broad remedies in actions to enforce awards. This decision protects prevailing parties facing a refusal to honor a non-monetary award. The court held that when a non-monetary award has not been complied with, the enforcing court could fashion any apt remedy from the full range of remedies available in an ordinary common law action.<sup>123</sup>

As of October 22, 2020, Hong Kong International Arbitration Centre (HKIAC) has handled thirty-two applications to Chinese courts for interim measures; Chinese courts granted at least seventeen applications to preserve assets.<sup>124</sup> The total value of the assets sought to be preserved was around RMB 10.7 billion (approximately \$1.6 billion).<sup>125</sup> On November 27, 2020, the Hong Kong Government and the Supreme People's Court of China signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, making several amendments to the arrangement entered into in 2000.<sup>126</sup>

### C. TAIWAN

After more than thirty meetings of a taskforce—including experts from Taiwan, United Kingdom, and Australia—the Chinese Arbitration Association submitted a bill of the Arbitration Act based on the UNCITRAL Model Law.<sup>127</sup> The Bill introduces mechanisms the current Arbitration Act lacks, such as interim measures and preliminary orders.<sup>128</sup> It also resolves issues such as grounds for arbitrator withdrawal and challenge, statute of limitations<sup>129</sup> when an arbitral award is annulled, and the definition of foreign-arbitral awards.

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123. *Xiamen Xinjingdi Group Co. Ltd. v. Eton Prop. Ltd. et. al.*, [2020] H.K.C.F.A.R. 32, ¶ 126 (H.C.).

124. *HKIAC Report on the PRC-HK Interim Measures Arrangement: Responses to Frequently Asked Questions*, HONG KONG INT'L ARBITRATION CENTRE (Oct. 22, 2020), [https://www.hkiac.org/sites/default/files/ck\\_filebrowser/20201022%20HKIAC%20Report%20on%20PRC-HK%20Interim%20Measures%20Arrangement.pdf](https://www.hkiac.org/sites/default/files/ck_filebrowser/20201022%20HKIAC%20Report%20on%20PRC-HK%20Interim%20Measures%20Arrangement.pdf).

125. *Id.* ¶ 2.3.

126. Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland & the Hong Kong Special Administrative Region, China-H.K., Nov. 27, 2020.

127. *International Arbitration 2020*, CHAMBERS & PARTNERS, <https://practiceguides.chambers.com/practice-guides/comparison/505/5496/8800-8805-8808-8813-8819-8827-8831-8836-8840-8842-8846-8850-8854> (last updated Aug. 18, 2020).

128. *Id.*

129. *Id.*



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**D. SINGAPORE & ASEAN**

In October 2020, Singapore amended its International Arbitration Act.<sup>130</sup> Significant changes relevant to arbitrations seated in Singapore are the addition of default procedures for appointing arbitrators in multi-party arbitrations<sup>131</sup> and explicitly providing enforcement of confidentiality provisions by an arbitral tribunal or a court.<sup>132</sup>

The Court of Appeal declined to uphold an artificial interpretation of an arbitration agreement, finding that the proper seat of Arbitration was Singapore, and the applicable law was Singapore law.<sup>133</sup> The Court of Appeal also applied the Tribunal Versus Claim Test for deciding whether an issue went toward jurisdiction or admissibility.<sup>134</sup> It held that issues of time barring arising from statutory limitation periods went to admissibility, even if the applicable statute of limitation was classified as substantive or procedural.<sup>135</sup>

The Singapore High Court set aside an arbitration award due to the “breach of natural justice” resulting from the tribunal’s refusal to hear a party’s witness evidence.<sup>136</sup> The High Court also found in another case that the ninety-day time limit for setting aside an award cannot be extended due to fraud discovered after that period.<sup>137</sup>

In July 2020, the Singapore International Arbitration Centre announced it expects revised arbitration rules in 2021.<sup>138</sup>

Myanmar recognized and enforced a foreign, arbitral award for the first time.<sup>139</sup> Cambodia’s National Commercial Arbitration Centre announced in July 2020 that it is revising its arbitration rules and expects to release the revised rules next year.<sup>140</sup>

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130. Ch. 143A International Arbitration Act (I.A.A) of 1994, *amended by* No. 34 I.A.A. (Supp. 2020) (Sing.), <https://sso.agc.gov.sg/Acts-Supp/32-2020/Published/20201111?DocDate=20201111#al->.

131. *Id.* § 3.

132. *Id.* § 4.

133. *BNA v. BNB* [2019] SGCA 84.

134. *BBA v. BAZ* [2020] SGCA 53.

135. *Id.*

136. *CBP v. CBS* (Sing.), Judgment, [2020] SGHC 23, ¶ 49 (Jan. 31, 2020), <https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2020-sghc-23-pdf.pdf>.

137. *Bloomberry Resorts & Hotels v. Global Gaming Phil.* (Sing.), [2020] SGHC 01, ¶ 46 (Jan. 3, 2020), <https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2020-sghc-01-pdf>.

138. *SIAC Announces Commencement of Revisions for SIAC Arbitration Rules*, SIAC PRESS RELEASE (July 7, 2020), available at <https://www.siac.org.sg/>.

139. Yoshiaki Muto, Hiroshi Kasuya & Dominic Sharman, *Client Alert: International Arbitration Update No. 10: Landmark Recognition and Enforcement of a Foreign Arbitral Award in Myanmar*, Baker McKenzie (Aug. 6, 2020), [https://www.bakermckenzie.co.jp/wp/wp-content/uploads/20200806\\_ClientAlert\\_International\\_Arbitration\\_Update\\_No.10\\_E.pdf](https://www.bakermckenzie.co.jp/wp/wp-content/uploads/20200806_ClientAlert_International_Arbitration_Update_No.10_E.pdf).

140. Sarath Sorn, *Arbitration Rules Under Review*, KHMER TIMES (July 28, 2020), <https://www.khmertimeskh.com/50749327/arbitration-rules-under-review/>.

## V. Africa

In 2020, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards strengthened its membership in Africa.<sup>141</sup> The Seychelles, Ethiopia, and Sierra Leone acceded to the New York Convention on February 3, August 24, and October 28, 2020 (respectively).<sup>142</sup>

Negotiations on the Investment Protocol to the African Continental Free Trade Area were expected to start at the end of 2020.<sup>143</sup> The Investment Protocol would replace the existing 171 intra-African bilateral investment treaties (BITs) with a single multi-lateral instrument, presenting a unified ISDS framework for all intra-African investments<sup>144</sup> and striking a harmonized balance between investment protection and the African States' right to regulate their public interests.<sup>145</sup>

In July 2020, the Arbitration Foundation of Southern Africa (AFSA) published its new draft of International Arbitration Rules for public comment, which includes *inter alia* the creation of a new AFSA International Court and provisions on the conduct of virtual hearings.<sup>146</sup>

### A. EGYPT

In October, the Egyptian Court of Cassation affirmed that estoppel and the prohibition of taking advantage of one's own wrongdoing are universally applicable principles in arbitration and beyond under Egyptian law.<sup>147</sup> The Court found that a party that fails to raise a procedural irregularity on time would be estopped from raising it in subsequent set-aside proceedings.<sup>148</sup> It also confirmed that parties to an Egyptian-seated arbitration need not be represented by Egyptian lawyers and acknowledged the increasing recourse to virtual arbitral hearings worldwide.<sup>149</sup>

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141. See generally *List of Contracting States*, N.Y. ARBITRATION CONVENTION, <http://www.newyorkconvention.org/countries> (last visited Jun. 4, 2021).

142. *Id.*

143. Hamed El-Kady, *The New Landmark African Investment Protocol: A Quantum Leap for African Investment Policy Making?*, KLUWER ARBITRATION BLOG (Sept. 24, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/09/24/the-new-landmark-african-investment-protocol-a-quantum-leap-for-african-investment-policy-making/>.

144. United Nations Conference on Trade and Development (UNCTD), *World Investment Report, Special Economic Zones* at 20 (2019), [https://unctad.org/system/files/official-document/wir2019\\_en.pdf](https://unctad.org/system/files/official-document/wir2019_en.pdf).

145. El-Kady, *supra* note 143.

146. Jonathan W. Lim & Gregory Travaini, *AFSA Launches New International Arbitration Rules for Public Comment*, KLUWER ARBITRATION BLOG, (July 23, 2020), at 1, <http://arbitrationblog.kluwerarbitration.com/2020/07/23/afsa-launches-new-international-arbitration-rules-for-public-comment/>.

147. Mohammed Abdel Wahab, *Egypt's Top Court Issues Wide-Ranging Decision*, GLOB. ARBITRATION REV. (Nov. 6, 2020), <https://globalarbitrationreview.com/egypts-top-court-issues-wide-ranging-decision>.

148. *Id.*

149. *Id.*

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**B. NIGERIA**

A unanimous ICSID award rejected two U.S. oil companies' \$3 billion claims against Nigeria, ruling that Nigeria did not breach its duties to the claimants.<sup>150</sup> After finding that the Nigerian National Petroleum Corporation's actions and omissions were not attributable to Nigeria,<sup>151</sup> the Tribunal rejected the claimants' accusation that Nigeria's courts engaged in judicial expropriation.<sup>152</sup>

**VI. South America**

**A. ARGENTINA**

Due to the COVID-19 pandemic and the effects of governmental restrictive measures, local practitioners expect an increase in arbitration cases.<sup>153</sup> With this concern in mind, these practitioners have joined efforts with their regional colleagues at the Latin American Arbitration Association to launch a permanent observatory body to monitor the evolution of arbitration in Latin America.<sup>154</sup>

Regarding investment arbitration, Argentina remains one of the most-sued countries<sup>155</sup> and expects a new flood of cases to arise from the announcement of the termination of several PPP contracts entered into by former governmental authorities in 2018.<sup>156</sup>

**B. URUGUAY**

On November 17, 2020, Parliament approved the "General Law on Private International Law, which recognizes party autonomy to select the

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150. *Interocean Oil Dev. Co. & Interocean Oil Exploration Co. v. Fed. Republic of Nigeria*, ICSID Case No. ARB/13/20, Award, ¶ 299 (Oct. 6, 2020), available at <https://www.italaw.com/sites/default/files/case-documents/italaw1189.pdf>; *Interocean Oil Dev. Co. & Interocean Oil Exploration Co. v. Fed. Republic of Nigeria*, ICSID Case No. ARB/13/20, at ¶¶ 308, 310–315.

151. *Interocean Oil Dev. Co. & Interocean Oil Exploration Co. v. Fed. Republic of Nigeria* [hereinafter *Interocean Oil*], ICSID Case No. ARB/13/20, Award, ¶ 299 (Oct. 6, 2020), available at <https://www.italaw.com/sites/default/files/case-documents/italaw1189.pdf>. For an analysis of the Tribunal's decision on attribution, see Alison Ross, *What The Award In Interocean v. Nigeria Tells Us*, GLOB. ARBITRATION REV. (Nov. 10, 2020), <https://globalarbitrationreview.com/public-international-law/what-the-award-in-interocean-v-nigeria-tells-us>.

152. *Interocean Oil*, at ¶¶ 308, 310–315; see also Ross, *supra* note 151.

153. See Practical Law Arbitration, *Latin American Arbitration Association launches permanent observatory body to monitor arbitration in Latin America*, THOMSON REUTERS (July 14, 2020), <https://uk.practicallaw.thomsonreuters.com>.

154. *Id.*

155. See *X-Ray of Investment Arbitration with Argentina, Spain and Venezuela at the Forefront*, CIAR GLOB. (Oct. 30, 2019), <https://ciarglobal.com/radiografia-del-arbitraje-de-inversiones-con-argentina-espana-y-venezuela-a-la-cabeza/>.

156. *Id.*

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law governing commercial contracts.”<sup>157</sup> The outdated framework preceding this law did not permit free choice of law.

On June 3, 2020, in a case brought against Uber by one of its drivers in Montevideo, the Labor Court of Appeals held that Uruguayan courts had jurisdiction despite the contract’s arbitration clause. The clause, which was rendered null and void, contemplated arbitration seated in Amsterdam.<sup>158</sup>

In the investment arbitration arena, in August 2020, Uruguay prevailed in a \$4 billion case before the Permanent Court of Arbitration. Mining investors brought the case after one of the most ambitious projects in Uruguayan mining history failed. Dismissal was granted on jurisdictional grounds.<sup>159</sup>

### C. BRAZIL

In Brazil, four decisions marked key developments in arbitration. For instance, the Superior Court of Justice decided that:<sup>160</sup> (i) Petrobras’s shareholders could not arbitrate against the Federal Government (Petrobras’s controlling shareholder), which is not party to a shareholders’ agreement;<sup>161</sup> and (ii) state courts lack jurisdiction over the existence, validity, and amount of a debt arising from a contract subject to arbitration.<sup>162</sup>

In addition, the São Paulo Court of Appeal: (i) set aside an award where the presiding arbitrator had failed to disclose that he had previously been appointed by one of the parties in a similar case;<sup>163</sup> and (ii) found that Brazil-seated arbitrations may be subject to foreign law;<sup>164</sup> the dismissal of a request for production of evidence by the arbitrator does not per se violate due

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157. *Documents & Laws*, PARLAMENTO DEL URUGUAY, <https://parlamento.gub.uy/documentosleyes/ficha-asunto/38377/tramite>.

158. See Soledad Diaz, *Arbitrability of Disputes Between Apps and Drivers in Uruguay*, INT’L BAR ASS’N (Nov. 26, 2020), IBA - Arbitrability of disputes between apps and drivers in Uruguay ([ibanet.org](http://ibanet.org)).

159. See Cosmo Sanderson, *Uruguay Defeats Multibillion-Dollar Mining Claim*, GLOB. ARBITRATION REV. (GAR) (Aug. 7, 2020), <https://globalarbitrationreview.com/uruguay-defeats-multibillion-dollar-mining-claim>.

160. Marci Hoffman, *Brazil – Legal System*, FOREIGN LAW GUIDE (Apr. 2, 2021), Brazil - Legal System — Brill ([smu.edu](http://smu.edu)).

161. S.T.J.J., C.C. No. 151130 2017.0043173-8, Relator: Min. Nancy Andrighi e Min. Acórdão Ministro Luis Felipe Salomao, 27.11.2019, Diário do Judiciário Eletrônico [d.j.e.], 11.02.2020, ¶ 3 (Braz.), [https://scon.stj.jus.br/SCON/jurisprudencia/doc.jsp?livre=151%2C130&b=ACOR&p=false&thesaurus=JURIDICO&l=10&i=1&operador=e&tipo\\_visualizacao=RESUMO](https://scon.stj.jus.br/SCON/jurisprudencia/doc.jsp?livre=151%2C130&b=ACOR&p=false&thesaurus=JURIDICO&l=10&i=1&operador=e&tipo_visualizacao=RESUMO).

162. S.T.J.J., R.E. No. 1864686 2019.0167038-0, Relator: Min. Moura Ribeiro, 13.10.2020, Diário do Judiciário Eletrônico [d.j.e.], 15.10.2020, ¶ 2 (Braz.), <https://scon.stj.jus.br/SCON/pesquisar.jsp>.

163. See generally T.J.S.P., Ap. Civ. No. 1076161-35.2017.8.26.0100, Relator: Francisco Casconi, DIÁRIO DA JUSTIÇA [D.J.E.S.P.], 08.09.2020, 472 (Braz.), <https://tj-sp.jusbrasil.com.br/jurisprudencia/934380035/apelacao-civel-ac-10761613520178260100-sp-1076161-3520178260100/inteiro-teor-934380066>.

164. *Id.*

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process;<sup>165</sup> and (iii) an arbitration award cannot be set aside based on public information not disclosed by the arbitrator.<sup>166</sup>

**D. CHILE**

In September 2020, the Supreme Court granted an appeal in an arbitration that was arguably international and therefore governed by Chile's International Commercial Arbitration Act.<sup>167</sup> Under the Act, annulment is the sole recourse against an arbitral award.<sup>168</sup> The Court found that, even though the arbitration agreement provided for application of the international arbitration rules of the Chamber of Commerce of Santiago, the agreement was clear that the parties intended to allow an appeal against the award.<sup>169</sup> The Court's decision was not based on whether the arbitration was international, but rather on the voluntary nature of arbitration and on the principles of party autonomy and procedural good faith.<sup>170</sup>

**E. COLOMBIA**

In April, the Colombian Council of State, the highest court with jurisdiction over administrative issues, recognized an ICC arbitral award under the Colombian Arbitration Statute for the first time.<sup>171</sup> The Court granted a set-aside petition against an international arbitration award because the deciding tribunal violated the parties' agreed-upon procedure when it allowed Claimant to correct an expert opinion; but the Court denied Respondent a response.<sup>172</sup> The Court departed from requirements established by the Colombian Supreme Court,<sup>173</sup> the highest court with

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165. *Id.*

166. See generally T.J.S.P., Ap. Civ. No. 1056400-47.2019.8.26.0100/50001, Relator: Fortes Barbosa, 26.08.2019, 16, DIÁRIO DA JUSTIÇA [D.J.E.S.P.], 205 (Braz.), [https://jurisprudencia.s3.amazonaws.com/TJ-SP/attachments/TJ-SP\\_EMBDECCV\\_10564004720198260100\\_8fb54.pdf?AWSAccessKeyId=AKIARMMD5JEAO67SMCVA&Expires=1618583314&Signature=W5%2FFTfUONdDzTKW0zP0t%2FomiDk%3D](https://jurisprudencia.s3.amazonaws.com/TJ-SP/attachments/TJ-SP_EMBDECCV_10564004720198260100_8fb54.pdf?AWSAccessKeyId=AKIARMMD5JEAO67SMCVA&Expires=1618583314&Signature=W5%2FFTfUONdDzTKW0zP0t%2FomiDk%3D).

167. See *Corte Suprema de Justicia* [C.S.J.] [Supreme Court of Justice], 14 de septiembre 2020, "Sudamérica SpA y CCF Sudamérica SpA," *Rol de la causa: 19.568-2020, internacional privado, Revista Chilena de Derecho* [R.C.H.D] No. 6 p. 125 (Chile), <http://wolterskluwerblogs.com/arbitration/wp-content/uploads/sites/48/2021/01/final-judgement.pdf>.

168. *Id.*

169. *Id.*

170. *Id.* ¶ 6.

171. *Consejo de Estado* [C.E.] [Council of State], Sala Tercera, Apr. 17, 2020, M.P: Maria Adriana Marin, Expediente 2019-00015/63266 (Colom.) available at <http://www.consejodeestado.gov.co/busquedas/busador-jurisprudencia/index.htm>.

172. *Consejo de Estado* [C.E.] [Council of State], Sala Tercera, Feb. 27, 2020, M.P: Maria Adriana Marin, Expediente 2018-00012/60714 (Colom.) available at <https://www.kluwerarbitration.com/document/KLI-KA-ONS-20-25-018>, § 8.2. (Colom.) available at <https://www.kluwerarbitration.com/document/KLI-KA-ONS-20-25-018>, § 8.2.

173. *Id.* § 8.2.4.viii; see also *Corte Suprema de Justicia* [C.S.J.] [Supreme Court], *Sala de Casación Civil y Agraria*, Jul. 11, 2018, Expediente 2017-03480, n.º SC5677-2018, M.P: Margarita Cabello Blanco.

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jurisdiction over civil and criminal issues, reasoning that these requirements included conditions that are not provided by the Colombian Arbitration Act.<sup>174</sup> This decision may lower the bar to set aside international arbitration awards.

F. VENEZUELA

In March, the Swiss Federal Tribunal revived a \$185 million claim when it set aside an award issued in *Clorox Spain v. Venezuela*, where the Permanent Court of Arbitration declined jurisdiction over Clorox's claim.<sup>175</sup> U.S. district courts also enforced two awards against Venezuela for a sum of nearly \$444 million.<sup>176</sup> Venezuela now owes approximately \$12.45 billion in international arbitration awards.<sup>177</sup>

G. PERU

Emergency Decree No. 020-2020 reformed Peru's international arbitration system after a Odebrecht Scandal that involved arbitrator bribes. The decree aims to protect procedural integrity where the State is a party.<sup>178</sup> Separately, Peru faced six arbitration claims.<sup>179</sup> Among these is a claim by

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174. *Consejo de Estado* [C.E.] [Council of State], Sala Tercera, Feb. 27, 2020, M.P. Maria Adriana Marin, Expediente 2018-00012/60714 (Colom.) at § 8.2.4. available at <http://www.consejodeestado.gov.co/busquedas/buscador-jurisprudencia/index.htm>.

175. *Tribunal fédérale* [TF] [Federal Supreme Court] Mar. 25, 2020, 4A\_306/2019 (Switz.), [https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight\\_docid=aza%3A%2F%2F25-03-2020-4A\\_306-2019&lang=de&type=show\\_document&zoom=YES&](https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F25-03-2020-4A_306-2019&lang=de&type=show_document&zoom=YES&); Report of *Clorox v. Venezuela*, INV. POLICY HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/832/clorox-v-venezuela>.

176. *Commodities & Mins Enter., v. CVG Ferrominera Orinoco, C.A.*, No. 19-CV-25217-GAYLES (S.D. Fla. Sept. 23, 2020); *Tenaris S.A. & Talta-Trading E Mktg. Sociedade Unipessoal LDA v. Bolivarian Republic of Venez.*, No. 18-CV-1371, ¶ 3, (D.D.C. Jun. 17, 2020).

177. See *ConocoPhillips v. Venezuela*, INV. POLICY HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/245/conocophillips-v-venezuela>; *Crystallex v. Venezuela*, INV. POLICY HUB, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/403/crystallex-v-venezuela>; *Rusoro and Venezuela Reach Billion Dollar Settlement*, GLOB. ARBITRATION REV. (Oct. 12, 2018), <https://globalarbitrationreview.com/rusoro-and-venezuela-reach-billion-dollar-settlement>; *Gauido Fails Halt US Enforcement Against Venezuela*, GLOB. ARBITRATION REV. (Nov. 6, 2019), <https://globalarbitrationreview.com/gauido-fails-halt-us-enforcement-against-venezuela> (This figure is approximate and only includes investment arbitration cases. Venezuela owes \$1.2 billion to Crystallex International Corporation, \$1.3 billion to Rusoro Mining Ltd., \$0.5 billion to Ol European Group, and \$0.25 billion to Tenaris and Talta; PDVSA owes \$9 billion to ConocoPhillips; and CVG Ferrominera Orinoco owes \$0.2 billion to Commodities & Minerals Enterprise.).

178. Diego Martínez Villacorta & Emily Horna Rodríguez, *Peruvian Arbitration System Before and After the Covid-19 Pandemic*, GLOB. ARBITRATION REV. (Oct. 13, 2020), <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/peruvian-arbitration-system-and-after-the-covid-19-pandemic>.

179. Of the six cases registered against Peru, six were registered at ICSID. See *Odebrecht Latinvest S.à.r.l. v. Republic of Peru* (ICSID Case No. ARB/20/4); *Freeport-McMoRan v. Republic of Peru* (ICSID Case No. ARB/20/8); *SMM Cerro Verde Neth. B.V. v. Republic of*

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Odebrecht seeking \$1.2 billion related to Peru's actions against the company following the corruption Scandal.<sup>180</sup> Odebrecht alleges Peru canceled the \$7 billion *Gasoducto Sur Peruano* natural gas pipeline project, banned the company from contract bidding, and forced it to divest interest in projects.<sup>181</sup>

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Peru (ICSID Case No. ARB/20/14); Desarrollo Vial de los Andes S.A.C. v. Republic of Peru (ICSID Case No. ARB/20/18); Lupaka Gold Corp. v. Republic of Peru (ICSID Case No. ARB/20/46), and one was registered at the PCA, *see* Bacilio Amorrortu v. Republic of Peru (PCA Case No. 2020-11).

180. Cosmo Sanderson, *Odebrecht Brings Treaty Claim Against Peru*, GLOBAL ARBITRATION REV. (Feb. 5, 2020), <https://globalarbitrationreview.com/odebrecht-brings-treaty-claim-against-peru>.

181. *Id.*

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## **International Courts & Judicial Affairs**

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ALEXANDER WITT, AND MARC WEITZ\*

This chapter reviews some of the most significant developments made by international courts and tribunals in 2020.

### **I. International Court of Justice**

As of the time of writing (November 2020), this year, the International Court of Justice (Court) has rendered one order on provisional measures, two judgments on appeals from decisions of the International Civil Aviation Organization (ICAO) Council, and two orders relating to expert evidence.

#### **A. PROVISIONAL MEASURES IN THE CASE CONCERNING THE APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (THE GAMBIA V. MYANMAR)**

In November 2019, The Gambia filed an application instituting proceedings against Myanmar (Application) concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in relation to Myanmar's treatment of the Rohingya group.

In its Application, The Gambia requested the indication of provisional measures (Request) ordering Myanmar to: (i) immediately take all measures within its power to prevent all acts that amount to or contribute to the crime of genocide; (ii) ensure that any military, paramilitary or irregular units which may be directed or supported by Myanmar, as well as any organizations and persons which may be subject to its control, direction, or influence do not commit any acts of genocide, conspiracy to commit

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\* The Committee Editor is Sara L. Ochs, Assistant Professor of Law at the University of Louisville, Louis D. Brandeis School of Law. Paula Henin of White & Case LLP and Paola Patarroyo, International Lawyer, wrote Section I. Haydee Dijkstal, Barrister at 33 Bedford Row Chambers, London, authored Section II.A and Ira Herenda Trako, Instructor of Law and Associate Director for the Center for International and Comparative Law at Saint Louis University School of Law contributed Section II.B. Kabir Duggal, Chloë Fletcher, and Alexander Witt of Arnold & Porter Kaye Scholer LLP wrote Section III. Marc Weitz of the Law Office of Marc Weitz authored Section IV. The views expressed in this chapter are the authors' own and do not necessarily represent the views of their law firms or organizations, or their firms' or organizations' clients.



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genocide, direct and public incitement to commit genocide, or complicity in genocide, against the Rohingya group; (iii) refrain from destroying or rendering inaccessible any evidence related to the events described in the Application; and (iv) grant access to and cooperate with all United Nations fact-finding bodies investigating alleged genocidal acts against the Rohingya.

<sup>1</sup> The Gambia further requested that the Court order both parties to: (v) refrain from taking any action and assure that no action is taken which may aggravate, extend, or render more difficult the resolution of the dispute; and (vi) provide a report to the Court on all measures taken to give effect to its order on provisional measures, no later than four months from its issuance.<sup>2</sup>

On January 23, 2020, the Court unanimously indicated provisional measures reflecting items (i), (ii), (iii), and (vi) above.<sup>3</sup>

In its decision, the Court first determined that it had *prima facie* jurisdiction over the case.<sup>4</sup> The Court reasoned that, contrary to Myanmar's contentions, at the time of the Application's filing, there existed a dispute between The Gambia and Myanmar relating to the interpretation, application, or fulfillment of Myanmar's obligations under the Genocide Convention, as required under Article IX of the Genocide Convention.<sup>5</sup> In particular, the Court rejected Myanmar's argument that the proceedings were instituted by The Gambia, not on its own behalf, but as a "proxy" and "on behalf of" the Organization of Islamic Cooperation (OIC), noting that The Gambia had filed the Application in its own name and maintained that it had a dispute with Myanmar regarding its own rights under the Genocide Convention.<sup>6</sup> The fact that The Gambia may have sought and obtained the support of other States and international organizations in its endeavor to seize the Court did not change this conclusion.<sup>7</sup> The Court further rejected Myanmar's argument that its reservation to Article VIII of the Genocide Convention deprived The Gambia of the possibility of seizing the Court, noting that Article VIII and Article IX have different areas of application.<sup>8</sup>

Second, the Court rejected Myanmar's submission that The Gambia lacked standing to bring a case before the Court because it was not specially affected by alleged violations of the Genocide Convention.<sup>9</sup> The Court determined that The Gambia's standing to sue flowed from the *erga omnes partes* character of the obligations that Myanmar allegedly violated.<sup>10</sup>

Third, the Court found that The Gambia's Request fulfilled the prerequisites for the indication of provisional measures pursuant to Article

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1. Gam. v. Myan., 2020 I.C.J. ¶4, 5–12.

2. *Id.* ¶¶ 5, 12.

3. *Id.* ¶ 86.

4. *Id.* ¶ 37.

5. *Id.* ¶¶ 30–31.

6. Gam. v. Myan., 2020 I.C.J. at ¶ 25.

7. *Id.*

8. *Id.* ¶¶ 35–36.

9. *Id.* ¶¶ 39, 42.

10. *Id.* ¶¶ 41–42.

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41 of the Court's Statute.<sup>11</sup> The rights asserted by The Gambia—namely, the rights of the Rohingya group and its members to be protected from acts of genocide and related prohibited acts and The Gambia's right to seek compliance by Myanmar with its obligations under the Genocide Convention—were plausible,<sup>12</sup> and related to “some of” the provisional measures requested (i.e., all but the measures described in item (iv) above).<sup>13</sup> Moreover, the Court found that there was a real and imminent risk of irreparable prejudice to these rights, which justified the indication of provisional measures.<sup>14</sup>

The Court thus granted the requests described in items (i), (ii), and (iii), above.<sup>15</sup> Recalling its power to indicate provisional measures that are, in whole or in part, different from those requested,<sup>16</sup> with regard to item (vi), the Court ordered that Myanmar submit a report to the Court on all measures taken to give effect to the Court's Order within four months of the date of the Order, and thereafter every six months until the Court renders a final decision in the case.<sup>17</sup> The Court also ordered that The Gambia be given the opportunity to submit its comments on each report to the Court.<sup>18</sup> However, the Court did not find it necessary to order either item (iv) or item (v).<sup>19</sup>

Following the Court's order on provisional measures, in September 2020, Canada and the Netherlands announced their intentions to intervene in the case.<sup>20</sup>

**B. JUDGMENTS ON APPEALS FROM THE ICAO COUNCIL'S  
DECISIONS ON PRELIMINARY OBJECTIONS IN TWO CASES  
RELATING TO THE QATAR BLOCKADE**

In October 2017, Qatar initiated two separate proceedings before the ICAO Council against Bahrain, Egypt, the United Arab Emirates, and Saudi Arabia (the Quartet), claiming that the aviation restrictions that these countries imposed on Qatar earlier in 2017 constituted violations of, respectively, the Convention on International Civil Aviation (Chicago Convention) and the International Air Services Transit Agreement

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11. *Id.* ¶¶ 75–76.

12. *Gam. v. Myan.*, 2020 I.C.J. at ¶ 56.

13. *Id.* ¶¶ 61–63.

14. *Id.* ¶¶ 75–76.

15. *Id.* ¶¶ 79–81, 86.

16. *Id.* ¶ 77.

17. *Id.* ¶¶ 82, 86.

18. *Gam. v. Myan.*, 2020 I.C.J. at ¶¶ 82, 86.

19. *Id.* ¶¶ 62, 83.

20. Diplomatic Statement, Neth. Ministry of Foreign Affs., Joint statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in *The Gambia v. Myanmar* case at the International Court of Justice (Sept. 2, 2020) (on file with Gov't of the Neth.).

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(IASTA).<sup>21</sup> In two separate decisions issued in June 2018, the ICAO Council rejected the Quartet's preliminary objections that it lacked jurisdiction to resolve the claims raised by Qatar and that these claims were inadmissible.<sup>22</sup> The Quartet appealed both decisions to the Court.<sup>23</sup> In two judgments dated July 14, 2020, the Court rejected both appeals and held that the ICAO Council had jurisdiction under both treaties to entertain Qatar's claims, which are admissible.<sup>24</sup>

C. ORDERS RELATING TO EXPERT EVIDENCE IN THE CASE  
CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF  
THE CONGO (DEMOCRATIC REPUBLIC OF THE CONGO  
V. UGANDA)

On September 8, 2020, the Court called for an expert opinion to determine the reparation Uganda owed to the Congo pursuant to the Court's Judgment of December 19, 2005, in the above-referenced case, under three heads of damage: "loss of human life, loss of natural resources and property damage."<sup>25</sup> After hearing the parties, on October 12, 2020, the Court appointed four experts.<sup>26</sup>

## II. International Criminal Law

### A. THE INTERNATIONAL CRIMINAL COURT

In 2020, the International Criminal Court (ICC) made significant developments, both in its administration and judicial proceedings, despite complications to the Court's regular functions caused by the global Covid-19 pandemic.<sup>27</sup>

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21. See Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar), Judgment, 2020 I.C.J., ¶¶ 1-2 (July 14) (IASTA Appeal); Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment, 2020 I.C.J., ¶¶ 1-2 (July 14) (Chicago Convention Appeal). (Note: Saudi Arabia is not a party to the proceedings under IASTA, as it is not a contracting state to IASTA).

22. IASTA Appeal ¶¶ 1-2; Chicago Convention Appeal ¶¶ 1-2.

23. *Id.*

24. IASTA Appeal ¶ 127; Chicago Convention Appeal ¶ 126.

25. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Order, 2020 I.C.J. ¶16(2) (Sep. 8).

26. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Order, 2020 I.C.J. 3 (Oct. 12).

27. Press Release, ICC Presidency publishes 'Guidelines for the Judiciary Concerning the Holding of Court Hearings during the COVID-19 Pandemic' (June 23, 2020) (on file with the International Criminal Court).

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1. *Court Administration*

In December, the Assembly of States Parties (ASP) elected six new judges.<sup>28</sup> The following February, a new Prosecutor was elected.<sup>29</sup>

In September, after receiving a mandate from the ASP in December 2019, the Independent Expert Review Group of the ICC released its Final Report, which covered matters of court administration and provided a multitude of recommendations for the Court and its organs.<sup>30</sup>

Also in September, the Court strongly rebuked economic sanctions and travel restrictions issued by the United States Government against ICC staff under President Donald Trump's Executive Order of June 11, 2020,<sup>31</sup> calling the measures "coercive acts" that attack the rule of law.<sup>32</sup>

2. *New Cases and Situations*

Several developments signified new and potential situations and cases before the Court. Venezuela, as a State Party, lodged a self-referral in February asking the Office of the Prosecutor (OTP) to investigate alleged crimes committed as a result of unilateral measures by the U.S. Government.<sup>33</sup>

In the Sudan situation, relations between the court and Sudan showed signs of thawing with the Prosecutor's first visit to Sudan.<sup>34</sup> Gains were also made on the possibility that former Sudanese President Omar Al Bashir, who is subject to two outstanding arrest warrants, will be transferred to the Court for trial on charges of crimes against humanity, war crimes, and genocide in Darfur.<sup>35</sup>

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28. Assembly of the States Parties, *2020 - Election of Six Judges - Results*, INT'L CRIM. CT. (Dec. 23, 2020), [https://asp.icc-cpi.int/en\\_menus/asp/elections/judges/2020/Pages/Results.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/judges/2020/Pages/Results.aspx).

29. Assembly of the States Parties, *2021 - Election of the Prosecutor - Results*, INT'L CRIM. CT. (Feb. 21, 2021), [https://asp.icc-cpi.int/en\\_menus/asp/elections/prosecutor/pages/2021results.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/prosecutor/pages/2021results.aspx).

30. Assembly of State Parties, Independent Expert Review of the International Criminal Court and the Rome Statute, at 7-10, ICC-ASP/19/16 (2020).

31. Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 15, 2020) (later revoked by Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 1, 2021)).

32. Press Release, Int'l Crim. Ct., International Criminal Court condemns US economic sanctions, ICC-CPI-20200902-PR1535 (Sep. 2, 2020) (on file with the International Criminal Court).

33. Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by Venezuela regarding the situation in its own territory (Feb. 17, 2020) (on file with the International Criminal Court).

34. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a media briefing in Khartoum, Sudan: "There is an urgent need for justice in Sudan. Sustainable peace and reconciliation are built on the stabilizing pillar of justice." (Oct. 20, 2020) (on file with the International Criminal Court).

35. *Sudan's Omar al-Bashir a Step Closer to Facing War Crimes Charges*, AL JAZEERA, (Aug. 23, 2020), [https://www.aljazeera.com/news/2020/08/23/sudans-omar-al-bashir-a-step-closer-to-facing-war-crimes-charges/?fbclid=IWAR1\\_VTBj3SqRO1ZG5PZH4v6nzqwhbTReOUwtPIy7wknJpGnPHIntipzrXgk](https://www.aljazeera.com/news/2020/08/23/sudans-omar-al-bashir-a-step-closer-to-facing-war-crimes-charges/?fbclid=IWAR1_VTBj3SqRO1ZG5PZH4v6nzqwhbTReOUwtPIy7wknJpGnPHIntipzrXgk).

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Two new accused persons appeared before the court, with initial appearances by Ali Muhammad Ali Abd-Al-Rahman in June for crimes in Darfur,<sup>36</sup> and Paul Gicheru in November for crimes against the administration of justice regarding witnesses in the Kenya cases.<sup>37</sup>

### 3. *Pre-Trial*

Concerning jurisdiction, Pre-Trial Chamber (PTC) I considered submissions, including over forty amici curiae,<sup>38</sup> regarding the scope of the Court's territorial jurisdiction over alleged crimes committed within the Occupied Palestinian Territory.<sup>39</sup>

In April, Trial Chamber (TC) V confirmed the admissibility of Alfred Yekatom's case given there were no ongoing or planned investigations by the authorities in the Central African Republic into the same conduct for which Yekatom was indicted.<sup>40</sup> Yekatom and Ngaïssona's joint trial is scheduled to begin in February 2021.<sup>41</sup>

In the case against Malian accused Al Hassan, the Appeals Chamber (AC) affirmed the PTC's finding that the crimes for which Al Hassan is being tried meet the gravity threshold to be tried before the ICC.<sup>42</sup> Gravity was also central to developments in the Registered Vessels Situation, in which the Comoros Government filed its third application for judicial review in March, after the OTP, upon reconsideration, again decided not to investigate the alleged crimes.<sup>43</sup> In September, the PTC found the Prosecution had not genuinely reconsidered its decision not to investigate,

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36. Press Release, Int'l Crim. Ct., Ali Muhammad Ali Abd-Al-Rahman makes first appearance before the ICC, ICC-CPI-20200615-PR1528 (June 15, 2020) (on file with the International Criminal Court).

37. Press Release, Int'l Crim. Ct., Paul Gicheru makes first appearance before the ICC: Confirmation of charges procedure to be conducted in writing, ICC-CPI-20201106-PR1545 (Nov. 6, 2020) (on file with the International Criminal Court).

38. Portia Karegeya, *17 February 2019 – Amicus Applications Submitted on Palestine Territorial Question*, ICL MEDIA REV. (Feb. 17, 2020), <http://www.iclmediareview.com/17-february-2019-amicus-applications-submitted-on-palestine-territorial-question>.

39. Situation in the State of Palestine, Case No. ICC-01/18, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ¶ 18 (Jan. 22, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00161.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00161.PDF).

40. Prosecutor v. Yekatom, Case No. ICC-01/14-01/18-493, Decision on the Yekatom Defence's Admissibility Challenge, ¶ 25 (Apr. 28, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_01715.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01715.PDF).

41. Press Release, Int'l Crim. Ct., Yekatom and Ngaïssona case: Trial to open on 9 February 2021, ICC-CPI-20200716-PR1532 (July 16, 2020) (on file with the International Criminal Court).

42. Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ah Mahmud, Case No. ICC-01/12-01/18 OA, Judgment, ¶ 128 (Feb. 19, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00536.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00536.PDF).

43. Situation on Registered Vessels, Case No. ICC-01/13-100, Application for Judicial Review by the Government of the Comoros, ¶ 2 (Mar. 2, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00762.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00762.PDF).

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but determined, based on the AC's previous finding that it did not have authority to direct the Prosecutor's decisions on matters of fact.<sup>44</sup>

In reversing the TC's decision that it is not in the "interest of justice" to investigate the Situation in Afghanistan,<sup>45</sup> the AC issued a judgment in March authorizing the Prosecution to investigate alleged crimes within the territory of Afghanistan and other crimes with a nexus to the armed conflict.<sup>46</sup>

#### 4. *Trial*

The Al Hassan case proceeded to trial in July,<sup>47</sup> after the PTC's April decision permitting the OTP to partially modify the confirmed charges by adding facts.<sup>48</sup> In October, the TC rejected the defense's leave to appeal the Chamber's decision not to terminate the proceedings on arguments of fair trial violations.<sup>49</sup>

The TC heard closing statements in the case against Dominic Ongwen in March.<sup>50</sup>

#### 5. *Post-Conviction*

After his 2019 conviction and sentence, Bosco Ntaganda's reparations proceedings began in June,<sup>51</sup> and the AC heard from amicus curiae in appeal proceedings on the definition of "attack" as it pertained to the Trial Chamber's decision not to convict Ntaganda for the crime of attacking cultural property.<sup>52</sup>

In June, the AC heard arguments for the Prosecutor's appeal of the acquittals of former President of Côte d'Ivoire, Laurent Gbagbo, and

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44. Situation on Registered Vessels, Case No. ICC-01/13-111, Decision on the 'Application for Judicial Review by the Government of the Comoros', ¶ 106 (Sep. 16, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_05261.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_05261.PDF).

45. Situation in Afghanistan, Case No. ICC-02/17-138, Judgment, ¶ 46 (Mar. 5, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF).

46. *Id.* ¶ 79.

47. Press Release, Int'l Crim. Ct., Al Hassan Trial Opens at International Criminal Court, ICC-CPI-20200713-PR1531 (July 14, 2020) (on file with the International Criminal Court).

48. *Al Hassan Case*, INT'L CRIM. CT., <https://www.icc-cpi.int/mali/al-hassan> (last visited May 26, 2021).

49. Prosecutor v. Al Hassan, Case No. CC-01/12-01/18-1099-Red, Decision on Defence request for leave to appeal, ¶ 18 (Oct. 29, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_05898.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_05898.PDF).

50. Press Release, Int'l Crim. Ct., Closing statements in the Ongwen case: Practical information, ICC-CPI-20200302-MA251 (Mar. 2, 2020) (on file with the International Criminal Court).

51. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2547, First Decision on Reparations Process, ¶ 21 (June 26, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_02833.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_02833.PDF).

52. Portia Karegeya, *21 September 2020 – ICC AC receives amicus curiae briefs in Ntaganda case*, ICL MEDIA REV. (Sep. 21, 2020), <http://www.iclmediareview.com/21-september-2020-icc-ac-receives-amicus-curiae-briefs-in-ntaganda-case>.

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Ivorian national Charles Blé Goudé in 2019.<sup>53</sup> The Chamber also rejected an application for reconsideration of the pair's conditional release, despite their acquittal.<sup>54</sup>

Post-acquittal matters were also addressed in May, when the PTC rejected a compensation claim brought by previously acquitted defendant, Jean-Pierre Bemba Gombo, who alleged miscarriage of justice in his case under Article 85 of the Rome Statute and sought damages for the mismanagement of his assets.<sup>55</sup>

In March, Thomas Lubanga became the first ICC convicted person to be released from prison after completing his fourteen-year sentence in Kinshasa for the war crimes of enlisting and conscripting children.<sup>56</sup>

## B. AD HOC & HYBRID CRIMINAL TRIBUNALS

Despite the COVID-19 pandemic, 2020 was marked by significant developments at ad hoc and hybrid international criminal courts and tribunals, including the International Residual Mechanism for Criminal Tribunals (IRMCT), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), and the Kosovo Specialist Chambers (KSC).

### 1. *The IRMCT*

In 2020, the IRMCT continued managing the residual functions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).<sup>57</sup>

In February, Judge Carmel Agius, the IRMCT President, denied Valentin Coric's request for variations of his early release conditions.<sup>58</sup> Also in February, the Appeals Chamber dismissed the Republic of Serbia's appeal in

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53. Press Release, Int'l Crim. Ct., Appeals hearing in the Gbagbo and Blé Goudé case: Practical information, ICC-CPI-20200619-MA253 (June 19, 2020) (on file with the International Criminal Court).

54. Press Release, Int'l Crim. Ct., ICC appeals Chamber amends the conditions of release of MM. Gbagbo and Blé Goudé (May 28, 2020) (on file with the International Criminal Court).

55. Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3694, Decision on Mr. Bemba's claim for compensation and damages, ¶ 24 (May 18, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_01979.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01979.PDF).

56. AFP News Feed, *War Crimes Convict Thomas Lubanga Freed in DR Congo*, JUSTICEINFO (Mar. 16, 2020), <https://www.justiceinfo.net/en/44016-war-crimes-convict-thomas-lubanga-freed-in-dr-congo.html>.

57. *About the IRMCT*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBS., <http://www.irmct.org/en/about> (last visited May 27, 2021).

58. See Prosecutor v. Aoriæ, Case No. MICT-17-112-ES.4, Decision on Motions Related to Valentin Aoriæ's request for Variation of Early Release Conditions, ¶ 44 (Int'l Residual Mechanism for Crim. Tribs. Feb. 21, 2020), <https://www.irmct.org/sites/default/files/case-documents/mict-17-112/president%E2%80%99s-decisions/en/20-02-21-decision-motions-valentin-coric-early-release.pdf>.

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its entirety and affirmed the impugned decision from *In the Case Against Petar Jojic and Vjerica Radeta*.<sup>59</sup>

In March, the IRMCT issued a formal statement on its operations during the COVID-19 pandemic.<sup>60</sup> It implemented a temporary remote working mandate for all branches and postponed court hearings until June 2020 at The Hague branch and until August 2020 at the Arusha branch.<sup>61</sup> The IRMCT did not suspend or postpone its other functions and obligations.<sup>62</sup>

Also in March, the Appeals Chamber granted Ratko Mladic's defense counsel's motion to stay the appeal hearing in part, vacated the scheduling order, and continued the appeal hearing until after Mladic underwent surgery.<sup>63</sup> The Appeals Chamber began oral arguments in Mladic's appeal on August 25;<sup>64</sup> its ruling is forthcoming. Mladic is serving a life sentence for his ICTY conviction for genocide, crimes against humanity, and violations of the laws or customs of war in Bosnia and Herzegovina.<sup>65</sup>

In April, Judge Carmel Agius issued a decision on Radovan Karad\_ic's request for video communications with his family.<sup>66</sup> Judge Agius ordered the Registrar to review the feasibility of video conferencing and to implement an interim solution or a timeline for subsequent implementation.<sup>67</sup> Karad\_ic is serving his life sentence<sup>68</sup> at the United Nations Detention Unit following

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59. Prosecutor v. Jojic, Case No. MICT-17-111-R90-AR14.1, Decision on Republic of Serbia's Appeal Against the Decision Re-Examining the Referral of a Case, ¶ 19 (Int'l Residual Mechanism For Crim. Tribs. Feb. 24, 2020), <https://www.irmct.org/sites/default/files/casedocuments/mict-17-111/president%E2%80%99s-decisions/en/20-02-24-decision-republic-serbia-appeal-against-decision-re-examining-refferral.pdf>.

60. Statement, Int'l R Residual Mechanism Crim. Tribs., IRMCT statement on operations during COVID-19, (Mar. 31, 2020) (on file with the U.N. International Residual Mechanism for Criminal Tribunals).

61. *Id.*

62. *Id.*

63. See Prosecutor v. Mladic, Case No. MICT-13-56-A, Decision on a Motion to reconsider the Decision staying the Appeal Hearing, at 2 (Int'l Residual Mechanism for Crim. Tribs. Mar. 11, 2020), <https://www.irmct.org/sites/default/files/casedocuments/mict-13-56/appeals-chamber-decisions/en/200311-decision-motion-reconsider-decision-stay-appeal-hearing.pdf>.

64. See *Mladic*, Decision on the Scheduling of the Appeal Hearing and a Status Conference, at 10 (Int'l Residual Mechanism for Crim. Tribs. July 17, 2020), <https://www.irmct.org/sites/default/files/casedocuments/mict-13-56/appeals-chamber-decisions/en/200717mladicappeal-hearingdecision.pdf>.

65. *Mladic*, Judgment, ¶ 5212 (Int'l Crim. Trib. for the former Yugoslavia Nov. 22, 2017), [https://www.icty.org/x/cases/mladic/tjug/en/171122-4of5\\_1.pdf](https://www.icty.org/x/cases/mladic/tjug/en/171122-4of5_1.pdf).

66. Prosecutor v. Karad\_ia, Case No. MICT-13-55-ES, Decision on Request for Review of Registrar's Decision on Video Communications, ¶ 50 (Int'l Residual Mechanism for Crim. Tribs. Apr. 16, 2020), <https://www.irmct.org/sites/default/files/casedocuments/mict-13-55/president%E2%80%99s-decisions/en/200416-decision-request-review-registrar-decision-video-communications.pdf>.

67. *Id.*

68. *Karad\_ic*, Judgment, ¶ 777 (Int'l Residual Mechanism for Crim. Tribs. Mar. 19, 2019), <https://www.irmct.org/sites/default/files/casedocuments/mict-13-55/appeals-chamber-judgements/en/190320-judgement-karadzic-13-55.pdf>.



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his conviction for genocide, crimes against humanity, and violations of the laws or customs of war in Bosnia and Herzegovina.<sup>69</sup>

Also in April, the IRMCT President issued the first of three orders directing the Registrar to work with the Enforcement States to monitor COVID-19 prevention measures and the number of COVID-19 cases within the prisons where ICTY, ICTR, or IRMCT convicted persons are serving their sentences.<sup>70</sup>

A highlight of IRMCT enforcement this year occurred in May when Félicien Kabuga, who is charged with genocide, crimes against humanity, and other related charges pertaining to the Rwandan genocide, was arrested in France.<sup>71</sup> In October, to assess whether it is safe to transfer Kabuga to the Arusha branch, the Court issued an order for submissions seeking more information from the Registry in regard to the COVID-19 conditions and treatment of elderly patients at the detention facilities at The Hague and in Arusha.<sup>72</sup> Kabuga's initial appearance was conducted at The Hauge branch on November 11, during which a plea of not guilty was entered on Kabuga's behalf.<sup>73</sup>

Another significant ongoing case from the Arusha branch, the contempt case of *Turinabo et al*, was continued throughout the year due to COVID-19 restrictions.<sup>74</sup> Opening statements ultimately commenced on October 22, 2020.<sup>75</sup>

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69. See generally *Karadzic*, Public Redacted Version of Judgment Issued on 24 March 2016, (Int'l Crim. Trib. for the former Yugoslavia Mar. 24, 2016), [https://www.icty.org/x/cases/karadzic/tjug/en/160324\\_judgement.pdf](https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf).

70. See Order for COVID-19 Updates from Enforcement States, Case No. MICT-12-01-ES (Int'l Residual Mechanism for Crim. Tribs. Apr. 24, 2020), <https://www.irmct.org/sites/default/files/casedocuments/mict-12-01-es/president%E2%80%99s-orders/en/200424-order-covid-19-updates-enforcement-states.pdf>.

71. See *Prosecutor v. Kabuga*, Case No. MICT-13-38-I, Urgent Motion for Amendment of Order of Transfer (Int'l Residual Mechanism for Crim. Tribs. May 20, 2020), <https://www.irmct.org/sites/default/files/casedocuments/mict-13-38/prosecution-motions/en/200520-urgent-motion-amendment-order-transfer.pdf>.

72. *Kabuga*, Order for Submissions (Int'l Residual Mechanism for Crim. Tribs. Oct. 13, 2020), <https://www.irmct.org/sites/default/files/casedocuments/mict-13-38/single-judge-orders/en/201013-order-submissions-kabuga.pdf>.

73. Press Release, U.N. Int'l Residual Mech. For Crim. Trib., Félicien Kabuga appears before the Mechanism for his Initial Appearance (Nov. 11, 2020) (on file with U.N. Int'l Residual Mech. for Crim. Trib.).

74. See *Prosecutor v. Turinabo*, Case No. MICT-18-116-PT, Order on Trial Preparations (Int'l Residual Mechanism for Crim. Tribs. Aug. 31, 2020), <http://ucr.irmct.org/Search/PreviewPage/?link=http%253A//icr.icty.org/LegalRef/CMSDocStore/Public/English/Order/NotIndexable/MICT-18-116/MS53820R0000636029.pdf>.

75. See *Turinabo*, Order Concluding the Written Exchanges Procedure and Scheduling the Pre-Trial Conference and Trial Proceedings (Int'l Residual Mechanism for Crim. Tribs. Oct. 7, 2020), <http://ucr.irmct.org/Search/PreviewPage/?link=http%253A//icr.icty.org/LegalRef/CMSDocStore/Public/English/Order/NotIndexable/MICT-18-116/MS53820R0000636287.pdf>.

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After several COVID-19 related continuances to *Prosecutor v. Jovica Stanisic Franko Simatovic*, the IRMCT Trial Chamber at the Hague ordered in-court hearings to resume on September 1, 2020.<sup>76</sup> The Trial Chamber allowed an extension of Jovica Stanisic's provisional release until March 8, 2021.<sup>77</sup> The Trial Chamber noted that Stanisic's health issues coupled with COVID-related travel restrictions justified a provisional release until the delivery of the trial judgment.<sup>78</sup> Simatovic was similarly granted provisional release until March 8, 2021.<sup>79</sup>

In October, Judge Theodor Meron assigned a three-judge bench for Milan Lukic's ongoing appeal.<sup>80</sup>

## 2. *The ECCC*

The ECCC finalized several significant cases in 2020. In July, the ECCC Special Panel dismissed Khieu Samphan's application for disqualification of six appeal judges who adjudicated his case.<sup>81</sup> Khieu Samphan is currently serving a life sentence for crimes against humanity committed during the Khmer Rouge regime between 1975 and 1979.<sup>82</sup> In August, the Trial Chambers dismissed the Prosecutor's appeal of the termination of the case against Ao An, the last remaining defendant before the ECCC.<sup>83</sup>

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76. See *Prosecutor v. Stanisic*, Case No. MICT-15-96-T, Order Scheduling the Resumption of In-Court Hearings (Int'l Residual Mechanism for Crim. Tribs. Aug. 5, 2020), <http://ucr.irmct.org/Search/PreviewPage/?link=http%253A//icr.icty.org/LegalRef/CMSDocStore/Public/English/Order/NotIndexable/MICT-15-96/MSC53823R0000635821.pdf>.

77. See *Stanisic*, Decision on Stanisic's Twelfth Motion for Further Extension of Provisional Release (Int'l Residual Mechanism for Crim. Tribs. Oct. 19, 2020), <http://ucr.irmct.org/Search/PreviewPage/?link=http%253A//icr.icty.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-15-96/MRA25247R0000636403.pdf>.

78. *Id.*

79. See *Stanisic*, Decision on Simatinovic's Motion for Provisional Release (Int'l Residual Mechanism for Crim. Tribs. Oct. 7, 2020), <http://ucr.irmct.org/Search/PreviewPage/?link=http%253A//icr.icty.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-15-96/MRA26310R2000596260.pdf>.

80. See *Prosecutor v. Lukic*, Case No. MICT-13-52-R.1, Order Assigning Judges to a case before the Appeals Chamber, (Int'l Residual Mechanism for Crim. Tribs. Oct. 1, 2020), <http://ucr.irmct.org/Search/PreviewPage/?link=http%253A//icr.icty.org/LegalRef/CMSDocStore/Public/English/Order/NotIndexable/MICT-13-52-R%25231/TMB36861R0000636266.pdf>.

81. See *Prosecutor v. Samphan*, Case No. 002/31-10-2019-ECCC/SC (03), Decision on Khieu Samphan's Application for Disqualification of Six Appeal Judges Who Adjudicated in Case 002/01, ¶ 124 (Extraordinary Chambers in the Cts. of Cambodia July 14, 2020), [https://eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/11\\_EN.pdf](https://eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/11_EN.pdf).

82. See *Prosecutor v. Khieu Samphan*, Case No. 002/19-09-2007/ECCC/TC, Judgment (Nov. 16, 2018), [https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/20181217%20Summary%20of%20Judgement%20Case%20002-02%20ENG\\_FINAL%20FOR%20PUBLICATION.pdf](https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/20181217%20Summary%20of%20Judgement%20Case%20002-02%20ENG_FINAL%20FOR%20PUBLICATION.pdf)

83. See *Prosecutor v. An*, Case No. 004/2/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutors' Immediate Appeal of the Trial Chamber's Effective Termination of Case 004/2, ¶¶ 5, 7 (Extraordinary Chambers in the Cts. of Cambodia Aug. 10, 2020), [https://eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E004\\_2\\_1\\_1\\_2\\_EN.pdf](https://eccc.gov.kh/sites/default/files/documents/courtdoc/%5Bdate-in-tz%5D/E004_2_1_1_2_EN.pdf).

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3. *The STL*

In 2020, the STL Trial Chamber issued its long-awaited verdict in the *Ayyash et al* case.<sup>84</sup> The STL is currently the only international tribunal with a mandate to prosecute terrorism crimes, focusing on the February 14, 2005 terrorist attacks that killed twenty-two people, including former Lebanese Prime Minister Rafik Hariri.<sup>85</sup> In its judgment, delivered against the defendants in absentia, the Trial Chamber found Salim Jamil Ayyash guilty beyond reasonable doubt and acquitted Hassan Habib Merhi, Hussein Hassan Oneissi, and Assad Hassan Sabra.<sup>86</sup>

4. *The KSC*

The KSC issued its first indictments and scheduled its first hearings in 2020. In June, the KSC indicted Salih Mustafa on four counts of war crimes.<sup>87</sup> In October, Mustafa pled not guilty on all counts of the indictment.<sup>88</sup> In September, the Court indicted and issued arrest warrants for Nasim Haradinaj and Hysni Gucati on charges of intimidation and retaliation against witnesses, as well as violations of the secrecy of the court's proceedings.<sup>89</sup> Nasim Haradinaj had his first court appearance on September 29, 2020.<sup>90</sup> Hysni Gucati had his first appearance on October 1, 2020.<sup>91</sup> In October, the Special Prosecutor indicted Hashim Thaçi, Kadri

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84. See *Prosecutor v. Ayyash*, Case No. STL-11-01/T/TC, Judgment, ¶ 6903 (Special Trib. for Leb. Aug. 18, 2020), <https://www.stl-tsl.org/crs/assets/Uploads/20200818-F3839-PUBLIC-Full-Judgement-Annexes-FILED-EN-WEB-Version-v0.2.pdf>.

85. *About the STL*, SPECIAL TRIB. FOR LEB., <https://www.stl-tsl.org/en/about-the-stl> (last visited May 28, 2021).

86. *Ayyash*, STL-11-01/T/TC, at ¶ 6903.

87. See *Special Prosecutor v. Mustafa*, Case No. KSC-BC-2020-05-F00011, Public Redacted Version of "Indictment," dated 19 June 2020, ¶ 35 (Oct. 2, 2020), [https://repository.scp-ks.org/LW/Published/Filing/0b1ec6e9803599b9/Annex%201%20to%20Public%20Redacted%20Version%20of%20E2%80%9CSubmission%20of%20confirmed%20indictment%E2%80%9D,%20filing%20KSC-BC-2020-05\\_F00011%20dated%2019%20June%202020.pdf](https://repository.scp-ks.org/LW/Published/Filing/0b1ec6e9803599b9/Annex%201%20to%20Public%20Redacted%20Version%20of%20E2%80%9CSubmission%20of%20confirmed%20indictment%E2%80%9D,%20filing%20KSC-BC-2020-05_F00011%20dated%2019%20June%202020.pdf).

88. Initial Appearance Transcript of Salih Mustafa, Case No. KSC-BC-2020-05 (Kos. Specialist Chambers Oct. 28, 2020), <https://repository.scp-ks.org/LW/Published/Transcript/KSC-BC-2020-05/Further%20Initial%20Appearance%20and%20Status%20Conference.pdf>.

89. Specialist Prosecutor v. Gucati, Case No. KSC-BC-2018-01, Decision on Request for Arrest Warrants and Transfer Orders, ¶¶ 5, 9 (Kos. Specialist Chambers Sept. 24, 2020), <https://repository.scp-ks.org/LW/Published/Filing/0b1ec6e98035613f/Decision%20on%20Request%20for%20Arrest%20Warrant%20and%20Transfer%20Orders.pdf>.

90. First Appearance Transcript of Nasim Hardinai, Case No. KSC-BC-2018-01 (Kos. Specialist Chambers Sept. 29, 2020), <https://repository.scp-ks.org/LW/Published/Transcript/KSC-BC-2020-07/First%20Appearance%20of%20Nasim%20Haradinaj.pdf>. <https://repository.scp-ks.org/LW/Published/Transcript/KSC-2020-07/First%20Appearance%20of%20Nasim%20Haradinaj.pdf>.

91. First Appearance Transcript of Hysni Gucati, Case No. KSC-BC-2018-01 (Kos. Specialist Chambers Oct. 1, 2020), <https://repository.scp-ks.org/LW/Published/Transcript/KSC-BC-2020-07/First%20Appearance%20of%20Hysni%20Gucati.pdf>.

Veseli, Rexhep Selimi, and Jakup Krasniqi for crimes against humanity and war crimes.<sup>92</sup>

### III. Investor-State Developments

The year 2020 has been noteworthy for developments in arbitration, particularly in terms of jurisdictional and procedural decisions rendered by the International Center for the Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) pursuant to UNCITRAL Arbitration Rules.

#### A. JURISDICTION

On August 3rd, the Ministry of Justice of the Republic of Kazakhstan announced that it had prevailed in the arbitration against the Canadian mining company, Gold Pool LLC.<sup>93</sup> The PCA tribunal dismissed the case for lack of jurisdiction.<sup>94</sup> In its July 30th award, the tribunal held that Kazakhstan was not a successor to the Canada-USSR bilateral investment treaty (BIT).<sup>95</sup> In particular, the tribunal rejected Gold Pool's argument that Kazakhstan and Canada had reached a "tacit agreement" on Kazakhstan's succession to the Canada-USSR BIT.<sup>96</sup>

Interestingly, this decision conflicts with a 2015 decision in *World Wide Minerals v. Republic of Kazakhstan (2)*, in which an ad hoc tribunal held that Kazakhstan *was* a successor to the Canada-USSR BIT and the tribunal consequently had jurisdiction to hear the investor's claims.<sup>97</sup> It remains to

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92. Further Redacted Indictment, Case No. KSC-BC-2020-06 (Kos. Specialist Chambers Nov. 4, 2020), <https://repository.scp-ks.org/LW/Published/Filing/0b1ec6e98037f0e4/ANNEX%203%20to%20Submission%20of%20corrected%20and%20public%20redacted%20versions%20of%20confirmed%20Indictment%20and%20related%20requests.pdf>

93. *The Republic of Kazakhstan Won a Multimillion Arbitration Brought by Canadian Company "Gold Pool": Arbitral Tribunal Confirms that Kazakhstan is Not Bound by the Soviet Treaty with Canada*, MINISTRY OF JUST. OF KAZ., (Aug. 3, 2020), <https://www.gov.kz/memleket/entities/adilet/press/news/details/respublika-kazahstan-vyigrala-mnogomilionnyy-arbitrazhnyy-process-protiv-kanadskoy-kompanii-gold-pool-arbitrazhnyy-tribunal-podtverzhdaet-cto-kazahstan-ne-svyazan-sovetskim-soglasheniem?lang=en>

94. *Id.*

95. Anton Tugushev, *Gold Pool v Kazakhstan: The State is Not Bound by the Soviet Treaty*, CIS ARB. F. (Nov. 11, 2020), <http://www.cisarbitration.com/2020/11/11/gold-pool-v-kazahstan-the-state-is-not-bound-by-the-soviet-treaty/>.

96. Vladislav Djanic, *Kazakhstan Fends Off Claims By Canadian Gold Miner, As Tribunal Finds It Is Not A Successor To USSR BIT*, IA REP. (Aug. 4, 2020), <https://www.iareporter.com/articles/kazakhstan-fends-off-claims-by-canadian-gold-miner-as-tribunal-finds-it-is-not-a-successor-to-ussr-bit/> (The award remains confidential at the time of publication.).

97. Luke Eric Peterson, *In a dramatic holding, UNCITRAL tribunal finds that Kazakhstan is bound by terms of former USSR BIT with Canada*, IA REP. (Jan. 28, 2016), <https://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazahstan-is-bound-by-terms-of-former-ussr-bit-with-canada/>.

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be seen how former Soviet Republic nations will respond to these conflicting decisions.

**B. MOTIONS**

In *PTT Energy Resources v. Egypt*, the Cairo administrative court became the first known domestic court to hear an investment treaty dispute case.<sup>98</sup> PTT commenced proceedings under the Thailand-Egypt BIT, which permits foreign investors to submit disputes either to the competent courts of the host state or to ICSID.<sup>99</sup> As Thailand has not ratified the ICSID Convention, the Cairo administrative court heard the US \$1 billion claim.<sup>100</sup> No decision has yet been made public.

New light has been shone on relationships between key players in arbitrations. In *Eiser v. Spain*, an ICSID ad hoc committee annulled the original award due to an undisclosed relationship between the claimant's appointed arbitrator and a damages expert, concluding that the significant number of professional connections between the arbitrator and expert over several years created a manifest appearance of bias.<sup>101</sup> The arbitrator's failure to disclose the connection was considered to deprive Spain of an independent and impartial tribunal, impacting its defense and fair trial rights.<sup>102</sup> The omission, therefore, constituted an improper constitution of the tribunal and a serious departure from fundamental rules of procedure, warranting annulment of the award in its entirety.<sup>103</sup> The committee deliberately set a high bar for disclosure obligations and clarified that tribunals must remain properly constituted throughout their existence.<sup>104</sup>

Finally, conducting arbitral proceedings in a virtual format has caused significant issues. In *Landesbank Baden-Württemberg v. Spain*, the ICSID tribunal decided to hold a virtual hearing, over Spain's objections.<sup>105</sup> Spain subsequently challenged all three tribunal members, arguing that two

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98. See Vladislav Djanic, *In a Rare Development, Egypt is Facing BIT Claims Before Local Courts*, IA REP. (July 21, 2020), <https://www.iareporter.com/articles/in-a-rare-development-egypt-is-facing-bit-claims-before-local-courts/>.

99. Agreement for the Promotion and Protection of Investments, Egypt-Thai., art. 10(2), Feb. 18, 2000.

100. See *Thailand's PTT Energy Resources files USD 1 bn lawsuit against gov't over EMG*, ENTER. (May 6, 2019), <https://enterprise.press/stories/2019/05/06/thailands-ptt-energy-resources-files-usd-1-bn-lawsuit-against-govt-over-emg/#:~:text=EXCLUSIVE%2D%20Thailand%27s%20PTT%20Energy%20Resources,Court%20against%20the%20Egyptian%20government.>

101. *Eiser Infrastructure Ltd. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment, ¶ 219 (Int'l Ctr. for Settlement of Inv. Disps. June 11, 2020), <https://www.italaw.com/sites/default/files/case-documents/italaw11591.pdf>.

102. *Id.* ¶¶ 220, 225.

103. *Id.* ¶¶ 143, 241–242, 253.

104. *Id.* ¶¶ 255, 159, 179.

105. *Landesbank Baden-Württemberg et al. v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on Intra-EU Jurisdictional Objection, ¶ 1 (Feb. 25, 2019), <https://www.italaw.com/sites/default/files/case-documents/italaw10834.pdf>.

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arbitrators had misrepresented their inability to travel during the pandemic.<sup>106</sup> At the time the decision was issued, the arbitrators based in Switzerland and the UK would have been able to attend an in-person hearing at The Hague under the applicable Dutch travel restrictions.<sup>107</sup> As procedural orders are issued jointly, these misrepresentations were attributable to the whole tribunal. The World Bank President will decide the challenge.

C. MERITS

Multiple tribunals have reached divergent conclusions regarding states' liability for losses resulting from civil war. In *Güris v. Syria*, an International Chamber of Commerce tribunal held Syria liable under the Turkey-Syria BIT.<sup>108</sup> The relevant clause provides that foreign-owned investments damaged by "war, insurrection [and] . . . other similar events" shall receive treatment "no less favourable than that accorded to [domestic] investors or to investors of any third country."<sup>109</sup> Güris had no comparable investment to cite, but was allowed by the majority of the tribunal to import a broader war-losses clause contained in the Italy-Syria BIT by virtue of the Turkey-Syria BIT's Most-Favored-Nation (MFN) clause.<sup>110</sup> The Italy-Syria BIT war-losses clause provided for compensation even without proof that another investor had been treated more favorably.<sup>111</sup> The majority of the tribunal found that the clause had been breached and the investor was owed damages.<sup>112</sup> Syria's appointed arbitrator dissented, arguing that the Turkey-Syria BIT's war-losses clause acted as *lex specialis*, and the general MFN clause should therefore not be applied when war losses were claimed.<sup>113</sup>

In *Strabag v. Libya*, the ICSID tribunal held that Libya had violated the Libya-Austria BIT through a series of requisitions and destruction of assets

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106. Cosmo Sanderson, *ICSID panel challenged over decision to hold virtual hearing*, GLOB. ARB. REV. (Aug. 14, 2020), <https://globalarbitrationreview.com/arbitrator-challenges/icsid-panel-challenged-over-decision-hold-virtual-hearing>.

107. *The Netherlands lifts travel ban for certain groups of travellers*, GOV'T OF THE NETH. (Jun. 30, 2020), <https://www.government.nl/latest/news/2020/06/30/the-netherlands-lift-travel-ban-for-certain-groups-of-travellers#:~:text=AS%20of%201%20July%202020,South%20Korea%2C%20Thailand%2C%20Tunisia%20and> (noting at the time of the tribunal's decision, travel restrictions to the Netherlands did not apply to UK or Swiss citizens).

108. Lisa Bohmer, *Investigation: in confidential award, Syria is held liable for foreign investor's war losses, after tribunal majority imports a more generous war-losses protection via BIT's MFN clause*, IA REP. (Oct. 19, 2020), <https://www.iareporter.com/articles/investigation-in-confidential-award-syria-is-held-liable-for-foreign-investors-war-losses-after-tribunal-majority-imports-a-more-generous-war-losses-protection-via-bits-mfn-clause/>.

109. Agreement Between the Republic of Turkey and the Syrian Arab Republic Concerning the reciprocal Promotion and Protection of Investments, art. IV(3) (2004), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2335/download>.

110. Bohmer, *supra* note 108.

111. *Id.*

112. *Id.*

113. *Id.*

in the context of its 2011 revolution.<sup>114</sup> But the tribunal found no violation of the treaty's full protection and security (FPS) standard, noting that Libya's duty should be viewed in context of the conditions prevailing in the country at the time.<sup>115</sup>

By contrast, in *Güriş v. Libya*, an International Chamber of Commerce tribunal rejected the majority of Güriş's claims after finding that actions of ODAC (a state-owned development entity) were not attributable to Libya, since ODAC enjoys separate legal personality under Libyan law.<sup>116</sup> Public sources report that the claimant failed to demonstrate that the acts of various armed groups were attributable to the Libyan State, succeeding only in relation to damage directly caused by Tripoli's police force.<sup>117</sup> The tribunal again analyzed Libya's FPS duty in the context of "major internal upheavals."<sup>118</sup> Given the fragility of the Libyan State at that time, the tribunal determined that Libya had discharged its obligation and declined to conclude that Libya had contributed to the upheaval by financing militias.<sup>119</sup>

In a separate case regarding a project that was similarly impacted by civil war, the tribunal in *Tekfen Holdings v. Libya* dismissed the claimants' \$95 million USD claim, with a majority finding that Libya did not breach its "protection" and "equal treatment" obligations under the BIT and customary international law.<sup>120</sup>

#### IV. International Human Rights

The year 2020 marked one of many noteworthy case developments by international human rights courts and tribunals, including the European Court of Human Rights (ECHR), the African Court on Human and People's Rights (AfCHPR), and the Inter-American Court on Human Rights (IACHR).

##### A. THE ECHR

The ECHR issued many notable decisions in 2020. In January, the ECHR ruled in *Yam v. the United Kingdom* that required a former MI6

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114. Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 298, 320 (June 29, 2020), [https://www.iareporter.com/wp-content/themes/iareporter/download.php?post\\_id=44416](https://www.iareporter.com/wp-content/themes/iareporter/download.php?post_id=44416).

115. *Id.* ¶ 234.

116. Luke Eric Peterson, *Libya wins one and loses one, as new bilateral investment treaty awards are rendered*, IA REP. (Feb. 18, 2020), <https://www.iareporter.com/articles/libya-wins-one-and-loses-one-as-new-bilateral-investment-treaty-awards-are-rendered>.

117. Damine Charlotin, *Analysis: Tribunal in Guris v. Libya award draws contrast with Cengiz award on FPS interpretation and sides with majority of prior Libya awards with respect to war losses clause*, IA REP. (Mar. 5, 2020), <https://www.iareporter.com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and-sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause/>.

118. *Id.*

119. *Id.*

120. Cosmo Sanderson and Sebastian Perry, *A Win and a Loss for Libya*, GLOB. ARB. REV. (Feb. 28, 2020), <https://globalarbitrationreview.com/win-and-loss-libya>.

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informant accused of murder to defend himself in camera due to concerns about national security did not violate his right to a fair trial.<sup>121</sup>

In *N.D. and N.T. v. Spain*, the Court held that forcing two nationals of Mali and Côte d'Ivoire to return to Morocco after they scaled a fence to enter Spanish territory was not a violation of Article 4 of Protocol No. 4 or of Article 13 of the European Convention of Human Rights (Convention).<sup>122</sup> The Court determined that because a legal method existed to enter Spain, the two applicants violated the Convention by failing to enter legally.<sup>123</sup>

In *Gaughran v. United Kingdom*, after the plaintiff was arrested and convicted of driving under the influence, the police took his DNA profile, fingerprints, and photograph.<sup>124</sup> The ECHR ruled that the United Kingdom's indefinite retention of plaintiff's personal data without certain safeguards, such as considering the "seriousness of the offen[s]e or the need for indefinite [data] retention and in the absen[s]e of any real possibility of [police] review,"<sup>125</sup> violated the Convention's Article 8.<sup>126</sup>

In *Kotilainen et al v. Finland*, the ECHR found that Finland had violated its positive obligation to "provide a general protection to society against potential criminal acts"<sup>127</sup> by failing to confiscate a gun from a man who posted violent content on social media.<sup>128</sup> The court determined these posts casted doubt on his fitness to possess a firearm, even though he made no specific threats.<sup>129</sup>

In *Mirgadirov v. Azerbaijan and Turkey*, a detainee was denied the ability to receive social and political magazines.<sup>130</sup> The Court found no legal basis for the restriction under Articles 17.3, 19.8, or 23 of the Law on the Guarantee of the Rights and Freedoms of Individuals Kept in Detention Facilities of May 22, 2012.<sup>131</sup> Article 23 states that a detainee has a right to receive periodicals, provided that the publications do not "propagand[ize] war, violence, extremism, terror and cruelty, or incit[e] racial, ethnic[,] and social enmity and hostility, or contain[] pornography."<sup>132</sup>

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121. *Yam v. The United Kingdom*, App. No. 31295/11, ¶¶ 7–12, 60 (June 22, 2020), <https://hudoc.echr.coe.int/spa#%7B%22itemid%22:%5B%22001-200315%22%5D%7D>.

122. *N.D. & N.T. v. Spain*, App. Nos. 8675/15 & 8697/15, ¶¶ 231, 244 (Feb. 13, 2020), <http://hudoc.echr.coe.int/spa?i=001-201353>.

123. *Id.*

124. *Gaughran v. U.K.*, App. No. 45245/15, ¶¶ 6–9, 96 (June 13, 2020), <http://hudoc.echr.coe.int/spa?i=001-200817>.

125. *Id.* ¶ 96.

126. *Id.* ¶ 98.

127. *Kotilainen v. Fin.*, App. No. 62439/12, ¶ 85 (Sept. 17, 2020), <http://hudoc.echr.coe.int/eng?i=001-204603>.

128. *Id.* ¶¶ 7–18.

129. *Id.* ¶ 89.

130. *Mirgadirov v. Azer. & Turk.*, App. No. 62775/14, ¶ 29 (Sept. 17, 2020), <http://hudoc.echr.coe.int/eng?i=001-204584>.

131. *Id.* ¶¶ 117–18.

132. *Id.* ¶ 118.



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In October 2020, the ECHR ruled that France’s dissolution of three right-wing extremist groups did not violate the Convention’s Article 11 governance of freedom of assembly and association, or Article 10’s governance for freedom of expression.<sup>133</sup>

**B. THE AfCHPR**

The AfCHPR also issued notable decisions in 2020 but continues to lose members, presenting concerns for its future.<sup>134</sup> In April, Côte d’Ivoire withdrew from the AfCHPR, claiming “the court ha[d] undermined its sovereignty.”<sup>135</sup> Tanzania also withdrew in December 2019, leaving the Court with just six member states.<sup>136</sup> The Court initially had thirty members when it was established in 1998.<sup>137</sup> Benin also announced its withdrawal from an agreement allowing its citizens to appeal directly to the AfCHPR.<sup>138</sup>

In October, the AfCHPR ruled that Côte d’Ivoire’s ex-president, Laurent Gbagbo, must be added to the electoral roll for the nation’s October election.<sup>139</sup> The judgment overruled the Ivorian Constitutional Council’s decision to prohibit his candidacy.<sup>140</sup> In September, the AfCHPR similarly ruled that Côte d’Ivoire’s ex-prime minister, Kigbafori Guillaume Soro, be allowed to run for president.<sup>141</sup> This decision followed the AfCHPR’s previous decision to suspend the execution of an arrest warrant for Soro and his family, saying it would “seriously compromise the exercise of the political rights and freedoms of the applicants[.]”<sup>142</sup>

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133. *Ayoub v. Fr.*, App. Nos. 77400/14, 34532/15, & 34550/15, ¶¶ 1, 4, 138-39 (Oct. 8, 2020), <http://hudoc.echr.coe.int/eng?i=001-204822>.

134. Philipp Sandner, *Africa’s Court of Human Rights on the brink of collapse*, DEUTSCHE WELLE (June 11, 2020), <https://www.dw.com/en/africas-court-of-human-rights-on-the-brink-of-collapse/a-53776946>.

135. Felix Nkambeh Tih, *Ivory Coast withdraws from African Human Rights Court*, ANADOLU AGENCY (Apr. 30, 2020), <https://www.aa.com.tr/en/africa/ivory-coast-withdraws-from-african-human-rights-court/1824474>.

136. Sandner, *supra* note 134.

137. *Id.*

138. *Id.*

139. *Gbagbo v. Côte d’Ivoire*, No. 025/2020, Provisional Measures, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 30 (Feb. 25, 2020), <https://www.african-court.org/cpmt/storage/app/uploads/public/5f7/31c/25e/5f731c25e0f7e556137371.pdf>.

140. *Id.* ¶ 28.

141. *Emile v. Côte d’Ivoire*, No. 044/2019, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 270 (July 15, 2020), <https://www.african-court.org/cpmt/storage/app/uploads/public/5f4/f72/e7a/5f4f72e7aa10d589108872.pdf>.

142. Maurice Muhwezi, *African Court of Justice suspends arrest warrant against Ivory Coast’s Guillaume Soro*, RED PEPPER (Apr. 23, 2020), <https://redpepper.co.ug/2020/04/african-court-of-justice-suspends-arrest-warrant-against-ivory-coasts-guillaume-soro/>.

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Finally, in November, the AfCHPR ruled Tanzania's mandatory imposition of the death penalty unjust because it denied defendants due process and the right to be heard.<sup>143</sup>

C. THE IACHR

The IACHR issued several decisions in 2020. First, *Pueblos Indígenas Maya Kaqchikel de Sumpango v. Guatemala* concerned Guatemala's conduct in erecting multiple legal obstacles for indigenous people to operate radio stations.<sup>144</sup> The IACHR ruled that Guatemala violated indigenous people's freedom of expression with unjust and discriminatory legal obstacles and held that states must guarantee indigenous people's access to the airwaves for "the enjoyment and exercise of the right to freedom of expression," protected by Article 13 of the American Convention on Human Rights (American Convention).<sup>145</sup>

Second, in *Baptiste Willer v. Haiti*, the IACHR ruled Haiti violated Mr. Willer's human rights under the American Convention by failing to protect him and his family from a gang who had been making threats to his life and acting with impunity.<sup>146</sup>

Third, in *Mayan Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala*, the Court ruled that Guatemala violated the American Convention by failing to grant the indigenous community collective property rights and allowing them to be heard on a mining project affecting that property.<sup>147</sup> The Court ruled that Guatemala must "grant complete title and effective sanitation of their ancestral territory . . . [and] their right to live their traditional way of life in a peaceful manner,"<sup>148</sup> which the IACHR similarly ruled in *Comunidad Garífuna de San Juan v. Honduras*.<sup>149</sup>

Finally, in *Pueblos Indígenas en Aislamiento Voluntario Tagaeri v. Ecuador*, the Court heard its first case involving indigenous people in voluntary isolation, meaning the decision to live traditionally without being disturbed by

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143. *Rajabu v. Tanz.*, No. 007/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 110 (Nov. 28, 2019), <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/63d/f99/5f563df99fbc7507699184.pdf>.

144. Press Release, Inter-Am. Comm'n Hum. Rts., La CIDH presenta caso sobre Guatemala ante la Corte Interamericana (Sept. 25, 2020), <http://www.oas.org/es/cidh/prensa/comunicados/2020/232.asp>.

145. *Id.*

146. Press Release, Inter-Am. Comm'n Hum. Rts., IACHR refers case on Haiti to the Inter-American Court (May 27, 2020), [http://www.oas.org/en/iachr/media\\_center/PReleases/2020/121.asp](http://www.oas.org/en/iachr/media_center/PReleases/2020/121.asp).

147. Press Release, Inter-Am. Comm'n Hum. Rts., IACHR refers case on Guatemala to the Inter-American Court (Sept. 8, 2020), [http://www.oas.org/en/iachr/media\\_center/PReleases/2020/211.asp](http://www.oas.org/en/iachr/media_center/PReleases/2020/211.asp).

148. *Id.*

149. Press Release, Inter-Am. Comm'n Hum. Rts., CIDH presenta caso sobre Honduras ante la Corte Interamericana (Sept. 30, 2020), <http://www.oas.org/es/cidh/prensa/comunicados/2020/239.asp>.

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surrounding civilization surrounding.<sup>150</sup> The IACHR ruled that Ecuador had violated the plaintiffs' human rights and must define their territory, grant them "the full exercise of their collective property, including the necessary measures to ensure strict compliance with the principle of non-contact."<sup>151</sup>

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150. Press Release, Inter-Am. Comm'n Hum. Rts., IACHR refers case on Ecuador to the Inter-American Court (Oct. 5, 2020), [http://www.oas.org/en/iachr/media\\_center/PReleases/2020/245.asp](http://www.oas.org/en/iachr/media_center/PReleases/2020/245.asp).

151. *Id.*

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## **International Criminal Law**

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### **I. Introduction**

This year, there have been significant developments in international criminal law in a variety of international and national courts, investigative bodies, and international and non-governmental organizations. These developments include ones related to investigation, litigation, and treaty drafting. In light of the complexity of the matters covered, this section is organized alphabetically by situation, rather than by court or other entity. Accordingly, it will focus on notable developments in five situations: Afghanistan, Lebanon, Myanmar and Bangladesh, the Crimes Against Humanity Treaty, and virtual lawyering during the pandemic.<sup>1</sup>

### **II. Afghanistan**

#### **A. ICC AUTHORIZES AFGHANISTAN INVESTIGATION**

On November 20, 2017, Fatou Bensouda, the Prosecutor of the International Criminal Court (ICC), filed a request in the Court's Pre-Trial Chamber (PTC) for authorization<sup>2</sup> under Article 15<sup>3</sup> of the Rome Statute<sup>4</sup> to initiate an investigation in relation to alleged crimes committed on the territory of Afghanistan in the period since May 1, 2003,<sup>5</sup> as well as other alleged crimes that (1) had a nexus to the armed conflict in Afghanistan; (2) were sufficiently linked to the situation; and (3) were committed on the

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1. The section on virtual lawyering offers some additional practical application for lawyers engaged in cross-border civil litigation and investigations.

2. Public redacted version of "Request for authorisation of an investigation pursuant to article 15," 20 November 2017, ICC-02/17-7-Conf-Exp; [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF).

3. Rome Statute, Art. 15, § 3. ("If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.")

4. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, Article 126.

5. See International Criminal Court, "Afghanistan: Ratification and Implementation Status," [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/asian%20states/Pages/afghanistan.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/afghanistan.aspx). (Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003.); see Rome Statute of the Int'l Crim. Ct., *supra* note 4 (The ICC may therefore exercise its jurisdiction committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards, i.e., the first day of the month after the 60th day following that date.).

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territory of other States Parties in the period since July 1, 2002.<sup>6</sup> Bensouda further requested permission to expand or modify her investigation “with respect to these or other alleged acts, incidents, groups or persons, provided that the cases brought forward for prosecution [were] sufficiently linked to the authorised situation.”<sup>7</sup>

Having completed an eleven-year preliminary investigation<sup>8</sup> of approximately 200 reported incidents<sup>9</sup> and an analysis of open source information,<sup>10</sup> the Office of the Prosecutor (OTP) had determined that there was a “reasonable basis to believe”<sup>11</sup> that war crimes and crimes against humanity had been committed on the territory of Afghanistan by the Taliban, their affiliated Haqqani Network, the Afghan National Security Forces, and members of the U.S. armed forces.<sup>12</sup> It had also found

a reasonable basis to believe that members of United States of America (‘US’) armed forces and members of the Central Intelligence Agency (‘CIA’) committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period.<sup>13</sup>

The OTP had furthermore obtained information regarding “alleged crimes associated with the Afghan armed conflict” which had been committed in Poland, Romania, and Lithuania, all territories which were parties to the Rome Statute.<sup>14</sup> Bensouda specified that

from 2002-2008, individuals allegedly participating in the armed conflict in Afghanistan, such as members of the Taliban or Al Qaeda, Hezb-e-Islami Gulbuddin and other militant groups, were allegedly transferred to clandestine CIA detention facilities located in those countries and are alleged to have been subjected to acts constituting crimes within the jurisdiction of the Court.<sup>15</sup>

The PTC, despite recognizing that “all the relevant requirements are met as regards both jurisdiction and admissibility,”<sup>16</sup> nevertheless unanimously

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6. See Rome Statute, Art. 11, 24 (The temporal jurisdiction of the ICC is universally limited with respect to crimes committed after the entry into force of the Rome Statute on 1 July 2002.).

7. *Id.*

8. ICC Office of the Prosecutor, “Report on Preliminary Examination Activities 2016,” (Nov. 14, 2016), [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

9. *Id.* ¶ 3.

10. *Id.* ¶ 27.

11. *Id.* ¶ 4.

12. *Id.*

13. *Id.*

14. Report on Preliminary Examination Activities 2016, *supra* note 8, ¶ 49.

15. *Id.*

16. Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the

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denied the request on April 12, 2019, finding that the interests of justice were not met.<sup>17</sup> It furthermore criticized Bensouda's concept of expanding her investigation to include incidents "sufficiently linked to the authorised situation."<sup>18</sup>

Bensouda appealed the PTC decision to the ICC's Appeals Chamber (AC), which delivered its judgment on March 5, 2020.<sup>19</sup> The AC overturned the previous ruling, finding that the PTC had erred in factoring the interests of justice into its decision because "[it] should have addressed only whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation . . . and whether the potential case(s) . . . would appear to fall within the Court's jurisdiction."<sup>20</sup>

Noting that the PTC had otherwise affirmed Bensouda's assertions of "a reasonable basis" and that "all the relevant requirements are met as regards . . . [j]urisdiction,"<sup>21</sup> the AC, therefore, elected to proceed "in the interests of judicial economy" and amended the prior decision to effectively grant Bensouda immediate authorization for the commencement of her investigation.<sup>22</sup>

Moreover, the AC resolved the contested issue of the investigation's scope, and, in doing so, provided guidance for the Court applicable in any potential investigation.<sup>23</sup> It explained that once a PTC has authorized a Prosecutor under Article 15 of the Rome Statute, the Prosecutor then becomes subject to the terms of Article 54 of the Statute, which specifically govern her powers and duties concerning investigations.<sup>24</sup> The Prosecutor, "in order to establish the truth," is mandated to "extend the investigation to cover all facts and evidence . . . and, in doing so, investigate incriminating and exonerating circumstances equally."<sup>25</sup> In light of this requirement, the AC said, "restricting the authorised investigation to the factual information obtained during the preliminary examination would erroneously inhibit the Prosecutor's truth-seeking function."<sup>26</sup>

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Islamic Republic of Afghanistan, (12 April 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_02068.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF), ¶ 96.

17. *Id.* at 32.

18. *See* Report on Preliminary Examination Activities 2016, ¶ 49.

19. Afghanistan, ICC-02/17-138, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, (5 March 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_00828.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF). [hereinafter Afghanistan Judgment].

20. *Id.* ¶ 46.

21. *Id.* ¶53.

22. *Id.* ¶54.

23. *Id.* ¶56.

24. Rome Statute art. 54.

25. *See* Afghanistan Judgment, *supra* note 19, ¶ 60.

26. *Id.* ¶ 61.

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### III. Lebanon

#### A. SPECIAL TRIBUNAL FOR LEBANON

The Trial Chamber for the Special Tribunal for Lebanon (STL) pronounced judgment in *Prosecutor v. Ayyash, et al.* (STL-11-01)<sup>27</sup> on August 20, 2020, and on December 11, 2020, after finding aggravating circumstances and no evidence of mitigating circumstances, sentenced him to five concurrent terms of life imprisonment.<sup>28</sup> This case began with the 2005 assassination of Lebanese Prime Minister Rafik Hariri and the death and serious injury of many others, to which the original indictment was handed up on January 17, 2011, and the trial began on January 16, 2014.<sup>29</sup> After a trial involving 297 witnesses (including seventy victims) and 3,131 exhibits, the Trial Chamber unanimously convicted defendant Salim Jamil Ayyash as a co-perpetrator<sup>30</sup> of five criminal counts: commission of a terrorist act by an explosive device; conspiracy to commit the act; intentional premeditated homicide of Prime Minister Rafik Hariri using explosive materials; intentional premeditated homicide for causing the death of twenty-one others; and attempted intentional homicide of 226 others by the same means.<sup>31</sup> The Trial Chamber unanimously acquitted defendants Hassan Habib Merhi, Hussein Hassan Oneissi and Assad Hassan Sabraty.<sup>32</sup> The Judgment Summary briefly lays out the findings of fact, in pertinent parts:

3. [O]n . . . 14 February 2005, the former prime minister of Lebanon, Mr. Rafik Hariri, was travelling in his convoy in Beirut . . . [A] massive explosion was detonated. Mr. Hariri was killed in the blast. Twenty-one others, including eight members of Mr. Hariri's convoy, and innocent bystanders, also died . . .

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27. STL-11-01/T/TC, F3240/20200818/R331793-R331994/EN/dm (Judgment Summary); F3839/20200818/R331945-R334626/EN/dm ("Judgment") (The Judgment Summary is an "authentic and authoritative" version of the full Judgment, with notes that direct the reader to the relevant paragraphs in the complete document.).

28. STL-11-01/T/TC, F3855/202011211/R336570-R33657/EN/dm (Sentencing Judgment), [https://www.stl-tsl.org/sites/default/files/sentencing/STL-11-01\\_Sentencing\\_pronouncement\\_EN.pdf](https://www.stl-tsl.org/sites/default/files/sentencing/STL-11-01_Sentencing_pronouncement_EN.pdf) ¶¶55-59, 92, 97 (Sentencing Pronouncement). (The Court recommended that a trust fund for restitution for victims of crimes within STL's jurisdiction be established and also that Lebanon create a system of compensation for crime victims.).

29. *Ayyash et al.*, Special Tribunal for Lebanon, <https://www.stl-tsl.org/en/the-cases/stl-11-01> (last visited Jun. 2, 2021).

30. Judgment Summary ¶ 556-57 ("A perpetrator of attempted intentional homicide must have the mens rea to commit the crime of intentional homicide . . . Or, alternatively, he at least foresaw that deaths would occur and accepted that risk.") (citation omitted).

31. Judgment Pronouncement, [https://www.stl-tsl.org/sites/default/files/judgment/FOR\\_REF\\_20200818\\_STL-11-01\\_PUBLIC\\_Judgment\\_Pronouncement\\_EN.pdf](https://www.stl-tsl.org/sites/default/files/judgment/FOR_REF_20200818_STL-11-01_PUBLIC_Judgment_Pronouncement_EN.pdf) at 60, (August 20, 2020).

32. *Id.* at 61.

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4. Another 226 people were injured, some very seriously. People passing in the street and working in nearby buildings sustained terrible injuries. Many buildings were badly damaged.

5. The explosion was triggered by a suicide bomber in . . . a light . . . truck, loaded with more than two tonnes of RDX high-grade explosives—that detonated as Mr. Hariri’s heavily protected six vehicle convoy passed the St Georges Hotel. The explosives had the equivalent of 2,500 to 3,000 kilograms of TNT. The explosion left a crater in the road that, based on the cone shape, had a diameter of around 11.4 metres with a depth of around 1.9 metres . . .

6. Mr. Hariri and his convoy had been under surveillance for some months before his assassination. Those engaged in the surveillance were communicating in the field using three sets of mobile telephone networks . . . labelled as the Yellow, Blue[,] and Red networks.

7. The Red network was the assassination team.

[ . . . ]

13. The successful attack on Mr. Hariri was carefully planned and implemented. The six core Red network mobile users were responsible for Mr. Hariri’s murder . . . . On the day of the attack, the Red mobile users observed Mr. Hariri’s movements . . . and were . . . near the crime scene shortly before the explosion. They also coordinated the [truck’s] movement towards the convoy. The Red network users made their final calls in the minutes before the attack and these anonymous mobiles were never used again.<sup>33</sup>

This case is notable for a number of procedural, substantive, and policy<sup>34</sup> reasons. Not least of which is the nature of the tribunal itself.<sup>35</sup> The STL is neither a treaty-based international court like the ICC nor a national criminal court. The impetus for an international tribunal arose in the wake of a series of violent attacks in the State dating to 2004 and has followed a complicated path leading ultimately to the STL.<sup>36</sup> Lebanon has not ratified the Rome Treaty and is not a member of the ICC, so the ICC would have no jurisdiction. Lebanon requested the UN Security Council (Security Council) to create a special tribunal, but it instead adopted several resolutions condemning the violence, calling for international cooperation against terrorism<sup>37</sup> and establishing an international investigating commission.<sup>38</sup> Later, the Security Council recommended that the Lebanese

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33. Judgment Summary, *supra* note 30, ¶¶ 1-2.

34. For a discussion of the decision, see Arthur Traldi, Special Tribunal for Lebanon Hands Down Historic Verdict on Hariri Assassination Charges (August 20, 2020), published at <https://www.lawfareblog.com/special-tribunal-lebanon-hands-down-historic-verdict-hariri-assassination-charges>.

35. *History and establishment*, SPECIAL TRIBUNAL FOR LEB., <https://www.stl-tsl.org/en/about-the-stl/history-and-establishment> (last visited Jun. 2, 2021).

36. *Id.*

37. S.C. Res. 1566 (Oct. 8, 2004), 1373 (Sept. 28, 2001), 1595 (April 7, 2005).

38. S.C. Res. 1595, *supra* note 37.



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government and the UN agree to establish a special tribunal. That effort failed when parliament did not ratify it.<sup>39</sup> Instead, the STL is the creation of the Security Council, whose jurisdiction is limited to a specific set of circumstances to be tried under national criminal law before a tribunal of international and Lebanese jurists.<sup>40</sup> The STL's jurisdiction is limited as follows:

. . . persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks . . .<sup>41</sup>

The STL and the national courts of Lebanon have concurrent jurisdiction, but the STL has primacy.<sup>42</sup> Moreover, the STL has the power to conduct criminal trials in absentia if the defendant:

- (a) Has expressly and in writing waived his or her right to be present;
- (b) Has not been handed over to the Tribunal by the State authorities concerned;
- (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.<sup>43</sup>

The STL conducted the trial in absentia following a hearing in which prosecutors had taken the required steps to locate and to inform the defendants, but they could not be found.<sup>44</sup> All defendants were represented by counsel throughout the proceedings and at trial. In absentia trials are not unprecedented; an early example was the Nuremberg International Military Tribunal trial of Martin Bormann, authorized by the London Charter.<sup>45</sup> The ICC, by contrast, requires that “the accused shall be present during the trial.”<sup>46</sup>

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39. S.C. Res. 1664 (March 29, 2006).

40. S.C. Res. 1757 (May 30, 2007).

41. *Id.*

42. *Id.* at art. 4.

43. *Id.* at art. 22.

44. Decision to Hold Trial in Absentia, STL-11-01/I/TC, FOI12/201202011/RI09799-RI09846nEN/pvk, [https://www.stl-tsl.org/crs/assets/Uploads/20120201\\_F0112\\_PUBLIC\\_TC\\_Decision\\_Trial\\_inAbsentia\\_Filed\\_EN.pdf](https://www.stl-tsl.org/crs/assets/Uploads/20120201_F0112_PUBLIC_TC_Decision_Trial_inAbsentia_Filed_EN.pdf), Judgment Pronouncement ¶ 22 at 5.

45. See Elizabeth Herath, Trials In Absentia: Jurisprudence and Commentary on the Judgment in Chief Prosecutor v. Abul Kalam Azad in the Bangladesh International Crimes Tribunal, 55 HARV. INT'L L.J. (Online 2 June 2014).

46. Rome Statute, art. 63.1.

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Turning to the merits, the case was based “almost completely” on circumstantial evidence,<sup>47</sup> including extensive use of cell phone data, call history, and location tracing to prove the alleged conspiracy and its participants. The Trial Chamber pointed out that, in such cases, conclusions that “*could potentially* emerge” from any patterns are insufficient and conclusions must be found “beyond coincidence” and beyond a reasonable doubt.<sup>48</sup> But there are real challenges to finding conspiracy beyond a reasonable doubt based on cell phone data. For example, although a defendant may own a particular phone, ownership is not evidence that the person made a particular call. For example, a person may use a phone they did not own. Furthermore, the calls themselves were identified, but the content of the conversation was not heard or recorded. Finally, while location data may be useful, it does not necessarily provide pinpoint accuracy.<sup>49</sup> Nevertheless, the Trial Chamber found that there was an agreement to assassinate Prime Minister Hairy by means of an explosive device,<sup>50</sup> but that the prosecutor had failed to prove the ultimate breadth of the conspiracy and the knowledge of various participants.<sup>51</sup> The Trial Chamber was convinced beyond a reasonable doubt of defendant Ayyash’s participation in the conspiracy and of homicide as charged<sup>52</sup> but not of the other three defendants’ criminal responsibility.<sup>53</sup>

Motive is not an element of the crimes charged. No State or non-governmental organization was charged with a crime. Nevertheless, the Trial Chamber heard evidence on the “political and historical background,” stating that

the assassination of the former Lebanese prime minister did not occur in a vacuum, nor was it organised by the six core users of the Red network. The political and background evidence points to it being a political act directed by those whose activities Mr. Hariri’s were threatening . . . but the evidence does not establish affirmatively who directed them to murder Mr Hariri and thus eliminate him as a political opponent.<sup>54</sup>

The case demonstrates some of the limitations of the modern international criminal justice system and provides a reminder that the ICC is not a world court. Because the ICC is a treaty-based organization, States may join or decline the ICC, leaving national systems of law enforcement that may or may not have the necessary credibility and capacity, especially in post-conflict situations. Faced with calls to create an ad hoc tribunal on the

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47. Judgment Summary ¶44.

48. *Id.* ¶ 43-45 at 9-10.

49. Judgment Pronouncement ¶¶ 26-46 at 6-10.

50. *Id.* ¶ 262 at 46.

51. *Id.* ¶ 279 at 49.

52. *Id.* ¶¶ 304 at 53, 312-16 at 55-56.

53. *Id.* ¶¶ 131 at 22-23, 134 at 24, 145 at 26, 247 at 43, 259 at 45, 322-24 at 56-57, 332 at 59.

54. Judgment Pronouncement ¶ 290 at 51.

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model of the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia, the United Nations refused and instead created the hybrid STL. The STL applied national law and some international principles and used international judges. Furthermore, the STL was based far from the site of the crime and witnesses and was thus unavailable for observation in person by those in the region of the attack.

The trial itself was notable for the extensive use of cell phone data, which revealed the value and limitations of this evidence when the standard of proof is beyond a reasonable doubt. Substantively, the discussion of terrorism law which, while based on Lebanese law, may be of value for other international and national courts. In discussing the possible involvement and motives of others not charged, the Trial Chamber walked a fine line between deciding the individual charges against individual defendants and placing the situation into the historical and political setting that it “cannot ignore” regarding possible motive and context.<sup>55</sup> Since any party may appeal, the case is far from over.

#### **IV. Myanmar**

In 2020, there were significant advancements in various fora regarding accountability for crimes and human rights violations in Myanmar. The following brief summary focuses primarily on judicial mechanisms, but civil society and other governmental, non-governmental, and international bodies performed substantial work on the Myanmar situation.

##### **A. INTERNATIONAL CRIMINAL COURT**

In September 2018, the ICC’s Pre-Trial Chamber I (PTC) ruled on the jurisdiction of the court.<sup>56</sup> Myanmar is not a party to the Rome Statute, unlike its neighbor to the northwest, Bangladesh, which has received hundreds of thousands of refugees from Myanmar.<sup>57</sup> The Prosecutor’s submissions queried whether it could investigate the potential crime against humanity of deportation perpetrated in Myanmar under the ICC’s jurisdiction over Bangladesh, on the basis that deportation requires movement across an international border and thus an element of that crime was “perpetrated” in Bangladesh.<sup>58</sup>

The PTC decision confirmed that the ICC would have jurisdiction over deportation on that basis,<sup>59</sup> but it also went further, noting that its rationale

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55. Judgment ¶¶ 393 at 116; *see generally id.* ¶¶ 93–787 at 116–241.

56. Request Under Regulation 46(3) of the Regulations of the Court, Pre-Trial Chamber I, No. ICC-RoC46(3)-01/18, Decision on the Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, (Sept. 6, 2018), *available at* [https://www.icc-cpi.int/CourtRecords/CR2018\\_04203.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF).

57. *See id.* ¶ 27.

58. *Id.*

59. *Id.* at 30–42.

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“may apply to other crimes within the jurisdiction of the Court as well”<sup>60</sup> if at least one element of those crimes also occurred on the territory of state party. And it gave as examples the crimes against humanity of persecution and “other inhumane acts.”<sup>61</sup>

Armed with this decision, the Prosecutor requested to open an investigation into the Situation in Bangladesh and Myanmar under Article 15 of the Rome Statute, and PTC III granted that request in November 2019.<sup>62</sup> The authorized investigation encompasses any crimes covered by the Rome Statute committed at least in part in the territory of state parties to the Rome Statute if those crimes occurred on or after June 1, 2010.<sup>63</sup>

The prosecution’s further investigation has been confidential, but this year there have been some public actions regarding victims related to the alleged crimes. In January 2020, PTC III issued guidance to the Registry to facilitate victims’ participation in the investigation and to keep them informed,<sup>64</sup> and it also mandated that the Registry establish “a system of public information and outreach activities.”<sup>65</sup> The Registry has submitted a report to the PTC on its outreach activities that has been released publicly with redactions.<sup>66</sup>

In August 2020, a group of victims in Cox’s Bazaar filed a request with the PTC seeking to ensure access to the proceedings and inquiring whether some or all of any criminal proceedings could take place near Cox’s Bazaar.<sup>67</sup> The filing revealed that following their requests, the Registry was considering opening a field office near Cox’s Bazaar.<sup>68</sup>

The Prosecution opposed the request as premature and with the potential to interfere with the conduct of the investigation.<sup>69</sup> The Registry responded,

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60. *Id.* at 42.

61. *Id.* at 42-44.

62. Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III ), No. ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/ Republic of the Union of Myanmar, (Nov. 14, 2019), *available at* [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF). [hereinafter Bangladesh/Myanmar Situation].

63. Request Under Regulation 46(3), *supra* note 56, at 53-54.

64. Bangladesh/Myanmar Situation, Order on Information and Outreach for the Victims of the Situation (Jan. 20, 2020), *available at* [https://www.icc-cpi.int/CourtRecords/CR2020\\_00138.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_00138.PDF).

65. *Id.* at 6.

66. Bangladesh/Myanmar Situation, Public Redacted Version of “Registry’s First Report on Information and Outreach Activities”, ICC-01/19-33 (July 6, 2020), *available at* [https://www.icc-cpi.int/CourtRecords/CR2020\\_04049.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_04049.PDF). (Outreach was done in print, on the radio, and in visits to Cox’s Bazaar, Bangladesh, where many refugees are located.)

67. Bangladesh/Myanmar Situation, Victims’ Joint Request Concerning Hearings Outside the Host State (Aug. 4, 2020), *available at* [https://www.icc-cpi.int/CourtRecords/CR2020\\_04736.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_04736.PDF).

68. *Id.* at 12-13.

69. Bangladesh/Myanmar Situation, Prosecution’s Response to the Victims’ Joint Request Concerning Hearings Outside the Host State (Aug. 17, 2020), *available at* [https://www.icc-cpi.int/CourtRecords/CR2020\\_04861.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_04861.PDF).

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offering various options for some proceedings to take place in Bangladesh.<sup>70</sup> On October 27, 2020, the PTC dismissed the request as premature.<sup>71</sup>

In a potentially significant evidentiary development, video emerged in September 2020 of two low-ranking members of the Myanmar military, the Tatmadaw, describing attacks against Rohingya in which they took part.<sup>72</sup> This is the first public acknowledgment by members of the Tatmadaw of participation. The soldiers fled Myanmar and have been transported to The Hague. Reportedly, they are not under arrest, but are being questioned by ICC staff.<sup>73</sup>

**B. INTERNATIONAL COURT OF JUSTICE**

In November 2019, The Gambia lodged a case against Myanmar in the International Court of Justice (ICJ) claiming a violation of the Genocide Convention.<sup>74</sup> Both states are parties to that convention and have agreed to the ICJ's jurisdiction, a separate question from whether the ICJ has jurisdiction over this particular case. The court held hearings on The Gambia's application from December 10-12, 2019.<sup>75</sup> The hearings were particularly notable because Aung San Suu Kyi led the Myanmar delegation to present the arguments.<sup>76</sup> As part of its application, The Gambia requested that the ICJ impose provisional measures against Myanmar to prevent additional harm from occurring while the case, which will likely take years to resolve, progresses.

The decision on preliminary measures was issued on January 23, 2020.<sup>77</sup> First, the ICJ addressed whether the case was properly before it. The ICJ held that there was a *prima facie* basis for finding a dispute related to the Genocide Convention<sup>78</sup> and that The Gambia had standing to bring a claim against Myanmar based on obligations *erga omnes partes* between parties to

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70. Bangladesh/Myanmar Situation, Registry's Observations on the Victims' Joint Request Concerning Hearings Outside the Host State (ICC-01/19-34) (Sept. 21, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_05354.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_05354.PDF).

71. Bangladesh/Myanmar Situation, Corrected Version of "Decision on Victims' Joint Request Concerning Hearings Outside the Host State" (26 October 2020, ICC-01/19-38) (Oct. 27, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_05877.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_05877.PDF).

72. Hannah Beech et al., "Kill All You See": In a First, Myanmar Soldiers Tell of Rohingya Slaughter, N.Y. TIMES, Sept. 8, 2020, <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html>

73. *Id.*

74. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Gambia v. Myanmar ICJ App.), Application Instituting Proceedings and Requesting Provisional Measures (Nov. 11, 2019) available at <https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf>.

75. Press Release, International Court of Justice, The Court to hold public hearings from Tuesday 10 to Thursday 12 December 2019 (Nov. 18, 2019).

76. The Gambia v. Myanmar, Verbatim Record, pg. 6, <https://www.icj-cij.org/public/files/case-related/178/178-20191210-ORA-01-00-BI.pdf>.

77. Gambia v. Myanmar ICJ App., *supra* note 76, Order.

78. *Id.* at 10.

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the Genocide Convention.<sup>79</sup> The ICJ found that there was “real and imminent risk [of] irreparable prejudice” to rights under the Genocide Convention<sup>80</sup> and ultimately unanimously granted four provisional measures, ordering Myanmar to do the following:

1. Take “all measures” to prevent genocidal acts against the Rohingya in its territory;
2. Ensure that its military or other armed groups subject to its control do not engage in acts related to genocide;
3. Preserve evidence regarding Genocide Convention claims at issue; and
4. Submit within four months a report on all measures taken to implement the provisional measures and every six months thereafter.<sup>81</sup>

The first two provisional measures listed above reiterate Myanmar’s obligations under the Genocide Convention. Myanmar confidentially submitted the initial four-month report to the ICJ in May 2020,<sup>82</sup> but the report has not been released publicly.

In September 2020, Canada and the Netherlands announced their intentions to intervene in the case against Myanmar.<sup>83</sup> Previously, the Maldives had also announced its intention to intervene in the case.<sup>84</sup> Thus far, however, no state has formally done so.

Though not publicly available, The Gambia’s Memorial filed on October 23, 2020 is reportedly over 500 pages long and includes over 5,000 pages of supporting materials.<sup>85</sup> Myanmar’s response to the Memorial is due on July 23, 2021.<sup>86</sup>

In June 2020, The Gambia sued Facebook in U.S. district court seeking data of various Burmese individuals, including officials and military officers, for The Gambia’s case against Myanmar in the ICJ.<sup>87</sup> The action is based on

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79. *Id.* at 13.

80. *Id.* at 22.

81. *Id.* at 23–24.

82. *Myanmar Submits First Report on Rohingya to UN’s Top Court*, AL JAZEERA (May 24, 2020), <https://www.aljazeera.com/news/2020/5/24/myanmar-submits-first-report-on-rohingya-to-uns-top-court> .

83. Joint Statement of Canada and the Kingdom of the Netherlands Regarding Intention to Intervene in The Gambia v. Myanmar Case at the International Court of Justice (Sept. 2, 2020), <https://www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice> .

84. *Maldives Hires Amal Clooney to Represent Rohingya at UN*, AL JAZEERA (Feb. 26, 2020), <https://www.aljazeera.com/news/2020/2/26/maldives-hires-amal-clooney-to-represent-rohingya-at-un> .

85. *The Gambia Submits Case Against Myanmar for Rohingya Genocide*, South Asian Monitor (Oct. 24, 2020), <https://southasianmonitor.net/en/issues/the-gambia-submits-case-against-myanmar-for-rohingya-genocide> .

86. *Gambia v. Myanmar* ICJ App., *supra* note 76, Order, at 2.

87. *U.S. court asked to force Facebook to release Myanmar officials’ data for genocide case*, REUTERS (June 10, 2020), <https://www.reuters.com/article/us-myanmar-rohingya-world-court/u-s-court->

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28 U.S.C. § 1782, which provides a process for litigants before foreign and international courts to obtain court-aided evidence in the United States. Arguing that compliance would violate the Stored Communications Act (codified at 18 U.S.C. § 2702(a)), Facebook opposed the request.<sup>88</sup>

C. MYANMAR INDEPENDENT COMMISSION OF EXPERTS

On January 20, 2020, just days before the ICJ issued its order, the Myanmar-established Independent Commission of Enquiry (ICOE) announced that it submitted a 461-page Executive Summary to the Myanmar President, and only some of the thirty-six purported annexes were released publicly.<sup>89</sup> Myanmar had established the ICOE in July 2018 with a mandate to “investigate the allegations of human rights violations and related issues” with a view to ensuring full accountability.<sup>90</sup> The ICOE, which has been broadly criticized for a lack of objectivity,<sup>91</sup> comprises four members from the Philippines, Japan, and Myanmar.

The ICOE found that “war crimes, serious human rights violations, and violations of domestic law took place during the security operations between 25 August and 5 September 2017.”<sup>92</sup> The ICOE also found that members of Myanmar security forces were involved in some of these acts.<sup>93</sup> But the report did not indicate findings of evidence of genocide,<sup>94</sup> and cited the lack of evidence of specific intent.<sup>95</sup> The ICOE also claimed it could not find any credible evidence of rape by Myanmar’s security forces.<sup>96</sup> The executive summary concludes with twenty-two recommendations that address the ICOE’s findings.<sup>97</sup>

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asked-to-force-facebook-to-release-myanmar-officials-data-for-genocide-case-idUSKBN23H2E3.

88. Poppy McPherson, *Facebook Rejects Request to Release Myanmar Officials’ Data for Genocide Case*, REUTERS (Aug. 6, 2020), <https://www.reuters.com/article/us-myanmar-facebook/facebook-rejects-request-to-release-myanmar-officials-data-for-genocide-case-idUSKCN2521PI>.

89. Independent Commission of Enquiry, *Executive Summary of Independent Commission of Enquiry—ICOE Final Report* (Jan. 21, 2020), <https://reliefweb.int/report/myanmar/executive-summary-independent-commission-enquiry-icoe> [hereinafter ICOE Exec Summ. Final Rep.].

90. Independent Commission of Enquiry, *Key Terms*, available at <https://www.icoe-myanmar.org/key-terms> (last visited Oct. 28, 2020).

91. See, e.g., Human Rights Watch, *Myanmar: Government Rohingya Report Falls Short*, (Jan. 22, 2020).

92. Press Release, Independent Commission of Enquiry (Jan. 20, 2020), <https://www.icoe-myanmar.org/icoe-pr-final-report>.

93. *Id.*

94. *Myanmar Finds War Crimes But No Genocide in Rohingya Crackdown*, AL JAZEERA (Jan. 21, 2020), <https://www.aljazeera.com/news/2020/1/21/myanmar-finds-war-crimes-but-no-genocide-in-rohingya-crackdown>.

95. Press Release, Independent Commission of Enquiry (Jan. 20, 2020), available at <https://www.icoe-myanmar.org/icoe-pr-final-report>.

96. ICOE Exec Summ. Final Rep., *supra* note 89, at 6.

97. *Id.* at 12-14.

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D. U.N. INDEPENDENT INVESTIGATIVE MECHANISM FOR MYANMAR

In 2018, the Human Rights Council established the Independent Investigative Mechanism for Myanmar (IIMM) to

collect, consolidate, preserve[,] and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional, or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.<sup>98</sup>

The IIMM subsequently took possession of the material gathered by the Human Rights Council's Independent International Fact-Finding Mission on Myanmar. To date, Myanmar has not allowed the IIMM to conduct investigations within Myanmar; however, the IIMM is able to conduct investigations, including interviews of refugee witnesses, in neighboring Bangladesh, as well as through open source evidence.

In September 2020, the head of the IIMM issued his second annual report.<sup>99</sup> Among other things, the report (1) identified complications from the COVID-19 pandemic; (2) discussed advances in various logistical measures, such as recruiting, training, and construction of office space; (3) mentioned the May 2020 issuance of its inaugural bulletin; and (4) described development of an evidence management framework for collection, analysis, and sharing of evidence (with one "prosecutorial authority" and two states involved in the ICJ litigation).<sup>100</sup>

The IIMM also took two important steps to aid outreach to victims, affected communities, stakeholders, and the interested public. First, it established a website available in English and Burmese.<sup>101</sup> Second, it established a Facebook page, also available in both languages.<sup>102</sup> This second action is particularly important because Facebook is widely used in Myanmar and the region.<sup>103</sup> The IIMM also recently confirmed that, after lengthy

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98. UN Human Rights Council, Resolution Adopted By the Human Rights Council on 27 September 2018, P. 5 (Oct. 3, 2018), <https://undocs.org/en/A/HRC/RES/39/2> .

99. UN Human Rights Council, Report of the Independent Investigative Mechanism for Myanmar (July 7, 2020), <https://iimm.un.org/wp-content/uploads/2020/08/G2016493.pdf> .

100. *Id.*

101. United Nations Independent Investigative Mechanism for Myanmar, <https://iimm.un.org/> .

102. Press Release, Myanmar Mechanism Launches Facebook Page, United Nations Independent Investigative Mechanism for Myanmar, <https://iimm.un.org/myanmar-mechanism-launches-facebook-page/>.

103. *Facebook Users in Myanmar*, NAPOLEONCAT (Jan. 2020), <https://napoleoncat.com/stats/facebook-users-in-myanmar/2020/01>.



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negotiations with Facebook, it had started to receive some of the data it has requested from Facebook relevant to its investigations.<sup>104</sup>

E. ARGENTINA DOMESTIC COURT

In November 2019, Rohingya and Latin American human rights groups sued in Argentinian domestic court, alleging crimes against humanity and genocide against a raft of Myanmar officials, including Aung San Suu Kyi, under the concept of universal jurisdiction.<sup>105</sup> In December 2019, a court rejected the lawsuit, but in May 2020, Argentina's Federal Criminal Chamber No. 1 reversed and agreed to consider additional information as to whether the case would be duplicative of efforts by the ICC.<sup>106</sup>

F. MYANMAR DOMESTIC PROSECUTIONS

Myanmar engaged in a handful of domestic prosecutions for crimes against Rohingya in 2020, including a June court-martial conviction of three military personnel.<sup>107</sup> But many observers consider these actions less-than-genuine prosecutions and instead attempt to limit responsibility to lower-level perpetrators, while at the same time trying to prevent international prosecutions on the basis that the crimes are being addressed domestically.<sup>108</sup>

V. A Proposed New Treaty on Crimes Against Humanity

Ever since the Whitney R. Harris Institute at Washington University Law School published a proposed treaty on crimes against humanity in 2010,<sup>109</sup> there has been an increasingly robust discussion within the United Nations about the possibility of a new global convention on crimes against humanity. The International Law Commission (ILC) specifically added "crimes against humanity" to its long-term program of work in 2013.<sup>110</sup> The ILC emphasized how a new treaty would complement the Rome Statute in four key elements of a new convention: (1) a definition tracking Article 7 of the ICC Statute; (2) a State obligation to criminalize crimes against humanity in

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104. Poppy McPherson, *Facebook Shares Data on Myanmar with United Nations Investigators*, REUTERS (Aug. 25, 2020), <https://www.reuters.com/article/us-myanmar-facebook-idUSKBN25L2G4>.

105. Burmese Rohingya Organization UK, *Complaint (Certified Translation)* (Nov. 11, 2019), <https://burmacampaign.org.uk/media/Complaint-File.pdf>.

106. Tun Khin, *Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide*, OPINIO JURIS (Oct. 23, 2020).

107. Human Rights Watch, *Myanmar: Court Martial Latest Accountability Sham* (Jul. 3, 2020), <https://www.hrw.org/news/2020/07/03/myanmar-court-martial-latest-accountability-sham#>.

108. *Id.*

109. See *Forging a Convention for Crimes Against Humanity* (Leila Nadya Sadat, ed., 2013, 2d ed.) available at <http://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/convention-text/>.

110. Leila Nadya Sadat, *A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity*, 16 J. INT'L CRIM. L. 683 (2018).

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their domestic legal systems; (3) robust interstate cooperation procedures; and (4) a clear obligation to prosecute or extradite offenders.<sup>111</sup>

While many States were initially cautious about the idea, support for the new treaty grew with each successive report of the ILC.<sup>112</sup> By 2017, when the ILC submitted the first reading of a complete set of Draft Articles on Prevention and Punishment of Crimes Against Humanity (Draft Articles) to the UN Sixth Legal Committee, only four out of fifty-five States (China, India, Iran, and Sudan) offered negative views.<sup>113</sup> In December 2018, the ILC received a record number of approximately 750 comments on the First Draft, including thirty-nine States,<sup>114</sup> which were largely positive.<sup>115</sup>

The ILC completed a second and final reading of Draft Articles with revised commentary in August 2019, and in doing so, it took into account the comments it had received from States, international organizations, civil society, as well as those in the Special Rapporteur's Fourth Report.<sup>116</sup> The 2019 ILC text contains fifteen Draft Articles and one Annex, covering the scope of the convention, the definition of the crime, general obligations of states to prevent and punish crimes against humanity, *non-refoulement*, criminalization under national law, jurisdiction, investigation, *aut dedere aut judicare*, fair treatment of the accused, victim participation, extradition, mutual legal assistance, and dispute settlement.<sup>117</sup> The 2019 Draft Articles are accompanied by extensive Commentaries and, on the basis of the Draft Articles, the ILC recommended their adoption either as a convention by the General Assembly or by an international conference of plenipotentiaries.<sup>118</sup>

The work of the Commission provides a strong basis for the adoption of a new convention and was favorably received by many States during the 2019 Session of the Sixth Committee. Austria proposed hosting a diplomatic

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111. Int'l Law Comm'n, *Report on the Work of Its Sixty-Fifth Session*, U.N. Doc. A/68/10 (2013), Ann. B.

112. Whitney R. Harris World Law Institute, *Compilation of Government Reactions to the UN International Law Commission's Project on Crimes Against Humanity During UN Sixth Committee Meetings: 68th Session (2013) – 74th Session (2019)*, available at <https://law.wustl.edu/wp-content/uploads/2020/08/Compilation-of-6th-Committee-Responses-to-CAH-2013-2019.pdf>.

113. Leila Nadya Sadat & Madaline George, *An Analysis of State Reactions to the ILC's Work on Crimes Against Humanity: A Pattern of Growing Support*, 6 AFRICA J. INT'L CRIM. J. 162 (2020).

114. In comparison, the ILC received twenty submissions from twenty-four States on the Draft Code of Crimes Against the Peace and Security of Mankind in 1993 (Denmark, Finland, Iceland, Norway, and Sweden jointly submitted observations). *Yearbook of the International Law Commission*, Vol. II (Part One) (1993), at 59. In 1994, the Working Group on a draft statute for an international criminal court received twenty-seven submissions from thirty-one States. *Yearbook of the International Law Commission*, Vol. II (Part One) (1994), at 21.

115. Sadat & George, *supra* note 113.

116. Int'l Law Comm'n, *Report on the Work of Its Seventy-First Session*, U.N. Doc. A/74/10 (2019) [hereinafter "ILC 2019 Draft Articles"]; Sean Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/725, 18 February 2019.

117. ILC 2019 Draft Articles, *supra* note 116.

118. *Id.*

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conference, but some States felt they had not had enough time between the Commission's August report and the Sixth Committee's meeting to fully evaluate the Commission's work and consult with their capitals.<sup>119</sup> Accordingly, and because the Sixth Committee operates by consensus, a decision was taken to postpone consideration until the 2020 session of the ILC. Austria delivered a statement on behalf of forty-two other States<sup>120</sup> expressing disappointment that the Sixth Committee was unable to agree on an "ambitious and structured approach" for future deliberations on the ILC Draft Articles. UN General Assembly Resolution A/74/187 on crimes against humanity, therefore "took note" of the Draft Articles and decided to consider the question more fully this year.<sup>121</sup>

Unfortunately, although many States made comments, with the pandemic, difficult working conditions in New York seemingly prevented a full and robust debate. The Sixth Committee discussion was once again largely positive, but as of this writing, no resolution has been adopted. Austria and other states have requested the establishment of an "adequate forum and efficient consultation process that allows for in-depth discussion . . . [including] the establishment of an ad-hoc committee for the intersessional period, with a specific mandate and timeline."<sup>122</sup> It may be that such a group is convened for 2020-21; if not, next year, the Sixth Committee will once again be taking up the ILC's important work.

## VI. Conducting Investigations in a Virtual World

The COVID-19 pandemic has resulted in the widespread adoption of technology platforms that provide for remote, virtual interactions between people who are otherwise socially distancing. These technologies have been applied to the internal investigations process, allowing many of its interpersonal activities to now be conducted remotely via Zoom or other similar technologies.

Traditional face-to-face witness interviews are increasingly being conducted remotely. Interview participants can connect from essentially any location with minimal effort and expense—a particular benefit in international investigations, where the time and cost of travel can otherwise be quite significant.

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119. Int'l Law Comm'n, *Report on the work of its seventy-first session (2019): Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session, prepared by the Secretariat*, U.N. Doc. A/CN.4/734, at paras. 129-131 (Feb. 12, 2020), <https://documents-cds-ny.un.org/doc/UNDOC/GEN/N20/026/16/PDF/N2002616.pdf?OpenElement>.

120. Statement by Austria (on behalf of 42 other countries), 74th Session of the General Assembly, Sixth Committee, under agenda item 79 (20 November 2019).

121. *Id.*

122. Statement by Amb. Alexander Marschik, Permanent Mission of Austria to the U.N., Oct. 14, 2000, *available at* [https://www.un.org/en/ga/sixth/75/pdfs/statements/cah/05mtg\\_austria.pdf](https://www.un.org/en/ga/sixth/75/pdfs/statements/cah/05mtg_austria.pdf)

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Virtualization, however, fundamentally alters certain aspects of an attorney's practice—for example, the way documents can be presented and discussed with a witness. Screen-sharing allows an attorney to focus a witness directly on a particular portion of a document, but it removes the witness's ability to thumb through the document as if it were physically on their desk. In some instances, it may be preferable to distribute a set of documents (either physically or by email)<sup>123</sup> to the witness in advance of the interview; but the need to preserve the confidentiality of the investigation or the desire to avoid a pre-interview document review by the witness may make such a practice inadvisable. Alternative options include sending documents electronically in advance (embedded within a password-protected zip file) and providing the password at the outset of the interview; or sending documents in a sealed, physical binder and asking the witness to open the seal onscreen when the interview begins. Note that while these latter options prevent the witness from reviewing documents before the interview, they do not mitigate confidentiality issues associated with the witness possessing the material afterward.

Remote witness interviews raise other unique scenarios implicating privacy, confidentiality, information security, and other aspects of the attorney-client relationship. Parties must verify that the platform itself is secure and encrypted while complying with applicable data privacy laws.<sup>124</sup> Additionally, it is critical that the witness participates from a private location accessible only to specific invitees, and that the witnesses are provided appropriate guidance concerning the interview, including expectations regarding confidentiality,<sup>125</sup> who else will be present, and who they are expected to speak to (or avoid speaking to) during the interview.

Conducting remote interviews also creates the possibility that the attorney(s) and witness are not in the same jurisdiction. Therefore, it is important to be mindful of any cross-border issues. Parties should determine where documents are "stored" and the data privacy laws and blocking statutes in all applicable jurisdictions,<sup>126</sup> as well as consider the possibility of a document previously outside a jurisdiction becoming available as part of civil discovery within that jurisdiction.

With care and thought, virtual interviews can be an appropriate substitute to protect everyone's safety amidst the practice—and will likely remain a

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123. See *City of Reno v. Reno Police Protective Ass'n*, 59 P.3d 1212, 1218 (2002) (holding that confidential documents transmitted via email are protected by attorney client privilege); *In re Asia Global Crossings, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (establishing four requirements for a reasonable expectation of privacy in privileged communication).

124. See e.g., *The Budapest Convention on Cybercrime* (2001) T.I.A.S 131, E.T.S. No. 185 (Encrypted platforms may still be accessible to law enforcement in certain jurisdictions.).

125. See e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389(1981).

126. *The Sedona Conference International Principles for Addressing Data Protection in Cross-Border Government & Internal Investigations*, 19 SEDONA CONF. J. 2, available at <https://thesedona.conference.org/sites/default/files/publications/International%20Investigations%20Principles%20%282018%29.pdf>.

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significant part of cross-border internal investigations even when the pandemic has resolved.

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## **International Litigation**

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### **I. Foreign Sovereign Immunities Act**

Foreign states are presumptively immune from suit, and their property is presumptively immune from attachment and execution, unless an exception in the Foreign Sovereign Immunities Act (“FSIA”) applies.<sup>1</sup>

#### **A. RETROACTIVE EFFECT**

In *Opati v. Republic of Sudan*, the U.S. Supreme Court held that 2008 amendments to the FSIA permitting punitive damages for federal law claims against a sovereign under the terrorism exception in Section 1605(A)(c) authorized punitive damages for an injury occurring before the enactment of such amendments.<sup>2</sup> Writing for a unanimous Court,<sup>3</sup> Justice Gorsuch acknowledged that while “legislation usually applies only prospectively,” in this case, “Congress was as clear as it could have been” in authorizing punitive damages for past conduct.<sup>4</sup> The Court rejected Sudan’s suggestion that a “super-clear” statement rule should apply for retroactive applications

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\* This article summarizes developments in international litigation during 2020. 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 Katie Gonzalez, Leila Mgaloblishvili, Canem Ozyildirim, Abigail Gotter-Nugent, and Paul Kleist, associates at the same firm. Theodore J. Folkman, founder of Folkman LLC in Boston, authored Section II. Phillip B. Dye, Jr., a partner at Vinson & Elkins L.L.P. in Houston, Texas, authored Sections III and VIII, with assistance from Brooke Noble and Caroline Stewart, associates at the same firm. Matthew D. Slater, a partner at Cleary Gottlieb in Washington, D.C., authored Section IV, with assistance from Alexis Lazda and Sam Fuller, associates at the same firm. Howard S. Zelbo, a partner at Cleary Gottlieb in New York, authored Section V, with assistance from Ms. Gonzalez, Ms. Mgaloblishvili, and Mr. Kleist. Igor V. Timofeyev, Charles A. Patrizia, and Joseph R. Profaizer, partners at Paul Hastings LLP in Washington, D.C., authored Sections VI and IX.

1. 28 U.S.C. § 1602 (1976).

2. *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020).

3. *Id.* (Justice Kavanaugh took no part in the decision).

4. *Id.* at 1607.

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of punitive measures.<sup>5</sup> Having resolved the issue as to the federal claims, the Court remanded the case to the U.S. Court of Appeals for the D.C. Circuit for further consideration regarding whether punitive damages are also available under state law.<sup>6</sup>

**B. JURISDICTIONAL EXCEPTION**

Three recent decisions by the U.S. Court of Appeals for the Second Circuit clarify the distinction between sovereign and commercial conduct. In *Pablo Star Ltd. v. Welsh Government*, the Second Circuit affirmed the district court's denial of a motion to dismiss in a copyright infringement case, finding that the Government of Wales's use of a photograph to promote domestic tourism was not "quintessentially governmental" conduct for purposes of Section 1605(a)(2)'s commercial activities exception.<sup>7</sup> The Second Circuit disregarded Wales's argument that its actions were governmental in nature, noting that the publication of advertising materials is routinely performed by private businesses.<sup>8</sup> The court also found that the conduct had the requisite "substantial contact" with the United States because Wales distributed its materials to American publications.<sup>9</sup>

The Second Circuit reached the opposite conclusion regarding the nature of commercial activity in a case involving Section 1605(a)(3)'s expropriation exception. In *Rukoro v. Federal Republic of Germany*, the court found that four New York properties purchased by Germany allegedly with expropriated funds—including a townhouse and a condominium—were not used in connection with a commercial activity, as required by the FSIA, because the properties were used to house German diplomats and institutions engaged in cultural programs.<sup>10</sup> The court found this to be paradigmatically sovereign activity, even though the programs could promote commercial, as well as cultural, growth.<sup>11</sup> The Second Circuit distinguished *Rukoro* from *Pablo Star* by explaining that "taking out advertisements promoting activities that are meant to encourage tourism is not the same as actually providing the activities."<sup>12</sup>

In *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, the Second Circuit determined that a letter sent by the Greek government to an auction house demanding repatriation of a figurine was not a commercial act.<sup>13</sup> Even though private actors regularly intervene in the market to assert property rights, the court found that "Greece's enactment and enforcement of

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5. *Id.* at 1609.

6. *Id.* at 1610.

7. *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 563 (2d Cir. 2020).

8. *Id.* at 565.

9. *Id.* at 566.

10. *Rukoro v. Fed. Republic of Ger.*, 976 F.3d 218, 226 (2d Cir. 2020).

11. *Id.*

12. *Id.* at 227.

13. *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 201 (2d Cir. 2020).

patrimony laws that declare the figurine to be the property of Greece” were two archetypical sovereign activities.<sup>14</sup>

### C. JURISDICTION OVER CRIMINAL CASES

In *United States v. Halkbank*, the U.S. District Court for the Southern District of New York denied a Turkish state-owned bank’s motion to dismiss an indictment charging violations of U.S. sanctions against Iran, holding that a foreign state-owned entity could be subject to criminal jurisdiction in the United States.<sup>15</sup> In so doing, the court joined the U.S. Courts of Appeals for the D.C., Tenth, and Eleventh Circuits, which have similarly found that the FSIA does not preclude jurisdiction over foreign sovereign entities in criminal cases.<sup>16</sup> The *Halkbank* decision also rejected the defendant bank’s defenses relating to common-law sovereign immunity, constitutional due process, and extraterritoriality, effectively expanding the potential scope of criminal liability and strengthening prosecutorial discretion on questions of sovereign immunity.<sup>17</sup>

## II. International Service of Process

The Hague Service Convention establishes a system of central authorities to facilitate transmission of requests for service abroad, but it does not prohibit the use of alternative methods of service.<sup>18</sup> In particular, it preserves “the freedom to send judicial documents, by postal channels, directly to persons abroad . . . [p]rovided the State of destination does not object.”<sup>19</sup> In *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co.*,<sup>20</sup> the prevailing party in an international arbitration against a Chinese company sought and obtained a default judgment on the award in the California courts. Even though China had objected to service by postal channels, the party served the petition and a summons on the Chinese company (SinoType) by Fedex, which the parties agreed was a

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14. *Id.* at 195–196.

15. *United States v. Halkbank*, No. 15 CR 867 (RMB), 2020 WL 5849512, at \*1, \*7 (S.D.N.Y. Oct. 1, 2020).

16. *See* *In re Grand Jury Subpoena*, 912 F.3d 623, 634 (D.C. Cir. 2019) (affirming criminal contempt order against a state-owned enterprise); *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1213 (10th Cir. 2019) (holding that, in the RICO context, if Congress intends to make sovereigns “immune from criminal indictment under the FSIA,” it “should amend the FSIA to expressly so state”); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (finding that the “FSIA addresses neither head-of-state immunity, not foreign immunity in the criminal context”).

17. *Halkbank*, 2020 WL 5849512 at \*6.

18. Convention for Service Abroad of Judicial and Extrajudicial Documents, *proclaimed* Jan. 8, 1969, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969).

19. *Id.* art. 10(a), at 169.

20. *Rockefeller Tech. Inv. (Asia) VII v. Changzhou SinoType Tech. Co. Ltd.*, 460 P.3d 764, 776 (Cal.), *cert. denied*, 141 S. Ct. 374 (2020).



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“postal channel” as understood by the Convention.<sup>21</sup> When SinoType sought to set aside the judgment as void for insufficient service of process, the judgment creditor argued that the Convention did not apply.<sup>22</sup>

The California Supreme Court held that the Convention did not apply, on two separate grounds.<sup>23</sup> First, it held that the parties had, by agreement, waived formal service of process under California law and agreed to an alternative form of notification, namely, notification by Fedex.<sup>24</sup> Although the California Supreme Court is the final word on California law, its holding raised—but also sidestepped—an important question of federal law. Specifically, the Convention applies “in all cases, in civil or commercial matters, where there is occasion to transmit a judicial . . . document for service abroad.”<sup>25</sup> It is a self-executing treaty and therefore trumps inconsistent state law.<sup>26</sup> The consideration is whether the Convention, and thus federal law, allows private litigants to “contract around” a foreign state’s objection under the Convention to service by postal channels. Such a result could be problematic because objections to Article 10(a) are expressly authorized by the Convention and binding on the United States as a matter of customary international law.<sup>27</sup> To the extent that a constituent state violates an obligation under the Convention, the United States is responsible under international law.<sup>28</sup> Service by postal channels in China violates Chinese law.<sup>29</sup> The transmission of the summons and petition by postal channels in China can thus be seen as an affront to China’s domestic law and international rights, and not merely a matter of SinoType’s personal rights that SinoType could waive.<sup>30</sup> At the same time, enforcement of the default judgment would not have raised an issue if SinoType had simply failed to plead insufficient service of process as an affirmative defense because application of routine procedural rules, such as the requirement to plead affirmative defenses, is consistent with international law even when a claim arises under a treaty.<sup>31</sup>

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21. See *Conclusions & Recommendation on the Practical Operation of the Hague Apostille, Evidence & Service Conventions*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ¶ 56 (2003), <https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf>.

22. *Rockefeller*, 460 P.3d at 768, 771.

23. *Id.* at 771.

24. *Id.* at 774.

25. Convention for Service Abroad of Judicial and Extrajudicial Documents, *supra* note 18, art. 1.

26. See *Volkswagenwerk AG v. Schlunk*, 986 U.S. 694, 699 (1988).

27. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313(2)(a), (3) (AM. L. INST. 1987).

28. See *id.* § 321.

29. CHINA INTERNATIONAL COMMERCIAL COURT, CIVIL PROCEDURE LAW OF THE PEOPLE’S REPUBLIC OF CHINA (2017), <http://cicc.court.gov.cn/html/1/219/199/200/644.html>.

30. See CHINA INTERNATIONAL COMMERCIAL COURT, CIVIL PROCEDURE LAW OF THE PEOPLE’S REPUBLIC OF CHINA: CHAPTER VII TIME PERIODS AND SERVICE (2017), <http://cicc.court.gov.cn/html/1/219/199/200/644.html>; see also *Rockefeller Tech. Inv. (Asia) III v. Changzhou Sinotype Tech. Co., Ltd.*, 460 P.3d 764, 775–76 (Cal. 2020).

31. See, e.g., *Breard v. Greene*, 523 U.S. 371, 375–76 (1998).

The California Supreme Court also decided that the Convention did not apply based on a second ground: the delivery of the summons and petition to the defendant did not constitute formal service of process.<sup>32</sup> Again, the California court is the final word on what is or is not formal service of process as a matter of California law. However, the Convention and federal law have defined service of process as “a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action,”<sup>33</sup> and the delivery of the summons and petition, which were necessary to the entry of the default judgment against SinoType, clearly met that standard. Although states have leeway to decide when it is necessary to transmit a summons abroad instead of serving it at home, as demonstrated by *Schlunk*, it is a far greater step to allow states to effectively evade the Convention by interpreting the scope of the federal and international understanding of “service of process.”

### III. Personal Jurisdiction

A touchstone of “specific” personal jurisdiction is that the defendant has “purposefully avail[ed] itself of the privilege of conducting activities within the forum State.”<sup>34</sup> Courts continue to struggle to find a consistent framework for analyzing the purposefulness of contacts created through an untargeted website. Since a website is accessible anywhere, an untargeted website does not always show that the defendant directed activities at any particular forum.<sup>35</sup> It appears settled that the operation of a website, without more, is insufficient to create the contacts necessary for either general<sup>36</sup> or specific<sup>37</sup> jurisdiction. But it remains unclear what additional contacts are necessary to establish the necessary purposeful availment.

In *Curry v. Revolution Labs., LLC*, the Seventh Circuit found that a non-resident purposefully directed its activities at Illinois when it created an interactive website that explicitly allowed Illinois residents to purchase the defendant’s products and ship them to Illinois.<sup>38</sup> The court noted that the non-resident defendant required its customers to select a shipping address and that Illinois was among the “ship-to” options from which the customers

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32. *Rockefeller*, 460 P.3d at 775–76.

33. *Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 700.

34. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *cf.* *Curry v. Revolution Lab’y, LLC*, 949 F.3d 385, 393 (7th Cir. 2020) (“[t]he Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgements of a forum with which he has established no meaningful contacts, ties, or relations”) (internal citations omitted).

35. *Cf. Curry*, 949 F.3d at 400 (“[s]ignificant caution is certainly appropriate when assessing a defendant’s online contacts with a forum to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state”).

36. *See Fidrych v. Marriott Int’l, Inc.*, 952 F.3d 124, 134 (4th Cir. 2020); *Chen v. U.S. Sports Acad., Inc.*, 956 F.3d 45, 53 (1st Cir. 2020).

37. *See Fidrych*, at 139.

38. *Curry*, 949 F.3d at 399.

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must chose.<sup>39</sup> By contrast, the Fourth Circuit in *Fidrych v. Marriott International* found that the inclusion of South Carolina in a drop-down address menu on a hotel booking website did not evidence activities directed at South Carolina.<sup>40</sup>

In another case, the Fourth Circuit found that a website owner did purposefully direct its activities to Virginia, where the website displayed advertising directly targeted at Virginia residents.<sup>41</sup> Even though the defendant did not control the content of the advertisements himself, the court found that he facilitated the targeted advertising by “collecting and selling visitors’ [location] data.”<sup>42</sup> The Fourth Circuit further noted that the defendant knew that his website was being accessed in Virginia, and that the defendant profited from the Virginia website visitors.<sup>43</sup> The Ninth Circuit, on the other hand, found that geo-targeted advertisements controlled by a third party did not establish purposeful contacts with Arizona.<sup>44</sup>

The First and Tenth Circuits also considered cases alleging specific personal jurisdiction based on untargeted websites. Both courts found they lacked personal jurisdiction.<sup>45</sup> As personal jurisdiction jurisprudence evolves alongside an interconnected technological world, there is still uncertainty as to whether or how a defendant’s operation of an untargeted website will establish specific personal jurisdiction.

#### IV. The Act of State Doctrine

The act of state doctrine is a prudential limitation on the exercise of judicial review, requiring U.S. courts to refrain from judging the validity of acts of a foreign sovereign taken within its own territory.<sup>46</sup>

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39. *Id.*

40. *Fidrych*, 952 F.3d at 143–42 (“South Carolina’s inclusion on a list of every other state in the country (and every other country in the world) shows that Marriott was willing to accept reservations from South Carolina residents, but it does not show that Marriott was targeting South Carolina residents through its website”).

41. *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 353 (4th Cir. 2020).

42. *Id.* at 354.

43. *Id.* (“[The defendant] knew the Websites were serving Virginian visitors and yet took no actions to limit or block access, all while profiting from the data harvested from the same visitors”).

44. *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1211 (9th Cir. 2020) (“[i]f such geo-located advertisements constituted express aiming, [the defendant] could be said to expressly aim at *any* forum in which a user views the website. . . . To find specific jurisdiction based on this would run afoul of the Supreme Court’s directive in *Walden* and ‘impermissibly allow[] a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis.’”) (emphasis added).

45. *See Chen*, 956 F.3d at 46; *XMission, L.C. v. Fluent LLC*, 955 F.3d 833, 850 (10th Cir. 2020).

46. *See, e.g., WS Kirkpatrick & Co., Inc. v. Env’t. Tectonics Corp. Int’l*, 493 U.S. 400, 406 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

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A. SCOPE

Courts continue to confront the territorial limits of the doctrine, particularly regarding extraterritorial effects. A specific application of the doctrine is that “courts of the United States ‘will not examine the validity of a taking of property within its own territory by a foreign sovereign government.’”<sup>47</sup> This past year, the United States District Court for the Southern District of New York decided a case in which Venezuela’s state oil company and associated entities sought a declaratory judgment that the oil company’s debt was entered into and issued illegally, and thus void,<sup>48</sup> and that the Venezuelan National Assembly properly invalidated the debt.<sup>49</sup> The court held that the Assembly’s resolutions were acts of a sovereign because the U.S. government recognized the Assembly as Venezuela’s lawful government, but it held that the debt’s situs was outside of Venezuela.<sup>50</sup> The court reasoned that the debt’s situs was in New York because payment was required in New York, the “paying agent, transfer agent, registrar, and depository [were] all based in New York,” the debtholders were in New York, and “the collateral [was] sitting in a vault in New York.”<sup>51</sup>

By contrast, in another case, a defendant’s counterclaims alleging that a Danish tax authority unlawfully refused to issue refunds were dismissed because they required that the court examine the validity of a sovereign Danish act concluded in Denmark.<sup>52</sup>

B. GOVERNMENT OFFICIALS’ ALLEGED MISCONDUCT

Alleged misconduct of government officials falls outside the act of state doctrine when performed individually and not as part of an official act or order.<sup>53</sup> When the Mexican state of Chihuahua sued its former governor, Cesar Horacio Duarte Jaquez, in a U.S. court, Duarte claimed that the doctrine required dismissal because the court would be required to pass

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47. *Petroleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 495 F. Supp. 3d 257, 270 (S.D.N.Y. 2020) (quoting *Sabbatino*, 376 U.S. at 428); see also Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l B.V., No. 14-CV-712 (SHS), 2020 WL 4349840, at \*4-5 (S.D.N.Y. July 29, 2020) (holding the act-of-state doctrine bars a court from reviewing the validity of the trademark transfer between a government and a company within its jurisdiction).

48. *Petroleos de Venezuela*, 495 F. Supp. 3d at 261.

49. *Id.* at 289.

50. *Id.* at 275–76 (The doctrine’s application to internationally wrongful acts raises different questions); see, e.g., *De Csepel v. Republic of Hungary*, No. 1:10-CV-01261(ESH), 2020 WL 2343405, at \*30 (D.D.C. May 11, 2020) (appeal filed June 10, 2020) (court rejected claims that intervening acts following the Nazi-allied Hungarian government’s confiscation of art from a Jewish collector would permit the doctrine to apply).

51. *Petroleos de Venezuela*, 495 F. Supp. 3d at 265.

52. *In re Cust. and Tax Admin. of Kingdom of Den. (SKAT) Tax Refund Litig.*, No. 18-CV-9797, 2020 WL 378046, at \*1-2 (S.D.N.Y. Jan. 23, 2020).

53. *Free and Sovereign State of Chihuahua v. Duarte Jaquez*, No. EP-20-CV-00086-DCG, 2020 WL 3977672, at \*6 (W.D. Tex. July 14, 2020).

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judgment on official acts of a foreign sovereign.<sup>54</sup> The U.S. District Court for the Western District of Texas held that Duarte's theft was not subject to the doctrine because it was performed individually for private financial benefit.<sup>55</sup> The court distinguished cases involving property looted by Ferdinand Marcos, former president of the Philippines, because Marcos issued an executive order facilitating his theft, while Duarte did not.<sup>56</sup>

In addition, in *Celestin v. Martelly*, the court for the Eastern District of New York applied the act of state doctrine to Haitian presidential orders that allegedly enabled a price fixing scheme between prior and current presidents on one hand and banks on the other.<sup>57</sup> The court held that because the orders were official acts ratified by government officials, it could not inquire into whether the orders had a legitimate purpose, a required element for plaintiffs to proceed with litigating their claims.<sup>58</sup>

## V. International Discovery

### A. OBTAINING U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

Recent decisions of the United States Courts of Appeals for the Second, Fourth, and Seventh Circuits have intensified the circuit split on the important question of whether 28 U.S.C. § 1782, which permits U.S. courts to order discovery "for use in a proceeding in a foreign or international tribunal," can be used to obtain discovery for private international arbitration proceedings.<sup>59</sup>

In *In re Application of Hanwei Guo*, the Second Circuit held that discovery under section 1782 is only available if the proceeding at issue is before a foreign governmental or intergovernmental tribunal, court, or other state-sponsored body.<sup>60</sup> In so doing, the Second Circuit adhered to its twenty-one-year-old precedent in *National Broadcasting Co. v. Bear Stearns & Co.*,<sup>61</sup> rejecting arguments that the precedent was effectively overruled by dicta in the U.S. Supreme Court's subsequent ruling in *Intel Corp. v. Advanced Micro Devices, Inc.*, and stating that the term "tribunal," as used in the statute, did encompass "arbitral tribunals."<sup>62</sup>

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54. *Id.* at \*2.

55. *Id.* at \*3.

56. *Id.*

57. *Celestin v. Martelly*, 450 F. Supp. 3d 264, 272 (E.D.N.Y. 2020); *see also* *Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV*, 456 F. Supp. 3d 1059, 1065 (W.D. Wis. 2020) (In this antitrust case, the doctrine precluded monopolization claims involving a Canadian government agency's restrictions on beer sales.).

58. *Celestin*, 450 F. Supp. 3d at 270–71.

59. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 690 (7th Cir. 2020), cert. granted, 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021).

60. *Hanwei Guo v. Deutsche Bank Sec.*, 965 F.3d 96, 102 (2d Cir. 2020).

61. *Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 185 (1999).

62. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004).

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The Fourth Circuit reached the opposite conclusion in *Servotronics, Inc. v. Boeing Co.*<sup>63</sup> Looking to the purpose of the statute as well as its plain language, the Fourth Circuit concluded that the 1964 amendments expanding section 1782 to include “disputes before not only foreign *courts* but before all foreign and international *tribunals*” evidenced Congress’ intent to include private international arbitral tribunals within the meaning of the statute.<sup>64</sup> The Fourth Circuit dismissed concerns that applying section 1782 to arbitration would contribute to inefficiencies and delays in those proceedings, noting that discovery under section 1782 was limited and subject to the district court’s wise discretion.<sup>65</sup> However, in a later, related proceeding, the Court of Appeals for the Seventh Circuit analyzed how the words “foreign or international tribunal” are used in different statutes, and held that a private international arbitration was *not* a “tribunal” under § 1782.<sup>66</sup> The Seventh Circuit’s most recent decision therefore tips the scales in favor of finding that section 1782 discovery is not permitted for use in private international arbitrations, with the Second, Fifth, and Seventh Circuits now aligned on this issue, in contrast with the Fourth and Sixth Circuits,<sup>67</sup> which have ruled that section 1782 *is* available in private international arbitrations.<sup>68</sup>

The federal district courts have also considered the application of section 1782 to private arbitration—and are similarly conflicted.<sup>69</sup> In *In re EWE Gasspeicher GmbH*, the U.S. District Court for the District of Delaware drew from Second and Fifth Circuit jurisprudence to find that a private commercial arbitration was not a “tribunal” within the meaning of section 1782,<sup>70</sup> whereas the U.S. District Court for the Northern District of California held that “the ordinary meaning of ‘tribunal’ draws the conclusion that § 1782(a) applies to private arbitral tribunals.”<sup>71</sup> Both district court decisions are on appeal.<sup>72</sup>

The decisions reveal a 3-2 circuit split which may soon widen in light of the pending appeals before the Third and Ninth Circuits.<sup>73</sup> However,

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63. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020).

64. *Id.* at 213.

65. *Id.* at 215.

66. *Rolls-Royce*, 975 F.3d at 694–695.

67. See *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710, 714 (6th Cir. 2019).

68. *Id.*

69. *In re EWE Gasspeicher GmbH*, CV 19-MC-109-RGA, 2020 WL 1272612, at \*3 (D. Del. Mar. 17, 2020).

70. *Id.*

71. *HRC-Hainan Holding Co., LLC v. Yihan Hu*, 19-MC-80277-TSH, 2020 WL 906719, at \*7 (N.D. Cal. Feb. 25, 2020).

72. See *In re EWE Gasspeicher GmbH*, 2020 WL at \*3; *HRC-Hainan Holding Co., LLC*, 2020 WL 906719 at \*7.

73. Armeen Mistry, *Supreme Court Asked to Resolve Circuit Split on Discover in Private Commercial Arbitration Outside the United States*, AMERICAN BAR ASSOCIATION (Dec. 23, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2021/01/circuit-split-discovery/](https://www.americanbar.org/groups/business_law/publications/blt/2021/01/circuit-split-discovery/).

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*certiorari* was granted in *Servotronics v. Rolls-Royce* to resolve the circuit split on applicability of 1782 to private international commercial arbitration.<sup>74</sup>

**B. OBTAINING DISCOVERY FROM ABROAD FOR USE IN U.S. PROCEEDINGS**

U.S. courts frequently compel the production of documents located abroad for use in U.S. proceedings, even despite the presence of foreign blocking statutes.<sup>75</sup> Although there was some speculation that courts may consider the European Union’s General Data Protection Regulation (“GDPR”) differently from other foreign blocking statutes, recent decisions indicate that courts are inclined to apply the same multi-factor comity analysis as they have historically.<sup>76</sup> Using the analysis set forth in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*,<sup>77</sup> courts have found that the GDPR’s privacy constraints do not outweigh U.S. national interest in obtaining discovery.<sup>78</sup>

**VI. Extraterritorial Application of United States Law**

**A. ALIEN TORT STATUTE**

In *Nestlé USA, Inc. v. Doe I*, the Supreme Court is considering whether domestic U.S. corporations are subject to liability under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, and whether an aiding and abetting claim based on allegations of corporate oversight in the United States may overcome the extraterritoriality bar.<sup>79</sup> Plaintiffs in the case are former child slaves in the Ivory Coast who contended that the defendants, U.S. food-producers, aided human rights abuses on the cocoa plantations where they worked.<sup>80</sup> The district court dismissed plaintiffs’ claims as seeking an impermissible extraterritorial application of the ATS.<sup>81</sup>

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74. *Servotronics*, 975 F.3d at 690.

75. Gary Adler & Susanna Chu, *All the World’s a Stage: International Implications of the New Rule’s on Electronic Discovery*, BINGHAM MCCUTCHEN LLP, [https://www.morganlewis.com/~media/files/docs/archive/rad1b87apdf.ashx](https://www.morganlewis.com/~/media/files/docs/archive/rad1b87apdf.ashx).

76. See George L. Washington, Jr., *An Examination of Factors Considered By U.S. Courts in Ruling on Requests to Conduct Discovery of Information Located in Foreign Counties*, AMERICAN BAR ASSOCIATION (Aug. 8, 2014), [https://www.americanbar.org/content/dam/aba/events/labor\\_law/am/2014/7b\\_washington.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/7b_washington.pdf).

77. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 547 (1987).

78. See, e.g., *AnywhereCommerce, Inc. v. Ingenico, Inc.*, 19-CV-11457-IT, 2020 WL 5947735, at \*1-2 (D. Mass. Aug. 31, 2020); *Giorgi Glob. Holdings, Inc. v. Smulski*, CV 17-4416, 2020 WL 2571177, at \*1 (E.D. Pa. May 21, 2020); *In re Mercedes-Benz Emissions Litig.*, 16-CV-881 (KM) (ESK), 2020 WL 487288, at \*5-7 (D.N.J. Jan. 30, 2020).

79. *Doe v. Nestle, S.A.*, 929 F.3d 623 (9th Cir. 2019), *cert. granted sub nom.* *Cargill, Inc. v. Doe I*, 141 S. Ct. 184 (2020), and *cert. granted sub nom.* *Nestle USA, Inc. v. Doe I*, 141 S. Ct. 188 (2020).

80. *Id.*

81. *Doe v. Nestle, S.A.*, 929 F.3d 623, 637–38 (9th Cir. 2019).

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The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the suit may continue insofar as plaintiffs' aiding and abetting allegations concern defendants' domestic conduct.<sup>82</sup> The Ninth Circuit then denied rehearing *en banc* over an eight-judge dissent arguing that plaintiffs' claims were impermissibly extraterritorial.<sup>83</sup> Six of the dissenting judges also argued that, under *Jesner v. Arab Bank, PLC*,<sup>84</sup> domestic corporations are no longer subject to liability under the ATS.<sup>85</sup> The Supreme Court granted certiorari on both questions, and heard argument on December 1, 2020. The Court's decision is expected by the end of the Term.

**B. WIRE FRAUD ACT**

The U.S. Courts of Appeals for the First and the Ninth Circuits rejected extraterritoriality challenges to convictions under the Wire Fraud Act, 18 U.S.C. § 1343, in *United States v. McLellan*<sup>86</sup> and *United States v. Hussain*,<sup>87</sup> respectively. The wire fraud statute contains three elements: "(1) a scheme to defraud, (2) use of the wires in furtherance of the scheme and (3) a specific intent to deceive or defraud."<sup>88</sup> In both cases, the defendant challenged his conviction arguing that the focus of section 1343 is on the first element—the "scheme to defraud"—and that the alleged fraud occurred in a foreign country.<sup>89</sup> Both courts rejected that argument, holding that the statute's focus is on the second element.<sup>90</sup> The courts then upheld the relevant conviction because the offense involved the use of domestic wires in furtherance of a scheme to defraud, and therefore represented a domestic application of the statute.<sup>91</sup> As a result, neither circuit reached the "difficult questions about whether Congress intended the statute to apply extraterritorially."<sup>92</sup>

**C. DEFEND TRADE SECRETS ACTS**

In the first decision to squarely address the question of whether the Defend Trade Secrets Act of 2016, applies extraterritorially, the U.S. District Court for the Northern District of Illinois held in *Motorola Solutions, Inc. v. Hytera Communications Corp.* that it does.<sup>93</sup> The DTSA amended the

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82. *Id.* at 639–42.

83. *See Doe*, 929 F.3d at 633–37 (Bennett, J., dissenting from denial of rehearing *en banc*).

84. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1419–20 (2018).

85. *See Doe*, 929 F.3d at 627–33 (Bennett, J., dissenting from denial of rehearing *en banc*).

86. *United States v. McLellan*, 959 F.3d 442 (1st Cir. 2020).

87. *United States v. Hussain*, 972 F.3d 1138 (9th Cir. 2020).

88. *Id.* at 1143 (internal quotation marks and citation omitted).

89. *McLellan*, 959 F.3d at 469; *Hussain*, 972 F.3d at 1143.

90. *McLellan*, 959 F.3d at 469; *Hussain*, 972 F.3d at 1143–45.

91. *Hussain*, 972 F.3d at 1145; *McLellan*, 959 F.3d at 471.

92. *McLellan*, 959 F.3d at 468; *see also Hussain*, 972 F.3d at 1143.

93. *Motorola Sols., Inc. v. Hytera Communications Corp.*, 436 F. Supp. 3d 1150, 1159 (N.D. Ill. 2020). (Prior to that decision, some courts "have assumed" that the DTSA can apply extraterritorially.).



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previously enacted Economic Espionage Act of 1996 (EEA), which had created federal criminal liability for trade secrets misappropriation.<sup>94</sup> Section 1837 of the EEA expressly allows extraterritorial application of its provisions if (1) the offender is a natural person who is a U.S. citizen or permanent resident, or “an organization organized under the laws of the United States;” or (2) “an act in furtherance of the offense was committed in the United States.”<sup>95</sup> The DTSA created a private civil right of action in federal court for owners of trade secrets misappropriated by others, and codified that right as part of the EEA in 18 U.S.C. § 1836(b).<sup>96</sup>

The district court acknowledged that extraterritorial application of section 1836(b) was “not an easy question,” especially given the Supreme Court’s “distinction between extraterritorial criminal application and private application of the RICO statute.”<sup>97</sup> After examining the statutory language and structure, however, the court found the requisite “clear indication” that Congress intended “to extend the extraterritorial provisions of section 1837 to section 1836,” so that the DTSA “may have extraterritorial reach subject to the restrictions in section 1837.”<sup>98</sup>

## VII. Recognition and Enforcement of Foreign Judgments

In U.S. courts, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the Convention) governs the recognition and enforcement of most foreign arbitral awards.<sup>99</sup> State law, however, governs the recognition and enforcement of foreign court judgments.

### A. FOREIGN ARBITRAL AWARDS

In *EGI-VSR, LLC v. Coderch Mitjans*, the Eleventh Circuit considered a challenge to enforcement of an arbitral award ordering specific performance,

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94. Economic Espionage Act (EEA) 18 U.S.C. § 1832 (1996) (*amended by* Defend Trade Secrets Act (DTSA) 18 U.S.C. § 1832 (2016)).

95. 18 U.S.C. § 1837.

96. *Id.* at § 1836.

97. *Motorola Sols.*, 436 F. Supp. 3d at 1159 (discussing *RJR Nabisco, Inc. v. European Cmty.* 136 S. Ct. 2090 (2016)).

98. *Id.* at 1162; *see, e.g.*, *Inventus Power, Inc. v. Shenzhen Ace Battery Co.*, No. 20-CV-3375, 2020 WL 3960451, at \*7 (N.D. Ill. July 13, 2020); *Personalize Inc. v. Magnetize Consultants Ltd.*, 437 F. Supp. 3d 860, 878 (W.D. Wash. 2020) (giving examples of courts reaching a similar conclusion).

99. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 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, implemented in Chapter 3 of the FAA, governs the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified it).

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as opposed to a monetary award.<sup>100</sup> The court found that the nature of the award was irrelevant for determining whether it was confirmable, but was “relevant to crafting the appropriate remedy.”<sup>101</sup> Accordingly, the court found that the lower court had erred by ordering the defendant-appellant to pay a put price for the securities at issue rather than enforcing the corresponding requirement that the plaintiff-appellee tender those securities upon payment.<sup>102</sup> The court also held that the put price would be converted into U.S. dollars per the “breach day” rule—using the exchange rate in effect on the date the award was issued—because the enforcement action had arisen under U.S. law.<sup>103</sup>

In another notable decision, the Tenth Circuit in *Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.* considered whether, in an action to confirm a foreign arbitral award, “the only contacts that matter” for personal jurisdiction “are those relating to the arbitration” or “contacts relating to the underlying claim” are also pertinent.<sup>104</sup> Joining four other federal appellate courts, the Tenth Circuit concluded that the proper jurisdictional inquiry takes into account the foreign defendant’s “forum activities in connection with the claim that led to the arbitration,” and held that personal jurisdiction existed in the case because the foreign defendant had met with the plaintiff in the U.S. multiple times during the negotiations leading to the underlying claim.<sup>105</sup>

Lastly, in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, the U.S. Supreme Court held that domestic equitable estoppel doctrines are applicable to the enforcement of arbitration agreements, an issue foundational to the enforcement of arbitral awards.<sup>106</sup> The Supreme Court held that the Convention does not “conflict[] with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories” under certain circumstances, reversing an Eleventh Circuit decision where the court had interpreted the Convention to require that “the parties *actually sign* an arbitration agreement” to compel arbitration.<sup>107</sup> The Court also refused to interpret Article II(3) of the Convention, requiring courts to refer parties to arbitration when asked to consider a case subject to a valid arbitration agreement, as “set[ting] a ceiling that tacitly precludes the use of domestic law to enforce arbitration agreements.”<sup>108</sup>

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100. *EGI-VSR, LLC v. Coderch Mitjans*, 963 F.3d 1112 (11th Cir. 2020), *cert. denied sub nom. Mitjans v. EGI-VSR, LLC*, 141 S. Ct. 1075 (2021).

101. *Id.* at 1124.

102. *Id.*

103. *Id.* at 1123.

104. *Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 970 F.3d 1269, 1285–86 (10th Cir. 2020).

105. *Id.* at 1287–88.

106. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020).

107. *Id.* at 1642–43.

108. *Id.* at 1645.

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**B. FOREIGN COURT JUDGMENTS**

In *SAS Institute, Inc. v. World Programming Ltd.*, the Fourth Circuit held that comity concerns did not prevent the U.S. District Court for the Eastern District of North Carolina from granting injunctive relief undermining a collateral attack in English courts by World Programming Ltd. (WPL) on an outstanding U.S. court judgment against it.<sup>109</sup> WPL obtained a judgment from the English court allowing it to “claw back” two-thirds of any amount it paid in satisfaction of a \$79.1 million North Carolina jury verdict in favor of SAS arising from WPL’s breach of a software licensing agreement.<sup>110</sup> The English court also issued an injunction purporting to prevent SAS from taking further steps to enforce the U.S. judgment in separate proceedings in California.<sup>111</sup> On appeal, WPL focused on comity considerations, but the Fourth Circuit, while acknowledging the importance of comity generally, held that it would not be decisive “when a foreign country condones an action brought solely to interfere with a final U.S. judgment,” or when “one country enjoins legitimate collection efforts in another country.”<sup>112</sup> The Fourth Circuit also found that the lower court had “showed great respect for comity” because the “anti-clawback” injunction it issued applied only to sums collected in the United States, and that the lower court’s injunction was necessary to prevent its own decision from being “rendered completely hollow.”<sup>113</sup>

**VIII. Forum Non Conveniens**

A plaintiff is usually entitled to its choice of forum unless a court determines, through the *forum non conveniens* analysis, that another forum would be more convenient. As part of the multi-prong analysis, courts must give some level of deference to the plaintiff’s choice of forum.<sup>114</sup> In 2020, several courts clarified that a U.S.-based plaintiff’s choice of forum should be accorded substantial deference, regardless of whether the plaintiff is joined by foreign plaintiffs, but that the deference can be overcome by other factors.<sup>115</sup>

In *Otto Candies LLC v. Citigroup Inc.*, the United States Court of Appeals for the Eleventh Circuit made clear that, unlike foreign plaintiffs, a domestic plaintiff’s choice of forum should be accorded substantial deference, even when the domestic plaintiff invests in a foreign company.<sup>116</sup> The lower court

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109. *SAS Institute, Inc. v. World Programming Ltd.*, 952 F.3d 513, 524 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1053 (2021).

110. *Id.* at 519–520.

111. *Id.*

112. *Id.* at 525.

113. *Id.* at 521, 525.

114. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–256 (1981) (“When the home forum has been chosen, it is reasonable to assume that this choice is convenient”).

115. *Behrens v. Arconic, Inc.*, 487 F. Supp. 3d 283, 318 (E.D. Pa. 2020).

116. *Otto Candies LLC v. Citigroup Inc.*, 963 F.3d 1331, 1340 (11th Cir. 2020).

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gave less deference to the two U.S.-based plaintiffs' choice to sue in the United States because they invested in a foreign company whose operations were abroad.<sup>117</sup> With respect to the domestic plaintiffs' international business, the Eleventh Circuit refused to create a "foreign investment" exception to the strong presumption in favor of a domestic plaintiff's choice of forum, especially when the defendant was a U.S. entity.<sup>118</sup> The Eleventh Circuit also rejected the U.S. defendant's argument that the deference to the two domestic plaintiffs should be reduced because they were significantly outnumbered by the number (thirty-seven) of foreign plaintiffs.<sup>119</sup>

Although the Eleventh Circuit's decision reinforced the presumption in favor of a domestic plaintiff's choice of forum, a recent decision from the U.S. Court of Appeals for the District of Columbia Circuit illustrates the type of evidence required for a domestic plaintiff's choice of forum to be overcome.<sup>120</sup> In *In re Air Crash Over the Southern Indian Ocean on Mar. 8, 2014*, the D.C. Circuit affirmed the *forum non conveniens* dismissal of claims brought by personal representatives and beneficiaries of deceased passengers on Malaysia Airlines Flight MH370, which disappeared in the Southern Indian Ocean.<sup>121</sup> Although only three of the 227 passengers were U.S. citizens, the aircraft (a Boeing 777-2H6ER) was designed and manufactured in Washington state.<sup>122</sup> The D.C. Circuit found that the district court had properly given some deference to the choice of the sole U.S. citizen plaintiff (who was serving as personal representative of the estate of his brother, also a U.S. citizen), but agreed with the lower court that the deference could not overcome the significant evidentiary problems that the parties would encounter by proceeding in a U.S. court,<sup>123</sup> as well as the fact that the connection to the United States was "overshadowed by Malaysia's overwhelming interest in the resolution of claims concerning this national disaster."<sup>124</sup> The appellate court acknowledged the issue of the practical difficulties involved in trying the case in the United States, but emphasized that the most pressing factor was "Malaysia's public interest in hearing claims arising out of Flight MH370's disappearance," which "far outweigh[ed] that of the United States, even as to the tort claims asserted against U.S.-based manufacturer Boeing."<sup>125</sup>

Together, the Eleventh Circuit and D.C. Circuit decisions illustrate that a domestic plaintiff's decision to sue in the United States will receive a high level of deference, even when the plaintiff faces other jurisdictional

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117. *Id.* at 1339.

118. *Id.* at 1340–43.

119. *Id.* at 1343–45 (citing *Carijano v. Occidental Petrol. Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011); *Simon v. Republic of Hung.*, 911 F.3d 1172, 1183 (D.C. Cir. 2018)).

120. *See In re Air Crash Over the S. Indian Ocean on Mar. 8, 2014*, 946 F.3d 607 (D.C. Cir. 2020), *cert. denied sub nom.* *Wood v. Boeing Co.*, 141 S. Ct. 451 (2020).

121. *Id.* at 610.

122. *Id.* at 611–612.

123. *Id.* at 614.

124. *Id.*

125. *In re Air Crash Over the S. Indian Ocean*, 946 F.3d at 613.

headwinds, but that deference can be overcome, especially when based on considerations of national interest.

## **IX. Parallel Proceedings**

### **A. INTERNATIONAL ABSTENTION**

In *Bugliotti v. Republic of Argentina*, the U.S. Court of Appeals for the Second Circuit clarified when abstention in favor of a foreign proceeding is proper under the doctrine of “adjudicative” international comity.<sup>126</sup> The case involved one of the many actions to recover unpaid amounts of defaulted Argentine sovereign debt, but had an unusual feature of plaintiffs having participated in an Argentine governmental tax credit program under which the plaintiffs’ bonds were “held in trust for their benefit.”<sup>127</sup> After the plaintiffs’ bonds reached maturity, but Argentina did not repay the principal, one of the plaintiffs brought an *amparo* proceeding in an Argentine court seeking a declaration that Argentina’s postponement of its payment obligations was unconstitutional under Argentine law.<sup>128</sup> The district court dismissed the complaint, holding that under the doctrine of adjudicative international comity, abstention was appropriate in deference to the pending *amparo* proceeding.<sup>129</sup> The Second Circuit, however, vacated that ruling, citing the “general rule” that “concurrent proceedings regarding the same question are tolerated.”<sup>130</sup> The appellate court held that “abstention on the grounds of adjudicative international comity would be appropriate only upon a ‘clear justification’ supported by considerations which are ‘not generally present as a result of parallel litigation.’”<sup>131</sup> Although the appellate court acknowledged the district court’s attention to the importance of the tax credit program to Argentina and “Argentina’s ‘greater interest’ in the litigation,”<sup>132</sup> it stressed that such considerations were not “exceptional” and “would be present in virtually every case implicating an important foreign governmental program.”<sup>133</sup>

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126. *Bugliotti v. Republic of Arg.*, 952 F.3d 410, 411 (2d Cir. 2020).

127. *Id.*

128. *Id.* at 412.

129. *Id.* (also ruling that the complaint should be dismissed because under Argentine trust law, plaintiffs no longer “owned” the bonds despite being beneficiaries of the trusts in which they were held, and further vacating that ruling because it concluded that the relevant question is “not whether Plaintiffs ‘own’ the bonds but whether they may sue to enforce them”).

130. *Id.* at 415 (quoting *Leopard Marine & Trading, Ltd. v. Easy St. Ltd.*, 896 F.3d 174, 191 (2d Cir. 2018)).

131. *Id.* (quoting *Royal & Sun Alliance Ins. Co. of Canada v. Century Int’l Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006)).

132. *Bugliotti*, 952 F.3d at 415.

133. *Id.* (quoting *Bugliotti v. Republic of Argentina*, No. 17-CV-9934, 2019 WL 586091, at \*3 (S.D.N.Y. Jan. 15, 2019) (noting that it “ha[s] singled out only one type of foreign governmental program—namely, foreign bankruptcy regimes—as categorically sufficient to trigger comity-based abstention”) (citing *Royal & Sun*, 466 F.3d at 92–93)).

B. ANTI-SUIT INJUNCTIONS

In *MWK Recruiting Incorporated v. Jowers*, the U.S. Court of Appeals for the Fifth Circuit disapproved of a district court's use of the logical-relationship test when determining whether to grant a foreign anti-suit injunction.<sup>134</sup> There, an employee who had been sued in Texas brought a defamation suit against his former employer in Hong Kong.<sup>135</sup> The district court enjoined the employee from prosecuting his Hong Kong lawsuit.<sup>136</sup> Applying the three-prong test, the district court acknowledged that the Hong Kong litigation “would *not* pose an inequitable hardship” to the plaintiffs in the Texas action, and “would *not* frustrate and delay the district court's determination,” but nonetheless concluded that an injunction was appropriate because “the claims in the Hong Kong suit ‘substantially and logically duplicate’ those in the domestic case.”<sup>137</sup>

The Fifth Circuit vacated the injunction, finding that that the district court had erroneously applied the logical-relationship test in two respects.<sup>138</sup> First, the circuit court held that the district court had incorrectly focused on the similarity of the facts involved in the two suits, whereas the logical-relationship test properly focused on “*legal*, not *factual*, similarity.”<sup>139</sup> Second, the district court had effectively “lower[ed] the bar for antisuit injunctions” to an extent that would make them “much more commonplace, given that only some relevant factual connection would render a foreign suit duplicative.”<sup>140</sup> This result, the Fifth Circuit explained, would run contrary to the principle that an anti-suit injunction “is ‘an extraordinary remedy’” that must strike the right balance between “the need to prevent vexatious or oppressive litigation and to protect the court's jurisdiction against the need to defer to principles of international comity.”<sup>141</sup>

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134. *MWK Recruiting Inc. v. Jowers*, 833 F. App'x 560, 564 (5th Cir. 2020).

135. *Id.* at 561.

136. *Id.*

137. *Id.* at 562–63.

138. *Id.* at 560.

139. *Id.* at 564.

140. *Jowers*, 833 F. App'x at 564. (The Fifth Circuit underlined that in this case, “the two other factors that help to establish vexatious or oppressive litigation—inequitable hardship along with frustration and delay—were admittedly absent”).

141. *Id.* at 562 (quoting *Karaba Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003)).

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## Sexual Orientation and Gender Identity

MARK E. WOJCIK\*

This article surveys selected legal developments around the world related to sexual orientation and gender identity during 2020.<sup>1</sup> A backdrop to all of the events discussed was the global pandemic of COVID-19, which effectively shut down most of the world for most of 2020.<sup>2</sup> Additionally, the electoral victory of President Joe Biden, in November 2020, signaled the end of many anti-gay and anti-trans policies of the Trump administration. The 2020 presidential elections also saw Pete Buttigieg become the first viable, openly gay Presidential candidate (and who, in February 2021, became Secretary of Transportation and the first openly gay member of a Presidential Cabinet). Legal protections around the world continued to increase for same-sex couples, and advances were made in non-discrimination laws to protect LGBTQ persons. But the situations for LGBTQ persons around the world vary greatly, and many still face violence, criminal sanction, and even the death penalty.

### I. Hate Crimes, Violence, and Discrimination

LGBT persons endured hate crimes and violence around the world in 2020. In the United States, the Southern Poverty Law Center noted a forty-three percent increase in the number of anti-LGBTQ hate groups, from forty-nine groups in 2018 to seventy groups in 2019.<sup>3</sup>

The period of October 2019 and September 2020 was particularly bad for transgender and gender-diverse persons. According to data gathered by Transrespect Versus Transphobia Worldwide, a research arm of the advocacy network Transgender Europe, at least 350 transgender and gender-diverse

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1. Because of space limitations, this article cannot include all the legal developments in sexual orientation and gender identity around the world during 2020. For developments during 2019, see Mark E. Wojcik, *Sexual Orientation and Gender Identity*, 53 ABA/SIL YIR 271 (2020). For developments during 2018, see Mark E. Wojcik, David W. Austin, Andrea Deffenu, and Jon Fortin, *Sexual Orientation and Gender Identity*, 53 ABA/SIL YIR 263 (2019).

2. See, e.g., Graeme Reid, *Global Trends in LGBT Rights During the Covid-19 Pandemic*, HUMAN RIGHTS WATCH (Feb. 24, 2021), available at <https://www.hrw.org/news/2021/02/24/global-trends-lgbt-rights-during-covid-19-pandemic#> (“It’s impossible to evaluate what the year 2020 looked like from the perspective of lesbian, gay, bisexual and transgender people’s rights without recognizing how Covid-19 put a spanner in the works and made for an especially tumultuous year, including for LGBT people.”).

3. Julie Moreau, *Anti-LGBTQ hate groups on the rise in U.S., report warns*, NBC NEWS (Mar. 30, 2020), <https://www.nbcnews.com/feature/nbc-out/anti-lgbtq-hate-groups-rise-u-s-report-warns-n1171956>.



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people were murdered during that period.<sup>4</sup> The number represents a six percent increase in reported murders from the previous period when 331 trans and gender non-conforming people were murdered.<sup>5</sup> Of the seventy-five countries tracked in the survey, Brazil had the highest number with 152 trans people killed.<sup>6</sup> Mexico ranked second with fifty-seven murders, and the United States ranked third with twenty-eight murders of trans people.<sup>7</sup>

Discrimination and violence against LGBTQ persons was especially pronounced in countries such as Egypt, Hungary, and Poland.

Human Rights Watch reported in 2020 that “Egyptian police and National Security Agency officers arbitrarily arrest lesbian, gay, bisexual, and transgender (LGBT) people and detain them in inhuman conditions, systematically subject them to ill-treatment including torture, and often incite fellow inmates to abuse them . . . .”<sup>8</sup> Homosexuality is not illegal in Egypt but authorities have used laws criminalizing “debauchery” and prostitution against LGBTQ persons.<sup>9</sup> Egyptian police also subjected LGBTQ persons to forced anal examinations.<sup>10</sup>

In Hungary, the Parliament passed legislation in May 2020 to replace the category of “sex” on the civil registry with the category of “sex assigned at birth.”<sup>11</sup> Because the civil registry is used for all legal identity documents for Hungarian citizens, the change has made it impossible to have legal gender recognition, the process by which trans and intersex people can bring their documents into alignment with their gender identity.<sup>12</sup> The change was described as “a major backwards step on transgender and intersex rights, and yet another violation of Hungary’s international rights obligations.”<sup>13</sup> The change was pushed through “at a time when the government has used the Covid-19 pandemic as a pretext to grab unlimited power and is using parliament to rubber-stamp problematic non-public health related bills, like this one.”<sup>14</sup> In November 2020, an amendment to the Hungarian

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4. Derrick Clifton, *At Least 350 Transgender People Have Been Killed Globally in 2020*, THEM (Nov. 11, 2020), <https://www.them.us/story/at-least-350-transgender-people-killed-globally-in-2020>.

5. *Id.*

6. *Id.*

7. *Id.*

8. HUMAN RIGHTS WATCH, *Egypt: Security Forces Abuse, Torture LGBT People* (Oct. 1, 2020), <https://www.hrw.org/news/2020/10/01/egypt-security-forces-abuse-torture-lgbt-people>.

9. *See id.*

10. *Id.* (“Police forced three men, a transgender girl, and a transgender woman to undergo anal examinations. In one case, after a man presented his disability card to the police, officers inserted the card up his anus.”).

11. *Hungary rolls back legal protections, puts trans and intersex people at risk*, ILGA-Europe (May 19, 2020), <https://ilga-europe.org/resources/news/latest-news/hungary-rolls-back-legal-protections-puts-trans-and-intersex-people-risk>.

12. *Id.*

13. Kyle Knight and Lydia Gall, *Hungary Ends Legal Recognition for Transgender and Intersex People*, HUMAN RIGHTS WATCH (May 21, 2020), <https://www.hrw.org/news/2020/05/21/hungary-ends-legal-recognition-transgender-and-intersex-people>.

14. *Id.*

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Constitution was put forward to restrict adoption to married couples and thus exclude LGBT families, a measure that Human Rights Watch described as “an affront to common European values.”<sup>15</sup>

And in Poland, the ruling Law and Justice Party, supported by religious leaders, continued to scapegoat and attack LGBTQ persons for political ends.<sup>16</sup> Additionally, six Polish towns also declared themselves to be “LGBT-Free Zones.”<sup>17</sup> The European Union cut off funding to those six Polish towns, “a rare financial sanction of a member nation for issues related to the equal treatment of its citizens.”<sup>18</sup>

Because of violence against LGBTQ persons around the world, there is a large number of asylum applications based on LGBTQ status. The Williams Institute at UCLA School of Law estimated in 2021 that at least 11,400 asylum applications based on LGBT status were filed in the United States between 2012 and 2017.<sup>19</sup>

## II. Sodomy Laws

States that criminalize sexual acts between consenting adults violate international human rights law because sodomy laws, “by their mere existence, violate the rights to privacy and non-discrimination.”<sup>20</sup> 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*, some sixty-nine states still have laws that criminalize and harass people on the basis of their sexual orientation and gender expression.<sup>21</sup> Countries that may punish consensual acts of homosexuality with the death penalty include Brunei, the Islamic Republic of Iran, Mauritania, Saudi Arabia, Yemen, and parts of Nigeria and Somalia.<sup>22</sup>

In July 2020, after the toppling in 2019 of Omar al-Bashir, the nation of Sudan announced that it would eliminate flogging and the death penalty for

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15. *Hungary: Intensified Attack on LGBT People*, HUMAN RIGHTS WATCH (Nov. 18, 2020), <https://www.hrw.org/news/2020/11/18/hungary-intensified-attack-lgbt-people>.

16. *Poland: Crackdown On LGBT Activists*, HUMAN RIGHTS WATCH (Aug. 7, 2020), <https://www.hrw.org/news/2020/08/07/poland-crackdown-lgbt-activists>

17. Monika Pronczuk, *Polish Towns That Declared Themselves ‘L.G.B.T. Free’ Are Denied E.U. Funds*, N.Y. TIMES (July 30, 2020, updated Apr. 24, 2021), <https://www.nytimes.com/2020/07/30/world/europe/LGBT-free-poland-EU-funds.html>.

18. *Id.* (“While the amounts of money being withheld are modest — from \$6,000 to \$29,000 — the exclusion of the towns from funding for a program that connects local communities across Europe was intended to have a deeper symbolic resonance.”).

19. *Over 11,000 applications for asylum based on LGBT status filed in the US between 2012 and 2017*, WILLIAMS INSTITUTE UCLA (Mar. 4, 2021), <https://williamsinstitute.law.ucla.edu/press/lgbt-asylum-press-release/>.

20. A/HRC/29/23 at 12, ¶ 43.

21. *Id.* at 12–13 (paras. 43 and 44); Benjamin Weinthal, *[United States] urges 69 nations, including Iran, to decriminalize homosexuality*, JERUSALEM POST (Dec. 21, 2019), <https://www.jpost.com/Middle-East/US-urges-69-nations-including-Iran-Yemen-decriminalize-homosexuality-611618>.

22. *Id.* at 13, ¶ 46.

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sodomy.<sup>23</sup> Under Sudan's previous sodomy law, men who had sex with men faced 100 lashes for the first offense, five years in jail for the second offense, and the death penalty for a third offense.<sup>24</sup> The punishments under the new sodomy law will be prison terms, ranging from five years to life.<sup>25</sup>

In December 2020, the Kingdom of Bhutan took final legislative steps to repeal its sodomy law.<sup>26</sup> The National Assembly (the lower house of the Bhutanese parliament) had voted in June 2019 to decriminalize same-sex relationships.<sup>27</sup> The Bhutan Penal Code (2004) had defined the offense of "unnatural sex" as occurring when the defendant "engages in sodomy or any other sexual conduct that is against the order of nature."<sup>28</sup> The offense was a misdemeanor under Bhutanese law<sup>29</sup> and no one was known to have ever been prosecuted under the law,<sup>30</sup> but its presence on the statute books violated the rights of privacy and non-discrimination. Oddly enough, despite having a criminal sodomy statute, the category of "sexual orientation" is a protected category of non-discrimination under Bhutan's Consumer Protection Law.<sup>31</sup> Additionally, the Constitution of Bhutan provides that "[a]ll persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics, or other status."<sup>32</sup> The category of "other status" can be read to include both sexual orientation and gender identity. The legislation to repeal Bhutan's sodomy law still requires approval from the King of Bhutan.<sup>33</sup>

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23. Ban Barkawi and Rachel Savage, 'Great first step' as Sudan lifts death penalty and flogging for gay sex, *REUTERS* (July 16, 2020), <https://www.reuters.com/article/us-sudan-lgbt-rights-trfn/great-first-step-as-sudan-lifts-death-penalty-and-flogging-for-gay-sex-idUSKCN24H30J>.

24. *Id.*

25. *See id.*

26. Mike Ives, *Bhutan Becomes Latest Asian Nation to Dial Back Anti-Gay Laws*, *N.Y. TIMES* (Dec. 12, 2020), <https://www.nytimes.com/2020/12/12/world/asia/bhutan-decriminalizes-gay.html>.

27. *Bhutan: Historic Opportunity to Decriminalize Same-Sex Relationships*, *AMNESTY INTERNATIONAL* (Jan. 9, 2020), <https://www.amnesty.org/en/latest/news/2020/01/bhutan-historic-opportunity-to-decriminalize-same-sex-relationships/>; *see also* Sonam Chuki, *Being LGBT: Their Status and Rights in Bhutan*, 20 *AUSTRALIAN J. ASIAN LAW*, art. 10: 1-8 (2019), available at <https://ssrn.com/abstract=3490388>.

28. Bhutan Penal Code § 213 (2004).

29. *Id.* § 214.

30. *See, e.g., Bhutan: Historic Opportunity to Decriminalize Same-Sex Relationships*, *AMNESTY INT'L* (Jan. 9, 2020), <https://www.amnesty.org/en/latest/news/2020/01/bhutan-historic-opportunity-to-decriminalize-same-sex-relationships/>.

31. Bhutan Consumer Protection Rules and Regulations § 8(c) (2015).

32. BHUTAN CONST. art. 7(15) (2008).

33. *See Ives, supra* note 26.

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### III. Equality and Non-Discrimination

#### A. NON-DISCRIMINATION BASED ON SEXUAL ORIENTATION

As of the end of 2020, ten countries expressly protect sexual orientation under their national constitutions: Bolivia,<sup>34</sup> Cuba,<sup>35</sup> Ecuador,<sup>36</sup> Fiji,<sup>37</sup> Kosovo,<sup>38</sup> Malta,<sup>39</sup> Mexico,<sup>40</sup> Portugal,<sup>41</sup> South Africa,<sup>42</sup> and Sweden.<sup>43</sup> “Sexual orientation” is also protected under the Human Rights Act of New Zealand,<sup>44</sup> the Northern Ireland Act 1988, as amended<sup>45</sup> and the Scotland Act 1988, as amended.<sup>46</sup> “Gender identity” is also expressly protected as an additional category under the constitutions of Bolivia,<sup>47</sup> Cuba,<sup>48</sup> Ecuador,<sup>49</sup> and Malta.<sup>50</sup> The Constitution of Fiji was the first to protect explicitly three categories: sexual orientation, gender identity, and gender expression.<sup>51</sup>

In June 2020, the U.S. Supreme Court ruled in *Bostock v. Clayton County, Georgia*<sup>52</sup> that an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1961. That federal statute makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex . . . .”<sup>53</sup> In deciding whether that language extended to protect someone for being homosexual or transgender, the Supreme Court held that “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or

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34. Plurinational State of Bolivia Const. art. 14(II).

35. Cuba Const. art. 42 (2019). The new Cuban Constitution came into force in April 2019 after it was proclaimed in the Cuban National Assembly and published in the *Official Gazette of the Republic*.

36. Ecuador Const. arts. 11(2) and 83(14).

37. Fiji Const. art. 26(3)(a).

38. Republic of Kosovo Const. art. 24(2).

39. Malta Const. arts. 32, 45(3), and 45(5)(b).

40. *Constitución Política de los Estados Unidos Mexicanos* [C.P.], art. 1 [Political Constitution of the United Mexican States].

41. Portugal Const., art. 13(2).

42. S. Afr. Const., art. 9(3).

43. 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.”).

44. 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.

45. Northern Ireland Act art. 75(1)(a).

46. Scotland Act § L2.

47. Plurinational State of Bolivia Const., art. 14(II).

48. Cuba Const. art. 42 (2019).

49. Ecuador Const., arts. 11(2) and 83(14).

50. A/HRC/29/23 at 19 (para. 72).

51. Fiji Const., art. 26(3)(a).

52. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).

53. 42 U.S.C. § 2000e-2(a)(1).

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actions it would not have questioned in members of a different sex.”<sup>54</sup> Accordingly, “[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”<sup>55</sup>

In November 2020, after the death of Justice Ruth Bader Ginsburg, the U.S. Supreme Court heard oral argument in *Fulton v. City of Philadelphia*.<sup>56</sup> In that case, the city of Philadelphia excluded a religious agency from its foster care system because that agency discriminated against LGBTQ persons. Among the questions before the Court is whether a government violates the First Amendment by conditioning a religious agency’s ability to participate in the foster care system on taking actions and making statements that directly contradict the agency’s stated religious beliefs. A decision in the case is expected by June 2021.

**B. NON-DISCRIMINATION BASED ON GENDER IDENTITY**

Several countries, afford various levels of legal recognition to a non-binary third gender (neither male nor female). These countries include Australia,<sup>57</sup> Austria,<sup>58</sup> Bangladesh,<sup>59</sup> Canada,<sup>60</sup> Chile,<sup>61</sup> Denmark,<sup>62</sup> India,<sup>63</sup> Nepal,<sup>64</sup> the

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54. *Bostock*, 140 S. Ct. at 1737.

55. *Id.* (Gorsuch, J., stated further: “Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”).

56. S. Ct. Docket No. 19-123 (Nov. 4, 2020).

57. *See, e.g., Australian Passports to Have Third Gender Option*, THE GUARDIAN (Sept. 15, 2011), <https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option>; A/HRC/29/23 at 19 (para. 73).

58. 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 G 77/2018-9* (June 15, 2018), *available (in German) at* [https://www.vfgh.gv.at/downloads/VfGH\\_Entscheidung\\_G\\_77-2018\\_unbestimmtes\\_Geschlecht\\_anonym.pdf](https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_77-2018_unbestimmtes_Geschlecht_anonym.pdf).

59. A/HRC/29/23 at 19, ¶ 73.

*See, e.g.,* Mythli Sampathkumar, *Canada to add third gender option to next census*, THE INDEPENDENT (May 16, 2018), <https://www.independent.co.uk/news/world/americas/canada-third-gender-census-lgbtq-rights-spectrum-identity-statistics-a8355031.html>.

60. *See, e.g.,* 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>.

61. *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/>.

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Netherlands,<sup>65</sup> New Zealand,<sup>66</sup> Portugal,<sup>67</sup> and Uruguay.<sup>68</sup> These jurisdictions may issue gender-neutral birth certificates, passports, and other official documents.<sup>69</sup>

#### IV. Marriage Equality

##### A. RECOGNIZING SAME-SEX MARRIAGE

Marriage equality continues to expand around the world. As of the end of 2020, same-sex marriage was legal in Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, many parts of Mexico, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom, the United States, and Uruguay.<sup>70</sup> Same-sex marriage was also recognized in Taiwan as of 2019.<sup>71</sup>

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62. See, e.g., Fikri, *Denmark's New Law Makes Legal Gender Recognition A Lot Easier*, AUTOSTRADDLE (Sept. 4, 2014), available at <https://www.autostraddle.com/denmarks-new-law-makes-legal-gender-recognition-a-lot-easier-253562>.

63. National Legal Services Authority v. Union of India, No. 400 (2012) and No. 604 (2013), available at <http://supremecourtindia.nic.in/outtoday/wc40012.pdf>; see also Mark E. Wojcik, *Male. Female. Other. India Requires Legal Recognition of a Third Gender*, 43:4 INT'L LAW NEWS 1 (2014).

64. 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 at 19, ¶ 73.

65. Sabrina Barr, *Netherlands Issues Gender Neutral Passport for First Time in its History*, THE INDEPENDENT (Oct. 19, 2018) <https://www.independent.co.uk/travel/netherlands-gender-neutral-passport-sex-dutch-leonne-zeegers-a8592091.html>.

66. *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 at 19 (para. 73).

67. Louisa Wright, *Portugal's parliament approves new gender identity bill*, DW (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.”).

68. 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>.

69. See, e.g., *Non-binary*, EQUAL RECOGNITION, <http://equalrecognition.scot/non-binary> (last visited Jun. 4, 2021).

70. Rex Wockner, *Marriage Equality Around the World*, GLOBAL MARRIAGE EQUALITY, <https://wockner2.blogspot.com> (last visited May 31, 2021).

71. *Id.*; see also Austin Ramzy, *Taiwan Legislature Approves Asia's First Same-Sex Marriage Law*, N.Y. TIMES, May 17, 2019, <https://www.nytimes.com/2019/05/17/world/asia/taiwan-gay-marriage.html> (“The legislature faced a deadline imposed by Taiwan’s constitutional court, which in 2017 struck down the Civil Code’s definition of marriage as exclusively between a man and woman. The court gave the government two years to revise the law, or same-sex couples would automatically be allowed to have their marriages registered by the local authorities.”).

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Same-sex marriage is recognized in all U.S. states and territories, with the single exception of American Samoa.<sup>72</sup>

In January 2020, Northern Ireland recognized same-sex marriages (as they already had been in England, Wales, and Scotland).<sup>73</sup> And in May 2020, Costa Rica became the first Central American country to legalize same-sex marriage, implementing a ruling of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica.<sup>74</sup> That ruling was itself implementing a November 2017 decision of the Inter-American Court of Human Rights, instructing Costa Rica and fourteen other nations in the Americas to allow same-sex couples to marry.<sup>75</sup>

Mexico, a federal state, has authorized same-sex marriages to be performed in eighteen of its thirty-one states in the Federal District of Mexico City.<sup>76</sup> Although same-sex marriages cannot be performed in every state, all Mexican states must recognize lawful same-sex marriages performed in other Mexican states.<sup>77</sup> 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.<sup>78</sup>

Countries and territories that may see same-sex marriage in the future include Andorra; Bermuda; Bolivia; Chile; Cuba; Curaçao; Czech Republic (Czechia); El Salvador; Estonia; Honduras; India; Jamaica; Japan; the remaining twelve states of Mexico that do not yet formally recognize same-

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72. Ili Sagapolutele and Jennifer Sinco Kelleher, *American Samoa questions gay marriage validity in territory*, LGBTQ NATION (July 10, 2015), <https://www.lgbtqnation.com/2015/07/american-samoa-questions-gay-marriage-validity-in-territory/>; *but see* Daniel Villareal, *A gay criminal case could help bring marriage equality to American Samoa*, LGBTQ NATION (Nov. 27, 2019), <https://www.lgbtqnation.com/2019/11/gay-criminal-case-help-finally-bring-marriage-equality-american-samoa/>.

73. *See* Peter Coulter, *Same-sex marriage now legal in Northern Ireland*, BBC NEWS (Jan. 13, 2020), <https://www.bbc.com/news/uk-northern-ireland-51086276>.

74. *See* Sophie Lewis, *Costa Rica becomes the first country in Central America to legalize same-sex marriage*, CBS NEWS (May 27, 2020), <https://www.cbsnews.com/news/costa-rica-first-country-central-america-legalize-same-sex-marriage/>; *see also* Javier Corrales, *Same-Sex Marriage in Conservative Costa Rica Was Not a Miracle*, N.Y. TIMES (June 5, 2020), *available at* <https://www.nytimes.com/2020/06/05/opinion/international-world/same-sex-marriage-costa-rica.html> (“It may seem like a miracle that a conservative little country adopted same sex-marriage in the midst of a pandemic.”).

75. Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-24/17 (Nov. 24, 2017), *available at* [https://www.corteidh.or.cr/docs/opiniones/seriea\\_24\\_esp.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf); Rex Wockner, *Worldwide Marriage Equality Watch List*, GLOBAL MARRIAGE EQUALITY, <https://wockner2.blogspot.com/2018/09/worldwide-marriage-equality-watch-list.html> (last visited May 31, 2021).

76. Rex Wockner, *Mexico’s Wild Ride to Marriage Equality*, GLOBAL MARRIAGE EQUALITY, <https://wockner2.blogspot.com/2018/09/mexicos-wild-ride-to-marriage-equality.html> (last visited May 31, 2021).

77. *See, e.g.*, Randal C. Archibold & Paulina Villegas, *Ruling by Ruling, Mexico Has Legalized Same-Sex Marriage*, N.Y. TIMES, June 14, 2015, at A1.

78. Rex Wockner, *Mexico’s Wild Ride to Marriage Equality*, GLOBAL MARRIAGE EQUALITY, <https://wockner2.blogspot.com/2018/09/mexicos-wild-ride-to-marriage-equality.html> (last visited May 31, 2021).

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sex marriage; Namibia; Panama; Paraguay; Peru; the Philippines; Romania; South Korea; Switzerland; Thailand; and Venezuela.<sup>79</sup>

**B. OPPOSING SAME-SEX MARRIAGE**

Despite the advances in marriage equality around the world, some countries amended their national constitutions to avoid having to recognize same-sex marriages. Countries that amended their constitutions to define marriage as a union of a man and a woman include Belarus,<sup>80</sup> Bolivia,<sup>81</sup> Bulgaria,<sup>82</sup> Burundi,<sup>83</sup> Honduras,<sup>84</sup> Hungary,<sup>85</sup> Latvia,<sup>86</sup> Lithuania,<sup>87</sup> Moldova,<sup>88</sup> Montenegro,<sup>89</sup> Mozambique,<sup>90</sup> Nicaragua,<sup>91</sup> Panama,<sup>92</sup> Poland,<sup>93</sup> Rwanda,<sup>94</sup> Serbia,<sup>95</sup> the Seychelles,<sup>96</sup> Slovakia,<sup>97</sup> Somalia,<sup>98</sup> South Sudan,<sup>99</sup> Tajikistan,<sup>100</sup> Uganda,<sup>101</sup> Ukraine,<sup>102</sup> and Vietnam.<sup>103</sup> The constitutions of Peru<sup>104</sup> and Venezuela<sup>105</sup> also provide for common law marriage only between a man and a woman.

**C. CIVIL UNIONS AND OTHER FORMS OF LEGAL RECOGNITION  
THAT FALL 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

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79. Rex Wockner, *Worldwide Marriage Equality Watch List*, GLOBAL MARRIAGE EQUALITY, <https://wockner2.blogspot.com/2018/09/worldwide-marriage-equality-watch-list.html> (last visited May 31, 2021).

80. Belarus Const. art. 32.

81. Plurinational State of Bolivia Const. art. 63(I).

82. Bulgaria Const. art. 46(1).

83. Burundi Const. art. 29.

84. Honduras Const. arts. 112 and 116.

85. Hungary Const. art. L(1).

86. Latvia Const. art. 110.

87. Lithuania Const. art. 38.

88. Moldova Const. art. 48(2).

89. Montenegro Const. art. 71.

90. Mozambique Const. art. 14(1).

91. Nicaragua Const. art. 72.

92. Panama Const. art. 58.

93. Poland Const. art. 18.

94. Rwanda Const. art. 26.

95. Serbia Const. art. 62.

96. Seychelles Const. art. 32.

97. Slovakia Const. art. 41(1).

98. Somalia Const. art. 28(1).

99. South Sudan Const. art. 15.

100. Tajikistan Const. art. 33.

101. Uganda Const. art. 31(2a).

102. Ukraine Const. art. 51.

103. Vietnam Const. art. 36(1).

104. Peru Const. art. 5.

105. Venezuela Const. art. 77.



such as registered partnerships, domestic partnerships, reciprocal beneficiary relationships, civil solidarity pacts, and similar relationships.<sup>106</sup> Some civil unions are open to both same-sex and opposite-sex couples,<sup>107</sup> although some jurisdictions have limited civil unions to same-sex couples as an alternative to marriage.

In December 2019, the National Council of Monaco unanimously approved civil unions for same-sex couples, opposite-sex couples, and other cohabitants.<sup>108</sup> In September 2020, the Cayman Islands enacted a Civil Partnership Law, open to both same-sex and opposite-sex couples.<sup>109</sup> Under the new law, same-sex marriages performed in other countries can be recognized as civil partnerships in the Cayman Islands.<sup>110</sup> Also in 2020, Lawmakers in Thailand also took steps to legalize same-sex relationships by use of a Civil Partnership Bill.<sup>111</sup>

## V. Other Family Law Developments

A court in Croatia ruled in December 2019 that a gay couple could be foster parents.<sup>112</sup> “The new policy in Croatia follows that of Greece in which same-sex couples in a civil partnership may become foster, but not adoptive, parents.”<sup>113</sup>

Full joint adoption by same-sex couples is legal in seventeen European countries: Andorra, Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal,

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106. See, e.g., Cesare Massimo Bianca, *Le Unioni Civili e le Convivenze* (2017) (Commentary on the civil partnership law of Italy).

107. See, e.g., 750 Ill. Comp. Stat. 75/10 (2020) (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.

108. N° 1481, *Loi du 17 Décembre 2019 Relative aux Contrats Civils de Solidarité*, <http://www.conseil-national.mc/index.php/textes-et-lois/projets-de-loi/item/644-974-projet-de-loi-relative-au-contrat-de-vie-commune>.

109. Cayman Islands Civil Partnership Law, 2020, available at <http://gazettes.gov.ky/portal/pls/portal/docs/1/13006487.PDF>.

110. See, e.g., Andrel Harris, *Same-Sex Union Regulations Come Into Effect Next Week*, CAYMAN COMPASS (Sept. 25, 2020), <https://www.caymancompass.com/2020/09/25/same-sex-union-regulations-come-into-effect-next-week/>.

111. See Hannah Beech, *Thailand Moves to Legalize Same-Sex Unions, a Rare Step in Asia*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/world/asia/thailand-same-sex-unions.html> (“The bill, approved by the cabinet, avoids the term ‘marriage’ but allows for the legal registration of same-sex partnerships. Accompanying amendments to the civil code would give couples the right to jointly own property, adopt children and pass on inheritances. Civil partnerships must occur between individuals who are at least 17 years old. At least one of the pair must be a Thai citizen.”). But see Poramet Tangsathaporn, *Civil Partnership Bill Hits Roadblock*, BANGKOK POST, Feb. 15, 2021, <https://www.bangkokpost.com/thailand/special-reports/2068187/civil-partnership-bill-hits-roadblock>.

112. Forrest Stilin, *Croatia Court Decision: Gay Couple Allowed to be Foster Parents*, TOTAL CROATIA NEWS (Dec. 20, 2019), <https://www.total-croatia-news.com/politics/40398-croatia-court-gay-parents>.

113. *Id.*

Spain, Sweden, and the United Kingdom.<sup>114</sup> Another five countries (Estonia, Italy, Slovenia, San Marino, and Switzerland) permit stepchild adoption where a registered partner can adopt a partner's child.<sup>115</sup>

In December 2019, the First Chamber of the Supreme Court of Justice of Mexico ruled against the Mexican state of Aguascalientes for prohibiting a lesbian couple from registering as the parents of their child.<sup>116</sup>

## VI. Conversion Therapy Bans

The year 2020 saw “a growing international momentum for an end to conversion therapy, the practice of attempting to change an individual's sexual orientation or gender identity.”<sup>117</sup> Countries that enacted a ban on conversion therapy or took steps toward doing so included Albania, Australia, Canada, France, Germany, Malta, Ireland, New Zealand, Spain, United Kingdom, and at least twenty states of the United States.<sup>118</sup>

In July 2020, Victor Madrigal-Borloz, the United Nations Independent Expert on Combatting Violence and Discrimination based on Sexual Orientation and Gender Identity, presented a report to the U.N. Human Rights Council, concluding that conversion therapy practices “provoke profound psychological and physical damage in lesbian, gay, bisexual, trans or gender-diverse persons of all ages, in all regions of the world.”<sup>119</sup> The report called for a global ban on conversion therapy.<sup>120</sup>

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114. *Id.*

115. *Id.*

116. *See* @SCJN (Dec. 19, 2019, 1:24 PM), <https://twitter.com/SCJN/status/1207743605470724096> (“Todas las personas sin importar su orientación sexual tienen derecho a formar una familia y tener hijos propios, adoptados, gestados de manera asistida o procreados por uno de ellos. Uniones familiares formadas por dos mujeres tienen derecho al reconocimiento de sus hijos.”).

117. Reid, *supra* note 2.

118. *Id.* (“California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Virginia, Vermont, Washington, the District of Columbia and Puerto Rico all have laws or regulations protecting youth from this harmful practice.”). The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity, Human Rights Campaign, available at <https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy> (last visited May 31, 2021). *See also, e.g.*, Rachel Savage, *Albania psychologists barred from conducting gay ‘conversion therapy’*, REUTERS (May 18, 2020), <https://www.reuters.com/article/us-albania-lgbt-health/albania-psychologists-barred-from-conducting-gay-conversion-therapy-idUSKBN22U2DU> (“Albania’s leading psychologists’ organisation has barred members from carrying out so-called “conversion therapy” which aims to make gay people straight, as countries around the world consider laws to ban the controversial practice.”).

119. *Practices of So-Called “Conversion Therapy”*, A/HRC/44/53\*, ¶ 86 (May 1, 2020), available at <https://undocs.org/A/HRC/44/53>.

120. *Id.* ¶87.

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## **Women's Interest Network**

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This article reviews significant legal and political developments impacting women internationally in 2020. Highlighted areas of interest include legal empowerment, gender-based and sexual violence, sexual harassment and assault, human trafficking, peace and security measures for women, international criminal courts and tribunals, and women's rights cases.

### **I. Legal Empowerment**

The rise of the COVID-19 global pandemic and the resulting health and socio-economic consequences have disproportionately affected women and girls.<sup>1</sup> A higher proportion of women work informally and in vulnerable sectors, and as a result, their job loss rate is 1.8 times greater than that of men.<sup>2</sup> In response, on November 25th, the European Union (E.U.) launched its new Action Plan on Gender Equality and Women's

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1. Press Release, European Commission, Gender Action Plan – Putting Women and Girls' Rights at the Heart of the Global Recovery for a Gender-Equal World (Nov. 25, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_2184](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2184).

2. *Id.*

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Empowerment in External Action 2021-2025 (GAP III).<sup>3</sup> The Action Plan sets up a policy framework that makes “the promotion of gender equality a priority of all external policies and actions.”<sup>4</sup>

A. WOMEN’S REPRESENTATION IN POLITICAL LEADERSHIP

Regarding women in the public sphere in 2020, women’s representation in parliaments around the world has increased, reaching twenty-five percent of parliamentary seats, due in part to the adoption of gender quotas and milestones achieved in countries in Latin America and the Caribbean.<sup>5</sup> Women held thirty-six percent of elected seats in local deliberative bodies worldwide.<sup>6</sup> The percentage of women heads of government increased from 5.7 to 6.2.<sup>7</sup> Overall, the proportion of women ministers is at an all-time high at twenty-one percent.<sup>8</sup> Women occupied over fifty percent of ministerial positions in thirteen countries, an increase from nine countries in 2019.<sup>9</sup> Spain continued to lead the world in gender parity, electing a parliament that is 66.7 percent women.<sup>10</sup> Notably, Finland’s proportion of women ministers almost doubled from thirty-seven percent to over sixty-one percent and the proportion of women ministers in Peru increased from twenty-seven percent to fifty-five percent.<sup>11</sup> In the United States, 141 women were elected to serve in the 117th Congress in 2020, beating the prior record set in 2019.<sup>12</sup> Yet, women only accounted for 26.4 percent of Congressional seats.<sup>13</sup> Notably, in a landmark election, Senator Kamala Harris became the first woman, and woman of color, in U.S. history to be elected as the Vice President of the United States.<sup>14</sup> But, despite these gains, the U.S. ranked a disappointing 128th out of 193 United Nations (U.N.) countries in gender parity in political participation.<sup>15</sup>

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3. *Id.*

4. *Id.*

5. See U.N. Department of Economic and Social Affairs, *The World’s Women 2020 Trends and Statistics* (Oct. 20, 2020), <https://worlds-women-2020-data-undesa.hub.arcgis.com/pages/power-and-decision>.

6. See *id.*

7. Press Release, Inter-Parliamentary Union [IPU], In 2020, World ‘Cannot Afford’ so Few Women in Power (Mar. 3, 2020), <https://www.ipu.org/news/press-releases/2020-03/in-2020-world-cannot-afford-so-few-women-in-power>.

8. *Id.*

9. *Id.*

10. *Id.*

11. See *id.*

12. Center for American Women in Politics [CAWP], *Rutgers Election 2020 Results Tracker* (last visited Dec. 1, 2020), <https://cawp.rutgers.edu/election2020-results-tracker>.

13. *Id.*

14. See Lisa Lerer and Sydney Ember, *Kamala Harris Makes History as First Woman and Woman of Color as Vice President*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/07/us/politics/kamala-harris.html>.

15. Council on Foreign Relations, *Women’s Power Index* (last visited Dec. 1, 2020), [https://www.cfr.org/article/womens-power-index?utm\\_source=pressnote](https://www.cfr.org/article/womens-power-index?utm_source=pressnote).

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Women heads of government around the world have been recognized for their rapid response to and “transparent and compassionate communication of fact-based public health information”<sup>16</sup> regarding COVID-19.<sup>17</sup> Taiwan’s President, Tsai Ing-wen, was the first world leader to start taking action, instituting 124 measures to contain the spread of COVID-19.<sup>18</sup> German Chancellor, Angela Merkel, instituted early lockdown measures, social distancing, and movement restrictions.<sup>19</sup> Her transparent communication has earned her over eighty-nine percent approval of the German people.<sup>20</sup> Denmark’s Prime Minister, Mette Frederiksen, was the second European leader to institute a shutdown.<sup>21</sup> She announced an economic package that covered seventy-five percent of employee salaries in businesses and ninety percent for those paid by the hour.<sup>22</sup> New Zealand Prime Minister Jacinda Ardern’s swift action in response to COVID-19 led to her reelection, the biggest election victory for the Labour Party since World War II.<sup>23</sup>

**B. LEGAL EQUALITY IN CONSTITUTIONS AND LAWS**

2020 marked the twenty-fifth anniversary of the Beijing Declaration and Platform for Action (Beijing Declaration).<sup>24</sup> The Beijing Declaration’s global framework sought to promote women’s equality and participation in both public and private areas of life.<sup>25</sup> The Beijing Declaration was adopted by 189 governments, committed to actions in twelve critical areas, but nearly twenty-five years later, the goals of the Beijing Declaration are largely unfulfilled.<sup>26</sup> Not a single country is close to achieving gender equality or

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16. See United Nations Entity for Gender Equality and the Empowerment of Women [UN Women], *Policy Brief 18: COVID-19 and Women’s Leadership: From an Effective Response to Building Back Better* (June 2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-covid-19-and-womens-leadership-en.pdf?la=en&vs=409>.

17. See Nirandhi Gowthaman, *Coronavirus: How Have Women-Led Countries Flattened the Curve?*, HERSTORY (Apr. 17, 2020), <https://yourstory.com/herstory/2020/04/coronavirus-women-led-countries-flattened-curve>.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See id.*

22. *See id.*

23. *New Zealand’s Ardern sworn in for second term after landslide win*, AL JAZEERA (Nov. 6, 2020), <https://www.aljazeera.com/news/2020/11/6/new-zealands-ardern-sworn-in-for-second-term-after-landslide-win>.

24. UN News, *25 Years after Beijing’s Women Conference, Significance ‘Undimmed’*, (Sept. 4, 2020), <https://news.un.org/en/story/2020/09/1071722>.

25. *See id.*

26. Press Release, UN Women, *On the 25th anniversary of landmark Beijing Declaration on women’s rights, UN Women calls for accelerating its unfinished business* (Sept. 4, 2020), <https://www.unwomen.org/en/news/stories/2020/9/press-release-25th-anniversary-of-the-beijing-declaration-on-womens-rights>.

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delivering on the commitments of the Beijing Declaration, and in the wake of COVID-19, progress and hard-won advances are being reversed.<sup>27</sup>

On March 9, 2020, Member States of the U.N. adopted the Political Declaration on the Occasion of the Twenty-Fifth Anniversary of the Fourth World Conference on Women (Political Declaration),<sup>28</sup> which recognizes that no country has fully achieved gender equality and empowerment for all women and girls and that the progress that has been made has been uneven, with major gaps remaining in education, participation and leadership, and economic empowerment.<sup>29</sup> Under the Political Declaration, Member States have pledged to take further action to ensure the accelerated and complete implementation of the Beijing Declaration, including “eliminating discriminatory laws and ensuring laws, policies and programmes benefit all women and girls,” “promoting social norms and practices that empower all women and girls and recognize their contributions,” and “strengthening accountability for the implementation of commitments to gender equality and the empowerment of women and girls.”<sup>30</sup>

1. *Right to Economic and Social Equality*

The gender gap in economic participation and opportunity remains stagnant, standing at thirty-one percent.<sup>31</sup> Globally, women are paid on average sixteen percent less than men.<sup>32</sup> Women, on average, do three times as much unpaid care and domestic work as men, resulting in long-term consequences for their economic security.<sup>33</sup>

COVID-19 has widened gender and economic inequalities, and 2020 saw an increase in labor and financial disparities.<sup>34</sup> During the first month of the

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27. See Press Release, UN Women, Ahead of International Women’s Day, New UN Women Report Warns That Progress Towards Gender Equality is Lagging and Hard-Fought Gains are Under Threat (Mar. 5, 2020), <https://www.unwomen.org/en/news/stories/2020/3/press-release-ahead-of-international-womens-day-report-warns-that-progress-is-lagging>.

28. Press Release, UN Women, Member States Agree to Fully Implement the Beijing Declaration on Gender Equality, Addressing Gaps That Hold Women Back (Mar. 9, 2020), <https://www.unwomen.org/en/news/stories/2020/3/press-release-csw64-adopts-political-declaration#:~:text=9%20March%202020%2C%20New%20York,still%20considered%20the%20most%20visionary>.

29. UN Commission on the Status of Women, *Political Declaration on the Occasion of the Twenty-Fifth Anniversary of the Fourth Conference on Women*, at 3-4 (Mar. 9, 2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/news%20and%20events/stories/2020/csw64-politicaldeclaration.pdf?la=en&vs=1220>.

30. *Id.* at 5.

31. UN Women, *Gender Equality, Women’s Rights in Review 25 Years After Beijing*, at 5-6, [hereinafter *Gender Equality*] (Oct. 2, 2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/gender-equality-womens-rights-in-review-en.pdf?la=en&vs=934>; see also World Econ. F. [WEF], *The Global Gender Gap Report 2020*, at 5, 8 (Dec. 16, 2019), [http://www3.weforum.org/docs/WEF\\_GGGR\\_2020.pdf](http://www3.weforum.org/docs/WEF_GGGR_2020.pdf).

32. *Id.* at 5.

33. *Id.* at 4.

34. UN Women and United Nations Development Programme [UNDP], *From Insight to Action, Gender Equality in the Wake of Covid-19*, at 1 (Sep. 2, 2020), [unwomen.org/-/media/](https://www.unwomen.org/-/media/)

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COVID-19 pandemic, women working in the informal sector lost an average of sixty percent of their income.<sup>35</sup> In September 2020 alone, 863,000 women dropped out of the workforce, which was nearly four times the number of men who left the workforce during that time.<sup>36</sup> Women make up thirty-nine percent of global employment, but accounted for fifty-four percent of overall job losses as of May 2020,<sup>37</sup> and it is projected that up to forty-seven million women will be pushed into poverty by 2021.<sup>38</sup> It is expected that there will be 118 women in poverty for every 100 men worldwide by 2021, and that number will increase, with 121 women in poverty for every 100 men by 2030.<sup>39</sup>

## 2. *Marriage Rights*

Costa Rica became the first country in Central America to legalize same-sex marriage,<sup>40</sup> nearly two years after Costa Rica's constitutional court ruled that prohibiting same-sex marriage "is unconstitutional and discriminatory."<sup>41</sup> In July, Montenegro became the first European country outside the E.U. and western Europe to grant same-sex couples a form of civil partnership.<sup>42</sup> Northern Ireland became the last region of the UK to introduce equal marriage rights in February.<sup>43</sup>

Child marriage has been exacerbated by the COVID-19 global pandemic.<sup>44</sup> Twelve million girls are married before their eighteenth birthday every year.<sup>45</sup> As a result of the economic impact of COVID-19, an estimated 500,000 more girls are at risk of being forced into child marriage

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headquarters/attachments/sections/library/publications/2020/ gender-equality-in-the-wake-of-covid-19-en.pdf?la=en&vs=5142 [hereinafter *From Insight to Action*].

35. See *id.* at 4.

36. Diana Boesch, *When Women Lose All the Jobs: Essential Actions for a Gender-Equitable Recovery*, CENTER FOR AMERICAN PROGRESS (Feb. 1, 2020), <https://www.americanprogress.org/issues/women/reports/2021/02/01/495209/women-lose-jobs-essential-actions-gender-equitable-recovery/>.

37. Deepa Mahajan, et al., *Don't Let the Pandemic Set Back Gender Equality*, HARV. BUS. REV. (Sept. 16, 2020), <https://hbr.org/2020/09/dont-let-the-pandemic-set-back-gender-equality>.

38. *Gender Equality*, *supra* note 31.

39. *From Insight to Action*, *supra* note 34.

40. See Cristian González Cabrera, *Costa Rica First in Central America to Legalize Same-Sex Marriage*, HUM. RTS. WATCH (May 26, 2020), <https://www.hrw.org/news/2020/05/26/costa-rica-first-central-america-legalize-same-sex-marriage#>.

41. See Sophie Lewis, *Costa Rica becomes the First Country in Central America to Legalize Same-Sex Marriage*, CBS NEWS (May 27, 2020), <https://www.cbsnews.com/news/costa-rica-first-country-central-america-legalize-same-sex-marriage/>.

42. See Darnell Christie, et al., *Same-sex Marriage Rights Around the World*, REUTERS (July 2, 2020), <https://news.trust.org/item/20200527101701-wcx43>.

43. See *id.*

44. Nelsy Affoum, *Child Marriage: The Unspoken Consequence of COVID-19*, WORLD BANK GROUP (Oct. 9, 2020), <https://blogs.worldbank.org/developmenttalk/child-marriage-unspoken-consequence-covid-19>.

45. United Nations International Children's Emergency Fund [UNICEF], *Child Marriage Around the World* (Mar. 11, 2020), <https://www.unicef.org/stories/child-marriage-around-world>.

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by the end of 2020.<sup>46</sup> In response, Ethiopia set up a network of committees aimed at identifying children forced into marriage during COVID-19.<sup>47</sup> The National Human Rights Commission in Bangladesh issued an advisory letter to the Ministry of Women & Children Affairs “to strengthen monitoring mechanisms to prevent child marriages.”<sup>48</sup>

In the United States, Pennsylvania<sup>49</sup> and Minnesota<sup>50</sup> became the third and fourth states respectively to pass laws prohibiting child marriage with zero exceptions, joining New Jersey, Delaware, the U.S. Virgin Islands, and American Samoa as the only American territories to do so.<sup>51</sup>

### 3. *Right to Health*

On October 22, 2020, Poland’s Constitutional Tribunal ruled that abortions in cases of fetal abnormalities are unconstitutional.<sup>52</sup> This ruling “effectively impos[es] a near-total ban” on abortion.<sup>53</sup> The ruling prompted the “largest protests Poland has experienced since the 1989 collapse of communism,” and after two weeks of protests, the Polish government indefinitely delayed publishing the Court’s opinion and prevented the decision from going into legal effect.<sup>54</sup>

On the same day as the ruling, the governments of Brazil, Egypt, Hungary, Indonesia, Uganda, the United States, and twenty-eight other countries signed the Geneva Consensus Declaration, an international declaration stating that “in no case should abortion be promoted as a method of family planning.”<sup>55</sup> The Geneva Consensus Declaration formalizes an alliance “in opposition to the U.N.’s Universal Declaration of

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46. Susanné Bergsten, *Child Marriage, Pregnancies Soar During Pandemic*, HUM. RTS. WATCH (Oct. 12, 2020), <https://www.hrw.org/news/2020/10/12/child-marriage-pregnancies-soar-during-pandemic>.

47. Emeline Wuilbercq, *Ethiopia Begins Reopening Schools to Fight Rising Rates of Child Marriage and Labor*, GLOBAL CITIZEN (Oct. 20, 2020), <https://www.globalcitizen.org/en/content/ethiopia-schools-covid-19-child-marriage-labor/>.

48. Affoum, *supra* note 44.

49. Pa. Cons. Stat. § 1304(b)(1).

50. Minn. Stat. § 517.02; 23.

51. See Marci A. Hamilton, *2020 Report on Child Marriage in the United States*, CHILD USA (May 8, 2020), <https://childusa.org/wp-content/uploads/2020/04/2020-Report-on-Child-Marriage-in-the-US.pdf>.

52. Monika Pronczuk, *Poland Court Ruling Effectively Bans Legal Abortions*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/10/22/world/europe/poland-tribunal-abortions.html>.

53. *Id.*

54. Monika Pronczuk, *Poland Delays a Near-Total Ban on Abortion*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/world/europe/poland-abortion-law-delay.html>.

55. *Geneva Consensus Declaration on Promoting Women’s Health and Strengthening the Family*, art. 4 (Oct. 22, 2020), <https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english-11-10-2020.pdf>.

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Human Rights, which forms the basis for the characterization of abortion” rights as human rights under international law.<sup>56</sup>

On December 30, 2020, Argentina’s senate voted in favor of a landmark bill passed by the legislature’s lower house that legalizes abortion, becoming the largest nation in Latin America to do so.<sup>57</sup> The bill will permit women to obtain abortions during the first fourteen weeks of pregnancy.<sup>58</sup>

The U.S. Supreme Court struck down a Louisiana state law that required every physician performing an abortion to have “admitting privileges at a hospital within thirty miles” of the abortion site.<sup>59</sup> Additionally, in July 2020, the U.S. Supreme Court held that religious objectors were lawfully exempt from federal regulations requiring health plans to include contraceptive coverage under the Affordable Care Act.<sup>60</sup>

Elsewhere on contraceptive rights, Iran’s Director General of the Ministry of Health’s Office of Population and Family Health announced that state hospitals could no longer offer contraceptives or perform vasectomies, to support the government’s effort to revive a dwindling population.<sup>61</sup> Private hospitals and pharmacies may still provide medications and procedures, and state hospitals may provide family planning procedures and products only to women whose lives are at risk.<sup>62</sup>

For the first time in the country’s history, Sudan passed a law that criminalizes female genital mutilation (FGM) and makes FGM punishable for up to three years in prison and finable.<sup>63</sup> In April 2020, Guinean President Alpha Conde enacted a new constitution that notably bans FGM.<sup>64</sup>

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56. See Miriam Berger, *U.S. Signs International Declaration Challenging Right to Abortion and Upholding ‘Role of the Family’*, WASH. POST (Oct. 22, 2020), <https://www.washingtonpost.com/world/2020/10/22/trump-geneva-consensus-abortion-family/>.

57. Taylor Boas, Mariela Daby, Mason Moseley and Amy Erica Smith, *Argentina legalized abortion. Here’s how it happened and what it means for Latin America*, WASH. POST (Dec. 30, 2020), <https://www.washingtonpost.com/politics/2021/01/18/argentina-legalized-abortion-heres-how-it-happened-what-it-means-latin-america/>.

58. *Id.*

59. *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103 (2020).

60. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020).

61. See Michael Safi, *Iran Ends Provision by State of Contraceptives and Vasectomies*, THE GUARDIAN (June 15, 2020), <https://www.theguardian.com/world/2020/jun/15/iran-bans-vasectomies-and-contraceptives-to-improve-birth-rate>.

62. *Id.*

63. Declan Walsh, *In a Victory for Women in Sudan, Female Genital Mutilation Is Outlawed*, N.Y. TIMES (Apr. 30, 2020), <https://www.nytimes.com/2020/04/30/world/africa/sudan-outlaws-female-genital-mutilation-.html>.

64. Trisha Klan, *Guinea President Enacts New Constitution Despite Protests*, JURIST (Apr. 9, 2020), <https://www.jurist.org/news/2020/04/guinea-president-enacts-new-constitution-despite-protests/>.

## **II. Gender-Based and Sexual Violence, Sexual Harassment, and Assault**

“Gender inequality, abuse of power, and harmful norms” give rise to gender-based violence.<sup>65</sup> In the twelve months preceding an April report issued by U.N. Women, approximately 243 million women and girls between ages fifteen to forty-nine have been subjected to sexual and/or physical domestic violence.<sup>66</sup> Following COVID-19, tensions between couples caused by concerns for security, health, and money have increased reports of domestic violence and demands for emergency shelters in Canada, Germany, Spain, the United Kingdom, and the United States. In Singapore and Cyprus, helpline calls have increased by more than thirty percent; reports of domestic violence have increased by thirty percent in France.<sup>67</sup>

### **A. SEXUAL HARASSMENT**

#### *1. Domestic Sexual Harassment Laws*

Although new state laws have “expand[ed] workplace protections for sexual harassment victims,”<sup>68</sup> challenges remain as fear of retaliation influences low reporting rates.<sup>69</sup> Every U.S. state recommends sexual harassment training, but only six states have passed legislation that requires both state and private employees to receive sexual harassment training.<sup>70</sup> On January 1st, the Illinois Workplace Transparency Act (IWTA) went into effect to revise, among other things, the definition of harassment in the Illinois Human Rights Act to include any unwelcome conduct on the basis of a protected characteristic that attempts to interfere with an individual’s work performance or creates a hostile work environment.<sup>71</sup> The IWTA also establishes reporting requirements such that employers must disclose information about “adverse judgments” or “administrative rulings” finding

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65. United Nations High Commissioner for Refugees [UNHCR], *Gender-based Violence*, <https://www.unhcr.org/gender-based-violence.html> (last visited Nov. 30, 2020).

66. Statement by Phumzile Mlambo-Ngcuka, Executive Director, UN Women, *Violence Against Women and Girls: The Shadow Pandemic* (Apr. 6, 2020), <https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>.

67. *Id.*

68. See Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AMERICAN BAR ASSOCIATION (May 8, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/>.

69. Lily Zheng, *Do Your Employees Feel Safe Reporting Abuse and Discrimination?*, HARV. BUS. REV. (Oct. 8, 2020), <https://hbr.org/2020/10/do-your-employees-feel-safe-reporting-abuse-and-discrimination>.

70. See *2020 State-Specific Sexual Harassment Training Requirements (United States)*, OPENSesame (Oct. 13, 2020), <https://www.opensesame.com/site/blog/2020-state-specific-sexual-harassment-training-requirements-united-states/>.

71. Illinois Workplace Transparency Act, 820 ILCS 96.

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sexual harassment or unlawful discrimination to the Illinois Department of Human Rights.<sup>72</sup>

2. *Regional and International Sexual Harassment Laws*

One year after the standard was adopted by the International Labour Conference (ILC), Uruguay and Fiji ratified Convention No. 190, the first international labor standard to address violence and workplace harassment and to define international violence and harassment, in the workplace, like gender-based violence.<sup>73</sup> Convention 190 will become effective on June 25, 2021.<sup>74</sup> The International Labour Organization (ILO) welcomed formal commitments made by Argentina, Finland, and Spain to ratify Convention No. 190,<sup>75</sup> and the Chamber of Deputies in Italy unanimously approved a bill to ratify Convention No. 190.<sup>76</sup>

Two years after the rise of China's #MeToo movement, the National People's Congress of the People's Republic of China enacted legislation that for the first time declares sexual harassment as a legal offense and defines actions that may be considered to be sexual harassment, including harassment through words, images, text, and physical conduct.<sup>77</sup>

In August 2020, Puerto Rico enacted the "Act to Prohibit and Prevent Workplace Harassment in Puerto Rico," which prohibits workplace harassment and requires employers to implement policies, establish investigation procedures, and "impose sanctions."<sup>78</sup>

B. ELIMINATION OF VIOLENCE AGAINST WOMEN

In April, the U.N., African Union Commission, and the E.U. signed the Spotlight Initiative Regional Programme, a three-year, \$40-million initiative

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72. See *id.*

73. *ILO Violence and Harassment Convention Will Enter into Force in June 2021*, ILO (June 25, 2020), [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_749148/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_749148/lang-en/index.htm).

74. See *id.*

75. *ILO Welcomes Commitments to Ratify Convention on Violence and Harassment*, ILO (Mar. 3, 2020), [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_737414/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_737414/lang-en/index.htm).

76. *Zero Tolerance to Violence and Harassment in the World of Work: Unanimous Vote of The Chamber of Deputies for The Ratification of The ILO Convention*, ILO (Sept. 24, 2020), [https://www.ilo.org/rome/risorse-informative/comunicati-stampa/WCMS\\_756268/lang-it/index.htm](https://www.ilo.org/rome/risorse-informative/comunicati-stampa/WCMS_756268/lang-it/index.htm).

77. Huizhong Wu, *In Nod to #MeToo, China Codifies Sexual Harassment by Law*, REUTERS (June 1, 2020), <https://www.reuters.com/article/us-china-parliament-lawmaking-metoo-idUSKBN2390EY>.

78. See Anabel Rodríguez-Alonso and Alberto Tabales-Maldonado, *Puerto Rico Enacts Law on Workplace Harassment*, LITTLER (Aug. 7, 2020), <https://www.littler.com/publication-press/publication/puerto-rico-enacts-law-workplace-harassment>.

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to eliminate “violence against women and girls in Africa.”<sup>79</sup> The initiative aims to strengthen regional efforts to end harmful practices such as female genital mutilation and child marriage and will address underlying factors that contribute to violence against women and girls.<sup>80</sup>

In October, after protests erupted in response to footage of the brutal assault and gang-rape of a woman went viral on social media, the government of Bangladesh amended the women and children repression prevention bill, introducing the death penalty for rape cases.<sup>81</sup>

1. *Domestic Violence as a Criminal Offense*

In September, Kuwait’s National Assembly passed the Law on Protection from Domestic Violence.<sup>82</sup> The law calls for the formation of a National Family Protection Committee to create new policies to protect women from domestic violence and to recommend the repeal or amendment of existing laws that may contradict the new domestic violence law.<sup>83</sup> Article 13 prohibits any attempt to coerce a victim of domestic violence to withdraw her complaint and article 20 makes it a crime to violate an order of protection, punishable by up to three months in prison;<sup>84</sup> however, the law does not propose penalties for an act of domestic violence, nor does it include individuals who are not spouses.<sup>85</sup>

France adopted a new law in July that aims to detect and better protect victims of domestic violence.<sup>86</sup> The new law allows doctors to break patient confidentiality if they believe a patient’s life is in immediate danger due to domestic abuse and makes the theft of a communication device by a spouse or a partner a prosecutable offense.<sup>87</sup> Notably, harassment of a spouse or partner is now punishable by up to ten years in jail and 150,000 euros if the harassment caused the victim to commit or attempt to commit suicide.<sup>88</sup>

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79. See African Union, *A Multilateral Response to Eliminate All Forms of Violence Against Women & Girls* (May 7, 2020), <https://au.int/en/pressreleases/20200507/multilateral-response-eliminate-all-forms-violence-against-women-girls>.

80. See *id.*

81. See Hannah-Ellis Peterson, *Bangladesh Approves Death Penalty for Rape After Protests*, THE GUARDIAN (Oct. 12, 2020), <https://www.theguardian.com/world/2020/oct/12/bangladesh-approves-death-penalty-for-after-protests>.

82. Rothna Begum, *Domestic Violence Law Signals Hope for Kuwait’s Women*, HUM. RTS. WATCH (Sept. 29, 2020), <https://www.hrw.org/news/2020/09/29/domestic-violence-law-signals-hope-kuwaits-women#>.

83. *Imprisonment and Fine for the Perpetrator . . . and Alternative Penalties*, AL QABAS, (Aug. 20, 2020), <https://alqabas.com/article/5794841>.

84. *Id.*

85. Begum, *supra* note 82.

86. See Library of Congress, *France: Parliament Adopts Law against Domestic Violence* (Aug. 7, 2020), <https://www.loc.gov/law/foreign-news/article/france-parliament-adopts-law-against-domestic-violence/>.

87. *Id.*

88. See *id.*

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2. *Online Abuse and Violence*

Online harassment, stalking, threats, and extortion have increased in the wake of COVID-19. According to a landmark survey interviewing 14,000 women across twenty-two countries, fifty-eight percent of girls have experienced online harassment or abuse, and every “one in four girls abused online feels physically unsafe as a result.”<sup>89</sup>

In November, it was discovered that thousands of images of Irish women were shared online without consent.<sup>90</sup> In response, on December 18th, the Oireachtas (the legislature of Ireland) passed the *Harassment, Harmful Communications and Related Offences Bill*, which provides for two new offenses that deal with the distribution of intimate images without one’s consent: (i) the first makes it a crime to distribute, take, publish, or threaten to distribute images without consent and with the intent to cause harm, and is punishable by an unlimited fine and/or up to seven years’ imprisonment, and (ii) the second offense involves the same acts as the first, but without the intent to cause harm, and carries a maximum penalty of a 5,000 euro fine and/or twelve months’ imprisonment.

On August 6th, more than 100 women lawmakers and legislators from around the world sent a letter to Facebook CEO Mark Zuckerberg and COO Sheryl Sandberg urging them to take concrete action to protect women from rampant and increasing online attacks.<sup>91</sup> Concrete actions included eliminating malicious hate speech that targets women, removing accounts that violate the terms of service by harassing or threatening to attack women leaders and candidates, and swiftly removing posts that threaten candidates with sexual or physical violence and referring such offenders to law enforcement.<sup>92</sup>

3. *Regional Instruments and Guidelines*

In Latin America, the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention) is the principal treaty for tackling harassment and other forms of violence against women.<sup>93</sup> The Belém do Pará Convention has been ratified by all the Member States to the Organization of American

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89. Plan International, “Free to be online? Girls’ and Young Women’s Experiences of Online Harassment” (Oct. 5, 2020), [https://www.plan.de/fileadmin/website/05\\_Ueber\\_uns/Maedchenberichte/Maedchenbericht\\_2020/Free\\_to\\_be\\_online\\_report\\_englisch\\_FINAL.pdf](https://www.plan.de/fileadmin/website/05_Ueber_uns/Maedchenberichte/Maedchenbericht_2020/Free_to_be_online_report_englisch_FINAL.pdf).

90. *Laws Proposed After Intimate Images of Irish Women Shared Without Consent*, BBC NEWS (Nov. 20, 2020), <https://www.bbc.com/news/world-europe-55013964>.

91. See Jackie Speier, Press Release, Democratic Women’s Caucus, Speaker Pelosi Send Letter to Facebook Demanding It Stop the Spread of Gendered Disinformation and Misogynistic Attacks Against Women Leaders (Aug. 6, 2020), [https://speier.house.gov/\\_cache/files/6/c/6c8eec9e-eadf-4aac-a416-3859703eefc4/802A6A022C05E16123E4EAF4B0BE5BBF.gender-disinformation-letter-to-facebook-final-formatted-2.pdf](https://speier.house.gov/_cache/files/6/c/6c8eec9e-eadf-4aac-a416-3859703eefc4/802A6A022C05E16123E4EAF4B0BE5BBF.gender-disinformation-letter-to-facebook-final-formatted-2.pdf).

92. *Id.* at 2.

93. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 [*Belém do Pará Convention*]; see also Org. of Am.

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States (O.A.S.), with the exception of Canada, Cuba, and the United States.<sup>94</sup> Under the Belém do Pará Convention, the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) monitors the implementation of the treaty by its parties.<sup>95</sup> The follow-up phase of MESECVI's Third Multilateral Evaluation Round was scheduled to be completed in 2020.<sup>96</sup> Following completion of the follow-up phase, MESECVI's Committee of Experts (CEVI) will prepare a Follow-up Report to be submitted to the Conference of States Party for approval.<sup>97</sup> During 2020, MESECVI turned its attention to the disproportionate impact of the COVID-19 crisis on women and girls.<sup>98</sup> On March 18, 2020, CEVI issued a statement in which they urged Member States to incorporate a gender-based perspective in the measures they take to mitigate COVID-19 and asked the Member States to expand their efforts to prevent gender-based violence and to promote and protect the rights of women in all spheres of life during the COVID-19 pandemic.<sup>99</sup> In July 2020, MESECVI and the Interamerican Commission of Women published a more detailed study of the relationship between measures taken by the Member States to contain the spread of COVID-19 and the increase in violence against women in Latin America and the Caribbean.<sup>100</sup>

In Europe, the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) is the principal instrument for addressing violence against women.<sup>101</sup> As of November, forty-five out of the forty-seven Council of Europe Member States have signed the Istanbul Convention, thirty-four

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States [OAS] and Council of Europe [COE], *Regional Tools to Fight Violence Against Women: The Belém do Pará and Istanbul Conventions*, [hereinafter *Regional Tools*] (Feb. 2014).

94. OAS, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women: Status of Signatures and Ratifications*, <http://www.oas.org/en/mesecvi/docs/Signatories-Table-EN.pdf> (last visited Nov. 13, 2020).

95. OAS, *What is MESECVI?*, <http://www.oas.org/en/mesecvi/about.asp> (last visited Nov. 13, 2020).

96. See OAS, *Third Hemispheric Report on the Belém do Pará Convention: Prevention of Violence Against Women in The Americas: Paths to Follow*, MESECVI/CEVI/doc. 242/17 (2017); see also OAS, *National Reports on the Implementation of the Belém do Pará Convention*, <http://www.oas.org/en/mesecvi/NationalReportsThirdRound.asp> (last visited Nov. 13, 2020).

97. See OAS, *Indicators of the Exercise of Women's Right to Live Free of Violence*, <https://www.oas.org/en/mesecvi/indicators.asp> (last visited Nov. 13, 2020).

98. *Communique Committee of Experts*, OAS, <https://www.oas.org/es/mesecvi/docs/CEVI-ComunicadoCOVIDViolencia-2020-EN.pdf> (last visited May 17, 2021).

99. *Id.*

100. See OAS, *Violence Against Women and the Measures to Contain the Spread of COVID-19*, <http://www.oas.org/en/cim/docs/COVID-19-RespuestasViolencia-EN.pdf>.

101. See COE, *Convention on Preventing and Combating Violence against Women and Domestic Violence* April 12, 2011 C.E.T.S. No. 210 [Istanbul Convention]; see also *Regional Tools*, *supra* note 93.

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have ratified it, and one has neither signed nor ratified it.<sup>102</sup> Under the Istanbul Convention, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) monitors the implementation of the treaty by its parties.<sup>103</sup> During 2020, GREVIO received State reports from six countries, Government comments to its first evaluation report from one country and issued recommendations for another five.<sup>104</sup> On April 20, the Committee of the Parties to the Istanbul Convention issued a declaration on the implementation of the Convention during the COVID-19 pandemic.<sup>105</sup> During 2020, several countries voiced their opposition to the Istanbul Convention. In May 2020, the Hungarian legislature refused to ratify the Convention, objecting to its definition of gender as “socially constructed,” while Poland and Turkey are both reportedly studying the possibility of withdrawing from the Convention.<sup>106</sup>

In Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is the principal treaty for addressing women's rights.<sup>107</sup> Forty-nine out of the fifty-five African Union Member States have signed the Maputo Protocol, forty-two have ratified it, and six have neither signed nor ratified it.<sup>108</sup> In June 2020, the African Union Commission's Women, Gender and Development Directorate introduced the Maputo Protocol Scorecard and Index (MPSI).<sup>109</sup> The MPSI was developed to support effective gender equitable COVID-19 response and recovery monitoring and implementation of the Maputo Protocol.<sup>110</sup> In November, the 27th Extra Ordinary Session of the African

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102. See COE, *Chart of Signatories and Ratifications of Treaty 210*, [https://www.coe.int/en/web/conventions/full-list/-conventions/treaty/210/signatures?p\\_auth=C4RjbE9C](https://www.coe.int/en/web/conventions/full-list/-conventions/treaty/210/signatures?p_auth=C4RjbE9C) (last visited Nov.13, 2020).

103. COE, *About GREVIO – Group of Experts on Action against Violence against Women and Domestic Violence*, <https://www.coe.int/en/web/istanbul-convention/grevio> (last visited Nov. 13, 2020).

104. COE, *Country-monitoring work*, <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work> (last visited Nov. 13, 2020).

105. *Declaration of the Committee of the Parties to the Istanbul Convention* (Apr. 20, 2020), <https://rm.coe.int/declaration-committee-of-the-parties-to-ic-covid-/16809e33c6>.

106. See International Justice Resource Center, *Turkey, Poland Consider Leaving Istanbul Convention on Violence Against Women* (Aug. 6, 2020), <https://ijrcenter.org/2020/08/06/turkey-poland-consider-leaving-istanbul-convention-on-violence-against-women>.

107. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Jul. 11, 2003, [https://www.un.org/en/africa/osaa/pdf/au/protocol\\_rights\\_women\\_africa\\_2003.pdf](https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf).

108. *List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, AFRICAN UNION [A.U.] (Oct. 16, 2019), <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf>.

109. See A.U., *Maputo Protocol Scorecard and Index Introduced to Monitor Implementation of Women's Rights* (June 23, 2020), <https://au.int/en/pressreleases/20200623/maputo-protocol-scorecard-and-index-introduced-monitor-implementation-womens>.

110. *Id.*



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Commission on Human and Peoples' Rights, held from February 19 to March 4, 2020, adopted General Comment No. 6 on Article 7(d) of the Maputo Protocol.<sup>111</sup> General Comment No. 6 SEEKS TO IMPROVE THE PROTECTION OF RIGHTS OF WOMEN IN CASES OF SEPARATION, DIVORCE, OR ANNULMENT OF MARRIAGE, AND IN PARTICULAR, THE WOMAN'S RIGHT TO AN EQUITABLE SHARING OF THE JOINT PROPERTY DERIVING FROM THE MARRIAGE IN SUCH CIRCUMSTANCES.<sup>112</sup>

In Southeast Asia, the debate continues 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 and the full implementation of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) across all ASEAN Member States.<sup>113</sup> In June, the ACWC held a special online meeting on Protective and Preventive Measures for Women and Children at Risk of Domestic Violence during the COVID-19 Pandemic.<sup>114</sup> In November, in connection with the ACWC-UNHCR Cooperative Project, ASEAN published a regional report on "promoting sustainable integration of ASEAN Community through ensuring the legal status of ASEAN women and children."<sup>115</sup> The report provided an overview of legal frameworks and "enforcement in ASEAN countries in promoting women and children's rights,"<sup>116</sup> and emphasized the significance of birth registration and the right

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111. See African Commission on Human and Peoples' Rights, General Comment No 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Feb. 2020), <https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5faa5cbb3d168f22723180d5/1605000381318/AUC+General+Comment+7+English+2020.pdf>. (General comments clarify the content of a given right and the nature of state obligations in relation to this right, including measures that all countries should take to ensure that specific rights or issues covered by the treaty are realized.)

112. The Global Initiative for Economic, Social and Cultural Rights, *Women's rights in Africa: Launch event of General Comment No. 6 on Art. 7 (d) of the Maputo Protocol* (Nov. 10, 2020), <https://www.gi-esqr.org/latest-news/14-nov-general-comment-on-art-7-of-the-maputo-protocol-launch-event>.

113. See The Assoc. of Southeast Asian Nations [ASEAN], *The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children ACWC Work Plan 2016-2020* (2018), <https://asean.org/storage/2019/01/37.-December-2018-The-ASEAN-Commission-on-the-Promotion-and-Protection-of-the-Rights-of-Women-and-Children-ACWC-Work-Plan-2016-2020.pdf>; see also ASEAN, *ASEAN Regional Plan of Action on the Elimination of Violence Against Women* (Feb. 2016), <https://asean.org/wp-content/uploads/2018/01/48.-December-2017-ASEAN-RPA-on-EVAW-2nd-Reprint.pdf>.

114. *ASEAN Calls for Protective and Preventive Measures Against Domestic Violence Towards Women and Children During COVID-19 Pandemic*, (Jun. 5, 2020), <https://asean.org/asean-calls-protective-preventive-measures-domestic-violence-towards-women-children-covid-19-pandemic/>.

115. *ASEAN works to promote rights of women, children*, VIETNAM INVESTMENT REVIEW (Nov. 18, 2020), <https://www.vir.com.vn/asean-works-to-promote-rights-of-women-children-80845.html>.

116. *Id.*

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to nationality in “facilitating the inclusion and well-being of all women and children within ASEAN member states.”<sup>117</sup>

4. *United Nations*

The United Nations Central Emergency Response Fund has allocated \$25 million to address the “shadow pandemic” of gender-based violence against women displaced by COVID-19.<sup>118</sup> The money will be used to fund women-led organizations that prevent violence against women and girls and help victims and survivors with access to medical care, family planning, legal advice, safe spaces, mental health services, and counseling.<sup>119</sup>

In continued efforts to promote the end of gender-based violence, the U.N. created an “EVAW COVID-19 briefs” series<sup>120</sup> that provides resources for women experiencing intimate partner violence, thus ensuring both safe public and private places<sup>121</sup> and raising awareness for women around the world.<sup>122</sup> The U.N. has encouraged governments and organizations to make the prevention and redress of violence against women a key part of their national response plans.<sup>123</sup> In response, the French government put in place counseling centers in pharmacies and grocery stores across the country to allow women to seek help, while also donating an additional one million euros to anti-domestic abuse organizations.<sup>124</sup> In Ukraine, the national domestic violence hotline, supported by the United Nations Population

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117. ASEAN, *Legal Identity of All Women and Children in ASEAN, A Regional Synthesis*, 1, 8 (Nov. 25, 2020), <https://asean.org/storage/Final-Legal-Identity-Report-compressed.pdf>.

118. Liz Ford, ‘Shadow Pandemic’ of Violence Against Women to be Tackled with \$25m UN Fund, *THE GUARDIAN* (Nov. 25, 2020), <https://www.theguardian.com/global-development/2020/nov/25/shadow-pandemic-of-violence-against-women-to-be-tackled-with-25m-un-fund>.

119. UN Women, *Opening Remarks by Under-Secretary-General of the United Nations and Executive Director of UN Women, Phumzile Mlambo-Ngcuka at the Commemoration of the International Day for the Elimination of Violence against Women* (Nov. 25, 2020), <https://www.unwomen.org/en/news/stories/2020/11/speech-ed-phumzile-international-day-for-the-elimination-of-violence-against-women>.

120. UN Women, *EVAW Covid-19 Briefs*, <https://www.unwomen.org/en/digital-library/publications/2020/04/series-evaw-covid-19-briefs> (last visited Nov. 30, 2020).

121. Press Release, UN Women, COVID-19 and Ensuring Safe Cities and Safe Public Spaces for Women and Girls, (2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-covid-19-and-ensuring-safe-cities-and-safe-public-spaces-for-women-and-girls-en.pdf?la=en&vs=632>.

122. Press Release, UN Women, Prevention: Violence Against Women and Girls & COVID-19, (2020), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-prevention-violence-against-women-and-girls-and-covid-19-en.pdf?la=en&vs=3049>.

123. See U.N. Department of Global Communications, *UN Supporting ‘Trapped’ Domestic Violence Victims During COVID-19 Pandemic* (Jun. 12, 2020), <https://www.un.org/en/coronavirus/un-supporting-%E2%80%98trapped%E2%80%99-domestic-violence-victims-during-covid-19-pandemic>.

124. Melissa Godin, *French Government to House Domestic Abuse Victims in Hotels as Cases Rise During Coronavirus Lockdown*, *TIME* (Mar. 31, 2020), <https://time.com/5812990/france-domestic-violence-hotel-coronavirus/>.

Fund, is providing online consultation services as well as counseling services through Skype, email, Facebook, and its website.<sup>125</sup>

### III. Human Trafficking

Despite stricter border controls, travel restrictions, and lockdowns implemented worldwide due to COVID-19, traffickers have quickly adapted their “business models” to the new and changing conditions by driving their operations underground and capitalizing on the plight of trafficked individuals.<sup>126</sup> Moreover, the COVID-19 pandemic has triggered widespread social and economic crises, increasing the exposure of vulnerable populations to trafficking and exploitation.<sup>127</sup> Socio-economic problems<sup>128</sup> such as unemployment, homelessness, and reduced access to healthcare and education<sup>129</sup> play a strong role in rising rates of human trafficking.<sup>130</sup> Women and girls are the most likely to suffer from COVID-19-related impairments;<sup>131</sup> they are also disproportionately represented as victims of human trafficking,<sup>132</sup> especially forced sex work.<sup>133</sup> Yet, the pandemic is also hindering the efforts of law enforcement, justice systems, and service

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125. See United Nations Population Fund [UNFPA], *Silent Solutions Available to Quarantined Survivors of Domestic Violence* (May 21, 2020), <https://www.unfpa.org/news/silent-solutions-available-quarantined-survivors-domestic-violence>.

126. U.N. Office on Drugs and Crime [UNODC], *Impact of the COVID-19 Pandemic on Trafficking in Persons*, at 1, 3 [hereinafter *Impact of the COVID-19 Pandemic on Trafficking in Persons*] [https://www.unodc.org/documents/Advocacy-Section/HTMSS\\_Thematic\\_Brief\\_on\\_COVID-19.pdf](https://www.unodc.org/documents/Advocacy-Section/HTMSS_Thematic_Brief_on_COVID-19.pdf).

127. See ILO, *COVID-19 Impact on Child Labour and Forced Labour: The Response of the IPEC+ Flagship Programme*, at 2 [hereinafter *COVID-19 Impact on Child Labour and Forced Labour*] (May 2020), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---ipec/documents/publication/wcms\\_745287.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_745287.pdf); see also World Bank Group, *Global Economic Prospects*, Ch. 1, Global Outlook, Pandemic, Recession: The Global Economy in Crisis, at 3 (Jun. 2020), <https://openknowledge.worldbank.org/bitstream/handle/10986/33748/211553-Ch01.pdf>.

128. See ILO, Organisation for Econ. Cooperation and Development [OECD], Int'l Organization for Migration [IOM] and UNICEF, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains*, at 17 (2020), [https://publications.iom.int/system/files/pdf/ending\\_child\\_labour\\_en.pdf](https://publications.iom.int/system/files/pdf/ending_child_labour_en.pdf).

129. *COVID-19 Impact on Child Labour and Forced Labour*, *supra* note 128.

130. U.S. Dep't of State, *Trafficking in Persons Report June 2020*, at 275, [hereinafter *Trafficking in Persons Report 2020*] <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>.

131. See *COVID-19 Impact on Child Labour and Forced Labour*, *supra* note 128.

132. UNODC, *Report: Majority of trafficking victims are women and girls; one third children* (Dec. 12, 2016), <https://www.un.org/sustainabledevelopment/blog/2016/12/report-majority-of-trafficking-victims-are-women-and-girls-one-third-children/>; see also U.N. Secretary -General, *World Day Against Trafficking in Persons Statements* (July 30, 2020), <https://www.unodc.org/endht/en/statements.html>.

133. ILO, *Forced Labour, Modern Slavery and Human Trafficking*, <https://www.ilo.org/global/topics/forced-labour/lang-en/index.htm> (last visited Nov. 12, 2020).

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organizations in their efforts to provide assistance and resources to victims of trafficking.<sup>134</sup>

On July 30th, the U.N. Office on Drugs and Crime (UNODC), together with the Permanent Mission of Belarus, held the high-level event, “Recognizing Response – Committed to the Cause,” to mark 2020 World Day against Human Trafficking in Persons. UNODC took to the global stage to honor and support first responders who assist victims of human trafficking during the pandemic.<sup>135</sup> In his message for World Day, U.N. Secretary-General António Guterres remarked that “[w]omen and girls already account for more than seventy percent of detected human trafficking victims, and today are among the hardest hit by the pandemic. With previous downturns showing that women face a harder time getting paid jobs back in the aftermath of crises, vigilance is especially important at this time.”<sup>136</sup>

Currently, the global goal is to end human trafficking by 2030.<sup>137</sup> In the meantime, it is necessary to ensure effective access to justice for victims of trafficking,<sup>138</sup> especially in view of the pandemic-related consequences.<sup>139</sup>

A. INTERNATIONAL EFFORTS TO COMBAT TRAFFICKING OF WOMEN AND CHILDREN

1. *Report of the U.N. Secretary-General (2020)*

The U.N. Secretary-General report, “Trafficking in women and girls,”<sup>140</sup> provides information for Member States and U.N. stakeholders in an effort to eradicate the trafficking of women and girls. The gender-focused report addresses the “economic drivers and consequences” of human trafficking and how COVID-19 has impacted these issues.<sup>141</sup>

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134. See *Impact of the COVID-19 Pandemic on Trafficking in Persons*, *supra* note 126, at 3; by way of example, see also *Trafficking in Persons Report 2020*, *supra* note 130, at 75, 88, and 347.

135. See UNODC, *Paying Tribute to First Responders in the Fight Against Human Trafficking* (Aug. 7, 2020), <https://www.unodc.org/unodc/frontpage/2020/August/paying-tribute-to-first-responders-in-the-fight-against-human-trafficking.html>.

136. Press Release, U.N. Secretary-General, COVID-19 Recovery Must Address New Exploitation Risks, Secretary-General Warns in Message for World Day against Trafficking in Persons SG/SM/20180 (July 20, 2020), <https://www.un.org/press/en/2020/sghsm20180.doc.htm>.

137. See ILO, *International Programme on the Elimination of Child Labour and Forced Labour [IPEC+]* (2020), <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/flagships/ipec-plus/lang-en/index.htm>; see also ILO, *Ending forced labour by 2030: A review of policies and programmes* (2018), [https://www.ilo.org/wcmsp5/groups/public/-ed\\_norm/-ipec/documents/publication/wcms\\_653986.pdf](https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-ipec/documents/publication/wcms_653986.pdf).

138. For statistics regarding global law enforcement data see *Trafficking in Persons Report 2020*, *supra* note 130, at 43.

139. *Impact of the COVID-19 Pandemic on Trafficking in Persons*, *supra* note 126.

140. U.N. Secretary-General, *Trafficking in women and girls*, U.N. Doc., A/75/289 (Aug. 7, 2020), <https://undocs.org/en/A/75/289>.

141. *Id.* at 1.

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According to the report, “[P]rogress in the elimination of trafficking in women and girls remains unacceptably slow.”<sup>142</sup> Moreover, “the drivers of trafficking, in particular women’s unequal economic status, poverty and economic inequality, are expected to intensify and deepen as a result of the COVID-19 crisis.”<sup>143</sup> The report puts forth several recommendations for Member States, such as continuing to detect, investigate, enforce, and adjudicate cases of human trafficking of women and girls during COVID-19; partnering with the private sector to monitor, detect, and report financial and other suspicious activities associated with trafficking; increasing investment in women’s economic empowerment programs; and compensating survivors through state funding.<sup>144</sup>

**B. REGIONAL EFFORTS TO COMBAT TRAFFICKING OF WOMEN AND CHILDREN**

In 2020, the critically important Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), celebrated its twentieth anniversary.<sup>145</sup> As of November, three additional states—Brunei Darussalam, Comoros, and Nepal—have signed the Palermo Protocol.<sup>146</sup> Nevertheless, in the words of U.N. Special Rapporteur Maria Grazia Giammarinaro, it is time for states to “go beyond the Palermo Protocol.”<sup>147</sup> The Special Rapporteur delivered a highly-endorsed twelve-point recommendation, proposing that governments and other stakeholders shift away from a criminal-justice framework under the Palermo Protocol and move toward human-rights-based principles, instruments, case law, and legislation.<sup>148</sup>

*1. The United States*

October 28th marked the twentieth anniversary of the bipartisan passage of the Trafficking Victims Protection Act (TVPA).<sup>149</sup> This landmark legislation was the first U.S. federal law enacted to criminalize sex and labor

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142. *Id.*

143. *Id.* at 16.

144. *Id.* at 17–18.

145. Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons), *Concluding remarks by UN Special Rapporteur on Trafficking in Persons* [hereinafter *Concluding remarks*] (Jun. 29, 2020), <http://lastradainternational.org/dynamic/files/Concluding%20remarks%20-%20Manifest%20Webinar%20-%202022%20July%202020.pdf>.

146. See *Treaty Collection Depository, Status of treaties*, U.N. Treaty Collection (2020), [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en); see also *Impact of the COVID-19 Pandemic on Trafficking in Persons*, *supra* note 126, at 43.

147. See *Concluding remarks*, *supra* note 145.

148. *Id.*

149. See Trafficking Victims Protection Act of 2000 [TVPA], Pub. L. No. 106-386, div. A, 114 Stat. 1466 (2000), (codified as amended at 22 U.S.C. §§ 7101–7114 (2000)).

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trafficking in response to the Palermo Protocol.<sup>150</sup> In commemoration of this anniversary, the Trump Administration held a human trafficking “Summit,”<sup>151</sup> promulgated a National Action Plan,<sup>152</sup> and issued an Executive Order on combating human trafficking.<sup>153</sup> In addition, the U.S. Department of Justice (DOJ) allocated \$100.9 million to combat human trafficking.<sup>154</sup> However, despite these outwardly aggressive moves from the Trump administration, U.S. prosecutions against sex and labor traffickers decreased,<sup>155</sup> and human trafficking reporting increased, especially during the COVID-19 pandemic.<sup>156</sup> A “new and highly restrictive interpretation” of the TVPA under the Trump administration led to a dramatic increase in denial of “T-visas”<sup>157</sup> (the humanitarian visa status for trafficking victims created under the TVPA<sup>158</sup>), especially for women and girls trafficked at the southwestern border.<sup>159</sup> According to a Refugees International field report, the Trump administration not only failed to protect women and children, but proactively put them in harm’s way.<sup>160</sup> The report reveals that “the administration’s decision-making . . . [was] particularly dismissive of claims by women and children who have been trafficked over the southwestern

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150. Rebecca Jun, *On This Day in History: The Trafficking Victims Protection Act Passed in Congress*, THE HUMAN TRAFFICKING INSTITUTE, <https://www.traffickingmatters.com/on-this-day-in-history-the-trafficking-victims-protection-act-passed-in-congress/> (last visited Nov. 29, 2020).

151. Katie Rogers, *White House Holds Trafficking ‘Summit,’ but Critics Dismiss Lack of Dialogue*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/trump-trafficking.html>.

152. The National Action Plan to Combat Human Trafficking, Whitehouse.gov (Oct. 22, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/10/NAP-to-Combat-Human-Trafficking.pdf>.

153. Exec. Order No. 13903, 85 Fed. Reg. 6721 (Jan. 31, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-combating-human-trafficking-online-child-exploitation-united-states/>.

154. U.S. Dep’t. of Just., *Fact Sheet: Justice Department Awards Nearly \$101 Million to Combat Human Trafficking* (Sep. 21, 2020), <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/ovchumantraffickingfactsheet.pdf>.

155. See *Trafficking in Persons Report 2020*, *supra* note 130, at 515-17.

156. Polaris Project, *Crisis in Human Trafficking During the Pandemic*, <https://polarisproject.org/wp-content/uploads/2020/06/Crisis-in-Human-Trafficking-During-the-Pandemic.pdf> (last visited Nov. 29, 2020).

157. U.S. Citizenship and Immigration Services [USCIS], Form I-914, Application for T Nonimmigrant Status by Fiscal Year, Quarter, and Case Status, Fiscal Years 2008-2020 (last visited Dec. 1, 2020), [https://www.uscis.gov/sites/default/files/document/reports/I914t\\_visastatistics\\_fy2020\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/document/reports/I914t_visastatistics_fy2020_qtr3.pdf).

158. USCIS, *Victims of Human Trafficking: T Nonimmigrant Status* (last visited Dec. 1, 2020), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status>.

159. Yael Schacher, *Abused, Blamed, and Refused: Protection Denied to Women and Children Trafficked Over the U.S. Southern Border*, REFUGEES INT’L. (May 2019), <https://static1.squarespace.com/static/506c8ea1e4b01d9450dd53f5/t/5cfbf5c55c747a0001e19274/1560016326718/Trafficking+Report+-+May+2019+-final.pdf>.

160. See *id.*

border, and has effectively blamed them for their own victimization.”<sup>161</sup> Moreover, the administration’s “policies also scare[d] survivors from coming forward to report abuse and even push[ed] them into the hands of traffickers.”<sup>162</sup>

Many anti-human-trafficking groups boycotted the White House Summit for these reasons, including Polaris, which coordinates the national human trafficking hotline, and Freedom Network, USA, the largest U.S. anti-trafficking coalition.<sup>163</sup>

## 2. *Europe*

The Group of Experts on Action against Trafficking in Human Beings (GRETA) (in connection with the Council of Europe) published the “Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection.”<sup>164</sup> The guidance note aims to assist authorities and organizations in providing protective entitlements such as refugee status, grants of asylum, and non-punishment of compelled criminal acts to trafficking victims or people.<sup>165</sup>

In June, the European Court of Human Rights (ECHR) ruled that human trafficking for the purpose of forced prostitution falls within the scope of Article 4 of the European Convention on Human Rights and clarified that human trafficking covered both transnational and national trafficking, regardless of whether or not it was connected with organized crime.<sup>166</sup>

## IV. Women, Peace, and Security

This year marked the twentieth anniversary of the U.N. Security Council’s adoption of the landmark Resolution 1325,<sup>167</sup> which stressed women’s equal involvement in peace and security and reaffirmed the important role women play in peace-building, peacekeeping, peace

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161. *Id.*

162. *Id.*; see also Rogers, *supra* note 151; Abigail Abrams, ‘I Thought I Was Going to Die.’ How Donald Trump’s Immigration Agenda Set Back the Clock on Fighting Human Trafficking, TIME (Oct. 30, 2020), <https://time.com/5905437/human-trafficking-trump-administration/>.

163. See Jessica Contrera, *Trump Signs Executive Order to Combat Human Trafficking as Some Advocacy Groups Boycott Summit*, WASH. POST (Jan. 31, 2020), [https://www.washingtonpost.com/local/trump-signs-executive-order-to-combat-human-trafficking-as-some-advocacy-groups-boycott-summit/2020/01/31/420284ce-4456-11ea-aa6a-083d01b3ed18\\_story.html](https://www.washingtonpost.com/local/trump-signs-executive-order-to-combat-human-trafficking-as-some-advocacy-groups-boycott-summit/2020/01/31/420284ce-4456-11ea-aa6a-083d01b3ed18_story.html).

164. Group of Experts on Action against Trafficking in Human Beings [GRETA], Council of Europe, *Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection*, (June 19, 2020), <https://rm.coe.int/guidance-note-on-the-entitlement-of-victims-of-trafficking-and-persons/16809ebf44>.

165. See *id.* at 9 et seq.

166. *S.M. v. Croatia*, App. No. 60561/14 (Jun. 25, 2020) at 297, 303, <http://hudoc.echr.coe.int/eng?i=001-203503>.

167. UN Peacekeeping, *20 Years of Women, Peace and Security*, <https://peacekeeping.un.org/en/20-years-of-women-peace-and-security> (last visited Nov. 30, 2020).

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negotiations, and conflict resolution.<sup>168</sup> In recognition of this anniversary and the twenty-fifth anniversary of the Beijing Declaration, the U.N. Security Council unanimously adopted Resolution 2538 in August,<sup>169</sup> which recognizes the indispensable role women play in peacekeeping operations, stresses the importance of increasing women's participation in peacekeeping operations, and calls upon Member States to strengthen their efforts to increase the meaningful participation of women in all levels of peacekeeping operations.<sup>170</sup>

Pursuant to the United States Strategy on Women, Peace, and Security (WPS Strategy), which was published in relation to the Women, Peace, and Security Act of 2017,<sup>171</sup> the U.S. Department of State,<sup>172</sup> the U.S. Department of Defense,<sup>173</sup> the U.S. Department of Homeland Security,<sup>174</sup> and the U.S. Agency for International Aid Development<sup>175</sup> each created and published implementation plans to implement “women’s meaningful participation in preventing and resolving conflict, countering violent extremism (CVE) and terrorism, and building post-conflict peace and stability.”<sup>176</sup>

## **V. International Criminal Courts and Tribunals and Women’s Rights Cases**

### **A. INTERNATIONAL CRIMINAL COURT: PERSECUTION BASED ON GENDER**

The International Criminal Court (ICC), through its founding treaty—the Rome Statute—allows for the prosecution of genocide, crimes against

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168. See Office of the Special Adviser on Gender Issues and Advancement of Women [OSAGI], *Landmark Resolution on Women, Peace and Security*, <http://www.un.org/womenwatch/osagi/wps/> (last visited Nov. 30, 2020).

169. Press Release, Security Council, *Security Council Calls on United Nations, Regional Organizations to Bolster Role of Women in Peacekeeping, Unanimously Adopting Resolution 2538* (Aug. 28, 2020), <http://www.un.org/press/en/2020/sc14288.doc.htm>.

170. *Id.*

171. *United States Strategy on Women, Peace, and Security*, Whitehouse.gov (Jun. 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/06/WPS-Strategy-FINAL-PDF-6.11.19.pdf>.

172. U.S. Dept. of State, *The Department of State’s Plan to Implement the U.S. Strategy on Women, Peace, and Security 2020-2023*, [https://www.state.gov/wp-content/uploads/2020/06/20-01943-SGWI\\_v11\\_forWeb\\_Bookmarks508.pdf](https://www.state.gov/wp-content/uploads/2020/06/20-01943-SGWI_v11_forWeb_Bookmarks508.pdf).

173. U.S. Dept. of Defense, *Women, Peace, and Security Strategic Framework and Implementation Plan* (Jun. 2020), [https://media.defense.gov/2020/Jun/11/2002314428/-1/-1/1/WOMEN\\_PEACE\\_SECURITY\\_STRATEGIC\\_FRAMEWORK\\_IMPLEMENTATION\\_PLAN.PDF](https://media.defense.gov/2020/Jun/11/2002314428/-1/-1/1/WOMEN_PEACE_SECURITY_STRATEGIC_FRAMEWORK_IMPLEMENTATION_PLAN.PDF).

174. U.S. Dept. of Homeland Security, *Department and Agency Implementation Plans for The U.S. Strategy on Women, Peace, and Security*, <https://www.dhs.gov/sites/default/files/publications/wps-dhs-implementation-plan.pdf> (last visited Nov. 30, 2020).

175. U.S. Agency for International Dev., *USAID’s Women, Peace, and Security Implementation Plan* (2020), <https://www.usaid.gov/women-peace-and-security>.

176. *Id.*



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humanity, war crimes, and crimes of aggression.<sup>177</sup> In July, the trial against former Islamic militant Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud opened at the ICC, where he has been accused of war crimes, crimes against humanity, and persecution on the grounds of gender.<sup>178</sup> The trial is groundbreaking as the criminal charges against Mr. Al Hassan are not only based on gender for the first time but also because non-sexual violence has been included.<sup>179</sup> In April, the Pre-Trial Chamber I of the ICC partially granted the prosecution's request to modify the charges against Mr. Al Hassan to include recognizing forced marriage as a crime distinct from sexual violence, constituting an inhumane act that infringes on women's fundamental right to choose a spouse.<sup>180</sup>

**B. THE SUPREME COURT OF KYRGYZSTAN**

In March, a trial court in Kyrgyzstan sentenced Gulzhan Pasanova to nine years in prison for killing her husband in self-defense.<sup>181</sup> In November 2019, Ms. Pasanova's husband accused Ms. Pasanova of infidelity and threatened to kill her with a knife.<sup>182</sup> In an attempt at self-defense, Ms. Pasanova picked up a steel bar and hit Mr. Isakov on the head, ultimately killing him.<sup>183</sup> The trial court denied Ms. Pasanova's requests to call corroborating witnesses regarding her husband's history of domestic abuse, denied her requests for a comprehensive psychiatric examination to determine Ms. Pasanova's state of mind at the time of the altercation, and most notably, restrained Ms. Pasanova in a cage throughout her criminal trial.<sup>184</sup> In June, the Court of Appeals reduced Ms. Pasanova's sentence as part of a "general prisoner amnesty," but nevertheless affirmed her conviction.<sup>185</sup> The Supreme Court of Kyrgyzstan took up the appeal of Ms. Pasanova's case on October 22nd.<sup>186</sup>

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177. See Rome Statute art. 5, July 17, 1998, 2187 U.N.T.S. 90, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>.

178. Jason Burke, *Islamist Fighter's Case Begins in First ICC Trial for Gender Persecution*, THE GUARDIAN (Jul. 14, 2020, 11:19 EDT), <https://www.theguardian.com/law/2020/jul/14/ex-islamist-militant-in-court-accused-of-forcing-women-into-sexual-slavery>.

179. *Id.*

180. *Le Procureur v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Correction to the Decision amending the charges confirmed on September 30, 2019 (Apr. 23, 2020), [https://www.icc-cpi.int/CourtRecords/CR2020\\_01844.PDF](https://www.icc-cpi.int/CourtRecords/CR2020_01844.PDF).

181. Aichurek Kurmanbekova, *A Domestic Violence Case Goes to Kyrgyzstan's Supreme Court*, HUM. RTS. WATCH (Oct. 20, 2020), <https://www.hrw.org/news/2020/10/20/domestic-violence-case-goes-kyrgyzstans-supreme-court>.

182. Brief of the Clooney Foundation for Justice as Amicus Curiae, *Kyrgyzstan v. Gulzhan Pasanova* (May 12, 2020), <https://cfj.org/wp-content/uploads/2020/05/CFJ-Amicus-Brief-in-Support-of-Pasanova-G.-12-May-2020-English.pdf>.

183. *Id.*

184. See *id.*

185. See Kurmanbekova, *supra* note 181.

186. See *id.*

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C. THE SUPREME COURT OF SPAIN

In May,<sup>187</sup> the Supreme Court of Spain affirmed a lower court's decision to sentence an underage individual to four years in prison for sexual abuse with penetration, stating that an explicit verbal or a physical negation is not needed to prove that the victim did not consent to the sexual act, but rather a gestural negation is considered enough, as well as a silence caused by the fear of a physical aggression.<sup>188</sup>

D. THE SAUDI SPECIALIZED CRIMINAL COURT

In defiance of widespread public outrage from the international community, the Saudi Specialized Criminal Court (SCC) convicted long-detained women's rights activist, Loujain al-Hathloul, on charges related to advocating for women's rights, including the right to drive and putting an end to the male guardianship system in Saudi Arabia.<sup>189</sup> The SCC sentenced al-Hathloul to five years and eight months in prison, with a partial suspension and a reduction for time served; she is also barred from travel outside the kingdom for five years and faces three years' court-supervised probation.<sup>190</sup>

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187. STS 147/2020, Cassation Appeal n° 2985/2018, Supreme Court of Spain (May 14, 2020), <https://supremo.vlex.es/vid/844844948>.

188. *Id.*

189. See Bill Chappell, *Saudi Activist Who Urged Women's Driving Rights Gets Nearly 6-Year Prison Term*, NPR (Dec. 28, 2020), <https://www.npr.org/2020/12/28/950765197/saudi-activist-who-urged-womens-driving-rights-gets-nearly-6-year-prison-term>.

190. *Id.*

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## Africa

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This article discusses the significant international legal developments that occurred in Africa in 2020.

### I. North Africa

#### A. WESTERN SAHARA

##### 1. *MINURSO Extended by Another Year*

In October 2020, the UN Security Council “renewed the mandate of the UN Mission for the Referendum in Western Sahara (MINURSO) for [twelve] months,” to October 31, 2021.<sup>1</sup> Morocco’s 2007 Autonomy Plan proposed “making Western Sahara a semi-autonomous region” permitted to manage its own “socio-economic and political development processes”

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\* Committee Editor (Holmes); Angola (Silva; Frazão; André; Ed.); Botswana (Ed.); Burkina Faso (Ed.); Burundi (Musoni); Cameroon (Ed.); Cape Verde (Silva; Frazão; André); CAR (Ed.); Chad (Ed.); Comoros (Ed.); DRC (Ed.); Congo (Silva; Frazão; André); Cote d’Ivoire (Ed.); Djibouti (Ed.); Equatorial Guinea (Silva; Frazão; André); Eritrea (Ed.); Ethiopia (Ed.); Gabon (Silva; Frazão; André); Gambia (Manneh); Ghana (Ohene-Bonsu); Guinea (Ed.); Guinea-Bissau (Ed.); Kenya (Mweseli); Lesotho (Ed.); Liberia (Ed.); Madagascar (Ed.); Malawi (Ed.); Mali (Ed.); Mauritania (Ed.); Mauritius (Ed.); Mozambique (Silva; Frazão; André; Ed.); Namibia (Ed.); Niger (Tossa); Nigeria (Ed.); Rwanda (Musoni); São Tome and Principe (Silva; Frazão; André; Ed.); Senegal (Ed.); Seychelles (Ed.); Sierra Leone (Ed.); Somalia (Ed.); South Africa (Ed.); South Sudan (Ed.); Sudan (Ed.); Swaziland (Ed.); Tanzania (Ed.); Togo (Ed.); Uganda (Ed.); Western Sahara (Bodley); Zambia (Ed.); Zimbabwe (Ed.); AU (Ed.); AfComm. (Fombang; Gaskins); AfCHPR (Fombang; Ed.); AfCFTA (Ohene-Bonsu; Ojakol); AfDB (Bodley); Afreximbank (Ed.); UNECA (Ed.); COMESA (Ed.); EAC (Ojakol; Ed.); ECCAS (Ed.); ECOWAS (Ohene-Bonsu); IGAD (Ed.); SADC (Ed.); UNMICT (Fombang).

1. *Security Council renews UN mission mandate in Western Sahara for a year*, XINHUA.NET (Feb. 23, 2021), [http://www.xinhuanet.com/english/2020-10/31/c\\_139479867.htm](http://www.xinhuanet.com/english/2020-10/31/c_139479867.htm); see also S.C. Res. 2548, ¶ 1 (Oct. 30, 2020); Press Release, Security Council, Security Council Extends Mandate of United Nations Mission for Referendum in Western Sahara by 13 Votes in Favour, 2 Abstentions, U.N. Press Release SC/14342 (Oct. 30, 2020).

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under Morocco.<sup>2</sup> Negotiations between Morocco and the Polisario Front on self-determination for Western Sahara, however, remain stalled.<sup>3</sup>

## II. West Africa

### A. BURKINA FASO

#### 1. Elections

Despite the threat of terrorism, Burkina Faso held national elections on November 22, 2020.<sup>4</sup> An August revision to the electoral code allowed the presidential vote to proceed without voter registration in as much as seventeen percent of the country, where security could not be guaranteed.<sup>5</sup>

### B. CAPE VERDE

#### 1. Capital Regulation

To “dispel [ ] international perception of [Cape Verde] as an ‘offshore’ legal system,” two laws were passed to give “restricted-authorization credit institutions” until December 30, 2020, to “conver[t] into generic authorization banks” and to “establish [a] legal framework [for] reporting irregularities in financial institutions.”<sup>6</sup>

#### 2. Environmental Impact Assessments

Cape Verde created a “new legal framework for environmental impact assessments of public and private” developments.<sup>7</sup> Projects will now be evaluated based on their respective environmental risk profile, instead of one-size-fits-all.<sup>8</sup>

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2. Yahia Hatim, *Western Sahara: 3 West African Countries Reaffirm Support for Morocco*, MOROCCO WORLD NEWS (Oct. 17, 2020), <https://www.morocoworldnews.com/2020/10/322888/western-sahara-3-west-african-countries-reaffirm-support-for-morocco/>.

3. Safaa Kasraoui, *Western Sahara: UN Security Council Renews MINURSO Mandate for 1 Year*, MOROCCO WORLD NEWS (Oct. 30, 2020), <https://www.morocoworldnews.com/2020/10/324260/western-sahara-un-security-council-renews-minurso-mandate-for-1-year/>.

4. Associated Press, *Burkina Faso goes to the polls in elections marred by violence and threats from jihadists*, EURONEWS (Nov. 22, 2020), <https://www.euronews.com/2020/11/22/burkina-faso-goes-to-the-polls-in-elections-marred-by-violence-and-threats-from-jihadis>.

5. Henry Wilkins, *Insecurity dominates Burkina Faso campaigns before tight polls*, AL JAZEERA (Nov. 17, 2020), <https://www.aljazeera.com/news/2020/11/16/what-to-expect-from-burkina-faso-coming-election>.

6. MIRANDA ALLIANCE, Legal News – Cape Verde: January through March 2020 (2020); *see also*, Lei No. 79/IX/2020, 23 Mar. 2020, BOLETIM OFICIAL [B.O.], 23 Mar. 2020 (Cape Verde); Lei No. 81/IX/2020, 26 Mar. 2020, BOLETIM OFICIAL [B.O.], 26 Mar. 2020 (Cape Verde).

7. MIRANDA ALLIANCE, *supra* note 6; *see also* Decreto-Lei No. 27/2020, 19 Mar. 2020, BOLETIM OFICIAL [B.O.], 19 Mar. 2020 (Cape Verde).

8. United Nations Conf. on Trade & Dev., Investment Policy Review: Cabo Verde 20-21 (2018), [https://unctad.org/system/files/official-document/diaepcb2018d2\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2018d2_en.pdf).

C. CÔTE D'IVOIRE

1. *Ouattara's Third Term*

After his intended successor, then-Prime Minister Amadou Gon Coulibaly, died in July, President Alassane Ouattara accepted the ruling party's nomination for president.<sup>9</sup> Ouattara argued that he was not limited to two, five-year terms after the new constitution's 2016 adoption.<sup>10</sup> The Constitutional Council confirmed the president's re-election with "more than 94 percent" of the vote in November.<sup>11</sup>

2. *Statelessness Determination Procedure*

"Two regulations signed on [September 2, 2020] formally establish[ed] procedures" to recognize people without nationality in Côte d'Ivoire.<sup>12</sup> The procedures will give those who are stateless access to formal documentation and fundamental services.<sup>13</sup>

D. GAMBIA

1. *Draft Constitution Rejected*

After his 2016 election, President Adama Barrow promised a new constitution,<sup>14</sup> and Parliament then established the Constitutional Review Commission to review the 1997 constitution and draft a new constitution to be put to a public referendum.<sup>15</sup> After almost two years of research, consultations, review, and testing, the Commission submitted its final draft constitution in March.<sup>16</sup> Ultimately, too many legislators rejected the draft

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9. *Ivory Coast Constitutional Council confirms Ouattara re-election*, AL JAZEERA (Nov. 9, 2020), <https://www.aljazeera.com/news/2020/11/9/ivory-coast-president-ouattaras-disputed-third-term-confirmed>.

10. Katarina Höije, *Ouattara's election victory could risk Ivory Coast's stability*, AL JAZEERA (Nov. 2, 2020), <https://www.aljazeera.com/news/2020/11/2/ivory-coast-ouattaras-election-victory-could-risk>.

11. *Ivory Coast Constitutional Council confirms Ouattara re-election*, *supra* note 9.

12. *Côte d'Ivoire adopts Africa's first legal process to identify and protect stateless people*, UNHCR, SEPT.: THE UN REFUGEE AGENCY (Sept. 4, 2020), <https://www.unhcr.org/news/press/2020/9/5f51f33b4/cote-divoire-adopts-africas-first-legal-process-identify-protect-stateless.html>.

13. *Id.*

14. Omar Wally, *Gambia's draft law restricts presidential terms*, DW (June 16, 2020), <https://www.dw.com/en/gambias-draft-law-restricts-presidential-terms/a-53825425>; *see, e.g.*, Madi Jobarteh, *Constitutional Developments in The Gambia: Reading for a New Constitution*, LAW HUB GAMBIA (Feb. 18, 2018), <https://www.lawhubgambia.com/lawhug-net/2018/2/18/constitutional-developments-in-the-gambia-readying-for-a-new-constitution>.

15. *The Commission*, CONST. REV. COMM'N, *available at* <https://www.crc220.org/> (last visited Dec. 6, 2020).

16. *Draft Constitution to be presented to National Assembly*, REPUBLIC OF GAMBIA: OFF. OF PRESIDENT (May 15, 2020), <https://www.statehouse.gm/draft-constitution-be-presented-national-assembly>.

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because it applied presidential term limits retrospectively to President Barrow.<sup>17</sup>

E. GHANA

1. *New Insolvency Protections*

President “Akufo-Addo . . . assented to the Corporate Restructuring and Insolvency Act of 2020, (Act 1015)” on May 1, 2020, “repeal[ing] the Bodies Corporate (Official Liquidations) Act of 1963 (Act 180).”<sup>18</sup> The new act introduces stronger protections and alternatives, including provisions for company-rescue options, “cross-border insolvency,” and “establishment of an Insolvency Services Division (ISD) under the Office of the Registrar Companies.”<sup>19</sup>

F. GUINEA

1. *Condé Gets Third Term*

Despite widespread protests, Guinea passed a new constitution through a March 22, 2020, referendum.<sup>20</sup> President Alpha Condé argued that “ban[s] on female genital mutilation and underage marriage” were needed social protections, while the president’s opponents alleged the changes were a pretext for a fresh constitution that would not apply term limits proscriptively.<sup>21</sup> Despite the opponents’ arguments, the new constitution was passed, and Condé was elected to a third term in October 2020.<sup>22</sup>

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17. See Sait Maty Jaw, *The Gambia: Why MPs just shot down the popular new draft constitution*, AFR. ARGUMENTS (Sept. 24, 2020), <https://africanarguments.org/2020/09/24/the-gambia-why-mps-just-shot-down-the-popular-new-draft-constitution/>; Mustapha K. Darbo, *Gambia’s hope for a new Constitution dashed*, ANADOLU AGENCY (Sept. 22, 2020), <https://www.aa.com.tr/en/africa/gambia-hope-for-new-constitution-dashed/1982332>.

18. Garia News, *President Assent to the Corporate Restructuring and Insolvency Act 2020 (Act 1015)*, GHANA ASS’N RESTRUCTURING & INSOLVENCY ADVISORS (May 1, 2020), <https://garia.org/president-assent-to-the-corporate-restructuring-and-insolvency-act-2020-act-1015/>.

19. Rosemary Anakwa Boadu, *Why the Corporate Restructuring and Insolvency Act makes Ghana the preferred destination for investment*, MY JOY ONLINE (May 3, 2020, 8:00AM), <https://www.myjoyonline.com/why-the-corporate-restructuring-and-insolvency-act-makes-ghana-the-preferred-destination-for-investment/>; see also Corporate Insolvency and Restructuring Act, 2020 (Act No. 1015) (Ghana).

20. *Guinean President Alpha Conde enacts new constitution*, AL JAZEERA (Apr. 7, 2020), <https://www.aljazeera.com/news/2020/4/7/guinean-president-alpha-conde-enacts-new-constitution>.

21. *Id.*

22. Diawo Barry and Marième Soumaré, *Guinea election: Condé’s victory confirmed by Constitutional Court*, AFR. REP. (Nov. 10, 2020, 11:51AM), <https://www.theafricareport.com/49700/guinea-election-condes-victory-confirmed-by-constitutional-court/>.

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G. GUINEA-BISSAU

1. *Election Aftermath*

On January 1, 2020, Umaro Sissoco Embaló was declared the provisional winner of Guinea-Bissau's presidential election.<sup>23</sup> After the runner-up's first Supreme Court challenge failed on February 25, 2020, Embaló swore himself in as president.<sup>24</sup> As Embaló sought to dismiss the then-prime minister and form a government, the runner-up's party led a coalition to swear in the Speaker of the People's National Assembly as president on February 28, 2020.<sup>25</sup> Embaló swore in his own prime minister on February 29, 2020, which meant the country "had two presidents and two prime ministers," at least for the day.<sup>26</sup> Despite continuing tensions, Embaló's prime minister and government program obtained the required parliamentary approval by late June 2020.<sup>27</sup> As of August 2020, the UN Integrated Peacebuilding Office in Guinea-Bissau's (UNIOGBIS) "mandate is unlikely to be fully implemented before the Office draws down by" December 31, 2020.<sup>28</sup>

H. LIBERIA

1. *Constitutional Amendments*

Liberia's legislature approved eight measures, most of which reduce federal term limits (including the president's), in 2019, but the executive decided to present them as "three broad ballot measures."<sup>29</sup> Liberia's Supreme Court held that combining the measures was unconstitutional but noted that if they were presented as eight separate ballot questions, the problem would be cured.<sup>30</sup> The election commission planned to follow the

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23. U.N. Secretary-General, *Developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea Bissau*, ¶ 23, U.N. Doc. S/2020/105 (Feb. 6, 2020).

24. U.N. Secretary-General, *Developments in Guinea-Bissau and the activities of the United Nations Integrated Peacebuilding Office in Guinea-Bissau*, ¶ 3, U.N. Doc. S/2020/755 (July 29, 2020).

25. *Id.* at ¶¶ 5–6.

26. *Guinea-Bissau: Political chaos could boost cocaine trade*, BBC NEWS (Mar. 12, 2020), <https://www.bbc.com/news/world-africa-51833073>.

27. *Political crisis in Guinea-Bissau: UN Representative urges political leaders to enact reforms*, U.N. NEWS (Aug. 10, 2020), <https://news.un.org/en/story/2020/08/1069942>.

28. *Id.*

29. Robtel Neajai Pailey, *Liberia's Weah might be in for a rude awakening at the polls*, AL JAZEERA (Dec. 1, 2020), <https://www.aljazeera.com/opinions/2020/12/1/liberias-weah-might-be-in-for-a-rude-awakening-at-the-polls/>.

30. *Id.*; see also *Liberian electoral body says referendum on presidential terms will take place*, REUTERS (Nov. 22, 2020, 4:51PM), <https://uk.reuters.com/article/us-liberia-politics/liberian-electoral-body-says-referendum-on-presidential-terms-will-take-place-idUSKBN2820UI>.



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Supreme Court's order, and in early December 2020, Liberians voted on the eight constitutional amendments.<sup>31</sup>

I. MALI

1. *Protests, Coup, Transition*

President Ibrahim Boubacar Keïta was overthrown on August 18, 2020.<sup>32</sup> The coup followed weeks of massive protests by the June 5 Movement (M5-RFP) against deteriorating economic and social conditions.<sup>33</sup> After it was agreed upon to hold future elections, the executive, led by “diplomat Moctar Ouane as Prime Minister,” formed a transitional government that would govern over the next eighteen months, and in response, the Economic Community of West African States (ECOWAS) lifted its standard embargo on Mali.<sup>34</sup>

J. MAURITANIA

1. *Former President Arrested*

A parliamentary report on former President Mohamed Ould Abdel Aziz led to a government shake-up in August 2020.<sup>35</sup> The inquiry implicated the former head of state and four ministers of the then government in “maladministration and embezzlement.”<sup>36</sup> Aziz initially rebuffed a parliamentary summons, which led to the re-creation of a High Court with jurisdiction to investigate “presidents and ministers in cases of ‘high treason’” and ultimately to Aziz’s arrest.<sup>37</sup>

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31. Selma Lomax, *Liberia: Referendum Will Not Be Cancelled as Pres. Weah Insists He Broke No Law*, FRONT PAGE AFR. (Dec. 4, 2020), <https://frontpageafricaonline.com/front-slider/liberia-referendum-will-not-be-cancelled-as-pres-weah-insists-he-broke-no-law/>.

32. *Mali coup: Bab Ndaw sworn in as civilian leader*, BBC NEWS (Sept. 25, 2020), <https://www.bbc.com/news/world-africa-54292919>.

33. *Mali opposition rejects military-backed transition charter*, AL JAZEERA (Sept. 13, 2020), <https://www.aljazeera.com/news/2020/9/13/mali-opposition-rejects-military-backed-transition-charter>.

34. Aïssatou Diallo, *Mali: ECOWAS lifts sanctions after appointment of new government*, AFR. REP. (Oct. 7, 2020, 6:39PM), <https://www.theafricareport.com/44829/mali-ecowas-lifts-sanctions-after-appointment-of-new-government/>.

35. Agence France-Presse, *Mauritania President Appoints New Government*, VOICE OF AMERICA (Aug. 9, 2020, 6:35PM), <https://www.voanews.com/africa/mauritania-president-appoints-new-government>.

36. *Mauritania releases ex-president week after arrest for corruption*, AL JAZEERA (Aug. 24, 2020), <https://www.aljazeera.com/news/2020/8/24/mauritania-releases-ex-president-week-after-arrest-for-corruption>.

37. *Id.*

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K. NIGER

1. *New Communications Law*

On May 29, 2020, Niger legalized the interception of telephonic communication to “fight ‘terrorism and transnational organized crimes.’”<sup>38</sup> Opponents, including a small minority of legislators, argued the law could be used for mass tracking and harassment of Nigeriens<sup>39</sup> without judicial authorization or oversight.<sup>40</sup> In 2019, the Niger government used a cybercrime law to detain journalists, provoking intense debates about state repression.<sup>41</sup>

L. NIGERIA

1. *#EndSARS Inquiries*

Though Nigerians had protested for the dissolution of the Special Anti-Robbery Squad (SARS) before, social media and the global pandemic created a different environment when the current iteration of peaceful protests began on October 4, 2020.<sup>42</sup> The federal government announced the break-up of SARS on October 11, 2020, but the protests continued.<sup>43</sup> Government forces killed over 100 people,<sup>44</sup> including those at Lekki Toll Gate on October 20, 2020,<sup>45</sup> arrested hundreds more, and froze protesters’ bank accounts.<sup>46</sup> Twenty-six of Nigeria’s thirty-six states set up judicial panels of

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38. AFP & Jeune Afrique, *Le Niger adopte une nouvelle loi sur les écoutes téléphoniques*, JEUNEAFRIQUE, <https://www.jeuneafrique.com/991323/politique/le-niger-adopte-une-nouvelle-loi-sur-les-ecoutes-telephoniques/> (May 30, 2020, 12:16PM); see also Simone Toussi & Thomas Robertson, *Niger Passes New Law on Interception of Communications*, OPEN NET AFR. (Aug. 25, 2020), <https://www.opennetfrica.org/niger-passes-new-law-on-interception-of-communications/>.

39. *Lutte antiterroriste au Niger: une loi pour intercepter des communications téléphoniques*, BBC NEWS (May 30, 2020), <https://www.bbc.com/afrique/region-52861647>.

40. *The Nigerian bill giving broad powers to intercept communications*, PRIVACY INT’L (June 2, 2020), <https://privacyinternational.org/news-analysis/3854/nigerien-bill-giving-broad-powers-intercept-communications>.

41. Falila Gbadamassi, *Niger: la journaliste Samira Sabou libre après 48 jours de prison “pour rien”*, FRANCEINFO: AFRIQUE (July 31, 2020, 10:39AM), [https://www.francetvinfo.fr/monde/afrique/societe-africaine/niger-la-journaliste-samira-sabou-libre-apres-48-jours-de-prison-pour-rien\\_4061377.html](https://www.francetvinfo.fr/monde/afrique/societe-africaine/niger-la-journaliste-samira-sabou-libre-apres-48-jours-de-prison-pour-rien_4061377.html).

42. Abosede George, *The Roots of the #EndSARS Protests in Nigeria*, WASH. POST (Oct. 25, 2020), <https://www.washingtonpost.com/outlook/2020/10/25/roots-endsars-protests-nigeria/>.

43. *Id.*

44. *Id.*

45. *Nigeria: Killing of #EndSARS protesters by the military must be investigated*, AMNESTY INT’L (Oct. 21, 2020), <https://www.amnesty.org/en/latest/news/2020/10/killing-of-endsars-protesters-by-the-military-must-be-investigated/>.

46. Azeekat Olaoluwa, *End Sars protests: The Nigerian women leading the fight for change*, BBC NEWS (Dec. 1, 2020), <https://www.bbc.com/news/world-africa-55104025>.

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inquiry into alleged human rights violations perpetrated by police.<sup>47</sup> The International Criminal Court also opened an investigation.<sup>48</sup>

M. SÃO TOMÉ AND PRÍNCIPE

1. *Oil & Gas*

In April 2020, legislation was passed that applies to operators engaged in the wholesale sale of petroleum products who are now required to transfer a price differential to the state and included regulations addressing the price differential transfer process and respective debt repayment contracting.<sup>49</sup>

2. *Sand Mining*

In September 2020, Law 9/2020, which defines when mining and extraction is allowed, was published.<sup>50</sup> This law prohibits the extraction of sands and coastal aggregates except in rare instances.<sup>51</sup> This law will come into force in October 2021.<sup>52</sup>

N. SENEGAL

1. *Startup Act*

In late 2019, Senegal became the second African country (after Tunisia) to pass a law providing special benefits to startup businesses.<sup>53</sup> Once implemented, Senegalese businesses will be able to register as “startups,” receive training, and avoid taxes for three years.<sup>54</sup>

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47. Adejumo Kabir, *Nigeria: #EndSARS - See the States That Have Set Up Panels of Inquiry So Far*, ALLAFRICA (Nov. 9, 2020), <https://allafrica.com/stories/202011100044.html>.

48. Wale Odunsi, *End SARS: ICC begins probe of shootings, crimes in Nigeria*, DAILY POST (Nov. 4, 2020), <https://dailypost.ng/2020/11/04/end-sars-icc-begins-probe-of-shootings-crimes-in-nigeria/>.

49. MIRANDA LAW FIRM, *Legal News São Tomé and Príncipe*, 2020.

50. *Sao tome and principe legal regime for the mining and extraction of aggregates*, VDA LEGAL PARTNERS (Oct. 15, 2020), <https://www.lexology.com/library/detail.aspx?g=42bd38c7-4ac1-487f-b1cf-e180c4337d91>.

51. *Id.*

52. *Id.*

53. Nellie Peyton, *Senegal's start-up act to boost female-led business in first for West Africa*, REUTERS (Feb. 21, 2020), <https://www.reuters.com/article/us-senegal-entrepreneurs-law-trfn-idUSKBN20F1UZ> [<https://perma.cc/5MVL-RBXJ>]; see Loi no. 2020-01, *Loi relative à la création et à la promotion de la Startup au Sénégal* [Law Relating to the Creation and Promotions of Startups in Senegal] (Sen.), available at <http://www.numerique.gouv.sn/mediatheque/documentation/loi-relative-%C3%A0-la-cr%C3%A9ation-et-%C3%A0-la-promotion-de-la-startup-au-s%C3%A9n%C3%A9gal>.

54. Loi no. 2020-01 arts. 10–11; see *Senegal Approves A-Three Year Tax Exemption For Its Startups*, AFR. HEROES (Mar. 1, 2020), <https://afrikanheroes.com/2020/03/01/senegal-approves-a-three-year-tax-exemption-for-its-startups/>.

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2. *Import Ban*

An import prohibition on plastic waste came into effect in April 2020.<sup>55</sup> Though exceptions were made due to the COVID-19 pandemic, the new law also bans single-use plastics such as cups, lids, and bags intended for packaging beverages.<sup>56</sup>

O. SIERRA LEONE

1. *Criminal Libel Repealed*

President Bio assented to a law decriminalizing libel in October 2020.<sup>57</sup> The law repealed Part V of the 1965 Public Order Act (of which criminal libel was part) and replaced it with the Independent Media Commission Act 2020.<sup>58</sup>

P. TOGO

1. *Female Prime Minister*

Togo's first female prime minister, Victoire Tomegah Dogbe, was appointed to the role in late September.<sup>59</sup> President Faure Gnassingbe, who won a fourth, five-year term earlier in 2020, appointed Dogbe.<sup>60</sup> Gnassingbe's family has been in power since 1967.<sup>61</sup>

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55. Boris Ngounou, *SENEGAL: Covid-19 "contaminates" the anti-plastic law*, AFRIK21 (Apr. 27, 2020), <https://www.afrik21.africa/en/senegal-covid-19-contaminates-the-anti-plastic-law/>; see Loi no. 2020-04, *Loi relative à la prévention et la réduction de l'incidence sur l'environnement des produits plastiques* [Law Relating to the Prevention and the Reduction of the Impact on the Environment of Plastic Products] (Sen.), available at <https://www.au-senegal.com/IMG/pdf/loi-plastique-senegal-2020-04.pdf>.

56. *Id.*

57. *New Dawn for Sierra Leone's Media as President Assents New Law Repealing Criminal Libel*, MEDIA FOUND. FOR W. AFR. (Nov. 1, 2020), <https://www.mfwa.org/new-dawn-for-sierra-leones-media-as-president-assents-new-law-repealing-criminal-libel>.

58. Mohamed Fofanah, *Sierra Leone – Why Everyone is Not Celebrating the New Media Law*, INTER PRESS SERVICE (July 30, 2020), <http://www.ipsnews.net/2020/07/sierra-leone-why-everyone-not-celebrating-new-media-law/>; see The Independent Media Commission Act 2020, Gazette Vol. CXLXI, No. 52 (Sierra Leone).

59. *Togo Appoints Its First Woman Prime Minister*, TOGONEWS (Sept. 28, 2020), <https://allafrica.com/stories/202009290315.html>.

60. See Reuters Staff, *Togo court confirms President Gnassingbe's landslide electoral victory*, REUTERS (Mar. 3, 2020), <https://www.reuters.com/article/us-togo-election-idUSKBN20Q2CK>.

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**III. Central Africa**

**A. CAMEROON**

1. *Decentralization “Solution”*

Amidst open hostilities between the Anglophone regions and Cameroon’s Francophone central government, President Paul Biya authorized election of Regional Councils in each of the country’s ten districts.<sup>62</sup> The elections will fulfill a 1996 constitutional reform to decentralize Cameroon’s governance.<sup>63</sup>

**B. CENTRAL AFRICAN REPUBLIC**

1. *Crimes Against Humanity Convictions*

In February 2020, five leaders of a Christian militia were sentenced to life in prison for crimes against humanity and war crimes committed in the May 2017 killing of dozens of people.<sup>64</sup> The convictions were the first handed down by a Central African Republic court for crimes against humanity.<sup>65</sup>

**C. CHAD**

1. *Capital Punishment Eliminated*

Perhaps motivated by the April 2020 death of forty-four Boko Haram suspects in pre-trial detention, the Chad anti-terrorism law was amended to remove the death penalty as a potential punishment.<sup>66</sup> Death is no longer a penalty for any crime under the laws of Chad.<sup>67</sup>

**D. CONGO (DEMOCRATIC REPUBLIC)**

1. *President’s Chief of Staff Convicted*

The top aide to President Felix Tshisekedi was convicted for embezzling over \$48.8 million in public funds meant for a housing program for the

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62. Newswires, *Cameroon announces elections in December, despite unrest in anglophone regions*, FRANCE24 (Sept. 8, 2020) <https://www.france24.com/en/20200907-cameroon-s-president-paul-biya-announces-first-regional-elections-in-december>.

63. R. Maxwell Bone, *Paul Biya Is Offering Cameroon’s Anglophones Too Little, Too Late*, FOREIGN POLICY (Nov. 21, 2020), <https://foreignpolicy.com/2020/11/21/paul-biya-is-offering-camerouns-anglophones-too-little-too-late>.

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65. *Id.*

66. Allan Ngari, *Chad’s new counter-terrorism law a step in the right direction*, INST. FOR SEC. STUDIES (June 15, 2020), <https://issafrica.org/iss-today/chads-new-counter-terrorism-law-a-step-in-the-right-direction>; *Civil society organizations pave the road to end capital punishment in Chad*, UN HUM. RTS. OFFICE OF THE HIGH COMMISSIONER (Oct. 9, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/chad-death-penalty.aspx>.

67. *Civil society organizations pave the road to end capital punishment in Chad*, *supra* note 66.

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poor.<sup>68</sup> The former chief of staff, Vital Kamerhe, had been the highest-ranking politician in the DRC to face corruption charges.<sup>69</sup> Controversial draft laws were proposed by the majority party to restrict judicial<sup>70</sup> and prosecutorial discretion, likely in response to the trial.<sup>71</sup>

E. CONGO (REPUBLIC)

1. *Industrialization Plan*

In February 2020, the president approved a national strategic plan for industrialization.<sup>72</sup> The strategic plan sets the first stage of implementation for the use of natural resources and sets the priority needs for development as land, loans, preferential tariffs, tax exemptions, and export credits.<sup>73</sup>

F. EQUATORIAL GUINEA

1. *Foreign Investment*

To attract foreign investment, new legislation was approved in May.<sup>74</sup> The legislation includes a reduction of the minimum share of capital for limited liability (SARL) companies from 1,000,000 CFA Francs to 100,000 CFA Francs.<sup>75</sup> Additionally, a new mining law repealed the mining rules in force and introduced significant changes, including new local content obligations, applicable to foreign investors.<sup>76</sup>

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68. *DRC president's top aide gets 20-year jail term for corruption*, AL JAZEERA (June 20, 2020), <https://www.aljazeera.com/news/2020/6/20/drc-presidents-top-aide-gets-20-year-jail-term-for-corruption>.

69. *Id.*

70. Thomas Fessy, *Justice at Risk in Democratic Republic of Congo*, HUM. RTS. WATCH (July 8, 2020), <https://www.hrw.org/news/2020/07/08/justice-risk-democratic-republic-congo/>.

71. *Id.*

72. *Legal News Republic of the Congo February through April 2020*, MIRANDA ALLIANCE (May 25, 2020), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/republic-of-congo-legal-news-february-through-april-2020>; see Décret no. 2020-32, Portant approbation de la stratégie nationale d'industrialisation [Approving the National Industrialization Strategy] (Dem. Rep. Congo).

73. *Id.*

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G. GABON

1. *Social Security Changes Official*

After being introduced in 2014, several Social Security Code amendments were published in early 2020.<sup>77</sup> Changes include rules making independent workers subject to the Social Security regime, defining criteria applicable to the grant of family allowances or survivorship pensions, and entitling mothers to full salary while on maternity leave.<sup>78</sup>

IV. East Africa

A. BURUNDI

1. *Post of Prime Minister Restored*

President Évariste Ndayishimiye appointed Alain-Guillaume Bunyoni as the prime minister on June 23, 2020<sup>79</sup> in accordance with the 2018 constitution.<sup>80</sup> The post—the head of the government—was abolished in 1998.<sup>81</sup> Ndayishimiye was sworn in early after President Pierre Nkurunziza died in June 2020.<sup>82</sup>

B. DJIBOUTI

1. *ICSID Ratification*

On June 9, 2020, Djibouti deposited ratification documents for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).<sup>83</sup>

C. ERITREA

1. *Religious Rights*

In September 2020, the government released more than twenty prisoners held in detention “because of their faith.”<sup>84</sup> The prisoners had been held for

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77. *Legal News - Gabon*, MIRANDA ALLIANCE (Feb. 28, 2020), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/gabon-legal-news-january-and-february2020>.

78. *Id.*

79. Felix Tih, *Burundi gets new prime minister after 22 years*, ANADOLU AGENCY (June 24, 2020), <https://www.aa.com.tr/en/africa/burundi-gets-new-prime-minister-after-22-years/1887807>.

80. Constitution of 2018 May 17, 2018, Title V, art. 112 (Burundi).

81. Tih, *supra* note 79.

82. *Id.*

83. *Djibouti Ratifies the ICSID Convention*, INT’L CTR. FOR SETTLEMENT OF INV. DISP. (June 9, 2020), <https://icsid.worldbank.org/news-and-events/news-releases/djibouti-ratifies-icsid-convention>.

84. Kahsay Tewoldebirhan, *Eritrea ‘releases Christian prisoners on bail’*, EASTAFRICANHERALD (Sept. 10, 2020), <https://www.eastafricanherald.com/lifestyle/2020/9/11/eritrea-releases-christian-prisoners-on-bail>.

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as many as sixteen years for practicing outside the four official religions in Eritrea: Christian Orthodoxy, Catholicism, Lutheranism, and Sunni Islam.<sup>85</sup> This release followed recent nationalization of religious schools and the closure of Catholic Church-run health facilities.<sup>86</sup>

D. ETHIOPIA

1. *Conflict in Tigray*

Long suspicious of attempts perceived to strengthen Ethiopia's central government, the Tigray People's Liberation Front (TPLF) held regional elections in September 2020, despite all elections being postponed nationwide by the central government.<sup>87</sup> The central government called the Tigrayan election illegal, suspended funding for and cut ties with Tigray in October 2020.<sup>88</sup> In November of 2020, Prime Minister Abiy claimed Tigrayan forces attacked an army base to steal weapons, ultimately leading to mass casualties and a federal attack on the regional capital of Mekelle.<sup>89</sup>

As of December 2020, the TPLF claimed to retain most of the Tigray Region outside of the regional capital and to be prepared for a protracted fight.<sup>90</sup> Regionally, Eritrean forces are allegedly on the side of the Ethiopian federal government, while at least 45,000 Tigrayans have fled across the border into Sudan.<sup>91</sup>

E. KENYA

1. *Laws Enacted Without Senate Approval*

On October 29, 2020, the High Court of Kenya nullified twenty-three laws that the National Assembly passed and the president signed without the participation of the Senate.<sup>92</sup> The procedure for the bills was deemed inconsistent with, amongst other laws, Article 110(3) of the Kenyan Constitution.<sup>93</sup> The laws are still in operation, but if they are not passed

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85. *Id.*

86. Teklemariam Bekit, *Thousands continue to flee Eritrea - HRW*, BBC NEWS (Jan. 15, 2020), <https://www.bbc.com/news/topics/cz4pr2gdgiyt/eritrea>.

87. *Ethiopia's Tigray crisis: The long, medium, and short story*, BBC NEWS (Nov. 17, 2020), <https://www.bbc.com/news/world-africa-54964378>.

88. *Id.*

89. Nima Elbagir et al., *Forces from Ethiopia's Tigray region say Eritrean troops are part of the conflict and the war is far from over*, CNN (Dec. 4, 2020), <https://edition.cnn.com/2020/12/04/africa/ethiopia-war-tplf-exclusive-intl/index.html>.

90. *Id.*

91. *Aid coming to Ethiopia's Tigray as refugees recount war suffering*, AL JAZEERA (Dec. 3, 2020), <https://www.aljazeera.com/news/2020/12/3/aid-coming-to-ethiopia-tigray-as-refugees-recount-war-suffering>.

92. Joseph Wangui, *High Court nullifies 23 laws passed without Senate's approval*, NATION MEDIA GROUP (Oct. 29, 2020), <https://nation.africa/kenya/news/high-court-nullifies-24-laws-senate-s-approval-2725618>.

93. Pet. 248 & 353 (2019) THE LAWS OF KENYA, REVISED EDITION.



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under the constitutionally mandated procedure within nine months, the laws shall be nullified.<sup>94</sup>

F. RWANDA

1. *Surrogacy*

On September 11, 2020, the Nyarugenge Intermediate Court overturned a lower court and approved a couple's plan to have a child by surrogacy.<sup>95</sup> The child will be registered to the intended couple at birth but stay with the surrogate couple for six months after birth.<sup>96</sup> Existing statute only recognized medically assisted reproduction, not outside party involvement.<sup>97</sup>

2. *High Profile Criminal Case*

Paul Rusesabagina, famously portrayed in the movie *Hotel Rwanda*, was arrested on August 31, 2020.<sup>98</sup> Rusesabagina faces charges for alleged connections to a rebel group.<sup>99</sup> International human rights organizations, along with Rusesabagina's family, allege the arrest was due to an enforced disappearance.<sup>100</sup>

G. Seychelles

1. *Property Taxes for Non-Nationals*

Under the Immovable Property Tax Act of 2019, all non-Seychellois—including corporations whose directors, shareholders, or ultimate beneficial owners are non-Seychellois—who own real property must register and pay an annual property tax beginning in 2020.<sup>101</sup> The definition of "immovable property" is given a wide definition to avoid any legal gaps.<sup>102</sup>

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94. *Id.* at ¶ 146.

95. Emmanuel Côme Mugisha, *Rwandan court backs surrogacy in landmark ruling*, N.Y. TIMES (Sept. 11, 2020), <https://www.newtimes.co.rw/news/rwandan-court-backs-surrogacy-landmark-ruling>.

96. *Id.*

97. *Id.*

98. *Paul Rusesabagina: Hotel Rwanda film hero arrested*, BBC NEWS (Aug. 31, 2020), <https://www.bbc.com/news/world-africa-53972924>.

99. *Hotel Rwanda hero Paul Rusesabagina charged with 'terrorism'*, AL JAZEERA (Sept. 14, 2020), <https://www.aljazeera.com/news/2020/9/14/hotel-rwanda-hero-paul-rusesabagina-charged-with-terrorism>.

100. *Rwanda: Rusesabagina Was Forcibly Disappeared*, HUM. RTS. WATCH, (Sept. 10, 2020), <https://www.hrw.org/news/2020/09/10/rwanda-rusesabagina-was-forcibly-disappeared>.

101. IMMOVABLE PROPERTY TAX ACT (2019) § 3(1) (Seychelles); Malcolm Moller & Juliette Ally, *Seychelles: New Property Tax Law Now In Force In Seychelles*, MONDAQ (July 16, 2020), <https://www.mondaq.com/property-taxes/966268/new-property-tax-law-now-in-force-in-seychelles>.

102. Moller & Ally, *supra* note 101.

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H. SOMALIA

1. *New Media Law*

Amendments to Somalia's 2016 Media Law came into effect in August 2020.<sup>103</sup> Journalists welcomed the minor advances and the government's apparent interest in establishing public broadcasting.<sup>104</sup> But critics claimed the law imposes strict rules on who can work as a journalist, continues to criminalize journalistic activities, and provides for large fines and even prison sentences.<sup>105</sup>

I. SOUTH SUDAN

1. *Peace Process*

Meeting the February 22, 2020 deadline, opposition leader Riek Machar returned as the first vice president of Sudan under President Salva Kiir in a unity government.<sup>106</sup> The two sides reached a deal on control of the country's ten states in June 2020.<sup>107</sup> Progress for the three-year interim government has since moved slowly regarding security sector reform and constitutional drafting, the latter of which requires the Transitional National Legislative Assembly to be re-formed.<sup>108</sup>

J. SUDAN

1. *Peace Deal with Rebel Coalition*

On August 31, 2020, the transitional government signed a peace agreement with the Sudan Revolutionary Front, a coalition of rebel groups.<sup>109</sup> Absent from the agreement were two key groups, the Sudan Liberation Movement and the Sudan People's Liberation Movement-North.<sup>110</sup> The deal addresses matters such as the integration of rebels into

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103. Int'l Fed'n of Journalists, *Somalia: New Media Law Fails to Comply with International Standards On Press Freedom*, ALL AFR. (Aug. 16, 2020), <https://allafrica.com/stories/202008270637.html#>.

104. *Somalia's new media law ignores calls for journalists to be protected*, REPS. WITHOUT BORDERS (Aug. 28, 2020), <https://rsf.org/en/news/somalias-new-media-law-ignores-calls-journalists-be-protected>.

105. *Id.*

106. Sam Mednick, *After 6 years of war, will peace finally come to South Sudan?*, AL JAZEERA (Feb. 23, 2020), <https://www.aljazeera.com/news/2020/2/23/after-6-years-of-war-will-peace-finally-come-to-south-sudan>.

107. *South Sudan leaders reach key deal on control of states*, AL JAZEERA (June 17, 2020), <https://www.aljazeera.com/news/2020/6/17/south-sudan-leaders-reach-key-deal-on-control-of-states>.

108. *South Sudan: Progress on peace agreement 'limps along', UN envoy tells Security Council*, U.N. NEWS (Sept. 16, 2020), <https://news.un.org/en/story/2020/09/1072502>.

109. Naba Mohiedeen & Michael Atit, *In South Sudan, Mixed Reaction to Peace Deal with Rebel Coalition*, VOA NEWS (Sept. 1, 2020), <https://www.voanews.com/africa/south-sudan-mixed-reaction-peace-deal-rebel-coalition>.

110. *Id.*

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security forces, political representation, land rights, and distribution of \$7.5 billion over the next ten years to southern and western Sudan.<sup>111</sup>

2. *No Longer a State Sponsor of Terror*

In exchange for \$335 million in compensation to victims of U.S. embassy bombings in Kenya and Tanzania in 1998,<sup>112</sup> and Sudan normalizing relations with Israel, the United States agreed to remove Sudan's designation as a state sponsor of terrorism.<sup>113</sup>

K. TANZANIA

1. *Public Interest Litigation Curtailed*

In June 2020, the government passed a law to eliminate strategic litigation by: (1) limiting an applicant's legal standing under Article 26(2) of the Tanzanian Constitution, which allows every person to "ensure the protection of this Constitution and the laws of the land," to when they have suffered personal harm; and (2) directing petitions against the president, vice president, prime minister, chief justice, or speaker or deputy speaker of the legislature to only be brought against the Attorney General.<sup>114</sup>

L. UGANDA

1. *Run Up to 2021 Elections*

As President Yoweri Museveni stood for a sixth, five-year term in office, his government took steps to block opposition candidates.<sup>115</sup> For example, Robert Kyagulanyi (known by his musical stage name, Bobi Wine) was prohibited from performing concerts despite court order,<sup>116</sup> prevented from

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111. *Sudan's government, rebel groups sign landmark deal*, AL JAZEERA (Oct. 3, 2020), <https://www.aljazeera.com/news/2020/10/3/sudans-government-rebels-set-to-sign-landmak-deal>.

112. *Sudan, US sign agreement to restore sovereign immunity*, AL JAZEERA (Oct. 31, 2020), <https://www.aljazeera.com/news/2020/10/31/sudan-says-agrees-with-us-on-restoring-of-sovereign-immunity>.

113. Matthew Leriche, *Sudan: Trump's deal could be disastrous. Biden can fix it.*, AFR. ARGUMENTS (Nov. 18, 2020), <https://africanarguments.org/2020/11/18/sudan-trumps-deal-could-be-disastrous-biden-can-fix-it/>.

114. Written Laws (Misc. Amendments) Act No. 6 of 2020 (Tanzania), at §§ 7–8; Issa Shivji, *Tanzania abolishes Public Interest Litigation*, ACADEMIA (June 11, 2020), [https://www.academia.edu/43326914/Tanzania\\_abolishes\\_Public\\_Interest\\_Litigation\\_A\\_Comment\\_on\\_the\\_Amendment\\_of\\_Basic\\_Rights\\_and\\_Duties\\_Enforcement\\_Act\\_Cap\\_3\\_of\\_the\\_Revised\\_Laws\\_of\\_Tanzania?auto=download](https://www.academia.edu/43326914/Tanzania_abolishes_Public_Interest_Litigation_A_Comment_on_the_Amendment_of_Basic_Rights_and_Duties_Enforcement_Act_Cap_3_of_the_Revised_Laws_of_Tanzania?auto=download).

115. *Uganda: Bobi Wine suspends presidential campaign after violence*, AFR. REP. (Dec. 2, 2020), <https://www.theafricareport.com/53076/uganda-bobi-wine-suspends-presidential-campaign-after-violence/>.

116. Halima Athumani, *Uganda High Court Rules Police Halting Bobi Wine Concerts Illegal*, VOA NEWS (May 16, 2020), <https://www.voanews.com/africa/uganda-high-court-rules-police-halting-bobi-wine-concerts-illegal>.

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registering a new political party,<sup>117</sup> and sued for taking the mantle of a political party.<sup>118</sup> Less than two months from the January 2021 election, Kyagulanyi was arrested for failing to observe COVID-19 rules.<sup>119</sup> Police killed at least forty-five supporters who protested the arrest,<sup>120</sup> while Museveni held large rallies without consequence.<sup>121</sup>

## V. Southern Africa

### A. ANGOLA

#### 1. *Environmental Law*

In March 2020, Angola agreed to the Kyoto Protocol to the United Nations Framework Convention on Climate Change through Accession Letter No. 3/20.<sup>122</sup> In domestic law, Angola passed the Law on Environmental Conservation Areas, issued new regulations on environmental impact assessment licensing, and adopted a national program for environmental standards.<sup>123</sup>

#### 2. *New Penal Code Finalized*

New penal and criminal procedure codes were announced and will take effect in February 2021.<sup>124</sup> After initial approval in early 2019, this year President Lourenço sought to add stronger penalties for crimes committed in the performance of public duties and crimes against the environment.<sup>125</sup> The penal code no longer criminalizes gay sex<sup>126</sup> and makes criminal liability of corporate persons the norm.<sup>127</sup>

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117. *2021 elections: Bobi Wine unveils political party*, INDEP. (July 22, 2020), <https://www.independent.co.ug/2021-elections-bobi-wine-unveils-political-party/>.

118. *Bobi Wine sued over NUP party registration*, DAILY MONITOR (Aug. 26, 2020), <https://www.monitor.co.ug/News/National/Bobi-Wine-sued-over-NUP-party-registration/688334-5614334-joi6njz/index.html>.

119. Samson Ntale et al., *At least 45 people have been killed during Uganda protests*, CNN (Nov. 24, 2020), <https://edition.cnn.com/2020/11/23/africa/ugandan-protest-death-toll-intl/index.html>.

120. *Id.*

121. *Bobi Wine protests: Shoot to kill defended by Uganda minister*, BBC NEWS (Nov. 20, 2020), <https://www.bbc.com/news/world-africa-55016519>.

122. *Legal News - Angola*, MIRANDA ALLIANCE (May 29, 2020), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/angola-legal-news-january-throughapril-2020>.

123. *Id.*

124. Frederico Issuzo, *New Penal Code Makes History in João Lourenço's Era*, ANGOP (Nov. 11, 2020), <https://www.angop.ao/en/noticias/politica/codigo-penal-faz-historia-na-era-joao-lourenco/>.

125. *Id.*

126. Tris Reid-Smith, *Angola has finally voted to make gay sex legal*, GAY STAR NEWS (Nov. 13, 2020), <https://www.gaystarnews.com/article/angola-has-finally-voted-to-make-gay-sex-legal/>.

127. *Angola- Criminal law overhaul in line with international standards*, VDA LEGAL PARTNERS (Nov. 25, 2020), [https://www.vda.pt/xms/files/05\\_Publicacoes/2020/Flashes\\_Newsletters/](https://www.vda.pt/xms/files/05_Publicacoes/2020/Flashes_Newsletters/)

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B. BOTSWANA

1. *Married Women's Land Ownership*

Changing the 2015 Land Policy, a September law will allow married women in Botswana to own land even if their husbands already do.<sup>128</sup>

2. *Border Issue With Namibia*

The Botswana Defense Force (BDF) killed three Namibian fishermen and their Zambian cousin in early November, claiming the four were actually armed poachers.<sup>129</sup> Prior to this attack, in September 2020, Botswana's parliament rejected a call to re-arm game rangers.<sup>130</sup> The two governments launched a joint investigation into the killings and called for calm.<sup>131</sup> Previously it was alleged that Botswana anti-poaching operations have killed at least thirty Namibians and twenty-two Zimbabweans over the past twenty years.<sup>132</sup>

C. COMOROS

1. *Parliamentary Elections*

President Azali Assoumani's party won twenty out of twenty-four legislative seats in parliamentary elections in February 2020.<sup>133</sup> Opposition parties boycotted the 2020 elections as they had previously done for a 2018 constitutional referendum (which permitted a president to serve two consecutive terms instead of one at a time) and the 2019 presidential election.<sup>134</sup>

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\_Criminal\_Law\_overhaul\_in\_line\_with\_International\_Standards.pdf.

128. Keletso Thobega, *Botswana opts to make land owners of wives with new law*, THOMSON REUTERS FOUND. (Sept. 17, 2020), <https://news.trust.org/item/20200917163703-1z7qr>.

129. Kuzeeko Tjitemisa, *Namibia: Probe in Fishermen Killing Escalates*, ALL AFR. (Nov. 19, 2020), <https://allafrica.com/stories/202011200556.html>.

130. Mqondisi Dube, *Botswana Parliament Rejects Call to Arm Game Rangers*, VOA NEWS (Sept. 12, 2020), <https://www.voanews.com/africa/botswana-parliament-rejects-call-arm-game-rangers>.

131. Keamogetse Letsholo, *Botswana: Maintain Peace, Tranquility Image*, ALL AFR. (Nov. 18, 2020), <https://allafrica.com/stories/202011190373.html>.

132. Tileni Mongudhi, Joel Konopo, and Ntibinyane, *Deadly borders . . . 30 Namibians killed through Botswana's shoot-to-kill policy*, NAMIBIAN (Mar. March 9, 2016), <https://www.namibian.com.na/148318/archive-read/Deadly-borders—30-Namibians-killed-through>.

133. Anziza M'Changama, *Comores: le parti présidentiel remporte sans surprise les législatives*, RFI (Feb. 25, 2020), <https://www.rfi.fr/fr/afrique/20200224-comores-resultats-provisoire-legislatives-ceni>.

134. *Comoros president's party wins poll boycotted by opposition*, AL JAZEERA (Jan. 21, 2020), <https://www.aljazeera.com/news/2020/1/21/comoros-presidents-party-wins-poll-boycotted-by-opposition>; see also *The Dangers of Assoumani's 'Creeping Authoritarianism' in Comoros*, WORLD POL. REV. (Feb. 14, 2020), <https://www.worldpoliticsreview.com/trend-lines/28540/with-comoros-elections-azali-assoumani-cements-his-authoritarian-rule>.

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D. LESOTHO

1. *Former Prime Minister Implicated in Ex-Wife's Death*

Two days before he assumed office in 2017, Prime Minister Thomas Thabane's ex-wife was shot and killed.<sup>135</sup> Authorities alleged that Thabane's current wife (then-mistress) was responsible for the shooting.<sup>136</sup> Under pressure from outside and within his own party, Thabane attempted to dissolve parliament and call for fresh elections and he even sent the army into the streets in an effort to maintain power<sup>137</sup> before resigning in May 2020.

2. *Internet Broadcasting Rules*

In October 2020, the Lesotho Communications Authority proposed new rules that would regulate "internet broadcasting," including the publishing of text, pictures, video, or audio accessible to at least 100 internet users in Lesotho.<sup>138</sup> Persons who "conduct" internet broadcasting will be required to register with the authorities and comply with broadcasting standards.<sup>139</sup> Critics claim that the proposal is chilling to free expression and absurd to implement.<sup>140</sup>

E. MADAGASCAR

1. *Suspended Mining Project Audited*

Madagascar's Court of Auditors, part of the Supreme Court, issued a report on the governance of a mineral sands mining project that was suspended in late 2019.<sup>141</sup> The report, a first about a mining operation, "cite[d] irregularities in the issuance of permits, the transference of land

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135. *Thomas Thabane resigns as Lesotho prime minister*, BBC NEWS (May 19, 2020), <https://www.bbc.com/news/world-africa-52707752>.

136. *Id.*

137. *Lesotho Senate piles more pressure on PM by amending constitution*, AL JAZEERA (Apr. 28, 2020) <https://www.aljazeera.com/news/2020/4/28/lesotho-senate-piles-more-pressure-on-pm-by-amending-constitution>.

138. Public Consultation Notice, Lesotho Comm'n Auth. (Oct. 1, 2020), *available at* <https://www.lca.org.ls/proposed-promulgation-of-the-lesotho-communications-authority-internet-broadcasting-rules-2020/>; *see also* *Lesotho mulls tighter social media regulations*, APA NEWS (Oct. 8, 2020), <http://apanews.net/en/news/lesotho-mulls-tighter-social-media-regulations>.

139. Lesotho mulls tighter social media regulations, *supra* note 138.

140. Anita Powell, *Tiny African Nation of Lesotho Proposes Social Media Limits*, VOA NEWS (Oct. 15, 2020), <https://www.voanews.com/africa/tiny-african-nation-lesotho-proposes-social-media-limits>.

141. Edward Carver, *Madagascar's top court criticizes government handling of mining project*, MONGABAY (Oct. 9, 2020), <https://news.mongabay.com/2020/10/madagascars-top-court-criticizes-government-handling-of-mining-project/> (Court of Auditors report not available online).

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rights, the management of a protected area, and the consultation process with local people.”<sup>142</sup>

F. MALAWI

1. *2019 Presidential Election Re-Run*

In February 2020, a Constitutional Court of Malawi overturned the results of the 2019 presidential election.<sup>143</sup> The judgment was based on two new holdings: (1) a combination of quantitative and qualitative irregularities can invalidate an election; and (2) section 80(2) of the Malawian constitution, which requires a president to be elected by a majority, means the winning candidate must receive fifty percent of the votes plus one.<sup>144</sup> The Supreme Court of Appeal affirmed the judgment in May.<sup>145</sup> In June 2020, Lazarus Chakwera, 2019’s runner up, won the presidency on an opposition unity ticket.<sup>146</sup>

G. MAURITIUS

1. *Oil Spill*

On July 25, 2020, a Japanese-owned ship spilled up to 2,000 tons of oil when it ran aground on a coral reef near Pointe d’Esny.<sup>147</sup> The spill, though relatively small, happened near two environmentally protected areas, and it may seriously impact Mauritius’ environmental diversity and tourism.<sup>148</sup> Because the ship was not an oil tanker, financial liability for the spill will be relatively small.<sup>149</sup>

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142. *Id.*

143. Jonathan Pasungwi, *ConCourt judges get international honour*, NATION (July 22, 2020), <https://www.mwnation.com/concourt-judges-get-international-honour/>.

144. Chilima and Another v. Mutharika and Another No. 1 of 2019 Malawi High Court, Lilongwe District, at 416–17 (MWHC 2, Feb. 3, 2020), <https://malawilii.org/mw/judgment/high-court-general-division/2020/2>; see also Alfred Mavedzenge, *A Breath of Fresh Air as the Supreme Court of Malawi Breaks Rank with Its Own Precedent and Peers in Southern Africa: Part 1*, OPINIOJURIS (May 25, 2020), <http://opiniojuris.org/2020/05/25/a-breath-of-fresh-air-as-the-supreme-court-of-malawi-breaks-rank-with-its-own-precedence-and-peers-in-southern-africa-part-1/>.

145. Mutharika and Another v. Chilima and Another, MSCA Const. Appeal No. 1 of 2020, at 83, MWSC 1 (May 8, 2020), <https://malawilii.org/mw/judgment/supreme-court-appeal/2020/1>.

146. Pasungwi, *supra* note 143.

147. *Mauritius Oil Spill Highlights Importance of Global Maritime Laws: UN Trade Body*, U.N. NEWS (Aug. 20, 2020), <https://news.un.org/en/story/2020/08/1070682>.

148. Navin Singh Khadka, *Why the Mauritius Oil Spill is So Serious*, BBC NEWS (Aug. 13, 2020), <https://www.bbc.com/news/world-africa-53754751>.

149. *Mauritius Oil Spill Highlights Importance of Global Maritime Laws: UN Trade Body*, *supra* note 147.

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2. *Digital Services Tax*

Effective August 7, 2020, a fifteen percent “value added tax will apply to digital or electronic services supplied over the internet or an electronic network or which is dependent on information technology.”<sup>150</sup> But it remains unclear how many services will be taxed.<sup>151</sup>

H. MOZAMBIQUE

1. *Criminal Laws*

Updated criminal, criminal procedure, and sentence enforcement codes came into force in June 2020 after their December 2019 approval.<sup>152</sup> Additionally, Parliament adopted Law No. 21/2019, setting forth the terms of Mozambican cooperation on international criminal matters.<sup>153</sup>

2. *Cabo Delgado*

Violence continued to escalate in and around the insurgency in northern Mozambique.<sup>154</sup> As of November 2020, the conflict had killed as many as 2,000 people and left around 430,000 without a home.<sup>155</sup> Affected by both the violence and COVID-19, the financing structure of the Golfinho/Atum Liquid Natural Gas Project was altered.<sup>156</sup>

I. NAMIBIA

1. *Genocide Reparations*

Namibia and Germany continue negotiations for a formal apology and reparations for the German genocide of the Herero and Nama people in 1904.<sup>157</sup> Germany offered \_10 million, which Namibia rejected.<sup>158</sup>

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151. Thomas Roberston, *Mauritius’s Newly Introduced Tax on Online Services Threatens Freedom of Expression*, ALLAFRICA (Nov. 30, 2020), <https://allafrica.com/stories/202012010325.html>.

152. *Legal News Mozambique: November 2019 through January 2020*, MIRANDA ALLIANCE (Mar. 10, 2020), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-november-2019-through-january-2020>.

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154. *Militant Islamists ‘behead more than 50’ in Mozambique*, BBC NEWS (Nov. 9, 2020), <https://www.bbc.com/news/world-africa-54877202>.

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156. *Legal News Mozambique: May Through July 2020*, MIRANDA ALLIANCE (Aug. 31, 2020), <https://mirandalawfirm.com/en/insights-knowledge/publications/legal-news/mozambique-legal-news-may-throughjuly-2020>. Decree No.

157. Claus Stacker, *Opinion: A Mere \_10 Million for Germany’s Colonial-Era Genocide in Namibia?*, DW (Aug. 13, 2020), <https://www.dw.com/en/namibia-herero-nama-genocide-reparations/a-54560681>.



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Negotiations between the two countries have been ongoing for five years, and eight rounds of negotiation; a ninth round will be the last.<sup>159</sup>

J. SOUTH AFRICA

1. *GBV Bills*

In response to public outcry over sexual violence against South African women, three bills were introduced in September 2020 to bring justice to gender-based violence victims.<sup>160</sup> The proposals include provisions to add sexual intimidation as a criminal offense; limit accused offenders' access to bail (and have victims heard in the decision-making process); and create additional obligations on police, prosecutors, and health and education officials in the handling of survivor services.<sup>161</sup>

K. SWAZILAND (KINGDOM OF ESWATINI)

1. *Journalists Face Penalties*

A series of high-reward defamation cases were won by public figures in Eswatini, which led one of the two daily newspapers to implement a fine for journalists whose stories incur liability.<sup>162</sup> Further, an introduced bill proposed penalizing the publication of "fake news" with a fine of up to \$600,000, a ten-year prison sentence, or both, but the bill was amended in November 2020 to remove the section on "fake news."<sup>163</sup>

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158. Sakeus Iikela, *Gov't to Propose Genocide Projects*, THE NAMIBIAN (Aug. 11, 2020), <https://www.namibian.com.na/203425/archive-read/Govt-to-propose-genocide-projects>.

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160. Khanyi Mlaba, *South Africa's New Gender-Based Violence Laws: What You Should Know and How to Have Your Say*, GLOBAL CITIZEN (Sept. 23, 2020), <https://www.globalcitizen.org/en/content/south-africa-new-laws-gender-violence-what-to-know/>.

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162. Vuyisile Hlatshwayo, *'Climate of Fear' in eSwatini Media*, MAIL & GUARDIAN (Nov. 11, 2020), <https://mg.co.za/africa/2020-11-11-climate-of-fear-in-eswatini-media/>.

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L. ZAMBIA

1. *Default*

On November 13, 2020, Zambia became the first country to default on public debts during the COVID-19 pandemic when Eurobond holders rejected the country's request to defer interest payments until April 2021.<sup>164</sup> President Edgar Lungu asked Chinese President Xi for debt relief and cancellation in July 2020.<sup>165</sup>

M. ZIMBABWE

1. *Critics Arrested*

Scores of arbitrary detentions, attacks on journalists, and assaults have led to international condemnation of Zimbabwe.<sup>166</sup> The government's most recent effort to quell dissent came in the form of legal amendments approved by the cabinet in October 2020, aimed at protest and "collaboration" with foreign governments against the state.<sup>167</sup>

2. *Marital Property*

In June, Zimbabwe's Supreme Court ruled that couples are entitled to an equal share of their joint property upon divorce.<sup>168</sup>

**VI. African Institutions**

A. AFRICAN UNION

1. *Disputes Turn to AU Leadership*

As Egypt, Ethiopia, and Sudan failed to reach agreement about the usage of Ethiopia's dam on the Blue Nile River, each party turned to South Africa,

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164. Karin Strohecker, *UPDATE 2-Zambia on Track for Protracted Debt Overhaul as Creditors Slam Lack of Engagement*, REUTERS (Nov. 16, 2020), <https://www.reuters.com/article/zambia-debt-creditors-idUSL8N2I22D4>.

165. Eric Olander, *President Edgar Lungu Just Straight Up Asked Xi Jinping for Zambia's Debts to be Cancelled*, CHINA AFR. PROJECT (July 22, 2020), <https://chinaafricaproject.com/2020/07/22/president-edgar-lungu-just-straight-up-asked-xi-jinping-for-zambias-debts-to-be-cancelled/>.

166. Joseph Cotterill, *Arrested Zimbabwe Journalist: 'They Would Have Thrown the Key Away'*, FIN. TIMES (Sept. 13, 2020), <https://www.ft.com/content/8600f375-480f-4b85-83ac-37654af56d2a>.

167. Nobantu Shabangu, *Zimbabwe Approves Law Which Will Criminalise Anti-Government Protests*, OKAYAFRICA (Oct. 30, 2020), <https://www.okayafrica.com/zimbabwe-passes-law-that-criminalises-protests/>.

168. Lungelo Ndhlovu, *Zimbabwe Divorce Law Spurs Women's Fight for Property*, THOMSON REUTERS FOUND. (Sept. 11, 2020), <https://news.trust.org/item/20200911030928-q3aei>.

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the current chair of the AU Executive Council, for further support.<sup>169</sup> In December 2020, South Africa appointed three envoys to the Tigray crisis.<sup>170</sup>

**B. AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

**1. Nigeria's Special Anti-Robbery Squad (SARS)**

In October 2020, the African Commission called for Nigeria to conduct independent investigations into wrongdoing; allow harmed parties “unhindered access to remedies;” suspend implicated SARS officials; thoroughly vet officers transferred to other police units; and establish “an independent police oversight, investigation and accountability mechanism.”<sup>171</sup>

**2. Principles of Freedom of Expression and Access to Information**

In April 2020, the African Commission published the revised Declaration of Principles of Freedom of Expression and Access to Information in Africa.<sup>172</sup> The revised Declaration replaces its 2002 predecessor and notably adopts the African Commission's Model Law on Access to Information for Africa (2013) and Guidelines on Access to Information and Elections in Africa (2017).<sup>173</sup> The Declaration was adopted during the Commission's 65th Ordinary Session.<sup>174</sup>

**C. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

**1. Withdrawal from Article 34**

On March 16 and April 21, 2020, Benin and Côte d'Ivoire, respectively, announced the withdrawal of their declaration under Article 34 of the Protocol to the African Charter on Human and Peoples' Rights on the

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169. News Agencies, *Nile Dam Talks Between Egypt, Ethiopia and Sudan Fail Again*, AL JAZEERA (Nov. 5, 2020), <https://www.aljazeera.com/news/2020/11/5/egypt-ethiopia-sudan-fail-to-succeed-in-disputed-dam-talks>.

170. *Appointment of AU Envoys for Ethiopia's Tigray Crisis an 'Initiative for Peace': UN Chief*, U.N. NEWS (Nov. 21, 2020), <https://news.un.org/en/story/2020/11/1078272>.

171. *EndSARS – African Commission Calls for Immediate Investigation into Reported Cases of Police Brutality*, BoNEWS (Oct. 17, 2020), <https://bonewsng.com/endsars-african-commission-calls-for-immediate-investigation-into-reported-cases-of-police-brutality/>; see Press Release, African Commission on Human and Peoples' Rights, Statement on Unlawful Killings by Security Forces in Nigeria (Oct. 23, 2020), <https://www.achpr.org/pressrelease/detail?id=538>.

172. *New ACHPR Declaration on Freedom of Expression & Access to Information*, INT'L JUST. RES. CTR. (Apr. 22, 2020), <https://ijrcenter.org/2020/04/22/new-achpr-declaration-on-freedom-of-expression-access-to-information/>.

173. *Id.*

174. Press Release, Afr. Ct., African Court on Human and Peoples' Rights Adopts New Rules of Court (Sept. 28, 2020), <https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-adopts-new-rules-of-court/>.

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Establishment of the African Court on Human and Peoples' Rights.<sup>175</sup> The withdrawal will take away the right of citizens and NGOs in the two countries to bring cases before the Court.<sup>176</sup>

2. *Petty Offences*

Many African countries retain colonial era laws criminalizing loitering, public indecency, begging, and other "vagrant" behaviors.<sup>177</sup> In an advisory opinion, the African Court found these laws to be inconsistent with the African Charter, African Children's Rights Charter, and Women's Rights (Maputo) Protocol and encouraged the laws' repeal.<sup>178</sup>

D. AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)  
SECRETARIAT

1. *Secretariat Inaugurated*

On March 19, 2020, the first Secretary General of the AfCFTA Secretariat, Wamkele Mene was sworn in for a four-year term.<sup>179</sup> The AfCFTA Secretariat in Accra, Ghana, was officially commissioned and handed over on August 17, 2020.<sup>180</sup> As of December 7, 2020, there are fifty-four signatories to the AfCFTA, of which at least thirty-six have ratified and thirty-three have deposited their instruments of ratification.<sup>181</sup> Trading under the AfCFTA begins January 1, 2021.<sup>182</sup>

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175. *Benin and Côte D'Ivoire to Withdraw Individual Access to African Court*, INT'L JUST. RES. CTR. (May 6, 2020), <https://ijrcenter.org/2020/05/06/benin-and-cote-divoire-to-withdraw-individual-access-to-african-court/>.

176. *Id.*

177. African Court's Landmark Opinion Could Reduce Criminalization of Poverty, Prison Overcrowding, ALLAFRICA (Dec. 4, 2020), <https://allafrica.com/stories/202012041038.html>.

178. The Compatibility of Vagrancy Laws with the Afr. Charter on Hum. Rts. & Peoples Rts. & Other Hum. Rts. Instruments Applicable in Afr., Advisory Opinion No. 001/2018, *available at* [https://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/001-2018\\_-\\_PALU-Advisory\\_Opinion.pdf](https://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/001-2018_-_PALU-Advisory_Opinion.pdf).

179. Esther Azaa Tankou, *Newly Sworn-In AfCFTA Secretary General, Wamkele Mene, Undertakes to Serve Africa with Resolute Determination*, AFR. UNION (Apr. 18, 2020), <https://au.int/en/pressreleases/20200418/newly-sworn-afcfta-secretary-general-wamkele-mene-undertakes-serve-africa>.

180. Kingsley Ighobor, *AfCFTA Secretariat Commissioned in Accra as Free Trade is Set to Begin in January 2021*, AFR. RENEWAL (Aug. 17, 2020), <https://www.un.org/africarenewal/magazine/august-2020/arz/afcfta-secretariat-commissioned-accra-free-trade-set-to-begin-january-2021>.

181. See *AfCFTA Agreement Towards the African Continental Free Trade Area*, TRALAC, <https://www.tralac.org/documents/resources/infographics/2605-status-of-afcfta-ratification/file.html> (last updated Dec. 7. 2020).

182. *Id.*

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E. AFRICAN DEVELOPMENT BANK (AFDB)

1. *Bank President Cleared*

In July 2020, an independent panel of experts cleared AfDB President Akinwunmi Adesina of corruption charges.<sup>183</sup> Staff members had alleged in January 2020, without substantiation, sixteen complaints, including that Adesina did not respect internal recruitment rules and regulations.<sup>184</sup> Adesina was appointed to a second term in August 2020.<sup>185</sup>

F. AFRICAN EXPORT-IMPORT BANK (AFREXIMBANK)

1. *Pan-African Payment and Settlement System (PAPSS)*

The African Export-Import Bank has developed a payment system, PAPSS, to enable intra-African trade and commerce payments without resorting to third currencies.<sup>186</sup> The interim Governing Council of the system held its inaugural meeting in Cairo on December 3, 2020.<sup>187</sup> PAPSS is planned to be operational in early 2021.<sup>188</sup>

G. UN ECONOMIC COMMISSION FOR AFRICA

1. *Price Watch*

In August 2020, the Economic Commission for Africa unveiled a continental price data platform.<sup>189</sup> The platform will rely on national statistical offices and revenue authorities to provide up to date information about the prices of goods, currency exchange rates, and inflation.<sup>190</sup>

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183. Cassie Maas, *African Development Bank President Cleared of Corruption Charges*, JURIST (July 30, 2020), <https://www.jurist.org/news/2020/07/african-development-bank-president-cleared-of-corruption-charges/>.

184. *Id.*

185. Press Release, Afr. Dev. Bank, Dr. Akinwumi Adesina Reelected Unanimously as President of the African Development Bank Group (Aug. 27, 2020), <https://am.afdb.org/en/press-releases/dr-akinwumi-adesina-re-elected-unanimously-president-african-development-bank-group>.

186. *Nigeria: Emeziele, Others Support New Payment Settlement Initiative*, ALLAFRICA (Dec. 8, 2020), <https://allafrica.com/stories/202012080250.html>.

187. Press Release, Afr. Exp. Imp. Bank, The Governing Council of the Pan-African Payment and Settlement System Holds Inaugural Meeting (Dec. 7, 2020), <https://www.afreximbank.com/the-governing-council-of-the-pan-african-payment-and-settlement-system-holds-inaugural-meeting/>.

188. *Id.*

189. Addis Getachew, *Lack of Price Data Led to Unrest in Africa: UN*, ANADOLU AGENCY (Aug. 12, 2020), <https://www.aa.com.tr/en/africa/lack-of-price-data-led-to-unrest-in-africa-un/1939693>.

190. *Id.*

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H. COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA  
(COMESA)

1. *Border Export Zones*

With support of the European Union, COMESA plans to construct six cross-border export zones for small-scale traders.<sup>191</sup> Four selected sites that Zambia shares with DR Congo, Malawi, Tanzania, and Zimbabwe, respectively, are at an advanced planning stage.<sup>192</sup>

I. EAST AFRICAN COMMUNITY (EAC)

1. *Trade Wars*

This year, Tanzania allowed Ugandan sugar to enter its territory for the first time since Tanzania stopped issuing permits in 2018.<sup>193</sup> But elsewhere in the EAC, Kenya maintains a ban on Ugandan milk,<sup>194</sup> and borders between Rwanda and Uganda and Rwanda and Burundi are closed.<sup>195</sup> COVID-19 did not help, as Kenya and Tanzania traded bans on truck drivers and flights.<sup>196</sup> The EAC heads of states' summit did not meet all year, even virtually.<sup>197</sup>

2. *East African Court on Hold*

No new judges have been appointed to the East African Court of Justice in two years, leaving the Court with only five judges as of late November 2020.<sup>198</sup> Neither the First Instance Division nor the Appellate Division can operate.<sup>199</sup>

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191. Mwangi Gakunga, *COMESA to Construct Border Export Zones for Small Scale Traders*, COMESA (Nov. 6, 2020), <https://www.comesa.int/comesa-to-construct-border-export-zones-for-small-scale-traders/>.

192. *Id.*

193. Amanda Lichtenstein, *A 'Sweet' Deal: Sugar War Ends Between Tanzania and Uganda After Years-Long Embargo*, GLOB. VOICES (Mar. 9, 2020), <https://globalvoices.org/2020/03/09/a-sweet-deal-sugar-war-ends-between-tanzania-and-uganda-after-years-long-embargo/>.

194. David Himbara, *East African Community Integration: One Step Forward, Two Steps Back*, AFR. REP. (Aug. 26, 2020), <https://www.theafricareport.com/39264/east-african-community-integration-one-step-forward-two-steps-back/>.

195. Frederic Musisi, *Uganda-Rwanda Border Talks End in a Stalemate*, DAILY MONITOR (June 7, 2020), <https://www.monitor.co.ug/uganda/news/national/uganda-rwanda-border-talks-end-in-stalemate-1893704>.

196. Himbara, *supra* note 194.

197. *Id.*

198. Luke Anami, *Justice in the Dock at Arusha-Based EA Court as Bench Empties*, E. AFR. (Oct. 12, 2020), <https://www.theeastafrican.co.ke/tea/news/east-africa/justice-dock-arusha-based-ea-court-as-bench-empties-2463610>.

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J. ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES (ECCAS)

1. *Road Integration*

An ECCAS roundtable in March kicked off an effort to raise \$3 billion for road and transportation projects in the 2020s.<sup>200</sup> A new ECCAS leadership team will be responsible for advancing the regions' integration goals.<sup>201</sup>

K. ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

1. *Organized Crime*

ECOWAS virtually launched European Union support to Organized Crime for West Africa Region (OCWAR) projects on October 30, 2020.<sup>202</sup> These projects target trafficking, money laundering, terrorism funding, and cybercrime.<sup>203</sup>

L. INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT (IGAD)

1. *Protocols on Free Movement*

Relevant ministers endorsed the Protocol on Free Movement of Persons and the Protocol on Transhumance in February<sup>204</sup> and November 2020,<sup>205</sup> respectively. The protocols are part of a four-year European Union funded project to allow seasonal movement across IGAD member borders.<sup>206</sup>

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200. APO Group, *Economic Community of Central African States Announces the Organization of a Round Table in Brazzaville to Develop Roads and Transport Sector*, AFR. NEWS (Mar. 16, 2020), <https://www.africanews.com/2020/01/16/economic-community-of-central-african-states-eccas-announces-the-organisation-of-a-round-table-in-brazzaville-to-develop-roads-and-transport-sector/>.

201. *Economic Community of Central African States Installs New Presidency, Team*, N. AFR. POST (Sept. 2, 2020), <https://northafricapost.com/43502-economic-community-of-central-african-states-installs-new-presidency-team.html>.

202. *Virtual Launch of Organized Crime, the West African Response to Cybercrime, Money Laundering and Trafficking*, ECOWAS (Oct. 29, 2020), <https://www.ecowas.int/virtual-launch-of-organized-crime-the-west-african-response-to-cybercrime-money-laundering-and-trafficking/>.

203. *Id.*

204. *Protocol on Free Movement of Persons Endorsed at Ministerial Meeting*, IGAD (Feb. 26, 2020), <https://igad.int/divisions/health-and-social-development/2016-05-24-03-16-37/2373-protocol-on-free-movement-of-persons-endorse-at-ministerial-meeting>.

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206. *Free Movement of Persons and Transhumance in the IGAD Region*, INT'L. LAB. ORG., [https://www.ilo.org/africa/technical-cooperation/WCMS\\_631153/lang-en/index.htm](https://www.ilo.org/africa/technical-cooperation/WCMS_631153/lang-en/index.htm) (last visited Dec. 8, 2020).

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M. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

1. *Mozambique Unrest*

At a November meeting of the SADC Extraordinary Organ Troika Summit, leaders directed the “finalization of a comprehensive regional response and support” to Mozambique in its handling of the insurgency in the country’s North.<sup>207</sup>

N. UN MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS (UMICT)

1. *Kabuga Arrested*

French authorities arrested Felicien Kabuga on May 16, 2020.<sup>208</sup> Kabuga will stand trial on charges of genocide before the UMCIT.<sup>209</sup> In French Court, Kabuga’s lawyers unsuccessfully argued against the eighty-seven-year-old’s transfer to Tanzania on health grounds.<sup>210</sup> A similar argument was made for the trial to take place in The Hague.<sup>211</sup>

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207. *Communiqué of the Extraordinary Organ Troika Summit Plus Force Intervention Brigade*, S. AFR. DEV. CMTY. (Nov. 27, 2020), <https://www.sadc.int/news-events/news/communique-extraordinary-organ-troika-summit-plus-force-intervention-brigade-troop-contributing-countries-democratic-republic-co/>.

208. *Rwanda Genocide Suspect Felicien Kabuga Arrested in France*, AL JAZEERA (May 16, 2020), <https://www.aljazeera.com/news/2020/5/16/rwanda-genocide-suspect-felicien-kabuga-arrested-in-france>.

209. AP, *Rwandan Genocide Suspect Felicien Kabuga Arrives in the Hague to Face Trial*, DW (Oct. 26, 2020), <https://www.dw.com/en/rwandan-genocide-suspect-felicien-kabuga-arrives-in-the-hague-to-face-trial/a-55402723>.

210. *French Court Approves Transfer of Rwanda Genocide Suspect Felicien Kabuga to UN Tribunal*, FRANCE24, (Sept. 30, 2020), <https://www.france24.com/en/20200930-top-french-court-approves-transfer-of-rwandan-genocide-suspect-kabuga-to-un-court>.

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## Europe

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CATHERINE TASSIN DE MONTAIGU EDITING\*

This Article reviews some of the most significant international legal developments made in Europe in 2020.

### I. Major Decisions of the Court of Justice of the European Union

It has been a remarkable year for the jurisprudence of the Court of Justice of the European Union (CJEU), especially in the areas of rule of law and data protection as it relates to national security. The following landmark judgments stand out.

In two major cases, the CJEU addressed European Union (EU) legal limits on national rules restricting internal market freedoms and infringing the Charter of Fundamental Rights. In Case C-78/18, *European Commission v. Hungary*, the Court considered Hungary's Non-Governmental Organizations (NGO) Transparency Law<sup>1</sup> that required NGOs to file a report declaring they were "organisation[s] in receipt of support from abroad," if in receipt of more than 1,450 euros.<sup>2</sup> Under the Transparency Law, the declaration would be made public and penalties for refusal to comply included the dissolution of the NGO in Hungary.<sup>3</sup>

At the heart of the case was the standard to be applied to restrictions to internal markets rights where human rights enshrined in the Charter of Fundamental Rights (CFR)<sup>4</sup> were also infringed. The Court found that the Transparency Law infringed on the free movement of capital, freedom of association, and protection of personal data.<sup>5</sup> Following the reasoning of

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\* Contributing authors include James Henry Bergeron (Major Decisions of the Court of Justice of the European Union), Willem den Hertog ("UBO-Register" Operational in the Netherlands), Jon McGowan (ELI/ UNIDROIT European Model Code of Civil Procedure), Valeria Camboni Miller (Italy), Austin Pierce (EU Sustainable Finance Taxonomy), Matthew Soper (Brexite: fait accompli), with Catherine Tassin de Montaigu editing.

1. *a külföldről támogatott szervezetek átláthatóságáról szóló 2017. évi LXXVI. törvény* (Law No LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad).

2. Case C-78/18, *European Comm'n v Hungary*, 2020 ECLI:EU:C:2020:476.

3. *Id.* ¶ 55.

4. Charter of Fundamental Rights of the European Union, O.J. (C 326, 26.10.2012) 391-407.

5. *Comm'n v. Hung.*, 2020 ECLI:EU:C:2020 at ¶¶ 65, 119, 134.

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Advocate General Sánchez-Bordona,<sup>6</sup> the Court confirmed the applicability of the CFR where a Member State seeks to justify a derogation from internal market freedoms by relying on EU law objectives such as education standards, countering money laundering, or public security.<sup>7</sup> Such a justification was considered an “implementation” of EU law within Article 51(1) of the CFR, triggering the higher standard of necessity, appropriateness, and proportionality under Article 52.<sup>8</sup> The judgment confirms wider applicability of the CFR to Member State Law.

A second case in the ongoing legal battle over the rule of law and ‘illiberal democracy’ in Europe was decided in Case C-66/18, *European Commission v. Hungary*.<sup>9</sup> The case reviewed the “Lex CEU” Hungarian legislation essentially designed to prevent the Central European University from offering courses to Hungarian students.<sup>10</sup> It also has wider implications for the competence of the EU to enforce General Agreement on Trade in Services (GATS) obligations on Member States.<sup>11</sup>

Under the 2017 law, a bilateral treaty was required in the host state of the university, and that university must also offer to teach to students of the host state.<sup>12</sup> In addition to determining a violation of several EU laws, the CJEU also held that such requirements violated the GATS Article XVII duty of national treatment for a university registered in the United States.<sup>13</sup> The CJEU also held – importantly – that because the Lisbon Treaty transferred responsibility for the GATS to the EU (ending the “mixed agreement” model), GATS now formed part of EU law.<sup>14</sup> The CJEU had jurisdiction to enforce those obligations on Member States under the infringement proceedings of Article 258 TFEU, as it was the EU that would be liable under GATS for national infringements.<sup>15</sup>

A second major series of judgments expanded and clarified EU data protection law. In its landmark decision in *Schrems II*, the Court determined that the General Data Protection Regulation (GDPR) was applicable to the EU-US Privacy Shield Agreement notwithstanding exceptional provisions on national security.<sup>16</sup> The essential requirement of equivalence with EU

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6. Case C-78/18, *European Commission v Hungary*, Opinion of Advocate General Campos Sánchez-Bordona, 2020 ECLI:EU:C:2020:1.

7. *Comm’n v. Hung.*, 2020 ECLI:EU:C:2020 at ¶¶ 76, 101-03.

8. *Id.*

9. Case C-66/18, *European Commission v Hungary*, 2020, ECLI:EU:C:2020:792.

10. *Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény módosításáról szóló 2017. évi XXV. törvény* (Law XXV of 2017 amending Law CCIV of 2011 on national higher education).

11. *Comm’n v. Hung.*, 2020 ECLI:EU:C:2020:792 at ¶ 75.

12. *Id.* at ¶ 145.

13. Dr. Christoph Herrmann, *The Treaty of Lisbon Expands the EU’s External Trade and Investment Powers*, AM. SOC’Y INT’L L. (Sept. 21, 2010), <https://www.asil.org/insights/volume/14/issue/29/treaty-lisbon-expands-cu%E2%80%99s-external-trade-and-investment-powers>.

14. *Id.*

15. *Comm’n v. Hung.*, 2020 ECLI:EU:C:2020:792 at ¶ 91.

16. Case C-311/18, *Data Prot. Comm’r v. Facebook Ir. Ltd.*, ECLI:EU:C:2020:559, ¶ 155 (July 16, 2020).

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standards, including those of the CFR, also applies to Standard Contractual Clauses (SCCs) in data transfer agreements with commercial entities in third states under Article 45 GDPR.<sup>17</sup> The Court upheld the legality of SCCs but placed the primary duty of ensuring third-state equivalence with EU data protection standards with national data protection authorities.<sup>18</sup> The DCAs were required to verify such equivalence for every transfer of data to an entity in a non-EU state.<sup>19</sup> The CJEU then invalidated the EU-US Privacy Shield on the basis that U.S. law lacked adequate protection from U.S. law enforcement to override Privacy Shield obligations and the lack of safeguards and adequate judicial remedies in the United States.<sup>20</sup> Heavy emphasis was placed on requirements of the CFR that restrictions on data privacy be strictly necessary and that the right to judicial review was essential.<sup>21</sup>

Finally, in the *Privacy International*<sup>22</sup> and the *La Quadrature du Net* cases,<sup>23</sup> the CJEU addressed the nature of the national security exception to the GDPR and the scope of Article 4 TEU. In *Privacy International*, the Court reiterated its position in *Tele2* that bulk interception of all an individual's data is incompatible with EU law and that under the GDPR and the e-Privacy Directive<sup>24</sup> national legislation must establish objective criteria for the acquisition and use of personal, including by the security and intelligence services.<sup>25</sup> The Court took a more careful position in the *La Quadrature du Net* cases dealing with the retention of traffic and location data by police and intelligence agencies, establishing that retention of bulk data was permissible when dealing with "a serious threat to national security."<sup>26</sup> The policy could not be permanent, so there needed to be safeguards. The CJEU also held that retention of less specific data such as IP addresses could survive less onerous tests.<sup>27</sup> The Court noted the law of evidence remains national; thus, violation of the GDPR or EU data protection rights would not automatically make evidence inadmissible in criminal proceedings.<sup>28</sup>

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17. *Id.* ¶¶ 3–4.

18. *Id.* ¶ 3.

19. *Id.* ¶¶ 134, 142.

20. *Id.* at ¶¶ 197–201.

21. *Id.* ¶¶ 92–95.

22. Case C-623/17, *Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and others*, 2020, ECLI:EU:C:2020:790.

23. Case C-511/18, *La Quadrature du Net*, 2020 ECLI:EU:C:2020:791.

24. Directive 2002/58/EC, of the European Parliament and of the Council of 12 July 2002 on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector O.J. (L 201, 31.7.2002) 37–47.

25. *La Quadrature du Net*, 2020 ECLI:EU:C:2020:791 at ¶ 177.

26. *Id.*

27. *Id.* ¶ 1.

28. *Id.* ¶¶ 223–238.

## II. “UBO-Register” Operational in the Netherlands

Article 30 of the 4th EU Anti-Money Laundering Directive requires the Member States to institute a central register holding information on the beneficial ownership, including “corporate and other legal entities incorporated within their territory . . . [and] the details of the beneficial interests held.”<sup>29</sup>

On June 24, 2020, the Bill implementing the Directive was signed into law by King Willem-Alexander, called the Money Laundering and Terrorist Financing Prevention Act (the Act).<sup>30</sup> By decree dated July 3, 2020, the Act would become operative on September 27, 2020.<sup>31</sup>

The Act refers to the definition of UBO in article 10a, section 1 Wwft<sup>32</sup> as “*de natuurlijke persoon die de uiteindelijke eigenaar is van of zeggenschap heeft over een vennootschap of andere juridische entiteit,*” which translates into the natural person who ultimately owns or controls a company or other legal entity.<sup>33</sup>

This definition is further specified in the *Uitvoeringsbesluit Wwft 2018* (Execution Decree Wwft 2018),<sup>34</sup> and was last changed by decree on September 9, 2020.<sup>35</sup> Article 3, section 1 of the Execution Decree contains further minimum specifications “to be considered as beneficial owner in any case . . .” for several legal entities.<sup>36</sup> The following specifications are mentioned:<sup>37</sup>

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29. Directive (EU) 2015/849 of the European Parliament and 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 (“Directive (EU) 2015/849”).

30. *Wet van 24 juni 2020 tot wijziging van de Handelsregisterwet 2007, de Wet ter voorkoming van witwassen en financieren van terrorisme en enkele andere wetten in verband met de registratie van uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten ter implementatie van de gewijzigde vierde anti-witwasrichtlijn (Implementatiewet registratie uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten) 6/24/2020*, Stb. (Staatsblad (Dutch Government Gazette) 2020, 231.

31. *Besluit van 3 juli 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet registratie uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten 7-3-2020* Stb. 2020, 232.

32. *Wet ter voorkoming van witwassen en financieren van terrorisme* (Dutch Prevention of Moneylaundering and Financing of Terrorism Act).

33. *Wet van 24 juni 2020*, *supra* note 30, at 5.

34. *Besluit van 17 juli 2018, houdende nadere regels met betrekking tot uiteindelijk belanghebbenden en politiek prominente personen, het vaststellen van indicatoren voor het melden van ongebruikelijke transacties en tot wijziging van enige andere besluiten in verband met de implementatie van de vierde anti-witwasrichtlijn en de verordening betreffende bij geldovermakingen te voegen informatie*, Stb. 2018, 241.

35. *Besluit van 9 september 2020 tot wijziging van het Handelsregisterbesluit 2008 en het Uitvoeringsbesluit Wwft 2018 in verband met de registratie van uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten ter implementatie van de gewijzigde vierde anti-witwasrichtlijn (Implementatiebesluit registratie uiteindelijk belanghebbenden van vennootschappen en andere juridische entiteiten)* Stb. 2020, 147.

36. *Besluit van 17 juli 2018*, *supra* note 34, at art. 3 § 1.

37. There are other stipulations, but these are the most important.

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For a private or public limited company: natural persons who have “the direct or indirect holding of more than 25[ percent] of the shares, voting rights,” or of the property rights of the company.<sup>38</sup> If for these companies no UBO can be traced, the person or persons belonging to the higher executives, i.e., statutory directors<sup>39</sup> (Pseudo-UBO);<sup>40</sup>

For a church: “natural persons appointed as successors in the statute of the denomination upon dissolution of the denomination.”<sup>41</sup> If for a church no UBO can be traced, the person or persons named in its Statute as its officers;<sup>42</sup>

For another legal entity (such as a Foundation<sup>43</sup> or Association<sup>44</sup>): natural persons owning more than twenty-five percent of the entity or have more than twenty-five percent of the vote in changing its Statutes or have factual control of it.<sup>45</sup> Here, too, the Statutory Directors are considered Pseudo-UBO, if no UBO can be traced.<sup>46</sup>

For a private partnership: Natural persons owning more than twenty-five percent of the partnership or have more than twenty-five percent of the vote in changing the partnership contract or have factual control over it.<sup>47</sup> Here, too, the higher executives (partners) can be considered Pseudo-UBO;<sup>48</sup>

For a trust: the founder(s), trustee(s), if present the protector(s), the beneficiaries or another natural person exercising control over the trust.<sup>49</sup>

According to article 15a, section 2 of the *Handelsregisterwet 2007* (Dutch Trade Register Act, Hrw),<sup>50</sup> introduced in article I.D of the Act, the following data of a UBO must be registered: (a) the Dutch civil service number (*burgerservicenummer*), if applicable; (b) a fiscal identification number of another country than The Netherlands where that person is domiciled, if that person has been issued one; (c) the person’s (full) name,

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38. FN 20a: *Id.* at art. 1, § 1, sub. a.

39. Wwft art. 3.

40. *Id.*

41. *Besluit van 17 juli 2018, supra* note 18, at art. 3, § 1, sub. b.

42. Wwft Article 3.

43. *Stichting*, as defined in article 2:285 *Burgerlijk Wetboek*, (“BW”, Dutch Civil Code), meaning a Dutch legal entity without owners or members.

44. *Vereniging* as defined in article 2:26 BW.

45. *See id.*

46. Wwft art. 3.

47. *Id.*

48. Wwft Article 3.

49. *Id.*

50. *Wet van 22 maart 2007, houdende regels omtrent een basisregister van ondernemingen en rechtspersonen*, Stb. 2007, 153, last changed by the Act as per 27-9-2020.

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month and year of birth, country of domicile and nationality; (d) the person's day, place and country of birth and his address of domicile; and (e) the nature and extent of his economic interest in the legal entity.<sup>51</sup> Article 15a, section 3 Hrw further stipulates that documents of a UBO also must be deposited: copies of the documents used for verifying the data mentioned in (a)-(d) above; and copies of the documents from which the nature and extent of the economic interest mentioned in (e) above.<sup>52</sup> The data and the documents mentioned above are available to the Dutch FIU.<sup>53</sup>

Articles 21 and 22 Hrw provide for a right for any member of the public to view (Article 21) and obtain copies (Article 22) of the data mentioned above in paragraph 0c (full name, month and year of birth, country of domicile and nationality) and 5e above (nature and extent of the economic interest in the legal entity).<sup>54</sup> The documents mentioned above in paragraph 0 cannot be viewed nor can copies be obtained.

The officers of a legal entity are obliged to register the data mentioned in paragraph 0 above and provide the documents mentioned in paragraph 0 above.<sup>55</sup> For newly formed entities, this must be done within one week after formation (usually the Notary performing the formation will do so).<sup>56</sup> Existing entities have eighteen months to comply—until March 27, 2022.<sup>57</sup> The officers, likewise, have the duty to keep the data and documents up to date.<sup>58</sup>

Failure to register, to register accurately, and to keep registrations up-to-date is threatened with heavy penalties, prison to a maximum of six months, forced public service, or a fine of at present EUR 21.750,00.<sup>59</sup> A UBO is obliged to provide his legal entity with all information necessary to comply with the registration requirements.<sup>60</sup> At a later time, the UBO will obtain a right to be told how many times the UBO's data have been provided to a member of the public (not to the FIU).<sup>61</sup>

The UBO register is a departure from former Dutch practice, where the ownership of a legal entity was not public (except in the case of 100 percent ownership). This new register means that the privacy of a business owner is made subordinate to the battle against financial malfeasance. Business owners who value their privacy would do well to limit their interest and factual control to twenty-five percent or use a legal entity according to non-

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51. *Id.*

52. *Id.*

53. Hrw art. 28; *FIU* as meant in *Wwft* art. 12.

54. Hrw art. 28.

55. *Id.*

56. Hrw art. 20.

57. Hrw art. 57.

58. Hrw art. 19.

59. Hrw art. 47, jo. articles 1, 4, 6; *Wet economische delicten* (Dutch Economic Offenses Act).

60. *Wwft* art. 10b.

61. Art. I.Fa.

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Dutch (and non-EU) law, because these rules only apply to Dutch legal entities.<sup>62</sup>

### III. ELI/UNIDROIT European Model Code of Civil Procedure

In August 2020, the European Law Institute (ELI) membership approved the final draft of the ELI – UNIDROIT European Model Rules of Civil Procedure (Rules), which was subsequently approved in September by The International Institute for the Unification of Private Law (UNIDROIT) Governing Council.<sup>63</sup> The Rules both codify and harmonize existing common law regarding civil procedure. The document is the culmination of seven years of work between the two institutions.<sup>64</sup> Now complete, it must be adopted through the European Union’s lawmaking process to take effect.<sup>65</sup>

The effort to harmonize rules for private international law began with a specialized agency within the League of Nations in 1926.<sup>66</sup> With the demise of the League of Nations in the 1930s, the agency became independent.<sup>67</sup> UNIDROIT was established through the 1940 multilateral agreement to continue the harmonization efforts.<sup>68</sup> In 2004, UNIDROIT and the American Law Institute (ALI) produced the ALI/UNIDROIT Principles of Transnational Civil Procedure (PTCP).<sup>69</sup> The PTCP aimed to reconcile the national differences in the rules of civil procedure.<sup>70</sup> In 2013, the European Law Institute (ELI) joined with UNIDROIT to utilize the PTCP to develop model rules.<sup>71</sup>

The European Commission’s Committee on Legal Affairs commissioned a study on the Rules in 2015, noting the need for the Rules given that existing judicial procedures in Europe are not found in European Union instruments; rather, they have been developed through the Court of Justice of the European Union (CJEU) case law.<sup>72</sup>

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62. Wwft Article 10a.

63. *Model European Rules of Civil Procedure (with the International Institute for the Unification of Private Law, UNIDROIT)*, ELI, <https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/completed-projects-sync/civil-procedure/>.

64. *Id.*

65. *Id.*

66. Dr. Udo Bux, *The European Law Institute/UNIDROIT Civil Procedure Projects as a Soft Law Tool to Resolve Conflicts of Law*, European Parliament, 5 (2017), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/556972/IPOL\\_IDA\(2017\)556972\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/556972/IPOL_IDA(2017)556972_EN.pdf).

67. *UNIDROIT Overview*, UNIDROIT, <https://www.unidroit.org/about-unidroit/overview> (last visited Nov. 30, 2020).

68. *Id.*

69. Bux, *supra* note 66, at 8.

70. *Id.*

71. *Id.*

72. *Id.* at 13.



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The Rules include twelve parts consisting of a total of 245 rules with official comments on each rule, following a similar style as the ALI Model Penal Code.<sup>73</sup> Below is a brief summary of each Part.

**A. PART I – GENERAL PROVISIONS**

The Rules apply to both “domestic and cross-border disputes in civil and commercial matters.”<sup>74</sup> Excluded from the scope are legal status of persons, property rights from a matrimonial relationship, bankruptcy, social security, arbitration, maintenance obligations arising from family relationships, and wills.<sup>75</sup> The principles of the Rules include a focus on the need for parties, attorneys, and the courts to “promote fair, efficient and speedy resolution” to the dispute.<sup>76</sup> The Rules also establish a right to be heard by the parties and confer upon the public the right of access to hearings and court documents.<sup>77</sup> Proceedings may only be initiated by a party, not the court, and are limited to the relief claimed.<sup>78</sup>

**B. PART II – PARTIES**

Parties include anyone by and against whom proceedings are brought and anyone with a right under substantive law.<sup>79</sup> The Rules allow for voluntary joinder of parties, necessary joinder of parties, and court ordered consolidation of separate proceedings.<sup>80</sup> In cross-border disputes, a foreign natural person’s or corporation’s capacity to be a party to a dispute will be governed by the laws of their home country.<sup>81</sup>

**C. PART III – CASE MANAGEMENT**

Parties must present their “claims, defenses, factual allegations and offers of evidence” as quickly as possible in order to expedite the procedural process.<sup>82</sup> The court may take action to expedite the proceedings.<sup>83</sup>

**D. PART IV – COMMENCEMENT OF PROCEEDINGS**

The Rules continue their focus on an expedited, fair, and proportionate management of proceedings by laying out pre-commencement procedural

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73. European Model Code of Civil Procedure, *supra* note 63.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 53.

78. *Id.* at 63-65.

79. European Model Code of Civil Procedure, *supra* note 63.

80. *Id.* at 81-83.

81. *Id.* at 88.

82. *Id.* at 89.

83. *Id.* at 90.

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duties of the parties.<sup>84</sup> Once the proceedings have commenced, the Rules lay out the timelines and requirements for a Statement of Claims and a Statement of Defense, including any counterclaims, and the timelines and processes for amending those statements.<sup>85</sup>

**E. PART V – PROCEEDINGS PREPARATORY TO A FINAL HEARING**

Building on Part III, Part V further establishes procedures for hearings prior to the final hearing.<sup>86</sup> The court will close preparatory proceedings once the court is satisfied that both sides had a reasonable opportunity to present their case.<sup>87</sup> Final hearings must take place before the judge renders the final verdict and may take place electronically.<sup>88</sup> The court may also order early final judgments, similar to summary judgments.<sup>89</sup>

**F. PART VI – SERVICE AND DUE NOTICE OF PROCEEDINGS**

Addressing the difficulties of due notice in cross-border disputes, the Rules establish the processes and content of service, including electronic service.<sup>90</sup>

**G. PART VII – ACCESS TO INFORMATION AND EVIDENCE**

Despite the Evidence Regulation of the Council and The Hague Convention on the Taking of Evidence, there is no existing harmonization of the rules of evidence.<sup>91</sup> Evidentiary procedures diverge widely between countries, which is particularly problematic in cross-border disputes.<sup>92</sup> Part VII establishes forty-two rules that address all aspects of evidence.<sup>93</sup>

**H. PART VIII – JUDGMENT, RES JUDICATA AND LIS PENDENS**

A court may issue a final judgment, partial judgment, or a default judgment.<sup>94</sup> Part VIII establishes the process and content of judgments.<sup>95</sup> To prevent irreconcilable or contradictory judgments, *lis pendens* and *res judicata* follow the Brussels Ibis Regulation, while incorporating subsequent European Court of Justice (ECJ) case law.<sup>96</sup>

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84. *Id.* at 95.

85. European Model Code of Civil Procedure, *supra* note 63, at 98–104.

86. *Id.* at 107–109.

87. *Id.* at 109–110.

88. *Id.* at 110–112.

89. *Id.* at 112–116.

90. *Id.* at 117–131.

91. European Model Code of Civil Procedure, *supra* note 63, at 132.

92. *Id.*

93. *Id.* at 132–168.

94. *Id.* at 168–170.

95. *Id.* at 181–190.

96. *Id.*

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I. PART IX – MEANS OF REVIEW

The Rules establish a right of appeal which may be exercised with the permission of the appellate court.<sup>97</sup> The scope of review should be limited to claims and defenses addressed in the first-instance proceeding. But in the interest of justice, the court may consider new facts and evidence.<sup>98</sup>

J. *Part X – Provisional and Protective Measures*

The Rules establish measures for protecting evidence and to prevent further harm during the proceedings.<sup>99</sup> Taking into account the existing variations in the approaches of European jurisdictions, the Rules provide options for enforcement and rely on existing EU instruments for cross-border disputes.<sup>100</sup>

K. PART XI – COLLECTIVE PROCEEDINGS

The Rules addressing Collective or Class-Action Proceedings are consistent with the approach of the European Commission in 2013 and the EU in 2013 and 2018.<sup>101</sup>

L. PART XII – COST

Limiting legal costs to reasonable and proportionate costs of legal representation, court fees, and reasonable financial outlays, the Rules defer to the jurisdiction for determination of which party covers the costs.<sup>102</sup>

**IV. Italy**

The Italian Government and the Italian Legislature have been especially prolific in 2020, passing eight decree laws<sup>103</sup> and converting each of those decree laws into laws in response to the Covid-19 pandemic, including its most important one: Decree Law n. 18 of March 17, 2020, published in the *Gazzetta Ufficiale* n. 70 of March 17, 2020, which was amended and converted into law by Law n. 27 of April 24, 2020, published in the *Gazzetta Ufficiale* n. 110 of 2 April 29, 2020. The legislature also ratified several treaties with Countries such as Mexico, Singapore, Turkmenistan, Qatar,

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97. European Model Code of Civil Procedure, *supra* note 63, at 191-209.

98. *Id.*

99. *Id.* at 211-229.

100. *Id.*

101. *Id.* at 231-256.

102. *Id.* at 258.

103. See art. 77 *Costituzione* (Cost.) (It.), <https://www.senato.it/documenti/repository/istituzione/costituzione.pdf>. (A Decree Law is a temporary measure that expires if it is not converted into law within sixty days from its publication. A Decree Law is enacted by the Government, the executive organ, rather than the parliament in cases of necessity and urgency.)

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Chad, Congo, Jamaica, Colombia, Ethiopia, Uruguay, Bulgaria, and Armenia.

Some noteworthy and interesting laws, aside from the ones mentioned above, are Law n. 107 of July 29, 2020, entitled “Creation of a Parliamentary Commission of Investigation into Family-Type Communities for Minors - Regulations on the Right of Children to Have a Family” and Law n. 126 of October 13, 2020, entitled “Conversion into Law, with Modifications, of Decree Law n. 104 of August 14, 2020 - Urgent Measures for the Support and Relaunch of the Economy.”

A. LAW N. 107

The purpose of Law n. 107 is to create a Parliamentary Commission, as prescribed by Article 82 of the Italian Constitution, with the authority to oversee and investigate family-type communities for minors,<sup>104</sup> and the Commission, once created, will remain in place until the end of the XVIII legislative session,<sup>105</sup> which started on March 23, 2018, and will end in March 2023.<sup>106</sup> Under Article 1, subdivision 3 of Law n. 107, the Commission must submit a report to the legislature with the result of its investigation prior to the end of its mandate, not to exceed thirty days after the end of the XVIII legislative session.<sup>107</sup>

The Commission will be composed of twenty senators and twenty representatives, each chosen by the President of the Senate and the President of the House of Representatives,<sup>108</sup> and the Commission will be convened within ten days from the date each member of the Commission is chosen.<sup>109</sup>

The Commission’s responsibilities are to investigate the situation of minors entrusted to family-type communities, confirm the court orders of juvenile/family courts, verify the operating procedures of social services, verify the implementation of court orders of juvenile/family courts, verify whether court custody orders are temporary or permanent, verify the structural requirements of the family-type communities, carry out random checks on the use of public and private resources destined for such communities, and assess the adequacy of government grants or allocation.<sup>110</sup>

Law n. 107 also modifies Article 2 of Law n. 184 of May 4, 1983, by requiring court orders granting custody of a minor to a public or private

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104. *Legge 29 luglio 2020*, n. 107, art.1, subd. 1 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2020;107>.

105. *Id.* at art. 1, subd. 2.

106. XVIII *Legislatura dal 23 marzo 2018*, (It.) <http://www.governo.it/it/i-governi-dal-1943-ad-oggi/xviii-legislatura/9451>.

107. L. n. 107/2020, art. 1, subd. 3 (It.), <https://www.normattiva.it/urires/N2Ls?urn:nir:stato:legge:2020;107>.

108. *Id.* at art. 2, subd. 1.

109. *Id.*

110. *Id.* at art. 3, subd. 1.

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assistance institution, rather than a family-type structure,<sup>111</sup> to explicitly state the reason why it is not possible for the minor to remain in the home and the reason why said minor cannot be placed with a family.<sup>112</sup>

Law n. 107 was published in the *Gazzetta Ufficiale* n. 214 of August 28, 2020, and it went into effect on September 12, 2020.<sup>113</sup>

**B. LAW N. 126**

Inevitably, the Italian economy suffered as a result of the Covid-19 pandemic. Between January and June 2020, about half a million workers lost their jobs, despite a prohibition on layoffs imposed by Law n. 27 of April 24, 2020, which is still in effect.<sup>114</sup> The number of job announcements, after an initial drop, began to increase in September; but the new lockdown now in effect in many Italian regions caused that number to decrease once again.<sup>115</sup>

Law n. 126 is related to Law n. 27 of April 24, 2020, because it allows employers affected by the Covid-19 pandemic to apply for an additional nine weeks of payroll subsidies to avoid possible layoffs. The total of eighteen weeks must be requested between July 13, 2020, and December 31, 2020.<sup>116</sup>

To curb the negative effects of the Covid-19 pandemic in areas with serious socio-economic hardship, this new law allows private employers an exemption up to thirty percent of the total mandatory contributions for retirement benefits for their employees, if the employers are headquartered in regions, which in 2018 had a gross domestic product per capita inferior to seventy-five percent of the average EU27 or otherwise ranging from seventy-five percent to ninety percent, and an employment rate lower than the national median.<sup>117</sup>

Law n. 126 was published in the *Gazzetta Ufficiale* n. 253 of October 13, 2020, and it went into effect on October 14, 2020.<sup>118</sup>

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111. *Legge 4 maggio 1983*, n. 184 (It.), [https://www.gazzettaufficiale.it/atto/serie\\_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1983-05-17&atto.codiceRedazionale=083U0184&elenco30giorni=False](https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1983-05-17&atto.codiceRedazionale=083U0184&elenco30giorni=False).

112. L. n. 107/2020, art. 9, subd. 1 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2020;107>.

113. *Id.*

114. *L'Economia Italiana Nell'Era Covid*, LAVORO, <https://lab24.ilsole24ore.com/economia-italiana-post-covid/>.

115. *L'Economia Italiana Nell'Era Covid*, LAVORO, <https://lab24.ilsole24ore.com/economia-italiana-post-covid/>.

116. *Decreto-Legge 14 agosto 2020*, n. 104, art. 1, subd. 1 & 2 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto-legge:2020;104>.

117. D.L. n. 104/2020, art. 27 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto-legge:2020;104>.

118. *Legge 13 ottobre 2020*, n. 126 (It.), <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2020;126>.

## V. EU Sustainable Finance Taxonomy

Sustainable finance continues to grow at a rapid pace.<sup>119</sup> This causes an increasing need to clarify sustainability criteria so that companies, investors, lenders, and other financial market participants have a consistent and shared language for sustainable finance activities. To address this need, the EU promulgated the Sustainable Taxonomy Regulation (Taxonomy), which entered into force in July 2020.<sup>120</sup> The Taxonomy establishes a uniform classification system to determine whether an economic activity qualifies as environmentally sustainable.<sup>121</sup> These criteria also serve as a foundation for any subsequent sustainable finance regulation from the EU or its member states.<sup>122</sup>

Although any market participant may use the Taxonomy in classifying its products, reporting under the Taxonomy is mandatory for (1) market participants offering financial products within the EU and the UK and (2) companies required to publish a non-financial statement under the EU's Accounting Directive (2013/34/EU).<sup>123</sup> Although the particular requirements vary by product and sector, these disclosures generally must include a description of how and to what extent the disclosure subject is associated with economic activities that qualify as environmentally sustainable under the Taxonomy.<sup>124</sup> Additionally, financial instruments that do not have sustainable investment objectives must make a disclosure statement to that effect in pre-contractual and periodic reporting disclosures.<sup>125</sup>

For an activity to qualify as environmentally sustainable under the Taxonomy, it must (1) contribute substantially to one or more of the environmental objectives set out in the Taxonomy; (2) not significantly harm any of those environmental objectives; (3) be carried out in compliance with certain minimum social safeguards; and (4) comply with technical screening criteria established by the European Commission.<sup>126</sup>

The Taxonomy sets out six environmental objectives (1) climate change mitigation; (2) climate change adaptation; (3) sustainable use and protection of water and marine resources; (4) transition to a circular economy; (5) pollution prevention and control; and (6) protection and restoration of

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119. See, e.g., Reed Landberg et al., *Green Finance is Now \$31 Trillion and Growing*, BLOOMBERG (June 6, 2019), <https://www.bloomberg.com/graphics/2019-green-finance/>; see also *Why Sustainable Finance is on the Rise*, VINSON & ELKINS (Oct. 14, 2020), <https://www.velaw.com/insights/why-sustainable-finance-is-on-the-rise/>.

120. European Union ("EU") Commission Regulation 2020/852, *The Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R0852&from=en>.

121. *Id.*

122. *Id.* at art. 4.

123. *Id.* at art. 1, 5–8.

124. *Id.* at art. 5, 8.

125. *Id.* at art. 7.

126. Commission Regulation 2020/852, *supra* note 120, at art. 3.

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biodiversity and ecosystems.<sup>127</sup> The Taxonomy also provides parameters for determining if an economic activity substantially contributes or significantly harms any of these objectives.<sup>128</sup>

In determining whether there is “significant harm,” activity should be reviewed not only for its direct environmental impact but also for indirect environmental impacts throughout its value cycle and end of life.<sup>129</sup> For example, automakers would need to consider emissions from the use of their vehicles and the handling of any wastes (e.g., from batteries or electronic equipment) for purposes of assessing impacts to climate mitigation and transition to a circular economy respectively.

Assessments of “substantial contribution” are subject to similar elaborations. Certain activities that may not themselves substantially contribute to any of the enumerated environmental objectives may still qualify under the Taxonomy as “enabling activities,” provided they have net-positive environmental effects and do not hinder the Taxonomy’s long-term environmental goals.<sup>130</sup> Separately, the Taxonomy contemplates “technical screening criteria” for each environmental objective, to determine whether various economic activities meet the “substantial contribution” threshold for each.<sup>131</sup> The technical screening criteria for the climate-related objectives were originally to be adopted by year-end 2020 (effective Jan. 1, 2022), and the criteria for the other objectives by year-end 2021 (effective Jan. 1, 2023).<sup>132</sup>

Proposed criteria have been published by the European Commission, proposed criteria for these objectives were produced by the Technical Expert Group (TEG) established to advise the European Commission on the Taxonomy.<sup>133</sup> The TEG developed these technical screening criteria across a variety of industries, including agriculture, power generation, water and waste services, construction, and transportation.<sup>134</sup> Should they be adopted by the European Commission, the TEG’s proposed criteria have several important implications, particularly for the energy and power sectors.

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127. *Id.* at art. 9.

128. *Id.* at art. 10–15, 17.

129. *Id.* at art. 17.

130. *Id.* at art. 16.

131. *Id.* at art. 10–15, 19.

132. Commission Regulation 2020/852, *supra* note 120, at art. 10–15, 19. (Ultimately, the technical screening criteria for the climate-related objectives were published in April 2021; this deferred inclusion of natural gas or nuclear energy to subsequent acts.); *see* Climate Delegated Act (2021), [https://ec.europa.eu/finance/docs/level-2-measures/taxonomy-regulation-delegated-act-2021-2800\\_en.pdf](https://ec.europa.eu/finance/docs/level-2-measures/taxonomy-regulation-delegated-act-2021-2800_en.pdf).

133. *Taxonomy Report: Technical Annex (2020)*, EU Technical Expert Group on Sustainable Finance (“TEG”), [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy-annexes\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy-annexes_en.pdf).

134. *Id.*

In its final report, the TEG did not recommend the inclusion of certain fuels, such as nuclear fission or natural gas.<sup>135</sup> Energy and power companies have argued that such bridge fuels are a necessary step in the decarbonization process.<sup>136</sup> But critics have argued that natural gas, in particular, cannot “substantially” contribute to climate mitigation, as it still produces significant emissions.<sup>137</sup> According to reports about the draft rulemaking, a criterion will be established for natural gas that essentially requires the gas to have been cleaned—such as through associated carbon capture and storage technology or other emissions accounting—to qualify.<sup>138</sup>

The final sustainability element under the Taxonomy involves minimum social safeguards. Currently, this requires the activity to implement procedures to ensure alignment with several international frameworks regarding human rights, including (1) the OECD Guidelines for Multinational Enterprises; (2) the UN Guiding Principles on Business and Human Rights; (3) the ILO Declaration on Fundamental Principles and Rights at Work; and the International Bill of Human Rights.<sup>139</sup> But this is subject to change. The TEG report recommended the eventual inclusion of social sustainability objectives, which would go beyond these minimum safeguards.<sup>140</sup>

The Taxonomy also provides for the establishment of a Platform on Sustainable Finance that will advise on updating technical screening criteria, the Taxonomy, and other sustainable finance policies.<sup>141</sup> These may eventually expand to other aspects of sustainability.

## **VI. Brexit: fait accompli**

### **A. BREXIT DAY**

Nearly four years after the British people voted to withdraw<sup>142</sup> from the European Union, and forty-seven years after joining the European Economic Community, the United Kingdom passed the “point of no return.”<sup>143</sup>

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135. *Id.*

136. Frédéric Simon, *Gas Industry Storms into EU Green Finance Taxonomy Debate*, EURACTIV (Oct. 30, 2019), <https://www.euractiv.com/section/energy-environment/news/gas-industry-storms-into-eu-green-finance-taxonomy-debate/>.

137. *Id.*

138. Kate Abnett & Simon Jessop, *EU Set to Deny Gas Power Plants a Green Investment Label – Draft*, REUTERS (Oct. 29, 2020), <https://ca.reuters.com/article/uk-europe-finance/eu-set-to-deny-gas-power-plants-a-green-investment-label-draft-idUKKBN27E382>.

139. Commission Regulation 2020/852, *supra* note 120, at art. 18.

140. *Taxonomy: Final Report (2020)*, TEG, [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf).

141. Commission Regulation 2020/852, *supra* note 120, at art. 20.

142. See Thomas Stanton, et al., *European Law Committee*, 51 INT’L L. 631 (2016).

143. David Wilcock, *‘There is no way this country will ever rejoin the EU’: Triumphant Nigel Farage says at 11 pm tonight the UK will ‘pass the point of no return’ and he is ‘optimistic’ about post-Brexit*



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On January 31, 2020, at 11:00 PM GMT, the UK left the EU and entered into a transition period set to expire at the end of 2020.<sup>144</sup> During the transition period, the UK will continue to follow the bloc's rules until January 1, 2021.<sup>145</sup> The purpose of a transition was to allow both sides some time to negotiate a post-Brexit deal, often referred to as "soft" Brexit. In the absence of a comprehensive deal before December 31, 2020, the UK will leave the bloc without the EU's main trading arrangements – the single market and the customs union.<sup>146</sup>

The Withdrawal Agreement, a legally binding treaty setting out the negotiated terms of the UK's departure from the EU, was signed by EU Presidents Charles Michel and Ursula von der Leyen in Brussels and UK Prime Minister Boris Johnson in London on January 24, 2020.<sup>147</sup> The Agreement, ratified the day before by UK Parliament at Westminster, had been renegotiated from a pre-General Election version.<sup>148</sup> It was republished as a UK Bill on December 19, 2019<sup>149</sup> and received Royal Assent on January 23, 2020.<sup>150</sup> The European Union (Withdrawal Agreement) Act 2020<sup>151</sup> reasserts Parliament's supremacy and effectuates parts of The European Communities Act 1972<sup>152</sup> until December 31, 2020. Further, the Act specifies the financial settlement for leaving; defines the rights of citizens, protocols on Ireland and Northern Ireland, Cyprus, and Gibraltar; and it dissolves the legal union between UK and EU.<sup>153</sup>

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*Britain*, DAILY MAIL (Jan. 31, 2020), <https://www.dailymail.co.uk/news/article-7951501/There-no-way-country-rejoin-EU-says-triumphant-Nigel-Farage.html>.

144. Kevin Rawlinson, Alexandra Topping and Simon Murphy, *Brexit day: end of an era as United Kingdom leaves EU – as it happened*, THE GUARDIAN (Jan. 31, 2020, Updated Feb. 3, 2020), <https://www.theguardian.com/politics/live/2020/jan/31/brexit-day-britain-prepares-leave-eu-live-news-updates>.

145. The EU-UK Withdrawal Agreement, European Commission, [https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement\\_en](https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en).

146. *Brexit: What's happening and what comes next?*, BBC NEWS (Nov. 18, 2020), <https://www.bbc.com/news/world-europe-54959056>.

147. *Brexit: European Presidents Sign Withdrawal Agreement*, IR. TIMES (Jan 24, 2020), <https://www.irishtimes.com/news/world/uk/brexit-european-presidents-sign-withdrawal-agreement-1.4149979>.

148. European Union (Withdrawal Agreement) Bill 2019, HC Bill [1] (UK), <https://www.gov.uk/government/publications/eu-withdrawal-agreement-bill>.

149. *Id.*

150. 670 Parl Deb HC (6th ser.) (2020) col. 480 (UK).

151. European Union (Withdrawal Agreement) Act 2020, c. 1 (UK) <https://www.legislation.gov.uk/ukpga/2020/1/contents/enacted>.

152. European Communities Act 1972, c. 68 (UK), <https://www.legislation.gov.uk/ukpga/1972/68/contents>.

153. European Union (Withdrawal Agreement), *supra* note 151.

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The Council of the European Union adopted its decision to conclude the Withdrawal Agreement on January 30, 2020.<sup>154</sup> This action followed the European Parliament's vote of consent on January 29, 2020.<sup>155</sup>

**B. TRANSITION PERIOD**

As the UK entered the transition period on February 1, 2020, the world was entering into a pandemic. On February 3rd, the British Prime Minister provided a written statement to the House of Commons setting out the Government's proposed approach to negotiations with the European bloc.<sup>156</sup> The statement indicated that the main elements for negotiation would be a comprehensive free trade agreement covering substantially all trade, an agreement on fisheries, and an agreement to cooperate in the area of internal security.<sup>157</sup> Each area the UK Government negotiated would have governance mechanisms and dispute settlement arrangements "appropriate to a relationship of sovereign equals."<sup>158</sup>

By February 25th, the European Council gave the go-ahead to negotiate a UK-EU future relationship in a directive.<sup>159</sup> The directive defined the scope and terms for any future partnership the EU envisions with the UK. The areas for negotiation include trade and economic cooperation, law enforcement and judicial cooperation in criminal matters, foreign policy, security and defense, and participation in bloc programs.<sup>160</sup>

The first round of future relationship negotiations occurred on March 2-5, 2020. On March 23, 2020,<sup>161</sup> the Prime Minister addressed the nation and announced its first coronavirus lockdown.<sup>162</sup> A week later, negotiators met for the first time via teleconference, and talks did not resume again until April 20-24.

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154. *Brexit: Council adopts decision to conclude the withdrawal agreement*, BRUSSELS EUROPEAN COUNCIL (Jan. 30, 2020), <https://www.consilium.europa.eu/en/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/>.

155. *Final Brexit vote in Parliament*, EUROPEAN PARLIAMENT BRUSSELS (Jan. 30, 2020), <https://www.europarl.europa.eu/news/en/agenda/briefing/2020-01-29/1/final-brexit-vote-in-parliament>.

156. UK/EU Relations, Statement UIN HCWS86, Prime Minister Boris Johnson (Feb. 3, 2020), <https://questions-statements.parliament.uk/written-statements/detail/2020-02-03/HCWS86>.

157. *Id.*

158. *Id.*

159. Directives for the Negotiation of a New Partnership with the United Kingdom of Great Britain and Northern Ireland, Brussels Council of the European Union, 5870/20 ADD 1 Rev. 3 of Feb. 2020.

160. Directives for the Negotiation of a New Partnership with the United Kingdom of Great Britain and Northern Ireland, Brussels Council of the European Union, 5870/20 ADD 1 REV 3 (Feb. 25, 2020), <https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf>.

161. *Prime Minister's statement on coronavirus (COVID-19): 23 March 2020*, PRIME MINISTER'S OFFICE, 10 DOWNING STREET (Mar. 23, 2020), <https://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020>.

162. Coronavirus Act 2020, c. 7 (UK), <https://www.legislation.gov.uk/ukpga/2020/7/contents>.

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Prime Minister Johnson said, “[t]here needs to be an agreement with our European friends by the time of the European Council on 15 October if it’s going to be in force by the end of the year.”<sup>163</sup> By the ninth round, which occurred from September 29 to October 2, 2020, a deal still had substantial work to go.

The talks have centered on a trade deal that aims to eliminate tariffs on each other’s goods and keep border checks to a minimum.<sup>164</sup> Areas that have caused friction are how much access EU boats should have to British waters and whether the UK should be allowed to subsidize companies, especially if they do business in the EU.<sup>165</sup> Under current EU law, governments are not generally allowed to subsidize companies. The EU is concerned about the UK Internal Market Bill,<sup>166</sup> published in September 2020, because the bill would overrule the bilateral Withdrawal Agreement treaty. Unwinding the Withdrawal Agreement could spell trouble for the Northern Ireland Protocol, which was previously negotiated and agreed to. The EU launched a legal challenge to the legislation, arguing superseding the treaty violates international law.<sup>167</sup>

As UK-EU negotiations were beginning again on November 19, 2020, a top-level official tested positive for COVID-19.<sup>168</sup> British chief negotiator David Frost and his EU counterpart Michel Barnier agreed to suspend negotiations to avoid spreading COVID-19.<sup>169</sup> Three key areas of policy are yet to be agreed upon: fisheries, how to enforce the trade deal, and UK–EU export standards.<sup>170</sup>

The final European Parliament plenary session of the calendar year is scheduled for December 14-17, 2020. Presumably, this would be the last opportunity for parliament to ratify the agreement. If no trade deal is in place by January 1, 2021, the default law governing international trade between the UK and EU will be World Trade Organization rules.

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163. *Prime Minister’s words on EU negotiations*, PRIME MINISTER’S OFFICE, 10 DOWNING STREET (Sept. 7, 2020), <https://www.gov.uk/government/speeches/prime-ministers-words-on-eu-negotiations-7-september-2020>.

164. *UK/EU Relations, Statement UIN HCWS86*, *supra* note 156.

165. *Id.*

166. United Kingdom Internal Market Bill 2019-21, HL Bill [150] (UK), <https://publications.parliament.uk/pa/bills/lbill/58-01/150/5801150.pdf>, *see also* UK Parliament legislation webpage for the bill’s progression, <https://services.parliament.uk/bills/2019-21/unitedkingdominternalmarket.html>.

167. *EU launches legal case against UK over Internal Market Bill*, REUTERS (Oct. 1, 2020), <https://www.reuters.com/article/us-britain-eu-vonderleyen/eu-launches-legal-case-against-uk-over-internal-market-bill-idUSKBN26M5FS>.

168. Raf Casert and Jill Lawless, *Brexit trade negotiations suspended because of COVID-19 case*, ASSOCIATED PRESS (Nov. 19, 2020), <https://apnews.com/article/international-news-brexit-michel-barnier-david-frost-f13d86639da482638a4226715055d742>.

169. *Id.*

170. *Id.*

C. NORTHERN IRELAND PROTOCOL

Northern Ireland's 310-mile long border is the only land crossing between the European bloc and the UK.<sup>171</sup> The Northern Ireland Protocol was negotiated in October 2019 as part of the Withdrawal Agreement.<sup>172</sup> The protocol is a “legally-operative solution that avoids a hard border on the island of Ireland, protects the all-island economy, and the Good Friday (Belfast) Agreement in all its dimensions, and safeguards the integrity of the EU Single Market.”<sup>173</sup>

On January 1, 2021, the protocol will come into force, and Northern Ireland will continue to enforce the European bloc's customs rules and product standards.<sup>174</sup> Northern Ireland will continue to operate largely as it has in the past. Goods can move across the Irish border without customs and border checks.<sup>175</sup> But to comply with the protocol, goods entering Northern Ireland from Great Britain that are bound for the EU will have to comply with EU standards and pay tariffs.<sup>176</sup>

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171. Sam Meredith, *What is the Irish Backstop? All You Need to Know About the Border Dispute Blocking an Orderly Brexit*, CNBC (last updated Oct. 26, 2019), <https://www.cnbc.com/2019/09/11/brexit-what-is-the-irish-backstop-and-why-is-it-so-controversial.html>.

172. Protocol on Ireland/Northern Ireland, (Oct. 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840230/Revised\\_Protocol\\_to\\_the\\_Withdrawal\\_Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840230/Revised_Protocol_to_the_Withdrawal_Agreement.pdf); *see also* Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 29, 31.1.2020, p. 7–187, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12020W/TXT#d1e32-102-1>.

173. The EU-UK Withdrawal Agreement, European Commission, [https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement\\_en](https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en).

174. Tom Edgington, *Brexit: What is the Northern Ireland Protocol and Why is it Needed?*, BBC NEWS (Sept. 8, 2020), <https://www.bbc.com/news/explainers-53724381>.

175. *Id.*

176. *Id.*

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## **Middle East**

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HOWARD L. STOVALL, AND MICHAEL TRAIISON\*

This Article reviews some of the most significant international legal developments made in the Middle East in 2020.

### **I. The Abraham Accords**

On September 15, 2020, American President Donald J. Trump, Israeli Prime Minister Benjamin Netanyahu, Bahraini Foreign Minister Abdullatif Al Zayani, and Emirati Minister of Foreign Affairs Abdullah bin Zayed Al Nahyan, signed the Abraham Accords on the White House South Lawn.<sup>1</sup> These accords consisted of three agreements: (1) The Abraham Accords Declaration signed by all four countries; (2) The Declaration of Peace,

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1. Michael Crowley, *Israel, U.A.E. and Bahrain Sign Accords, With an Eager Trump Playing Host*, N.Y. TIMES, (Sept. 15, 2020) (accessed Nov. 18, 2020), <https://www.nytimes.com/2020/09/15/us/politics/trump-israel-peace-emirates-bahrain.html>.

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Cooperation, and Constructive Diplomatic and Friendly Relations signed by Israel and Bahrain, with President Trump as witness; and (3) The Abraham Accords Peace Agreement, signed by Israel and the United Arab Emirates, with President Trump as witness, accompanied by a related annex.<sup>2</sup>

The Abraham Accords Declaration, signed by all four parties, endorsed peace, tolerance, respect, dignity, hope, interfaith and intercultural dialogue, and exhibited a commitment to ending radicalization, among other values and end goals.<sup>3</sup>

The Declaration of Peace, Cooperation, and Constructive Diplomatic and Friendly Relations, signed by Israel and Bahrain, formalized an agreement between the parties to establish full diplomatic relations with one another, promote lasting security, eschew threats and the use of force, as well as advance coexistence and a culture of peace. It also approved a series of immediate steps aimed at seeking agreements regarding investment, tourism, security, and numerous other matters.

The Abraham Accords Peace Agreement, signed by Israel and the United Arab Emirates, formally and explicitly established peace, diplomatic relations, and full normalization between the parties. It recognized their mutual sovereignty and right to live in peace and security. The agreement also called for the parties to establish embassies and exchange ambassadors as soon as practicable, work toward peace and stability by addressing terrorist and hostile activities, conclude bilateral agreements across fifteen specified spheres of mutual interest, and establish a High-Level Joint Forum for Peace and Co-Existence. The agreement specified that it would enter into force following the exchange of instruments of ratification, with disputes to be resolved by negotiation, or else through conciliation or arbitration subject to agreement of the parties. It also contained a three-page annex providing greater detail concerning the fifteen delineated spheres for which the parties agreed to establish bilateral agreements.

Morocco, the United States, and Israel subsequently signed a joint declaration on December 22, 2020, agreeing to similar terms as those contained in the Abraham Accords. This separate declaration specifically noted American recognition of Moroccan claims to Western Sahara and is listed as part of the Abraham Accords on the State Department's website.<sup>4</sup>

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2. For the rest of this subsection, *see generally* *The Abraham Accords*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/the-abraham-accords/> (last visited November 18, 2020) (containing links to all three documents and related annex).

3. Sudan signed a separate version of the Abraham Accords Declaration on January 6, 2021, *The Abraham Accords Declaration*, U.S. DEPARTMENT OF STATE, (last visited May 17, 2021), <https://www.state.gov/wp-content/uploads/2021/01/Sudan-AA.pdf>.

4. *Joint Declaration*, U.S. DEPARTMENT OF STATE, (Dec. 22, 2020) (accessed May 17, 2021), <https://www.state.gov/wp-content/uploads/2021/01/Joint-Declaration-US-Morocco-Israel.pdf>.

## II. Egypt

While the current Egyptian merger control regime only provides a post-closing filing obligation, the Egyptian Competition Authority (ECA) has recently demanded pre-closing notifications. Pursuant to the Egyptian Competition Law,<sup>5</sup> only a post-closing notification is required and must be made within thirty days of closing for transactions that involve parties with a combined annual turnover in Egypt exceeding Egyptian pound (EGP) 100 million—approximately USD 5.5 million.<sup>6</sup> The lack of a pre-closing notification requirement has been a point of discussion over the last three years with the ECA and other stakeholders advocating for an amendment of the Egyptian merger control regime. Draft legislation that imposes pre-closing notification and standstill obligations for domestic transactions and foreign transactions have been held up in parliament since 2017. It remains unclear whether the amendment to the Egyptian merger control regime will come into effect.

This lack of pre-closing and standstill obligations has, however, not stopped the ECA from imposing such obligations on domestic and foreign transactions under alternative theories outside of merger control. The ECA's position is that provisions of the Egyptian Competition Law addressing horizontal agreements should be (analogously) applied to mergers, acquisitions, and other forms of economic concentrations. Based on this application, the ECA has imposed pre-closing notification and standstill obligations in transactions the ECA deems to have a relevant impact on the Egyptian market.<sup>7</sup> This procedure is not regulated but rather based in practice and few transactions have thus far been accordingly reviewed by the ECA. It is therefore difficult to ascertain common standards for when a transaction would be deemed to have a relevant impact in the Egyptian market and thus qualify for pre-closing notification. To date, the ECA has not issued guidelines on the conditions in which it would consider a transaction to have a relevant impact in Egypt.

Still, the ECA will likely continue applying this extensive interpretation of the Egyptian Competition Law. As its Chairman, Dr. Amir Nabil stated on multiple occasions it is the ECA's position that the post-closing obligation provided for by Egyptian law is ineffective.<sup>8</sup> The ECA, therefore, imposed pre-closing notification and standstill obligations. Statements of ECA

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5. Law 3/2005 on the Protection of Competition and the Prohibition of Monopolistic Practices, published in the Official Gazette of the Arab Republic of Egypt dated 16.02.2005, entered into force on 17.06.2005 [Competition Law].

6. Art. 19(2) Competition Law in connection with Art. 44 Executive Regulations to the Law on the Protection of Competition and the Prohibition of Monopolistic Practices, issued by Prime Ministerial Decree 1316/2005, published in the Official Gazette of the Arab Republic of Egypt dated 16.08.2005, entered into force on 17.08.2005 [Executive Regulations].

7. ECA Board Decision 45/2019; ECA's Assessment of the Acquisition of Careem, Inc. by Uber Technologies, Inc., dated 19.12.2019, ¶ 12 *et seq.*

8. *See, e.g.*, A. Nabil, Press Release of the Egyptian Competition Authority, On the Decision to Review the Uber/Careem Merger, (Oct. 24, 2018); A. Nabil, Competition Law & Policy



officials appear to suggest that such obligations will be imposed on sectors that are of particular interest to Egypt and transactions that would affect Egyptian consumers.<sup>9</sup> Furthermore, the ECA has stressed that they have established ties to other merger control authorities in the larger Middle East, Africa, and the E.U. and continue to cooperate to uncover relevant transactions.

While Egyptian merger control practice remains ambiguous, parties contemplating transactions involving Egyptian subsidiaries or companies with significant direct or indirect sales in Egypt should consider approaching the ECA prior to closing. The ECA is known to be amenable to holding anonymous consultations to identify whether a pre-closing filing would be necessary.

### **III. Growth of Sustainable Finance Frameworks and Offerings**

The Middle East saw the world's greatest regional acceleration towards sustainability-focused finance regimes in 2020.<sup>10</sup> This marks a substantial change from the past. In part due to tensions stemming from the importance of fossil fuels to the region, the Middle East has often lagged behind other regions on Environmental, Social and Governance (ESG) matters. But several entities in the region generated substantial oversubscription for their offerings that incorporated sustainability criteria, suggesting a changing landscape.

#### **A. EGYPT**

In September 2020, Egypt published a framework to describe the country's approach to green financings, as well as a secondary verification of the framework by Vigeo Eiris.<sup>11</sup> Later that same month, the country issued \$750 million in sovereign green bonds, the first of such offerings in the Middle East.<sup>12</sup> The offering saw tremendous demand; Egypt ultimately reduced the rate by fifty basis points from their opening offer, and the offering received more than \$3.5 billion in orders (an approximately seven-

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Webinar, *Competition Law & Policy During and in the Aftermath of the Covid-19 Pandemic*, Reflections from the Arab Region, (Jul. 16, 2020).

9. OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Position Paper DAF/COMP/WD(2020)26, Start-ups, killer acquisitions and merger control – Note by Egypt, (May 14, 2020).

10. See HSBC, *Sustainable Financing and Investing Survey 2020: Middle East Report* at 4–5 (Oct. 14, 2020), <https://www.gbm.hsbc.com/insights/sustainable-financing/sfi-survey-middle-east>.

11. Press Release, Vigeo Eiris Provides Second Party Opinion on the Arab Republic of Egypt's Sovereign Green Financing Framework (Sept. 28, 2020), <https://vigeo-eiris.com/vigeo-eiris-provides-second-party-opinion-on-the-arab-republic-of-egypts-sovereign-green-financing-framework/>.

12. Mirette Magdy, *The Middle East's First Sovereign Green Bond Sees Strong Demand*, BLOOMBERG GREEN (Sep. 29, 2020), <https://www.bloomberg.com/news/articles/2020-09-29/egypt-offers-the-middle-east-s-first-sovereign-green-bond>.

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fold oversubscription from Egypt's original announcement of \$500 million in notes).<sup>13</sup>

**B. QATAR**

In February 2020, Qatar National Bank (QNB) published a framework to define what loans and investments QNB treats as environmentally or socially sustainable.<sup>14</sup> Building on this, in September, QNB announced a bond offering on the London Stock Exchange to finance Eligible Green Projects under the framework.<sup>15</sup> The offering was highly successful; QNB issued USD \$600 million in notes due September 2025, and the offering was approximately three times oversubscribed.<sup>16</sup>

**C. SAUDI ARABIA**

Also in September, the Saudi Electricity Company (SaudElec) successfully completed a green *sukuk* offering,<sup>17</sup> based on a framework published in June 2020.<sup>18</sup> As a *sukuk*, the offering is deemed compliant with Islamic law, creating an offering that integrates two sets of specialty financing considerations. SaudElec's *sukuk* offering was well-received, garnering orders for approximately four times the USD \$1.3 billion raised.<sup>19</sup>

These offerings indicate that entities in the Middle East are increasingly engaging in sustainable development and finance. The consistent oversubscription underscores the strong investor demand for such offerings, particularly when such offerings are bolstered by clear sustainability frameworks.

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13. Ivan Shumkov, *Egypt issues 1st sovereign green bond in USD- 750m deal*, RENEWABLES NOW (Sept. 30, 2020), <https://renewablesnow.com/news/egypt-issues-1st-sovereign-green-bond-in-usd-750m-deal-715514/>.

14. Qatar National Bank ("QNB"), Green, Social and Sustainability Bond Framework at 5–11 (2020), <https://www.qnb.com/sites/qnb/qnbqatar/document/en/enGreen>.

15. QNB Group Becomes the First in Qatar to Debut Green Bond Offering under its Medium Term Note (MTN) Programme, QNB (Sep. 14, 2020), <https://www.qnb.com/sites/qnb/qnbglobal/en/ennews15sep2020news>.

16. London Stock Exchange Welcomes Qatar National Bank Celebrating its Inaugural Sustainable Green Bond, London Stock Exchange (Sep. 23, 2020), <https://www.londonstockexchange.com/discover/news-and-insights/london-stock-exchange-welcomes-qatar-national-bank-celebrating-its-inaugural-sustainable-green-bond?lang=en>.

17. Selcuk Gokoluk, *Saudi Utility Raises \$1.3 Billion from Green Bonds*, BLOOMBERG GREEN (Sep. 11, 2020), <https://www.bloomberg.com/news/articles/2020-09-11/power-company-pioneers-green-bond-in-world-s-top-oil-exporter>.

18. See Saudi Electric Company, Green Sukuk Framework (June 2020), [https://www.se.com.sa/en-us/Lists/GreenSukukReports/Attachments/3/Green\\_Sukuk\\_Framework\\_Final.pdf](https://www.se.com.sa/en-us/Lists/GreenSukukReports/Attachments/3/Green_Sukuk_Framework_Final.pdf).

19. Cleofe Maceda, *Saudi Electricity's \$1.3bln Green Sukuk Oversubscribed*, ZAWYA (Sep. 13, 2020), [https://www.zawya.com/mena/en/markets/story/Saudi\\_Electricity\\_13bln\\_green\\_sukuk\\_oversubscribed-ZAWYA20200913085755/](https://www.zawya.com/mena/en/markets/story/Saudi_Electricity_13bln_green_sukuk_oversubscribed-ZAWYA20200913085755/).

#### **IV. Iran**

##### **A. THE DOCUMENT ON JUDICIAL SECURITY**

On October 12, 2020, Iran's Judiciary enacted the Judicial Security Document ("Document"), which consists of thirty-seven detailed articles.<sup>20</sup> In its introduction, the Document introduces the Iranian Government's intention to recover public faith in the Judiciary since the appointment of the new chief of Judiciary in 2019.<sup>21</sup> Due to the vast power given to the Judiciary by the Constitution to pass related laws and regulations preserving citizens' judicial security, the Document has been implemented to bring citizens peace of mind, and trust in the law and judicial system.<sup>22</sup> It outlines a set of phases for increasing judicial transparency, an essential step toward improving the judicial system and securing human rights.<sup>23</sup>

For the first phase, the Document provides guidelines on ensuring the judicial process' transparency by outlining measures to safeguard defendants' and citizens' rights.<sup>24</sup> These measures include that all citizens have the right to a fair trial and to choose their lawyer freely;<sup>25</sup> an emphasis on the presumption of innocence, meaning a person is considered innocent until proven guilty;<sup>26</sup> and a requirement that all cases should be adjudicated overtly.<sup>27</sup> The Document further stipulates that information on legal cases, including all court procedures, will be posted on the judiciary's website and that video and audio recordings of trials can be made publicly available if the judge or a defendant requests it.<sup>28</sup> Similarly, all final judgments will be publicly posted, effective immediately.<sup>29</sup>

The Document prohibits discrimination against citizens based on gender, race, color, language, religion, and political belief.<sup>30</sup> It declares that elders should have adequate access to the courts equal to other groups, and the Judiciary should provide all the required facilities to ensure compliance.<sup>31</sup> Additionally, the Document includes a ban on forced confessions, illegal police detentions, physical and mental torture, degrading treatment, brutality, unlawful killing, and the use of solitary confinement.<sup>32</sup> It also bars coercion for soliciting a confession or testimony, as well as disclosing

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20. The Judicial Security Document of 12 October 2020 (Iran), *available at* <http://media.dotic.ir/uploads/org/2020/10/13/160258628736004000.pdf>.

21. *See id.* Intro.

22. *See id.*

23. *Id.* art. 1.

24. *Id.* art. 2.

25. *Id.* art. 12.

26. Judicial Security Document, *supra* note 20, art. 19.

27. *See id.* art. 11.

28. *Id.* art. 5.

29. *See id.*

30. *Id.* art. 8.

31. *Id.* art. 9.

32. Judicial Security Document, *supra* note 20, art. 19.

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information, using insulting behavior, and sexual harassment, or insult to persons' dignity and honor, to achieve similar ends.<sup>33</sup>

The Document stipulates that the following phase of enactment should be aimed at eliminating oppression in prisons and courts. Additional future measures foresee the decriminalization of certain crimes and misdemeanors and the enactment of new laws to decrease the number of lawsuits filed.<sup>34</sup>

**B. THE PRISON SENTENCE REDUCTION ACT**

On May 12, 2020, the Parliament of Iran implemented a penal reform act aimed at reducing prisoner populations called "The Prison Sentence Reduction Act."<sup>35</sup> According to the act, all life imprisonment sentences for crimes—which are not considered as a *Hadd*,<sup>36</sup>—will be reduced to a sentence no less than twenty-five years' imprisonment.<sup>37</sup> In addition, most misdemeanors punishable by imprisonment are now instead punishable by financial penalties, according to the Act.<sup>38</sup>

**C. THE CHILDREN AND JUVENILE PROTECTION ACT**

Iran's Parliament passed the Children and Juvenile Protection Act on May 20, 2020, which consisted of fifty-one articles.<sup>39</sup> The act emphasizes minors' justice, defining children as under the age of religious maturity—which is nine for girls and fifteen for boys; while juvenile is defined as under eighteen years old.<sup>40</sup> It also defines common sexual offenses against minors and expands domestic violence protections through the issuance of detailed protection guidelines.<sup>41</sup> Finally, it also permits the relevant authorities' immediate intervention upon awareness of children's safety concerns.<sup>42</sup>

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33. *See id.* art. 20.

34. *Id.* art. 10; Hossain Nabi, *Legal Analysis of the Judicial Security Document*, ISNA NEWS AGENCY (Oct. 16, 2020), <https://www.isna.ir/news/99072518613/>.

35. The Prison Sentence Reduction Act of 12 May 2020 (Iran), *available at* <http://media.dotic.ir/uploads/org/159203661039383600.pdf>.

36. Referring to punishments that, under Sharia (Islamic Law), are mandated and fixed by Allah, and thus are not amendable. *See generally* Mehdi Najafi & Gholamreza Soltanfar, *Commutation and Intensification of Judicial Punishment after Award Issuance in Procedure Code of Iran*, 6.1 J. OF HIST. CULTURE AND ART RSCH. 489–503 (2017).

37. Prison Sentence Reduction Act, *supra* note 35, art. 3.

38. *See id.* art. 1.

39. The Children and Juvenile Protection Act of 20 May 2020 (Iran), *available at* <http://media.dotic.ir/uploads/org/159203517541122300.pdf>.

40. *See id.* art. 1.

41. *Id.* art. 10.

42. *Id.* art. 5.

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**V. Israel**

**A. CORONAVIRUS RELATED ACTS AND REGULATIONS IN ISRAEL**

Countries of the world have managed the Coronavirus pandemic in various manners. In Israel, it has been addressed initially by emergency regulations,<sup>43</sup> but after much public criticism of use of this instrument, the Knesset (Israeli parliament) has enacted four main acts as core legislation empowering the government to take action, and based on those four acts, regulations have been issued and enforced throughout the public.

The Knesset enacted what has been referred to as the “Big Coronavirus law,”<sup>44</sup> which allows the government to declare a state of emergency and to implement emergency regulations for dealing with the Coronavirus pandemic while bypassing the Knesset’s Coronavirus committee that will only be able to cancel new regulations retroactively. This act replaced the temporary previous act in said regard.

An extremely interesting point with this legislation is the act<sup>45</sup> enabling the Israeli General Security Service to use its advanced technological abilities of digital surveillance upon Coronavirus patients and persons subject to home isolation and civilians who have been near them and based on such surveillance to order people that were located near them to go into mandatory isolation.<sup>46</sup> This has been criticized in light of the human rights aspects, and yet used and not overruled to date by the courts.

Additionally, interesting in this regard is the act<sup>47</sup> enabling the closure of establishments, businesses, and facilities based on administrative discretion or the other Coronavirus legislation such as the activity limitation act<sup>48</sup> and regulations.

There has been and still is great criticism in Israel including in the Knesset concerning the threshold and scope of power granted to the government with the aforementioned legislation and its implementation, and a consistent call for checks and balances concerning implementation.

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43. Emergency Regulations Enforcement of Public Health Ordinance (the Novel Coronavirus) Home Isolation and Various Provisions (Temporary Provisions) 5780-2020.

44. Special Authorization Act for confronting the novel coronavirus (Temporary Provisions) 5780-2020.

45. The Act of Authorization of the General Security Services to assist in the national effort to reduce the spread of the novel coronavirus and advancement of the use of civil technology for allocation of those in close contact with the sick (Temporary Provisions) 5780-2020.

46. *Id.*

47. Special Authorization Act for confronting the novel coronavirus (administrative closing orders) 5780-2020.

48. The act for amendment and effectuation of the emergency regulations (the Novel Coronavirus – activity limitation) 5780-2020.

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**B. ABRAHAM ACCORDS AND AGREEMENTS BETWEEN ISRAEL AND  
THE UNITED ARAB EMIRATES/BAHRAIN**

On September 15, 2020, Israel entered into two new international agreements with countries from the Arab world. The agreements are called the Abraham Accords, which are in fact the declaratory foundation for the actual treaty of peace, diplomatic relations and full normalization between Israel and the United Arab Emirates (UAE), and for further annexed agreements concerning various fields such as finance, investment, aviation, tourism, science, innovation, trade and economic relations and more.

Parallel with the agreement with the UAE, Israel has engaged in a declaration of peace, cooperation and constructive diplomatic and friendly relations with the Kingdom of Bahrain. These agreements aim at widening the circle of peace, recognizing each state's right to sovereignty and to live in peace and security—normalizing foreign relations between them.

**C. EXPECTED IMPLEMENTATION OF THE NEW CIVIL LITIGATION  
CODE IN JANUARY 2021**

The revised civil litigation code<sup>49</sup> that was postponed will enter into force on January 1, 2021, dramatically changing the form of litigation in Israel. The new code puts the emphasis on oral hearings rather than lengthy affidavits, limitation on the length of submissions, mandatory due preparation of the case, its merits and evidence at the outset, extremely limited continuances, and the ability of the parties themselves to lead the process.<sup>50</sup> This is also somewhat a point of considerable criticism because it includes a change to the adversarial process which has been practiced for decades.

**D. COURT RULES ON LIMITATION OF CORPORATION'S DIRECTOR'S  
LIABILITY**

In a recent judgment<sup>51</sup> of the Commercial District Court of Tel Aviv, concerning a 120 million NIS lawsuit against directors of a real estate company, the lawsuit was dismissed, ruling that the duty of care of a director has two bases—the knowledge required from the director concerning matters of the company and the duty of taking a position and voting professionally in accordance with the companies' interest only.

The judgment indicates that the Israeli courts will indeed maintain the business judgment rule as long as the conduct of the director was on an adequately knowledgeable basis, without conflicts of interest and in good

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49. Civil Procedure Regulations, 5778-2018.

50. *Id.*

51. Tel Aviv Commercial District Court docket 30851-01-16 Habas Investments (1960) Ltd. v. Baruch Habas Yizum (2005) Ltd. [judgment of 30 July 2020].

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faith.<sup>52</sup> If these mandatory, cumulative parameters are met, the court will not review the substance of the director's decision nor replace his discretion.

## **VI. Saudi Arabia**

In late 2019, the Saudi Arabian legislator issued a new Competition Law.<sup>53</sup> Together with the accompanying Executive Regulations issued by the General Authority for Competition (GAC),<sup>54</sup> the new law completely revised and substantially expanded the Kingdom's merger control regime. Under the new regime, any transaction the parties to which have a combined annual turnover of at least Saudi riyal (SAR) 100 million—approximately twenty-six million USD—requires notification.<sup>55</sup> From the start the GAC employed a wide interpretation of the turnover-based threshold; however, it initially remained unclear whether only domestic or worldwide turnover would be considered and whether the transaction had to have a domestic nexus.

The GAC clarified both questions in their guidelines on the interpretation of certain provisions of the Competition Law and its Executive Regulations issued in March of 2020.<sup>56</sup> According to these Guidelines, when assessing whether the notification threshold has been met, the worldwide turnover of the parties involved in the transaction is to be considered.<sup>57</sup> Hence, the notification threshold is met where all parties involved in the transaction have a combined annual turnover of SAR 100 million or more. Furthermore, the Guidelines clarified that no specific domestic nexus was required.<sup>58</sup> Thus, it is the GAC's position that any transaction that fulfills the turnover threshold must be notified regardless of whether there is a link to Saudi Arabia.<sup>59</sup>

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52. *Id.*

53. Royal Decree No. (M/75) dated 29/06/1440H (corresponding to 07.03.2019G) on the Regulation of Competition, published in the Official Gazette of Saudi Arabia dated 20/07/1440H (corresponding to 27.03.2019G), entered into force on 31.09.2019 [Competition Law].

54. Executive Regulations on the Competition Law issued per Resolution No. (337) dated 25/1/1441H (corresponding to 24.09.2019G) of the Board of Directors of the General Authority for Competition, published by Circular of the General Authority for Competition dated 25/1/1441H (corresponding to 24.09.2019G), entered into force on 31.09.2019 [Executive Regulations].

55. Art. 7 Competition Law in connection with Art. 12(1) Executive Regulations.

56. David Monnier et al., *Saudi Arabia issues merger control guidelines – What is new?*, BAKER MCKENZIE (Apr. 14, 2020), <https://me-insights.bakermckenzie.com/2020/04/14/saudi-arabia-issues-merger-control-guidelines-what-is-new/>.

57. Doug Peel et al, *Saudi Arabia's New Competition Law Goes Into Effect*, WHITE & CASE (Nov. 11, 2019), <https://www.whitecase.com/publications/alert/saudi-arabias-new-competition-law-goes-effect#>.

58. Mohammed bin Saud Al-Rasheed, *Robust Competition and Merger Enforcement Activities in the Kingdom of Saudi Arabia – The New Normal*, BAKER BOTTS (Oct. 1, 2020), <https://www.bakerbotts.com/thought-leadership/publications/2020/october/robust-competition-and-merger-enforcement-activities-in-the-kingdom-of-saudi-arabia-the-new-normal>.

59. *Id.*

This extensive interpretation of the scope of the Saudi Arabian merger control regime together with the comparatively low turnover threshold effectively establishes the GAC as a global merger control regulator. The March 2020 issuance of the Guidelines by the GAC disappointed hopes that this was not the intention of the Saudi Arabian legislator and regulator when they issued the new merger control regime. It remains to be seen whether the GAC will change its position and apply a less extensive interpretation of its competencies to review (foreign) transactions in the future. But considering the position perpetuated by the Guidelines, it is unlikely that such a change will come soon.

## VII. Yemen

Yemen continues to suffer in the face of the world's most serious humanitarian crisis, the result of an ongoing civil war, starvation, disease, and economic collapse. A staggering eighty percent of Yemen's 30.5 million population is now dependent on outside aid.<sup>60</sup> According to the United Nations High Commissioner for Refugees, Yemen's health system "has in effect collapsed."<sup>61</sup> In 2020, the country faced an additional deadly foe—the COVID-19 pandemic.<sup>62</sup>

The civil war is no longer a binary conflict between the internationally recognized government of Abedrabbo Mansour Hadi (supported by Saudi Arabia) and the Houthi government (supported by Iran). In 2020, the Houthis controlled much of the northern part of Yemen, including the government apparatus in Sana'a (the capital city) and Hodeida (the main port on the Red Sea). Meanwhile, the Southern Transitional Council (STC) (supported by the UAE) took control over territory that the Hadi forces had previously held in the southern part of Yemen (including the seaport of Aden), seeking the re-establishment of the Republic of South Yemen as a separate nation.<sup>63</sup> Also, remnants of Al-Qaeda in the Arabian Peninsula (AQAP) continue to maintain a presence in eastern Yemen.

In mid-October, the Houthi and Hadi governments implemented a swap of over 1,000 prisoners, as part of the UN-sponsored 2018 Stockholm

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60. UN News, "Famine threat returns to Yemen, amid upsurge in fighting," <https://news.un.org/en/story/2020/09/1072422#:~:text=the%20spectre%20of%20famine%20has,Security%20Council%20heard%20on%20Tuesday> (September 15, 2020).

61. Omer Karasapan, *Yemen and COVID-19: The pandemic exacts its devastating toll*, BROOKINGS (June 15, 2020), <https://www.bakerbotts.com/thought-leadership/publications/2020/october/robust-competition-and-merger-enforcement-activities-in-the-kingdom-of-saudi-arabia-the-new-normal>.

62. Karasapan, "Yemen and COVID-19: The pandemic exacts its devastating toll," <https://www.brookings.edu/blog/future-development/2020/06/15/yemen-and-covid-19-the-pandemic-exacts-its-devastating-toll/> (June 15, 2020).

63. "Yemen: What is the Southern Transitional Council?", AL JAZEERA (April 26, 2020), <https://www.aljazeera.com/news/2020/4/26/yemen-what-is-the-southern-transitional-council>.



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Agreement designed to end the conflict.<sup>64</sup> The prisoner swap raised hopes that substantive peace talks could be restarted, although, at the time of writing, many parts of the Agreement have not seen any progress.<sup>65</sup>

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64. Bethan McKernan, “Satellite imagery of Aden indicates scale of pandemic in Yemen,” <https://www.theguardian.com/world/2020/oct/27/satellite-imagery-of-aden-indicates-scale-of-pandemic-in-yemen> (27 October 2020).

65. *Yemen war: Houthis and government complete prisoner exchange*, BBC NEWS (Oct. 16, 2020), <https://www.bbc.com/news/world-middle-east-54552051>.

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## **International Finance & Securities**

WALTER STUBER AND MOHAMED HASHISH\*

This Article reviews some of the most significant international legal developments made in the area of finance and securities law in 2020.

### **I. Developments in Brazil**

This article analyzes the recent changes effected by the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários – “CVM”*) by means of Resolution CVM 3, of August 8, 2020, that affect Brazilian Depositary Receipts (BDRs).<sup>1</sup> BDRs are certificates of deposit of securities issued by a Brazilian depositary institution representing securities issued by a foreign publicly traded corporation that have been deposited with a foreign custodian bank or institution.<sup>2</sup> The securities underlying the BDRs must be deposited with institutions that are headquartered in countries that have signed agreements with CVM or that have signed a memorandum of understanding with the International Organization of Securities Commission (IOSCO).<sup>3</sup> BDRs are quoted and traded in Brazilian Real (BRL) and are settled according to procedures governing the Brazilian securities market.<sup>4</sup>

BDR programs are classified as Levels I, II, or III. At Level I, regulatory requirements on issuers are lower; consequently, access for investors who are not considered qualified under the regulations is more restricted. In Level III, there is a greater amount of information provided by issuers and corresponding flexibility for investment in this product by a larger set of investors.<sup>5</sup>

The new rules are valid from September 1, 2020, and give Brazilian retail investors access to stocks, Exchange Traded Index Funds (ETFs), and debt

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1. See Brazilian Gazette of the Union (*Diário Oficial da União – DOU*), August 8, 2020, available at <http://www.cvm.gov.br/legislacao/resolucoes/resol003.html>.

2. *Resolução* CVM No. 3, art. 1 (Braz.).

3. *Id.* art. 2.

4. *Id.*

5. This classification is contained in Instruction CVM 332, of April 4, 2000, published in Brazilian Gazette of the Union (*Diário Oficial da União – DOU*), April 7, 2000 available at [www.cvm.gov.br/legislacao/instrucoes/inst332.html](http://www.cvm.gov.br/legislacao/instrucoes/inst332.html).

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securities abroad and will also allow Brazilian companies listed abroad to issue their BDRs in the local market.<sup>6</sup>

The reform preserves this structure but makes existing restrictions more flexible. In this sense, among the various changes that occurred through the new standard, the following stand out:<sup>7</sup>

- (1) Permission for BDRs to be backed up (i) on shares issued by foreign issuers with assets or revenues in Brazil; or (ii) on debt securities, including those issued by Brazilian publicly traded corporations. Until the reform, only shares issued by publicly held or similar companies, with headquarters and assets predominantly located abroad, could serve as a ballast for securities traded in Brazil.
- (2) Permission for investors who are not considered qualified to trade them, depending on the market in which the ballast securities of the BDR Level I are listed.
- (3) Forecasting of issuing BDRs based on shares of ETFs admitted to trading abroad.

According to the current regulations, “qualified investors” are: (i) professional investors; (ii) individuals or legal entities with financial investments over BRL 1 million; (iii) individuals approved in technical qualification exams or certified by CVM in relation to their own resources; and (iv) investment clubs with portfolios managed by unit holders who are qualified investors.<sup>8</sup> “Professional investors” are: (i) individuals or legal entities with financial investments above BRL 10 million; (ii) financial institutions and other institutions authorized to operate by the Central Bank of Brazil (*Banco Central do Brasil – Bacen*); (iii) insurance and capitalization companies; (iv) open and closed supplementary pension plan entities; (v) investment funds; (vi) investment clubs with a portfolio managed by a securities portfolio manager; (vii) independent investment agents, portfolio managers, securities analysts and consultants, in relation to their own resources; and (viii) non-resident investors.<sup>9</sup>

The following additional changes should also be highlighted:

- a) Reduction of obligations related to the translation of information produced by foreign issuers or ETFs, given the technological advances that have increasingly facilitated the processing of foreign language information by local investors.
- b) It is expected that the disclosure of the composition of the index of index funds may occur up to three months after the date to which they refer, in order to preserve the intellectual property of index providers

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6. *Id.*

7. *Id.*

8. *Id.*

9. *Resolução CVM No. 3, art. 1 (Braz.).*

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on the indices developed and provided by them, thereby increasing the supply of products to local investors.

c) Elimination of the obligation to disclose the entire contract between the ETF and the index provider, in view of the commercial nature of the content of these contracts.

d) Forecasting of automatic registration of BDR programs based on shares of ETFs, giving greater speed to the launch of new products.

e) Extension of the possibility of issuing debt backed BDRs to publicly traded corporations registered with CVM, allowing local investors to participate in issues frequently carried out abroad.<sup>10</sup>

With the move, BDR Level 1, which gives access to companies like Apple, Microsoft, Alphabet, Amazon, Netflix, and Facebook, can be purchased by retail investors and not just qualified investors.<sup>11</sup> The foreign company whose securities are represented by the BDRs is not involved in the process. The decision to issue these certificates is part of a depositary institution, which requests registration of the program to CVM and the Brazilian Exchange (B3 S.A. – Brasil, Bolsa, Balcão – “B3”).<sup>12</sup>

According to the rule, the foreign issuer must have, as its main trading market, a stock exchange based abroad, designated as a “recognized market” in the regulation of B3, which should still be defined and depends on CVM approval.<sup>13</sup>

The creation of securities backed by ETFs and the issuance of BDRs backed by debt securities are also allowed by publicly traded corporations registered with CVM. This will enable local investors to participate in issues carried out abroad. One of the goals of CVM is to strengthen the debt market.

On September 17, 2020, B3 announced that the standard lots of BDRs and variable income ETFs will be reduced starting September 28, 2020. The minimum negotiated amount of Unsponsored BDRs (when the company has no link to the issuance of that asset), Level I, variable income ETFs, and options on variable income ETFs will be reduced from the current 10 units to 1 unit. Tier II or III Sponsored BDRs will be reduced from 100 units to 1 unit. B3 is expected to allow individual investors access to BDRs during the month of October 2020.

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10. *Id.*

11. *See id.*

12. *GDP of African countries 2020, by country*, STATISTA (Feb. 18, 2021), <https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/>.

13. *Id.*

## II. Developments in Egypt

Egypt is one of the three largest economies in Africa and is strategically positioned at a crossroads between the East and West, making the country a significant player in international trade in the Middle East and Africa region.<sup>14</sup> Egypt is home to the Suez Canal, which connects the Mediterranean Sea with the Red Sea and is a key artery in global trade.<sup>15</sup>

The total area of Egypt is 1,001,450 square kilometers, including 995,450 square kilometers of land and 6,000 square kilometers of water.<sup>16</sup> According to the Egyptian Central Agency for Public Mobilization and Statistics, the population reached more than 100 million people in 2020.<sup>17</sup> Egypt is divided into 27 governorates, 217 cities and 4617 villages.<sup>18</sup> Governorates with the highest population are Cairo (10.8%), Giza (8.6%) and Sharqiyya (7.4%).<sup>19</sup>

The Egyptian government has been working hard to attract more Foreign Direct Investment (FDI) to the country and these efforts resulted in recognizing (i) Egypt as one of the top five destinations globally for greenfield FDI in 2016;<sup>20</sup> and (ii) Cairo was also named one of the top ten cities in the world to found a tech-startup in 2016<sup>21</sup>

According to the latest fDi Report 2020 issued by fDi Intelligence, “Egypt replaced South Africa as the second ranked destination by projects in the region, experiencing a sixty percent increase from 85 to 136 projects.”<sup>22</sup> This ranking covers both the Middle East and Africa regions.<sup>23</sup>

Furthermore, Egypt managed to also be on top of all ranked countries in the Middle East and African regions by capital investment in 2020 by acquiring twelve percent of capital investment with a total value of \$13.7

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14. *GDP of African countries 2020, by country*, STATISTA (Feb. 18, 2021), <https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/>.

15. William B. Fisher, *Suez Canal*, BRITANNICA (Mar. 26, 2021), <https://www.britannica.com/topic/Suez-Canal>.

16. *FAO GM Foods Platform*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (last visited May 5, 2019), <http://www.fao.org/food/food-safety-quality/gm-foods-platform/browse-information-by/country/country-page/en/?cty=EGY>.

17. *Egypt Population 2021 (Live)*, WORLD POPULATION REVIEW (last visited May 5, 2021), <https://worldpopulationreview.com/countries/egypt-population>.

18. *See Situation in Egypt*, UNICEF (last visited May 5, 2021), <https://www.unicef.org/egypt/country-background>.

19. *Id.*

20. FDI MARKETS 2017.

21. 10 Top Cities Around The World To Launch Your Startup, Forbes, <https://www.forbes.com/sites/amyguttman/2015/11/29/top-10-cities-in-the-world-to-launch-your-startup-some-may-surprise-you/#10a232c87e57>.

22. *The fDi Report 2020 Global greenfield investment trends*, FDI MARKETS (2020), 20, <http://report.fdiintelligence.com/files/ThefDiReport2020.pdf>.

23. *Id.*

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billion.<sup>24</sup> Financial services are amongst the top five sectors for projects in the Middle East and Africa in 2019.<sup>25</sup>

In general, according to the Central Bank and Banking Sector Law No. 88 of 2003 (Current Banking Law), it is prohibited for any natural or juristic person to practice any “*Banking Activities*” in Egypt without being licensed by and registered with the Central Bank of Egypt (CBE) (the Restriction).<sup>26</sup> This Restriction is not applied to (i) the public juristic persons that carry out any of the said “*Banking Activities*” within its scope of incorporation; and (ii) the international financial institutions that were empowered to do so in Egypt by virtue of any special law or international treaty (e.g. the International Monetary Fund (IMF), the World Bank Group, and *Agence Française de Développement* (AFD)).<sup>27</sup>

The term “Banking Activities” is defined under the Current Banking Law as “any activities of receiving deposits, providing refinancing, loans, facilities, contributing to share capitals in local companies as well as any other activities that are considered a banking activity as per the banking custom, on a regular basis and as the main business activities of any person carrying out these activities,” which definition is also adopted by the Egyptian Trade Code.<sup>28</sup>

Any person violating the Restriction above shall be subject to a penalty of imprisonment for a period between twenty-four hours to three years and/or a fine of not less than EGP 5,000 (five thousand Egyptian pounds) and not more than EGP 50,000 (fifty thousand Egyptian pounds) in accordance with the Banking Law.<sup>29</sup>

There are currently thirty-eight banks operating in Egypt, and the latest license issued by CBE approving the registration of a new bank in Egypt was issued for Arab International Bank on June 5, 2012.<sup>30</sup> Since this date, CBE has issued no new licenses for registration in Egypt and, therefore, the only way that has been available for non-registered banks to operate in Egypt is to acquire any bank that is registered with CBE.

“A profit bonanza for Egyptian banks is ripening the industry for acquisitions. If only there were more willing sellers,” is how Bloomberg describes the banking sector in Egypt.<sup>31</sup>

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24. *Id.*

25. *The fDi Report 2019 Global greenfield investment trends*, FDI MARKETS (2019), 22, [https://www.proshareng.com/admin/upload/report/12537-The\\_fDi\\_Report\\_2019-proshare.pdf](https://www.proshareng.com/admin/upload/report/12537-The_fDi_Report_2019-proshare.pdf).

26. Law No. 88 of 2003 (Law of the Central Bank, the Banking Sector, and Monetary Policy), *Jaridah al-Rasmiyah*, vol. 24, 15 June 2003 (Egypt).

27. *Id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *Demand for acquisitions in Egypt’s banking sector is soaring — but nobody really wants to sell*, ENTERPRISE, <https://enterprise.press/stories/2020/02/05/demand-for-acquisitions-in-egypts-banking-sector-is-soaring-but-nobody-really-wants-to-sell-11201/>.

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Throughout the past eight years, there have been a few big acquisition transactions in the banking sector in Egypt, from the acquisition of National Société Générale Bank - Egypt (NSGB) by Qatar National Bank Alahli (QNB) and the acquisition of BNP Paribas Egypt by Emirates NBD, both in 2013, to the latest acquisition of Barclays Bank Egypt by Attijariwafa bank in 2017. There are also a number of newspapers reporting an ongoing discussion for the acquisition of Bank Audi Egypt by First Abu Dhabi Bank.<sup>32</sup>

No one can deny the rapid global change in the banking and finance sector, especially including the international transmission into the fintech space. The banking sector in Egypt, being a country that witnessed two revolutions in 2011 and 2013, was definitely affected by such rapid global change as well as the local political challenge. This was more than enough for the Egyptian Government, upon a request by CBE, to propose an entire new draft for the Banking Law (the Banking Law). This Banking Law was prepared based on several pieces of advice rendered by international consultancy firms, a comparative study of other countries' laws, international standards, the Basel Framework, recommendations of the Organisation for Economic Co-operation and Development (OECD), the World Bank Group, and the IMF, as well as the recommendations made by the banks that are registered with CBE.

The Banking Law was issued under No. 194 of 2020 replacing the Previous Banking Law and entered into force as of September 16, 2020.<sup>33</sup>

Outlined below are the most important provisions of the Banking Law:

- (1) The Banking Law re-imposed the existing restriction under the Egyptian Companies Laws No. 159 of 1981 (the Companies Law) on any member of the Board of Directors of all banks registered in Egypt to be appointed as a Board member of more than one registered bank in Egypt, in any insurance company along with the Board membership of such one bank, or providing any management or consultancy services to such insurance company or more than one registered bank in Egypt. The Banking Law highlights that the said restriction shall be imposed for acting as a Board member either in person or as a representative of any entities, which highlight is not explicitly stated under the existing provisions of the Companies Law.<sup>34</sup>
- (2) All persons that are subject to the Banking Law are required to legitimize their position therewith by no later than one year as of September 16, 2020, extendable by CBE for no more than two years.<sup>35</sup>

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32. *First Abu Dhabi Bank pushes ahead with Bank Audi Egypt acquisition*, ENTERPRISE (Apr. 2, 2020), <https://enterprise.press/stories/2020/04/02/first-abu-dhabi-bank-pushes-ahead-with-bank-audi-egypt-acquisition-14169/>.

33. The Banking Law, No. 194 of 2020 issued Sept. 15, 2020, effective Sept. 16, 2020, published in the Official Gazette no.37.

34. Banking Law, art. 122.

35. *Id.*

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- (3) The Banking Law adopts the same definition of the “*Banking Activities*” stipulated under the Previous Banking Law.<sup>36</sup>
- (4) The required minimum paid-in capital for CBE will be increased to EGP 20 billion (approx. USD 1.25 billion) instead of EGP 3 billion (approx. USD 190.46 million) under the Previous Banking Law.<sup>37</sup>
- (5) The Governor of CBE will not be in a position to serve in this position for more than two successive terms of four years each, while there are no renewal limits under the Previous Banking Law.<sup>38</sup>
- (6) CBE will have the right to enter into loan agreements with local and international entities. Despite this right that will be granted to CBE under the Banking Law, noting that the Egyptian Constitution already includes the following provisions:<sup>39</sup>

According to the Egyptian Constitution, the House of Representatives is entrusted with approving, *inter alia*, the State’s Public Budget and the executive authority may not borrow, obtain facility, or be engaged in any project that is not included in the State’s Public Budget, as approved by the Parliament, resulting in expenditures from the State’s treasury for a subsequent period, unless an approval from the Parliament is obtained.<sup>40</sup>

Furthermore, the Public Budget Law imposes a similar restriction on the executive authority by stipulating that “the executive authority may not enter into loans or get engaged in projects that are not included in the State’s public plan or budget resulting in the utilization of amounts from the State’s treasury in the future without having an approval from the Parliament.”<sup>41</sup>

According to the Constitution, the term “*executive authority*” covers the President, the Government of Egypt (including CBE) and any Local Administration.<sup>42</sup>

- (1) CBE will be required to prepare its financial position statements on a monthly basis under the Banking Law, instead of a weekly basis under the Previous Banking Law.<sup>43</sup>
- (2) CBE will be allowed to enter into Memorandums of Understanding, Agreements and/or Protocols with its similar non-Egyptian supervisory entities to allow them to conduct an inspection on any registered bank in Egypt that is affiliated to any non-Egyptian bank that is subject to the supervision of such entities abroad.<sup>44</sup>
- (3) The required minimum paid-in capital for banks in Egypt will be EGP 5 billion (approx. USD 317.43 million) instead of EGP 500

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36. *Id.* art. 1.

37. *Id.* art. 4.

38. *Id.* art. 17.

39. Banking Law, art. 9.

40. Constitution of the Arab Republic of Egypt, arts. 101, 127.

41. Article 25 of the Public Budgets Law No.53 issued July. 29, 1973, effective August 2, 1973, published in the Official Gazette no. 31.

42. Constitution of the Arab Republic of Egypt § 2.

43. Banking Law, art. 129.

44. Banking Law art. 52.



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million (approx. USD 31.74 million) under the Previous Banking Law, while the required minimum paid-in capital for branches of non-Egyptian banks will remain USD 50 million, the same as the Previous Banking Law.<sup>45</sup>

- (4) Branches and subsidiaries of non-Egyptian banks will be required to obtain an approval from its supervisory authority in order to be eligible for registration in Egypt.<sup>46</sup>
- (5) The Banking Law imposes a fee of USD 50,000 to be paid to CBE for reviewing any new application for registration of branches of non-Egyptian banks with CBE and EGP 1 million (approx. USD 63,487) to be paid to CBE for reviewing any new application for registration of new banks with CBE.<sup>47</sup>
- (6) Any person carrying out the “*Banking Activities*” without authorization in Egypt will be subject to a penalty of imprisonment for a period between twenty-four hours to three years, the same as the Previous Banking Law, and/or a fine of between EGP 100,000 (approx. USD 6,348) and EGP 1,000,000 (approx. USD 63,487), instead of a fine between EGP 5,000 (approx. USD 317.44) and EGP 50,000 (approx. USD 3,174.36) under the Previous Banking Law.<sup>48</sup>
- (7) The Banking Law requires obtaining an approval from CBE for a holding of more than ten percent in any bank registered in Egypt, also covering Global Depository Receipts.<sup>49</sup>
- (8) The Banking Law adopts the same requirement as under the Previous Banking Law to notify CBE with holdings between five percent to ten percent of the issued capital of any registered bank in Egypt and extended this requirement to the voting rights in such banks as well.<sup>50</sup>
- (9) The Banking Law adopts the same requirement as under the Previous Banking Law to obtain a prior approval from the Board of Directors of CBE for holding ten percent or more than ten percent in any registered bank in Egypt; however, the Banking Law introduces an additional remedy for any unapproved ownership of shares whereby (i) the distribution of dividends and any voting rights associated with such shares must be ceased; and (ii) the said shares shall be transferred by no later than six months as of the date on which such ownership occurred.<sup>51</sup> Otherwise, CBE will have the right to request the Egyptian Financial Supervisory Authority (FSA) to appoint a brokerage firm to sell the said shares.<sup>52</sup> This new remedy is in addition to imposing a fine of EGP 1 to 2 million (approx. between

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45. *Id.* art. 64.

46. *Id.* art. 67.

47. *Id.*

48. Banking Law art. 226.

49. *Id.* art. 79.

50. *Id.* art. 73.

51. *Id.*

52. *Id.* art. 74.

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USD 63,517.47 and 127,034.94) instead of just a fine of EGP 100,000 to 200,000 (approx. between USD 6351.75 and 12,703.49) under the Previous Banking Law.<sup>53</sup> The Banking Law also imposes this requirement on Global Depository Receipts (GDRs), while the Previous Banking Law does not include any explicit provision applying this requirement to GDRs, noting that Commercial International Bank is the only registered bank in Egypt that issued GDRs.<sup>54</sup>

- (10) The Banking Law requires each registered bank in Egypt to evaluate all of its risk, especially its investments and loan portfolio risks on a quarterly basis instead of a semi-annual basis under the Previous Banking Law.<sup>55</sup>
- (11) The Banking Law requires all banks registered with CBE to obtain outsourcing service only from the providers that are registered with CBE.<sup>56</sup>
- (12) The Banking Law relaxed and extended the current existing deadline during which the Notary Public Office is required to review any commercial mortgage request from seven days to fifteen days.<sup>57</sup>
- (13) The required minimum capital for credit bureaus in Egypt is increased under the Banking Law to EGP 200 million (approx. USD 12.69 million) instead of EGP 5 million (approx. USD 317,359).<sup>58</sup>
- (14) The Military Prosecutor (or any delegates thereof) and Military Felony Court in Cairo are both empowered under the Banking Law to obtain any data related to any customers of the banks that are registered in Egypt with CBE.<sup>59</sup>
- (15) No one is now allowed under the Banking Law to carry out any activity of operating a payment system or providing a payment system unless a prior license is obtained by CBE.<sup>60</sup> This new restriction is applied to all persons, whether natural or juristic persons, carrying out such activity inside Egypt or providing such services abroad to any residents in Egypt except for Stock Exchanges, Futures Exchanges, Securities Settlement Systems, licensed Central Clearing, Depository and Registry Systems, Custodian Banks, or internal systems of the Egyptian Ministry of Finance that do not include payment, collection, set off or clearance of payment.<sup>61</sup>
- (16) The Banking Law includes a chapter dedicated to governing fintech including, *inter alia*, for the first time in Egypt, the possibility of

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53. Banking Law art. 228.

54. *Id.*

55. *Id.* art. 90.

56. *Id.* art. 96.

57. *Id.* art. 108.

58. *Id.* art. 112.

59. Banking Law art. 141.

60. *Id.*

61. *Id.* art. 184.

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issuing or marketing for cryptocurrencies, providing a prior license is obtained from the Board of Directors of CBE.<sup>62</sup>

- (17) The required minimum paid-in capital for currency exchange companies in Egypt will be EGP 25 million<sup>63</sup> (approx. USD 1.56 million) instead of EGP 5 million (approx. USD 317,452) under the Current Banking Law, while the required minimum paid-in capital for money transfer companies in Egypt will be EGP 25 million (approx. USD 1.56 million), instead of EGP 5 million (approx. USD 317,452) under the Current Banking Law.<sup>64</sup>
- (18) Auditors are required under the Banking Law not to audit more than two registered banks and more than three currency exchange companies in Egypt.<sup>65</sup>
- (19) The Banking Law explicitly excludes CBE, as well as any entity that is subject to its supervision, from the application of the Egyptian Consumer Protection No. 181 of 2018 and the Egyptian Antitrust Law No. 3 of 2005.<sup>66</sup>

Aside from the Banking Law, on April 17, 2019, a new Law was issued under No. 18 of 2019 regulating use of non-cash payment methods (Non-Cash Payment Law).<sup>67</sup> According to this Non-Cash Payment Law, the Executive Regulation thereof was required to be issued by the Prime Minister by no later than six months after April 17, 2019.<sup>68</sup> But this Executive Regulation has not been issued as required by the Non-Cash Payment Law.<sup>69</sup>

The Non-Cash Payment Law requires all governmental authorities, entities, public juristic persons and companies where the Egyptian Government owns the majority or all of its capital to settle all financial obligations due to, and social insurance subscriptions due on, *inter alia*, their members, employees and experts by any non-cash payments except for travel allowance abroad.<sup>70</sup>

The Non-Cash Payment Law requires all private sector entities of any kind to, *inter alia*:<sup>71</sup>

- (1) Settle all payments due to or social insurance subscriptions due on, *inter alia*, their employees, experts, chairs, board members and committees by non-cash payments, as long as the total number of such

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62. *Id.* art. 206.

63. *Id.* art. 208.

64. *Id.* art. 209.

65. Banking Law art. 208.

66. *Id.* art. 216.

67. The Non-Cash Payment Law No. 18 of 2019 issued April 16, 2019, effective April 17, 2020, published in the Official Gazette no.15.

68. *Id.* art. 2.

69. *Id.*

70. *Id.*

71. *Id.*

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employees or the aggregate amount of their monthly salaries exceeds the limits to be determined by the Executive Regulation;

- (2) Taxes, customs duties, fees and fines; and
- (3) Repayment installments for any loan and insurance premiums.

All governmental and private sector entities mentioned above are also required, within the thresholds to be determined by the Executive Regulations, to settle any payment by non-cash payment related to, *inter alia*, the following:<sup>72</sup>

- (1) Payments to suppliers, contractors, service providers, or any other counterparty;
- (2) Loans;
- (3) Dividends distribution;
- (4) Rent, purchase or allocation fees; and
- (5) Any other types of payment to be determined by the Prime Minister.

Any person who violates the requirements above shall be subject to a fine between two percent to ten percent of the payment made in cash subject to a cap of EGP one million (approx. USD \$63,493.27).<sup>73</sup>

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72. *Id.* art. 3.

73. *Id.* art. 7.

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## **Private International Law**

HOUSTON PUTNAM LOWRY<sup>1</sup>

### **I. Introduction**

Selecting the covered dates for the Year in Review article is always challenging. If just the 2020 year was selected, it would result in an article that covered less than twelve months of developments because the submittal deadline is November 1, and it takes about a month to prepare the article, so research really stops at the end of September. Since this topic has never been the subject of a Year in Review article, the author has a little more latitude than normal. Therefore, this article starts with an effective date of July 1, 2019, and continues through September 30, 2020.

This article discusses recent developments in private international law. It is important to define what constitutes “private international law.” To Europeans, private international law means what Americans call conflict of laws. To Americans, private international law means international law that is not the law of nations and not public international law.

### **II. United Nations Convention on International Settlement Agreements Resulting from Mediation**

The United Nations Convention on International Settlement Agreements Resulting from Mediation<sup>2</sup> (Singapore Mediation Convention) was promulgated on December 20, 2018. On August 7, 2019, the convention opened for signature in Singapore, and forty-seven States signed it (including the United States), and six additional States have signed since then.<sup>3</sup> There are currently six State parties to the Singapore Mediation Convention, which first entered into force on September 12, 2020—Ecuador, Fiji, Qatar, Saudi Arabia, Singapore, and Belarus. Belarus approved its signature on July 15, 2020, so the Singapore Mediation Convention will come into force on January 15, 2021, for Belarus.<sup>4</sup>

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2. G.A. Res. 73/198, at 1 (Dec. 20, 2018), *available at* [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation\\_convention\\_v1900316\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf) [hereinafter Singapore Mediation Convention].

3. *Status: United Nations Convention on International Settlement Agreements Resulting from Mediation*, U.N. COMM'N ON INT'L TRADE L. (last visited Nov. 2, 2020), [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements/status](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status).

4. *Id.*

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Instead of requiring parties to bring a separate suit to enforce a mediated settlement agreement, the Singapore Mediation Convention provides a procedural shortcut to enforce mediated settlement agreements without requiring a lawsuit to be instituted.<sup>5</sup> Under Article 1, the parties must first show that they meet the prerequisites for being governed by the Singapore Mediation Convention.<sup>6</sup>

Next, the aggrieved party must demonstrate to the competent authority that there was a settlement agreement signed by the parties.<sup>7</sup> The settlement agreement must have resulted from mediation,<sup>8</sup> which can be demonstrated in several ways: (1) the mediator's signature on the settlement agreement;<sup>9</sup> (2) a document signed by the mediator indicating the mediation was carried out;<sup>10</sup> (3) an attestation by the institution that administered the mediation;<sup>11</sup> or (4) any other evidence acceptable to the competent authority.<sup>12</sup>

The settlement agreement may be signed electronically.<sup>13</sup> The court shall determine the matter expeditiously, which means that the matter must be handled by motion rather than a complaint. A competent authority may refuse to enforce the settlement agreement on grounds similar to those utilized to refuse enforcement of contracts.<sup>14</sup> Examples of such grounds include: one of the parties to the settlement agreement was under some kind of incapacity;<sup>15</sup> the settlement agreement was null and void;<sup>16</sup> the settlement agreement was not binding;<sup>17</sup> or the settlement agreement was subsequently modified.<sup>18</sup>

The settlement agreement must be clear and understandable,<sup>19</sup> and it cannot be enforced if (a) it has already been performed,<sup>20</sup> or (b) the mediator seriously breached the mediation standards and that was the *sine qua non* for entering the settlement agreement.<sup>21</sup> The forum may not enforce the settlement agreement if doing so would be contrary to the terms of the settlement agreement.<sup>22</sup>

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5. Singapore Mediation Convention, *supra* note 2, at pmb1.

6. *Id.* at art. 1.

7. *Id.* at art. 4(1)(a).

8. *Id.* at art. 4(1)(b).

9. *Id.* at art. 4(1)(b)(i).

10. *Id.* at art. 4(1)(b)(i).

11. Singapore Mediation Convention, *supra* note 2, at art. 4(1)(b)(iii).

12. *Id.* at art. 4(1)(b)(iv).

13. *Id.* at art. 4(2)(a).

14. *Id.* at art. 5.

15. *Id.* at art. 5(1)(a).

16. *Id.* at art. 5(1)(b)(i).

17. Singapore Mediation Convention, *supra* note 2, at art. 5(1)(b)(ii).

18. *Id.* at art. 5(1)(b)(iii).

19. *Id.* at art. 5(1)(c)(ii).

20. *Id.* at art. 5(1)(c)(i).

21. *Id.* at art. 5(1)(e).

22. *Id.* at art. 5(1)(d).

In light of these restrictions, there is a caveat. If you are using *ad hoc* mediation and the mediator is elderly, ensure that the mediator signs the settlement agreement, as, without an administrative mediation institution to attest that a mediation took place, it would be hard to elicit the corroborating testimony of a now-deceased mediator.<sup>23</sup> The Singapore Mediation Convention may become a useful tool for countries where the court system is only marginally effective because of delays or inefficiencies.

Although the United States has not begun the process of seeking inter-agency clearance to transmit the Singapore Mediation Convention to the Senate for advice and consent, that process is expected to begin soon.

### **III. United Nations Convention on the Assignment of Receivables in International Trade (concluded New York, 2001)<sup>24</sup>**

On December 12, 2001, the United Nations Commission on International Trade Law (“UNCITRAL”) promulgated the Convention on the Assignment of Receivables in International Trade (“Receivables Convention”).<sup>25</sup> The Receivables Convention was designed to lower the cost of credit by validating the assignment of future receivables (either one at a time or in bulk) and clarifying the effect of an assignment on an account debtor and other possible third parties with a claim to the account receivable.<sup>26</sup>

On December 30, 2003, the United States signed the Receivables Convention. As so often happens in international law—especially private international law—the ratification process moved slowly, and the Senate did not give its advice and consent to the Receivables Convention until January 2, 2019.<sup>27</sup>

On October 15, 2019, the United States deposited its instrument of ratification, becoming the second State party (after Liberia) to the Receivables Convention.<sup>28</sup> Luxembourg and Madagascar have signed, but not ratified, the Receivables Convention.<sup>29</sup>

The Senate believes the Receivables Convention is self-executing, and the instrument of ratification reflects this belief.<sup>30</sup> Therefore, after the requisite five States become parties, the Receivables Convention comes into force,

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23. See Gilbert C. Laite, III, *Deal or No Deal? Don't Leave a Mediation Without a Signed Final Settlement Agreement*, WILLIAMS MULLEN (Jan. 16, 2011), <https://www.williamsmullen.com/news/deal-or-no-deal-don%E2%80%99t-leave-mediation-without-signed-final-settlement-agreement>.

24. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ctc-assignment-convention-e.pdf>.

25. G.A. Res. 56/81 (Jan. 31, 2002) [hereinafter Receivables Convention], 41 ILM 776 (2002).

26. *Id.*

27. See S. REP. NO. 114-7 (Feb. 10, 2016).

28. Receivables Convention, *supra* note 25.

29. *Id.*

30. S.R. 114-7, *supra* note 27, at 6.



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and there is no need for United States legislation implementing the convention into U.S. law.

According to Article 45 of the Receivables Convention, the convention does not enter into force until the first of the month following a six-month period after which the fifth instrument of ratification has been deposited. Therefore, the Receivables Convention is not yet in force; however, private parties can certainly incorporate it by reference into any contract between them.<sup>31</sup> Although the Receivables Convention will affect the relations between the contracting parties, it will not affect relations with third parties.<sup>32</sup> Contracting States may agree to have the Receivables Convention come into force early, but none have done so.<sup>33</sup> This is not likely to happen unless it is in connection with another treaty, such as a free trade area where the State parties agree that affected private parties should have recourse to the Receivables Convention.

The United States made the following understandings when its instrument of ratification was deposited with the United Nations Secretary-General:

[Section 2, Understanding 1] It is the understanding of the United States that paragraph (2)(e) of Article 4 excludes from the scope of the Convention the assignment of (i) receivables that are securities, regardless of whether such securities are held with an intermediary, and (ii) receivables that are not securities, but are financial assets or instruments, if such financial assets or instruments are held with an intermediary. . .<sup>34</sup>

[Section 2, Understanding 2] It is the understanding of the United States that the phrase “that place where the central administration of the assignor or the assignee is exercised,” as used in Articles 5(h) and 36 of the Convention, has a meaning equivalent to the phrase, “that place where the chief executive office of the assignor or assignee is located.”<sup>35</sup>

[Section 2, Understanding 3] It is the understanding of the United States that the reference, in the definition of “financial contract” in Article 5(k), to “any other transaction similar to any transaction referred to above entered into in financial markets” is intended to include transactions that are or become the subject of recurrent dealings in financial markets and under which payment rights are determined by reference to (a) underlying asset classes or (b) quantitative measures of economic or financial risk or value associated with an occurrence or

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31. *Id.*

32. G.A. Res 56/81, art. 22 (Jan. 31, 2002).

33. See Houston Putnam Lowry, Early Implementation of the 1988 UNCITRAL Bills and Notes Convention, LEGAL HARMONIZATION IN THE AMERICAS 159 (General Secretariat of the Organization of American States, 2002).

34. S. REP. NO. 115-7, at 7 (2018).

35. *Id.* at 8.

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contingency. Examples are transactions under which payment rights are determined by reference to weather statistics, freight rates, emissions allowances, or economic statistics:<sup>36</sup>

[Section 2, Understanding 4] It is the understanding of the United States that because the Convention applies only to “receivables,” which are defined in Article 2(a) as contractual rights to payment of a monetary sum, the Convention does not apply to other rights of a party to a license of intellectual property or an assignment or other transfer of an interest in intellectual property or other types of interests that are not a contractual right to payment of a monetary sum. . .<sup>37</sup>

[Section 2, Understanding 5] The United States understands that, with respect to Article 24 of the Convention, the Article requires a Contracting State to provide a certain minimum level of rights to an assignee with respect to proceeds but that it does not prohibit Contracting States from providing additional rights in such proceeds to such an assignee.<sup>38</sup>

The United States also made the following declarations:

[Section 3, Declaration 1] Pursuant to Article 23(3), the United States declares that, in an insolvency proceeding of the assignor, the insolvency laws of the United States or its territorial units may under some circumstances (a) result in priority over the rights of an assignee being given to a lender extending credit to the insolvency estate, or to an insolvency administrator that expends funds of the insolvency estate for the preservation of the assigned receivables (see, for example, Title 11 of the United States Code, Sections 364(d) and 506(c)); or (b) subject the assignment of receivables to avoidance rules, such as those dealing with preferences, undervalued transactions and transactions intended to defeat, delay or hinder creditors of the assignor. . .<sup>39</sup>

[Section 3, Declaration 2] Pursuant to Article 36 of the Convention, the United States declares that, with respect to an assignment of receivables governed by enactments of Article 9 of the Uniform Commercial Code, as adopted in one of its territorial units, if an assignor’s location pursuant to Article 5(h) of the Convention is the United States and, under the location rules contained in Section 9-307 of the Uniform Commercial Code, as adopted in that territorial unit, the assignor is located in a territorial unit of the United States, that territorial unit is the location of the assignor for purposes of this Convention. . .<sup>40</sup>

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36. *Id.*

37. *Id.* at 9.

38. *Id.*

39. *Id.* at 10.

40. S.R. 115-7, *supra* note 34, at 6.

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[Section 3, Declaration 3] Pursuant to Article 37 of the Convention, the United States declares that any reference in the Convention to the law of the United States means the law in force in the territorial unit thereof determined in accordance with Article 36 and the Article 5(h) definition of location. However, to the extent under the conflict-of-laws rules in force in that territorial unit a particular matter would be governed by the law in force in a different territorial unit of the United States, the reference to “law of the United States” with respect to that matter is to the law in force in the different territorial unit. The conflict-of-laws rules referred to in the preceding sentence refer primarily to the conflict-of-laws rules in Section 9-301 of the Uniform Commercial Code as enacted in each State of the United States. . .<sup>41</sup>

[Section 3, Declaration 4] Pursuant to Article 39 of the Convention, the United States declares that it will not be bound by Chapter V of the Convention. . .<sup>42</sup>

[Section 3, Declaration 5] Pursuant to Article 40, the United States declares that the Convention does not affect contractual anti-assignment provisions where the debtor is a governmental entity or an entity constituted for a public purpose in the United States. . .<sup>43</sup>

[Section 4, Self-Execution Declaration] The Senate’s advice and consent under section 1 is subject to the following declaration: This Convention is self-executing.<sup>44</sup>

The Receivables Convention covers many topics, including asset-based lending, which would otherwise be covered domestically by Article 9 of the Uniform Commercial Code, and factoring, which involves the sale of receivables, either with or without recourse.<sup>45</sup> While the sale of receivables with recourse resembles a lending transaction, a sale of receivables without recourse does not resemble a traditional lending transaction.<sup>46</sup> Some of the topics would seem settled under domestic United States law, but they are not well settled under the laws of every country.

First, although the sale of existing receivables has long been permitted in the United States and the sale of receivables was supposedly permitted under The Code of Hammurabi,<sup>47</sup> not all countries have followed this venerable precedent.

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41. *Id.*

42. *Id.* at 12.

43. *Id.*

44. *Id.*

45. See G.A. Res. 56/81, *supra* note 32.

46. See *Accounts Receivable Factoring*, CFI (last visited May 20, 2021) <https://corporatefinanceinstitute.com/resources/knowledge/accounting/accounts-receivable-factoring/>.

47. *Receivables Financing, Don’t Overlook the Basics*, ASHURST (Sep. 28, 2018), <https://www.ashurst.com/en/news-and-insights/legal-updates/receivables-financing/>.

Second, receivables may be assigned, but this is not permitted in some countries.<sup>48</sup> Receivables may either be individually assigned or assigned in bulk.<sup>49</sup> If future receivables are assigned, they must be assigned in bulk because they cannot be individually identified before they exist.<sup>50</sup> Because an undivided interest in receivables may also be assigned,<sup>51</sup> this makes it rather clear that receivables may be sold before they come into existence. Under Article 9 of the Uniform Commercial Code, a *lender* may take a collateral interest in receivables that do not yet exist.<sup>52</sup> Under existing US domestic law, it is unclear if a receivable can be *sold* before it comes into existence. Once the Receivable Convention comes into force, this issue will be resolved domestically (at least for international receivables).<sup>53</sup>

#### **IV. Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019)**

After considering the issue for many years, on July 2, 2019, the Hague Conference on Private International Law drafted and adopted the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters<sup>54</sup> (“Hague Judgments Convention”). Although only Ukraine and Uruguay have signed the Hague Judgments Convention, the United States is expected to sign it in the near future.<sup>55</sup>

The United States is not currently a party to any bilateral or multilateral convention on the enforcement of foreign judgments.<sup>56</sup> This has been one of the reasons arbitration has been so common under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention).<sup>57</sup> The near-universal acceptance of the 1958 New York Convention<sup>58</sup> has propelled arbitration into the

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48. U.N. Secretariat, Possible Future Work, Addendum by the Secretariat, ¶¶ 7–8, Int’l Law Comm’n, U.N. Doc. A/CN.9/378/Add.3 (May 28, 1993).

49. See G.A. Res. 56/81, *supra* note 32, at art. 8.

50. *The UN Convention on the Assignment of Receivables in International Trade*, 3, MAYER BROWN (May 21, 2020), <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2020/05/the-un-convention-on-the-assignment-of-receivables.pdf>.

51. See G.A. Res. 56/81, *supra* note 32, at art. 8.

52. *UCC Security Agreements*, FULLERTON & KNOWLES (last visited May 23, 2021), [https://fullertonlaw.com/ucc-security-agreements#\\_ftnref10](https://fullertonlaw.com/ucc-security-agreements#_ftnref10).

53. See G.A. Res. 56/81, *supra* note 32.

54. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, H.C.C.S.

55. *Contracting Parties to the Convention*, H.C.C.H. (last visited May 20, 2021) <https://www.hcch.net/en/instruments/conventions/status-table/print?cid=137>.

56. See Nadja Vietz, *Will Your U.S. Judgment Be Enforced Abroad?*, HARRIS BRICKEN (July 22, 2020), <https://harrisbricken.com/blog/will-your-u-s-judgment-be-enforced-abroad/>.

57. See King & Wood Mallesons, *An Overview on International Arbitration*, LEXOLOGY (July 7, 2020), <https://www.lexology.com/library/detail.aspx?g=37392764-3bdf-43d6-917d-4b7a95132e5a>.

58. *Id.*; See *Status: “New York Convention”*, UNITED NATIONS (last visited May 20, 2021), [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status2](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2).

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preferred method of international dispute resolution. While this does not present a problem for larger companies, the costs of arbitration often present an obstacle for small and medium enterprises.<sup>59</sup>

The Hague Judgments Convention only covers judgments in civil or commercial matters.<sup>60</sup> It does not apply, *inter alia*, to family law matters,<sup>61</sup> wills,<sup>62</sup> or insolvency.<sup>63</sup> In addition, the Hague Judgments Convention covers only final judgments and not interim measures of protection.<sup>64</sup> The general rule is a final judgment issued by the court of a contracting State will be recognized and enforced in another contracting State.<sup>65</sup>

The Hague Judgments Convention provides for a fairly long list of acceptable bases of jurisdiction.<sup>66</sup> Each country is concerned about an unusual exercise of jurisdiction that it considers unacceptably peculiar (commonly called “exorbitant bases of jurisdiction”).<sup>67</sup> The common-law lawyer will notice “presence in the forum” is not a listed acceptable basis of jurisdiction under the Hague Judgments Convention.<sup>68</sup> While United States jurisprudence is not offended by serving a defendant while flying over a jurisdiction when the airplane neither took off nor landed in that jurisdiction,<sup>69</sup> other countries might find that enforcing such a judgment would violate their public policy. Similarly, courts in the United States would be loath to enforce a judgment solely based upon the presence of the defendant’s personal property located within the forum.<sup>70</sup>

It is important to note that only compensatory judgments will be enforced.<sup>71</sup> This means that treble damage awards, such as anti-trust awards, and punitive damages awards will not generally be enforced, but consent judgments and litigated judgments will be enforced.<sup>72</sup>

While there can be no assurance that the Hague Judgments Convention will be transmitted promptly to the Senate for advice and consent, it seems likely in light of the business community’s interest.

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59. King & Wood Mallesons, *supra* note 57.

60. Convention on the Recognition and Enforcement of Foreign Judgements, *supra* note 54, at art. 1.

61. *Id.* at art. 2(1)(b)–(c).

62. *Id.* at art. 2(1)(d).

63. *Id.* at art. 2(1)(e).

64. *Id.* at art. 3(1)(b).

65. *Id.* at art. 4(1).

66. See Convention on the Recognition and Enforcement of Foreign Judgements, *supra* note 54, at art. 5.

67. Freidrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT’L L. 111, 112 (1998).

68. Convention on the Recognition and Enforcement of Foreign Judgements, *supra* note 54, at art. 1.

69. See *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

70. See *id.*

71. See Convention on the Recognition and Enforcement of Foreign Jurisdictions, *supra* note 54, at art. 10.

72. *Id.* at art. 11.

### V. Hague Convention on Choice of Court Agreement (2005)

On June 30, 2005, the Hague Conference on Private International Law promulgated the Hague Convention on Choice of Court Agreement<sup>73</sup> (Choice of Court Convention). On January 19, 2009, John Bellinger III (the State Department's Legal Advisor at the time) signed the Choice of Court Convention on behalf of the United States, but it has not been ratified. The Choice of Court Convention came into force on October 1, 2015.<sup>74</sup> On September 28, 2020, the United Kingdom deposited its instrument of accession, making it the 32nd State party to the Choice of Court Convention. And although the People's Republic of China (2017), the Republic of North Macedonia (2019), and the United States (2009) have signed the Choice of Court Convention, none of them have ratified their signatures.<sup>75</sup>

The primary problem is how to implement the Choice of Court Convention. As a matter of policy, the United States will not ratify a private international law convention unless it has been implemented. The longest delay in implementing a recent private international law convention is the 1973 UNIDROIT Convention on the Form of an International Will (Wills Convention).<sup>76</sup> In 1977, the Uniform Laws Commission (formerly known as the National Conference of Commissions on Uniform State Laws) drafted the implementing legislation.<sup>77</sup> At its January 24-25, 2015 meeting, the Uniform Laws Commission changed the original title "Uniform International Wills Act" to "Uniform Will Recognition Act."<sup>78</sup> The implementing legislation is also contained in part ten of the Uniform Probate Code.<sup>79</sup> Senate advice and consent to the Wills Convention have been obtained.

As stated earlier, the primary problem is how to implement the Choice of Court Convention. The recognition of foreign judgments has traditionally been a state-law matter, although some have unsuccessfully suggested that it should be a matter for federal law.<sup>80</sup> For example, this was done for both the

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73. See *Hague Convention on Choice of Court Agreements*, HAGUE CONF. ON PRIVATE INT'L LAW (June 30, 2005), <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>.

74. 37: *Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. ON PRIVATE INT'L LAW, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>, (last updated Mar. 3, 2021).

75. *Id.*

76. Convention providing a Uniform Law on the Form of an International Will, UNIDROIT, <https://www.unidroit.org/instruments/international-will> (last updated May 29, 2020).

77. *Uniform Wills Recognition Act of 1977*, NAT'L CONF. OF COMM'R OF UNIF. LAWS, July 29 – Aug. 5, 1977 (approved by the American Bar Association on February 14, 1978).

78. See *id.* (referring to the bottom of the first page).

79. UNIF. PROB. CODE §§ 2-10001–2-1010 (amended 2010).

80. See, e.g., *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, A.L.I. (1999-2006) (formerly known as "International Jurisdiction and Judgments Project").

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1958 New York Convention, which was implemented by the Federal Arbitration Act, chapter two,<sup>81</sup> and the 1975 Panama Arbitration Convention, which was implemented by the Federal Arbitration Act, chapter three.<sup>82</sup> Presumably, this was done pursuant to the holding in *Missouri v. Holland*.<sup>83</sup> The federal government may enact implementing legislation for treaties concluded under the Constitution's treaty power.

Some have suggested the Choice of Court Convention should be implemented at the state level by drafting a uniform law that every state and territory would adopt. As a political matter, such an approach would delay ratification.

Others have suggested a "cooperative federalism" approach. This would follow the model Federal eSign legislation<sup>84</sup> as a "gap filler" for the Uniform Electronic Transaction Act, which was promulgated by the Uniform Law Commission.<sup>85</sup> While this cooperative federalism approach would be faster than a State-by-State implementation of the Choice of Court Convention, it will still be slower than a pure federal implementation.

At a public meeting of the Secretary of State's Advisory Committee on Private International Law, which was chaired by Harold Koh (the then legal advisor of the State Department), there was no consensus on how to implement the Choice of Court Convention. Therefore, the matter did not proceed further.

The Choice of Court Convention allows the parties to a written commercial agreement to decide which court in a contracting State will hear their dispute.<sup>86</sup> The chosen court must be the exclusive court to hear the dispute.<sup>87</sup> If the parties have not explicitly designated the court as the exclusive court, the Choice of Court Convention presumes it is the exclusive court,<sup>88</sup> which is contrary to the traditional American jurisprudence's interpretation of such a contractual text.

Selecting an exclusive court gives rise to three main consequences. First, the chosen court will have the jurisdiction to hear the dispute.<sup>89</sup> Second, other courts of contracting States will not assume jurisdiction of the dispute.<sup>90</sup> The Choice of Court Convention does not apply to interim measures of protection (including prejudgment remedies), so the selection of

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81. 9 U.S.C. § 201.

82. *Id.* at § 301.

83. See *Missouri v. Holland*, 252 U.S. 416 (1920).

84. 15 U.S.C. § 7001.

85. See William H. Henning, *The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform State Laws*, 2 ELON L. REV. 39, 45 (2011).

86. Hague Choice of Court Convention, art. 5, June 30, 2005 [hereinafter Hague Convention].

87. *Id.* at art. 3.

88. *Id.* at art. 3(b).

89. *Id.* at art. 5.

90. *Id.* at art. 6.

an exclusive forum does not affect that.<sup>91</sup> Third, the judgment rendered by the chosen court will generally be recognized and enforced<sup>92</sup> unless one of the “laundry list” of grounds for refusing to recognize or enforce a judgment under article nine of the Choice of Court Convention exists. However, it is important to note that only compensatory judgments will be enforced.<sup>93</sup> This means treble damage awards (such as anti-trust awards) and punitive damages awards will not be enforced.

The Choice of Court Convention is mentioned because it will likely be packaged for Senate advice and consent with the Hague Judgments Convention.

## **VI. 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**

The 1958 New York Convention, which was concluded on June 10, 1958, is one of the most ratified and used conventions in the private international law area. Although the 1958 New York Convention is hardly new, many countries didn’t become parties until recently.<sup>94</sup>

Ethiopia deposited its instrument of accession on August 24, 2020, and the 1958 New York Convention became effective November 22, 2020.<sup>95</sup> Ethiopia will apply the 1958 New York Convention only to recognize and enforce arbitral awards made in the territory of another contracting State.<sup>96</sup> Ethiopia will apply the 1958 New York Convention only to differences arising out of commercial legal relationships, whether contractual or not. Ethiopia will not apply the 1958 New York Convention retroactively.<sup>97</sup>

The Maldives deposited its instrument of accession on September 17, 2019, and the 1958 New York Convention became effective December 16, 2019.<sup>98</sup>

Papua New Guinea deposited its instrument of accession on July 17, 2019, and the 1958 New York Convention became effective October 15, 2019.<sup>99</sup>

Palau deposited its instrument of accession on March 31, 2020, and the 1958 New York Convention became effective June 29, 2020.<sup>100</sup> Palau will apply the 1958 New York Convention only to recognize and enforce awards made in the territory of another contracting State.<sup>101</sup> Palau will also apply the 1958 New York Convention only to differences arising out of legal

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91. *Id.* at art. 7.

92. Hague Convention, *supra* note 86, at art. 8.

93. *Id.* at art. 11.

94. *Contracting States*, N.Y. ARB. CONVENTION, (last visited May 17, 2021) [hereinafter *Contracting States*], <https://www.newyorkconvention.org/countries>.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Contracting States*, *supra* note 94.

101. *Id.*



relationships, whether contractual or not, that are considered commercial under the national law.<sup>102</sup>

Seychelles deposited its instrument of accession on February 3, 2020, and the 1958 New York Convention became effective May 3, 2020.<sup>103</sup> Seychelles will apply the 1958 New York Convention only to recognize and enforce awards made in the territory of another contracting State. Seychelles will also apply the 1958 New York Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.<sup>104</sup> Seychelles will not apply the 1958 New York Convention retroactively.

Tonga deposited its instrument of accession on June 12, 2020, and the 1958 New York Convention became effective September 10, 2020. Tonga will not apply the 1958 New York Convention retroactively.

Currently, there are 165 State parties to the 1958 New York Convention.<sup>105</sup>

## **VII. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters**

While the Hague Service Convention was concluded more than 50 years ago—on November 15, 1965—new countries adhere to it every year.<sup>106</sup>

Austria signed the Hague Service Convention on June 22, 2019, and ratified its signature on July 14, 2020.<sup>107</sup> The Hague Service Convention entered into force on November 12, 2020. The Hague Service Convention does not apply to service on the Republic of Austria itself or its political subdivisions. The documents must be translated into German before service will be effective. Austria objected to the service of documents directly through foreign diplomatic or consular agents within its territory, as proposed in Article 8, paragraph 1 unless the document is to be served upon a national of the State where the documents originate.<sup>108</sup>

Brazil deposited its instrument of accession for the Hague Service Convention on September 29, 2019, and it became effective on June 1, 2019.<sup>109</sup> Brazil declared that it would not accept service of process by diplomatic or consular agents within Brazil unless it was being served on a national of the serving State. Brazil declared that it is opposed to the transmission methods of judicial and extrajudicial documents provided for in

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 14: *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HAGUE CONF. ON PRIVATE INT'L LAW (last updated July 27, 2020), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>.

107. *Id.*

108. *Id.*

109. *Id.*

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article ten (including service by mail). Under article five, paragraph three, and Article seven, paragraph two, Brazil declared that all documents transmitted to the Brazilian Central Authority for service must be accompanied by a translation into Portuguese (except in the case of the standard terms in the model annexed to the Convention, referred to in article seven, paragraph one).<sup>110</sup> Finally, Brazil declared that when Brazil is the receiving State, the required certificate must be signed by the Judge who has jurisdiction or by the Central Authority designated under article two of the Hague Service Convention.<sup>111</sup>

The Marshall Islands deposited its instrument of accession on July 29, 2020, and the Hague Service Convention will become effective February 1, 2021.<sup>112</sup> The Marshall Islands requires the served documents and the accompanying certificate to be in English. The Marshall Islands declared that it would not accept service of process by diplomatic or consular agents within its territory unless the service of process was being served on a national of the serving State, and announced that it would not accept service by mail under Article 10(a).<sup>113</sup>

Finally, a Marshall Island judge may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:<sup>114</sup>

- (i) the document was transmitted by one of the methods provided for in this Convention;
- (ii) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document; and
- (iii) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Also, the application for relief referred to in Article 16 will not be entertained if it is filed more than one year following the date of the judgment.<sup>115</sup>

Nicaragua deposited its instrument of accession for the Hague Service Convention on July 24, 2019, and it became effective February 1, 2020.<sup>116</sup> Nicaragua will apply the Hague Service Convention to family matters, and Nicaragua declared that it would not accept service of process by diplomatic

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110. *Id.*

111. *Id.*

112. *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, *supra* note 106.

113. *Id.*

114. *Id.* (notwithstanding the provisions of the first paragraph of Article 15).

115. *Id.*

116. *Id.*

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or consular agents within its territory unless it was being served on a national of the serving State.<sup>117</sup>

**VII. Conclusion**

Although some developments in private international law occurred, 2019-2020 was not a momentous year. Like most years, private international law made some gradual improvements. Because this area of law constantly changes, practitioners must consult the latest references to ensure accurate information.

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117. *Id.*

## **Immigration and Naturalization**

ESHIGO P. OKASILI, MICHAEL FREESTONE, HON. JOAN CHURCHILL,  
AND BETINA SCHLOSSBERG\*

### **I. Introduction**

The year 2020 was very challenging in most fields; immigration was no exception. Moreover, immigration around the world saw difficulties exacerbated by the COVID-19 pandemic. In the United States, the pandemic was used by the Trump administration to further choke the movement of people to the United States, and it impeded their ability to remain in the country. Travel bans, presidential proclamations, drastic reductions in the number of permitted asylees, redefinition of regulations in the Code of Federal Regulations (CFR), and limits on immigration judges' freedom to rule, among other issues, added to the already chaotic environment of closed consulates, uncertain requests for admission and extensions of stay, ever-pending appointments, and children separated from families. Trump's presidential proclamations concerning immigration issues received considerable publicity, though little clarification. Less publicized have been the other actions taken by the administration, in particular the intervention by the Trump administration into the activities carried out by immigration judges.

### **II. "Building the Wall" - An Effective Mechanism for Changing the American Immigration Landscape**

The Trump administration ended as it began—with a focus on drastically curtailing immigration. The outbreak of COVID-19 in Wuhan, China in December 2019, and its rapid development into a worldwide pandemic, presented an opportunity for President Trump to further restrict immigration during 2020 without the need for legislation, instead using presidential proclamations. President Trump will be remembered for exercising the authority vested in the President pursuant to sections 212(f) and 215(f) of the Immigration and Nationality Act, 8 U.S.C. 1182(f) and

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1185(a), to build invisible and inexpensive “walls” beyond America’s natural borders.<sup>1</sup>

A. 2020 PROCLAMATIONS

1. *Compliance-Related Proclamation*

a. Proclamation 9983

Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania were among many nations required by the United States to establish and implement reliable identity management systems, share their national security and public safety information, and ensure their nationals did not pose any national security or public safety threat to the United States.<sup>2</sup> They were also required to undergo biennial reviews (every 730 days) for full compliance with the above-described criteria, as established by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence.<sup>3</sup> Burma (Myanmar), Eritrea, Kyrgyzstan and Nigeria were found to be non-compliant with the requirements as well as hubs for terrorists.<sup>4</sup> Eritrea was also found to reject their nationals on final orders of removal from the United States.<sup>5</sup> Based on the findings described above, President Trump issued Proclamation 9983, on January 31, 2020, suspending nationals of Burma (Myanmar), Eritrea, Kyrgyzstan and Nigeria from entering the United States, with exceptions for individuals deemed “Special Immigrants” because of their assistance to the United States Government.<sup>6</sup> The stated reason for limiting these countries’ nationals to non-immigrant visas was that it is relatively easier to remove nonimmigrants than it is to remove immigrants from the United States.<sup>7</sup>

On the other hand, Sudan and Tanzania were found to be partially compliant with the security requirements, but partially deficient in meeting the criteria referenced above.<sup>8</sup> Consequently, their nationals were solely suspended from entering the United States on Diversity visas,<sup>9</sup> whose vetting process is deemed to be less thorough and reliable than other immigrant visas.<sup>10</sup>

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1. See 8 U.S.C. §§ 1182(f), 1185(a).

2. See Proclamation No. 9983, 85 Fed. Reg. 6699 (Feb. 5, 2020); Proclamation No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

3. Proclamation No. 9983, 85 Fed. Reg. 6699 (Feb. 5, 2020).

4. See *id.*

5. *Id.*

6. *Id.*

7. Proclamation No. 9983, *supra* note 3.

8. *Id.*

9. *Id.*; see also 8 U.S.C. § 1153(c).

10. Proclamation No. 9983, *supra* note 3.

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2. *COVID-19 Related Proclamations*

a. Proclamation 9984

On January 31, 2020, President Trump issued Proclamation 9984, suspending and limiting entry to the United States immigrants and nonimmigrants who were present in the People’s Republic of China (excluding the Special Administrative Regions of Hong Kong and Macau) during the fourteen days immediately before their entry or attempted entry into the country.<sup>11</sup> The proclamation stated the grounds for these suspensions and limitations were that these individuals posed a risk of transmitting COVID-19.<sup>12</sup> The suspension and limitations were subject to specific exceptions.<sup>13</sup>

b. Proclamation 9992

Following the outbreak of COVID-19 in the Islamic Republic of Iran (Iran), President Trump determined that aliens seeking to enter the United States as immigrants or nonimmigrants from Iran posed a risk of transmitting COVID-19 into the United States.<sup>14</sup> Therefore, on January 29, 2020, he issued Proclamation 9992, restricting and suspending entry into the United States of anyone who had been physically present in Iran during the fourteen-day period preceding their entry or attempted entry into the United States, again subject to specific exceptions.<sup>15</sup>

c. Proclamation 9993

On March 11, 2020, President Trump issued Proclamation 9993, allowing the free flow of commerce between the United States and the “Schengen Area”<sup>16</sup> to continue.<sup>17</sup> But, that proclamation restricted and limited the entry of all people physically present in the Schengen Area during the fourteen-day period before their entry or attempted entry into the United States.<sup>18</sup> This, once again, was subject to specific exceptions.<sup>19</sup> The measure was predicated on the finding that people physically present in the Schengen Area during the fourteen-day period immediately preceding their entry or attempted entry into the United States as immigrants and nonimmigrants posed substantial risk of transmitting COVID-19 into the United States.<sup>20</sup>

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11. See Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020).

12. *Id.*

13. *Id.*

14. Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020).

15. *Id.*

16. The Schengen Area is comprised of twenty-six European countries—namely Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

17. See Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 11, 2020).

18. *Id.*

19. *Id.*

20. *Id.*

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d. Proclamation 9996

On March 14, 2020, it was determined that all aliens physically present in the United Kingdom (excluding overseas territories outside Europe) during the fourteen-day period immediately before their entry or attempted entry into the United States posed substantial risk of transmitting COVID-19 into the United States.<sup>21</sup> As a result of this finding, President Trump issued Proclamation 9996, allowing the free flow of commerce to continue from the United Kingdom and from the Republic of Ireland.<sup>22</sup> But restrictions and limits were placed on the entry of aliens from the United Kingdom and the Republic of Ireland into the United States, subject to specific exceptions.<sup>23</sup>

e. Proclamation 10014

On April 22, 2020, President Trump issued Proclamation 10014, suspending and limiting the entry of foreign nationals into the United States as immigrants and nonimmigrants for work purposes.<sup>24</sup> He deemed it imperative to protect American workers, having determined that the lockdown necessitated by the COVID-19 pandemic was impacting the U.S. labor market severely; that existing visa processing protocols would not provide adequate protection to American workers; and that allowing the inflow of immigrants and nonimmigrants on employment-based visas would further burden the American health care system to the detriment of Americans, lawful permanent residents, and other nonimmigrants in the United States.<sup>25</sup>

f. Proclamations 10041 and 10042

President Trump found that the entry into the United States of all aliens physically present in the Federative Republic of Brazil during the fourteen-day period before their entry or attempted entry as immigrants and nonimmigrants posed a grave risk of spreading COVID-19 into the United States.<sup>26</sup> Therefore, he issued Proclamation 10041 on May 24, 2020, restricting and suspending their entry into the United States, subject to specific exceptions.<sup>27</sup> He later issued Proclamation 10042, amending Section 5 of Proclamation 10041 of May 24, 2020 (changing its effective date to May 26, 2020 at 11:59 p.m.).<sup>28</sup>

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21. See Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 14, 2020).

22. *Id.*

23. *Id.*

24. Proclamation No. 10014, 85 Fed. Reg. 23,441 (Apr. 22, 2020).

25. *Id.*

26. Proclamation No. 10041, 85 Fed. Reg. 31933 (May 24, 2020).

27. See *id.*

28. Proclamation No. 10042, 85 Fed. Reg. 32291 (May 25, 2020).

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g. Proclamation 10043

Upon finding that The People’s Republic of China (PRC) had been on a massive campaign to misappropriate U.S. technologies and intellectual property through its graduate students and post doctorate researchers, and that such activities posed a threat to the long-term economic well-being, safety, and security of Americans, President Trump, on May 29, 2020, issued Proclamation 10043.<sup>29</sup> This proclamation restricted and limited the entry of graduate students and post-doctoral researchers from the PRC from entering the United States, subject to specific exceptions.<sup>30</sup>

h. Proclamations 10052 and 10054

President Trump, stating that the unemployment rate in the United States had quadrupled between February and May; that his suspension and restriction of most immigrant and non-immigrant visas, subject to certain exceptions for an initial period of sixty days, did not provide sufficient protection for the American labor market; and that American workers continued to face substantial competition from various categories of nonimmigrant (temporary) workers, issued Proclamation 10052—extending Proclamation 10014 until December 31, 2020.<sup>31</sup> This proclamation provided for its continued extension as necessary.<sup>32</sup> Trump also suspended and limited, with immediate effect, the entry into the United States of aliens seeking to enter on specifically delineated nonimmigrant (temporary work) visas.<sup>33</sup> On June 29, 2020, he issued Proclamation 10054, amending Section 3(a)(ii) of Proclamation 10052, to include all non-immigrant visas specified in Section 2 of Proclamation 10014 that were valid effective June 29, 2020.<sup>34</sup>

B. IMPLEMENTATION OF FINAL RULES IN 2020

The Trump administration proposed and published final regulations, whose implementation will have a significant adverse impact on immigration, long after the expiration or reversal of some or all of President Trump’s immigration-related proclamations. For instance, the implementation of the final rule governing “Inadmissibility on Public Charge Grounds” is likely to reduce the number of foreign nationals who could be deemed eligible for various immigration benefits.<sup>35</sup> Further, the implementation of the final rule’s changes to fee exemptions, waiver requirements, and the fees charged by United States Citizenship and Immigration Services (USCIS) for immigration and naturalization benefit

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29. Proclamation No. 10043, 85 Fed. Reg. 34353 (May 29, 2020).

30. *Id.*

31. Proclamation No. 10052, 85 Fed. Reg. 38263 (June 22, 2020).

32. *See id.*

33. *Id.*

34. Proclamation No. 10054, 85 Fed. Reg. 40085 (June 29, 2020).

35. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019); 8 U.S.C. § 1182(a)(4).



requests will be extremely burdensome and will exclude a large number of foreign nationals attempting to enter or already present in the United States from seeking certain immigration benefits.<sup>36</sup>

Most, if not all, of President Trump's proclamations can be reversed by the incoming Biden administration by means of new proclamations.<sup>37</sup> But the best-case scenario is to overhaul the American immigration system legislatively (i.e. by act of Congress), rather than by executive fiat. Stakeholders, including, but not limited to, immigration advocates and practitioners, have an opportunity to collaboratively re-imagine a twenty-first century immigration system that rewards lawful immigration and deters illegal immigration while complying with all international treaties and preserving the fundamental human rights of all foreign nationals.

### III. National Interest Exemptions to 2020 Travel Restrictions

Health-related travel restrictions due to COVID-19 began on January 31, 2020, with the issuance of Presidential Proclamation 9984, effectively limiting the entry of individuals who had been physically present in the Peoples Republic of China in the previous fourteen days.<sup>38</sup> This Presidential Proclamation was followed by numerous others, adding to the list of countries to be restricted.<sup>39</sup> At the same time, the Department of State suspended routine visa services worldwide on March 20, 2020.<sup>40</sup> Presidential proclamations culminated in the issuance of Presidential Proclamation 10052 on June 22, 2020.<sup>41</sup> That proclamation, entitled, "Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak," suspended the entry of most H-1B, H-2B, certain J-1s, and L1 visa holders.<sup>42</sup>

When the State Department announced the phased resumption of visa services in July of 2020, a web of exemptions to the still-enforceable

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36. See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Other Benefit Request Requirements, 85 Fed. Reg. 46,788 (Aug. 3, 2020); see also U.S. Citizenship and Immigration Services Fee Schedule and Changes to Other Benefit Request Requirements, 85 Fed. Reg. 49,941 (Aug. 17, 2020).

37. See Proclamation No. 14013, 86 Fed. Reg. 8839 (Feb. 4, 2021) (President Biden revoked Executive Order 13,815 and Executive Order 13,888 among other things.).

38. Proclamation No. 9984, *supra* note 11.

39. See Proclamation 9992, *supra* note 8; Proclamation 9993, *supra* note 9.

40. See U.S. Department of State, *Suspension of Routine Visa Services*, U.S. VISAS NEWS (Jul. 22, 2020) <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>.

41. See Proclamation No. 10052, *supra* note 31.

42. *Id.*; see also Yaganeh Torbati, *Trump Administration Denying, Delaying more Foreign Skilled Worker Requests*, REUTERS (Feb. 22, 2019), <https://www.reuters.com/article/usa-immigration-visas/trump-administration-denying-delaying-more-foreign-skilled-worker-requests-idINKCN1QB2K1?edition-redirect=in> (providing examples of anti-H1B policy changes); U.S. Citizenship and Immigration Services, *2018 USCIS Statistical Annual Report*, USCIS (2018) (providing examples of anti-H1B policy changes).

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Presidential Proclamations were put in place.<sup>43</sup> The ability to determine eligibility for an exemption in the national interest of the United States was vested in the Consular Offices, and these National Interest Exemptions appear likely to continue to be relevant as long as the pandemic continues.<sup>44</sup>

Travel restriction exemptions are deemed important and necessary for the continued transfer of critically needed individuals during a global emergency.<sup>45</sup> On the other hand, the Administration may have learned its lesson from prior efforts to ban entry from certain countries, such as the so-called, “Muslim ban”<sup>46</sup> and its progeny, culminating in the decision in *Trump v. Hawaii*<sup>47</sup> and the so-called, “Travel Ban 3.0.”<sup>48</sup> The addition of a waiver provision proved vital in *Trump v. Hawaii*; thus, it is likely that the exemptions were set in place by the Trump administration for the new processes to be able to pass judicial review.<sup>49</sup>

Limited guidance on the National Interest Exemptions for the health-related bans came from the Department of State as well as individual embassies and consular posts.<sup>50</sup> However, exemptions under Presidential Proclamation 10052 for applicants who may pose a risk to the U.S. labor market were outlined via specific Department of State guidance.<sup>51</sup>

Consular officers reviewed National Interest Exemption cases individually.<sup>52</sup> Some cases clearly met an exception.<sup>53</sup> However, standards,

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43. See @TravelGov, TWITTER, (Nov. 12, 2020, 11:46 A.M.), <https://twitter.com/TravelGov/status/1326944480038187010> (The resumption of visa services was initially mentioned in a Twitter reply via the Department of State account with link to full statement).

44. See Sari M. Long, *Summary of Executive Actions Impacting Business Immigration*, X NAT’L L. REV. 1 (Jul. 31, 2020), <https://www.natlawreview.com/article/summary-executive-actions-impacting-business-immigration>.

45. See *id.*

46. See Proclamation No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (commonly referred to as the “Muslim Ban”).

47. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

48. See Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (commonly referred to as the “Travel Ban 3.0”).

49. See *Hawaii*, 138 S. Ct. at 2422 (“[T]he Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States.”).

50. See U.S. Department of State, *National Interest Exceptions for Certain Travelers from the Schengen Area, United Kingdom, and Ireland*, U.S. VISAS NEWS (Mar. 2, 2021), <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exceptions-from-certain-travelers-from-the-schengen-area-uk-and-ireland.html> (Department of State has only issued guidance for National Interest Exceptions for travelers from the Schengen Area, the United Kingdom and Ireland).

51. *National Interest Exceptions to Presidential Proclamation 10052 Suspending the Entry of Nonimmigrants Presenting a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, IMMIGRATION POLICY TRACKING PROJECT (last updated Feb. 24, 2021), [https://immpolicytracking.org/media/documents/National\\_Interest\\_Exceptions\\_to\\_Presidential\\_Proclamation\\_10052.pdf](https://immpolicytracking.org/media/documents/National_Interest_Exceptions_to_Presidential_Proclamation_10052.pdf).

52. *Id.* at 3.

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and therefore results, could change depending on the specific consular posts or officers.<sup>54</sup> In addition, National Interest Exceptions could be time sensitive as certain posts would issue visa stamps with an exemption valid for one trip to the United States within thirty days.<sup>55</sup>

After numerous universities complained, it was decided that students with valid visas would not need to seek a National Interest Exemption to travel.<sup>56</sup> Special exemptions were made for students who needed to obtain student visas—they would automatically qualify for a National Interest Exemption.<sup>57</sup> Academics traveling on J visas, as professors and researchers, would qualify for a National Interest Exemption as well.<sup>58</sup> In addition, Public Health professionals, researchers, or healthcare professionals working on COVID-19 issues, or other substantial public health areas, would also qualify for a National Interest Exemption.<sup>59</sup>

The National Interest Exemption could also apply to investors and business travelers, but those cases were far more complicated.<sup>60</sup> Investors had to demonstrate to the satisfaction of a consular officer that their travel to the United States “generates a substantial economic impact.”<sup>61</sup> The added requirement of “substantial” economic impact was to be addressed carefully, as most business plans, projected incomes, and travel expenses were formulated in a pre-COVID-19 economic environment.<sup>62</sup> For exceptions based on travel that would provide an economic benefit to the United States, a two-stage showing had to be made: first, that allowing this individual to enter the country would bring a substantial economic benefit to the United States; and second, that there was a need for a specific applicant.<sup>63</sup>

The Department of State guidance for National Interest Exemptions for H1B, L1, and J1 affected by Proclamation 10052 specifically outlined detailed requirements for each category.<sup>64</sup> The key principles from the

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53. *Id.*

54. *Id.*

55. See U.S. Dept. of State, *U.S. Embassy, Expansion of National Interest Exception Travel Students, Business Travelers, Investors, and Academics*, USEMBASSY.GOV, at 1–3 (2020).

56. *Id.* at 1.

57. *Id.*

58. *Id.*

59. *National Interest Exceptions to Presidential Proclamation 10052*, *supra* note 51, at 2.

60. *Expansion of National Interest Exception*, *supra* note 55, at 1.

61. *Id.*

62. *Id.*

63. *Id.*

64. See *National Interest Exceptions to Presidential Proclamation 10052*, *supra* note 51, at 1–2 (stating that on October 1, 2020, a federal district court in *Nat'l Ass'n of Manufacturers v. Dep't of Homeland Security (NAM)* enjoined the government from enforcing section 2 of Presidential Proclamation (PP) 10052 against named plaintiffs and members of the plaintiff associations. The named plaintiffs included the National Association of Manufacturers, the U.S. Chamber of Commerce, the National Retail Federation, TechNet, and Intrax, Inc. Therefore, any J-1, H-1B, H-2B, or L-1 applicant who is either sponsored (as an exchange visitor) by petition, or whose petitioner is a member of one of the above-named organizations is no longer subject to PP 10052's entry restrictions).

guidance encompassed multi-part tests that all applicants had to meet, which included several evidentiary categories.<sup>65</sup> Still, despite these supposedly clear-cut categories, consular officers' discretion resulted in some applicants receiving exceptions while others did not.<sup>66</sup>

The presidential proclamations, together with their exemptions, are due to expire on December 31, 2020.<sup>67</sup> For the short term, if the pandemic continues, it is highly likely that the health-related and specific country travel restrictions will continue and that additional restrictions will be put in place. In contrast, thinly veiled labor market concerns and business travel bans related to the Trump administration's policy are seen as overtly political restrictions by the new Biden Administration,<sup>68</sup> and many may be lifted after the inauguration.

#### **IV. Mounting Momentum for Independent Article I Immigration Court**

"[T]he immigration court system should be an independent body, separate from DOJ and free from the political whims of the Executive branch."<sup>69</sup>

The chorus of calls for an Article I Immigration Court are arching toward a crescendo. The ultimate culmination of the calls for an Article I Court will be the enactment of legislation to create it. As shown by the above quote from Congresswoman Zoe Lofgren, the push for an Immigration Court, independent of any agency in the executive branch, has now reached support from a powerful level: the Chair of the House Judiciary Subcommittee on Immigration and Citizenship, a body which has the power to introduce the legislation to make it happen.<sup>70</sup>

Numerous developments in 2020 affected these discussions. This year alone, the Department of Justice (DOJ) and Executive Office of Immigration Review (EOIR), which house the Immigration Court system at

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65. *See id.* (H-1B applicants must demonstrate at least two of five evidentiary categories: Certified need for the Employee in the United States; the Applicant will provide significant and unique contributions to an employer meeting a critical infrastructure need; the wage rate paid to the H-1B applicant meaningfully exceeds the prevailing wage by at least fifteen percent; the H-1B's applicant's education; the applicant's proposed job duties and specialized knowledge indicate the individual will provide significant and unique contributions to the petitioning country; the applicant's specialized knowledge is specifically related to a critical infrastructure need; and the applicant has spent multiple years with the company overseas, indicating a substantial knowledge and expertise within the organization that can only be replicated by a new employee within the company following extensive training that would cause the employer financial hardship).

66. *Id.*

67. Proclamation No. 10131, 86 Fed. Reg. 417 (Dec. 31, 2020) (extending Proclamation No. 10052).

68. *See generally* Matt Viser, Seung Min Kim, and Annie Linskey, *Biden Plans Immediate Flurry of Executive Orders to Reverse Trump Policies*, WASH. POST (Nov. 7, 2020, 6:42 PM).

69. Tal Kopan, *Justice Department Cancels Diversity Training, Including for Immigration Judges*, THE SAN FRANCISCO CHRONICLE (Oct. 9, 2020).

70. *Id.*

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both the trial and appellate levels, acted in the form of regulatory and policy changes. The Attorney General (AG) used his quasi-judicial authority to reverse legal precedents and longstanding practices to issue precedent decisions of self-certified cases.<sup>71</sup> The EOIR's chain of command and adjudicatory appellate path was restructured.<sup>72</sup> Actions were also taken against the judges themselves. A petition to decertify the forty-one-year collective bargaining status of the immigration judges' union (the National Association of Immigration Judges (NAIJ)) was pursued.<sup>73</sup> And, the immigration judge position description was altered such that it demonstrated an apparent politicized hiring of judges.<sup>74</sup>

These actions taken by the AG, the DOJ, and the EOIR resulted in a number of reactions from various judicial, legal, pro bono, immigrant advocacy, religious, and other related non-government organizations. Among these reactions was strengthened advocacy—evidenced by the issuance of resolutions, press releases, public statements, reports, and articles, in support of change to Article I courts, free from interference. Calls for reform were even acted upon by politicians: the Democratic Party 2020 Platform contained a plank which states:

“Democrats believe immigration judges should be able to operate free of inappropriate political influence, and will support steps to make immigration courts more independent.”<sup>75</sup>

Congress responded in the form of hearings, testimony, letters of inquiry, and public statements. Even the Federal bench took note and issued pointed criticisms of the BIA's actions in judicial decisions.<sup>76</sup>

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71. Julie Menke, *Abuse of Power: Immigration Courts and the Attorney General's Referral Power*, 52 CASE W. RES. J. INT'L L. 599, 624 (2020).

72. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 81,588 (Dec. 16, 2020).

73. American Immigration Lawyers Association, *Featured Issue: FLRA Strips Immigration Judges of Collective Bargaining Rights*, AILA (Nov. 9, 2020), <https://www.aila.org/advo-media/issues/all/doj-move-decertify-immigration-judge-union>.

74. Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, ROLL CALL (Oct. 29, 2019), <https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/>.

75. <https://democrats.org/where-we-stand/party-platform/creating-a-21st-century-immigration-system/> approved by the Democratic National Convention on August 18, 2020. A pdf document can be downloaded from the DNC Website at: <https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf>. The above quote is located on p. 64 of the pdf version. See also Marcia Brown, *The Best Way to Protect Immigrants from the Whims of Politics*, THE NEW REPUBLIC (Oct. 5, 2020), <https://www.newrepublic.com/article/159530/best-way-to-protect-immigrants-whims-politics>.

76. Jerry Lambe, *Appellate Court Calls Out DOJ for 'Flatly Refusing' to Implement Decision in Immigration Case*, LAW & CRIME (Jan. 24, 2020), <https://lawandcrime.com/high-profile/appellate-court-calls-out-doj-for-flatly-refusing-to-implement-decision-in-immigration-case/#:~:text=appellate%20Court%20Calls%20Out%20DOJ,Implement%20Decision%20in%20Immigration%20Case&text=A%20federal%20appellate%20court%20issued,in%20a%20controversial%20immigration%20case.>

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A. CONTEXT

The idea for an Article I Immigration Court has been brewing for many decades and has maintained traction despite setbacks. Legislation to create it was recommended by the 1979-1981 Select Commission on Immigration.<sup>77</sup> Congressman Bill McCollum (R-FL), then chair of the House Immigration Subcommittee, introduced bills to create an Article I Immigration Court in 1996,<sup>78</sup> 1998,<sup>79</sup> and 1999.<sup>80</sup> Scholars and legal advocacy groups published articles and issued reports in support of an Article I Court. In 2002, The National Association of Women Judges (NAWJ) adopted a resolution calling for “an independent structure for the Immigration Courts (at both the trial and appellate levels) outside the DOJ, to assure fairness and equal access to justice, and to assure both the appearance and reality of impartiality.”<sup>81</sup>

The ongoing support for an Article I court was bolstered by numerous events over the years, which continued to raise concerns among advocates. In 1996, Congress enacted contempt authority for Immigration Judges.<sup>82</sup> However, no Attorney General to date has promulgated enabling regulations to establish procedures for this possibility.<sup>83</sup> Equally concerning was what happened in 2003: AG Ashcroft purged 5 members of the Board of Immigration Appeals (BIA), including its Chairman, whose decisions were not to his liking.<sup>84</sup> In 2006, AG Gonzales introduced performance evaluations for Immigration Judges.<sup>85</sup> However, these had been deemed inappropriate by the original EOIR Chief Judge, William Robie, citing their ban in the Administrative Procedures Act (APA) for Federal Administrative Law Judges (ALJs).<sup>86</sup> That next year, in 2007, Senate testimony revealed

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77. Select Commission on Immigration and Refugee Policy, *Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners*, 65-66 (1981).

78. H.R. REP. NO. 104-4258 (1985).

79. H.R. REP. NO. 105-4107 (1998).

80. H.R. REP. NO. 106-185 (1999).

81. Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL., January 2008, at 3.

82. *Id.* at 10.

83. *Id.* (reportedly stating that the DOJ does not want its judges, who are officially classified as DOJ “attorneys,” to have authority to hold other government attorneys in contempt).

84. Ricardo Alonso-Zaldivar and Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a “Purge”*, LOS ANGELES TIMES (March 12, 2003, 12 AM), <https://www.latimes.com/archives/la-xpm-2003-mar-12-na-immig12-story.html>.

85. Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals, No. 06-520, (U.S. Dep’t of Justice Aug. 9, 2006).

86. See *The Life and Death of Administrative Closure*, TRAC IMMIGRATION (Sep. 10, 2020), <https://www.trac.syr.edu/immigration/reports/623/>.

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that improper political considerations were factors in the DOJ's hiring of Immigration Judges.<sup>87</sup> Numerous publications reported on the testimony.<sup>88</sup>

Meanwhile, the call for Article I courts became stronger. In 2008, the Honorable Dana Marks, then President of the NAIJ, authored an article calling the establishment of an Article I Immigration Court “an urgent priority.”<sup>89</sup> Her article describes persistent problems with housing the immigration judiciary within DOJ, including the inherent conflict of interest of having a judicial tribunal housed within, and subservient to, a prosecutorial law enforcement agency.<sup>90</sup> The article also reiterates the rising encroachments on judicial independence, inadequate resources, and politicization of the appointments.<sup>91</sup>

The American Bar Association (ABA) Commission on Immigration in 2010 published a detailed report entitled, “Reforming the Immigration System.”<sup>92</sup> To assure judicial independence and protection from politicization of the Board and the Courts, the report presented three options, with an independent Article I Court as its number one choice.<sup>93</sup>

**B. EVENTS FROM 2017–19**

In the past three years, the call for Article I courts has taken on a new urgency. The ABA came out unequivocally for the Article I option.<sup>94</sup> The Federal Bar Association (FBA), the American Immigration Lawyers Association (AILA), NAWJ, and the Appleseed Fund for Justice<sup>95</sup> all issued their own strong statements of support.<sup>96</sup> The FBA prepared and disseminated a draft bill to relevant members of Congress.<sup>97</sup> The ABA, FBA,

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87. *Continuing Investigation Into The U.S. Attorneys Controversy and Related Matters (Part I): Hearing Before the Sen. Judiciary Comm.*, 110th Cong. 8, 48–49 (2007) (testimony of Monica Goodling, former senior counsel to the Att’y Gen. and D.O.J.-White House liaison).

88. See, e.g., Gabriel Pacyniak, *Controversy Reemerges over Hiring, Review of Immigration Judges*, 22 GEO. IMMIGR. L. J. 805, 806 (2008); see also Marks, *supra* note 81, at 9.

89. Marks, *supra* note 81, at 1.

90. *Id.* at 2.

91. *Id.* at 7.

92. ARNOLD & PORTER LLP, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, ABA 1, 2–28 (2010), [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/coi\\_complete\\_full\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf).

93. *Id.*

94. *Id.*

95. See generally *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts*, APPLESEED NETWORK, at 35–36 (May 2009), [https://www.appleseednetwork.org/uploads/1/2/4/6/124678621/assembly\\_line\\_injustice\\_-\\_blueprint\\_to\\_reform\\_americas\\_immigration\\_courts.pdf](https://www.appleseednetwork.org/uploads/1/2/4/6/124678621/assembly_line_injustice_-_blueprint_to_reform_americas_immigration_courts.pdf).

96. Robert Carlson, Marketa Lindt, Maria Vathis & A. Ashley Tabaddor, *Congress Should Establish an Independent Immigration Court*, FED. BAR ASS'N (July 11, 2019), [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/update-final-organizational-letter-independent-immigration-court-7-11-19.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/update-final-organizational-letter-independent-immigration-court-7-11-19.pdf).

97. *A Bill to establish an independent United States Immigration Court under Article I of the Constitution, and for other purposes*, FED. BAR ASS'N (July 16, 2019), <https://www.fedbar.org/wp->

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AILA and NAIJ also issued a joint letter to Congress calling for the immediate establishment of an Article I Immigration Court.<sup>98</sup>

A significant factor in the renewed momentum was EOIR's announcement, on March 30, 2018, that it was introducing IJ Performance Metrics, case completion quotas, and benchmarks effective October 1, 2018.<sup>99</sup> This led to hearings on April 18, 2018, before the Senate Judiciary Subcommittee on Border Security and Immigration on the topic of "Strengthening and Reforming America's Immigration Court System."<sup>100</sup> One outcome of these hearings was Senate Bill S. 663, introduced on March 5, 2019.<sup>101</sup> The bill would codify "the immigration judge's exercise of independent decision-making authority over cases in which he or she presides."<sup>102</sup> Also, the bill would set a deadline for the Attorney General to promulgate contempt regulations and prohibit use of completion goals or other efficiency standards that would serve "(A) to limit the independent authority of immigration judges to fulfill their duties; or (B) as a reflection of individual judicial performance."<sup>103</sup>

Meanwhile, the ABA Commission on Immigration undertook a review of changes to the immigration system since its 2010 report.<sup>104</sup> Published in March 2019, the ABA's updated report, which calls the Immigration Courts "irredeemably dysfunctional," states emphatically "the only way to resolve the serious systemic issues within the immigration court system is through transferring the immigration court functions to a newly created Article I

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content/uploads/2019/10/proposed-Article-I-immigration-ct-model-bill-07162019-pdf-1.pdf (proposed bill from ABA, FBA, AILA, and NAIJ); see also *Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N (2021), <https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/>.

98. See Carlson, Lindt, Vathis, & Tabbador, *supra* note 96.

99. See *EOIR Issues Guidance Implementing Immigration Judge Performance Metrics*, AILA (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>.

100. *Strengthening and Reforming America's Immigration Court System Before the Subcommittee on Border Security and Immigration of the Comm. on the Judiciary*, COMMITTEE ON THE JUDICIARY (Apr. 18, 2018) <https://www.judiciary.senate.gov/meetings/strengthening-and-reforming-americas-immigration-court-system>.

101. S. 663, 116th Cong. (2019) (The Bill summary states "[t]his bill revises the definition of 'immigration judge' by establishing that an immigration is judicial in nature, and actions taken while serving in a judicial capacity shall be reviewed under the applicable Code of Judicial Conduct, not any code of attorney behavior. It also establishes that an immigration judge may not be disciplined for good faith legal actions made while hearing and deciding cases. Completion goal systems or efficiency standards imposed on immigration judges may not be used to limit such judges' independent authority or as a reflection of individual judicial performance").

102. *Id.*

103. *Id.*

104. 1 AMERICAN BAR ASSOCIATION, *2019 Update Report Reforming the Immigration System: Executive Summary and Summary of Recommendations*, at 15 (2019).

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court.”<sup>105</sup> The ABA report explains that it reaches this conclusion after reviewing developments since 2010.<sup>106</sup> In its conclusion, the report states:

“This approach is the best and most practical way to ensure due process and insulate the courts from the capriciousness of the political environment. It is further our view that the public faith in the immigration court system will be restored only when the immigrations courts are assured independence, and the fundamental elements of due process are met.”<sup>107</sup>

C. 2020 – OVERVIEW OF KEY DEVELOPMENTS

1. *Actions Taken by DOJ/EOIR*

Beginning on January 17, 2020, the EOIR issued a policy prohibiting immigration judges from speaking at events in their personal capacities about immigration law or policy or EOIR policies.<sup>108</sup> Later in the year, on June 17, 2020, the AG certified a case to himself for review.<sup>109</sup> The case was a final decision rendered by an immigration judge fourteen years earlier following a remand by the BIA.<sup>110</sup>

That case raises numerous issues: due process, fairness, the propriety of the use of the AG’s self-certification authority, the inter-relationship of the Department of State and DOJ in immigration matters, and politicization of the administrative adjudicatory process.<sup>111</sup> The Round Table of Former Immigration Judges filed an amicus brief arguing that self-certification of this case was “*ultra vires*.”<sup>112</sup> The case is still pending. Furthermore, and of equal concern, on November 2, 2020, the Federal Labor Relations Authority granted DOJ/EOIR’s petition, which was filed on August 13, 2019, to decertify the NAIJ.<sup>113</sup> This action reversed the Regional Director’s order issued on July 31, 2020, which dismissed the 2019 petition.<sup>114</sup>

Along with these issues, the EOIR promulgated several rules that altered the authority of immigration judges and the authority of the BIA. On

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105. *Id.*

106. *2019 Update Report*, *supra* note 104, at 1–5.

107. 2 AMERICAN BAR ASSOCIATION, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, at UD 2 – 11 (2019).

108. *Submission and Processing of Requests for Speaking Engagements*, EOIR Revised Speaking Engagement Policy (January 2020), <https://knightcolumbia.org/documents/eoir-revis>; *see also* New York City Bar, *Report on the Independence of the Immigration Courts*, at 6 (2020).

109. *In re A-M-R-C*, 28 I. & N. Dec. 7 (Att’y Gen. 2020).

110. Brief for Twenty-Nine Former Immigration Judges and Members of the Board of Immigration Appeals as Amici Curiae Supporting Respondents at 7, *In re A-M-R-C*, 28 I. & N., Dec. 7 (Att’y Gen. 2020) (No. 19-438).

111. *Id.*

112. *Id.*

113. *See Decisions of the Federal Labor Relations Authority*, 71 FLRA No. 207 (2020).

114. *Id.*

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August 26, 2020, the EOIR proposed a rule limiting the authority of the BIA and Immigration Judges, including a ban on the longstanding practice of administrative closure and eliminating BIA authority to certify cases to the AG.<sup>115</sup> This rule was finalized on November 3, 2020.<sup>116</sup> On September 23, 2020, the EOIR proposed a new regulation on asylum procedures, constricting the authority of immigration judges by setting fixed deadlines.<sup>117</sup> That comment period has since closed. On October 17, 2020, a new final rule was published that circumscribed the discretion of adjudicators by adding grounds of asylum ineligibility.<sup>118</sup> The added asylum bans cover numerous less serious offenses than the current bans and apply to people merely suspected of certain offenses, but who have not been arrested or charged.<sup>119</sup> This rule took effect on November 20, 2020.<sup>120</sup>

2. *Organizational Activities and Support*

In her testimony to Congress on January 29, 2020, ABA President, Judy Martinez, citing a litany of problems, concluded with the statement: “It is time for Congress to establish a truly independent Article I Court.”<sup>121</sup> She noted that placement of the Immigration Court under the Attorney General, “the chief law enforcement officer for the Federal government, is a fatal flaw to the reality and perception of independence.”<sup>122</sup> The NAIJ President, the Honorable Ashley Tabaddor, also testified to the litany of problems at the same hearing.<sup>123</sup> She observed that:

“[t]he call for an independent Article 1 Immigration Court is not new. Many of these systemic issues have been raised and robustly discussed in the past. Every administration has been afforded the opportunity to implement its ‘solution.’ The benefit of the doubt has been repeatedly afforded to DOJ by Congress.”<sup>124</sup>

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115. See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491 (Aug. 26, 2020).

116. *Id.*

117. See Procedures for Asylum and Withholding of Removal, 85 Fed. Reg. 59,692 (Sep. 23, 2020).

118. See Procedures for Asylum and Bars to Asylum Eligibility, 85 Fed. Reg. 67,202 (Oct. 21, 2020).

119. *Id.*

120. *Id.*

121. *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the H. Comm. on the Judiciary Subcommittee on Immigration and Citizenship*, 116th Cong. 11 (2020) (statement of Judy Perry Martinez).

122. *Id.* at 9.

123. *The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the H. Comm. on the Judiciary Subcomm. on Immigration and Citizenship*, 116th Cong. 1–3 (2020) (statement by Hon. Ashley Tabaddor).

124. *Id.* at 14.

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She concluded her testimony by stating “[t]he only real and lasting solution is the establishment of an independent Immigration Court.”<sup>125</sup> The Round Table of Former Immigration Judges/BIA Members also submitted a written statement to the hearing calling on Congress to establish an independent Immigration Court.<sup>126</sup>

On February 18, 2020, AILA sent a letter to Congress, cosigned by fifty-four non-government organizations, entitled “Congress Must Establish An Independent Immigration Court.”<sup>127</sup> AILA continued its advocacy on this issue by publicly criticizing EOIR’s new proposed regulation promulgated on August 26, 2020.<sup>128</sup> As mentioned above, this regulation proposed a ban on the longstanding practice of administrative closure and eliminating BIA authority to certify cases to the AG.<sup>129</sup> AILA issued a statement stating that “[t]he need for independent immigration courts has never been more urgent, or clear. This exemplifies why AILA is calling on Congress to pass legislation creating an immigration court system separate and independent from DOJ.”<sup>130</sup>

Action and advocacy were also undertaken by other judicial associations. For example, NAWJ President D’Souza wrote, on February 26, 2020 to the Judiciary Committee leaders in both houses urging Congress “to establish an independent Immigration Court system under Article I of the United States Constitution, that would assure due process and judicial independence.”<sup>131</sup> By July 1, 2020, the NAIJ filed a lawsuit complaining that the EOIR’s policy restricting public speaking by immigration judges in their personal capacity is a prior restraint that violates the First Amendment’s guarantee of free speech.<sup>132</sup>

Even politicians heeded the call for the reform of immigration courts. In the summer of 2020, the Biden-Sanders Unity Task Force recommended “consideration of Article I designation” with a goal of “making immigration courts more independent, and free from influence and interference. . . .”<sup>133</sup>

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125. *Id.* at 15.

126. See *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the H. Comm. on the Judiciary Subcomm. on Immigration and Citizenship*, 116th Cong. 6 (2020) (statement of the Round Table of Former Immigration Judges).

127. See *Congress Must Establish an Independent Immigration Court*, AILA (Feb. 18, 2020), <https://www.aila.org/advo-media/aila-correspondence/2020/advocates-call-on-congress-establish-independent>.

128. *DOJ Proposes Regulation to Turn Immigration Appeals into Tool of the Admin.’s Anti-Immigrant Agenda*, AILA (Aug. 26, 2020), <https://www.aila.org/advo-media/press-releases/2020/doj-proposes-regulation-to-turn-immigration>.

129. Appellate Procedures and Decisional Finality, *supra* note 115.

130. *DOJ Proposes Regulation*, *supra* note 128.

131. Hon. Bernadette D’Souza, *Letter to Comm. on the Judiciary*, NAWJ COUNTERBALANCE, at 5-6 (2020).

132. Complaint at 13, *Nat’l Ass’n of Immigr. Judges v. McHenry*, 477 F. Supp. 3d 466 (E.D. Va. 2020) (No. 20-cv-731).

133. Biden-Sanders Unity Task Force Recommendations, *Combating the Climate Crisis and Pursuing Environmental Justice*, at 104 (2020), <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

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Then, on August 18, 2020, the Democratic National Convention approved a new platform plank, stating “Democrats believe immigration judges should be able to operate free of inappropriate political influence, and will support steps to make immigration courts more independent.”<sup>134</sup> And finally, on October 21, 2020, the New York City Bar issued a report detailing the many problems besetting the immigration judiciary.<sup>135</sup> It concluded by “call[ing] for the removal of the court from DOJ and the creation of a truly independent Article I court. . . . [T]he many steps that the current administration has taken to politicize the court. . .[leave] not even the appearance of justice or due process of law.”<sup>136</sup>

3. *Congressional Activities*

Beginning on January 29, 2020, the House Judiciary Subcommittee on Immigration & Citizenship held hearings entitled “Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts.”<sup>137</sup> As mentioned above, a number of bar organizations and legal advocacy groups testified, imploring Congress to create a new and better immigration court system with more independence.<sup>138</sup> Then, on February 13, 2020, Senator Whitehouse (D-RI) sent a letter to AG Barr, cosigned by eight other members of the Senate Judiciary Committee.<sup>139</sup> The letter expressed deep concern that the administration is “undermining the independence of immigration courts” by politicizing them and adopting policies that interfere with impartiality of the judges.<sup>140</sup>

4. *Judicial Criticisms*

The Federal bench has also weighed in on this issue with its concerns appearing in different opinions. In December 2019, a Federal judge expressed concern that the BIA was operating as a mechanism to ensure deportation.<sup>141</sup>

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134. 2020 Democratic Party Platform, *Creating a 21st Century Immigration System*, at 64 (Aug. 18, 2020), <https://cdn.factcheck.org/UploadedFiles/2020-Democratic-Party-Platform.pdf>.

135. See Immigration and Nationality Law Committee, *Report on the Independence of the Immigration Courts*, NEW YORK BAR, at 1 (Oct. 2020).

136. *Id.* at 16.

137. See *Courts in Crisis*, *supra* note 121.

138. See *id.*

139. Letter from Sheldon Whitehouse, U.S. Senator, to Hon. William Barr, U.S. Attorney General (Feb. 13, 2020) [https://www.whitehouse.senate.gov/imo/media/doc/2020-02-13%20Ltr%20to%20AJ%20Barr%20re%20independence%20of%20immigration%20courts%20\(004\).pdf](https://www.whitehouse.senate.gov/imo/media/doc/2020-02-13%20Ltr%20to%20AJ%20Barr%20re%20independence%20of%20immigration%20courts%20(004).pdf).

140. *Id.*

141. *Quinteros v. Att’y Gen. of United States*, 945 F.3d 772, 789 (3d Cir. 2019) (McKee, J., concurring). Reade Levinson, Kristina Cooke, & Mica Rosenberg, *Special Report: How Trump administration left indelible mark on U.S. immigration courts*, REUTERS (Mar. 8, 2021), <https://www.reuters.com/article/uk-usa-immigration-trump-court-special-r-idAFKBN2B0186>.

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>“[I]t is difficult for me to read this record and conclude that the Board was acting as anything other than an agency focused on ensuring [the petitioner’s] removal rather than as the neutral and fair tribunal it is expected to be.”<sup>142</sup>

Then, in January 2020, a Seventh Circuit decision expressed disbelief that the BIA, relying on an AG opinion, ignored its prior binding remand order.<sup>143</sup> The Seventh Circuit decision stated it had “never before encountered defiance of a remand order,” and warned that the BIA must count itself lucky not to have been held in contempt.<sup>144</sup>

The long-range objective for Article I immigration court supporters is legislation from Congress that begins the process of creating a new and better system. There are indications that legislation may be in sight. The quote from Congresswoman Lofgren<sup>145</sup> is a promising indicator that she is on board to introduce a bill to create an independent court. Senate Bill S.663, a partial measure introduced by members of the Democratic minority in the Senate earlier this term, and Senator Whitehouse’s February letter to the Attorney General indicate their recognition of the severity of the problems.<sup>146</sup> With some support in both houses of Congress, plus a plank in the 2020 Democratic platform supporting more independence for immigration courts, we can expect more developments in the coming year.

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142. *Id.*

143. *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035-36 (7th Cir. 2020).

144. *Id.*

145. See Kopan, *supra* note 69.

146. Letter from Sheldon Whitehouse, *supra* note 139.

## **International Employment Law**

POORVI CHOTHANI AND ASHWINA PINTO

This article discusses the significant international legal developments that occurred in international employment law in India in 2020.

### **I. Introduction**

India intends to introduce the Code of Wages (hereinafter referred to as “the Wage Code”), which seeks to amend and consolidate the laws concerning wages, bonuses, and associated matters.<sup>1</sup> The existing statutes that deal with such matters are:

- The Equal Remuneration Act, 1976, which ensures no discrimination against recruitment and for payment of equal remuneration to male and female workers for the same work or work of similar nature;<sup>2</sup>
- The Payment of Bonus Act, 1965 provides for payment of bonus to employees of certain establishments as a part of profit or productivity for the employees;<sup>3</sup>
- The Minimum Wages Act, 1948 fixes the minimum wage rates in India;<sup>4</sup> and
- The Payment of Wages Act, 1936 ensures the regulation of the payment of wages.<sup>5</sup>

A primary reason for labor reform in the country is to boost India to be among the top ten countries in the World Bank’s Ease of Doing Business rankings.<sup>6</sup> Three other codes will eventually incorporate changes to help

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1. *Code on wages likely to be implemented by Sept, govt circulates draft rule*, MINT (July 9, 2020), <https://www.livemint.com/news/india/code-on-wages-likely-to-be-implemented-by-sept-govt-circulates-draft-rule-11594299387774.html>.

2. The Equal Remuneration Act, No. 25 of 1976, ch. II, ¶ 5, INDIA CODE (1987), [https://www.indiacode.nic.in/bitstream/123456789/1494/1/AAA1976\\_\\_\\_\\_25.pdf](https://www.indiacode.nic.in/bitstream/123456789/1494/1/AAA1976____25.pdf).

3. The Payment of Bonus Act, No. 21 of 1965 at 3, INDIA CODE, <https://www.indiacode.nic.in/bitstream/123456789/1548/1/a1965-21.pdf>.

4. The Minimum Wages Act, No. 11 of 1948, sec. 3, INDIA CODE, [https://www.indiacode.nic.in/bitstream/123456789/1730/1/AAA1948\\_\\_\\_\\_11.pdf](https://www.indiacode.nic.in/bitstream/123456789/1730/1/AAA1948____11.pdf).

5. The Payment of Wages Act, No. 4 of 1936 at 3, INDIA CODE, [https://www.indiacode.nic.in/bitstream/123456789/2402/1/AAA1936\\_\\_\\_\\_04.pdf](https://www.indiacode.nic.in/bitstream/123456789/2402/1/AAA1936____04.pdf).

6. *Labour reforms intend to put India among top 10 nations in ease of doing business*, ECON. TIMES (Sept. 22, 2020, 6:55 PM), <https://economictimes.indiatimes.com/news/economy/policy/labour-reforms-intend-to-put-india-among-top-10-nations-in-ease-of-doing-business/articleshow/78257939.cms>; see World Bank Group [WBG], *Ease of Doing Business Rankings*

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achieve this objective: The Code on Social Security; The Occupational Safety, Health and Working Conditions Code; and The Industrial Relations Code.<sup>7</sup>

The Wage Code has several key features that will reform the existing Indian labor standards.<sup>8</sup> The first of these features is a simpler definition of wages.<sup>9</sup> Currently, several different definitions of wages exist under various labor laws in India, leading to confusion, litigation, and difficulty in implementation.<sup>10</sup> The Wage Code seeks to provide a single uniform definition of “wages” and this term will now include basic pay, dearness allowance, and retaining allowance.<sup>11</sup> It specifically excludes components such as statutory bonus, value of house accommodation, gratuity, and overtime allowance.<sup>12</sup> The Wage Code further states that such exclusions should not exceed fifty percent of all remuneration.<sup>13</sup> If the exclusion does exceed it, the amount which exceeds fifty percent shall be deemed as remuneration and considered as “wages.”<sup>14</sup>

The Wage Code also provides a modified definition of “employees.”<sup>15</sup> Under the provisions of the existing Minimum Wages Act and the Payment of Wages Act, “employees” were restricted to workers drawing wages below a particular ceiling and in certain specified categories of scheduled employment.<sup>16</sup> The Wage Code, however, will extend protection to employees of all types of establishments.<sup>17</sup> It also modifies the definition of “employees,” which will benefit a large number of workers in the unorganized sector who do not work under written contracts.<sup>18</sup>

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(2020), available at [https://www.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020\\_rankings.pdf](https://www.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020_rankings.pdf) (showing that India is ranked at number sixty-three).

7. Melissa Cyrill, *India's New Labor Codes: A Brief Note for Foreign Investors*, INDIA BRIEFING (Oct. 2, 2020), <https://www.india-briefing.com/news/indias-new-labor-codes-impact-businesses-ease-labor-compliance-20956.html/>.

8. See generally PDS Legal, *India: Code on Wages, 2019 – Key Features And Highlights*, MONDAQ (Oct. 23, 2019), <https://www.mondaq.com/india/employee-benefits-compensation/856716/code-on-wages-2019-key-features-and-highlights>.

9. *Id.*

10. Dezan Shira & Associates, *The Code on Wages Bill, 2019: What Employers in India Need to Know*, INDIA BRIEFING (Aug. 6, 2019), <https://www.india-briefing.com/news/code-on-wages-bill-2019-employers-need-to-know-19062.html/>.

11. The Code on Wages, No. 29 of 2019, ch. I, § 2(y), INDIA CODE, <http://egazette.nic.in/WriteReadData/2019/210356.pdf>.

12. *Id.*

13. *Id.* at ch. I, § 2(y)(k).

14. *Id.*

15. *Id.* at ch. I, § 2(k).

16. Saraswathi Kasturirangan, Tarun Garg & Shubham Goel, *The Code on Wages, 2019: Understanding the key to changes to wages, remuneration and bonus*, ECON. TIMES (Dec. 21, 2019), <https://economictimes.indiatimes.com/small-biz/legal/the-code-on-wages-2019-understanding-the-key-changes-to-wages-remuneration-and-bonus/articleshow/72913106.cms>.

17. The Code on Wages, ch. I, § 2(y).

18. *Id.*

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In addition to expanding the definition of employees, the Wage Code will ensure timely payment of wages to all employees regardless of the sector and wage ceiling.<sup>19</sup> Earlier laws pertaining to timely payment only applied to workers below a certain wage ceiling working in scheduled employments.<sup>20</sup>

The Wage Code also has introduced the concept of floor wages taking into account the minimum living standards of workers varying across geographical areas.<sup>21</sup> In areas where the existing minimum wages as fixed by the state government is higher than the floor wages, then the former shall prevail.<sup>22</sup> Additionally, under the Wage Code discrimination based on gender relating to wages will no longer be allowed, broadening the existing protection under the Equal Remuneration Act, 1976, which prohibits discrimination among workers for the same work or work of similar nature.<sup>23</sup> Finally, the Wage Code provides that each state will appoint an Inspector-cum-Facilitator to implement the Wage Code, who will have the right to inspect establishments and the power to advise employers and employees on compliance with the Wage Code.<sup>24</sup> The Wage Code will also allow the use of technology to pay wages and proposes to fix overtime payments to twice the amount of the prevailing wage rate.<sup>25</sup>

While the Wage Code implements some significant changes to Indian labor law, it still fails to address some key points.<sup>26</sup> For instance, the Wage Code does not outline the methodology to determine minimum wages but grants the Central Government the authority to establish appropriate procedures to determine the minimum wages.<sup>27</sup> Additionally, the penalties for non-compliance of wage laws under the Wage Code have significantly been weakened.<sup>28</sup> Penal inspections are now being replaced by guidance inspections.<sup>29</sup> Further, while the Wage Code attempts to provide a single definition of “wages,” the separate definitions of “workers”<sup>30</sup> and “employees” under the Code will likely lead to additional confusion.<sup>31</sup> Finally, workers who seek to contest the wages paid to them will no longer

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19. *Id.* at ch. III, §§ 16–17.

20. *Employment law updates in India The Code of Wages 2019 receives Presidential assent*, RÖDL & PARTNER (Aug. 28, 2019), <https://www.roedl.com/insights/employment-law-india-update-code-of-wages-2019>.

21. The Code on Wages, ch. II, § 9(1)-(2).

22. *Id.*

23. *Id.* at ch. I, § 3.

24. *Id.* at ch. VII, § 51(5)(a)-(b).

25. *Id.* at ch. II, §§ 14–15.

26. Nivedita Jayaram, *Protection of Workers' Wages in India: An Analysis of the Labour Code on Wages, 2019*, 54 *ECON. & POL. WEEKLY*, no. 49 (Dec. 14, 2019), at 1, 7, <https://www.epw.in/engage/article/protection-workers-wages-india-labour-wage-code>.

27. *Id.* at 2.

28. *Id.* at 5.

29. *Id.*

30. The Code on Wages, ch. I, § 2(y)-(z).

31. Atul Gupta, *Code on Wages 2019: In Simplification, Confusion?*, *BLOOMBERG* (Aug. 2, 2019, 5:53 AM), <https://www.bloomberquint.com/opinion/code-on-wages-2019-in-simplification-confusion>.



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have recourse with the courts.<sup>32</sup> The workers will have to approach a quasi-judicial body and appellate authority for recourse that will be set up under the Wage Code.<sup>33</sup>

India hopes that these significant changes in the labor laws will help boost investments and reshape its growth trajectory.<sup>34</sup> These changes have been introduced with the aim of benefitting both workers as well as employers in a bid to ease the procedural rigidities surrounding India's labor regime.<sup>35</sup>

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32. Jayaram, *supra* note 26.

33. *Id.*

34. Chandrajit Banerjee, *Labour reforms can help reshape India's growth trajectory*, THE NEW INDIAN EXPRESS (Oct. 5, 2020, 6:27 AM), <https://www.newindianexpress.com/opinions/2020/oct/05/labour-reforms-can-help-reshape-indias-growth-trajectory-2205888.html>.

35. *Id.*

## **International Family Law**

ROBERT G. SPECTOR & MELISSA A. KUCINSKI\*

This article addresses significant legal developments in 2018 in the area of international family law.

### **I. International Litigation**

#### **A. THE HAGUE CONVENTION OF OCTOBER 25, 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

Most U.S. international family law litigation involves the Hague Convention on the Civil Aspects of International Child Abduction (Abduction Convention)<sup>1</sup> and its implementing legislation, the International Child Abduction Remedies Act (ICARA).<sup>2</sup> U.S. federal and state courts have concurrent jurisdiction to resolve a request for the return of a child under the Abduction Convention.

The Abduction Convention serves to return children promptly to their habitual residence. To obtain an order returning a child, the petitioner must prove that the child was wrongfully removed from, or retained outside of, the child's "habitual residence" and that the petitioner had "a right of custody," which he or she was "actually exercising" (or would have exercised, but for the abduction), under the law of the child's habitual residence.<sup>3</sup>

##### *1. Applicability of the Abduction Convention*

The Abduction Convention only applies to countries that have ratified or acceded to it and between countries that have accepted the accession of the other as a treaty partner.<sup>4</sup> It cannot be made applicable to a case by the parties' stipulation. It ceases to apply when the child in question turns

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1. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 49 [hereinafter Abduction Convention].

2. International Child Abduction Remedies Act, 22 U.S.C.S. §§ 9001–9011.

3. *See e.g.*, *Quintero v. De Leora Barba*, 2019 WL 1386556, at \*3 (W.D. Tex. March 27, 2019) (As is often noted, the law of the Abduction Convention is relatively straightforward, but the facts can be complicated.).

4. *Alikovna v. Viktorovich*, 2019 WL 4038521, at \*2 (S.D. Fla. August 27, 2019) (dismissing a return petition to Russia because the United States has not accepted Russia's accession).

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sixteen.<sup>5</sup> A person who is not a blood relative but has provided support and with whom the child lives is a proper respondent in a return proceeding.<sup>6</sup>

2. *The Child's Habitual Residence*

In the case of *Pope v. Lunday*,<sup>7</sup> U.S. citizen parents residing in Brazil separated when the mother was five months pregnant. She traveled to the United States, and the child was born in Oklahoma. The father filed a return request under the Abduction Convention, but the court determined that a child cannot, short of unusual circumstances, be a habitual resident of a country where the child has never been physically located.<sup>8</sup> Because the child was never in Brazil, the court determined that the case not about wrongful removal but rather was a custody dispute, and the Abduction Convention did not apply.<sup>9</sup>

The Abduction Convention does not define the term “habitual residence.” Until this year, there were two major approaches in U.S. courts to determine a child’s habitual residence. The majority approach focused on the parents’ intent as set out in *Mozes v. Mozes*.<sup>10</sup> But the Sixth and Eighth Circuits had departed from this test and looked instead to the place where the child had spent a period of time sufficient to be acclimatized.

The U.S. Supreme Court resolved this Circuit split in *Monasky v. Taglieri*.<sup>11</sup> Monasky and Taglieri were married in the United States in 2011. Two years later, they relocated to Italy, where they both found work. Neither had definite plans to return to the United States. During their first year in Italy, they lived together, but the marriage soon deteriorated, and Monasky alleged Taglieri was physically violent towards her.

Their daughter, A.M.T., was born in February 2015. On March 31, 2015, after yet another heated argument, Monasky fled with her daughter to the Italian police and sought shelter in a safe house. Two weeks later, Monasky and A.M.T. left Italy for Ohio to live with Monasky’s parents. Taglieri successfully sought the child’s return. With the key issue focusing on the child’s habitual residence, the return order was affirmed by a panel of the Sixth Circuit and then by the Circuit *en banc*. The U.S. Supreme Court granted certiorari to decide the appropriate test for determining the child’s habitual residence and the appropriate standard of review in habitual residence cases.

The U.S. Supreme Court unanimously concluded that a child’s habitual residence is a flexible fact-based determination that should focus on “[t]he

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5. Abduction Convention, *supra* note 1, at art. 4; *Newell v. DeMoss*, 2018 WL 4495022, at \*2 (Tenn. Ct. App. 2018).

6. *Jacquety v. Baptista*, 2020 WL 5946562, at \*5 (S.D. N.Y. Oct. 7, 2020).

7. *Pope on behalf of T.H.L-P v. Lunday* 2019 WL 7116115, at \*2 (W.D. Okla. Dec. 23, 2019).

8. *Id.* at \*4.

9. *Id.* at \*2.

10. *Mozes v. Mozes*, 239 F.3d 1067, 1078–84 (9th Cir. 2001).

11. *Monasky v. Taglieri*, 140 S.Ct. 719, 730 (2020).

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place where a child is at home, at the time of removal or retention. . . .”<sup>12</sup> This standard gives a trial judge significant deference, which should be informed by “common sense” in reviewing the unique circumstances of the case. The Supreme Court gave little guidance on how best to weigh the different facts that will be presented to the trial judge but left that to the discretion of the judge, stating that “[n]o single fact . . . is dispositive across all cases.”<sup>13</sup> The bottom line: “There are no categorical requirements for establishing a child’s habitual residence—least of all an actual-agreement requirement for infants.”<sup>14</sup>

The court also determined that the standard of review for trial court determinations on habitual residence is “clear error.”<sup>15</sup> This is a much more deferential standard of review than “abuse of discretion,” which had been used by a number of appellate courts.

Cases on review must be judged under the new standards set out by *Monasky*. Therefore, the Ninth Circuit affirmed a district court determination of habitual residence, stating that “[t]he district court’s very thorough findings enable us to conclude that, under the totality of the circumstances, the children’s habitual residence was the United States.”<sup>16</sup>

In *Schwartz v. Hinnendael*,<sup>17</sup> the court found that American citizens who lived in Mexico for five years were still habitual residents of the United States because they appeared to have lived as visitors, rather than individuals seeking to become citizens of Mexico. They did not immerse themselves in the culture or establish roots in the new country. Their only tie to Mexico, other than their appreciation of the vacation atmosphere in which they lived, was Mr. Schwartz’s job.

But in *Chambers v. Russell*,<sup>18</sup> the district court seemingly distinguished *Monasky* and applied the Fourth Circuit’s long-standing approach to look at the parents’ shared intent and the child’s acclimatization.

### 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 under the law of the child’s habitual residence and was “actually exercising” that right at the time of removal, or the parent would have exercised that right but for the removal.<sup>19</sup>

In a return proceeding involving Honduras, the court examined the Honduran code to determine if the left-behind parent had a right of custody.

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12. *Id.* at 726–27.

13. *Id.*

14. *Id.* at 728.

15. *Id.* at 730.

16. *Farr v. Kendrick*, 824 Fed.Appx. 480, 481 (9th Cir. 2020). *See also* *Smith v. Smith*, 976 F.3d 558, 563 (5th Cir. 2020); *Forcelli v. Smith*, 2020 WL 5015838, at \*7 (D. Minn. 2020).

17. *Schwartz v. Hinnendael*, 2020 WL 6111634, at \*3 (E.D. Wis. 2020).

18. *Chambers v. Russell*, 2020 WL 5044036, at \*5 (M.D. N.C. 2020).

19. *Abduction Convention*, *supra* note 1, at art. 3.

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It concluded that “parental authority belongs to both parents jointly,” unless the court conferred parental authority on one parent. Therefore, the court concluded that the petitioner had a right of custody because there was no evidence otherwise.<sup>20</sup>

In Japan, parents can agree on a custodial arrangement that determines whether the left-behind parent will have a right of custody under Japanese law. Where the agreement specifically grants the mother “parental authority,” giving her the right to determine the child’s residence, the father does not have a right of custody unless he can demonstrate that the language in the custody agreement gives him more than just rights of access.<sup>21</sup>

In *Da Silva v. Viera*, the court held that the Grandmother failed to show by a preponderance of the evidence that she had a right of custody, but the co-petitioner father had retained a right of *ne exeat* under Brazilian law.<sup>22</sup>

b. Exercise of the Right to Custody

Normally the question of a parent’s exercise of custody rights is not an issue in the case. The vast majority of cases follow the standard in *Friedrich v. Friedrich*,<sup>23</sup> which held that absent a ruling from a court in the country of habitual residence, a parent is exercising his or her rights by maintaining any sort of regular contact with the child.<sup>24</sup>

4. *Exceptions to Return*

There are a number of exceptions a respondent may assert against returning his or her child. Each exception must be timely asserted; filing a general denial and waiting until opening statements to assert it may constitute a waiver.<sup>25</sup>

a. Child is Settled in His or Her New Environment

Article 12 of the Abduction Convention provides that the authorities need not return a child if more than one year has elapsed since the child’s abduction and the child is now settled in the new environment.<sup>26</sup> The one-year period begins from the date the retention or removal became “wrongful.”<sup>27</sup> Retention occurs not on the date when the abducting parent

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20. *Id.* at 467–68; *see also* Orellana Joya v. Munguia Gonzalez, 2020 WL 1181846, at \*6 (E.D. La. 2020) (finding that in the absence of a custody decree, Honduran parents both have patria potesta rights and therefore a right of custody).

21. *Id.* at 1181–82.

22. *Da Silva v. Viera*, 2020 WL 5652710, at \*4 (M.D. Fla. 2020).

23. *Friedrich v. Friedrich*, 78 F. 3d 1060, 1065 (6th Cir. 1996); *see also* Lopez v. Bamaca, 455 F. Supp. 3d 76, 82 (D. Del. 2020).

24. *Friedrich*, 78 F.3d at 1065; *Bamaca*, 455 F. Supp. 3d at 82.

25. *See* Leon v. Ruiz, 2020 WL 1227312, at \*6 (W.D. Tex. Mar. 13, 2020); *see also* Orellana Joya v. Munguia Gonzalez, 2020 WL 1181846, at \*7 (E.D. La. Mar. 12, 2020).

26. Abduction Convention, *supra* note 1, at art. 12.

27. *See* Monzon v. De La Roca, 910 F.3d 92, 96 (3d Cir. 2018) (The period runs for one year from the time the removal or retention became wrongful and the filing of the petition to have

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formed the intent to retain the child wrongfully, but instead, on the date the taking parent's actions were so unequivocal that the left-behind parent knew or should have known that the child would not be returned.<sup>28</sup>

The factual findings used in determining the “now settled” defense are reviewed using the clear-error standard. This exception can only be considered if the left-behind parent files their petition for return more than one year after the wrongful retention or removal.<sup>29</sup> Given that the date of a wrongful retention is often in dispute, this issue cannot be decided on summary judgment.<sup>30</sup>

In *Silva and Biagioli v. Viera*, the Court determined that the child was not settled in Florida. The Court relied on the facts that the mother and child overstayed their tourist visas and that, despite having applied for asylum, their applications were not yet approved, nor was there any indication their applications were meritorious.<sup>31</sup> The court found that “being subject to removal at any time contradicts being ‘settled’ no matter how pleasant their current living situation.”<sup>32</sup>

In *Da Silva v. Aredes*,<sup>33</sup> the appellate panel affirmed the district court's determination that the child's resiliency and ability to form bonds in Brazil would not make a return to Brazil an event that “wrench[ed] [her] out of a well-settled position.”<sup>34</sup> In addition, the district court adequately considered the “unsettled character” [of] the mother and child's immigration status.<sup>35</sup>

b. Grave Risk of Harm/Intolerable Situation

i. Child Not Returned

Under Article 13(b), a court need not return a child if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>36</sup> Such an exception cannot be decided on a motion to dismiss but rather requires an evidentiary hearing.<sup>37</sup> In determining whether to sustain the exception, the court must consider the nature and frequency of the abuse, the likelihood of

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the child returned. Seeking the assistance of the central authority of the country from which the child was taken does not constitute commencement of a proceeding.)

28. See *Palencia v. Perez*, 921 F.3d 1333, 1343 (11th Cir. 2019); *Lopez Moreno v. Zank*, 456 F. Supp. 3d 904, 908 (W.D. Mich. 2020).

29. See *id.*; see also *Chambers v. Russell*, 2020 WL 5044036, at \*9 (M.D. N.C. 2020).

30. *Capalungan v. Lee*, 2019 WL 1330711, at \*5 (E.D. Ohio 2019).

31. *Id.*

32. *Id.*

33. *Da Silva v. Aredes*, 953 F.3d 67 (1st Cir. 2020).

34. *Id.* at 75.

35. *Id.*; see also *Bejarno v. Jimenez*, 2020 WL 4188212, at \*11 (D. N.J. 2020) (determining that a six-year-old was well settled in the United States and therefore would not be returned to Honduras); *Flores Castro v. Hernandez Renteria*, 971 F.3d 882, 884 (9th Cir. 2020) (affirming that it was a wrongful removal and not a wrongful retention and therefore the petition to return was filed after more than one year).

36. Abduction Convention, *supra* note 1, at art. 13(b).

37. *Flores v. Alvarado*, 2018 WL 1725615, at \*2 (W.D. N.C. 2018).

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its recurrence, and whether any enforceable undertakings would sufficiently ameliorate the risk of harm to the child caused by its return.<sup>38</sup>

In *Saada v. Golan*,<sup>39</sup> the Second Circuit concluded that “unenforceable undertakings are generally disfavored, particularly when there is reason to question whether the petitioning parent will comply with the undertakings and there is no other sufficient guarantees of performance[.]” The Court stressed, on remand, that the Eastern District of New York should look for enforceable measures to allow the child to return.<sup>40</sup> After nine months of communication with the Italian authorities and the Central Authority, the court determined that the Italian courts were willing and able to resolve the parties’ multiple disputes, address the family’s history, and ensure the child’s safety and well-being.<sup>41</sup> After a second appeal, on October 28, 2020, the Second Circuit again affirmed the child’s return to Italy.<sup>42</sup>

In *Rubio v. Castro*, evidence that the petitioner hit the child with a belt four times and with a stick once was, “although disturbing,” insufficient to establish a sustained pattern of physical abuse or a “propensity for violent abuse,” whether directed at the child or respondent.<sup>43</sup> In addition, the court thought that Ecuador could impose and enforce remedial measures to protect the child.<sup>44</sup>

Although harm to the child is required under 13(b), most courts recognize that sustained spousal abuse can, in some instances, create such a risk. Spousal abuse is relevant for Article 13(b) purposes only if it “seriously endangers” the child. There is a difference between evidence of a “clear and long history of spousal abuse,” which could “suffice to show a propensity for child abuse,” and evidence of “isolated incidents of abuse,” which generally demonstrate a risk of harm only to the spouse.<sup>45</sup> At a minimum, the spouse must “draw a connection” showing that the risk posed by the abuse to them “constitute[s] a grave risk to the children.”<sup>46</sup>

In *Monroy v. Mendoza*,<sup>47</sup> the court found that, although the respondent testified to abuse by petitioner and his father, her testimony did not constitute evidence of a “grave” risk to the child. Moreover, the court found

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38. See *Valles Rubio v. Veintimilla Castro*, 813 Fed.Appx. 619, 621 (2d Cir. 2020) (crediting evidence that proceeding in Ecuador would be capable of protecting the child).

39. *Saada v. Golan*, 930 F.3d 533 (2d Cir. 2019).

40. *Id.* at 541–43.

41. *Saada v. Golan*, 2020 WL 2128867, at \*3 (E.D. N.Y. 2020).

42. *Saada v. Golan*, 833 Fed.Appx. 829 (2d Cir. 2020).

43. *Valles Rubio*, 2019 WL 5189011, at \*24.

44. *Id.*; see also *LaSalle v. Adams*, 2019 WL 6135127, at \*9 (D. Ariz. 2019) (finding that husband did not come close to establishing a grave risk defense and there is no recognition of a 13(b) defense).

45. *Id.*; see also *Da Silva*, 953 F.3d at 74 (finding insufficient evidence to show that spousal abuse, if any, had an effect on the child); *Grano v. Martin*, 821 Fed. Appx. 26, 28 (2d Cir. 2020) (finding insufficient evidence to show that spousal abuse, if any, had an effect on the child).

46. *Gallegos v. Garcia Soto*, 2020 WL 2086554, at \*4 (W.D. Tex. 2020) (quoting *Charalambous v. Charalambous*, 627 F.3d 462, 468 (1st Cir. 2010)).

47. 2019 WL 5204832, at \*2 (N.D. Tex. 2019).

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that without substantiation, respondent's testimony of the petitioner's abuse of the child cannot rise to the standard of clear-and-convincing evidence.<sup>48</sup>

With regard to returning the child to an unsafe place, the court in *Joya v. Gonzalez*<sup>49</sup> concluded that the respondent failed to prove that an anti-government group in the habitual residence would endanger the child, and her testimony standing alone was insufficient to prove her allegations.<sup>50</sup>

ii. Child Returned

Circuits are now split over whether, upon a finding of a grave risk, the court must then assess whether protective measures exist in the habitual residence. In *Díaz-Alarcón v. Flández-Marcel*, the court held that once the district court determined a child's return to Chile would cause him a grave risk of harm, consideration of protective measures was not required.<sup>51</sup>

In *Mobácsi v. Rippa*, the trial judge denied the child's return based on expert testimony that the Petitioner was statistically likely to abuse the child and show the child pornographic images of the respondent.<sup>52</sup> The appellate panel affirmed.<sup>53</sup>

c. Mature Child's Objection

In applying this exception, courts must consider whether the child objects to being returned to his or her habitual residence, and not whether the child has a preference as to his or her residence. This issue is subject to review under the clear error standard.<sup>54</sup> In *Blancarte v. Santamaria*, where a ten-year-old child expressed a preference, the Court concluded that the testimony was more akin to a child's wishes in a custody hearing rather than the particularized objection required under the Child Abduction Convention.<sup>55</sup>

In *Avendano v. Balza*, the court determined, with the help of two experts, that the twelve-year-old child was mature enough to express an objection to returning to Venezuela.<sup>56</sup> The child was able to balance the positive and negative aspects of returning versus remaining in the United States. It also

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48. *Id.*; see also *Hart v. Anderson*, 425 F. Supp. 3d 545 (D. Md. 2019); *Ajami v. Solano*, 2020 WL 996813 (M.D. Tenn. 2020) (finding that one instance of domestic abuse did not constitute a grave risk of harm, particularly when the respondent failed to prove risk of future harm to the children should they be returned to Venezuela); *Jimenez Blancarte v. Ponce Santamaria*, 2020 WL 38932 (E.D. Mich. 2020) (finding that some abuse to the wife did not constitute a grave risk of harm, given that the children were not afraid of the mother and learned about the mistreatment through the mother).

49. *Joya v. Gonzalez*, 2020 WL 1181846 (E.D. La. 2020).

50. *Id.*; see also *Colon v. Mejia Montufar*, 2020 WL 3634021 (S.D. Fla. 2020) (finding evidence of "gangs" threatening the child was not sufficient to sustain defense).

51. *Díaz-Alarcón*, 2020 WL 118146, at \*5.

52. *Mobácsi*, 346 F. Supp. 3d at 303.

53. *In re Matter of NIR*, 797 Fed. App'x. 23 (2d Cir. 2019).

54. *Custodio*, 842 F.2d at 1089.

55. *Blancarte v. Sanamaria*, 2020 WL 38932, at \*7.

56. *Avendano*, 442 F.Supp.3d at 428.



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appeared that the child was not unduly influenced by the parent.<sup>57</sup> In *Zaoral v. Meza*, the court returned a child almost age sixteen.<sup>58</sup> At trial, she did not affirmatively “object” to a return to Venezuela. Instead, she preferred to remain in the United States because she would enjoy a better lifestyle in the United States. Her preference was undercut by credible evidence that Petitioner would provide the child with food, clothing, medical care, family support, and a good education in Venezuela.<sup>59</sup> In *Forcelli v. Smith*,<sup>60</sup> the court returned a child to Germany over the child’s objections, saying, “[w]hile the Court cannot conclude that M.S.S. was coached, the particular idiomatic use of language and similar arguments calls into question whether M.S.S.’s preference to remain in the United States is her own, or whether it has been cemented by others.”<sup>61</sup> Finally, in *JCC v. LC*, the judge declined to interview a fifteen-year-old who preferred to remain in the United States because “it would have been redundant, needlessly harmful to the Children, and potentially influenced by Respondent.”<sup>62</sup>

d. Human Rights and Fundamental Freedoms

Article 20 provides that the return of the child may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.<sup>63</sup> The only cases where this exception was raised resulted in an outright dismissal by the trial court.<sup>64</sup>

e. Consent/Acquiescence to the Removal

In order to show acquiescence, there must be either an act or statement with the requisite formality, such as testimony in a judicial proceeding, a convincing written renunciation of rights, or a consistent attitude of acquiescence over a significant period of time.<sup>65</sup> Courts have required that the totality of circumstances must be examined to determine whether there was consent or acquiescence.<sup>66</sup> In *Application Guerra*, the Respondent’s consent argument was rebutted by the fact that immediately after the child was taken from Guatemala, the Petitioner reported the removal to

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57. *Id.*; see also *Colon v. Mejia Montufar*, 2020 WL 3634021 (S.D. Fla. July 7, 2020) (finding twelve-year-old mature enough to object to being returned to Guatemala).

58. *Zaoral v. Meza*, 2020 WL 5036521 (S.D. Tex. Aug. 26, 2020).

59. *Id.*

60. *Forcelli v. Smith*, 2020 WL 5015838, at \*10 (D. Minn. Aug. 25, 2020).

61. *Id.*

62. *J.C.C. v. L.C.*, No. 19-21889, WL 6375789 (D.N.J. Oct. 30, 2020).

63. Abduction Convention, *supra* note 1, at art. 20.

64. *Gallegos v. Soto*, 2020 WL 2086554 (W.D. Tex. Apr. 4, 2020); *Monroy v. Mendoza*, 2019 WL 5204832 (N.D. Tex. Oct. 16, 2019).

65. *Diagne v. Demartino*, 2018 WL 4385659 (E.D. Mich. Sept. 14, 2018), *cert. denied*, 2018 WL 6054965; see also *Djeric v. Djeric*, 2019 WL 1046893 (S.D. Ohio Mar. 5, 2019).

66. *Cocom v. Timofeev* 2019 WL 76773 (D. S.C. Jan. 2, 2019).

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authorities and, soon thereafter, began to pursue her rights under the Abduction Convention.<sup>67</sup>

It is the respondent's burden to prove consent or acquiescence. So, when the only evidence of consent was a petitioner mother's testimony about a letter she signed, apparently under duress, consenting to the child's relocation to Florida, the respondent did not meet his burden.<sup>68</sup>

Finally, because it was clear that at the time of removal, a father did not agree to an indefinite relocation of his children to California, the mother failed to demonstrate his consent by a preponderance of the evidence.<sup>69</sup>

f. Other Attempted Exceptions

The "unclean hands" doctrine is not available in return proceedings under the Child Abduction Convention.<sup>70</sup> When a mother withdrew her affidavit of support for the father so he could no longer remain in Canada, he was nonetheless not permitted to remove the child to the United States.<sup>71</sup>

g. Recognition of Foreign Hague Proceedings

A Minnesota appellate court held that it need not give comity to a Japanese decision declining to return a child to the United States because the Japanese court contravened one of the fundamental principles of the Abduction Convention when it allowed the mother to stall enforcement long enough to produce a change in circumstances.<sup>72</sup> A New York federal court gave comity to a return proceeding in Bermuda.<sup>73</sup> Finally, a U.S. federal court need not give res judicata effect to a prior Thai custody decision because the Thai court had not decided its case under the Abduction Convention.<sup>74</sup>

5. *Other Issues Under the Abduction Convention*

a. Attorney's Fees

Under ICARA, attorney fees and costs are to be awarded to the prevailing petitioner unless the respondent demonstrates that the award would be clearly inappropriate.<sup>75</sup> District courts have broad discretion to determine

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67. 2020 WL 2858534 (W.D. Okla. June 2, 2020).

68. 2020 WL 896487 (11th Cir. 2020); Berenguela-Alvarado v. Castanos, 2020 WL 3791569 (11th Cir. 2020) (criticizing the court on remand for not applying the Monasky decision to determine habitual residence and instead applying the totality of the circumstances test).

69. See Sacchi v. Dervishi, 2020 WL 3618957 (N.D. Cal. July 2, 2020).

70. See LaSalle v. Adams, 2019 WL 6135127 (D. Ariz. Nov. 19, 2019).

71. Palomo v. Howard, 2019 WL 6682989 (M.D. N.C. Dec. 6, 2019).

72. Marriage of Cook, 2020 WL 1983223 (Minn. Ct. App. July 23, 2020).

73. Trott v. Trott, No. 20-CV-1392, 2020 WL 4926336 (E.D. N.Y. Aug. 21, 2020).

74. Pawanun v. Pettit, 2020 WL 4462255, at \*1 (N.D. Ohio Aug. 4, 2020).

75. This may also include expenses and fees incurred when the original order for fees has to be defended on appeal; Sundberg v. Bailey, 2019 WL 2550541 (W.D. N.C. June 19, 2019).

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when a fee award is appropriate.<sup>76</sup> The “clearly inappropriate” inquiry is dependent on the facts of each case. But courts often rely on the following two considerations to determine whether to grant fees: (1) whether a fee award would significantly impair the respondent’s ability to care for the child and (2) whether a respondent had a good faith belief that his or her actions were legal or justified.<sup>77</sup> In at least one recent case, the court did not award attorney’s fees because it was clear that the father could not pay them.<sup>78</sup> Courts consider the degree to which the petitioner contributed to the circumstances giving rise to the fees. Thus, in *Jimenéz Blancarte v. Ponce Santamaria*,<sup>79</sup> the court found that petitioner’s history of abuse causing respondent to flee Mexico with the children rendered any award of fees clearly inappropriate.<sup>80</sup> Nothing in ICARA permits fees to be awarded to a prevailing respondent.<sup>81</sup>

b. Stays

The 2020 pandemic created a situation where courts stayed their return orders either because international travel was unsafe<sup>82</sup> or countries were prohibiting entry and borders were closed.<sup>83</sup>

c. Temporary Restraining Orders

A petitioner seeking a preliminary injunction must establish: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.<sup>84</sup> Normally such an

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76. *West v. Dobrev*, 735 F.3d 921, 932 (10th Cir. 2013) (quoting *Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir. 2004)). When the abducting parent makes no appearance at the fee hearing and it appears that the petitioner’s law firm already reduced the amount by thirty percent, the trial court found no reason to further reduce the amount of the fees. *Orellana Joya v. Munguia Gonzalez*, No. 20-236, 2020 WL 1904010, at \*2 (E.D. La. Apr. 17, 2020); *Beard v. Beard*, No. 4:19-cv-00356-JAJ, 2020 WL 4548253, at \*1 (S.D. Iowa June 19, 2020) (granting requested fee amount when case for fees is undefended).

77. *Id.* (quoting *Rath v. Marcowski*, 898 F.3d 1306, 1311 (11th Cir. 2018)); see *Wtulich v. Filipkowska*, No. 16-CV-2941, 2020 WL 1433877, at \*2 (E.D.N.Y. Mar. 24, 2020) (determining that parties’ financial situation was not so disparate as to deny fees but was sufficient to slightly reduce the amount the petitioner was seeking).

78. *Cocom*, 2019 WL 5964634, at \*3; see also *LaSalle v. Adams*, No. CV-19-04976-PHX-DWL, 2019 WL 6135127, at \*11 (D. Ariz. Nov. 19, 2019) (awarding only some of mother’s costs because of father’s financial status and reasons for taking the children).

79. *Id.*

80. *Id.*

81. *Stone v. Stone*, No. 19-17962 (MAS) (ZNQ), 2020 WL 491194, at \*1 (D.N.J. Jan. 30, 2020).

82. *Gallegos*, 2020 WL 2086554, at \*8.

83. See *Guerra v. Rodas*, No. CIV-20-96-SLP, 2020 WL 2858534, at \*7 (W.D. Okla. June 2, 2020); see also *Sacchi v. Dervishi*, No. 19-cv-06638-SK, 2020 WL 3618957, at \*10 (N.D. Cal. July 2, 2020).

84. *Muwakil-Zakuri v. Zakuri*, No. 17-CV-2062 (JCH), 2017 WL 6453399, at \*1 (D. Conn. Dec. 11, 2017) (quoting *Glossip v. Gross*, 576 U.S. 863, 876 (2015)); *Hodge v. Hughes*, No. 18-cv-21571-SCOLA, 2018 WL 2688800, at \*1 (S.D. Fla. Apr. 23, 2018); *Cocom*, 2018 WL

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order will be granted when it is clear that the respondent is likely to leave the jurisdiction with the children<sup>85</sup> or there was an imminent risk of serious physical harm.<sup>86</sup>

d. Other Procedural Issues

It is usually not appropriate for a federal court to abstain from deciding an abduction case merely because a proceeding for custody had been previously filed in state court. Abstention is only proper if the state proceeding will decide all the issues in the Abduction Convention case using the Abduction Convention.<sup>87</sup>

A federal court has the authority to allow the left-behind parent to testify remotely. When a petitioner refuses to comply with discovery, does not attend any of the proceedings, and will not comply with any of the trial court's orders, dismissal with prejudice is appropriate.<sup>88</sup> Courts normally take judicial notice of foreign law without requiring authentication.<sup>89</sup> The court may, in its discretion, allow expert testimony concerning conditions in the petitioner's country even though the expert was not disclosed.<sup>90</sup> Some considerations include the difficulty of the case, the conditions under which the expert is testifying, and the need for haste.<sup>91</sup> Normally post-trial developments will not change the results of a removal proceeding.<sup>92</sup>

B. THE HAGUE SERVICE CONVENTION

New York permitted alternative service in Mexico for a divorce that would take place in New York.<sup>93</sup> But the application of the Convention can be

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3958129, at \*2, \*5 (D. S.C. Aug. 17, 2018) (enjoining the father and his mother from removing the child).

85. Jimenéz Blancarte v. Ponce Santamaria, No. 19-13189, 2019 WL 5790017, at \*1 (E.D. Mich. Nov. 6, 2019); *see also* Sandoval Quintana v. Quintana Dolores, No. 3:19-cv-00730-MMD-WGC, 2019 WL 6790654, at \*4 (D. Nev. Dec. 12, 2019).

86. Sokolowski v. Wengrze, No. 6:20-cv-638-Orl-40DCI, 2020 WL 3266054, at \*2 (M.D. Fla. Apr. 24, 2020).

87. Cordoba v. Mullins, No. 20 C 2721, 2020 WL 3429771, at \*4 (N.D. Ill. June 23, 2020) (holding abstention is proper when the same issues are presented to the state court judge).

88. Teller v. Helbrans, 19-CV-3172-SJB, 2019 WL 5842649, at \*6 (E.D.N.Y. Nov. 7, 2019).

89. Nunez Bardales v. Lamothe, 423 F. Supp. 3d 459, 464-65 (M.D. Tenn. 2019).

90. Foster v. Foster, No. 19-cv-656-wmc, 2019 WL 6255215, at \*2 (W.D. Wis. Nov. 22, 2019).

91. *Id.*; *see also* Schwartz v. Hinnendael, No. 20-C-1028, 2020 WL 5946998, at \*1 (E.D. Wis. Oct. 7, 2020) (finding petitioner's statement that he reserved the right to call additional witnesses was sufficient to notify respondent that a particular rebuttal witness might be called).

92. Wtulich v. Filipkowska, No. 16-CV-2941 (JO), 2019 WL 2869056, at \*3 (E.D.N.Y. July 3, 2019).

93. Sweet-Martinez v. Martinez, No. EF2019-67605, 2020 WL 4590510, at \*2 (N.Y. Sup. Ct. Aug. 10, 2020).

waived by entering a general appearance.<sup>94</sup> The Convention also does not apply if the respondent's address is not known.<sup>95</sup>

### C. Other International Family Law Cases

#### 1. *Marriage And Divorce*

Two cases refused to recognize divorces granted in foreign countries on the ground that due process was not afforded. In *In re Marriage of Basith*, the trial court erred in granting comity to an Indian divorce decree that the husband obtained without notice to the wife.<sup>96</sup> The divorce decree also applied Muslim law and gave the wife no spousal support, despite the length of the marriage and disparate incomes. The court held that to grant comity would violate Illinois' concepts of fairness and equity.<sup>97</sup> In *In re Marriage of Abutaleb*, the trial court erred in granting comity to an Egyptian divorce decree with notice to the husband in order to "obtain civil protection in Egypt" during the pendency of the divorce litigation in Illinois.<sup>98</sup> The parties had strong ties to Illinois with their marital home and children in the state, and Illinois had a substantial interest in the parties' divorce, such that public policy dictated the divorce should proceed in Illinois.<sup>99</sup>

In another non-precedential appellate decision, a New Jersey appellate court revived a previously dismissed divorce proceeding, finding that the first-in-time filed separation action in Italy did not substantially resolve the same claims and legal issues. The parties were proceeding with a non-consensual Italian separation proceeding, which resulted in a final separation decree and a support obligation, but it did not divorce the parties and did not divide their assets. The wife managed to revive the New Jersey divorce action before either party filed for divorce in Italy.<sup>100</sup>

#### 2. *Premarital Agreements*

A ketubah entered into by the parties at the time of their marriage in Israel, under Israeli law, could not be enforced because the terms required an examination of whether the wife violated certain religious marital obligations and undertakings.<sup>101</sup> The document furthermore lacked any hallmarks of a contract, including consideration and acceptance.<sup>102</sup>

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94. *J. O. v. Tex. Dep't of Family and Protective Serv.*, 604 S.W.3d 182, 188 (Tex. App.—Austin 2020, no pet.).

95. *Winston v. Walsh*, 829 F. App'x. 448, 450 (11th Cir. 2020).

96. *In re Marriage of Basith*, No. 2-18-0332, 2019 WL 1749290, at \*3 (Ill. App. Ct. Apr. 15, 2019).

97. *Id.*

98. *In re Marriage of Abutaleb*, No. 3-18-0559, 2019 WL 3298864, at \*4 (Ill. App. Ct. July 19, 2019).

99. *Id.* at \*5.

100. *Id.* at \*5.

101. *Cohen v. Cohen*, No. 2018-0010, 2019 WL 1598946, at \*2 (N.Y. Sup. Ct. Feb. 07, 2019).

102. *Id.* at \*7.

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A Maryland appellate court addressed the issue of whether an Islamic marriage contract should be valid and enforceable.<sup>103</sup> The court concluded that, so long as the court could resolve the contract dispute on neutral principles of law without touching upon ecclesiastical issues, it could address the issue of the contract's validity.<sup>104</sup>

3. *Procedural Issues*

A party in foreign litigation can use 28 U.S.C. § 1782 to secure evidence in the United States for use in their foreign family law proceeding if the request is made of a person residing or found in the jurisdiction of the federal court where the application is made, the evidence would be used in a foreign proceeding in a foreign tribunal, and the application was made by an interested party. Additionally, there are four discretionary factors that a U.S. district court must consider before requiring the person to provide the evidence: (1) whether the person providing the evidence is a party in the foreign litigation; (2) the receptivity of the foreign court to U.S. federal court judicial assistance; (3) whether the request is an attempt to circumvent proper evidence gathering procedures; and (4) whether the request is unduly intrusive or burdensome. The court found that the applicant met all factors and could request bank records from Citibank for use in his divorce in Italy.<sup>105</sup>

4. *Children's Issues*

a. Custody

i. Home State and Significant Connections Jurisdiction

New York does not have jurisdiction to decide the custody of children whose home state is Yemen.<sup>106</sup> The court also refused to decide if Yemeni child custody law violated fundamental principles of human rights.<sup>107</sup> Mexico had jurisdiction to determine the custody of children because the children had been living in Mexico for six consecutive months before the father filed his divorce complaint in Mexico.<sup>108</sup>

On the other hand, Maryland determined that, although the children had been in Nigeria for four years, their absence from Maryland was temporary and that Maryland was the home state because the father was retaining the children in Nigeria without the mother's consent.<sup>109</sup>

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103. Nouri v. Dadgar, 245 Md. App. 324, 338–339 (2020).

104. *Id.* at 339.

105. *Id.* at \*2.

106. Matter of a Custody Proceeding Pursuant to Fam. Ct. Act Article 6, 120 N.Y.S.3d 726 (N.Y. Fam. Ct. 2020).

107. *Id.*

108. Kortman v. Kortman, No. 349270, 2020 WL 746968 (Mich. Ct. App. Feb. 13, 2020), appeal denied, 506 Mich. 962 (2020).

109. Olarinde v. Korede, No. 2405, 2020 WL 4882449, at \*10 (Md. Ct. Spec. App. Aug. 20, 2020).

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But a child who lived for two weeks a month in Canada and two weeks a month in Minnesota did not have a home state. Instead, Minnesota took jurisdiction on a “significant connections” theory.<sup>110</sup>

ii. Emergency Jurisdiction

A Kuwaiti father was subject to Florida jurisdiction for a protective order injunction because the mother and the child were in the state and the father had committed at least some of the alleged domestic abuse in Florida.<sup>111</sup>

iii. Continuing Jurisdiction

When one parent’s misrepresentations deterred the other parent from exercising custodial rights in Pennsylvania (over a child who was residing in Hungary), and such contacts would have been enough to justify exclusive continuing jurisdiction, the fact that the other parent did not maintain contact with the child did not divest Pennsylvania of jurisdiction.<sup>112</sup>

iv. Inconvenient Forum

England was a more convenient forum for a custody determination because “the evidence as to the child’s care, well-being, and personal relationships was more readily available in England,” and the mother and child did not have a visa to remain in the United States. The court also concluded that England would be a more appropriate forum for the entire divorce.<sup>113</sup>

v. Enforcement

If a foreign custody determination is made in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) it will be enforced in the United States.<sup>114</sup> In an action to enforce a Qatari custody order questioning whether proper notice was given and whether Qatar recognizes the best interests of the child, a New Jersey appellate panel decided in an unpublished opinion that these issues could not be decided without holding a full evidentiary hearing.<sup>115</sup> In another case, the North Carolina Court of Appeals vacated a father’s registration, and subsequent order of enforcement, of several custody orders from the Shar’ia Court of Jerusalem after learning on appeal that the father never produced certified copies of the orders pursuant to the UCCJEA.<sup>116</sup>

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110. *Id.* at \*4.

111. *Alobaid v. Khan*, 306 So. 3d 159, 164 (Fla. Dist. Ct. App. 2020).

112. *J.S. v. R.S.S.*, 231 A.3d 942, 950 (Pa. Super. 2020).

113. *Id.*

114. *See Francois B. v. Fatoumata L.*, 97 N.Y.S.3d 83, 84 (N.Y. Sup. Ct. 2019) (enforcing French order changing custody from mother to father).

115. *A.D.A. v. R.J.*, No. A-5287-18T3, 2020 WL 1847469, at \*6 (N.J. App. Div. Apr. 13, 2020).

116. *Hamdan v. Freitekh*, 844 S.E.2d 338, 342 (N.C. Ct. App. 2020).

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vi. Relocation

Even though India has not joined the Abduction Convention, the trial court's determination that the father did not pose an abduction risk was upheld.<sup>117</sup>

The Court of Appeals of Texas reversed a permanent injunction prohibiting both parents from removing their children from the United States on the basis that there was insufficient evidence to find a risk of child abduction.<sup>118</sup> The trial court failed to make an express or implied finding of which risk factors it believes existed in the Texas child abduction prevention code, and the appellate court determined that the evidence did not support any such finding.<sup>119</sup>

On the other hand, in *O.G. v. A.B.*,<sup>120</sup> the Pennsylvania appellate court found that the mother's threat to take the child to Russia so that their father would never see them again and the parties' difficulty cooperating with each other required a restriction on either party taking the child out of the United States without the other's permission.

b. Adoption

Massachusetts determined that it had jurisdiction over an adoption where the petitioner, who is the child's biological father and is named on her birth certificate, lives outside the United States with the child and his same-sex partner, and where the child was born in the Commonwealth to a gestational carrier who lives in Massachusetts.<sup>121</sup>

In *Raia v. Pompeo*,<sup>122</sup> the court rejected a father's request for an immediate passport to be issued for his ten-year-old son who was taken to Italy by the child's mother. The child was subject to a pending Abduction Convention return petition in the Italian courts. The father did not meet any of the three requirements for a preliminary injunction. The father was not going to exercise self-help and would wait for the outcome of the Abduction Convention case, which would occur at some undetermined time due to the court closures. The father also did not prove he was likely to prevail in the Abduction Convention case, and the outcome was uncertain. Furthermore, the father did not meet two requirements to secure the child's passport—a recent photo and an in-person interview of the child—and it would be contrary to the public interest to dispense with those requirements.

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117. *Ece D. v. Sreeram M.*, 114 N.Y.S.3d 287, 288 (2019); *see also* *Nietupski v. Del Castillo*, 228 A.3d 1053, 1061 (Conn. App. Ct. 2020) (determining on recommendation of guardian ad litem that there was no abduction risk from the mother taking the child to Peru).

118. *Gerges v. Gerges*, 601 S.W.3d 46, 52 (Tex. App. 2020).

119. *Id.* at 61.

120. *O.G. v. A.B.*, 234 A.3d 766, 776 (Pa. Super. Ct. 2020).

121. *Adoption of Daphne*, 141 N.E.3d 1284, 1292 (Mass. 2020).

122. *Raia v. Pompeo*, 455 F. Supp. 3d 7, 14 (E.D.N.Y. 2020).



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3. *Other Cases*

a. Criminal Law

The Tenth Circuit affirmed a federal conviction for international kidnapping under 18 U.S.C. § 1204. However, the left-behind parent's attorney fees were not recoverable.<sup>123</sup>

b. Torts

In *Brann v. Guimaraes*,<sup>124</sup> the court dismissed the Guimaraes' tort action against Brann for his role in convicting Guimaraes under the International Parenting Kidnapping Act.

c. Property

The Supreme Court of New York County deferred to a divorce and property action first filed in Thailand. The husband was served with the Thai court papers, the case ultimately only addressed the divorce and property (for which the parties had a Thai prenuptial agreement, construed under Thai law), and nearly all of the assets were in Thailand. It was in the "interest of justice" that the divorce and property be resolved in Thailand. There was no meaningful connection to New York with regard to the parties' financial issues, and it would be an inconvenient forum to resolve those issues in New York. The court did not dismiss the New York action or financial claims of the New York suit but allowed for the adjudication of the issues to occur in Thailand.<sup>125</sup>

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123. *Id.* at 1208.

124. *Brann v. Guimaraes*, No. 01-19-00439-CV, 2020 WL 5414980, at \*9 (Tex. App.—Houston [1st Dist.] Sept. 10, 2020, pet. denied).

125. *Id.*

## International Human Rights

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### I. Introduction

This article highlights developments in 2020 that the International Human Rights Committee (IHRC) focused on in its programming and advocacy work.

### II. Climate Change Litigation

#### A. BRAZIL

The years 2019 and 2020 saw significant increases in climate change-related litigation.<sup>1</sup> One important case to watch is in Brazil, where in September the Supreme Court held the first public hearing on the country's use of funds to address climate change and the environment.<sup>2</sup>

In 2009, the government established the National Fund on Climate Change (National Fund) as a financial instrument to implement Brazil's National Climate Policy.<sup>3</sup> In 2020, four political parties sued the government seeking a declaration that its inaction in using the National Fund's resources to address climate mitigation and adaption projects violates

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\* The Committee Editor is Constance Z. Wagner, Professor, Saint Louis University School of Law. Daniel L. Appelman, Partner, M&H, LLP, wrote Section II.A. Carlos de Miguel Perales, Professor, Faculty of Law (ICADE), Comillas University, Madrid, Spain, wrote Section II.B. Corinne Lewis, Partner, Lex Justi, wrote Section III.A. Shauna Curphey, Curphey Law, wrote Section III.B. Lawrence C. Locker, Partner, Summit Law Group, PLLC, wrote Section III.C. Sara Sandford, Of Counsel, Foster Garvey P.C., and Cyreka Jacobs, J.D., UIC John Marshall Law School, wrote Section IV.A. Jaclyn Fortini Laing, Principal Attorney, Fortini Laing Law, wrote Section IV.B. Morvarid Bagheri, J.D., LL.M., Fordham University School of Law, wrote Section IV.C.

2. Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2020 Snapshot*, LSE (July 3, 2020), <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2020-snapshot/#:~:text=from%20May%202019%20-%20May%202020,were%20filed%20across%20six%20continents.&text=for%20non%20DUS%20cases%2C%2058,likely%20impact%20on%20climate%20policy>.

3. Maria Antonia Tigre, *Brazil's First Climate Case to Reach the Supreme Court*, OPINIOJURIS (Oct. 13, 2020), <https://opiniojuris.org/2020/10/13/brazils-first-climate-case-to-reach-the-supreme-court/>.

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its constitutional and international legal environmental obligations; and asked for an injunction to compel the government to reactivate the National Fund.<sup>4</sup> The government argued that judicial intervention in government policy would constitute a violation of the separation of powers doctrine.<sup>5</sup>

The plaintiffs relied on Article 225 of the Brazilian Constitution, which established a right to a balanced environment and the obligation to protect it.<sup>6</sup> Plaintiffs also relied on Principle 10 of the Rio Declaration<sup>7</sup> and its implementation by the Escazu Agreement, the first environmental treaty for Latin America, which seeks to ensure that every person: (1) has access to information; (2) can participate in the decision-making process; and (3) has access to justice in environmental matters with the aim of safeguarding the right to a healthy and sustainable environment for present and future generations.<sup>8</sup> Other participants referenced Brazil's international human rights commitments, including those under the International Covenant on Economic, Social and Cultural Rights<sup>9</sup> and the United Nations Convention on the Rights of the Child.<sup>10</sup>

It is unclear when the Supreme Court will issue its ruling.<sup>11</sup> But at the end of the hearing, Justice Barroso summarized nine “uncontroversial” points that he said confirmed that Brazil's National Fund plays an important role, and the Brazilian State has a duty to protect the environment.<sup>12</sup>

Another important case is concurrently pending before the Brazilian Supreme Court.<sup>13</sup> Very similar to the National Fund case, the issue in this case is the Brazilian government's failure to allocate its Amazon fund and its consequential failure to make progress in implementing its Amazon environmental policies.<sup>14</sup> A public hearing resembling the public hearing in the National Fund case was held in late October 2020, and the two cases may be considered jointly.<sup>15</sup>

This challenge to government inaction in implementing its climate policies is of historic proportion.<sup>16</sup> These are the first two climate change cases to reach Brazil's Supreme Court; the first to challenge the government's sole discretion to manage its funds to implement

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Constituição Federal* [C.F.] [Constitution] art. 225 (Braz.).

8. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), annex I (Aug. 12, 1992).

9. Regional Agreement of Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean art.1, Sept. 27-Sept. 24, 2020.

10. International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

11. UN Convention on the Rights of the Child, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989).

12. Tigre, *supra* note 2.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

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environmental policy; and the first to request and obtain broad public input in conformance with Brazil's international environmental treaty obligations to consult all stakeholders.<sup>17</sup> As Justice Barroso stated in the National Fund opinion, the country's failure to address climate change, if proven, is "potentially harmful from any perspective: environmental, social, cultural or economic."<sup>18</sup>

**B. NETHERLANDS**

On December 20, 2019, the Dutch Supreme Court issued a significant decision on climate change and human rights.<sup>19</sup> Stichting Urgenda (Urgenda) is a Dutch foundation aimed at preventing climate change.<sup>20</sup> Urgenda claimed, on behalf of the interests of the residents of the Netherlands, that a court order be issued instructing the Dutch State (State) to limit the volume of greenhouse gas (GHG) emissions by at least twenty-five percent, compared to 1990, to achieve the 2°C target under the 2015 Paris Agreement.<sup>21</sup> The District Court ordered the State to so limit GHG annual emissions by the end of 2020.<sup>22</sup> The Court of Appeal confirmed the District Court's decision.<sup>23</sup> In its cassation appeal, the State presented nine grounds for cassation, ultimately arguing that Articles 2 and 8 of the European Convention on Human Rights (ECHR) (respectively, right to life; and right to respect for private and family life) obliged the State to take measures to ensure that GHG emitted at the end of 2020 was twenty-five percent less than it was in 1990.<sup>24</sup>

The Dutch Supreme Court decision included the following findings of fact:

(i) GHG emissions are leading to an increasing concentration of these gases in the atmosphere.<sup>25</sup> This is warming the planet, resulting in various hazardous consequences (e.g., extreme heat; extreme drought; extreme precipitation; melting of glacial ice and ice in and near the polar regions; rise in sea level).<sup>26</sup> These consequences will result in the "erosion of ecosystems

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17. Caio Borges, *Supreme Court Holds Historical Hearing*, CLIMAINFO (Sept. 23, 2020), <https://climainfo.org.br/2020/09/23/adpf-708-fundo-clima-e-politicas-ambientais/>.

18. Joana Setzer, *First Climate Case Reaches Brazil's Supreme Court*, LSE (Sept. 30, 2020), <https://www.lse.ac.uk/granthaminstitute/news/first-climate-case-reaches-brazils-supreme-court/>.

19. Maria Antonia Tigre & Alex Goodman, *Climate Fund. What to Expect from Brazil's First Public Hearing on Climate Policy*, GNHRE (Sept. 22, 2020), <https://gnhre.org/2020/09/22/adpf708-climate-fund-what-to-expect-from-brazils-first-public-hearing-on-climate-policy/>.

20. HR 20 December 2019, NJ 2020, m.nt. 19/00135 EVRM, (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) Stichting Urgenda) (Neth.).

21. *Id.*

22. *Id.* at 3.

23. *Id.*

24. *Id.*

25. *Id.* at 4.

26. HR 20 December 2019, NJ 2020, m.nt. 19/00135 EVRM, (Netherlands/Stichting Urgenda) (Neth.), at 10.

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which will, example, jeopardize the food supply, result in the loss of territory and habitable areas, endanger health, and cost human lives.”<sup>27</sup>

(ii) Climate science long ago reached a high degree of consensus that the warming of the earth must be limited to no more than 2°C, and a safe warming of the earth must not exceed 1.5°C.<sup>28</sup>

(iii) “The need to reduce greenhouse gas emissions is becoming ever more urgent.”<sup>29</sup>

The Dutch Supreme Court further elaborated:

(i) Under ECHR Articles 2 and 8, the State would be required to take measures to counter the threat of dangerous climate change if this were merely a national problem.<sup>30</sup> There is a real and immediate risk to the lives and welfare of Dutch residents.<sup>31</sup> ECHR Articles 2 and 8 apply even though this risk will only be able to materialize a few decades from now and will not impact specific persons or groups, but large parts of the population.<sup>32</sup> This is consistent with the precautionary principle; the possibility that this risk will materialize means that suitable measures must be taken.<sup>33</sup>

(ii) Under ECHR Articles 2 and 8, the Netherlands is also obliged to prevent dangerous climate change, even if it is a global problem, because climate change threatens human rights.<sup>34</sup> The defense that a State does not have to take responsibility because other countries do not comply cannot be accepted, as is the defense that a country’s own share in global GHG emissions is small and reducing emissions from one’s own territory makes little difference on a global scale.<sup>35</sup>

(iii) In this case, Urgenda represents the interests of the residents of the Netherlands.<sup>36</sup> These interests are sufficiently similar and can be pooled to promote efficient and effective legal protection.<sup>37</sup> This protection is in line with Articles 9(3) and 2(5) of the Aarhus Convention and with ECHR Article 13, the right to an effective remedy before a national authority if ECHR rights and freedoms are violated.<sup>38</sup>

(iv) In principle, determining the share to be contributed by the Netherlands in the reduction of GHG emissions is a matter for the

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27. *Id.* at 21.

28. *Id.*

29. *Id.*

30. *Id.* at 22.

31. *Id.* at 26.

32. HR 20 December 2019, NJ 2020, m.nt. 19/00135 EVRM, (Netherlands/Stitching Urgenda) (Neth.), at 26.

33. *Id.* at 4.

34. *Id.* at 21.

35. *Id.* at 24.

36. *Id.* at 29.

37. *Id.*

38. HR 20 December 2019, NJ 2020, m.nt. 19/00135 EVRM, (Netherlands/Stitching Urgenda) (Neth.), at 29–30.

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Government and the Parliament.<sup>39</sup> But the Dutch courts can assess whether the measures taken by the State are adequate.<sup>40</sup>

(v) The high degree of consensus mentioned above can be regarded as common ground within the meaning of the European Court of Human Rights case law, so it must be taken into account when interpreting and applying the ECHR.<sup>41</sup> The precautionary principle means that more far-reaching measures should be taken to reduce GHG emissions, rather than less far-reaching measures.<sup>42</sup>

(vi) “If the Government is obliged to do something, it may be so ordered by the courts.”<sup>43</sup> This is a fundamental rule of constitutional democracy and is consistent with the right to effective legal protection under ECHR Article 13.<sup>44</sup> Courts cannot order the legislature to create legislation with a particular content but can issue a decision that the omission of legislation is unlawful.<sup>45</sup> Courts may also order measures to achieve a certain goal, as long as they do not order the creation of legislation with a particular content.<sup>46</sup>

(vii) Therefore, the Court of Appeals was allowed to rule that the State is obliged to achieve the aforementioned GHG reduction of at least twenty-five percent by 2020.<sup>47</sup>

This decision established a direct link between human rights and climate change.<sup>48</sup> The State is obliged to act to make the human rights protection of the ECHR effective and certain legal entities have legal standing to so claim before Dutch courts.<sup>49</sup>

### III. United States Developments

#### A. REPORT OF THE U.S. COMMISSION ON UNALIENABLE RIGHTS

U.S. Secretary of State Pompeo announced the formation of a Department of State Commission on Unalienable Rights (Commission) on July 8, 2019.<sup>50</sup> The Commission issued its final Report, *Report of the Commission on Unalienable Rights* (Report), on August 26, 2020, in which it articulates a vision of international human rights that is at variance with the nature and principles of the Universal Declaration of Human Rights

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39. *Id.* at 30.

40. *Id.*

41. *Id.*

42. *Id.* at 31.

43. *Id.* at 34.

44. HR 20 December 2019, NJ 2020, m.nt. 19/00135 EVRM, (Netherlands/Stitching Urgenda) (Neth.), at 40.

45. *Id.*

46. *Id.*

47. *Id.* at 41.

48. *Id.*

49. *Id.* at 29.

50. HR 20 December 2019, NJ 2020, m.nt. 19/00135 EVRM, (Netherlands/Stitching Urgenda) (Neth.), at 31.

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(UDHR).<sup>51</sup> Although the Commission and the Report have been extensively criticized, the Report has been used by the U.S. Department of State to influence the human rights approach of other States and for domestic policymaking.<sup>52</sup>

The Commission, mandated to provide “advice and recommendations on human rights to the Secretary of State,”<sup>53</sup> reviewed the role of human rights in U.S. foreign policy<sup>54</sup> based on the premise that the “ambitious human rights project of the past century is in crisis.”<sup>55</sup> The Commission’s advice and recommendations were to be grounded in the founding principles of the United States and the UDHR, and they were intended to further the Secretary of State’s “promotion of individual liberty, human equity, and democracy through U.S. foreign policy.”<sup>56</sup>

Numerous individuals and organizations objected to the composition of the Commission, including a group of over 400 U.S. organizations and individuals who submitted a joint letter requesting the Commission be disbanded.<sup>57</sup> When the Commission issued its draft Report in July 2020, it was highly criticized, including in a joint submission by 230 organizations, former senior government officials, and others,<sup>58</sup> and a submission by the Chair of the American Bar Association’s International Law Section, Lisa Ryan.<sup>59</sup> But despite these criticisms, the Final Report was released in August 2020 with virtually no changes.<sup>60</sup>

The Report’s approach to human rights is based on the views of the founders of the United States, rather than the UDHR and international human rights treaties, and uses the term “unalienable rights,” from the U.S. Declaration of Independence, rather than the UDHR’s “inalienable

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51. Alexandra Schmitt, *5 Questions About the Commission on Unalienable Rights*, *Center for American Progress* (Oct. 31, 2019), <https://www.americanprogress.org/issues/security/news/2019/10/31/476632/5-questions-commission-unalienable-rights/>.

52. U.S. Dep’t of State, Officer of Policy Planning, Report of the Commission on Unalienable Rights (2020) [hereinafter Commission on Unalienable Rights].

53. Jayne Huckerby & Sarah Knuckey, *Pompeo’s “Rights Commission” is Worse Than Feared: Part I*, *JUST SEC.* (Mar. 13, 2020), <https://www.justsecurity.org/69150/pompeos-rights-commission-is-worse-than-feared-part-i/>.

54. U.S. Dep’t of State, Charter for the Commission on Unalienable Rights [hereinafter U.S. Charter], ¶ 3 (June 26, 2019), <https://2017-2021.state.gov/charter-for-the-commission-on-unalienable-rights/index.html>.

55. Commission on Unalienable Rights, *supra* note 51, at 8.

56. *Id.* at 5.

57. U.S. Charter, *supra* note 53, ¶ 3.

58. See Letter from Non-Governmental Organization Signatories, to the Honorable Michael Pompeo, Secretary of State (July 23, 2019) (on file with Human Rights First).

59. Letter from Non-Governmental Organization Signatories, to Mary Ann Glendon, Professor (July 30, 2020) (on file with Human Rights First); see Draft Report of the Commission on Unalienable Rights: Public Comment (Jan. 20, 2017), <https://www.state.gov/draft-report-of-the-commission-on-unalienable-rights-public-comment/>.

60. Letter from Lisa Ryan, International Law Section Chair, to Department of State Commission on Unalienable Rights & Duncan H. Walker, Policy Planning Staff, Department of State, (July 30, 2020) (on file with the American Bar Association).

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rights.”<sup>61</sup> Religious liberty, which is emphasized throughout the Report, and property rights are considered to be “foremost among the unalienable rights that government is established to secure, from the founders’ point of view.”<sup>62</sup>

The Report states that “decisions about the priority of rights are not only inescapable but desirable,” and supports a prioritization among human rights.<sup>63</sup> This assertion contrasts with the view that international human rights are interdependent and interrelated, and thus, one set of human rights cannot be enjoyed without the other.<sup>64</sup> The Report also disregards the universal nature of human rights through its assertion of the primacy of religious rights and property rights over other rights.<sup>65</sup> Moreover, the interpretation of human rights based on U.S. historical tradition lays the foundation for other countries to adopt their own national interpretations of human rights.<sup>66</sup> As the Report states: “[n]ation-states have some leeway to base their human rights policy on their own distinctive national traditions.”<sup>67</sup> Yet, this approach is inconsistent with the notion of international cooperation as essential to the promotion and encouragement of respect for human rights under the UN Charter.<sup>68</sup>

The United States promoted its approach during the 75th session of the UN General Assembly by issuing a *Joint Statement on the Universal Declaration of Human Rights* and encouraging its endorsement by other States.<sup>69</sup> The Joint Statement provides: “[w]e recognise the many differences in our cultural, political, legal, religious, and other traditions” and asserts a prioritization of rights.<sup>70</sup> Major U.S. allies, including Canada, Australia, New Zealand, and many western European countries, refused to sign the Joint Statement, reportedly fearing its negative impact on LGBTQ persons.<sup>71</sup>

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61. F. Cartwright Weiland, *The NGOs and Activist Criticizing the Commission’s Inaugural Report are Distorting its Contents*, FOREIGN POL’Y (Sept. 22, 2020, 6:45 AM), <https://foreignpolicy.com/2020/09/22/critics-misrepresent-commission-unalienable-rights/>.

62. G.A. Res. 217A, Universal Declaration of Human Rights (Dec. 10, 1948).

63. Commission on Unalienable Rights, *supra* note 51, at 13.

64. *Id.* at 38.

65. What are Human Rights?, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Apr. 2, 2021 4:11 PM), <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx#:~:text=all%20human%20rights%20are%20indivisible,economic%2C%20social%20and%20cultural%20rights.>

66. Jamil Dakwar, *In Pompeo’s New Hierarchy of Rights, Religion and Property, Not Humans, Are at the Top*, ACLU (Aug. 4, 2020), <https://www.aclu.org/news/human-rights/in-pompeos-new-hierarchy-of-rights-religion-and-property-not-humans-are-at-the-top/>.

67. *Id.*

68. Commission on Unalienable Rights, *supra* note 51, at 55.

69. U.N. Charter art. 1 ¶ 3.

70. *Joint Statement on the Universal Declaration of Human Rights*, U.S. MISSION TO THE U.N. (Dec. 10, 2020), <https://usun.usmission.gov/joint-statement-on-the-universal-declaration-of-human-rights/>.

71. *Id.*



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Additionally, the Report appears to be the basis for modifications to USAID's 2012 Gender Equality and Women's Empowerment Policy.<sup>72</sup> The revised policy not only uses the terms "unalienable human rights" and "basic and legal rights," rather than "international human rights," but also deletes inclusivity language and all references to "gender identity" and LGBTQU persons.<sup>73</sup> Many observers raised concerns about these modifications, including fifteen Senators in a joint letter.<sup>74</sup>

**B. U.N. HUMAN RIGHTS COUNCIL EXAMINES SYSTEMIC RACISM IN  
LAW ENFORCEMENT**

In May 2020, protests erupted around the world following the death of George Floyd, an unarmed African-American man, captured on video pleading, "I can't breathe," while a Minneapolis police officer knelt on his neck for eight minutes.<sup>75</sup> As the protests escalated, family members of police violence victims in the United States, and nearly 700 civil society organizations worldwide, called on the U.N. Human Rights Council (UNHRC) to hold an urgent debate and mandate an independent commission of inquiry into racist policing and police use of excessive force against peaceful protesters in the United States.<sup>76</sup> Soon after, Burkina Faso,

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72. See Pranshu Verma, *Pompeo's Quest to Redefine Human Rights Draws Concern at U.N.*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/us/politics/pompeo-human-rights-un.html>.

73. Compare USAID, GENDER EQUALITY AND FEMALE EMPOWERMENT POLICY 1, 7, 13 (2012), [https://www.usaid.gov/sites/default/files/documents/1865/GenderEqualityPolicy\\_0.pdf](https://www.usaid.gov/sites/default/files/documents/1865/GenderEqualityPolicy_0.pdf), with USAID, GENDER EQUALITY AND WOMEN'S EMPOWERMENT POLICY 3 (2020), [https://www.usaid.gov/sites/default/files/documents/Draft\\_USAID\\_2020\\_Gender\\_Equality\\_and\\_Womens\\_Empowerment\\_Policy\\_-\\_External\\_Review\\_8.19.2020\\_.pdf](https://www.usaid.gov/sites/default/files/documents/Draft_USAID_2020_Gender_Equality_and_Womens_Empowerment_Policy_-_External_Review_8.19.2020_.pdf) (the 2020 Gender Equality and Women's Empowerment Policy removes references to gender identity and LGBTQU persons).

74. Gender Equality and Women's Empowerment Policy, *supra* note 72.

75. See Letter from Robert Menendez, U.S. Senator and 14 other Senators to Mr. John Barsa, Acting Administrator, USAID (Aug. 31, 2020), <https://www.foreign.senate.gov/imo/media/doc/08-31-20%20RM%20Dems%20letter%20to%20Barsa%20re%20USAID%20Gender%20Policy%20gp.pdf>; see also Kelsey Harris, *Comments on USAID Draft Gender Equality and Women's Empowerment Policy*, INTERACTION (Sept. 9, 2020), <https://www.interaction.org/blog/comments-on-usaid-draft-gender-equality-and-womens-empowerment-policy/>; George Ingram & Nora O'Connell, *USAID's draft policy retrenches on gender equality*, BROOKINGS (Sept. 10, 2020), <https://www.brookings.edu/blog/future-development/2020/09/10/usaid-draft-policy-retrenches-on-gender-equality/#:~:text=often%2C%20glaringly%20left%20out%20are,previous%20language%20about%20gender%20identity>; see also Kelsey Harris, *Comments on USAID Draft Gender Equality and Women's Empowerment Policy*, INTERACTION (Sept. 9, 2020), <https://www.interaction.org/blog/comments-on-usaid-draft-gender-equality-and-womens-empowerment-policy/> and George Ingram and Nora O'Connell, *USAID's draft policy retrenches on gender equality*, BROOKINGS (Sept. 10, 2020), <https://www.brookings.edu/blog/future-development/2020/09/10/usaid-draft-policy-retrenches-on-gender-equality/#:~:text=often%2C%20glaringly%20left%20out%20are,previous%20language%20about%20gender%20identity>.

76. Matt Furber et al., *Police Veteran Charged in George Floyd Killing Had Used Neck Restraints Before*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/us/derek-chauvin->

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writing on behalf of all fifty-four African countries, called for the UNHRC to hold an urgent debate, highlighting the United States in particular.<sup>77</sup>

The UNHRC promptly acceded to the requests, marking the fifth time in its fourteen-year history that it agreed to hold an urgent debate, a procedure designed to bring attention to an especially pressing matter.<sup>78</sup> In the leadup to the debate, however, the Africa group abandoned its initial resolution, which called for an independent commission of inquiry—one of the U.N.’s highest levels of investigation—focused on racism in the United States.<sup>79</sup> The United States did not have a vote in the matter because the Trump administration ended U.S. membership in the UNHRC in 2018, alleging it was biased against Israel.<sup>80</sup> Instead, U.S. officials used back-channel diplomacy to thwart the original call for an independent commission of inquiry.<sup>81</sup>

More than 120 speakers addressed the UNHRC during the debate, including Philonise Floyd, George Floyd’s brother, who repeated the call for a U.S.-focused independent commission of inquiry into U.S. police brutality and racial discrimination.<sup>82</sup> In the end, however, the UNHRC instead issued a resolution requesting the Office of the United Nations High Commissioner for Human Rights (OHCHR) to: (1) prepare a report on systemic racism and human rights violations against Africans and people of African descent by law enforcement agencies, “especially those incidents that resulted in the death of George Floyd,” and (2) examine government responses to anti-racism peaceful protests, including the alleged use of excessive force against protestors, bystanders, and journalists.<sup>83</sup> The resolution directed the OHCHR to make an oral report to the UNHRC at its forty-fifth and forty-sixth sessions, and to submit a comprehensive report at its forty-seventh session, in June-July 2021.<sup>84</sup>

In August 2020, over 100 family members of police violence victims in the United States, and hundreds of civil society organizations, wrote a letter to

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george-floyd-trial.html (last visited Oct. 29, 2020); see also Carlie Porterfield, *Global Protests Sparked by George Floyd’s Death Spread to Toronto, London and Berlin*, FORBES (May 30, 2020, 6:10 PM), <https://www.forbes.com/sites/carlieporterfield/2020/05/30/global-protests-sparked-by-george-floyds-death-spread-to-toronto-london-and-berlin/>.

77. Letter from Am. C.L. Union to Members of the U.N. Human Rights Council, (June 8, 2020), <https://www.aclu.org/letter/coalition-letter-request-un-independent-inquiry-escalating-situation-police-violence-and>.

78. *Human Rights Council Picks Up Again After COVID Suspension, To Hold Racism Debate*, UN NEWS (June 15, 2020), <https://news.un.org/en/story/2020/06/1066312>.

79. Adam Taylor, *U.N. Human Rights Council to Turn Attention on ‘Systemic’ Racism in United States*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/world/2020/06/16/un-human-rights-council-turn-attention-systemic-racism-united-states/>.

80. *Id.*; Thomas Reuters, *U.N. Human Rights Council, Spurred by Floyd Killing, Approves Report on Systemic Racism*, CBC NEWS (June 19, 2020, 12:10 PM), <https://www.cbc.ca/news/world/geneva-unhrc-floyd-report-1.5618722>.

81. Taylor, *supra* note 78.

82. Thomas Reuters, *supra* note 79.

83. *Id.*

84. G.A. Res. 43/1, at 2–3 (June 19, 2020).

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the OHCHR, calling for the mandated report to contribute to full accountability for systemic police violence against Black people in the United States and people of African descent around the world.<sup>85</sup> Specifically, the letter asked that the OHCHR's report: (1) center on the lived experiences of people of African descent and those directly impacted by structural racism and police violence; (2) examine individual cases of extrajudicial killings of people of African descent and impunity for police violence, including, but not limited to, the murder of George Floyd; (3) examine the history of racist policing in the United States and other countries and make recommendations that work towards dismantling structural racism; (4) allocate sufficient financial and other resources to the report; and (5) hold public hearings on the use of excessive force against protesters, bystanders, and journalists during antiracism protests.<sup>86</sup>

At its forty-fifth session this fall, the OHCHR made the first report to the UNHRC per the mandate of the resolution.<sup>87</sup> Commissioner Bachelet indicated her office had formed a dedicated team and was determining the scope of the report.<sup>88</sup> She noted that the voices of victims of African descent and their families and communities would be critical to the team as it formulated recommendations to bring about genuine and transformative change.<sup>89</sup> More broadly, she noted that reports of police brutality and racism against people of African descent continue, and reminded the UNHRC of the gravity of the issue and the need to not let the urgency that fueled the resolution subside.<sup>90</sup> The OHCHR will provide another oral update to the UNHRC in March 2021, with the final written report due June 2021.<sup>91</sup>

C. THE INTERNATIONAL CRIMINAL COURT AND TRUMP  
ADMINISTRATION SANCTIONS

In 2020, the Trump administration imposed sanctions and travel restrictions against International Criminal Court (ICC) personnel in response to an announced Afghanistan war crimes investigation.<sup>92</sup> During

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85. *Id.* at 3; Calendar of Meetings and Events 2021, Off. of the High Comm'r for Hum. Rts., <https://www.ohchr.org/EN/NewsEvents/Pages/Meetings.aspx>.

86. Letter from The Families of the Victims of Police Brutality to H.E. Michelle Bachelet, U.N. High Comm'r for Hum. Rts., 2, 3–14, (Aug. 3, 2020), (on file with U.S. Human Rights Network).

87. *Id.* at 1–3.

88. Michelle Bachelet, *High Comm'r for Hum. Rts., Oral Update by the High Commissioner for Human Rights on A/HRC/RES/43/1: Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers* (Oct. 1, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26326&LangID=ce>.

89. *Id.*

90. *Id.*

91. *Id.*

92. G.A. Res. 43/1, *supra* note 83, at 3–4. See, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26921&LangID=E>.

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the same period, courts of other countries, but not the United States, increased their efforts to bring offenders to justice by exercising jurisdiction for gross violations occurring outside their borders when in-country justice mechanisms were unavailable.<sup>93</sup>

On March 4, 2020, the ICC authorized Prosecutor Fatou Bensouda to investigate potential war crimes in Afghanistan committed by all actors in the conflict.<sup>94</sup> Allegations against U.S. personnel included torture, rape, and other inhumane and degrading treatment of prisoners held or captured in Afghanistan.<sup>95</sup>

The ruling by the Appeals Chamber of the ICC reversed a denial of investigation by the Pre-Trial Chamber.<sup>96</sup> Both Chambers agreed that although the United States is not a party to the Rome Statute that created the ICC, it was subject to ICC jurisdiction because the alleged crimes were committed in Afghanistan, which is a party.<sup>97</sup> The Pre-Trial Chamber found reasonable cause to believe that violations occurred and that the United States failed to investigate.<sup>98</sup> But the Pre-Trial Chamber denied the ICC investigation on the basis that the United States and Afghanistan were unlikely to cooperate, concluding that a dead-end investigation ran contrary to the interests of justice.<sup>99</sup> The Appeals Chamber reversed the decision, holding that only the Prosecutor could make an interests-of-justice determination—not the ICC itself.<sup>100</sup>

U.S. Secretary of State Pompeo angrily denounced the Appeals Chamber decision, referring to the ICC as a “renegade, unlawful, so-called court.”<sup>101</sup> The United States had already revoked Prosecutor Bensouda’s entry visa when she announced the intent to investigate in April 2019.<sup>102</sup> After the Appeals Chamber ruling authorizing the investigation, the Trump administration, in June 2020, imposed economic sanctions and travel

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93. Sascha Matuszak, *US sanctions ICC personnel*, JDSUPRA (Sept. 17, 2020), <https://www.jdsupra.com/legalnews/us-sanctions-icc-personnel-26650/>.

94. See TRIAL Int’l, *Universal Jurisdiction Annual Review 2020—Terrorism and International Crimes: Prosecuting Atrocities for what they are*, 13 (Univ. Jurisdiction Ann. Rev. 2020).

95. Elian Peltier & Fatima Faizi, *I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html>.

96. *Id.*

97. Press Release, Int’l Crim. Ct., Afghanistan: ICC Appeals Chamber authorizes the opening of investigation (Mar. 5, 2020) (on file with the International Criminal Court).

98. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 OA4, Judgment on the Appeal, ¶¶ 53–54 (Mar. 5, 2020).

99. *Id.*

100. *Id.*

101. *Id.* ¶¶ 51–52.

102. *Pompeo: International Criminal Court a ‘renegade, unlawful so-called court’*, WASH. POST (Mar. 5, 2020), [https://www.washingtonpost.com/video/world/pompeo-international-criminal-court-a-renegade-unlawful-so-called-court/2020/03/05/90b49a71-b2fc-473a-a0ca-11f8b6b23ece\\_video.html](https://www.washingtonpost.com/video/world/pompeo-international-criminal-court-a-renegade-unlawful-so-called-court/2020/03/05/90b49a71-b2fc-473a-a0ca-11f8b6b23ece_video.html).

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restrictions on ICC personnel working the case.<sup>103</sup> They claimed such investigations interfered with U.S. sovereignty, stating “[w]hen our own people do wrong, we lawfully punish those individuals, rare as they are . . . .”<sup>104</sup>

But the Trump administration’s actions against ICC personnel have been widely condemned by human rights organizations<sup>105</sup> and the ABA.<sup>106</sup> Further, the ICC exercises jurisdiction when no country is willing and able to effectively investigate and prosecute violations through its domestic law and courts.<sup>107</sup> As a result, the Trump administration’s stated policy of preventing ICC jurisdiction over U.S. nationals can be met by the United States actively investigating and prosecuting cases against any offending U.S. nationals.<sup>108</sup> On April 2, 2021, Secretary of State Anthony Blinken announced that President Biden had revoked the executive order imposing ICC sanctions.<sup>109</sup>

Numerous countries exercised jurisdiction in their national courts for gross violations of international human rights and humanitarian law beyond their borders where other justice mechanisms were absent.<sup>110</sup> In April 2020, for example, Germany started trial against two former Syrian security officials for torturing prisoners in Syria.<sup>111</sup>

The exercise of such extraterritorial jurisdiction is becoming more common. For example, in 2017, 126 suspects were accused of 132 counts of genocide, crimes against humanity, war crimes, and torture, and were investigated, prosecuted, or brought to trial in fourteen countries, with thirteen convictions.<sup>112</sup> But by 2019, these numbers had increased to 207 suspects from twenty-two countries standing accused of 400 counts of

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103. Lara Jakes & Michael Crowley, *U.S. to Penalize War Crime Investigators Looking Into American Troops*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/us/politics/international-criminal-court-troops-trump.html>.

104. *Id.*

105. *Id.*

106. See Radio Free Eur. Radio Libr., *U.S. Announces New Sanctions Against International Court Over Probe of War Crimes in Afghanistan* (Sept. 2, 2020, 22:32), <https://www.rferl.org/a/u-s-announces-new-sanctions-against-international-court-over-probe-of-war-crimes-in-afghanistan/30817633.html>.

107. See *ABA President Judy Perry Martinez statement Re: U.S. sanctions of International Criminal Court personnel*, A.B.A. (June 12, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-judy-perry-martinez-statement-re--u-s--sanctions-o/>.

108. Rome Statute of the International Criminal Court, pmbl., 17 July 1998, 2187 U.N. Treaty Series 38544 (2002) (the Court “shall be complementary to national criminal jurisdictions . . . .”).

109. Brian L. Cox, *Balancing the US Approach to the ICC*, JUST SEC. (Feb. 10, 2021), <https://www.justsecurity.org/74595/balancing-the-us-approach-to-the-icc/>.

110. U.S. Department of State, Press Statement, Anthony Blinken, Secretary of State, *Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court* (April 2, 2021).

111. *Id.*

112. See Loveday Morris, *German court case is first to try Syrian regime for war crimes*, WASH. POST (Apr. 23, 2020), [https://www.washingtonpost.com/world/europe/syrian-war-crimes-germany-trial/2020/04/23/9384d1ae-832a-11ea-81a3-9690c9881111\\_story.html](https://www.washingtonpost.com/world/europe/syrian-war-crimes-germany-trial/2020/04/23/9384d1ae-832a-11ea-81a3-9690c9881111_story.html).

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genocide, crimes against humanity, war crimes and torture in the courts of sixteen prosecuting countries,<sup>113</sup> with sixteen convictions and two acquittals.

But the United States rarely prosecutes extraterritorially, as there are many gaps in U.S. legislation that prevent such prosecutions.<sup>114</sup> For example, the War Crimes Act is limited to cases where the perpetrator or victim is an American.<sup>115</sup> It does not include cases in which the perpetrator is merely present in the United States.<sup>116</sup> The United States has no crimes against humanity statute.<sup>117</sup> Even the existing statutes are underutilized.<sup>118</sup> The United States has never tried a service member under the War Crimes Act.<sup>119</sup> The United States has initiated only three cases, all under the federal torture statute, one of which was filed this year.<sup>120</sup>

To credibly maintain its leadership in human rights, the United States must not only end its actions against the ICC, but also close the legislative gaps preventing extraterritorial prosecutions of serious human rights offenses and use those statutes more frequently.<sup>121</sup> Further, because the ICC has jurisdiction to act only when national courts do not, a more robust prosecutorial program by the United States will ensure that its own nationals will not be tried in the ICC.<sup>122</sup>

#### **IV. Other National Developments**

##### **A. ATTACKS ON THE JUDICIARY AND BAR**

Recent attacks on the judiciary and bar around the globe undermine the rule of law by affecting the independence and integrity of judicial systems.<sup>123</sup> Such attacks include intimidation, threats to family and other loved ones, public embarrassment, harassment, surveillance, imprisonment, and death,

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113. TRIAL Int'l, *Universal Jurisdiction Annual Review 2018—Make way for Justice #4, Momentum towards accountability*, 5-6 (Univ. Jurisdiction Ann. Rev. 2018).

114. Univ. Jurisdiction Ann. Rev. 2020, *supra* note 93, at 13.

115. Thomas Wayde Pittman, *Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court*, 21 LEIDEN J. INT'L L. 165, 171 (2008).

116. Michael John Garcia, Cong. Rsch. Serv., RL33662, *The War Crimes Act: Current Issues* 1, (2009).

117. *Id.*

118. David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT'L HUM. RTS. 36, 36-37 (2009).

119. *See* Pittman, *supra* note 114, at 171.

120. *Id.*

121. Beth Van Schaack, *Accused Gambian Torturer Arrested in Denver*, JUST SEC. (June 11, 2020), <https://www.justsecurity.org/70735/breaking-news-accused-gambian-torturer-arrested-in-denver/>.

122. *See* Letter from Law. Rts. Watch Can. to Recep Tayyip Erdoan & Abdulhamit Gül (May 13, 2020) (on file at <https://www.lrwc.org/>).

123. *Id.*

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and may be instigated or sanctioned by State representatives.<sup>124</sup> In addition to raising moral concerns, these attacks violate international law to which the respective countries have committed.<sup>125</sup> This section reports on teleconference panels sponsored by the IHRC.

1. *Turkey*

Panelists reported that the persecution of attorneys by the government has worsened.<sup>126</sup> One speaker, who had been detained, spoke of challenges for attorneys to represent clients in the absence of due process.<sup>127</sup> For example, the government's charges against clients are unknown until the first day of trial when the indictment is issued, making preparation for trials almost impossible.<sup>128</sup> Moreover, the crime of "terrorism" is defined so broadly that almost any activity opposing the government, much of which used to be considered free speech, now qualifies as a criminal offense.<sup>129</sup> Freedom of speech and freedom of assembly effectively no longer exist.<sup>130</sup> Another speaker reported that, since the unsuccessful coup in 2016, 4,800 judges have been arrested, which represents twenty-five percent of the judiciary.<sup>131</sup> Replacement judges are ill-prepared and subject to intimidation.<sup>132</sup> Many of those arrested were given sentences of six to eleven years in prison, and some 800 judges are still in jail; four have died while in prison.<sup>133</sup> Meanwhile, those who have been released no longer have jobs and cannot leave the country. This is true even though the European Court of Human Rights declared denying travel as improper in *Altan v. Turkey* as violations of Article 5 of the ECHR.<sup>134</sup>

2. *Pakistan*

Panelists reported that the fundamental rights guaranteed by Pakistan's Constitution are sometimes annulled by legislation motivated by controversial interpretations of Islamic law. Human rights defenders trying to protect the Constitution have become targets of attacks. Anyone aligned with individual lawyers who push for rule of law is targeted. Recently, a lawyer who had represented a defendant sentenced to death for blasphemy

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124. See Reports accompanying ABA Resolutions 18A-106A and 106B, submitted by the American Bar Association, International Law Section's, International Human Rights Committee's Working Group.

125. *Id.*

126. *Id.*

127. IHRC Teleconference (July 24, 2020).

128. *Id.* (Remarks of Ramazan Demir).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* (Remarks of Hon. Judge Sukru Say).

133. IHRC Teleconference (July 24, 2020).

134. *Id.*

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was murdered.<sup>135</sup> Outspoken individuals are denied human rights, such as being denied visas which impedes their right to travel.<sup>136</sup> Another speaker provided examples, including lawyers facing contempt proceedings, intimidation in performance of their duties, torture, detention, raids, assaults, killings, death threats, disappearance, and disbarment.<sup>137</sup> In some instances, judges receive threatening calls and visits to chambers.<sup>138</sup> Many nongovernmental organizations (NGOs) have been denied access to the country, making it more difficult to enter the country and directly observe and report on human rights violations.<sup>139</sup>

3. *Poland*

Panelists described how Poland's judiciary has been suppressed by the Law and Justice Party, which was seen as a solution to reported corruption when it came to power.<sup>140</sup> Since then, they have restricted freedom of association of judges, who are now at risk for prosecution and removal from office by the executive branch without court involvement. In February 2020, the Muzzling Act was instituted, which added three grounds for prosecution of a judge for "improper" speech: (a) any action that creates difficulty to the functioning of the existing justice system; (b) questioning whether another judges' appointments complied with law; and (c) any public action by a judge not comporting with independence and impartiality.<sup>141</sup> As a result, three judges have already been subject to disciplinary proceedings.<sup>142</sup> The government was reported to be strategically and intentionally undermining the independence of the judiciary and procedural protection of rights and freedoms.<sup>143</sup> For example, a political appointee took over the Constitutional Court without process or confirmation of qualifications, which facilitated the formation of two new chambers, including the disciplinary chamber, which controls lawyers, judges, and prosecutors.<sup>144</sup> Another way to undermine the rule of law has been the over "vetting" of judges.<sup>145</sup> Another speaker noted that other attacks on the rule of law include appointments of non-lawyers to

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135. Altan v. Turk., App. No. 12778/17, ¶¶ 99-100, 115, (Apr. 16, 2019), [https://hudoc.echr.coe.int/eng#{"fulltext":\["Application%20no.%2012778/17"\],"itemid":\["001-192804"\]}](https://hudoc.echr.coe.int/eng#{).

136. Farahnaz Ispahani, Senior Fellow, Religious Freedom Inst., ABA Int'l Human Rights Comm. Teleconference Panel (Jan. 24, 2020).

137. *Id.* (Remarks of Amb. Husain Haqqani, Senior Fellow, The Hudson Inst., ABA Int'l Human Rights Comm. Teleconference Panel (Jan. 24, 2020).

138. *Id.* (Remarks of Farahnaz Ispahani).

139. *Id.*

140. *Id.* (Remarks of Amb. Husain Haqqani).

141. Elizabeth Zechenter, President, Jagiellonian L. Soc'y, *ABA Int'l Human Rights Comm. Teleconference Panel: Poland and Rule of Law – Where Are We Now?*, 6 (Apr. 16, 2020).

142. *Id.* at 7–8.

143. *Id.* at 8.

144. Mikolaj Pietrzak, Dean, Warsaw Bar Ass'n, *ABA Int'l Human Rights Comm. Teleconference Panel: Poland and Rule of Law – Where Are We Now?*, 9 (Apr. 16, 2020).

145. *Id.* at 10.



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some review panels and locking out opposing party representatives in the budget process.<sup>146</sup> Judges have also been disciplined for discussing the legality of the lockout.<sup>147</sup>

4. *Colombia*

Panelists reported that the U.N. Special Rapporteur on Human Rights and the Environment determined that Colombia is the country where human rights defenders, broadly defined, suffer the most. Judges face threats to life and personal integrity. Several received threats and two judges were killed in 2018. In the last fifteen years, more than 200 judges and judicial staff have been killed and thirty-eight declared disappeared. Another tactic employed for the past fifteen years is the state intelligence agency wiretapping journalists, judges, lawyers, and other human rights defenders, including members of the Supreme Court.<sup>148</sup> These attacks have impacted freedom of expression and democracy in the country, as well as access to justice.<sup>149</sup>

5. *Responsive Actions*

Panelists suggested the following actions could be taken by individuals and organizations: (1) holding programs like those organized by the IHRC; (2) supporting judges and lawyers in exile with financial aid; (3) raising this topic in U.N. Universal Periodic Review processes; (4) giving visibility to this topic in the press and publications; (5) drafting an annual report on this topic; (6) offering a place for human rights defenders to speak out for themselves; (7) urging the U.S. Congress to condition funding on a country's improvement on these issues; (8) arranging for trial observations; (9) helping with amicus briefs and joining in litigation and legal research pursued locally; (10) engaging law firms to support these efforts; and (11) supporting and partnering with domestic and foreign NGOs doing this work.

B. ABORTION RESTRICTIONS IN POLAND AND THE UNITED STATES

In the United States, advocates and opponents of access to abortion held their collective breath after the appointment of conservative judge Amy Coney Barrett to the U.S. Supreme Court (Supreme Court) in September 2020, who replaced liberal icon Justice Ruth Bader Ginsburg.<sup>150</sup> Justice Barrett brings the conservative count on the Supreme Court to six of nine

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146. *Id.*

147. Melissa Hooper, Dir., Human Rights First, *ABA Int'l Human Rights Comm. Teleconference Panel: Poland and Rule of Law – Where Are We Now?*, 12 (Apr. 16, 2020).

148. *Id.*

149. Natalia Angel Cabo, Professor, Universidad de los Andes, *ABA Int'l Human Rights Comm. Teleconference Panel* (May 20, 2020).

150. Viviana Krsticevic, Exec. Dir., Ctr. Just. & Int'l Law, *ABA Int'l Human Rights Comm. Teleconference Panel* (May 20, 2020).

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Justices, giving the conservatives a clear majority.<sup>151</sup> After the Supreme Court ruled in 2020 in *June Medical Services L.L.C. v. Russo* that Louisiana Law 620 was unconstitutional, by a narrow margin with Ginsburg still on the court,<sup>152</sup> both sides foresee a distinct possibility that the Supreme Court's next decision in *Dobbs v. Jackson Women's Health Organization*<sup>153</sup> could find a Mississippi law restricting access to abortion constitutional.<sup>154</sup>

In Poland, on October 22, 2020, the Constitutional Tribunal found that in cases of "severe and irresistible fetal defect or incurable illness that threatens the fetus' life," abortion is unconstitutional.<sup>155</sup> In practice, this decision makes abortion in Poland completely illegal.<sup>156</sup> The anti-abortion Law and Justice Party appointed fourteen of the fifteen justices sitting on the Constitutional Tribunal.<sup>157</sup> The decision has led to the biggest protests in Poland since 1989 and to the government delaying implementation of the decision.<sup>158</sup>

These Courts' contentious political climates may not be the only similarity in their 2020 decisions, as shown by both the Polish Constitutional Tribunal's reasoning and the dissenting Justices' reasoning in *June Medical*.<sup>159</sup> The Polish Constitutional Tribunal's President, in announcing the ruling, opined that allowing abortions in cases of fetal abnormalities "thus den[ie]d [the unborn child] the respect and protection of human dignity."<sup>160</sup> This action, according to the Polish Constitution would lead to "a directly

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151. President Donald Trump, Remarks by President Trump at Swearing-In Ceremony of the Honorable Amy Coney Barrett as Associate Justice of the Supreme Court of the United States (Oct. 26, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-swearing-ceremony-honorable-amy-coney-barrett-associate-justice-supreme-court-united-states/>.

152. Mona Chalabi, *Here's How Conservative the Supreme Court Could Tip With Amy Coney Barrett*, THE GUARDIAN (Oct. 26, 2020), <https://www.theguardian.com/news/datablog/2020/oct/26/us-supreme-court-amy-coney-barrett-conservative-majority>.

153. *June Med. Servs. L.L.C. v. Russo*, 140 S.Ct. 2103, 2113 (2020).

154. *Dobbs v. Jackson Women's Health Organization*, 951 F.3d 246 (5th Cir. 2020), *petition for cert. filed*, No. 19-1392 (U.S. June 15, 2020).

155. *See, e.g., Amy Barrett to Consider First Abortion Case Friday*, TEXAS RIGHT TO LIFE (Oct. 29, 2020), <https://www.texasrighttolife.com/amy-barrett-to-consider-first-abortion-case-friday/>; *see also* Julie Rovner, *How an Abortion Fight in Supreme Court Could Threaten Birth Control, Too*, NPR (Nov. 3, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/11/03/930533103/how-an-abortion-fight-in-supreme-court-could-threaten-birth-control-too>.

156. *Poland's Constitutional Tribunal Rolls Back Reproductive Rights*, AMNESTY INT'L (Oct. 22, 2020), <https://www.amnesty.org/en/latest/news/2020/10/polands-constitutional-tribunal-rolls-back-reproductive-rights/>.

157. Monika Pronczuk, *Poland Court Ruling Effectively Bans Legal Abortions*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/world/europe/poland-tribunal-abortion.html>.

158. *Id.*

159. Kenan Malik, *Look to Poland for a Lesson in How Popular Protest Works*, THE GUARDIAN (Nov. 8, 2020, 1:30 PM), <https://www.theguardian.com/commentisfree/2020/nov/08/look-to-poland-for-lesson-in-how-protest-works-abortion>.

160. 140 S.Ct. at 2142-82.

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forbidden form of discrimination.”<sup>161</sup> Importantly, the Constitutional Tribunal ruled that a fetus is entitled to protections under the Polish Constitution from the moment of conception, namely the right to non-discrimination and respect for human life.<sup>162</sup>

While the U.S. Supreme Court Justices did not mention the fetus’ rights, the balance of the mother’s rights versus the fetus’ rights underlies the contention between opponents and proponents of the right to abortion in the United States and is a central political theme.<sup>163</sup> In fact, in *June Medical*, Justice Clarence Thomas’ dissenting opinion underlined states’ interest in protecting “the potentiality of human life.”<sup>164</sup> Justice Thomas’ dissent, the most starkly anti-abortion dissent in *June Medical*, also stated that the Supreme Court precedent regarding abortion is wrong and should be overturned.<sup>165</sup> He argued that a woman’s right to abortion is based on an erroneous interpretation of the Fourteenth Amendment Due Process clause—first in *Griswold*, and soon after in *Roe v. Wade*—as the Fourteenth Amendment does not mention a right to privacy: the right quoted by the majority in both cases that provides the right to abortion.<sup>166</sup>

While less extreme, both Chief Justice Roberts’ concurring opinion and two of the remaining dissents<sup>167</sup> found that *Whole Woman’s Health* defied Court precedent in creating a balancing test between the burden on women’s rights and the risk to the health of the mother.<sup>168</sup> Each of the three Justices promotes the “undue burden” test that the Court created in *Planned Parenthood of Southeastern Pa. v. Casey*<sup>169</sup>—a much lower standard for state laws restricting abortions to overcome.

The Courts’ citations to fetal rights and the mother’s lack of rights or lesser rights are different sides of the same coin. Although the United States has not restricted abortion rights as severely as Poland, the similarities are telling and perhaps foreboding.

### C. HONG KONG SECURITY LAW

On June 30, 2020, the People’s Republic of China (PRC) passed a National Security Law (NSL)<sup>170</sup> for the Hong Kong Special Administrative Region (HKSAR), which makes the acts of secession, subversion, terrorism, and collusion with external elements to endanger national security in the

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161. See Pronczuk, *supra* note 156.

162. *Id.*

163. *Id.*

164. Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. J. 599, 599–600 (1986).

165. *Roe v. Wade*, 410 U.S. 113, 162 (1973); See *June Med. Servs.*, 140 S.Ct. at 2149 (Thomas, J., dissenting).

166. *June Med. Servs.*, 140 S. Ct. at 2142 (Thomas, J., dissenting).

167. *Id.* at 2149–50.

168. *Id.* at 2182 (Kavanaugh, J., dissenting).

169. *Id.* at 2154, 2181 (Alito, J. & Gorsuch, J., dissenting).

170. 505 U.S. 833, 878 (1992) (plurality opinion).

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HKSAR punishable by up to life imprisonment.<sup>171</sup> The NSL's enactment came after a year of widespread pro-democracy protests in the HKSAR,<sup>172</sup> which initially erupted in response to the PRC's proposal of a bill permitting the extradition of HKSAR residents to PRC and persisted even after the bill's withdrawal.<sup>173</sup>

The NSL undercuts the autonomy, rule of law, judicial independence, and human rights protections promised in the 1985 Joint Declaration. Namely, it charges HKSAR executive, legislative, and judicial authorities with a duty to prevent, suppress, and impose punishment for any acts endangering national security and grants authority to transfer jurisdiction from the HKSAR to the PRC.<sup>174</sup> The NSL can also easily be applied in an arbitrary and disproportionate manner. The law's four enumerated crimes are broadly drafted and vaguely defined,<sup>175</sup> and could potentially apply to any act of dissent against the PRC by anyone, anywhere in the world.<sup>176</sup> In addition to lacking precision in key respects, the NSL expressly infringes on several fundamental rights, including the rights to freedom of expression, association, and peaceful assembly.<sup>177</sup>

Several States have strongly condemned the law's passage.<sup>178</sup> The United States suspended preferential treatment for the HKSAR,<sup>179</sup> designated individuals for economic sanctions, imposed secondary sanctions on foreign financial institutions that knowingly engage in significant transactions with those individuals,<sup>180</sup> and issued a travel advisory for the region due to

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171. The Law of the People's Republic of China Safeguarding National Security in the Hong Kong Special Administrative Region (promulgated by Standing Comm. Nat'l People's Cong., June. 30, 2020, effective June 30, 2020) 2020 G.N. (E.) 72 [hereinafter NSL].

172. *Id.* arts. 20–30.

173. *Hong Kong Timeline: A Year of Protests*, ASSOCIATED PRESS (June 9, 2020), <https://apnews.com/article/f356d575cdd28ab192405346b4908c08>.

174. Michael C. Davis & Thomas E. Kellogg, *The Promise of Democratization in Hong Kong: Discontent and Rule of Law Challenges*, 16 (Nat'l Democratic Inst. 2020); Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, China-U.K., arts. 3(2), 3(5), June 12, 1985, 1399 U.N.T.S. 61.

175. NSL, *supra* note 170, art. 55.

176. See G.A. Res. 2200A(XXI), International Covenant on Political and Civil Rights, art.15(1) (Mar. 23, 1976) (the "principle of legal certainty" requires that criminal laws are sufficiently precise so that it is clear what types of conduct would constitute a crime. It aims to prevent the arbitrary application of overly broad laws which may lead to arbitrary deprivation of liberty.).

177. NSL, *supra* note 170, art. 38; Schona Jolly, *Why Hong Kong's New National Security Law is a Coup Dressed Up in Statute*, PROSPECT MAG. (July 11, 2020), <https://www.prospectmagazine.co.uk/magazine/why-hong-kongs-new-national-security-law-is-a-coup-dressed-up-in-statute-carrie-lam-human-rights>.

178. NSL, *supra* note 170, art. 43.

179. Julian Braithwaite, U.K. Ambassador to the WTO and U.N., U.N. Human Rights Council 44: Cross-Regional Statement on Hong Kong and Xinjiang (June 30, 2020), <https://www.gov.uk/government/speeches/un-human-rights-council-44-cross-regional-statement-on-hong-kong-and-xinjiang>.

180. Hong Kong Autonomy Act, H.R. 7440, 116th Cong. (2020); Exec. Order No. 13936, 85 Fed. Reg. 43413, 43413 (July 17, 2020).

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“arbitrary enforcement of local laws.”<sup>181</sup> The United Kingdom also responded by granting a pathway for British citizenship to an estimated 2.9 million HKSAR residents who hold British National Overseas status.<sup>182</sup>

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181. U.S. Dep’t of State, Bureau of East Asian and Pac. Affairs, *Identification of Foreign Persons Involved in the Erosion of Obligations of China Under the Joint Declaration or the Basic Law Report* (Oct. 14, 2020), <https://www.state.gov/identification-of-foreign-persons-involved-in-the-erosion-of-the-obligations-of-china-under-the-joint-declaration-or-the-basic-law/>.

182. U.S. Dep’t of State, Hong Kong Travel Advisory (Sept. 14, 2020), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/hong-kong-travel-advisory.html>.

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## **International Refugee Law**

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This article highlights significant legal developments relevant to international refugee law that took place in 2020.

### **I. Introduction**

The COVID-19 pandemic leaves few lives and places untouched, but its impact has been harshest for those groups who were already in vulnerable situations before the crisis. This is particularly true for many people on the move.<sup>1</sup> The pandemic has severely affected, among others, their rights to health care services, education, food, protection, legal services, and even shelter.<sup>2</sup> “Unprecedented travel and mobility restrictions intended to prevent the spread of COVID-19 have multifaceted impacts, which, in combination, foster an environment in which refugees and migrants, particularly those in irregular situations, could be abused and exploited, along with challenges to identify, protect, and prosecute.”<sup>3</sup>

COVID-19 has emerged in an interconnected world where travel is vital. Suspension of travel and closing of borders coupled with the risk of contracting the disease have left refugees, migrants, and displaced populations with their health, safety, and futures in jeopardy.<sup>4</sup>

With 26 million refugees worldwide, the United Nations High Commissioner for Refugees (UNHCR) reports that more than 21,000 of them have tested positive for the virus across ninety-seven countries.<sup>5</sup> Refugees are vulnerable, particularly in this context, and they face different challenges in light of the pandemic, and they face different challenges in light of the pandemic which has widened inequalities between refugees and

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1. R4V, *The Impact of COVID-19 on Refugees and Migrants from Venezuela Vulnerable to Human Trafficking and Smuggling*, RELIEFWEB 1 (June 5, 2020), <https://reliefweb.int/sites/reliefweb.int/files/resources/76848.pdf>.

2. *See id.* at 4.

3. *Id.* at 1.

4. World Health Organization (WHO), *A Virus that Respects No Borders: Protecting Refugees and Migrants during COVID-19* (Mar. 25, 2021), <https://www.who.int/news-room/feature-stories/detail/a-virus-that-respects-no-borders-protecting-refugees-and-migrants-during-covid-19>.

5. United Nations High Commissioner for Refugees (UNHCR), *Global COVID-19 Emergency Response*, THE UN REFUGEE AGENCY 1 (Sept. 25, 2020), [https://reporting.unhcr.org/sites/default/files/25092020\\_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf](https://reporting.unhcr.org/sites/default/files/25092020_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf).

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other populations including: (i) the difficulty of accessing proper medical care, caused by a lack of medical care and expensive hygienic solutions to prevent the spread of the disease;<sup>6</sup> (ii) confinement of refugees increasing the chance of contracting coronavirus in refugee camps and children and family detention centers,<sup>7</sup> often leaving families two options between consenting to be forced to be separated from their children to prevent the spread of coronavirus, and staying together and taking such risk (U.S. federal judges have ordered the limited release of immigrants in detention centers to prevent the spread of the disease);<sup>8</sup> (iii) decisions of many governments to close the borders and suspend the immigration process of millions of immigrants.<sup>9</sup> President Trump’s presidential proclamation issued on April 22, 2020, and valid until December 31, 2020, prohibited the entry of any immigrants to the United States, with few exceptions.<sup>10</sup>

Lockdowns and camps becoming potential “hotspots” exacerbate inequalities between refugees, who lack sufficient access to medical care and sanitation and other segments of the population.<sup>11</sup> Proactive public policy efforts to grant equal access to basic human rights and expand the economic inclusion of refugees have become more unprecedentedly urgent.

**II. INEQUALITIES REFUGEES FACE IN LIGHT OF THE PANDEMIC  
AND THE NEED FOR A GLOBAL RESPONSE**

COVID-19 disproportionately impacts the most vulnerable individuals in our society, including migrants, refugees, and displaced people, piling increased hardship onto lives rife with trauma and persecution. This disparity manifests itself both through the abhorrent conditions within refugee camps and detention centers and in disparate access to social and economic support available to refugees more generally.

**A. SANITATION AND SOCIAL DISTANCING IN REFUGEE CAMPS**

Refugee camps around the world have recently been impacted by COVID-19 outbreaks including Greece, Lebanon, Syria, and Palestine.<sup>12</sup>

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6. Miriam Jordan, *U.S. Must Release Children from Family Detention Centers, Judge Rules*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/immigrant-children-detention-centers.html> (last updated Nov. 25, 2020).

7. American Bar Association (ABA), *Impact of COVID-19 on the Immigration System* (last updated December 7, 2020), [https://www.americanbar.org/groups/public\\_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/](https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/)

8. Miriam Jordan, *supra* note 6.

9. See Jorge Loweree, Aaron Reichlin-Melnick & Walter A. Ewing, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, AMERICAN IMMIGRATION COUNCIL 5 (Sept. 30, 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_impact\\_of\\_covid-19\\_on\\_noncitizens\\_and\\_across\\_the\\_us\\_immigration\\_system.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_impact_of_covid-19_on_noncitizens_and_across_the_us_immigration_system.pdf).

10. *See id.*

11. R4V, *supra* note 1, at 1.

12. Méliissa Godin, *COVID-19 Outbreaks Are Now Emerging in Refugee Camps*, TIME (Oct. 9, 2020, 11:22 AM), <https://time.com/5893135/covid-19-refugee-camps/>.

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Lack of access to clean water, food, or absence of social distancing all are factors in the spread of COVID-19.<sup>13</sup> These risks have been accentuated by recent natural disasters such as Cyclone Amphan, which struck Bangladesh and eastern India last May.<sup>14</sup>

The refugee camp of Cox's Bazar, Bangladesh, reported thirty-two new cases at the end of September 2020.<sup>15</sup> In Greece, 240 refugees have tested positive for the virus in the overcrowded camp of Lesbos island.<sup>16</sup> UNHCR and other organizations, however, note that reports of COVID-19 may underestimate the true number of cases due to limited testing.<sup>17</sup> The low number of cases early this year also may be explained by the age of refugees (half of them being under the age of 18), and the presence of asymptomatic people or people with mild symptoms who may be less likely to be tested.<sup>18</sup>

International support and non-governmental organizations (NGOs) have not been able to fully assist refugees.<sup>19</sup> Related COVID-19 budget cuts and limitations in the number of individuals allowed to enter camps are additional factors explaining why refugees have been underserved during this period.<sup>20</sup> Many international operations are now carried out remotely to prevent the spread of coronavirus.<sup>21</sup> In some refugee camps, staffing has been reduced by eighty percent.<sup>22</sup>

Refugee camps were protected from the pandemic for several months because camps tend to be located well outside cities and crowded areas.<sup>23</sup> While it took time to reach refugee camps, the epidemic continues to spread and will have catastrophic consequences on refugees if countries do not follow strict yet inclusive measures to combat the disease.

According to the World Health Organization guidelines, people should stay one meter away from anyone coughing or sneezing, wash hands

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13. United Nations High Commissioner for Refugees (UNHCR), Global COVID-19 Emergency Response, THE UN REFUGEE AGENCY 1 (Sept. 25, 2020), [https://reporting.unhcr.org/sites/default/files/25092020\\_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf](https://reporting.unhcr.org/sites/default/files/25092020_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf).

14. Aditi Hazra, *COVID-19: Here's How We Can Help Refugees*, WORLD ECONOMIC FORUM (Aug. 6, 2020), <https://www.weforum.org/agenda/2020/08/refugees-covid-19-response-coronavirus-policies-health-pandemic/>.

15. Godin, *supra* note 12, at 2.

16. *Id.*

17. *Id.* at 4.

18. *Id.*

19. United Nations High Commissioner for Refugees (UNHCR), Global COVID-19 Emergency Response, THE UN REFUGEE AGENCY 1 (Sept. 25, 2020), [https://reporting.unhcr.org/sites/default/files/25092020\\_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf](https://reporting.unhcr.org/sites/default/files/25092020_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf).

20. Mélissa Godin, *COVID-19 Outbreaks Are Now Emerging in Refugee Camps*, TIME (Oct. 9, 2020, 11:22 AM), <https://time.com/5893135/covid-19-refugee-camps>.

21. *Id.* at 4.

22. Helen Dempster et al., *Locked Down and Left Behind*, Policy Paper 179, Washington, DC: CTR. FOR GLOB. DEV. AND REFUGEES INT'L 23 (July 8, 2020), <https://www.cgdev.org/publication/locked-down-and-left-behind-impact-covid-19-refugees-economic-inclusion>.

23. Godin, *supra* note 12, at 3.



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frequently, and seek medical help as soon as the symptoms become apparent.<sup>24</sup> These rules are almost impracticable in refugee camps. Some of these camps, moreover, were already overcrowded before the beginning of the spread. The refugee camp of Cox's Bazar houses 40,000 refugees per square kilometer and hosts about 900,000 Rohingya refugees from Myanmar.<sup>25</sup> The Greek Island of Lesbos was initially built for 3,000 people but now hosts more than 20,000 people.<sup>26</sup>

The risk of harm to the refugee population could expand in the long term, even after finding a COVID-19 vaccine, hence the need to consider international aid to receive the vaccine at a low cost. Countries that have implemented strict lockdown measures on refugee camps have been more successful in mitigating the damages.<sup>27</sup> Jordan, hosting 747,000 refugees, shut down airports for months, penalizing people who broke quarantine.<sup>28</sup> All its borders and airspace were shut down as well, and it helped to some extent.<sup>29</sup> Strict measures, while serving the population as a whole, may not necessarily serve the refugee community in the short term and cannot suppress or eliminate the risk of outbreak.<sup>30</sup>

**B. SOCIAL AND ECONOMIC PROTECTION OF REFUGEES**

According to the Convention on the Rights of the Child, social protection is deemed to be a human right, applicable to all children in a country.<sup>31</sup> Migrant, refugee, or displaced children and their families also generally have social protection.<sup>32</sup>

An estimated 7.7 million workers in the United States have lost their job since the beginning of the year.<sup>33</sup> While refugees do not necessarily have

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24. World Health Organization (WHO), Coronavirus Disease Advice for the Public, WORLD HEALTH ORG. INT'L 14, 16 (last updated May 12, 2021), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>; See also Fears for Spread of Coronavirus in Refugee Camps as up to 250 People Share One Tap, OXFAM 2 (Apr. 6, 2020), <https://reliefweb.int/report/world/fears-spread-coronavirus-refugee-camps-250-people-share-one-tap-oxfam>.

25. Fears for Spread of Coronavirus in Refugee Camps as up to 250 People Share One Tap, *supra* note 24, at 1; Bill Frelick, *The Plight of Rohingya Refugees from Myanmar*, HUMAN RIGHTS WATCH 2 (Aug. 5, 2018), <https://www.hrw.org/report/2018/08/05/bangladesh-not-my-country/plight-rohingya-refugees-myanmar#>.

26. Fears for Spread of Coronavirus in Refugee Camps as up to 250 People Share One Tap, *supra* note 24, at 2.

27. Godin, *supra* note 12, at 2.

28. *Id.*

29. *Id.* at 3.

30. See Omar Akour, *UN Finds 2 Virus Cases in Syrian Refugee Camp in Jordan*, ASSOCIATED PRESS 3 (Sept. 8, 2020), <https://apnews.com/article/virus-outbreak-jordan-archive-united-nations-amman-a14b6e45e6c113585cae2e7d548daaaa>.

31. G.A. Res. 44/25, Convention on the Rights of the Child (Sept. 2, 1990).

32. *Id.* art. 22, ¶ 2.

33. Paul Fronstin & Stephen A. Woodbury, *Update: How Many Americans Have Lost Jobs with Employer Health Coverage During the Pandemic*, THE COMMONWEALTH FUND 2 (Jan. 11, 2021), <https://doi.org/10.26099/pg4k-k397>.

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legal status in the country where they intend to stay, in addition to sometimes being confronted with language barriers, it is more difficult to keep a job or find another one. Budget cuts affect refugees directly and indirectly: they may have lost their jobs and stopped receiving financial aid or food assistance with budget cuts.<sup>34</sup> Refugees usually pay their taxes but are underserved in terms of social protection.<sup>35</sup> Suspension of immigration case adjudication affects their legal status, work permits, and access to social protection on the same terms as nationals.<sup>36</sup>

Primary healthcare is typically rendered inaccessible to refugees, who may only perceive medical care in emergency cases.<sup>37</sup> They work in low-income occupations, generally in close proximity with patients or clients, which makes social distancing implausible compared to people who have or may have the opportunity of working remotely.<sup>38</sup>

Despite being less protected than nationals, migrants and refugees constitute an important workforce for communities and are seen as assets for countries' economic growth.<sup>39</sup> For instance, some European countries have seen workforce shortages in agriculture where the limited availability of seasonal workers raises serious concerns.<sup>40</sup> In 2003, Zambia launched a multi-sectoral rural development program targeting Angolan refugees as a solution to the refugee crisis.<sup>41</sup>

Refugees who have or are working were placed at the forefront of the pandemic, usually occupying low-paid jobs with precarious and poor working conditions. Women and girls, who represent forty-two percent of migrant workers, are the most impacted group.<sup>42</sup> They are critical to health services and bear the biggest burden in paid and unpaid domestic and care

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34. Godin, *supra* note 12, at 6.

35. United Nations, International Migrants: Carrying Their Own Weight, PROMOTING INCLUSION THROUGH SOCIAL PROTECTION 77, 94 (July 22, 2018), <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2018/07/Chapter-VIIInternational-migrants-carrying-their-own.pdf>.

36. Loweree et al., *supra* note 9, at 25; International Migrants: Carrying Their Own Weight, *supra* note 35, at 86.

37. Office of the High Commissioner, Covid-19 Guidance, U.N. HUMAN RIGHTS 5 (May 13, 2020), [https://www.ohchr.org/Documents/Events/COVID-19\\_Guidance.pdf](https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf).

38. See Hazra, *supra* note 14, at 2.

39. Dany Bahar & Meagan Dooley, *Refugees as Assets Not Burdens*, 8 BROOKINGS 1, 6 (Feb. 6, 2020), [https://www.brookings.edu/wp-content/uploads/2020/02/refugees\\_as\\_assets\\_not\\_burdens\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2020/02/refugees_as_assets_not_burdens_final.pdf).

40. Mauro Testaverde, *Social protection for migrants during the COVID-19 crisis: The right and smart choice*, WORLD BANK BLOGS (April 28, 2020), <https://blogs.worldbank.org/voices/social-protection-migrants-during-covid-19-crisis-right-and-smart-choice>.

41. David Khoudour & Lisa Anderson, *Assessing the contribution of refugees to the development of their host countries*, OECD, 14 (Sept. 28, 2017), [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DEV/DOC\(2017\)1&docLanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DEV/DOC(2017)1&docLanguage=en).

42. *Social Protection for Children and Families in the Context of Migration and Displacement during COVID-19*, UNICEF (Aug. 13, 2020), <https://www.unicef.org/media/83531/file/Social-Protection-for-Children-and-Families-in-the-Context-of-Migration-and-Displacement-during-COVID-19.pdf>.

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work, particularly impacted by physical social distancing measures.<sup>43</sup> They are also more likely to fall into poverty, be exploited, or forced to work while sick. This situation accentuates the need to include them in social protection programs.<sup>44</sup>

In the context of international aid to developing countries, unexpected situations have prevented displaced people from getting aid during the pandemic. In Kenya, displaced people without an identification card are left unable to receive food aid.<sup>45</sup> In many countries, refugees cannot benefit from food distribution or emergency cash relief programs.<sup>46</sup> It is also not possible, or at least challenging, to renew identification cards in many instances because administrations have slowed down.

C. IMMIGRANT VISAS AND DETENTION CENTERS

Countries around the world have temporarily postponed international travel and issuance of visas to limit the spread of the coronavirus. Refugees who escaped their country and seek to relocate permanently to another country witness a very unstable situation. With no immigration status or status pending adjudication, they are left with no solution other than to wait. These delays may create a backlog of immigration cases waiting for decisions or court hearings. For example, this situation left the United States Citizenship and Immigration Services (USCIS) with an already saturated case workload.<sup>47</sup>

Most refugees are unable to work and access basic healthcare because many embassies have suspended visa interviews and will not issue any visas or authorize immigration until the end of the year.<sup>48</sup> Certain immigration courts in the United States have postponed hearings apart from emergency cases and detained immigrants court hearings, causing refugees and immigrants to fear for their health, safety, and future more than ever.<sup>49</sup> In contrast, USCIS, part of the U.S. Department of Homeland Security, did

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43. COVID-19 Statement from Platform for Int'l Coop. on Undocumented Migrants, *The COVID-19 Pandemic: We need Urgent Measures to Protect People and mend the Cracks in our Health, Social Protection and Migration Systems* (March 2020), <https://picum.org/wp-content/uploads/2020/03/COVID-19-Statement-March-2020.pdf>.

44. *Id.*

45. *Id.*

46. Deena Dajani, *Displacement and the Pandemic*, IIED (Aug. 19, 2020), <https://www.iied.org/displacement-pandemic>.

47. Citizenship and Immigr. Services Ombudsman, *Annual Report to Congress June 2020*, 11 (June 30, 2020), [https://www.dhs.gov/sites/default/files/publications/20\\_0630\\_cisomb-2020-annual-report-to-congress.pdf](https://www.dhs.gov/sites/default/files/publications/20_0630_cisomb-2020-annual-report-to-congress.pdf).

48. Press Release, U.S. Department of State—Bureau of Consular Affairs, *Suspension of Routine Visa Services* (last updated July 22, 2020) (on file with author).

49. Hon. Robert Vinikoor (Ret.), *The COVID-19 pandemic causes dramatic delays to cases pending before the U.S. Immigration Court* (Sept. 10, 2020), <https://www.mmhpc.com/the-covid-19-pandemic-causes-dramatic-delays-to-cases-pending-before-the-u-s-immigration-court/>.

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not postpone any immigration filing or response deadline.<sup>50</sup> In April 2020, nonprofit organization Legal Services NYC sued New York City immigration courts and the Department of Justice Executive Office for Immigration Review for refusing to postpone immigration filing deadlines.<sup>51</sup>

Like refugee camps, detention centers are facing similar difficulties. Detention centers do not permit social distancing, keeping immigrants in close proximity with each other and depriving them of their freedom.<sup>52</sup> United States Immigration and Customs Enforcement (“ICE”) reported several instances of COVID-19 cases across U.S. detention centers.<sup>53</sup> Insufficient medical care, malfunctioning software, and gaps in the use of technology are all factors increasing the spread of the disease in these locations. Experts and human rights advocates explain that the attention ICE gives asylum seekers is “indifferent at best.”<sup>54</sup>

10,000 individuals who are or were in ICE custody have tested positive for COVID-19 as of March 23, 2021.<sup>55</sup> 357 individuals were in custody and isolation as of December 3, 2020.<sup>56</sup> ICE had tested 67,660 individuals in its custody for COVID-19 as of December 3, 2020.<sup>57</sup> Nonprofit organization Freedom for Immigrants Database recently developed an online map of COVID-19 cases inside U.S. detention centers.<sup>58</sup> According to its data collection, out of 200 existing detention centers, 103 detention facilities recall COVID-19 cases; eighty-six of them have sanitation and hygiene issues, and ninety-nine of these facilities offer inadequate medical response or health services. Only fifty-two facilities took retaliation measures in response to the surge of COVID-19 cases.<sup>59</sup>

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50. Letter from the American Immigration Lawyers Association, to Kenneth Cuccinelli, Senior Official Performing the Duties of the Director (Mar. 23, 2020) (on file with author).

51. Press Release, Legal Services NYC, Legal Services NYC, Legal Services NYC Sues NYC Immigration Courts for Refusing to Postpone Filing Deadlines Amid COVID-19, Putting Countless Lives at Risk (April 29, 2020) (on file with author).

52. Immigration Detention and COVID-19: Immigration enforcement strategies must change to help alleviate the worst damage of COVID-19, BRENNAN CENTER FOR JUSTICE (Mar. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19>.

53. *Id.*

54. Deaths at Adult Detention Centers, AMERICAN IMMIGR. LAWYERS ASS’N (last updated Mar. 17, 2021), <https://www.aila.org/infonet/deaths-at-adult-detention-centers>.

55. Noelle Smart, Adam Garcia, Nina Siulc, *One Year Later, We Still Don’t Know How Many People in ICE Detention Have Been Exposed to COVID-19* (April 8, 2021), <https://www.vera.org/blog/one-year-later-we-still-dont-know-how-many-people-in-ice-detention-have-been-exposed-to-covid-19>.

56. *Impact of COVID-19 on the Immigration System*, American Bar Association (last updated Dec. 7, 2020), [https://www.americanbar.org/groups/public\\_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/](https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/).

57. *Id.*

58. Mapping U.S. Immigration Detention, FREEDOM FOR IMMIGRANTS (last visited May 17, 2021), <https://www.freedomforimmigrants.org/map>.

59. *Id.*

Family separation and release of immigrants from detention centers tend to coerce asylum seekers from filing asylum claims, often leaving families with two options: agree to be released and separated from their children or stay together and take the risk that children would be exposed to coronavirus.<sup>60</sup>

### **III. Positive Responses by Some Countries to the Needs of Refugees in the Light of the Pandemic: Examples of Rwanda, Jordan, and Canada**

The coronavirus pandemic has hit the world without sparing any country. The crisis has revealed the vulnerability of health systems and poor management of health when it comes to refugees. As a global crisis, it no doubt needs a global solution. But only some countries have shown prepared and positive responses. Rwanda, Jordan, and Canada are examples of countries that have responded positively, either by including refugees in their fight against the virus or by improving their immigration status.

#### **A. HEALTH COVERAGE AND REFUGEES IN RWANDA**

Rwanda is a landlocked East African nation neighboring Burundi and the Democratic Republic of Congo. Following the 1994 Rwandan genocide, Rwanda has made efforts to bring peace and improve its economy in general. Rwanda hosts about 150,000 refugees.<sup>61</sup>

As the situation of refugees is most of the time precarious and the pandemic tends to worsen it, Rwanda proactively tried to keep under control a situation that could have otherwise rapidly deteriorated. During the pandemic, the Rwandan Ministry of Emergency Management, partnering with the UNHCR and the World Food Program, secured water access, health, nutrition, and sanitation products to all refugees in Rwanda.<sup>62</sup> Rwanda understood that providing healthcare to anyone and empowering all refugees on its territory were factors of development. This also is a way to protect everyone by controlling the virus's spread in the territory. As

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60. Kathryn Hampton & Juan E. Mendez, *Forced Family Separation During COVID-19: Preventing Torture and Inhumane Treatment in Crisis*, PHYSICIAN FOR HUMAN RIGHTS (July 10, 2020), [https://phr.org/our-work/resources/forced-family-separation-during-covid-19-preventing-torture-and-inhumane-treatment-in-crisis/?CID=701f40000018pCMAAY&ms=FY20\\_SEM\\_GoogleGrant&gclid=CJ0KCQjwlvT8BRDeARIsAACRFiWzQK9GHOp7KeplAJOhZLX6ynsa7mWRs954Tg-Jn0vH32Q1M30gifUaArlOeALw\\_wcB](https://phr.org/our-work/resources/forced-family-separation-during-covid-19-preventing-torture-and-inhumane-treatment-in-crisis/?CID=701f40000018pCMAAY&ms=FY20_SEM_GoogleGrant&gclid=CJ0KCQjwlvT8BRDeARIsAACRFiWzQK9GHOp7KeplAJOhZLX6ynsa7mWRs954Tg-Jn0vH32Q1M30gifUaArlOeALw_wcB); Spencer S. Hsu, *U.S. might separate families after federal judge orders ICE to free migrant children*, WASH. POST (July 7, 2020), [https://www.washingtonpost.com/local/legal-issues/us-may-separate-families-after-federal-judge-orders-ice-to-free-migrant-children/2020/07/07/a1758ad6-c067-11ea-b178-bb7b05b94af1\\_story.html](https://www.washingtonpost.com/local/legal-issues/us-may-separate-families-after-federal-judge-orders-ice-to-free-migrant-children/2020/07/07/a1758ad6-c067-11ea-b178-bb7b05b94af1_story.html).

61. *Humanitarian action and emergencies: UNICEF reaches out to the children in greatest need and at greatest risk in Rwanda*, UNICEF (last visited May 17, 2021), <https://www.unicef.org/rwanda/humanitarian-action-and-emergencies#:~:text=Rwanda%20hosts%20over%20150%2C000%20refugees,of%20these%20refugees%20are%20children.>

62. *Id.*

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recently as last year, Rwanda was considered among the most prosperous countries in the region.<sup>63</sup>

As a signatory of the Global Compact on Refugees,<sup>64</sup> Rwanda is striving to put its recommendations into practice. Despite the struggles and challenges that many countries face during the pandemic, Rwanda's Ministry in Charge of Emergency Management partnered with the Rwanda Social Security Board, the Africa Humanitarian Action, and the UNHCR, giving urban and student refugees health insurance, which provided them the same access to the health care system as Rwandan nationals.<sup>65</sup> Many health insurance applicants and their dependents, such as their children, registered as asylum seekers pending a status determination.<sup>66</sup> The project is ongoing and the Rwandan Government's goal is to have refugees pay the insurance premium through engagement in work opportunities.<sup>67</sup>

**B. JORDANIAN GOVERNMENT'S INCLUSION OF REFUGEES IN ITS  
NATIONAL PROGRAM IN LIGHT OF THE PANDEMIC**

Many refugee camps around the world lack clean water, thus exacerbating refugees' health issues, and making the morbidity and mortality rates escalate.<sup>68</sup> Jordan, an Arab country situated in the Levant region of western Asia, bordering Saudi Arabia, Iraq, Israel, and Palestine, hosts both Syrian and Palestinian refugees, making Jordan a major refugee host country.<sup>69</sup>

Amid the pandemic, some refugee camps in Jordan had confirmed coronavirus cases.<sup>70</sup> The government took all preventive and precautionary measures fighting the pandemic, limiting camp access to essential workers only.<sup>71</sup> The Jordanian government also included refugees in its National Health Response to COVID-19, giving refugees the same rights as Jordanian nationals.<sup>72</sup>

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63. Rwanda Country Profile (2020), THE LEGATUM PROSPERITY INDEX (last visited May 17, 2021), <https://www.prosperity.com/globe/rwanda>.

64. Press Release, General Assembly Endorses Landmark Global Compact on Refugees, Adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights (Dec. 17, 2018) (on file with author).

65. *Community-based health insurance for urban refugees and refugee students in Rwanda*, UNHCR (June 24, 2020), <https://globalcompactrefugees.org/article/health-insurance-rwanda-covid-19-response-accessible-nationals-and-refugees-alike>.

66. *Id.*

67. *Id.*

68. Marissa Taylor, *9 Facts about the Refugee Water Crisis*, THE BORGAN PROJECT (Mar. 18, 2020), <https://borgenproject.org/refugee-water-crisis/#:~:text=UNHCR%20estimates%20that%20more%20than,has%20intervened%20with%20several%20programs>.

69. *Where We Work: Jordan*, ANERA (last visited May 17, 2021), <https://www.anera.org/where-we-work/jordan/>.

70. Statement from Dominik Bartsch, UNHCR Representative in Jordan, on the spread of coronavirus to refugee camps (Sept. 12, 2020) (on file with author).

71. *Id.*

72. *Id.*

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The United Nations High Commissioner for Refugees, Filippo Grandi, remarked that Jordan continues to show great solidarity.<sup>73</sup> The measures taken by Jordan's government and its preparedness were tremendous steps to take while other countries were, and still are, leaving refugees behind without health care. The government's continuous efforts had made the mortality rate drop to zero as of November 10.<sup>74</sup>

C. ACCORDING PERMANENT RESIDENCY TO ASYLUM SEEKERS  
WORKING IN THE FRONTLINE OF THE CORONAVIRUS  
PANDEMIC IN CANADA

Movements of people internally and internationally have facilitated the spread of the virus.<sup>75</sup> As a result, many countries have closed their borders, forcing asylum seekers to return to their country of origin.<sup>76</sup> Additionally, asylum seekers have had their cases pending determination suspended.<sup>77</sup> Taking a stand, the Assistant High Commissioner of the UNHCR stated that a priority continues to be to reinstate fully functioning asylum systems and access to territory for all asylum seekers and that measures restricting access to asylum must not be allowed to become entrenched under the guise of public health.<sup>78</sup>

Canada has always shown support to refugees around the world and has contributed to solving the refugee crisis already present before the pandemic.<sup>79</sup> Canada has not yet opened its borders to asylum seekers from outside the country but has considered doing so when conditions are met.<sup>80</sup> In general, the Canadian government responded well to the pandemic;

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73. Charlie Dunmore & Mohammad Hawari, *Grandi hails Jordan's Inclusion of Refugees in COVID Response*, UNHCR (Sept. 15, 2020), <https://www.unhcr.org/news/stories/2020/9/5f60c1794/grandi-hails-jordans-inclusio-refugees-covid-reponse.html>.

74. Moawiah Khatatbeh, *The Battle Against COVID-19 in Jordan: From Extreme Victory to Extreme Burden*, FRONTIERS IN PUBLIC HEALTH (Jan. 27, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7873486/>.

75. See Najia S. Khalid, *Immigration and Compliance Briefing: Coronavirus Disease 2019 (COVID-19) Travel*, THE NATIONAL L. REV. (May 17, 2021), <https://www.natlawreview.com/article/immigration-and-compliance-briefing-coronavirus-disease-2019-covid-19-travel-impact>.

76. *Id.*

77. Jennie Kneeder, *Impact of COVID-19 on the Immigration System*, ABA COMMISSION ON IMMIGRATION, (last updated Dec. 7, 2020), [https://www.americanbar.org/groups/public\\_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/](https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/).

78. UNHCR *Applauds Canada's Commitment to Grant Permanent Residency to Asylum-Seekers Working on COVID-19 Frontlines*, UNHCR (Aug. 14, 2020), <https://www.unhcr.org/news/press/2020/8/5f3708f44/unhcr-applauds-canadas-commitment-grant-permanent-residency-asylum-seekers.html>.

79. See Canada's Response to the Conflict in Syria, Government of Canada (last updated Jan. 30, 2020), [https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/conflict\\_syria-syrie.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/conflict_syria-syrie.aspx?lang=eng).

80. Coronavirus Disease (COVID-19): Refugees, asylum claimants, sponsors and PRRA Applicants, Government of Canada (last updated March 17, 2021), <https://www.canada.ca/en/immigration-refugees-citizenship/services/coronavirus-covid19/refugees.html#claimants>.

furthermore, it has decided to upgrade asylum seekers' status because they risk their own lives to save others' lives. The access to permanent residency must follow an established procedure; however, Canada has considered making exceptions for reasons of the pandemic.<sup>81</sup> The Canadian government has opened a pathway to permanent residency to all asylum seekers in the health care field who have been working on the frontlines of the COVID-19 pandemic.<sup>82</sup>

The UNHCR has applauded this initiative through Rema Jamous Imseis, who admitted that refugees, asylum-seekers, and displaced people have skills and resources that can be a part of the solution.<sup>83</sup> Also, the Canadian Government is committed to continue working with the UNHCR and the International Organization on Migration to facilitate the resettlement of refugees once the COVID-19 preventive measures are lifted.<sup>84</sup>

Before the pandemic, there was an undeniable refugee crisis in the world. The pandemic made it more complicated for refugees, calling for more efficient solutions. Rwanda, Jordan, and Canada are good examples to follow because they give consideration to refugees.<sup>85</sup> Despite government efforts around the world to resolve the pandemic, their efforts remain timid, compared to the number of refugees, their living conditions, and more importantly, the span of the pandemic.

#### **IV. Negative Responses by Some Countries to the Needs of Refugees in Light of the Pandemic: Examples of the United States of America and Italy**

The deciding factor in whether a country has responded well to the needs of refugees and asylum seekers during the COVID-19 pandemic is the extent to which leaders have leveraged COVID-19 as an opportunity to act on existing strains of anti-immigrant rhetoric and policy. In the United States and Italy, pre-existing atmospheres of distrust toward asylum seekers and refugees pervaded COVID-19 responses, enabling leaders to enact policies that detrimentally affected these communities and compounded existing health care challenges.<sup>86</sup>

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81. See UNHCR Applauds Canada's Commitment to Grant Permanent Residency to Asylum-Seekers Working on COVID-19 Frontlines, *supra* note 78.

82. *Id.*

83. *Id.*

84. *Id.*

85. See Donah Mbabazi, *How are refugees surviving during the coronavirus pandemic?*, THE NEW TIMES (April 16, 2020), <https://www.newtimes.co.rw/news/how-are-refugees-surviving-during-coronavirus-pandemic>; UNHCR Applauds Canada's Commitment to Grant Permanent Residency to Asylum-Seekers Working on COVID-19 Frontlines, *supra* note 78; Dunmore, *supra* note 73.

86. See generally *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.*, ANTI-DEFAMATION LEAGUE (2018); Michael Guterbock, *Italy Becomes More Anti-Immigrant and Anti-EU*, GLOBAL RISKS INSIGHTS (Sept. 20, 2020), <https://globalrisksinsights.com/2020/09/italy-becomes-more-anti-immigrant-and-anti-eu/>.



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A. INCREASED BARRIERS AND RISKS FACED BY REFUGEES AND  
ASYLUM SEEKERS IN THE UNITED STATES OF AMERICA

The Trump administration's roadblocks to legal access in the United States continued without relief during the year. The disruption of legal immigration and asylum efforts for those seeking lawful entry to the United States were reflected in constantly shifting and changing requirements, needless bureaucratic impediments to those applying and to those who would legally represent them, and perhaps most dramatically in the modifications to refugee quotas and processing systems implemented by the United States.<sup>87</sup> In the fall of 2019, the United States cut, at the direction of President Trump, the number of refugees accepted yearly into the United States to 18,000,<sup>88</sup> reduced from 30,000 for fiscal year 2019.<sup>89</sup> These numbers represent a severe decline from the final year of the Obama administration when President Obama set the cap at 110,000.<sup>90</sup> Furthermore, continual and often unannounced changes to the methods of processing asylum seekers at the southern border drastically limited access to United States courts and the opportunity to receive thorough arbitration of asylum claims.<sup>91</sup> The practice of "metering," limiting the daily number of individuals granted access to the asylum process at ports of entry, has deferred the hopes of many asylum seekers by anywhere from a few days to six months.<sup>92</sup>

The Migrant Protection Protocols (MPP)<sup>93</sup> re-routed many of those granted hearings to various cities along the Mexican border, where, as they have awaited hearing dates, asylum seekers face dangers such as kidnapping, assault, sexual violence, difficulties obtaining counsel, homelessness, squalid

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87. Danilo Zak, *Immigration-Related Executive Actions During the COVID-19 Pandemic*, NATIONAL IMMIGRATION FORUM (Nov. 18, 2020), <https://immigrationforum.org/article/immigration-related-executive-actions-during-the-covid-19-pandemic/>.

88. Report to Congress on Proposed Refugee Admissions for Fiscal Year 2020, U.S. DEPT. OF STATE (2020).

89. *Id.*

90. Molly O'Toole, *White House to drastically cut number of refugees U.S. accepts to 18,000 next year*, L.A. TIMES (Sept. 26, 2019, 4:05 PM), <https://www.latimes.com/politics/story/2019-09-26/white-house-to-drastically-cut-number-of-refugees-us-accepts-to-18-000-next-year>.

91. See USCIS makes unannounced Form I-730 processing changes, referring certain petitions to ICE, IMMIGRATION POLICY TRACKING PROJECT (March 1, 2019), <https://immpolicytracking.org/policies/uscis-makes-unannounced-form-i-730-processing-changes-referring-certain-petitions-ice/#/tab-policy-overview>.

92. Policies Affecting Asylum Seekers at the Border: The Migrant Protection Protocols, Prompt Asylum Claim Review, Humanitarian Asylum Review Process, Metering, Asylum Transit Ban, and How They Interact, 1–2, AM. IMMIGRATION COUNCIL (2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/policies\\_affecting\\_asylum\\_seekers\\_at\\_the\\_border.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/policies_affecting_asylum_seekers_at_the_border.pdf)

93. The "Migrant Protection Protocols", 1, AM. IMMIGRATION COUNCIL (2020), [https://www.americanimmigrationcouncil.org/sites/default/files/research/migrant\\_protection\\_protocols.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/migrant_protection_protocols.pdf).

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living conditions, and the sorrows of family separation due to capricious applications of the MPP.<sup>94</sup> The American Immigration Council writes:

Given these issues, thousands of people subject to MPP have not been able to return to the border for a scheduled court hearing and have been ordered deported for missing court. Some have missed hearings because the danger and instability of the border region forced them to abandon their cases and go home. Others have missed hearings because they were the victims of kidnapping or were prevented from attending because robbers stole their court paperwork.<sup>95</sup>

Added to those pre-existing difficulties faced by asylum seekers were the manifold burdens of COVID-19 and the United States' subsequent policy response to the virus. Conditions in both Immigration and Customs Enforcement (ICE) detention centers and camps and shelters along the border were reported to fuel the spread of the virus, as ICE detainees or those awaiting a hearing outside the United States often are forced to live in close contact with one another and suffer minimal or nonexistent access to hygiene resources.<sup>96</sup> ICE detention centers became a focal point of concern for organizations such as Amnesty International, which observed that ICE “downplay[ed] the risk of COVID-19 outbreaks in its detention facilities’ while also failing ‘to facilitate adequate sanitation, hygiene, and social distancing between detainees.’”<sup>97</sup> The spread of COVID-19 throughout the United States’ network of detention centers also was linked to ICE conducting transfers of detainees from facilities with confirmed cases.<sup>98</sup> As of November 2, 2020, 6,922 individuals in ICE custody—approximately thirteen percent of those who received tests—tested positive for COVID-19.<sup>99</sup> Among those still held, ICE reported as of July 25, 2020, that 3,306 had “established a ‘credible fear of persecution’ or a ‘reasonable fear of persecution or torture.’”<sup>100</sup> Crucially, the Immigration and Nationality Act (INA) provides for the release of detainees for “urgent humanitarian reasons or significant public benefit,”<sup>101</sup> a provision the Center for Migration Studies

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94. Am. Immigration Council, *supra* note 92, at 2–6.

95. *Id.* at 6 (internal citations omitted).

96. *Human Rights Watch, US: COVID-19 Policies Risk Asylum Seekers’ Lives*, HUMAN RIGHTS WATCH (Apr. 2, 2020, 8:00 AM), <https://www.hrw.org/news/2020/04/02/us-covid-19-policies-risk-asylum-seekers-lives>; Aubrey Grant, *Coronavirus, Refugees, and Government Policy: The State of U.S. Refugee Resettlement during the Coronavirus Pandemic*, WORLD MED. HEALTH POL’Y (Aug. 9, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7436820/#wmh3362-bib-0014>.

97. Donald Kerwin, *Immigrant Detention and COVID-19: How a Pandemic Exploited and Spread through the US Immigrant Detention System*, CENTER FOR MIGRATION STUDIES (Aug. 2020), <https://cmsny.org/wp-content/uploads/2020/08/CMS-Detention-COVID-Report-08-12-2020.pdf>.

98. *Id.* at 8.

99. Kneeder, *supra* note 77.

100. Kerwin, *supra* note 97, at 9.

101. *Id.* at 15-16; Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5)(A).

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argued could be aptly applied to the pandemic.<sup>102</sup> Yet the United States, in contrast with countries such as Canada and Mexico, rejected the idea of widespread releases in 2020.<sup>103</sup>

The Trump Administration temporarily paused all refugee admissions effective March 19, 2020.<sup>104</sup> On March 20, 2020, the Centers for Disease Control and Prevention (CDC), acting under the authority of Title 42,<sup>105</sup> ordered a halt to entries of asylum seekers through Canadian or Mexican points of entry due to public health concerns.<sup>106</sup> The CDC intermittently extended the March 20, 2020 order, most recently on October 13, 2020, when it was extended until “further introduction of COVID-19 into the United States has ceased to be a serious danger to the public health.”<sup>107</sup> The U.S. Department of Homeland Security (DHS) acted on these orders to effectively freeze refugee resettlement and asylum programs. As of August 2020, “the only refugees currently being resettled [were] those deemed ‘emergency cases.’”<sup>108</sup>

While the impetus behind these policies is supposedly the mitigation of public health concerns, the practical effects of widespread denials of entry for those seeking asylum in the United States have been devastating. Recently, allegations surfaced that DHS expelled unaccompanied minors over 13,000 times in pursuit of CDC policy.<sup>109</sup> In some cases, in violation of United States policy and diplomatic agreements with Mexico, border authorities relocated to Mexico unaccompanied children from countries other than Mexico, where they have no family ties or reliable access to public services.<sup>110</sup>

The negative effects of rapid and haphazard expulsions were not limited to those seeking asylum, either. Widespread deportations and denials of entry early in the course of the pandemic fostered the spread of COVID-19 outside the United States, sometimes in places ill-equipped to manage the impacts of the pandemic.<sup>111</sup> The coronavirus pandemic triggered a policy hard on asylum seekers with dubious benefits for public health both in the United States and abroad.

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102. Kerwin, *supra* note 97, at 15.

103. *Id.* at 9.

104. Grant, *supra* note 96.

105. 42 U.S.C. §§ 265, 268.

106. Grant, *supra* note 96.

107. U.S. Dep’t of Health and Human Servs., Ctrs. for Disease Control and Prevention (CDC), Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists (Oct. 13, 2020), *available at* <https://www.cdc.gov/coronavirus/downloads/10.13.2020-CDC-Order-Prohibiting-Introduction-of-Persons-FINAL-ALL-CLEAR-encrypted.pdf>.

108. Grant, *supra* note 96.

109. Kneedler, *supra* note 77.

110. Caitlin Dickerson, *U.S. Expels Migrant Children From Other Countries to Mexico*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/us/migrant-children-expulsions-mexico.html?smid=TW-share>.

111. Kerwin, *supra* note 97, at 4–6.

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**B. DECREASED ACCESS TO PROTECTION, HEALTHCARE, AND  
REFUGE IN ITALY**

In Italy, one of the world's worst hotspots for the coronavirus, the government response weighed disproportionately on refugees and would-be asylum seekers. This outcome resulted from similarly draconian policies fueled by mistrust and animosity toward new arrivals.

Approximately eighty-two percent of migrants traveling to Europe transverse the sea route between Libya and Italy, and about half a million asylum seekers and migrants arrived in Italy by boat between 2015 and the start of 2020.<sup>112</sup> With approximately 100,000 new asylum seekers or migrants arriving in Italy per year by sea, far-right voices within Italy's government found ample opportunity to direct fears over the spread of COVID-19 into policies that restricted the access of migrants and asylum seekers to refuge and resources on Italy's shores.<sup>113</sup> Indeed, the stances adopted by Italy's government toward asylum seekers represented a continuation of conservative trends within Italy's immigration policies over the past three years.<sup>114</sup> In 2018, the Italian government adopted the "Security Decree," or the "Salvini Decree," named after far-right Interior Minister Matteo Salvini, which dramatically curtailed protections for asylum seekers.<sup>115</sup> The Security Decree removed the opportunity for asylum based on humanitarian grounds, impeded access to healthcare services for asylum seekers, and redesigned Italy's migrant reception system.<sup>116</sup> The newly designed reception system removed integration assistance and basic medical support for adult asylum seekers and accompanied children and placed these groups in less-resourced facilities,<sup>117</sup> which proved to have deadly repercussions during the pandemic.

While some hoped the center-left Democratic Party of the Conte II government would roll back many of the reforms of the Security Decree, at the time of COVID-19's arrival in Italy, the government remained locked in the system of the previous administration.<sup>118</sup> When the virus hit, the government was ill-equipped and lacked the political will to implement far-

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112. Ramy Aziz, *Italy, Libya, and the Threat of Coronavirus*, WASH. INST. (Apr. 6, 2020), <https://www.washingtoninstitute.org/fikraforum/view/Italy-Libya-Coronavirus-COVID-Middle-East-Refugees-Migration>.

113. Hannah Roberts, *Italian far right uses migrants to push coronavirus fears*, POLITICO (Aug. 1, 2020), <https://www.politico.eu/article/coronavirus-adds-fuel-to-migration-fire/>.

114. Sebastien Carlotti, *Migration Policy and Health Insecurity: Italy's response to COVID-19 and the impact of the Security Decree*, 2 RIVISTA TRIMESTRALE DI SCIENZA DELL'AMMINISTRAZIONE 4 (Apr. 20, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3627946](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3627946).

115. See, e.g., Cristina Abellan Matamoros, *Italy's new security decree clamps down on immigration*, EURONEWS (Nov. 30, 2018), <https://www.euronews.com/2018/11/29/italy-s-new-security-decree-clamps-down-on-immigration>; Carlotti, *supra* note 114.

116. Carlotti, *supra* note 114, at 8–12.

117. *Id.* at 10–11.

118. *Id.* at 5, 19.

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reaching reforms.<sup>119</sup> The policies handed down from the Security Decree continued throughout 2020, served to thwart Italy's pandemic response by limiting healthcare among undocumented migrant and asylum seeker communities, increasing homelessness and thereby fostering conditions for community spread, and producing conditions in reception facilities that fuel the spread of the virus.<sup>120</sup> In one facility in Treviso in Northern Italy, COVID-19 rampaged through the population, infecting 256 of 293 residents (more than eighty-seven percent).<sup>121</sup>

Many of the policies actively implemented by the Italian government during the course of the pandemic continued to reflect the trends set by the Security Decree. On April 7, 2020, the Italian government issued an order declaring all Italian ports unsafe for landing due to COVID-19.<sup>122</sup> This restricted access for migrants and asylum seekers attempting to make the passage to Italy and raised "serious concerns that European Union countries will use the COVID-19 pandemic as an excuse to evade their responsibilities under international law to respond to boats in distress at sea."<sup>123</sup> Furthermore, the use of "quarantine vessels" to contain migrants and asylum seekers offshore, a tactic Italy began implementing in April 2020,<sup>124</sup> raises plausible concerns over whether rule of law is "arbitrarily suspended" in these environments.<sup>125</sup> In crafting its COVID-19 response vis-à-vis asylum seekers and migrant communities, Italy was unable to shake the anti-migration strains of its recent past.

## V. Conclusion

Article 1 of the Universal Declaration of Human Rights provides inter-alia that "all human beings are born free and equal in dignity and rights."<sup>126</sup> From the foregoing, however, it is clear that, as a result of the pandemic, the sufferings and hardship experienced by refugees the world over have increased. Refugees suffer a high level of inequality and discrimination as a result of their status, negating various provisions of the Universal

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119. *Id.* at 5–6, 13.

120. *Id.* at 6–13, 19.

121. Gaia Pianigiani & Emma Bubola, *As Coronavirus Reappears in Italy, Migrants Become a Target for Politicians*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/28/world/europe/coronavirus-italy-migrants.html>.

122. *Italy closes ports to refugee ships because of coronavirus*, AL JAZEERA (Apr. 8, 2020), <https://www.aljazeera.com/news/2020/4/8/italy-closes-ports-to-refugee-ships-because-of-coronavirus>.

123. *EU/Italy: Port Closures Cut Migrant and Refugee Lifeline*, HUMAN RIGHTS WATCH (Apr. 9, 2020), <https://www.hrw.org/news/2020/04/09/eu/italy-port-closures-cut-migrant-and-refugee-lifeline#>.

124. Dep't of Civil Protection, Transparent Administration, Decree of the Head of Department n. 1287 (Apr. 12, 2020), <http://www.protezionecivile.gov.it/amministrazione-trasparente/provvedimenti/-/content-view/view/1250434>.

125. Godfrey Baldacchino, *Extra-territorial quarantine in pandemic times*, POL. GEOGRAPHIC (Oct. 8, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7544444/>.

126. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc A/810, art. 1 (1948).

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Declaration of Human Rights.<sup>127</sup> From the suspension/restriction of movement and travel ban and the lack of access to healthcare, protection, sanitation, legal services, social security, through the confinement of refugees (which aggravated the spread of the virus in refugee and detention camps as its practically difficult for them to maintain social distancing), with little or no economic benefits including food and palliatives, to the suspension of the immigration process in some countries, refugees have no doubt suffered aggravated hardships, inequality, discrimination, and low level of required attention from federal/national, regional, and international leaders.<sup>128</sup>

The UNHCR reports that more than 21,000 out of the 26 million refugees worldwide have tested positive for the coronavirus across ninety-seven countries.<sup>129</sup> As if that were not enough, many governments closed their borders and suspended the immigration processes of millions of immigrants without offering them alternative options.<sup>130</sup>

The pandemic aggravated the sufferings and inequalities experienced by refugees the world over, unlike other populations. While in some countries where little to nothing was done to cushion the effect of the pandemic on refugees, some countries like Rwanda, Jordan, and Canada introduced commendable policies and efforts, which other countries are encouraged to observe and build upon. There is an urgent need for each federal government across the globe (individually, in collaboration, or both, with relevant national, regional, and international stakeholders) to introduce and actively implement strong policies and programs aimed at offering protection or treatment to all, including persons on the move.

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127. *See id.* at arts. 2, 3, 13, 15, 22, 23(1), and 26.

128. COVID-19 and Human Rights, UNITED NATIONS (Apr. 2020), [https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un\\_-\\_human\\_rights\\_and\\_covid\\_april\\_2020.pdf](https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf).

129. Global COVID-19 Emergency Response, UNHCR (Sept. 25, 2020), [https://reporting.unhcr.org/sites/default/files/25092020\\_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf](https://reporting.unhcr.org/sites/default/files/25092020_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf).

130. *Id.*

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## **International Section Ethics Committee**

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TIFFANY COMPRÉS, AND ROLAND POTTS<sup>1</sup>

This article reviews some of the most significant international legal developments made in the area of ethics in 2020.

### **I. Introduction**

2020, the year of COVID, witnessed more than the warp-speed development of several vaccines against the Coronavirus. Indeed, as the world tackled a pandemic, the application of justice and law has carried on. Four areas of interest that merit highlighting in 2020 are: (1) service of process abroad, and how the pandemic has impacted alternative service under Federal Rule of Civil Procedure Rule 4(f); (2) the nomination of Supreme Court justices in the United States; (3) the neutrality or non-neutrality of wing arbitrators; and (4) the tackling of corruption in the execution of contracts that are later arbitrated.

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## II. COVID Relief? Not From FRCP Rule 4

### A. OVERVIEW OF FRCP RULE 4(F)(3)

Federal Rule of Civil Procedure 4(f)(3) “permits a court to authorize a means of service on a foreign defendant so long as that means of service is not prohibited by international agreement and comports with constitutional notions of due process.”<sup>2</sup> Due process is satisfied when the method of service is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>3</sup>

In deciding whether to exercise their discretion to permit alternative service under Rule 4(f)(3), some courts have looked to whether there has been “(1) a showing that the plaintiff has reasonably attempted to effectuate service on the defendant, and (2) a showing that the circumstances are such that the court’s intervention is necessary.”<sup>4</sup> However, these considerations guide the exercise of discretion and are not akin to an exhaustion requirement.<sup>5</sup>

### B. RECENT, PRE-COVID APPLICATIONS OF FRCP RULE 4(F)(3)

In the years preceding the COVID-19 pandemic, by applying Rule 4(f)(3), trial courts have authorized a wide variety of alternative methods of service including email.<sup>6</sup> Some courts even authorized service of process through social media.<sup>7</sup>

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2. In re BRF S.A. Sec. Litig., No. 18-CV-2213 (PKC), 2019 WL 257971, at \*2 (S.D.N.Y. Jan. 18, 2019) (citing *Devi v. Rajapaska*, No. 11 Civ. 6634, 2012 WL 309605, at \*1 (S.D.N.Y. Jan. 31, 2012)).

3. *Id.* (citing *Luessenhop v. Clinton Cty.*, N.Y., 466 F.3d 259, 269 (2d Cir. 2006)).

4. *Id.* (citing *Devi*, 2012 WL 309605, at \*1).

5. *Id.* (citing *Wash. State Inv. Bd. v. Odebrecht S.A.*, No. 17 Civ. 8118, 2018 WL 6253877, at \*6 (S.D.N.Y. Sept. 21, 2018)); *accord* *United States v. Besneli*, No. 14 Civ. 7339, 2015 WL 4755533, at \*1 (S.D.N.Y. Aug. 12, 2015) (“Exhaustion of the other provisions of Rule 4(f) is not required before a plaintiff seeks court-ordered service.”); *S.E.C. v. Anticevic*, No. 05 CV 6991, 2009 WL 361739, at \*3 (S.D.N.Y. Feb. 13, 2009) (“A plaintiff is *not* required to attempt service through the other provisions of Rule 4(f) before the Court may order service pursuant to Rule 4(f)(3).” (emphasis in original)).

6. *Id.* at \*3 (internal quotations omitted) (citing *Rio Props., Inc.*, 284 F.3d at 1016).

7. *See, e.g.*, *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-cv-3240, 2016 WL 5725002, at \*2 (N.D. Cal. Sep. 30, 2016) (discussing decision to grant “service by email, Facebook, and LinkedIn because notice through these accounts was reasonably calculated to notify the defendant of the pendency of the action and was not prohibited by international agreement”); *UBS Fin. Servs. v. Berger*, No. 13-cv-03770, 2014 WL 12643321, at \*2 (N.D. Cal. Apr. 24, 2014) (recounting court’s decision to authorize service via defendant’s “[G]mail address and through LinkedIn’s ‘InMail’ feature”); *Tatung Co. v. Shu Tze Hsu*, No. SA CV 13-1743-DOC, 2015 WL 11089492, at \*2 (C.D. Cal. May 18, 2015) (“Courts routinely authorize email service under Rule 4(f)(3)” (citing cases)).

C. POST-COVID APPLICATIONS OF FRCP RULE 4(F)(3)

Opinions pertaining to alternative service through Rule 4(f) issued during the COVID-19 era in the United States are far from uniform. Take, for example, *Tevra Brands LLC v. Bayer Healthcare LLC*, in which the plaintiff sought an order from the court to authorize the plaintiff to serve the German defendants through their U.S.-based counsel by email.<sup>8</sup> Although a German court clerk confirmed that the German court received the plaintiff's service packets, the clerk explained that the court was partially closed due to the COVID-19 pandemic, that there was a considerable backlog of requests for service of foreign documents, and that it would likely be several months before service could be effectuated.<sup>9</sup> The plaintiff's counsel requested, due to the delay caused by COVID-19, that the German defendants' U.S.-based counsel accept service on the defendants' behalf under Rule 4(f).<sup>10</sup> The defendants' counsel refused to waive service and noted, "the COVID-19 related delays have only materialized in the last six to eight weeks, while the lawsuit has been pending for almost a year."<sup>11</sup>

The court agreed with the defendants' counsel, holding that the plaintiff did not act with diligence or care and that any delay in serving the defendants was due to the plaintiff's own errors—not the global pandemic.<sup>12</sup> The record reflected that the summons was issued in July of 2019, but the plaintiff did not attempt to serve a German translation of its complaint until a month later.<sup>13</sup> The plaintiff then attempted to effect service by contacting an attorney who was on secondment and who represented a non-party affiliate of the German defendants.<sup>14</sup> It was not until that attorney refused to accept service for the defendants—two months after initiating the lawsuit—that the plaintiff attempted service under the Hague Convention.<sup>15</sup> The first two service packets that the plaintiff sent to the German court were rejected due to errors.<sup>16</sup> The court stated that the plaintiff "inexplicably waited another month before making a third attempt at service. And all of these missteps took place before the COVID-19 pandemic caused any disruptions to the service of process in Germany."<sup>17</sup>

The court denied the plaintiff's motion for alternative service, but without prejudice, in case service on the German defendants through the Hague Convention was delayed and the plaintiff had good cause to renew its motion. The court reasoned:

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8. *Tevra Brands LLC v. Bayer Healthcare LLC*, No. 19-cv-04312-BLF, 2020 WL 3432700, at \*2 (N.D. Cal. June 23, 2020).

9. *Id.*

10. *Id.* at \*2.

11. *Id.*

12. *Id.* at \*4.

13. *Id.*

14. *Tevra Brands LLC*, 2020 WL 3432700, at \*4.

15. *Id.*

16. *Id.*

17. *Id.* (omitting citation).

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These are certainly unprecedented times as the hardships of COVID-19 weigh heavily on all facets of life. But where a plaintiff fails to show that service through the [Hague] Convention would be unsuccessful or result in unreasonable burden or delay, simply citing COVID-19 as an obstacle is not sufficient to bypass the requirements of the Hague Convention.<sup>18</sup>

The Eastern District of Michigan reached a similar conclusion in *Aerodyn Engineering, LLC v. Fidia Company*<sup>19</sup> In *Aerodyn*, the plaintiff requested that the Italian defendants waive personal service, citing circumstances surrounding the COVID-19 pandemic.<sup>20</sup> The defendants declined to waive service, accept service electronically, or allow their attorney to accept service papers on their behalf.<sup>21</sup> The plaintiff asked the court to “permit it to forgo service through Hague Convention procedures and instead serve [the Italian defendants] through the e-mail addresses provided” on the defendant’s website because “judicial efficiency would be served by permitting e-mail service, especially during the current COVID-19 pandemic.”<sup>22</sup> The court denied the motion for alternative service, finding that the plaintiff failed to “show[] that achieving service through the [Hague] Convention would be unsuccessful or result in unreasonable burden or delay.”<sup>23</sup>

Unlike in *Tevra Brands LLC*, the *Aerodyn* court did not extend sympathies to plaintiffs attempting service on foreign defendants during the COVID-19 pandemic. However, as in *Tevra Brands*, the *Aerodyn* court required a plaintiff, at a minimum, to attempt service through the Hague Convention before seeking an order approving alternative service under Rule 4(f).<sup>24</sup> Although Rule 4(f) does not explicitly require it, it seems some courts will nevertheless insist a plaintiff must make diligent service attempts through the Hague Convention prior to seeking an order approving alternative service, notwithstanding a global pandemic. Both court decisions illustrate that a plaintiff errs to presume that a U.S. court will permit service on a foreign defendant by alternative means solely because the pandemic continues to cause litigation delays.

But a different result was reached in *Convergen Energy LLC v. Brooks*.<sup>25</sup> In *Convergen*, U.S. plaintiffs emailed Spain’s Central Authority to see whether it was accepting requests for service through the Hague Convention or anticipated delays to such service due to the COVID-19 pandemic.<sup>26</sup> The

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18. *Id.* at \*5 (internal quotation omitted).

19. *Aerodyn Eng’g, LLC v. Fidia Co.*, No. 20-10896, 2020 WL 3000509, at \*1 (E.D. Mich. June 4, 2020).

20. *Id.* at \*1.

21. *Id.*

22. *Id.* at \*1-2.

23. *Id.* at \*2.

24. *Id.*

25. *Convergen Energy LLC v. Brooks*, No. 20-cv-3746, 2020 WL 40838353, at \*1 (S.D.N.Y. July 17, 2020).

26. *Id.* at \*2.

Central Authority responded that it “will not be able to ensure the processing of every request received for the duration of this exceptional situation. Legal proceedings are currently limited in Spain; therefore, only urgent requests, with due accreditation of said urgency, that have been electronically filed will be processed.”<sup>27</sup> Notwithstanding that service in Spain under the Hague Convention was unlikely while the pandemic persisted, the plaintiffs submitted a formal request to serve Spanish defendants and requested additional guidance from the Central Authority regarding which requests were deemed “urgent.”<sup>28</sup> In light of “[p]laintiffs’ attempts, the current pandemic, and the Central Authority’s response,” the Court concluded that service through Central Authority was unlikely to be effected any time soon, if at all.<sup>29</sup> The court ruling allowed service through alternative means and evaluated whether the proffered alternatives were not prohibited by international agreement and that they comported with constitutional notions of due process.<sup>30</sup>

Collectively, these opinions, focusing on alternative service under Rule 4(f) and decided during the COVID-19 pandemic, uniformly require the domestic plaintiff to make some attempt to serve the foreign defendant through the Hague Convention before seeking an order permitting service through alternative means. However, the courts have not yet reached a consensus on whether to exercise their discretion to allow alternative service where the plaintiff has not been diligent or has only expressed vague or hypothetical difficulties affecting service on foreign defendants due to the global pandemic. Surely, international litigants across the globe are united in their hope that the courts are not given many more opportunities to reach a consensus on this issue because the pandemic will have reached its end.

### **III. Changing the Supreme Courts: Comparison between the United States and the United Kingdom**

Sprinkled into the laundry list of events that will inevitably define 2020 for years to come is the appointment of the 115th Associate Justice to the U.S. Supreme Court. A week before one of the most contested presidential elections of our time, Justice Amy Coney Barrett was appointed to the Supreme Court by President Donald Trump.<sup>31</sup> Justice Barrett’s appointment marked the third appointment by the President and secured the 6-3 conservative majority of the Court—for the not so foreseeable future.<sup>32</sup> Filling the seat left open by the passing of the iconic Justice Ruth

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27. *Id.*

28. *Id.* at \*4.

29. *Id.*

30. *Id.* at \*5.

31. Joan Biskupic, *Amy Coney Barret joins the Supreme Court in unprecedented times*, CNN (Oct. 27, 2020), <https://www.cnn.com/2020/10/27/politics/amy-coney-barrett-joins-supreme-court-unprecedented/index.html>.

32. *Senate Confirms Amy Coney Barret for Supreme Court*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/articles/senate-confirms-amy-coney-barrett-supreme-court/> (White

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Bader Ginsberg, the nomination and inevitable appointment of Justice Barrett was anything but peaceable.<sup>33</sup> The actions of the President and members of the Senate put the appointment process and composition of the Court on the stand (for lack of a better word).<sup>34</sup> And unlike most other Supreme Court appointments, which rarely spark an interest in the mainstream, the appointment of Justice Barrett did just that.<sup>35</sup>

This article breaks down the process of nominating a Supreme Court Justice in the United States and the long-term implications on its legal system as a whole. It also compares the process with the relatively new system adopted by the United Kingdom.

A. U.S. SUPREME COURT

Under Article II Section 2, or the “Appointment Clause,” of the U.S. Constitution, the President “shall nominate and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court,”<sup>36</sup> showing the process by which Supreme Court Justices are selected.<sup>37</sup> Notably, the Constitution is silent with respect to the number of Justices that should sit on the Court.

Simply put, the appointment of a Supreme Court Justice is the coalition of power between the President and the Senate, where all it takes is a majority vote by the Senate to bestow a lifetime of power.<sup>38</sup> However, as 2020 taught us, the process is far more political than it appears on paper.<sup>39</sup> In fact, since

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House Website confirming the appointment of Justice Barrett to the Supreme Court); *see also* Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87> (An appointment which will undoubtedly affect the outcome of future decisions.).

33. *Amy Coney Barrett confirmed to US Supreme Court*, BBC NEWS (Oct. 27, 2020), <https://www.bbc.com/news/election-us-2020-54700307>.

34. *See id.* (quoting Vice President Harris: the “confirmation was a ‘disgrace, not only because of what [Barrett] will do when she gets on the bench, but because of the entire process”).

35. Scott Clement and Emily Guskin, *Majority Says Winner of Presidential Election Should Nominate Next Supreme Court Justice, Post-ABC Poll finds*, WASH. POST (Sept. 25, 2020), at 2:00 pm EST, [https://www.washingtonpost.com/politics/poll-supreme-court-ginsburg-trump-biden/2020/09/25/0f634e6c-fe6a-11ea-8d05-9beaaa91c71f\\_story.html](https://www.washingtonpost.com/politics/poll-supreme-court-ginsburg-trump-biden/2020/09/25/0f634e6c-fe6a-11ea-8d05-9beaaa91c71f_story.html) (Ginsburg’s death jolted the issue of Supreme Court nominations to the forefront of the presidential campaign . . .).

36. U.S. Const. art. 2 § 2, cl. 2.

37. Barry J. McMillion, U.S. Congressional Research Service, *Supreme Court Nominations, 1789 to 2018: Actions by the Senate, the Judiciary Committee, and the President* (RL 33225; October 9, 2020), <https://fas.org/sgp/crs/misc/RL33225.pdf>.

38. *Id.* (The President will nominate an individual, then the Judiciary Committee (a special committee of senate members) will vet the candidate, which is followed by a Senate vote. If tied the Vice President, supervising the vote, is the tiebreaker.).

39. Barry J. McMillion, U.S. Congressional Research Service, *Final Action by the Senate on Supreme Court Nominations During Presidential Election Years (1789-2020)* (IN 11519; October 20, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11519>; *Why US Top Court is so much more political than UK’s*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035>.

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2010, the appointment of a Supreme Court Justice is a President's self-fulfilling prophecy.<sup>40</sup>

It is not surprising that one of the most contested factors of this process is the President's role in selecting who will be appointed to the Court.<sup>41</sup> In fact, the question that immediately hit the mind of many as President Trump shared his shortlist of candidates was: why does he get to decide?<sup>42</sup> The answer: "[t]here is no clear view as to why the president was granted this power."<sup>43</sup> All we know is they have this power under the Constitution and have wielded it to promote their ideological beliefs far beyond the time they leave office.<sup>44</sup>

However, while the President picks the marionette, the Senate is the real puppet master pulling the strings.<sup>45</sup> Without the Senate's approval, a Supreme Court nominee is nothing more than that. The Senate holds the ultimate control in approving a new Justice, and we saw this reality all too well in 2016 when the Senate ignored President Obama's nomination of Merrick Garland.<sup>46</sup> But why wasn't that the reality in 2020? Why did the Senate not push back? Two words: partisan split.

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40. Elizabeth Diaz and Adam Liptak, *To Conservatives, Barrett Has 'Perfect Combination' of Attributes for Supreme Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/09/20/us/politics/supreme-court-barrett.html>; see also *Why US Top Court is so much more political than UK's*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035> ("Things changed in 2010, with the retirement of [Justice] Stevens . . . . Since then, all nominations by Democrats have been liberal while all those appointed by Republicans are conservative. . . .").

41. *Id.*; Henry B. Hogue, U.S. Congressional Research Service, *Supreme Court Nominations Not Confirmed, 1789- August 2010 RL 31171* (August 20, 2010), <https://fas.org/sgp/crs/misc/RL31171.pdf> ("The 20th Century saw six confirmation failures: John J. Parker by President Hoover in 1930, Abe Fortas to be Chief Justice by President Lyndon Johnson in 1968, Homer Thornberry by President Lyndon Johnson in 1968, Clement F. Haynsworth Jr. by President Nixon in 1969, G. Harrold Carswell by President Nixon in 1970, Robert H. Bork by President Reagan in 1987, John G. Roberts, Jr., by President George W. Bush in 2005 and Harriet E. Miers, also by President Bush in 2005.").

42. Jared Mondschein, *This is why the fight over the Supreme Court could make the US presidential election even nastier*, THECONVERSATION.COM (Sept. 19, 2020), <https://theconversation.com/this-is-why-the-fight-over-the-supreme-court-could-make-the-us-presidential-election-even-nastier-146541>.

43. *Why US Top Court is so much more political than UK's*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035> (quoting Bruce Ackerman, Sterling Professor of Law at Yale University.).

44. Henry B. Hogue, U.S. Congressional Research Service, *Supreme Court Nominations Not Confirmed, 1789- August 2010 RL 3117*, (August 20, 2010), <https://fas.org/sgp/crs/misc/RL31171.pdf>.

45. Barry J. McMillion, U.S. Congressional Research Service, *Supreme Court Nominations, 1789 to 2018: Actions by the Senate, the Judiciary Committee, and the President RL 33225* (October 9, 2020), <https://fas.org/sgp/crs/misc/RL33225.pdf>.

46. Eric Bradner, *Here's what happened when Senate Republicans refused to vote on Merrick Garland's Supreme Court nomination*, CNN (Sept. 20, 2020), <https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html> (The senate refused to

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The key difference between 2016 and 2020 was the party affiliations of the President and Senate.<sup>47</sup> Unlike in 2020 where both the President and Senate shared an affiliation to the Republican Party, in 2016 President Obama, a Democrat, was met with opposition from a Republican-dominated Senate.<sup>48</sup> The partisan split, which led to the inevitable failure in President Obama's attempt to fulfill his constitutionally mandated right, and resulted in the appointment of conservative Justice Gorsuch by President Trump shortly thereafter.<sup>49</sup> This is the very issue at the heart of the appointment process.<sup>50</sup>

But how do we address it? Many argue the best way is to go out and vote: the more votes cast for our representatives, the more likely we reach the democratic idealism the Constitution was founded upon. Others prefer to "pack the courts"—where the size of the Court is increased to allow for a more neutral operation.<sup>51</sup> Despite not being a Constitutional requirement, however, the Court's composition, made up of nine justices, has remained unchanged since the Civil War. Yet another possibility is to change the appointment process altogether, which would, of course, require a Constitutional amendment. If this alternative were chosen, the United States could look to its brothers and sisters across the pond.<sup>52</sup>

## B. UK SUPREME COURT

Prior to 2009, a group of judges known as the "Law Lords" ruled on all final appeal hearings and judgments in the United Kingdom.<sup>53</sup> In 2009, however, the Law Lords were replaced by the Supreme Court, modernizing the court to simulate that of other modern nations.<sup>54</sup> This modernization acted as the final separation between the judicial and legislative branches of

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accept or vote on Merrick Garland, claiming that a nomination during an election year was inappropriate.).

47. *Amy Coney Barrett confirmed to US Supreme Court*, BBC NEWS (Oct. 27, 2020), <https://www.bbc.com/news/election-us-2020-54700307>.

48. *Id.*

49. Tessa Berenson, *How Neil Gorsuch's Confirmation Fight Changed Politics*, TIME (April 7, 2017), <https://time.com/4730746/neil-gorsuch-confirmed-supreme-court-year/>.

50. Eric Bradner, *Here's what happened when Senate Republicans refused to vote on Merrick Garland's Supreme Court nomination*, CNN (Sept. 20, 2020), <https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html>.

51. Elizabeth A. Moore, *What is Court Packing?*, RUTGERS (Oct. 27, 2020), <https://www.rutgers.edu/news/what-court-packing> (There has only been one failed attempt in 1937: "FRD proposed the plan in response to a series of Supreme Court decisions that struck down New Deal legislation. . . The plan failed in Congress . . .").

52. *Why US Top Court is so much more political than UK's*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035>.

53. UK Parliament, *Law Lords*, PARLIAMENT.UK (2009), <https://www.parliament.uk/about/mps-and-lords/about-lords/lords-types/law-lords/>.

54. *Id.* (The court "acts as a final court of appeal in cases of major public importance.").

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parliament.<sup>55</sup> Today, an independent commission “chaired by the president of the court” takes on the role of selecting a candidate for the Court.<sup>56</sup> Upon selection, the name is sent to the justice secretary who either accepts or rejects the name.<sup>57</sup> If accepted it is sent to the prime minister, who passes the recommendation to the Queen, in charge of making the final appointment.<sup>58</sup> However, this change did not come without its resistance and would raise a number of red flags if attempted by the United States.<sup>59</sup>

Specifically, the purpose the U.K.’s Court serves differs greatly from that in the United States. In the United Kingdom, there is no codified constitution,<sup>60</sup> and the Supreme Court does not have the ability to strike down a law as unconstitutional—a power which is vested in the U.S. Supreme Court.<sup>61</sup> This power undeniably renders the US Supreme Court more political than its UK counterpart—where the court only has the power to interpret laws with no involvement in key political decisions.<sup>62</sup> Further, the UK’s Supreme Court rarely sits *en banc*, and no justice can be over the age of 75.<sup>63</sup>

These differences not only affect the dynamic of the Court itself, but similarly, they play an important role in the process of selecting and nominating individuals to sit on the highest court in the land. There is a strong argument to be made that the current process in the United States is arbitrary based on the composition of the Senate at the time of an appointment; however, without an alternative that can effectively keep the constitutional process in place, we are left to deal with the repercussions of codified procedures left to us by our forefathers.

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55. Edwin Moore-Gillon, *Transition of the Appellate Jurisdiction of the House of Lords to the Supreme Court of the United Kingdom*, LEXOLOGY (2009), <https://www.lexology.com/library/detail.aspx?g=AC33b5c5-417c-4547-b6f6-034e4a06b916>.

56. *Id.*

57. *Id.*

58. *Id.* (quoting Alison Young, Professor of Public Law at the University of Cambridge) (“We have a completely independent process. . . It’s almost seen like an internal promotion system rather than a politicized process.”).

59. Michael Ryle, *Should the Law Lords have left the House of Lords?*, SUPREMECOURT.UK (Nov. 14, 2018), <https://www.supremecourt.uk/docs/speech-181114.pdf>.

60. *Why US Top Court is so much more political than UK’s*, BBC NEWS (Sept. 21, 2020), <https://www.bbc.com/news/world-us-canada-45632035> (“[T]he UK has no codified, written constitution.”).

61. *Id.*

62. *Id.*; see also Dominic Casciani, *What is the UK Supreme Court?*, BBC NEWS (Jan. 13, 2020), <https://www.bbc.com/news/uk-49663001> (“Only Parliament can pass or cancel law. . . . If the justices think a law conflicts with human rights safeguards, it can tell Parliament . . . but the government is under no legal obligation to act.”).

63. *Id.*; Michael Ryle, *Should the Law Lords have left the House of Lords?*, SUPREMECOURT.UK (Nov. 14, 2018), <https://www.supremecourt.uk/docs/speech-181114.pdf>.



#### **IV. Birds of a Feather: Do Wing Arbitrators Flock Together—Neutrally?**

“As an initial matter, it is not surprising that CEL’s party-appointed arbitrator dissented from the Panel majority’s decision, as “[i]n the main party-appointed arbitrators are supposed to be advocates.”<sup>64</sup>

Choosing an arbitrator is one of the most important, if not *the* most important, decisions parties make in an arbitration. When the arbitral tribunal is composed of three arbitrators and two are unilaterally party-appointed (so-called wings), the question arises as to the role of the wing arbitrators. Expectations of wing arbitrators have shifted over the years, especially in the United States with the 2004 reversal of the American Bar Association’s (ABA) position on the role of wing arbitrators. Now, wings are expected to be fully neutral and impartial. However, over fifteen years later, attitudes have proven hard to change, especially in the United States. In international arbitration the calculus becomes more complicated, considering the legal culture of the potential arbitrators and the parties.<sup>65</sup> This article will address the evolving role of the wing and what paths we may chart for tripartite panels in the future.

##### **A. PERCEPTIONS OF WING ARBITRATORS**

Scholars have long debated the effect of unilateral party-appointment of arbitrators.<sup>66</sup> A full 88.8 percent of respondents to a 2013 survey believe that party-appointed arbitrators are at least sometimes “predisposed toward the party that appointed them even when the applicable procedures require them to be independent and impartial.”<sup>67</sup> This is not an insignificant

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64. *Pioneer Navigation Ltd. v. Chem. Equip. Labs, Inc.*, No. 119CV02938DABSDA, 2019 WL 8989864, at \*12 (S.D.N.Y. Dec. 11, 2019), report and recommendation adopted, No. 119CV02938GHWSA, 2020 WL 1031082 (S.D.N.Y. Mar. 3, 2020) (quoting *Certain Underwriting Members of Lloyds of London v. Fla., Dep’t of Fin. Servs.*, 892 F.3d 501, 508 (2d Cir. 2018) (citing *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002))).

65. See, e.g., Lisa Bench Nieuwveld, *Oral Hearing and Party-Appointed Arbitrators: Guess?? Yep! That’s Who Appointed Them!*, Kluwer Arbitration Blog (April 20, 2011), <http://arbitrationblog.kluwerarbitration.com/2011/04/20/oral-hearing-and-party-appointed-arbitrators-guess-yep-thats-who-appointed-them/>.

66. See Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, AM. REV. OF INT’L ARB. 368-73; Jan Paulsson, *Moral Hazard in International Dispute Resolution*; Presented to the Institute for Transnational Arbitration – Dallas; June 2010, 7(1) WORLD ARB. & MEDIATION REV. 205 (2013); Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L.J. 59 (1995); Dominique Hascher, *Independence and Impartiality of Arbitrators: 3 Issues*, 27 AM. U. INT’L REV. 789 (2012). See also Seth H. Lieberman, Note, *Something’s Rotten in the State of Party-appointed Arbitration: Healing ADR’s Black Eye that Is “Nonneutral Neutrals,”* 5 CARDOZO ONLINE J. CONF. RES. 10 (2004).

67. Thomas Stipanowich, and Zachary Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators* (2014) at 426, COLUMBIA AM. REV. OF INT’L

number. A full 27.3 percent believed this to be the case at least half of the time.<sup>68</sup> Two other studies show that dissenting opinions are almost always (in upwards of ninety-five percent of cases) written by the arbitrator nominated by the losing party.<sup>69</sup> Statistical analyses of ICJ judgments similarly show that in approximately ninety percent of cases, ad hoc judges vote with the party that appointed them.<sup>70</sup>

These statistics call into question whether unilateral party appointments are actually party advocates by a different name. This may be the result, at least in part, of two related facts: (1) there is lingering disagreement about the role of party-appointed arbitrators, and (2) there is inherent conflict between the ethical expectation of neutrality and the practical reality on the ground—namely, parties want to win and will use every advantage they can, and arbitrators want to be re-appointed.<sup>71</sup>

As a whole, the perception seems to be that—contrary to the “Beckett Effect” (i.e., the supposed realization of an arbitrator, once appointed, that his or her “overriding objective should be to arrive at a good decision, not to . . . serve the narrow interest of the party who appointed them”<sup>72</sup>)—wing arbitrators do sometimes, even often, act in ways that favor the appointing party. Is this partiality desirable, and if so, why?

## B. THE ROLE(S) OF THE WING

As noted above, the ABA famously revised its Code of Ethics for Arbitrators in Commercial Disputes in 2004, reversing its traditional position that unilaterally party-appointed arbitrators are expected to favor their appointing party.<sup>73</sup> As Jan Paulsson later stated, “overt acceptance

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ARB., Vol. 25, 2014, Pepperdine University Legal Studies Research Paper No. 2014/30, available at <https://ssrn.com/abstract=2519196>.

68. *Id.*

69. See Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly*, 2003 Freshfields Lecture, 20 *Arbitration International* 223 (2004); Eduardo Silva Romero, *Brèves observations sur l'opinion dissidente*, *Les arbitres internationaux in Société de législation comparée* at 179-186 (2005).

70. Yuval Shany, *Squaring the Circle? Independent and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 *LOY. L.A. INT'L & COMP. L. REV.* 473 (2008), available at <http://digitalcommons.lmu.edu/ilr/vol30/iss3/8> (hereinafter, “Shany”).

71. Two recent cases illustrate these tensions. In *Pao Tatneft v. Ukraine*, No. CV 17-582 (CKK), 2020 WL 4933621, at \*2 (D.D.C. Aug. 24, 2020), (a decision rendered in August 2020 and currently on appeal, the wings chose the president of the tribunal. While the parties were preparing their final submissions on the merits, the law firm representing Pao Tatneft offered an appointment in a different arbitration.)

72. Manuel Conthe, *Paulsson's Nirvana Fallacy*, *SPAIN ARB. REV.*, N.º 29/2017 (June 2017), p.45.

73. See Stephen G. Yusem, *Comparing the Original with the Revised American Bar Association-American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes in Metropolitan Corp. Couns.* (July 2004), pp. 38, 38–39, 64 (“the judiciary has generally supported the concept of non-neutrality both before and after the adoption of the original Code. The original Code assumed that the business community desired and expected non-neutrality;

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‘non-neutral arbitrators’ . . . is no longer accepted in the international community.”<sup>74</sup>

Being a new position that supplants decades of practice, it comes as no surprise that adjudicators often have deeply ingrained instincts to overcome. Indeed, as recently as 2020, the Southern District of New York issued an opinion stating, with respect to an international arbitration award under challenge, that: “[i]t is not surprising that CEL’s party-appointed arbitrator dissented from the Panel majority’s decision, as ‘[i]n the main party-appointed arbitrators are supposed to be advocates.’”<sup>75</sup>

Several scholars have argued in favor of party-appointed wing arbitrators. Yubal Shany summarized certain aspects of these benefits succinctly, stating that party-appointed wings:

[s]erve the parties’ interests in two important ways. First, they monitor the proper and fair conduct of the adjudicative process. Second, they ensure that the appointing parties’ positions and interests are properly understood and considered by the tribunal. On a more abstract level, they also help to maintain the confidence of the parties in the adjudicative process and preserve some, albeit modest, degree of control over the process.<sup>76</sup>

Similarly, Manuel Conthe suggests that party-appointed arbitrators should act as the appointing party’s “due process watchdog,” “monitor,” or “Ombudsperson.”<sup>77</sup> Similarly, Catherine Rogers has argued that party-appointed wings serve the important function of devil’s advocate to counteract Groupthink, confirmation bias, free riding, and other psychological traps:<sup>78</sup>

By systematically but constructively second-guessing the majority, and expressly challenging it when appropriate, party-appointed arbitrators

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however, the modern rules of the major institutional ADR providers require neutrality for party-appointed arbitrators”).

74. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law (Apr. 29, 2010), ICSID REVIEW - FOREIGN INVESTMENT L. J., Volume 25, Issue 2, Fall 2010, available at <https://doi.org/10.1093/icsidreview/25.2.339>.

75. *Pioneer Navigation*, 2019 WL 8989864, at \*12; *Certain Underwriting Members of Lloyds of London v. Fla., Dep’t of Fin. Servs.*, 892 F.3d 501, 508 (2d Cir. 2018) (citing *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002)).

76. Shany, *supra* note 70 (citing Anreas Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT’L L.J. 59, 62 (1995)).

77. Conthe, *supra* note 72, at 55-56.

78. Catherine A. Rogers, *Ethics in International Arbitration*, Oxford University Press, 2014, Chapter 8, par. 8.51-8.69. (Rogers describes Groupthink as “a phenomenon developed by cognitive psychologist Irving Janis. Through his research, Janis demonstrated that Groupthink is a ‘mode of thinking that people engage in when they are deeply involved in a cohesive ingroup, when the membersp [sic] striving for unanimity override their motivation to realistically appraise alternative courses of action’. Groupthink ‘occurs when the decision-making capabilities of a panel become affected by subtle peer pressure’”).

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can improve the process . . . . The threat and potential reality of publishing a dissent is part of this process of challenge that promotes accountability. It can also promote party confidence in a process that lacks any form of appellate review[] and is regarded as creating some potentially perverse incentives for overly eager agreement by arbitrators with co-panelists in order to secure future appointments.<sup>79</sup>

Others have pointed out that party-appointed wings democratize the process and allow for each party to feel culturally understood. Certainly, party-appointed arbitrators satisfy a party's craving for a sense of control. Many of these benefits can be achieved by institutionally appointed wing arbitrators, but parties will chafe at the lack of control. Ultimately, none of these benefits or solutions address the inherent conflict of interest that unilaterally appointed arbitrators face when they know who hired them. Can we accomplish these worthy goals while avoiding such a conflict?

C. TOWARD A BETTER STRUCTURE

If unilaterally party-appointed arbitrators are guardians of due process for their appointing party, then why not simply say as much in the arbitration clause? Perhaps we fear that doing so would render them "partisans once removed from the actual controversy."<sup>80</sup> Conthe has suggested a neutrality pledge as a possible antidote.<sup>81</sup> Others have suggested blind appointments where the arbitrators do not know which party appointed them,<sup>82</sup> which will not always work, as an arbitrator's track record could give him or her away. There may be other solutions not considered here. However, a larger issue remains: what if each party appoints its arbitrator with a different approach to the proceedings, and as a result, one wing is a champion of the party that appointed it, and the other a stalwart neutral? This would create a significant imbalance in the proceedings. In theory, this prisoner's dilemma could be resolved by open communication about each party's selection,<sup>83</sup> but in practice, it is difficult to envision such collaboration.

The best choice seems to be, not that all arbitrators on a tri-partite tribunal be appointed by an institution, but instead that both wings be appointed jointly by the parties and the wings choose the chair. This would ensure that the parties have input in the selection of the arbitrators, bolstering confidence in the proceedings, while preventing bias in favor of one appointing party. The benefits of party-appointed arbitrators that Conthe and Rogers point out can still be achieved by an internal division of labor. At a minimum, the international and domestic arbitration communities must come to a unified approach on the purpose and role of

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79. Rogers, *supra* note 78, par. 8.60-8.61.

80. *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962).

81. Conthe, *supra* note 72, at 59.

82. Paulsson, *supra* note 74.

83. See Conthe, *supra* note 72, at 58-59.

wings: they should be flying in the same direction—either both as cheerleaders, or both as neutral as the chair of the tribunal.

## **V. Ethical Obligations of Arbitrators in Cases Tainted by Corruption**

As global trade continues to expand, those looking to illicitly gain from that trade seem to find endless possibilities. While the volume of global trade in 2019 was estimated at USD \$18.89 trillion,<sup>84</sup> the annual cost to global trade from corruption and bribery for the same period was an estimated USD \$3.6 trillion<sup>85</sup> and USD \$1.5 trillion<sup>86</sup>, respectively. The United Nations (U.N.) has listed corruption as one of the biggest impediments to reaching its 2030 Sustainable Development Goals.<sup>87</sup> Given the amount of corruption in the world, it is likely many contracts are tainted by corruption in international commerce. It is no wonder then that disputes arising from international transactions and investments may be touched by corruption.

What a tribunal can and should do when faced with these ills of international commerce is as important to stamping out corruption as are government initiatives. Some would argue even more so, since, given the largely confidential nature of arbitrations, not dealing with corruption in contract disputes can not only be ethically precarious, but it gives ne'er-do-wells an avenue to litigate illicit activities that they would otherwise be foreclosed from litigating.

### **A. SHOULD A TRIBUNAL INVESTIGATE?**

International arbitration tribunals may be faced with the issue of corruption in one of two ways. First, when it is raised by one of the parties to the arbitral proceeding. Second, a tribunal may spot indicia of corruption while reviewing the facts.<sup>88</sup> Once identified, the tribunal will be faced with the dilemma of the scope of its duties and jurisdiction to act because arbitrators may only exercise jurisdiction over the issues submitted to it for

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84. Press Release, WTO, Trade Set to Plunge as COVID-19 Pandemic Upends Global Economy (Apr. 8, 2020).

85. Stephen Johnson, *Corruption is Costing the Global Economy \$3.6 Trillion Dollars Every Year*, WORLD ECONOMIC FORUM (Dec. 13, 2018), <https://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n>.

86. Norman Eisen et al., *The TAP-Plus Approach to Anti-Corruption in the Natural Resource Value Chain*, BROOKINGS (June 28, 2020), <https://www.brookings.edu/research/the-tap-plus-approach-to-anti-corruption-in-the-natural-resource-value-chain/>.

87. See Johnson, *supra* note 85.

88. Domitille Baizeau & Tessa Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, WOLTERS KLUWER 225, 233-234 (Kluwer L. Int'l 2017) ("It is uncontroversial that the tribunal may, and indeed should, examine allegations of corruption when raised by a party . . . corruption entails public interests beyond those of the parties, setting corruption apart from standard legal arguments which a party may fail to raise or prove.").

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resolution.<sup>89</sup> Given this restriction, does an arbitrator, who, on their own, identifies corruption, have to ignore his/her perceived red flags?

Some international arbitration practitioners have stated that “it is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption where none is alleged.”<sup>90</sup> This reasoning, *ultra petita*, embraces one of the main tenets of arbitration, which is that a tribunal may not delve into an issue not referred to arbitration.<sup>91</sup>

But is tackling corruption an issue of exceeding the arbitrator’s scope of power or does the question of corruption and stamping it out rise above arbitrable issues, and instead reach a question of an arbitrator’s role in protecting the process?<sup>92</sup> The trend and modern-day consensus is that arbitrators have a duty to investigate red flags on their own initiative.

One way some tribunals have reached the question of corruption, even when not brought up by a party, is framing the inquiry in terms of jurisdiction. If a tribunal took the view that the issue of corruption concerns the very existence of a contract, then the tribunal’s jurisdiction might be implicated. In that case, only an investigation of the corruption may provide clarity “as to the validity of the main contract, the claims under that contract and/or the arbitration agreement.”<sup>93</sup>

Nevertheless, some tribunals still decline to investigate corruption. In *TSA Spectrum de Argentina S.A. v. Argentine Republic*, for example, the tribunal declined to investigate the corruption where “the available materials” did not establish illegality, and “investigations and proceedings in Argentina were still going on.”<sup>94</sup> In short, the tribunal in that instance punted the corruption issue to state authorities, avoiding the many difficult questions that arise once the tribunal decides to investigate corruption, such as what standard of proof to apply and how to fashion a remedy, discussed further below.

Interpretation of current laws and policies seem to support a more inquisitorial position. For example, one of the grounds for setting aside an award under the New York Convention is that recognition or enforcement of the award would be contrary to the public policy of the country where

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89. Jiménez, Felipe, *Arbitration: A Creature of Contract?* (July 21, 2020), <http://dx.doi.org/10.2139/ssrn.3657506> (“ . . . and, therefore, arbitration—is a creature of law.”).

90. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 153 (3d ed. 1999).

91. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(c), June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

92. See Baizeau & Hayes, *supra* note 88, at 235 (“Whether arbitrators have an accompanying duty to report suspicions of corruption to national authorities is somewhat controversial. Some consider that such an obligation ‘would be totally incompatible with the private nature of their mission and the trust the parties have in them,’ while the opposing view is that arbitrators have duties to the international community beyond their responsibilities to the parties.”).

93. AJ van den Berg, *International Commercial Arbitration: Important Contemporary Questions* 239 (1st ed. 2003).

94. *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, ¶ 175 (Dec. 19, 2008).

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enforcement is sought.<sup>95</sup> It goes without saying that corruption violates public policy in most countries, even ones that routinely embrace it in practice.<sup>96</sup>

Indeed, recent decisions highlight the fact that fraud and corruption, no matter when identified, can serve as grounds to set aside an award, if not dealt with in the underlying claim. An English High Court recently granted Nigeria an extension of time to challenge a USD \$6.6 billion arbitration award based on Sections 67 and 68 of the 1996 United Kingdom Arbitration Act under a theory of fraud in the procurement of the contract.<sup>97</sup> Incredibly, Nigeria's application for extension of time was more than four years past the 28-day time limit for challenging an award in England.<sup>98</sup> Nevertheless, because Nigeria's central contention for the late challenge is that it had previously been unaware that the initial contract had been procured by fraud, the High Court was persuaded Nigeria should be allowed to present its challenge.<sup>99</sup>

Perhaps, seeking to avoid challenges to arbitral awards years later, a growing body of decisions indicate that tribunals should make the inquiry into corruption on their own when confronted with information that would give them pause in ruling.<sup>100</sup> The case of *World Duty Free Company v Republic of Kenya* is indicative of how the old norm of *ultra petita*, with respect to investigating corruption, is giving way to a more affirmative duty for arbitrators to investigate corruption when facts surface that would warrant such an investigation, even in the absence of claims or defenses being raised by the parties. In *World Duty Free*, the alleged corruption was not pleaded or in any way submitted to the tribunal for determination. In reference to the corruption, the tribunal held that “. . . an Arbitral Tribunal does not normally roam around to find and determine issues the parties have not for themselves raised for determination.”<sup>101</sup> In a subsequent set-aside application, however, a Kenyan High Court disagreed with the tribunal,

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95. See New York Convention art. V(2)(b) (“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”).

96. *The Federal Republic of Nigeria v Process & Indus. Devs.*, [2020] EWHC 2379 (Comm); *World Duty Free Co. v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006) (The tribunal held that World Duty's expropriation claim based on “contracts obtained by corruption” could not be upheld by the tribunal because such bribery contravened international public policy).

97. *Nigeria v Process & Indus.*, EWHC 2379 at 277.

98. *Id.*

99. See *id.*

100. *China Mach. New Energy Corp. v Jaguar Energy Guat. LLC & AEI Guat. Jaguar Ltd.*, SGHC [2018] SGHC 101.

101. *World Duty Free Co. v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 34 (Oct. 4, 2006).

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holding that a “tribunal ought to pause and interrogate corruption if it is present even if it was not pleaded.”<sup>102</sup>

**B. WHAT STANDARD SHOULD A TRIBUNAL APPLY?**

Where a tribunal decides to investigate allegations of corruption, it is often confronted with a key question, what standard of proof should apply to the facts to determine whether they sustain the allegation? There is no consensus on the applicable standard, and it has been difficult to fashion a standard when each State has a different standard. One method, the “red flags” method, in corruption analysis, originated with the U.S. Foreign Corrupt Practices Act as warning signs of possible illicit activity by an intermediary.<sup>103</sup> They are recognized by numerous international soft law instruments.<sup>104</sup> “As a preventive tool, they warn a principal of potential risks that, if ignored, could result in liability in statutes that criminalize corruption based on willful ignorance as well as knowledge.”<sup>105</sup> On the other hand, the “connect the dots” approach was coined by the Tribunal in *Methanex Corporation v. United States of America*.<sup>106</sup> This theory held that “while individual pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events, which will support” a claim.<sup>107</sup> In *Oostergetel v. Slovak Republic*, the tribunal observed that “[f]or obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial evidence.”<sup>108</sup>

Regardless of which standard of proof is applied, at a minimum, something at or above “clear and convincing” evidence is required.<sup>109</sup> In *ECE Projektamngement v Czech Republic*, the tribunal cautioned that the “mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.”<sup>110</sup> While the tribunal there was willing to “connect the dots,” it noted, “the dots have to exist and they

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102. Kenya Airport Auth. v World Duty Free Co., (High Court of Kenya, Nairobi, misc. application no. 67 of 2013) ¶ 38, (Oct. 5, 2018).

103. See U.S. Dep’t of Justice & U.S. Sec. & Exch. Comm’n, A Resource Guide to the Foreign Corrupt Practices Act 22–23 (2012).

104. See, e.g., Int’l Chamber of Commerce, Guidelines on Agents, Intermediaries and Other Third Parties (2010).

105. Lucinda A. Low, *Dealing with Allegations of Corruption in International Arbitration*, AJIL UNBOUND 113, 341-345 (2019).

106. Methanex Corp. v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005).

107. *Id.* at part III, ch. B, ¶ 2.

108. Oostergetel & Laurentius v. Slovak Republic, UNCITRAL, Final Award, ¶ 303 (Apr. 23, 2012).

109. See EDF (Servs.) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009) (“There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.”).

110. ECE Projektamngement v. Czech Republic, UNCITRAL, PCA Case No. 2010-5, Award, ¶ 4.876 (Sept. 19, 2013).



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must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.”<sup>111</sup>

C. THE TRIBUNAL FOUND THE CONTRACT TAINTED BY  
CORRUPTION. NOW WHAT?

In every incident of corruption, there is a giver and a receiver. But how does a tribunal reach a fair result when both sides have engaged in corruption? In other words, to what extent can an arbitral tribunal do “justice” in a dispute tainted by corruption? Should it dismiss the arbitration, or should it ignore the bribery and consider the merits of the dispute? Or should it seek a middle ground – for instance, disgorgement or contributory fault?

In some instances, tribunals have looked to one enduring principle of arbitration: that the parties’ bargain is not technical justice of the state but justice as the merchant understood it.<sup>112</sup> This expectation is the wellspring of the doctrine of *lex mercatoria*, which in turn fundamentally underpins the non-precedential nature of arbitration—because it was never intended that any case should be the authority for the other.<sup>113</sup>

For example, in *World Duty Free Company*, the tribunal held that the corruption (bribes) to the President of Kenya was not attributable to Kenya. As a result, the tribunal found that based on international public policy, *World Duty Free Company* was not entitled to maintain any action against Kenya, and Kenya was entitled to rescind the agreement, and in doing so, the tribunal put the parties back in the place they would have been, had the contract never existed, fashioning a result that did not award either party for their respective malfeasance.<sup>114</sup>

In a somewhat novel solution, the tribunal in *In Spentex Netherlands B.V. v. Republic of Uzbekistan* ordered the state to either (1) donate USD \$8 million to a United Nations anti-corruption fund, or (2) pay the costs of the proceedings and reimburse seventy-five percent of the investor’s legal fees.<sup>115</sup>

The continuing progression and development of the “right” way to deal with corruption in an arbitral proceeding will continue to develop over time. And, although arbitrators may be guided by *lex mercatoria* in fashioning the appropriate relief, prior cases provide good exemplars of what can be done.

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111. *Id.* ¶ 4.879.

112. Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934).

113. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, J. INT’L DISP. SETTLEMENT, vol. 2, 5, 8 (2011) (“judicial decisions state, but do not create law”).

114. See *EDF (Servs.) Ltd.*, *supra* note 109, ¶ 188 (“In conclusion: The Respondent, Kenya, was legally entitled to avoid and did avoid legally by its Counter-Memorial dated 18 April 2003 the ‘House of Perfume Contract’”).

115. David M. Orta, et. al., *Allegations of Corruption in Investment Treaty Arbitration: The Need for Reform*, EXPERTGUIDES (Sept. 17, 2019), <https://www.expertguides.com/articles/allegations-of-corruption-in-investment-treaty-arbitration-the-need-for-reform/arkesfdy>.

## Customs Law

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### I. Introduction

This Article summarizes important developments in 2020 in customs law, including United States judicial, legislative, administrative, executive, and trade developments.

2020 has been a year like no other for practitioners in the customs and trade space. As we look towards 2021, it is worth reflecting on a few critical developments in customs and international trade law. Each has shaped and influenced how we practiced trade in 2020, despite significant challenges caused in large part by the COVID-19 pandemic and the continued trade spat between the United States and China.

### II. USMCA – A Template For The Future?

If anything galvanized trade this past year, it was the impending and actual implementation of the United States-Mexico-Canada Agreement (USMCA).<sup>1</sup> An update to the former North American Free Trade Agreement, USMCA has been held out as the template from which all future trade agreements will be negotiated.<sup>2</sup> While most of the changes made were minor in nature, the Agreement brought Digital Trade within its scope while also strengthening the compliance and enforcement provisions associated with Labor Rights and Protection of the Environment.<sup>3</sup> In addition, companies are now able to “self-certify” eligibility and there is no longer a

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1. See *generally* Agreement Between the United States of America, the United Mexican States, and Canada, Can.-Mex-U.S., Dec. 10, 2019, *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter USMCA].

2. See Josh Zumbur, *New North American Trade Deal Seen as Template for Deals to Come*, WALL ST. J. (Dec. 14, 2019), <https://www.wsj.com/articles/new-north-america-trade-deal-seen-as-template-for-deals-to-come-11576319401>.

3. See USMCA, ch. 1, sec. A, art. 1.3 (2020).

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mandated certification to complete (although the same essential data is still otherwise required).<sup>4</sup>

For many industries, the changes brought about by the USMCA were minor in nature. At the same time, although the six-month “Phase I – Implementation” period of USMCA is ending, the longer-term implications of the Agreement remain unknown as companies adjust to new rules amid a global pandemic.<sup>5</sup>

One industry that has already felt the impact of USMCA is the automotive sector. Through increased sourcing requirements based on higher Regional Value Content (RVC) qualification thresholds, the imposition of an additional Steel & Aluminum sourcing requirement, and a new Labor Value Content (LVC) requirement imposed on Original Equipment Manufacturers, USMCA has required both motor vehicle producers and their tiered suppliers to quickly adapt to a significantly changed landscape.<sup>6</sup> Increases in RVC are varied, depending upon not only the type of vehicle involved (passenger cars, light trucks, heavy trucks and “other”) but also four distinct categories of parts (defined as “core,” “principal,” “complementary” and, again, the ubiquitous “other”).<sup>7</sup> Phased in over a three-year to seven-year period, these increased sourcing requirements are challenging companies’ ability to first identify and then secure sufficient volumes to meet their production requirements.<sup>8</sup> Newly established Steel & Aluminum sourcing requirements mandating that seventy percent of all specified material inputs be “originating” are stretching an already thin supply chain of North American production that is still working through the choke points resulting from the imposition of “national security-related” tariffs previously imposed under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. §1862).<sup>9</sup> Finally, the new LVC standard that establishes a ramp up over three years so that forty to forty-five percent of the material, production, and other associated costs incurred in motor vehicle production be the result of workers whose base wages are at least \$16.00 an hour, has caused a number of companies to re-evaluate their current production and sourcing footprint to determine the impact of this requirement to their bottom line.<sup>10</sup>

Of these requirements, the addition of the LVC requirement is the most-challenging overall, with its greatest impact felt in Mexico. Most Mexico-based automotive workers were making between \$3.00 and \$7.00 an hour prior to USMCA, with the higher wage requirement and increased RVC

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4. See U.S. Customs Border Control, *United States-Mexico-Canada Agreement (USMCA): Implementation Instructions* (June 30, 2020), <https://www.cbp.gov/document/guidance/usmca-implementation-instructions>.

5. See USMCA, ch. 1, sec. A, art. 1.3 (2020).

6. See *id.* at 2a.

7. See USMCA, ch. 4 app., art. 3-4 (2020).

8. See *id.*

9. See *id.* at art. 6.

10. See *id.* at art. 7.

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thresholds translating into increased production costs for the Mexican auto sector that may not outweigh the 2.5 percent duty reprieve that is afforded to autos otherwise qualified under USMCA's Rules of Origin.<sup>11</sup> The impact is even greater for trucks, where the prevailing tariff for imports into the United States is twenty-five percent.<sup>12</sup> That increased cost— either in production or in duty payment— may disincentivize ongoing production in Mexico, which could adversely affect Mexico's Gross Domestic Product and lead to less local auto manufacturing and increased foreign purchases.<sup>13</sup> This risk is translating to a greater push in the Mexican government's customs enforcement sector against private companies to collect duties through compliance verifications. Coupled with the increased clamor within the U.S. government, labor unions, and interested non-governmental organizations for enforcement in other areas under USMCA's control,<sup>14</sup> 2021 promises to be an interesting year for all companies involved in trade within the USMCA territory.

**A. SECTION 232 TARIFFS ON IMPORTED STEEL AND ALUMINUM PRODUCTS**

On March 8, 2018, the President issued Proclamation 9704 and 9705 announcing his concurrence with the Secretary of Commerce's determination that aluminum and steel articles were "being imported into the United States in quantities and under circumstances that threaten to impair the national security of the United States."<sup>15</sup> Section 232 of the Trade Expansion Act of 1962 authorizes the President to take trade enforcement actions based on national security grounds.<sup>16</sup> Under this authority, the President imposed additional tariffs of twenty-five percent on steel articles and ten percent on aluminum articles imported from most countries effective March 23, 2018.<sup>17</sup> The American Institute for International Steel (AIIS) challenged the tariffs on steel imports and sued the United States, alleging imposition of the additional duties was the result of an unconstitutional delegation of authority to the president that allowed too

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11. See Daniel Chiquiar et al., *Mexico's Higher Costs Under USMCA May Potentially Offset Gains from China-Related Trade Spurt with U.S.*, FED. RES. BANK DALL. (2020), <https://www.dallasfed.org/research/swe/2020/swe2001/swe2001b.aspx>.

12. See Stephanie Overman, *USMCA Putting Cost-Control Pressure on U.S. Automakers*, WARDAUTO (Nov. 9, 2020), <https://www.wardsauto.com/industry-news/usmca-putting-cost-control-pressure-us-automakers>.

13. See generally *id.*

14. See generally *id.*

15. Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 15, 2018); Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018).

16. Trade Expansion Act of 1962, ch. 4, § 232, 76 Stat. 872 (1962) (current version at 19 U.S.C. § 1862 (2020)).

17. See Proclamation No. 9704, 83 Fed. Reg. at 11,619; Proclamation No. 9705 Fed. Reg. at 11,625.

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much discretion.<sup>18</sup> The Court of International Trade (CIT), citing a 1976 U.S. Supreme Court case,<sup>19</sup> found for the government.<sup>20</sup> The AIIS appealed and the U.S. Court of Appeals for the Federal Circuit affirmed the CIT ruling and also cited the Supreme Court precedent.<sup>21</sup> On June 22, 2020, the U.S. Supreme Court declined to take up the case.<sup>22</sup>

While the legal challenges progressed, the administration expanded the scope of Section 232 tariffs.<sup>23</sup> On January 24, 2020, the President issued a Proclamation imposing tariffs on certain derivatives of steel and aluminum, effective February 8, 2020.<sup>24</sup> The action applied to imports of these products from most countries with certain exceptions, including Canada and Mexico.<sup>25</sup> On August 6, 2020, the President announced the re-imposition of ten percent tariffs on imports of non-alloyed, unwrought aluminum articles from Canada, effective August 16, 2020.<sup>26</sup> Canada responded by announcing retaliatory tariffs on \$2.7 billion of imports from the United States.<sup>27</sup> In September, the countries agreed to refrain from increasing these tariffs on aluminum articles.<sup>28</sup> In a Proclamation dated October 27, 2020, the President announced the reinstatement of the exclusion of aluminum imports from Canada, retroactive to September 1, 2020.<sup>29</sup> But, the President indicated he may re-impose the tariffs on these articles if the actual quantities imported in the remaining months of 2020 exceed expected levels.<sup>30</sup>

The U.S. Department of Commerce (DOC) continues to administer a Section 232 tariff exclusion process.<sup>31</sup> An exclusion portal was established for electronic submission and processing of these requests.<sup>32</sup> As of March 23, 2020, the Department of Commerce reported that it had received 179,128

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18. *American Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1337 (Ct. Int'l Trade 2019).

19. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 552 (1976).

20. *American Inst. for Int'l Steel*, 376 F. Supp. 3d at 1345.

21. *American Inst. for Int'l Steel, Inc. v. United States*, 806 Fed. App'x 982, 991 (Ct. Int'l Trade 2020).

22. *American Inst. for Int'l Steel, Inc. v. United States*, 141 S. Ct. 133 (2020).

23. *See generally* Proclamation No. 9980, 85 Fed. Reg. 5,281 (Jan. 29, 2020).

24. *Id.*

25. *Id.*

26. Proclamation No. 10060, 85 Fed. Reg. 49,921 (Aug. 14, 2020).

27. David Liunggrun, *Canada to impose retaliatory tariffs on U.S. goods, hopes for resolution*, REUTERS (Aug. 7, 2020), <https://www.reuters.com/article/us-usa-trade-canada/canada-to-impose-retaliatory-tariffs-on-u-s-goods-hopes-for-resolution-idUSKCN2532E4>.

28. *U.S. Replaces 1% Punitive Tariff on Canadian-Origin Aluminum with Quota Limits; Canada Suspends Contemplated Countermeasures*, ERNST & YOUNG (Sept. 16, 2020), available at [https://www.ey.com/en\\_gl/tax-alerts/us-replaces-10-percent-punitive-tariff-on-canadian-origin-aluminum-with-quota-limits-canada-suspends-contemplated-countermeasures](https://www.ey.com/en_gl/tax-alerts/us-replaces-10-percent-punitive-tariff-on-canadian-origin-aluminum-with-quota-limits-canada-suspends-contemplated-countermeasures).

29. Proclamation No. 10106, 85 Fed. Reg. 68,709 (Oct. 30, 2020).

30. *See id.*

31. *See* Rachel F. Fefer et al., Cong. Rsch. Serv., R45249, Section 232 Investigations: Overview and Issues for Congress (2020).

32. *Id.*

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exclusion requests, 157,983 for steel and 21,145 for aluminum.<sup>33</sup> Of those requests, the agency granted 78,569 exclusions and denied 25,440.<sup>34</sup> The remaining requests are pending.<sup>35</sup> In a May 26, 2020 Federal Register notice, the public was invited to submit comments related to the appropriateness of factors considered and the efficiency and transparency of the process employed in rendering decisions on exclusion requests.<sup>36</sup>

**B. SECTION 301 CHINA INVESTIGATIONS**

Pursuant to Section 301 of the Trade Act of 1974 (Section 301), the Office of the United States Trade Representative (USTR) is provided with a range of responsibilities and authorities to investigate and take action to enforce U.S. rights under trade agreements and respond to certain foreign trade practices.<sup>37</sup> Several significant developments have occurred relating to the Section 301 investigation that the USTR first initiated in August 2017 concerning certain Chinese laws and policies relating to forced technology transfer and intellectual property rights that were alleged to be harmful to U.S. companies (China 301 Investigation).<sup>38</sup>

Before discussing the 2020 developments, it is useful to provide some background on the China 301 Investigation. Initially, based on findings made during the China 301 Investigation that was initiated in August 2017, President Trump instructed the USTR to impose tariffs on imports of certain Chinese products and to seek relief from China's unfair trade practices at the World Trade Organization (WTO) in March 2018.<sup>39</sup> Subsequently, the USTR imposed Section 301 tariffs at a rate of twenty-five percent on two different lists of Chinese products that collectively had an estimated annual value of \$50 billion that entered into effect for imports made, respectively, on or after July 6, 2018 (List 1 Products)<sup>40</sup> and on or after August 23, 2019 (List 2 Products).<sup>41</sup>

Following the Chinese government's actions to impose retaliatory tariffs on certain U.S. products in response to the imposition of Section 301 tariffs on List 1 Products and List 2 Products, the USTR imposed Section 301

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33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Notice of Inquiry Regarding the Exclusion Process for Section 232 Steel and Aluminum Import Tariffs and Quotas, 85 Fed. Reg. 31,441 (May 26, 2020).

37. *See* 19 U.S.C. § 2411 (2020).

38. *See* Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40,213 (Aug. 24, 2017).

39. *See* Notice of Action and Request for Public Comment: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28,710 (June 20, 2018).

40. *See id.*

41. *See* Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40,823 (Aug. 16, 2018).

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tariffs on a third list of Chinese products that collectively had an estimated annual value of \$200 billion (List 3 Products); the initial Section 301 tariff rate for List 3 Products was set at ten percent and applied to imports made on or after September 24, 2018,<sup>42</sup> and subsequently, the Section 301 tariff level was increased to twenty-five percent on imports of List 3 Products made on or after May 10, 2019.<sup>43</sup>

Shortly thereafter, the USTR published a proposed fourth list of additional Chinese products that collectively had an estimated annual value of \$300 billion on which Section 301 tariffs would be imposed (List 4 Products); ultimately, the USTR broke up the List 4 Products into List 4A Products and List 4B Products, with a Section 301 tariff rate of fifteen percent being imposed on List 4A Products imported on or after September 1, 2019, and scheduled to be imposed on List 4B Products imported on or after December 15, 2019.<sup>44</sup> But, as a result of positive developments in trade negotiations between China and the United States, the USTR chose to delay imposition of Section 301 tariffs on the List 4B Products.<sup>45</sup>

On January 15, 2020, the United States and China signed a Phase 1 Trade Agreement that entered into effect on February 14, 2020 (Phase 1 Trade Agreement).<sup>46</sup> Pursuant to the Phase 1 Trade Agreement, China agreed to make certain structural reforms and other changes to its economic and trade regime, including with respect to certain issues covered in China 301 Investigation, and the United States agreed to reduce the Section 301 tariff rate on List 4A Products to 7.5 percent effective February 14, 2020.<sup>47</sup>

Following the issuance of the notices relating to List 1 Products, List 2 Products, List 3 Products, and List 4-A Products, the USTR established procedures pursuant to which entities could request to have products identified on the lists be excluded from the Section 301 tariffs.<sup>48</sup> According to a report issued in October 2020 by the Congressional Research Service (CRS), the USTR received a total of 52,476 exclusion requests, of which

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42. See Notice of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47,974 (Sept. 21, 2018).

43. See Notice Implementing Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 21,892 (May 15, 2019).

44. See Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 21,892 (Aug. 30, 2019).

45. Lindsay Meyer et al., *U.S. Agrees to Suspend List 4B Tariffs*, VENABLE (Dec. 13, 2019), <https://www.venable.com/insights/publications/2019/12/us-agrees-to-suspend-list-4b-tariffs>.

46. See Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 3,741 (Jan. 22, 2020).

47. See *id.*

48. Andres B. Schwarzenberg, Cong. Rsch. Serv., IF11582, Section 301: Tariff Exclusions on U.S. Imports from China (updated Jan. 7, 2021).

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only 6,804 were granted (i.e., less than thirteen percent).<sup>49</sup> But, many of the exclusions that were granted were only valid for limited time periods, and no exclusions were valid beyond December 31, 2020.<sup>50</sup>

Significantly, hundreds of cases on behalf of thousands of companies challenging the validity of List 3 and List 4A were filed with the U.S. Court of International Trade (CIT) in late 2020. The causes of action in these various cases included, among other things, that the manner in which the USTR promulgated List 3 and List 4A violated the statute (Section 301), the Administrative Procedures Act (APA), and the U.S. Constitution.<sup>51</sup> As of the date of this article, CIT had not yet determined case management procedures for handling these cases, and as such, it seems unlikely that the CIT will issue substantive rulings in any of these cases until the latter part of 2021 at the earliest.

C. FOUR CASES OF RELEVANCE FROM THE COURT OF  
INTERNATIONAL TRADE AND THE COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT

As of December 6, 2020, the CIT issued 176 slip opinions in 2020, while the Court of Appeals for the Federal Circuit decided twenty-eight appeals from the CIT.<sup>52</sup> Roughly two-thirds of the CIT slip opinions involved antidumping/countervailing duty (ADD/CVD) cases, with the remaining one-third covering customs, penalty, and other matters.<sup>53</sup> At the Federal Circuit, the majority of the decisions also involved matters involving ADD/CVD laws and regulations. But two cases were noteworthy because either (a) they did not involve the traditional trade and customs matters that are routinely litigated in the CIT or the Federal Circuit, such as matters around the proper tariff classification of an article or the ADD duty rate calculated by Commerce Department, or (b) the cases will likely influence the practice of customs and international trade law moving forward.

In the first case, *Transpacific Steel LLC v. United States*, a three-judge panel at the CIT found that Presidential Proclamation 9772, which imposed a fifty percent tariff on Turkish steel, had illegally raised the tariff rate to fifty percent from twenty-five percent.<sup>54</sup> Specifically, in March of 2018, President Trump imposed a twenty-five percent tariff on Turkish steel pursuant to Section 232 of the Trade Expansion Act of 1962 after the Department of Commerce had determined in January 2018 that imports of

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49. *See id.*

50. *See id.*

51. *See, e.g.*, Complaint at 2, *HMTX v. United States*, Case No. 20-cv-00177 (Ct. Int'l Trade Sept. 21, 2020).

52. *See generally Slip Opinion 2020*, U.S. CT. INT'L TRADE (2020), available at <https://www.cit.uscourts.gov/slip-opinion-2020>.

53. *See id.*

54. *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1276 (Ct. Int'l Trade 2020).



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Turkish steel threatened U.S. national security.<sup>55</sup> In August 2018, President Trump doubled the tariff rate to fifty percent.<sup>56</sup>

The CIT ultimately struck down the increase from twenty-five percent to fifty percent, finding that President Trump had not followed the requirements of Section 232 when raising the tariffs.<sup>57</sup> According to the CIT, Proclamation 9772 violated the law because the new fifty percent tariffs were not done within the time frame for the President to take action under Section 232 (the President had ninety days from the Commerce Department report to make a decision about U.S. national security and fifteen days to implement action in response).<sup>58</sup> Additionally, the CIT found the fifty percent tariffs to be illegal because they were not based on a report and recommendation by the Commerce Department, as required under Section 232.<sup>59</sup> The statute, per the CIT, required a formal investigation and report.<sup>60</sup>

Apart from the statutory violations, the CIT also found that the President violated the Equal Protection Clause of the Fifth Amendment.<sup>61</sup> In so ruling, the Court noted that Presidential Proclamation 9772 would not violate the Fifth Amendment if it were a rational way of achieving a legitimate government purpose.<sup>62</sup> But, because the original January 2018 report by the Commerce Department spoke of the effect on the U.S. steel industry by the collective impact of global steel imports, the CIT found that a decision to increase tariffs on Turkish steel alone, without any justification, was arbitrary and irrational.<sup>63</sup>

The *Transpacific Steel* case is on appeal to the Federal Circuit (docketed as 2020-2157).<sup>64</sup> Many are anticipating the outcome, as there are parallels between the *Transpacific Steel* case and the over 3,000 lawsuits that were initiated starting in September 2020 to challenge certain other tariffs imposed on Chinese origin articles as part of the Trump Administration's trade policy.<sup>65</sup>

The second noteworthy decision issued in 2020 is *Sunpreme v. United States*.<sup>66</sup> *Sunpreme* involved two main issues: (1) whether Sunpreme's solar products were within the scope of the ADD/CVD order on certain solar products from China; and (2) whether U.S. Customs & Border Protection's (CBP) suspension of liquidation of entries filed before the DOC initiated a

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55. *See id.* at 1269.

56. *Id.* at 1271.

57. *Id.* at 1276.

58. *Id.* at 1273-74.

59. *Id.* at 1273.

60. *Id.*

61. *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1260 (Ct. Int'l Trade 2020).

62. *Id.* at 1258.

63. *Id.*

64. Order Dismissing the Motion to Stay, Case No. 20-2157 (Fed. Cir. 2020).

65. *See Slip Opinion 2020*, *supra* note 52.

66. *See generally Sunpreme, Inc. v. United States*, 946 F.3d 1300 (Fed. Cir. 2020).

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scope ruling proceeding was legal in light of 19 CFR 351.225(l)(3), which states that the DOC must instruct CBP to suspend liquidation of entries filed on or after the date of initiation of the scope inquiry.<sup>67</sup>

Regarding the first issue, the Federal Circuit agreed with the CIT ruling that Sunpreme's solar products were covered by the scope of the ADD/CVD order.<sup>68</sup> For importers of non-solar products, this aspect of the Federal Circuit's decision is not particularly noteworthy.

The second issue - the propriety of CBP's suspension of liquidation - is important to the trade community, as it goes to the heart of CBP's authority to collect ADD/CVD. CBP had started to suspend liquidation of Sunpreme's entries starting in April 2015.<sup>69</sup> In November 2015, Sunpreme filed its scope ruling request with the DOC for official resolution regarding whether its solar products were covered by the scope of the ADD/CVD orders.<sup>70</sup> Roughly one month later, in December 2015, the DOC officially initiated the scope inquiry.<sup>71</sup>

As noted above, the DOC's regulation stated that it must instruct CBP to suspend liquidation of entries filed on or after the date of initiation of the scope inquiry. Thus, the issue was whether CBP had authority to suspend liquidation of entries even earlier than December 2015, specifically, starting in April 2015.<sup>72</sup> Suspending liquidation of the entries starting in April meant, of course, that Sunpreme faced ADD/CVD liability for its imports starting in April 2015, not December 2015.<sup>73</sup>

The CIT had found that CBP's suspension of liquidation was illegal and that CBP lacked authority to interpret ambiguous scope language in an ADD/CVD order.<sup>74</sup> The interpretation of ambiguous orders was, per the CIT, exclusively the domain of the Commerce Department, not CBP.<sup>75</sup> On appeal to the Federal Circuit, the Federal Circuit upheld the CIT's decision.<sup>76</sup>

The government moved for rehearing en banc and the full Federal Circuit, in a rare decision, unanimously reversed the panel decision.<sup>77</sup> In the en banc proceedings, the government insisted that CBP had independent authority to interpret ambiguous orders.<sup>78</sup> The Federal Circuit agreed, reasoning that CBP's initial decision-making as to whether an ADD/CVD order applies to a given import would not invade the interpretive province of

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67. *Id.* at 1309.

68. *Id.*

69. *Id.* at 1315.

70. *Id.* at 1306.

71. *Id.* at 1315.

72. *Sunpreme, Inc.*, 946 F.3d at 1315.

73. *Id.* at 1316.

74. *Id.*

75. *Id.* at 1320.

76. *Id.* at 1316.

77. *Id.* at 1303.

78. *Sunpreme, Inc.*, 946 F.3d at 1315.

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the DOC and that any other result “would significantly limit CBP’s ability to perform its statutory role and would encourage gamesmanship by importers hoping to receive the type of windfall that Sunpreme seeks here.”<sup>79</sup>

A third noteworthy decision from 2020 is *Acetris v. United States*,<sup>80</sup> which will provide numerous potential new opportunities for companies to sell goods to the U.S. government.

Most federal procurement contracts are governed by the Trade Agreements Act of 1979 (TAA)<sup>81</sup> and the Federal Acquisition Regulations (FAR).<sup>82</sup> In essence, the TAA limits the government’s ability to purchase goods to those goods that are the “products of a foreign country” that is a member of the World Trade Organization (WTO).<sup>83</sup> To be a “product of a country,” an article must be: “wholly the growth, product, or manufacture of that country,” or “substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.”<sup>84</sup>

The FAR, in turn, requires that a government contractor “shall deliver . . . only U.S.-made or designated country end products” and defines a “U.S.-made end product” to be “an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.”<sup>85</sup>

The facts of *Acetris* show that Acetris had contracted to sell various pharmaceuticals to the Veterans Administration (VA).<sup>86</sup> Acetris’s products were made in the United States, but the active ingredients were from India.<sup>87</sup> The VA questioned whether Acetris’s products qualified under the TAA, and Acetris was forced to seek a ruling from CBP regarding the origin of the pharmaceuticals made in the United States using Indian-origin active ingredients.<sup>88</sup> Historically, CBP considered the origin of pharmaceuticals to be the origin of the active ingredients from which they were made.<sup>89</sup> As a result, CBP issued a ruling that Acetris’s products were of Indian, not U.S.

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79. *Id.* at 1317.

80. See generally *Acetris Health, LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020).

81. Trade Agreements Act of 1979, 19 U.S.C. §§ 2512(a)(1), 2518(4)(B).

82. Notice of Request for Public Comments on Section 232 National Security Investigation of Imports of Mobile Cranes, 48 C.F.R. § 25.003 (2021).

83. See 19 U.S.C. § 2518(4)(A).

84. 19 U.S.C. § 2518(4)(B); *Acetris*, 949 F.3d at 723.

85. 48 C.F.R. § 25.003; *Acetris*, 949 F.3d at 724.

86. *Acetris*, 949 F.3d at 724.

87. *Id.*

88. *Id.* at 724–25.

89. See Paul R. Hurst, *Federal Circuit’s Acetris Decision Addresses Rules for Determining TAA Compliance*, STEPTOE (Feb. 26, 2020), <https://www.steptoelaw.com/en/news-publications/federal-circuits-acetris-decision-addresses-rules-for-determining-taa-compliance.html>.

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origin.<sup>90</sup> India was not a member of the WTO government procurement agreement.<sup>91</sup> Thus, as a result of CBP's decision, the VA ruled that Acetris's products could not be sold to the VA.<sup>92</sup> Acetris sued in the Court of Claims after the VA excluded Acetris products from being sold to the VA.<sup>93</sup> It also sued in the CIT to challenge CBP's origin determination.<sup>94</sup>

The Court of Claims ruled that the VA erred in restricting the definition of U.S. made end products to only those products that are substantially transformed in a WTO member country and that because Acetris's products were manufactured in a facility in New Jersey, they qualified as U.S. made end products under the FAR.<sup>95</sup>

On appeal, the Federal Circuit upheld the Court of Claims decision.<sup>96</sup> The Federal Circuit reasoned that focusing on the active ingredient was incorrect and that the TAA test is not whether the active ingredient was the manufacture of India, but whether the pill was the manufacture of India.<sup>97</sup> The pill, according to the Federal Circuit, was clearly the manufacture of the United States, not India, because it was made in New Jersey.<sup>98</sup> Similarly, the Federal Circuit reasoned that the pill sold to the VA was also not substantially transformed in India.<sup>99</sup> Thus, per the TAA tests, the pill was not "a product of" India. Because the TAA only excluded procurement of products that are a "product of" a foreign country like India, and the pills were not a "product of" India, they were not barred under the TAA.<sup>100</sup>

The Federal Circuit reached a similar conclusion regarding the FAR. As noted earlier, the FAR requires that only "U.S.-made end products" be sold to the VA.<sup>101</sup> Because FAR defines a "U.S.-made end product" to be one that is "mined, produced, or manufactured in the United States" or one that is "substantially transformed in the United States," and because the pills were unquestionably manufactured in the United States, the Federal Circuit ruled that the pills qualified as U.S.-made end products.<sup>102</sup> In so ruling, the Federal Circuit admonished that if the government is dissatisfied with how the FAR defines "U.S.-made end product," it must change the definition and "not argue for an untenable construction of the existing definition."<sup>103</sup>

Although the government hasn't yet amended FAR, the *Acetris* decision opens up new opportunities for selling items to the government that are

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90. *Acetris*, 949 F.3d at 725.

91. *Id.*

92. *Id.* at 724.

93. *Id.* at 725.

94. *Id.*

95. *Id.* at 726.

96. *Acetris*, 949 F.3d at 733.

97. *Id.* at 731.

98. *Id.* at 732.

99. *Id.* at 732–33.

100. *Id.* at 731.

101. *Id.*

102. *Acetris*, 949 F.3d at 731–32.

103. *Id.* at 733.

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“manufactured” in the United States without regard to whether those items also resulted in a substantial transformation of their imported materials.<sup>104</sup> Previously, agencies like the VA had limited procurement-eligible goods to only those goods where the United States’ manufacturing process resulted in a substantial transformation.<sup>105</sup> Manufacture in the United States, standing alone, was not enough. Now it is.

Finally, the CIT also issued an important decision in country-of-origin determinations. *Cyber Power v. United States* involved a challenge to CBP’s decision to exclude certain merchandise claimed by the importer to be made in the Philippines.<sup>106</sup> CBP believed that the Philippines was not the correct country of origin of the merchandise. The importer had filed a prior disclosure that stated the origin of Philippines was incorrect and CBP believed, partly through its own investigation, that the origin was China.<sup>107</sup> A finding that the origin was China, rather than the Philippines, was significant due to the twenty-five percent of Section 301 tariffs that would be owed on Chinese, but not Philippine products, and due to the fact that if the origin was China, not the Philippines, the goods would not have a proper country-of-origin marking and thus would not be admissible (not to mention the importer might be liable for ten percent marking duties).<sup>108</sup> While this case could be viewed as a “routine” decision involving the propriety of CBP’s decision to exclude certain merchandise, it is noteworthy in that it is the first decision to shed further light on the country-of-origin test previously set forth by the CIT in 2016 in *Energizer Battery, Inc. v. United States*.<sup>109</sup>

*Energizer* concerned the country of origin of certain flashlights for government procurement purposes.<sup>110</sup> The CIT found that Energizer did not substantially transform various flashlight components in the United States as a result of its U.S. assembly and other operations (query whether *Energizer* would have had a different outcome had *Acetris* been decided prior to the *Energizer* litigation).<sup>111</sup> The CIT reasoned that a substantial transformation did not occur because, among other factors, the end use of the fifty or so components that Energizer assembled to make the flashlights was predetermined prior to their assembly in the United States.<sup>112</sup> CBP has

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104. See Hurst, *supra* note 89, at 5.

105. See *Acetris*, 949 F.3d at 724–25 (noting that the VA required proof of TAA compliance to purchase goods).

106. *Cyber Power Sys. (USA) Inc. v. United States*, No. 20-130 slip op. at 3–4 (Ct. Int’l Trade Sept. 2, 2020).

107. *Id.* at 2.

108. See *Section 301 Tariffs on China*, SANDLER, TRAVIS & ROSENBERG, P.A., available at <https://www.strtrade.com/trade-news-resources/tariff-actions-resources/section-301-tariffs-on-china> (last visited Feb. 19, 2021); 19 C.F.R. § 134.2 (2020).

109. See *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308 (Ct. Int’l Trade 2016).

110. See *generally id.*

111. *Id.* at 1321.

112. *Id.* at 1322.

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issued a significant amount of administrative rulings citing or relying on the “predetermined” concept in *Energizer*.<sup>113</sup>

In *Cyber Power*, the CIT observed that its prior decision in *Energizer* seemed “somewhat counterintuitive because on a practical level a finished flashlight does have a different name, character, and use than a pile of fifty unassembled constituent components.”<sup>114</sup> Yet, the CIT concluded in *Cyber Power* that the flashlight components “all retained their specific names, character and use when assembled into the flashlight”<sup>115</sup> and that the CIT, in *Energizer*, “relied on prior decisions that held the assembly of components for a pre-determined use could not constitute a change in use for the finished article in the country of assembly.”<sup>116</sup>

The CIT then observed that the “component-by-component approach to the substantial transformation test would seem to make it practically insurmountable for subsequent-country, pre-determined assembly to ever constitute further work/substantial transformation of an article.”<sup>117</sup> But the CIT stated that “[p]laintiff may still be able to prevail despite failing the component-by-component name, character and use test if it can establish that the Philippine processing is ‘sufficiently complex’ to justify a substantial transformation in the finished articles. Exactly what constitutes ‘sufficiently complex’ is a bit of a mystery though.”<sup>118</sup>

Recognizing that the Federal Circuit in its *Acetris* decision specifically rejected focusing on each component and whether it underwent a substantial transformation, the CIT noted that it, too, in *Uniden America Corp v. United States*, had previously rejected a component-by-component analysis in reviewing whether articles were substantially transformed.<sup>119</sup> Instead, the CIT suggested that an origin analysis should be guided by an analysis of the underlying statutory and regulatory purposes, and conclusions about whether those purposes were served by a finding of substantial transformation.<sup>120</sup>

Because of the procedural posture of the *Cyber Power* case (a motion for a preliminary injunction), the CIT did not reach the merits of the origin of Cyber Power’s goods.<sup>121</sup> Instead, CIT denied Cyber Power’s motion for a preliminary injunction and advised that the best course for Cyber Power to obtain the relief it requested from the Court was a full merits trial, not a motion for a preliminary injunction.<sup>122</sup> Despite this, the case remains significant for importers having to contend with country-of-origin

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113. See generally *Cyber Power*, *supra* note 106.

114. *Id.* at 9–10.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 11.

119. *Cyber Power*, slip op. at 11.

120. *Id.*

121. See generally *id.*

122. *Id.* at 12.

determinations because CIT made clear that the test for origin should focus on the purposes behind the statutes and regulations at issue, and not be guided solely by whether the components being assembled have a predetermined use, as seemed to be the rule after the *Energizer* decision.<sup>123</sup>

**D. NEW ENTRY TYPE 86 PROCESS PROPOSED FOR DE MINIMIS  
VALUE SHIPMENTS**

Section 321(a)(2)(C) of the Tariff Act of 1930 (19 U.S.C. §1321(a)(2)(C)), as amended by the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Section 901, Public Law 114-125, 130 Stat. 122 (19 U.S.C. §4301 note), authorizes CBP to provide an administrative exemption, and admit free from duty and tax, shipments of merchandise imported by one person on one day having an aggregate fair retail value in the country of shipment of not more than \$800.<sup>124</sup> The regulations issued under the authority of section 321(a)(2)(C) are set forth in sections 10.151 and 10.153 of Title 19 of the Code of Federal Regulations (19 CFR §10.151 and §10.153).<sup>125</sup>

Not all goods qualify for admission under Section 321; for instance, goods needing inspection as a condition of release, regardless of value; merchandise subject to ADD and/or CVD; and some products regulated by Participating Government Agencies (PGAs), such as FDA, FSIS, NHTSA, CPSA, and USDA.<sup>126</sup>

To facilitate compliance with the Section 321 limitations and to prevent the importation of restricted goods, CBP has initiated a test program for processing Section 321 entries under a new entry type code (Entry Type 86).<sup>127</sup> Currently, this is a voluntary test program and the release from manifest process will continue to be an option for filing on de minimis shipments.<sup>128</sup> Shipments qualifying for de minimis treatment are subject to the release from manifest process, which cannot be used for most PGA-regulated commodities.<sup>129</sup> Entry Type 86 will instead allow filing through Automated Broker Interface (ABI), and can be used for PGA regulated commodities; however, goods subject to ADD/CVD, goods subject to quota, certain tobacco and alcohol products, and goods taxed under the Internal Revenue Code, are not permitted to be filed under Entry Type 86.<sup>130</sup> Additional information on the use of the Test program concerning entry of

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123. *Id.* at 11.

124. The Tariff Act of 1930 § 321, 19 U.S.C. § 1321(a)(2)(C).

125. 19 C.F.R. §§ 10.151, 10.153.

126. See *What You Need to Know About Section 321 De Minimis Value Entry*, PCB CUSTOMS BROKERS (July 11, 2017), <https://www.pcb.ca/post/section-321-de-minimis-value-entry-8304>.

127. See *Entry Type 86 Frequently Asked Questions*, U.S. CUSTOMS AND BORDER PROTECTION, available at <https://www.cbp.gov/trade/trade-enforcement/tftea/section-321-programs/entry-type-86-frequently-asked-questions>.

128. See *id.*

129. *Id.*

130. *Id.*

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Section 321 Low-Valued Shipments is available in the Federal Register and the “Entry Type 86 Frequently Asked Questions (FAQ).”<sup>131</sup>

E. ENFORCE AND PROTECT ACT INVESTIGATIONS

In 2015, Congress enacted the Trade Facilitation and Enforcement Act (TFTEA), which included the Enforce and Protect Act (EAPA).<sup>132</sup> The purpose of EAPA is to establish formal procedures for submitting and investigating ADD or CVD allegations of evasion against U.S. importers.<sup>133</sup> With the EAPA’s enactment, both domestic producers and competing importers are finding ways to formally petition CBP to investigate suspected cases of evasion as a tool to level the playing field and to ensure that competition is alive and healthy in the domestic U.S. industry.<sup>134</sup> Under EAPA, CBP is responsible for tracking and reporting allegations of evasion from initial receipt, vetting, and enforcement actions, to final disposition of an investigation.<sup>135</sup>

As of May 2019, the Government Accountability Office (GAO) reported that \$4.5 billion in duties have gone uncollected since 2000.<sup>136</sup> But CBP has utilized EAPA to recoup many of the duties that have been identified as unpaid since 2000 through several EAPA investigations.<sup>137</sup> Accordingly, CBP has provided public notices of forty-one ADD/CVD investigations targeting a broad range of industries and has issued twenty-eight final determinations of evasion.<sup>138</sup> Out of the twenty-eight final determinations issued by CBP, only one investigation has resulted in a determination that no ADD/CVD evasion occurred, and out of forty-one investigations, the steel industry has been subject to at least twelve investigations.<sup>139</sup> But EAPA allegations from manufacturers and trade groups related to the chemical, furniture, aluminum, diamond sawblade, plywood, cased pencils, cast iron soil pipe, polyethylene bags, glycine, frozen shrimp, and agricultural industries have also led to investigations and interim measures.<sup>140</sup> Additionally, both competitors and industry groups have submitted EAPA

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131. *Id.*

132. *Enforce and Protect Act (EAPA)*, U.S. BORDER AND CUSTOMS PROTECTION, <https://www.cbp.gov/trade/trade-enforcement/tftea/epa> (last visited Dec. 6, 2020).

133. *See id.*

134. *See Recent EAPA Actions*, U.S. BORDER AND CUSTOMS PROTECTION, <https://www.cbp.gov/trade/trade-enforcement/tftea/epa/recent-epa-actions> (last visited Feb. 20, 2021).

135. *Id.*

136. Gov. Accountability Off. (GAO), *Antidumping and Countervailing Duties: Information on Actions by Commerce and CBP to Address Reported Weaknesses in Duty Collection Processes* (Nov. 7, 2019).

137. *See id.*

138. *See Notices of Action*, U.S. BORDER AND CUSTOMS PROTECTION, <https://www.cbp.gov/trade/trade-enforcement/tftea/epa/notices-action> (last visited Feb. 20, 2021) (counting investigations and Determinations of Evasion prior to November 2020).

139. *See id.*

140. *See Enforce and Protect Act*, *supra* note 132.



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allegations that led to investigations where competitors have filed twenty-nine allegations and industry groups have filed twelve thus far.<sup>141</sup>

Of the forty-one investigations, thirty-two involved the transshipment of merchandise, seven involved the misclassification of a product, and two involved fraudulent paperwork of the manufacturer within the country of origin.<sup>142</sup> In most transshipment cases, the goods were alleged to have been of Chinese origin and exported to a third country prior to importation into the United States in an effort to obscure the country of origin of the goods and to avoid the applicable ADD/CVD.<sup>143</sup> This trend toward allegations of transshipment reasonably suggests that evasion is easier to obtain in cases of transshipment than in cases of alleged evasion through other means, or that transshipment is the preferred method of ADD/CVD evasion.

Overall, according to the latest CBP data as of October 1, 2020, CBP has launched over 131 investigations that have resulted in over \$600 million ADD/CVD duties identified by CBP as being owed to the U.S. Government.<sup>144</sup> Moreover, within the past year, CBP has initiated eighteen EAPA investigations that coincide with the interim measures issued against parties.<sup>145</sup> In addition, CBP also issued sixteen notices of final determinations pursuant to the EAPA investigations.<sup>146</sup> CBP has published in a press release that “it has prevented importers from evading \$287 million in duties owed to the U.S. Government in the Fiscal Year 2020.”<sup>147</sup>

#### F. FORCED LABOR IN THE COMPLIANCE CROSSHAIRS

Another area of increasingly rigorous focus by CBP concerns the importation of merchandise either directly produced by or the result of the use of “forced labor.” Forced labor is defined as “all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.”<sup>148</sup>

Goods for which CBP has developed a reasonable belief that forced labor has been used will result in the issuance of Withhold Release Orders (WROs).<sup>149</sup> Shipments of merchandise subject to WROs will be detained, after which time the importer is provided with the opportunity either to re-

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141. *See id.*

142. *See Notices of Action, supra* note 138 (summarizing cumulative information).

143. *See id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *CBP Prevents \$287M of Duty Evasions through “Game-Changing” Enforce and Protect Act*, U.S. BORDER AND CUSTOMS PROTECTION (Oct. 21, 2020), <https://www.cbp.gov/newsroom/national-media-release/cbp-prevents-287m-duty-evasions-through-game-changing-enforce-and>.

148. 19 U.S.C. § 1307.

149. *Forced Labor Enforcement, Withhold Release Orders, Findings, and Detention Procedures*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/sites/default/files/assets/>

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export the goods or to submit information to CBP that proves that the merchandise is not in violation of Section 1307's dictates.<sup>150</sup> The proof required is specific, including presentment of a certificate of origin by the foreign seller or owner (as well as potentially a certification from sub-suppliers) in the form set out in 19 C.F.R. §12.43 as well as a declaration from the importer chronicling in detail "every reasonable effort" made by the ultimate consignee: to determine the source of the merchandise and of every component thereof and to ascertain the character of labor used in the production of the merchandise and each of its components, the full results of his investigation, and his belief with respect to the use of the class of labor specified in the finding in any stage of the production of the merchandise or of any of its components.<sup>151</sup>

All such support must be submitted within three months of importation with CBP still retaining ultimate authority to find that continued detention is warranted.<sup>152</sup> WROs remain in full force and effect until either withdrawn or a "Finding" is issued by CBP that conclusively determines that forced labor was used.<sup>153</sup> In that instance, all such goods will be barred from importation into the United States.<sup>154</sup>

To date, WROs have been issued against a wide range of commodities with a current particular focus on the sourcing of finished goods and/or raw materials or inputs from the Xinjiang Uyghur Autonomous Region of China.<sup>155</sup> A current list of WROs and Findings is maintained by CBP on its website with CBP also beginning to integrate questions regarding forced labor due diligence into its audit protocol.<sup>156</sup> CBP applies a strict liability standard where forced labor is concerned, so the time is now for companies to educate their sourcing and purchasing staff on these prohibitions and work to mitigate the risk that imported goods may be detained and/or seized.

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documents/2016-Aug/Fact%20Sheet%20-%20Forced%20Labor%20Procedures.pdf (last visited Feb. 25, 2021).

150. *Id.*

151. 19 C.F.R. § 12.43 (2017).

152. *See id.*

153. *See Forced Labor Enforcement, supra* note 149.

154. *Id.*

155. *See Xinjiang Uyghur Autonomous Region WRO Frequently Asked Questions*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/trade/programs-administration/forced-labor/xinjiang-uyghur-autonomous-region-wro-frequently-asked-questions> (last visited Feb. 20, 2021).

156. *See Withhold Release Orders and Findings*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings> (last visited Feb. 20, 2021).

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## **Export Controls and Economic Sanctions**

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LAWRENCE WARD<sup>1</sup>

This article discusses the significant legal developments that occurred in the area of export controls and economic sanctions in 2020.

### **I. Developments in the Export Control Reform Act and the Foreign Investment Risk Review Modernization Act**

In 2018, Congress enacted two major pieces of legislation relating to trade and investment—the Export Control Reform Act (ECRA)<sup>2</sup> and the Foreign Investment Risk Review Modernization Act (FIRRMA).<sup>3</sup> In the past two years, U.S. regulators have attempted to flesh out some of the new principles adopted by Congress. In 2020, for example, the Department of Commerce Bureau of Industry and Security (BIS) adopted regulations defining the critical term “emerging technologies.”<sup>4</sup> Similarly, new regulations adopted in 2020 have clarified FIRRMA’s effects on the Committee on Foreign Investment in the United States’ (CFIUS) jurisdiction and processes, bringing along with them some major changes to U.S. policy on foreign investments, including restrictions on popular social media app TikTok.<sup>5</sup>

#### **A. EXPORT CONTROL REFORM ACT**

One of the most important changes in ECRA is found in Section 1758, which requires BIS to establish controls on the export, re-export, and in-country transfer of “emerging and foundational technologies that. . . are essential to the national security of the United States” and are not already controlled under existing export control programs.<sup>6</sup> The new law did not

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2. 50 U.S.C. §§ 4801–4852 (2018).

3. H.R. 5841, 115th Cong. (2d Sess. 2018).

4. Implementation of Certain New Controls on Emerging Technologies Agreed at Wassenaar Arrangement 2019 Plenary, 85 Fed. Reg. 62,583, 62,584 (Oct. 5, 2020) (to be codified at 15 C.F.R. pt. 740, 772, 774).

5. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 3,112, 3,112 (Jan. 17, 2020) (to be codified at 31 C.F.R. pt. 800-801).

6. 50 U.S.C. § 4817(1)(A).

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define these critical terms, and as a result, shortly after ECRA went into effect, BIS released an Advanced Notice of Proposed Rulemaking (ANPRM) for comments on the definition of emerging and foundational technologies.<sup>7</sup> But it was not until this year that BIS began inching closer to actually defining these terms.

1. *Emerging Technologies*

In January, BIS issued its first regulation on emerging technologies.<sup>8</sup> The rule controls artificial intelligence-based software specially designed to automate the analysis of geospatial imagery and point clouds.<sup>9</sup> This regulation was the first of many such restrictions and was a long-awaited change, as it took BIS nearly two years following the passing of ECRA, and issuing of the ANPRM, to specify the types of items covered under “emerging technologies.”<sup>10</sup> The ANPRM also provided a broad definition of emerging technologies as those “technologies [essential] to the national security of the United States” that are not already subject to export controls under the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR).<sup>11</sup> The ANPRM further defined technologies that are essential to the national security of the United States as those that “have potential conventional weapons, intelligence collection, weapons of mass destruction, or terrorist applications, or could provide the United States with a qualitative military or intelligence advantage.”<sup>12</sup>

BIS gave further guidance on the meaning of emerging technologies in June and October 2020 when it defined new categories of emerging technologies. In June 2020, BIS defined the first three categories of “emerging” technologies: (1) Precursor Chemicals, (2) Equipment Capable of Use in Handling Biological Materials, and (3) Human and Animal Pathogen Toxins.<sup>13</sup> In October 2020, BIS imposed new controls on six categories of emerging technologies “that are essential to the national security of the United States” and are “recently developed or developing.”<sup>14</sup>

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7. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58,201, 58,201 (proposed Nov. 19, 2018) (to be codified at 15 C.F.R. pt. 744).

8. Addition of Software Specially Designed to Automate the Analysis of Geospatial Imagery to the Export Control Classification Number 0Y521 Series, 85 Fed. Reg. 459, 459 (Jan. 6, 2020) (to be codified at 15 C.F.R. pt. 774).

9. *Id.* at 460.

10. Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. at 58,202.

11. *Id.* at 58,201.

12. *Id.*

13. Implementation of the February 2020 Australia Group Intersessional Decisions; Addition of Certain Rigid-Walled, Single Use Cultivation Chambers and Precursor Chemicals to the Commerce Control List, 83 Fed. Reg. 36,483, 36,483–36,485 (June 17, 2020) (to be codified at 15 C.F.R. pt. 748, 774) [hereinafter Implementation of the February 2020 Australia Group Intersessional Decisions].

14. Implementation of Certain New Controls on Emerging Technologies Agreed at Wassenaar Arrangement 2019 Plenary, 85 Fed. Reg. at 62,584; *see also* Exp. Compliance Daily, *OIRA Completes Review of BIS Rules on 2019 Wassenaar Controls*, INTERNET TRADE TODAY (Aug.

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The six categories are (1) machine tools, (2) computational lithography software, (3) silicon wafer technology, (4) software designed for monitoring or analysis, (5) digital forensics or investigative tools, and (6) sub-orbital craft.<sup>15</sup> These categories reflect the discussions during the Wassenaar Arrangement, a multinational meeting of forty-two countries held to discuss uniform global export controls, in which the United States agreed to make changes to the EAR by identifying new and “emerging technologies.”<sup>16</sup> Going forward, BIS seems likely to continue this categoric, multi-lateral approach to identifying emerging technologies, rather than attempting to provide a more specific definition to the term.

2. *Foundational Technologies*

BIS also took steps toward defining “foundational technologies” by seeking public comment for criteria and stating that the term foundational technologies did not only refer to technologies, but also included commodities and software.<sup>17</sup> More action in this regard is expected in 2021, after the receipt of public comment.

B. FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT

The year 2020 also brought a slew of significant regulatory changes in relation to FIRRMA. In February 2020, FIRRMA went into full effect when the Department of the Treasury released its final set of regulations, which were initially proposed in 2019 to “implement the changes that FIRRMA made to CFIUS’s jurisdiction and process.”<sup>18</sup> Other changes were made in the subsequent months, such as using an approach of classifying critical technology based on its export-licensing requirements, as opposed to using their NAICS codes.<sup>19</sup>

Additionally, specifications in ECRA also triggered changes to FIRRMA. FIRRMA gives CFIUS the jurisdiction to review a broad range of foreign investment transactions related to “critical technologies.”<sup>20</sup> FIRRMA also

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11, 2020), <https://exportcompliance.com/news/2020/08/11/OIRA-Completes-Review-of-BIS-Rule-on-2019-Wassenaar-Controls-2008100013>.

15. Implementation of Certain New Controls on Emerging Technologies Agreed at Wassenaar Arrangement 2019 Plenary, 85 Fed. Reg. at 62,584.

16. See *id.* at 62,584; see also *OIRA Completes Review of BIS Rules on 2019 Wassenaar Controls*, *supra* note 14; Implementation of the February 2020 Australia Group Intersessional Decisions, 83 Fed. Reg. at 36,483.

17. Identification and Review of Controls for Certain Foundational Technologies, 85 Fed. Reg. 52,934, 52,934 (proposed Aug. 27, 2020) (to be codified at 15 C.F.R. pt. 742, 774).

18. U.S. Department of the Treasury, *The Committee on Foreign Investment in the United States (CFIUS)*, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>.

19. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. 57,124, 57,124 (Sept. 15, 2020) (to be codified at 31 C.F.R. pt. 800).

20. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1703(a)(4)(B)(iii), 132 Stat. 2173-2183 (2018).

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contains a detailed definition of which critical technologies are covered under its regulations, and specifically refers to emerging technologies.<sup>21</sup> Consequently, the list of emerging technologies recently published by BIS is also controlled by CFIUS. Therefore, companies involved in software and technologies considered to be emerging or foundational technologies must now consider CFIUS issues.

1. *TikTok Transaction*

Perhaps the most publicized development in trade this year has been the Trump administration's attempted ban on TikTok. Earlier in 2020, CFIUS directed TikTok owner and Chinese company, ByteDance, to sell TikTok to a U.S. company, or it would otherwise be banned from the United States.<sup>22</sup> CFIUS expressed concerns that TikTok accessed data from U.S. users and shared that data with the Chinese government, making use of the app a national security concern.<sup>23</sup>

CFIUS's potential ability to ban TikTok comes from FIRRMA's expansion of CFIUS's jurisdiction. In 2018, Congress stated that its intent in passing FIRRMA was to protect against U.S. national security threats coming from foreign investment in U.S. companies, primarily Chinese investment.<sup>24</sup> Although CFIUS could not reach assets outside of the United States in the past, this new reading of FIRRMA suggests that CFIUS's jurisdiction extends to foreign assets with operations or business in the United States. This is because FIRRMA redefined a "U.S. business" as a business that "irrespective of the nationality of persons that control it, engaged in interstate commerce in the United States," thereby removing a very important caveat in the old definition which stated that U.S. jurisdiction was "only to the extent of" the business activities in interstate commerce.<sup>25</sup>

CFIUS required ByteDance to submit weekly reports until the company divested from TikTok, which it was required to do by November 27, 2020.<sup>26</sup> But as of the date of this article's drafting, the fate of CFIUS's action was the subject of contentious federal court litigation,<sup>27</sup> leaving questions about the

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21. *Id.* § 1049(a)-(b), 132 Stat. at 1961–1962.

22. Exec. Order No. 13,942, 85 Fed. Reg. 48,637, 46,838 (Aug. 6, 2020).

23. See U.S. Department of the Treasury, *Statement on TikTok from Treasury Spokesperson Monica Crowley*, U.S. GOVERNMENT Sept. 19, 2020 <https://home.treasury.gov/news/press-releases/sm1129>.

24. See James K. Jackson, Cong. Rsch. Serv., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 1, 39 (2020).

25. Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 85 Fed. Reg. at 3,135.

26. Rachel Lerman, *TikTok Gets Short Extension Before It Must Be Sold*, WASH. POST (Nov. 13, 2020), <https://www.washingtonpost.com/technology/2020/11/13/tiktok-sale-extension-cfius/>.

27. *TikTok Inc. v. Donald J. Trump*, No. 1:20-cv-02658 (D.D.C. Sept. 27, 2020) (order granting preliminary injunction).

fate of TikTok up in the air. Given this litigation, there will likely be more to come in 2021.

## II. Export Controls Updates

### A. ITAR UPDATES

#### 1. *Encryption and Cloud Computing Rule*

On December 26, 2019, the Directorate of Defense Trade Controls (DDTC) published its long-awaited interim final rule for handling, storing, and transmitting ITAR-controlled technical data through the Internet.<sup>28</sup> This interim final rule also added ITAR section 120.54 to define what activities do not constitute exports and similar types of activities.<sup>29</sup> But the key aspect of this new rule, and the implementation of ITAR section 120.54, is that certain types of encrypted technical data are not considered exports when stored, or transmitted, through certain encrypted means.<sup>30</sup> The rule also adds a definition for “access information” under ITAR section 120.55, which allows a person to decrypt the technical data.<sup>31</sup> The transfer of such “access information” may constitute an export under ITAR section 120.50(a)(3)-(4).<sup>32</sup>

#### 2. *Revisions to U.S. Munitions List Categories I-III*

DDTC completed its efforts to revise the entire U.S. Munitions List under Export Control Reform when its revisions to Categories I, II, and III—all relating to firearms and ammunition—went into effect on March 9, 2020.<sup>33</sup> These revisions removed many types of civilian firearms, such as semi-automatic firearms and their related parts and components (as well as directly related defense services and technical data), from the EAR.<sup>34</sup> But, a federal court granted a preliminary injunction against DDTC to keep the ITAR-controls for certain types of technical data “insofar as [they alter] the status quo restrictions on technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment.”<sup>35</sup>

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28. International Traffic in Arms Regulations: Creation of Definition of Activities That Are Not Exports, Reexports, Retransfers, or Temporary Imports; Creation of Definition of Access Information; Revisions to Definitions of Export, Reexport, Retransfer, Temporary Import, and Release, 84 Fed. Reg. 70,887, 70,888 (Dec. 26, 2019) (to be codified at 22 C.F.R. pt. 120).

29. *Id.*

30. *Id.* at 70,888–89.

31. *Id.* at 70,890.

32. *Id.* at 70,891.

33. International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III, 85 Fed. Reg. 3,819, 3,819 (Jan. 23, 2020) (to be codified at C.F.R. pt. 121, 123, 124, 126, 129).

34. *Id.*

35. *Washington v. U.S. Dep’t of State*, 443 F. Supp. 3d 1245, 1262–63 (W.D. Wash. 2020), *appeal docketed*, No. 20-35391 (9th Cir. May 6, 2020).



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3. *Licensing Policy Revisions*

The most significant licensing policy change took place on July 15, 2020, when DDTC declared its position that, “Hong Kong [was] now considered to be included in the entry for China under section 126.1(d)(1) of the ITAR and therefore subject to a policy of denial for all transfers subject to the ITAR.”<sup>36</sup> DDTC also revised its licensing policy towards the Central African Republic. While it remains the general policy to deny licenses “destined for or originating in the Central African Republic,” the DDTC may now approve such licenses in certain specified situations identified within 22 C.F.R. § 126.1(u)(2).<sup>37</sup> Further, DDTC issued a policy notice to its website on September 2, 2020, that effective October 1, 2020, the DDTC “will temporarily amend the International Traffic in Arms Regulations (ITAR) § 126.1(r) to reflect the temporary waiver of the policy of denial on the export, reexport, retransfer, and temporary import of non-lethal defense articles and defense services destined for or originating in the Republic of Cyprus (ROC).”<sup>38</sup> So far, however, no Federal Register notice has been published to implement this policy change within the ITAR.

4. *Litigation Updates*

In *Thorne v. U.S. Dep’t of State*, the U.S. Court of Appeals for the Ninth Circuit held that “to establish a de facto debarment under § 127.7, plaintiffs need to show that the DDTC has completely prohibited them from legally engaging in all ITAR and AECA activities.”<sup>39</sup>

B. EAR UPDATES

1. *BIS Issued First Unilateral Export Control on Artificial Intelligence Software*

In an interim final rule,<sup>40</sup> effective Monday, January 6, 2020, BIS imposed export controls on its first “emerging technology” – software specially designed to automate the analysis of geospatial imagery. While BIS would

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36. U.S. Dep’t of State, *Hong Kong Executive Order: Licensing Policy Change for Hong Kong, Notice to News & Events*, DIRECTORATE OF DEF. TRADE CONTROLS (July 15, 2020), [https://www.pmdtc.state.gov/ddtc\\_public?id=ddtc\\_public\\_portal\\_news\\_and\\_events&p=2](https://www.pmdtc.state.gov/ddtc_public?id=ddtc_public_portal_news_and_events&p=2).

37. International Traffic in Arms Regulations: Amendment of Central African Republic, 85 Fed. Reg. 44,188, 44,189 (July 22, 2020) (to be codified at 22 C.F.R. pt. 126).

38. U.S. Dep’t of State, *Secretary of State National Security Determination: Upcoming Change to the Policy of Denial for the Republic of Cyprus – DDTC Public Announcements, Notice to News & Events*, DIRECTORATE OF DEF. TRADE CONTROLS (Sept. 2, 2020), [https://www.pmdtc.state.gov/ddtc\\_public?id=ddtc\\_public\\_portal\\_news\\_and\\_events&p=2](https://www.pmdtc.state.gov/ddtc_public?id=ddtc_public_portal_news_and_events&p=2).

39. 978 F.3d 1139, 1142 (9th Cir. 2020).

40. Addition of Software Specially Designed to Automate the Analysis of Geospatial Imagery to the Export Control Classification Number 0Y521 Series, 85 Fed. Reg. 459, 459 (Jan. 6, 2020) (to be codified at 15 C.F.R. pt. 7740).

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continue to receive comments on the interim final rule until March 6, 2020, the controls began immediately.<sup>41</sup>

This new item of “emerging technology” is controlled under Export Control Classification Number 0D521 (ECCN 0Y521) and is defined as “software specially designed to automate the analysis of geospatial imagery.”<sup>42</sup> BIS added this item to the 0Y521 Series, which was created in 2012 at the onset of Export Control Reform.<sup>43</sup> A determination was made “by the Department of Commerce, with the concurrence of the Departments of Defense and State, and other agencies . . . that the items warrant control for export because the items may provide a significant military or intelligence advantage to the United States or because foreign policy reasons justify control, pursuant to the ECCN 0Y521 series procedures.”<sup>44</sup>

2. *Revision of Military End Use/End User Rule*

On April 28, 2020, BIS issued a final rule imposing stricter license requirements on exports, reexports, and transfers (in-country) to China, Russia, or Venezuela for “military end uses” or to “military end users.”<sup>45</sup> BIS imposed these requirements by making several changes to the Export Administration Regulations (EAR), such as by expanding the licensing requirements for China to include “military end users,” in addition to “military end use,” and establishing a presumption of denial for license requests related to military end use/users in China.<sup>46</sup>

Notably, BIS changed the definition of “military end use” to include an expansion of “use,” adding items that “support[] or contribute[] to” certain activities related to military items described on the U.S. Munitions List (USML) or Wassenaar Arrangement Munitions List (WAML).<sup>47</sup> This expanded definition of “military end use” also expanded the definition of who qualifies as a “military end user.”<sup>48</sup> Additionally, 15 C.F.R. § 744.21(a) was amended to prohibit the export of certain items subject to the EAR for military end users in China, whereas previously exports for military end use were only prohibited without a license.<sup>49</sup>

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41. *Id.* at 460.

42. *Id.* at 459–60.

43. *Id.* at 460.

44. *Id.*

45. Expansion of Export, Reexport, and Transfer (in-Country) Controls for Military End Use or Military End Users in the People’s Republic of China, Russia, or Venezuela, 85 Fed. Reg. 23,459, 23,459 (June 29, 2020) (to be codified at 15 C.F.R. pt. 732, 734, 738, 742, 744, 758, 774).

46. *Id.* at 23,460.

47. *Id.*

48. *Id.* at 23,459.

49. Addition of ‘Military End User’ (MEU) List to the Export Administration Regulations and Addition of Entities to the MEU List, 85 Fed. Reg. 83,793, 83,793 (Dec. 23, 2020) (to be codified at 15 C.F.R. pt. 744).

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Now, any company that exports, re-exports, or transfers (in-country) items subject to U.S. export controls that fall into one of the now forty-nine ECCNs set forth in Supplement No. 2 to Part 744—List of Items Subject to the Military End Use or End User License Requirement of section 744.2 to China, Russia, or Venezuela—needs to revamp their end use, or end user, controls to account for this new rule.<sup>50</sup> The BIS’s final rule went into effect June 29, 2020.<sup>51</sup>

3. *Elimination of License Exception CIV*

In another final rule, published April 28, 2020, BIS removed the License Exception Civil End-Users (CIV)<sup>52</sup> from the EAR.<sup>53</sup> This new final rule, removing CIV from the EAR, became effective on June 29, 2020.<sup>54</sup> As a result, exporters of impacted ECCNs to D:1 countries now need to obtain an export license from BIS.<sup>55</sup>

License Exception CIV had “authorized exports, reexports, and transfers (in-country)” of certain items controlled for national security reasons, without prior review by BIS, provided that the exception’s criteria were met.<sup>56</sup> CIV applied to most civil end-users for civil end-uses in Country Group D:1, which is a shortlist of countries, including the key export markets of China and Russia.<sup>57</sup>

BIS found that “countries listed in Country Group D:1 [were] of concern for national security reasons.”<sup>58</sup> Further, the increased integration of civilian and military technology development in these D:1 countries made it “more difficult for industry to know or determine whether the end use and end users of items proposed for export, reexport or transfer (in-country) will not be or are not intended for military uses or military end users.”<sup>59</sup> As a result, BIS would simply delete CIV as a license exception from all ECCNs that had it, as well as from the EAR. 15 CFR § 740.5 will be reserved.<sup>60</sup>

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50. Expansion of Export, Reexport, and Transfer (in-Country) Controls for Military End Use or Military End Users in the People’s Republic of China, Russia, or Venezuela, 85 Fed. Reg. at 23,460.

51. *Id.*

52. 15 C.F.R. § 740.5 (2016).

53. Elimination of License Exception Civil End Users (CIV), 85 Fed. Reg. 23,470, 23,470 (Apr. 28, 2020) (to be codified at 15 C.F.R. pt. 740, 774).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 23,471.

59. Elimination of License Exception Civil End Users (CIV), 85 Fed. Reg. 23,470, 23,471 (Apr. 28, 2020) (to be codified at 15 C.F.R. pt. 740, 774).

60. *Id.* at 23,472.

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4. *Proposed Revision of License Exception APR*

In a third action, on April 28, 2020, BIS issued a proposed rule<sup>61</sup> that would revise License Exception Additional Permissive Re-Exports (APR) “to remove provisions which authorize reexports of certain national security-controlled items on the Commerce Control List (CCL) to gain better visibility into transactions of national security or foreign policy interest to the United States.”<sup>62</sup> The original provision had allowed for reexports of items subject to national security controls from Country Group A:1, and Hong Kong, to countries in Country Group D:1, except North Korea, provided that the export licensing requirements of the A:1 countries, or Hong Kong, as applicable were met.<sup>63</sup>

5. *Revision of the Foreign Product Rule*

On May 15, 2020, BIS revised the Foreign Direct Product Rule (FDPR), which imposed export controls on foreign-origin items that would fall under national security controls, but only for the direct product of a small set of very highly controlled technologies.<sup>64</sup> The FDPR only imposed a license requirement if those items were exported, re-exported, or transferred to a few countries.<sup>65</sup> This revision to the rule expanded the FDPR by creating two new categories of foreign direct products. These categories are far broader than those under the old rule, but new foreign direct products only require a license when they are exported, or re-exported, to entities with a “Footnote One” designation on the Entity List, which includes Huawei, HiSilicon, and many other Huawei affiliates.<sup>66</sup>

The FDPR was further revised on August 17, 2020.<sup>67</sup> BIS’s Final Rule stated that the additional entities added to the Entity List posed “a significant risk of involvement in activities contrary to the national security or foreign policy interests of the United States.”<sup>68</sup> A license is required for the export, re-export, or transfer (in-country) of any item to these entities that are subject to the EAR, including EAR99 items; and there is a presumption of denial for license applications.<sup>69</sup> The Entity List restrictions

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61. Modification of License Exception Additional Permissive Reexports (APR), 85 Fed. Reg. 23,496, 23,496 (Apr. 28, 2020) (to be codified at 15 C.F.R. pt. 740).

62. *Id.*

63. *Id.* at 23,496–97.

64. Export Administration Regulations: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List, 85 Fed. Reg. 29,849, 29,850 (May 15, 2020) (to be codified at C.F.R. pt. 730, 732, 736, 744).

65. *Id.* at 29,852.

66. *Id.* at 29,850.

67. Addition of Huawei Non-U.S. Affiliates to the Entity List, the Removal of Temporary General License, and Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule), 85 Fed. Reg. 51,596, 51,596 (Aug. 17, 2020) (to be codified at 15 C.F.R. pt. 736, 744, 762).

68. *Id.*

69. *Id.* at 51,596, 51,601.

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apply regardless of the role the Huawei entity plays in an export transaction.<sup>70</sup> As such, exports, re-exports, and transfers (in-country) are prohibited without a license if a Huawei entity is the “purchaser, intermediate or ultimate consignee, or end-user.”<sup>71</sup>

The BIS’s Final Rule allows the TGL, which had been in place for Huawei and its non-U.S. affiliates, to expire.<sup>72</sup> In place of the TGL is “a more limited permanent authorization that will further protect U.S. national security and foreign policy interests” related only to cybersecurity research and vulnerability disclosure.<sup>73</sup> The rule includes a limited carve-out for the release of EAR99 technology, or technology controlled for antiterrorism (AT) reasons only “when released to members of a ‘standards organization’ for the purpose of contributing to the revision or development of a ‘standard.’”<sup>74</sup>

The revised final rule also substantially expanded the scope of what the FDPR captures for Huawei, and other Entity List entities, with a Footnote One restriction.<sup>75</sup> The revised FDPR removed the requirement that the foreign product in question had to be either developed or produced by a designated Huawei entity, or be the direct product of Huawei software or technology.<sup>76</sup> Instead, to be captured under the new FDPR, the party exporting, re-exporting, or transferring the foreign product only needs to have knowledge that either:

- (1) The foreign-produced item will be incorporated into, or will be used in the “production” or “development” of any “part,” “component,” or “equipment” produced, purchased, or ordered by any Huawei entity on the Entity List in the license requirement column of this supplement; or
- (2) A Huawei entity on the Entity List is a party to any transaction involving the foreign-produced item, e.g., as a “purchaser,” “intermediate consignee,” “ultimate consignee,” or “end-user.”<sup>77</sup>

The FDPR items still need to be the direct product of U.S.-origin technology or software that falls into the enumerated ECCNs, or the direct product of a plant where a major component of the plant is the direct

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70. *Id.* at 51,597.

71. *Id.* at 51,596–97.

72. Jeanne Whalen, *License Allowing Some Trade with Huawei Expires, Spelling Possible Trouble for Rural Telecom Companies and Huawei Cell Phone Users*, WASH. POST (Aug. 14, 2020), <https://www.washingtonpost.com/business/2020/08/14/huawei-temporary-general-license-expires/>.

73. Importation Administration Regulations, 85 Fed. Reg. at 51,596.

74. *Id.* at 51,597.

75. See Richard Burke et al., *BIS Issues Rules on the Scope of Entity List Restrictions and Significantly Limits Activities Involving Huawei*, WHITE & CASE (Aug. 28, 2020), <https://www.whitecase.com/publications/alert/bis-issues-rules-scope-entity-list-restrictions-and-significantly-limits>.

76. *Id.* at ¶ 3.

77. Importation Administration Regulations, 85 Fed. Reg. at 51,596.

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product of one of the enumerated ECCNs.<sup>78</sup> Commercial off the shelf (COTS) products that are the direct product of U.S.-origin software or technology that fall into those enumerated ECCNs, or the direct product of a plant where a major component of the plant is the direct product of one of the enumerated ECCNs, now need a license for export, re-export, or transfer if the company engaging in the transaction has reason to know that Huawei will order or purchase a downstream product containing those items, or is otherwise a party to the transaction.<sup>79</sup> BIS will consider licenses on a case-by-case basis if the sophistication and capabilities of the technology fall below the 5G level.<sup>80</sup>

6. *Proposed Controls on “Software” Capable of Being Used to Operate Nucleic Acid Assemblers and Synthesizers*

On November 6, 2020, BIS proposed a new ECCN, 2D352, to control “software” that is capable of being used to operate nucleic acid assemblers and synthesizers.<sup>81</sup> BIS is concerned that the software is “capable of being utilized in the production of pathogens and toxins and, consequently, the absence of export controls on such ‘software’ could be exploited for biological weapons purposes.”<sup>82</sup> Because the technology ECCN 2E001 controls “technology” for the “development” of “software” listed under Category 2D, the creation of this new ECCN would also create a new technology control in 2E001 on the technology to develop ECCN 2D352 software.<sup>83</sup>

### III. Notable Enforcement Cases

#### A. OFAC Enforcement

In 2020, the Office of Foreign Assets Control’s (OFAC) enforcement actions continued to reach beyond the agency’s traditional focus on the financial industry to parties in the aviation services, e-commerce, travel assistance, lobbying, and shipping sectors, among others.

On February 26, 2020, OFAC announced a \$7.83 million settlement with Société Internationale de Télécommunications Aéronautiques SCRL (SITA), a Swiss civil aviation conglomerate, for dealings with Specially Designated Global Terrorists (SDGTs) targeting commercial services and

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78. *Id.* at 51,601.

79. *See id.*

80. *Id.* at 51,602.

81. Proposed Controls on “Software” for the Operation of Certain Automated Nucleic Acid Assemblers and Synthesizers, 85 Fed. Reg. 71,012 (proposed Nov. 6, 2020) (to be codified at 15 C.F.R. pt. 86).

82. *Id.*

83. *Id.* at 71,013.

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software subject to U.S. jurisdiction.<sup>84</sup> OFAC found SITA's membership included certain SDGT airlines, such as Mahan Air, Syrian Arab Airlines, and Caspian Air, and that SITA provided those SDGTs with U.S.-origin software and services, such as flight planning and dispatch, reservations, and network and connectivity services, via messages routed through the United States or otherwise involving SITA's U.S. operations.<sup>85</sup>

In its July 8, 2020 settlement with Amazon.com, Inc. (Amazon), OFAC emphasized its expectations that e-commerce companies and entities similarly engaged in provision of digital services develop robust compliance programs, which mitigate the risk of dealing with restricted parties and embargoed jurisdictions, and ensure appropriate reporting consistent with OFAC regulations.<sup>86</sup> In reaching the \$134,523 settlement for violations of "multiple" OFAC sanctions programs, OFAC noted that Amazon's automated screening programs had failed to identify orders referencing cities in sanctioned jurisdictions, or "common alternative spelling[s]" of those jurisdictions, and otherwise "failed to fully analyze" all relevant transaction and customer data.<sup>87</sup>

On October 1, 2020, the travel assistance services company, Generali Global Assistance, Inc. (GGA), agreed to remit \$5.86 million to settle its potential civil liability for violations of the Cuban Assets Control Regulations (CACR) in connection with intentional referral of Cuban-related payments to its Canadian affiliate, in violation of OFAC prohibitions on facilitation.<sup>88</sup>

In a continued focus on foreign subsidiaries of U.S. entities that conduct unauthorized dealings with Iran, OFAC reached a \$4.14 million settlement with Berkshire Hathaway Inc. (Berkshire) on October 20, 2020.<sup>89</sup> The settlement arose from sales of cutting tools and related items to Turkish distributors by Berkshire's wholly-owned Turkish subsidiary, with management knowledge that those goods were destined for Iran, and the Government of Iran, in violation of U.S. law and Berkshire compliance policies.<sup>90</sup>

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84. Press Release, U.S. Dep't of Treas., Société Internationale de Télécommunications Aéronautiques SCRL ("SITA") Settles Potential Civil Liab. for Apparent Violations of the Glob. Terrorism Sanctions Regulations ¶ 1 (Feb. 26, 2020) (underscoring the importance of robust compliance measures that address provision of software and services that ultimately benefit restricted parties, whether directly or indirectly).

85. *Id.* at ¶¶ 3–4.

86. Press Release, U.S. Dep't of Treas., OFAC Settles with Amazon.com, Inc. with Respect to Potential Civil Liab. in Violation of Multiple Sanctions Programs ¶ 11 (July 28, 2020).

87. *Id.* at ¶¶ 1,4.

88. Press Release, U.S. Dep't of Treas., OFAC Enters \$5,864,860 Settlement with Generali Glob. Assistance, Inc. for Apparent Violations of the Cuban Assets Control Regs. ¶ 1 (Oct. 1, 2020).

89. Press Release, U.S. Dep't of Treas., OFAC Settles with Berkshire Hathaway Inc. with Respect to Potential Civil Liability for Apparent Violations of the Iranian Transactions & Sanctions Regs. Engaged in by one of its Foreign Subsidiaries ¶ 1 (Oct. 20, 2020).

90. *Id.*

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Settlements involving entry into contracts with parties on the List of Specially Designated Nationals and Blocked Persons (SDN List)—including contracts for professional services,<sup>91</sup> as well as potential violations of currently-concluded but formerly-active U.S. sanctions programs, such as the Burma and Sudan programs<sup>92</sup>—showed OFAC’s continued commitment to enforce all aspects of its regulations, both historic and current. Similarly, enforcement actions involving the telecommunications industry,<sup>93</sup> an animal nutrition company,<sup>94</sup> and a cookware coating manufacturer<sup>95</sup> demonstrate the importance of OFAC compliance in circumstances involving both direct and indirect U.S. touchpoints, irrespective of sector.

**B. ITAR ENFORCEMENT**

On January 29, 2020, Netherlands-based Airbus SE (Airbus) entered into a three-year Consent Agreement with DDTC to resolve charges arising from Airbus’s apparent violations of the Arms Export Control Act (AECA) and ITAR.<sup>96</sup> The Proposed Charging Letter alleged that Airbus violated the AECA and ITAR through unauthorized exports and re-exports of defense articles, furnishing of false statements in licensing requests, and in failing to report political contributions as required by ITAR part 130.<sup>97</sup> The DDTC Consent Agreement was part of a more than \$3.9 billion global settlement

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91. See Press Release, U.S. Dep’t of Treas., Park Strategies, LLC Settles Potential Civil Liability for Apparent Violations of the Global Terrorism Sanctions Regulations ¶ 1 (Jan. 21, 2020).

92. See Press Release, U.S. Dep’t of Treas., Eagle Shipping International (USA) LLC Settles Potential Civil Liability for Apparent Violations of the Burmese Sanctions Regulations ¶ 1 (Jan. 27, 2020) (finding that Comtech Telecommunications Corp. and its wholly-owned subsidiary “indirectly exported warrantied satellite equipment and facilitated services and training to a government-owned entity in Sudan” during the pendency and in violation of the U.S. Sudan sanctions program).

93. See Press Release, U.S. Dep’t of Treas., Comtech Telecomm. Corp. & Comtech EF Data Corp. Settle Potential Civil Liability. for Apparent Violations of the Sudanese Sanctions Regs. ¶ 1 (Sept. 17, 2020).

94. See Press Release, U.S. Dep’t of Treas., OFAC Settles with BIOMIN America, Inc. with Respect to Potential Civil Liability for Apparent Violations of the Cuban Assets Control Regs. ¶¶ 1,2 (May 6, 2020) (relating to BIOMIN’s unauthorized coordination of agricultural product sales from outside the United States to Alfarma S.A. in Cuba).

95. See Press Release, U.S. Dep’t of Treas., OFAC Settles with Whitford Worldwide Co., LLC for Its Potential Civ. Liability for Apparent Violations of the Iranian Transactions & Sanctions Regs. ¶¶ 1,2,4 (July 28, 2020) (finding that between November 2012 and December 2015, Whitford WorldWide Company LLC’s foreign subsidiaries in Italy and Turkey sold cookware coatings to Iran, in part due to incorrect advice from a company compliance manager that sales to Iran could continue if no direct connections between Iran and company subsidiaries existed).

96. U.S. Dep’t of State, Bureau of Political-Military Affairs, Airbus SE Consent Agreement 1–2, 14 (2020).

97. U.S. Dep’t of State, General Counsel, Proposed Charging Letter Re: Alleged Violations of the Arms Export Control Act and the International Traffic in Arms Regulations by Airbus 1 (2020).



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for foreign bribery charges with the U.S. government, the United Kingdom, and France,<sup>98</sup> which required appointment of a Special Compliance Officer hired from outside the company to oversee the agreed-upon compliance program monitoring, DDTC-approved program enhancements, and reporting for the entirety of the three-year agreement.<sup>99</sup>

C. EAR ENFORCEMENT

BIS's most prominent enforcement-related activities of 2020 occurred through Entity List designations of additional affiliates of Huawei Technologies Co., Ltd.,<sup>100</sup> parties involved in human rights and labor abuses in the Xinjiang Uyghur Autonomous Region of China (XUAR) to deny them access to items subject to the Export Administration Regulations,<sup>101</sup> and similar list-based actions against parties acting contrary to U.S. national security and foreign policy interests.<sup>102</sup> BIS also engaged in coordinated enforcement actions with the Department of Justice and OFAC related to seizure of U.S.-registered domain names used by Foreign Terrorist Organizations and other restricted parties,<sup>103</sup> and in similar targeted enforcement actions against individuals.<sup>104</sup> On August 20, 2020, BIS likewise announced that it had issued a Temporary Denial Order (TDO) to six parties in Indonesia who were found to have been operating an international procurement network in support of Mahan Air, consistent with the U.S. government's ongoing campaign of "maximum pressure" on Iran.<sup>105</sup>

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98. Press Release, U.S. Dep't of Just., Airbus Agrees to Pay over \$3.9 Billion in Glob. Penalties to Resolve Foreign Bribery & ITAR Case ¶ 1 (Jan. 31, 2020).

99. See Airbus SE Consent Agreement, *supra* note 96, at 4.

100. See Press Release, U.S. Dep't of Com., Commerce Department Further Restricts Huawei Access to U.S. Tech. & Adds Another 38 Affiliates to the Entity List ¶ 1 (Aug. 6, 2020).

101. See Press Release, U.S. Dep't of Com., Commerce Department to Add Nine Chinese Entities Related to Human Rights Abuses in the Xinjiang Uyghur Autonomous Region to the Entity List ¶¶ 1-2 (May 22, 2020).

102. See, e.g., Press Release, U.S. Dep't of Com., Commerce Department Adds 24 Chinese Companies to the Entity List for Helping Build Military Islands in the S. China Sea ¶¶ 1, 5 (Aug. 26, 2020).

103. See, e.g., Press Release, U.S. Dep't of Just., U.S. Seizes Domain Names Used by Foreign Terrorist Org. ¶¶ 1, 6, 9-10 (Sept. 2, 2020) (noting BIS coordination in investigating the use and seizure of U.S. registered domains by Kata'ib Kizballah, a Foreign Terrorist Organization on the SDN List).

104. See, e.g., Press Release, U.S. Dep't of Just., California-Based Company, Company President and Employee Indicted in Alleged Scheme to Violate the Export Control Reform Act ¶¶ 1-3 (July 20, 2020) (involving the indictment of the president of a U.S. based electronic distribution company on charges of conspiracy to illegally export chemicals to a Chinese technology company).

105. See Press Release, U.S. Dep't of Com., U.S. Department of Commerce Acts Against International Procurement Network Supporting Iran's Mahan Air ¶¶ 1-2 (Aug. 20, 2020).

#### IV. Canadian Developments

##### A. EXPORT CONTROLS

In the wake of the COVID-19 pandemic, Canada implemented measures to ensure that the global movement of goods was not hampered and that essential goods were not unnecessarily delayed at national borders.<sup>106</sup> Notably, Canada has not implemented any export control restrictions designed to keep the supply of pandemic-related items within its borders.<sup>107</sup> In March 2020, Canada joined other countries in issuing a declaration to confirm the need to keep these supply chains open and free from export control.<sup>108</sup>

##### 1. *Changes to the Export Control List*

On March 13, 2020, Canada amended its Export Control List.<sup>109</sup> These changes to the Guide to Canada's Export Controls List (Guide) came into effect on May 1, 2020.<sup>110</sup> The Guide encompasses the list of items enumerated on Canada's Export Control List that are controlled for export, in accordance with the Export and Import Permits Act.<sup>111</sup> The Guide is regularly updated to reflect Canada's commitments under the four multilateral export control and non-proliferation regimes: the Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime, and the Australia Group.<sup>112</sup> The new version of the Guide reflects Canada's obligations under multilateral export control regimes as of December 31, 2018.<sup>113</sup>

The Guide contains more than six-hundred changes to its previous version.<sup>114</sup> The most significant additions were made with respect to Group 1, the Dual-Use List. Group 1 now covers "magnetic random access memories (MRAMs), high power discrete microwave transistors, electro-optic modulators, mask substrate blanks, software designed to restore

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106. See Press Release, Glob. Affairs Can., Joint Ministerial Statement by Austl., Brunei Darussalam, Can., Chile, Myan., N.Z. and Sing. Affirming Commitment to Ensuring Supply Chain Connectivity Amidst the COVID-19 Situation ¶ 1 (Mar. 25, 2020).

107. See *id.* at ¶ 3.

108. See *id.* at ¶ 1.

109. Order Amending the Export Control List, SOR/2020-48 (Can.).

110. GLOBAL AFFAIRS CAN., REGULATION – ORDER AMENDING THE EXPORT CONTROL LIST ¶ 1 (April 1, 2020), [https://www.international.gc.ca/controls-controles/about-a\\_propos/expor/regulation-reglement-2020.aspx?lang=eng#:~:text=on%20March%2013%2C%202020%2C%20the,various%20multilateral%20export%20control%20regimes](https://www.international.gc.ca/controls-controles/about-a_propos/expor/regulation-reglement-2020.aspx?lang=eng#:~:text=on%20March%2013%2C%202020%2C%20the,various%20multilateral%20export%20control%20regimes).

111. GLOBAL AFFAIRS CAN., A GUIDE TO CANADA'S EXPORT CONTROL LIST ¶¶ 4–6 (Feb. 19, 2021), [https://www.international.gc.ca/controls-controles/about-a\\_propos/expor/guide-2018.aspx?lang=eng](https://www.international.gc.ca/controls-controles/about-a_propos/expor/guide-2018.aspx?lang=eng).

112. *Id.* at ¶¶ 7–10.

113. See Regulation – Order amending the Export Control List, *supra* note 110, at ¶ 2.

114. Jessica Horwitz et al., *Amendments to Canada's Export Control List Take Effect May 1, 2020*, BENNETT JONES (May 1, 2020), <https://www.bennettjones.com/Blogs-Section/Amendments-to-Canadas-Export-Control-List-Take-Effect-May-1-2020>.

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microprocessors after electromagnetic pulse or electrostatic discharge, and read-out integrated circuits.”<sup>115</sup> There are also important changes to cryptographic information security that clarify definitions of controlled information security systems and security algorithms, as well as introduce a new “connected civil industry application” exemption.<sup>116</sup>

Other additions, deletions, and modifications were made with respect to Group 2 (Munitions List), Group 4 (Nuclear-Related Dual-Use List), Group 6 (Missile Technology Control Regime List), and Group 7 (Chemical and Biological Weapons Non-Proliferation List).<sup>117</sup>

### 2. *Restrictions on Transfers to Turkey*

Turkey’s intrusion into northern Syria, in October 2019, created a wave of responses by the international community. While Canada has not imposed formal economic sanctions against Turkey, it did suspend the issuance of new permits for exports of all controlled items to its fellow NATO member on October 11, 2019.<sup>118</sup> On April 16, 2020, the Canadian Government announced that, as of that date, applications to export Group 2 items (i.e., defense items) to Turkey would be presumptively denied and subject to review on a case-by-case basis to determine whether exceptional circumstances exist to justify issuing the permit, including relation to NATO cooperation programs.<sup>119</sup> Although the government’s announcement did not discuss its policy with respect to the issuance of brokering permits for transfers of controlled items from a foreign country to Turkey, Global Affairs Canada (GAC) has confirmed to the authors that a similar policy would be applied in such cases.

The situation further escalated when Turkey became involved in the conflict between Azerbaijan and Armenia, concerning the Nagorno-Karabakh region, in the fall of 2020.<sup>120</sup> Due to concerns regarding the use of Canadian technology in that conflict, on October 5, 2020, Canada announced the suspension of “the relevant export permits to Turkey, so as to allow time to further assess the situation.”<sup>121</sup>

### 3. *Canada Implements New Export Policy for Hong Kong*

In response to the passage of Hong Kong’s national security legislation, Canada announced that it will “treat exports and transfers of sensitive goods and technology to Hong Kong the same as those destined for mainland

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115. See Order Amending the Export Control List, *supra* note 109.

116. See Horwitz et al., *supra* note 114.

117. See *id.*

118. See EXP. CONTROLS DIV., GLOB. AFFAIRS CAN., SER. NO. 922, NOTICE TO EXPORTERS - EXPORT OF ITEMS LISTED ON THE EXPORT CONTROL LIST TO TURKEY ¶ 1 (2020), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/992.aspx?lang=eng>.

119. See *id.* at ¶ 2.

120. See Press Release, Glob. Affairs Can., Statement from Minister Champagne on Suspension of Export Permits to Turkey ¶¶ 5–6 (Oct. 15, 2020).

121. See *id.* at ¶ 4.

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China,” and will prohibit exports “of sensitive military items to Hong Kong.”<sup>122</sup> GAC announced the major policy changes in a Notice to Exporters issued July 7, 2020.<sup>123</sup>

Under the GAC’s new policy, all export permit applications for items listed on the Export Control List destined for Hong Kong will be “closely scrutinize[d],” and permits for exports or technology transfers inconsistent with Canada’s domestic and international legal obligations, foreign policy, or security interests will be denied.<sup>124</sup>

4. *No New Export or Brokering Permits for Belarus*

In September, October, and November 2020, Canada imposed three waves of sanctions against Belarus in response to “gross and systemic human rights violations.”<sup>125</sup> Shortly thereafter, on November 9, 2020, Canada announced that in response to an ongoing campaign of repression and state-sponsored violence against public protests, Canada was temporarily suspending the issuance of all new permits for the export and brokering of any controlled goods or technology to Belarus.<sup>126</sup> Exporters are free to continue exporting against any existing permits during their period of validity.<sup>127</sup>

5. *Canada Resumes Issuing Export Permits for Saudi Arabia*

In the fall of 2018, GAC was tasked with conducting a review of Canada’s arms exports to Saudi Arabia.<sup>128</sup> The issuance of new permits for exports to Saudi Arabia was put on hold at that time, pending the completion of this review.<sup>129</sup> On April 9, 2020, GAC issued a statement noting that because the review did not result in a finding of a substantial risk that controlled items would be used to commit or facilitate serious violations of international humanitarian law, international human rights law, or serious acts of gender-

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122. EXP. CONTROLS DIV., GLOB. AFFAIRS CAN., SER. NO. 1003, EXPORT OF ITEMS LISTED ON THE EXPORT CONTROL LIST TO HONG KONG ¶ 2 (July 18, 2020), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1003.aspx?lang=eng>.

123. *Id.* at ¶ 1.

124. *Id.* at ¶ 3.

125. CAN., *Canadian Sanctions Related to Belarus*, § 1 (Jan. 22, 2021) [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/sanctions/belarus.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/belarus.aspx?lang=eng).

126. EXP. CONTROLS DIV., GLOB. AFFAIRS CAN., SER. NO. 1033, *Notice to Exporters & Brokers – Export & Brokering of items listed on the Export Control List and the Brokering Control List to Belarus* ¶¶ 1–2 (Nov. 9, 2020), <https://www.international.gc.ca/trade-commerce/controls-controles/notices-avis/1033.aspx?lang=eng>.

127. *Id.* at ¶ 3.

128. See EXP. CONTROLS POLICY DIV., GLOB. AFFAIRS CAN., *2018 Report on the Export Of Military Goods*, 9 (2018).

129. See *id.*

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based violence, the GAC would resume reviewing exports for Saudi Arabia on a case-by-case basis.<sup>130</sup>

**B. ECONOMIC SANCTIONS**

*1. Canada Imposes Sanctions on Belarus*

On September 29, 2020, the Canadian government announced the imposition of sanctions on various officials of the government of Belarus effective immediately.<sup>131</sup> The sanctions, implemented under the Special Economic Measures Act (SEMA),<sup>132</sup> are Canada's response to the Belarus government's crack-down on opposition leaders and civilians protesting the results of Belarus' presidential election on August 9, 2020.<sup>133</sup>

Initially, the measures targeted eleven high-ranking Belarusian civil and military figures alleged to be involved in gross and systemic human rights violations following the failed election.<sup>134</sup> These figures included the purported winner of the election, Aleksandr Lukashenko, as well as his son and National Security Advisor, Viktor Lukashenko.<sup>135</sup> On October 15, 2020, Canada expanded its sanctions relating to Belarus by listing an additional thirty-one Belarusian officials.<sup>136</sup> On November 6, 2020, Canada added an additional thirteen officials to the list.<sup>137</sup> Currently, there are fifty-five listed government officials, including twelve members of the Central Electoral Commission of Belarus, the Interior Minister, and the former Prosecutor General.<sup>138</sup>

*2. Canada Imposes Sanctions on Russia*

On January 29, 2020, Canada expanded its SEMA sanctions against Russia by listing six additional individuals.<sup>139</sup> This measure was triggered by Russia's continued support for separatists operating in Ukraine's Donetsk, Luhansk, and Crimea regions and by Russia's involvement in the organization and facilitation of illegitimate elections in Crimea in September of 2019.<sup>140</sup>

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130. See Press Release, Glob. Affairs Can., Canada Improves Terms of Light Armored Vehicles Contract, Putting in Place a New Robust Permits Review Process ¶¶ 11, 14 (Apr. 9, 2020).

131. See Canadian Sanctions Related to Belarus, *supra* note 125, at § 4.

132. See generally Special Economic Measures Act, S.C. 1992, c. 17 p. 2 (Can.).

133. See Canadian Sanctions Related to Belarus, *supra* note 125, at § 4.

134. See *id.*

135. GLOB. AFFAIRS CAN., *Backgrounder: Belarus Sanctions* ¶¶ 1, 2, 4 (Sept. 29, 2020), <https://www.canada.ca/en/global-affairs/news/2020/09/backgrounder-belarus-sanctions.html>.

136. See Canadian Sanctions Related to Belarus, *supra* note 125, at § 4.

137. See *id.*

138. Tom Best et al., *Protests in Belarus*, PAUL HASTINGS: PHIRE § 3 (Nov. 17, 2020), <https://www.paulhastings.com/insights/international-regulatory-enforcement/blog-protests-in-belarus-eu-imposes-fresh-sanctions-on-the-belarusian-regime-and-follows-the-uk-us-and-canada-in-imposing-sanctions-on-lukashenko>.

139. Amending the Special Economic Measures (Ukraine), SOR/2020-15 (Can.).

140. *Id.*

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3. *Canada Amends its UN Sanctions Regulations*

On June 1, 2020, Canada updated several of its regulations under the United Nations Act, which is legislation that gives effect to United Nations Security Council resolutions.<sup>141</sup> Sanctions against Eritrea were repealed.<sup>142</sup> Sanctions against North Korea were expanded to include a prohibition on “selling, leasing, or otherwise making available real property to North Korea, a national or any person acting on behalf or at the direction of North Korea.”<sup>143</sup> Sanctions on the Central African Republic, Somalia, South Sudan, and Sudan were also amended to provide an exemption for payments of interest or other earnings to a designated person, in connection with dealings that occurred prior to their listing as a designated person.<sup>144</sup> Sanctions on Al-Qaeda and the Taliban were also expanded to include ISIL, also known as Da’esh.<sup>145</sup>

4. *Canada’s First Prosecution Under Syria Sanctions*

Nader Mohamad Kalai, a Canadian permanent resident and Syrian national, was charged with breaching the SEMA Syria sanctions.<sup>146</sup> It was alleged that Mr. Kalai made an illegal payment equivalent to CAD 140,000 to Syrialink, a Syrian real estate and telecommunications company.<sup>147</sup> Mr. Kalai, who is currently under the EU sanctions,<sup>148</sup> pled not guilty to the charges.<sup>149</sup> The maximum penalty for this offence is five years imprisonment.<sup>150</sup> Mr. Kalai was acquitted in December 2020.<sup>151</sup> This was the first prosecution for violation of Canada’s sanctions against Syria, and the second prosecution under SEMA since its enactment in 1992.<sup>152</sup>

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141. *Amendments Introduced to Canadian Sanctions Legislation*, BLAKES ¶ 1 (June 30, 2020), <https://www.blakes.com/insights/bulletins/2020/amendments-introduced-to-canadian-sanctions-legisl>.

142. *Id.* at ¶ 5.

143. *Id.* at ¶ 6.

144. *Id.* at ¶ 10.

145. *Id.* at ¶ 4.

146. *Halifax Man Accused of Breaking Syrian Economic Sanctions Elects Trial by Judge*, CBC NEWS (Aug. 20, 2018), <https://www.cbc.ca/news/canada/nova-scotia/halifax-judge-trial-syrian-economic-sanctions-1.4791610>.

147. *Id.* at ¶ 6.

148. Council Implementing Decision 2019/87, annex 1, 2019 O.J. (L 18) 16.

149. Alexander Quon, *Halifax Man First to Face Trial for Violating Canada’s International Economic Sanctions*, GLOB. NEWS (Nov. 12, 2019), <https://globalnews.ca/news/6086031/halifax-man-syria-economic-measures-act/>.

150. *Id.* at ¶ 6.

151. Blair Rhodes, *Halifax Man Acquitted on Charge of Violating Syria Trade Sanctions*, CBC NEWS (Dec. 10, 2020), <https://www.cbc.ca/news/canada/nova-scotia/halifax-man-acquitted-on-charge-of-violating-syrian-trade-sanctions-1.5835784>.

152. See Quon, *supra* note 149, at ¶¶ 1–2.

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## **International Animal Law**

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### **I. Introduction**

2020 has been a year of marked contrasts in animal welfare. While concerns over the spread of COVID-19 have led to calls for the mass slaughter of minks in the Netherlands and Denmark, France has announced the end of mink farming and Israel has announced that it will ban the fur trade. France has also announced a gradual ban on the use of wild animals in traveling circuses.

Given the threat posed by COVID-19 and the likely cause of its transmission, the Chinese government instituted a temporary ban on the country's wildlife trade in January 2020. For the first time in Pakistan's history, a high court extended legal rights to animals by ruling that animal cruelty violates Pakistan's Constitution. In Botswana and Zimbabwe, herds of elephants died near watering holes from environmental toxins, highlighting the need for comprehensive international collaboration extending further than that provided by existing treaties and initiatives. On a hopeful note, Bambi the elephant has been transferred from the Ribeirão Preto Zoo to a sanctuary.

### **II. France Announces Measures to Improve the Welfare of Captive Wildlife**

In September 2020, France announced a series of measures on the “welfare of captive wildlife,” including a gradual ban on the use of wild animals in traveling circuses and the end of mink fur farming.<sup>2</sup> Ecology Minister Barbara Pompili stated, “It is time to open a new era in our relationship with these [wild] animals . . . . It is time that our ancestral

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2. *France to Ban Wild Animals in Circuses ‘Within the Next Few Years’*, BRUSSELS TIMES ¶¶ 2, 4 (Sept. 29, 2020), <https://www.brusselstimes.com/news/world-all-news/133348/france-to-ban-wild-animals-in-circuses-within-the-next-few-years/>; Sophie Hirsh, *France Bans Wild Animal Circuses and Other Cruel Animal Entertainment*, GREENMATTERS §§ 1, 2 (Sept. 30, 2020, 2:56 PM ET), <https://www.greenmatters.com/p/france-bans-wild-animal-circuses>.



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fascination with these wild beings no longer means they end up in captivity.”<sup>3</sup>

A. TRAVELING CIRCUSES

France joins the ranks of more than twenty-seven countries that have banned wild animals from traveling acts.<sup>4</sup> Animals in circuses suffer from cruel training techniques, forcing them to perform unnatural and even painful acts and endure months of travel, social isolation, and cramped conditions.<sup>5</sup> Recognizing the abuses of animals in traveling circuses, Bolivia became the first country to institute such a ban in 2009.<sup>6</sup> Since then, more than twenty-seven countries have followed,<sup>7</sup> including Wales, which announced its ban in July of 2020,<sup>8</sup> and England, whose ban took effect in January 2020.<sup>9</sup> In the United States, the ten-year litigation against Ringling Brothers, along with the enactment of local laws banning the use of bullhooks, eventually led to the end of the so-called “Greatest Show on Earth” in 2017.<sup>10</sup> Although the Traveling Exotic Animal and Public Safety Protection Act was introduced in the U.S. House of Representatives in 2017,<sup>11</sup> and again in 2019,<sup>12</sup> it has made little progress. Nevertheless, six states and more than 150 cities in the United States have banned or restricted the use of wild animals in traveling acts.<sup>13</sup>

Finding suitable homes for the retired animals is challenging. Wild animals who have lived in captivity for years generally cannot be returned to

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3. *France Announces Gradual Ban on Wild Animals in Circuses*, BBC NEWS ¶¶ 5,6 (Sept. 30, 2020), <https://www.bbc.com/news/world-europe-54353907>.

4. *These 27 Countries Have Banned Wild-Animal Circuses*, PETAUK BLOG ¶ 3 (Sept. 11, 2019), <https://www.peta.org.uk/blog/these-26-countries-that-have-banned-wild-animal-circuses-are-making-england-look-really-bad/>; Madeleine Muzdakakis, *France Bans the Use of Wild Animals in Traveling Circuses*, MY MODERN MET ¶ 1 (Oct. 8, 2020), <https://mymodernmet.com/france-wild-animals-circuses/>.

5. See generally Jacqueline Neumann, *Redefining the Modern Circus: A Comparative Look at the Regulations Governing Circus Animal Treatment and America’s Neglect of Circus Animal Welfare*, 36 WHITTIER L. REV. 167, 171-76 (2014).

6. Visala Kantamneni, *These 8 Countries Have Banned Wild Animals in Circuses . . . Why Can’t We Do It?*, ONE GREEN PLANET § 1 (March 19, 2014), <https://www.onegreenplanet.org/animalsandnature/10-countries-that-have-banned-wild-animals-in-circuses#:~:text=Bolivia,circuses%20%E2%80%93%20both%20domestic%20and%20wild.>

7. See PETAUK, *supra* note 4, ¶ 3.

8. *Wild Animals Banned from Circuses in Wales*, BBC NEWS ¶ 1 (July 15, 2020), <https://www.bbc.com/news/av/uk-wales-53425090>.

9. Wild Animals in Circuses Act 2019, HC Bill [385] cl. 1 (UK).

10. Arin Greenwood, *Not the Last Act*, 103 A.B.A. J. 16, at §§ 1-2 (Aug. 2017).

11. See H.R. 1759, 115th Cong. at 1 (2017).

12. See H.R. 2863, 116th Cong. at 1(2019).

13. *Prohibiting circuses and traveling acts that use animals*, ANIMAL L. DEF. FUND, PROHIBITING CIRCUSES AND TRAVELING ACTS THAT USE ANIMALS ¶¶ 2-3, <https://aldf.org/article/protecting-animals-through-local-legislation/prohibiting-circuses-and-traveling-acts-that-use-animals/> (last visited Apr. 6, 2021).

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the wild, so sanctuaries must be found.<sup>14</sup> Some 500 wild animals are used in French circuses<sup>15</sup> and William Kerwich, the head of the Circus Animal Trainers' Union, stated, "Circuses will have to abandon their animals and the minister will be responsible."<sup>16</sup> But Barbara Pompili, France's Minister of Ecological Transition, said that "[s]olutions will be found on a case-by-case basis, with each circus, for each animal."<sup>17</sup> In fact, it took over three years for Ringling Brothers' Asian elephants to find a suitable home.<sup>18</sup> In September 2020, White Oak Conservation announced the purchase of thirty-five Asian elephants from Feld Entertainment and the construction of a new 2,500-acre habitat to house the largest community of Asian elephants in the Western Hemisphere, to be completed in 2021.<sup>19</sup> The Global Federation of Animal Sanctuaries currently certifies approximately 130 animal sanctuaries to ensure the animals receive the highest quality care and treatment.<sup>20</sup> Hopefully, as nations recognize the need to retire wild animals used in these acts, the number of accredited sanctuaries will grow to meet the needs of the retired animals.

**B. FUR FARMING**

France's announcement to end mink fur farming is indicative of a growing trend to end the cruel fur industry. In 2020, the pandemic offered yet another reason to end this horrific industry—public health. In June, the Netherlands reported COVID-19 outbreaks on mink farms and began gassing "tens of thousands of mink . . . most of them pups born only weeks ago."<sup>21</sup> As a result, the Netherlands, the fourth-largest producer of mink fur, advanced its deadline by two and a half years to close all mink farms by March 2021.<sup>22</sup> This will end all fur farming in the Netherlands as fox and chinchilla fur farming ended in the 1990s.<sup>23</sup> In November, Denmark debated whether to cull its mink population of between 15 million and 17 million after "[h]ealth authorities found virus strains in humans and in mink

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14. See James Owen, *Most Captive-Born Predators Die if Released*, NAT'L GEOGRAPHIC ¶¶ 4, 9 (Jan. 22, 2008), <https://www.nationalgeographic.com/animals/article/predators-captivity-habitat-animals>.

15. See Hirsh, *supra* note 2, at § 2.

16. See *France Announces Gradual Ban*, *supra* note 3, at ¶ 16.

17. See Hirsh, *supra* note 2, at § 2.

18. Oliver Whang, *Ringling's Retired Circus Elephants to Move to Conservation Center*, NAT'L GEOGRAPHIC ¶ 1 (Sept. 23, 2020), <https://www.nationalgeographic.com/animals/2020/09/ringling-bros-circus-elephants-get-new-home/>.

19. See *id.* at ¶ 2.

20. See Neumann, *supra* note 5, at 190.

21. Martin Enserink, *Coronavirus Rips through Dutch Mink Farms, Triggering Culls to Prevent Human Infections*, SCIENCE (June 9, 2020, 3:30 PM), <https://www.sciencemag.org/news/2020/06/coronavirus-rips-through-dutch-mink-farms-triggering-culls-prevent-human-infections>.

22. Kitty Block, *Breaking News: Netherlands Will Close All Mink Fur Farms by Next Year*, A HUMANE SOC'Y BLOG (Aug. 27, 2020), <https://blog.humanesociety.org/2020/08/breaking-news-netherlands-will-close-all-mink-fur-farms-by-next-year.html>.

23. *Id.* ¶ 4.

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which showed decreased sensitivity against antibodies, potentially lowering the efficacy of future vaccines.”<sup>24</sup> In the United States, Utah confirmed deaths of minks on mink farms from COVID-19 in August<sup>25</sup> and in October, the disease spread to Wisconsin mink farms.<sup>26</sup> Fur from the dead infected mink in Utah would nevertheless be used for coats and other garments after processing to remove traces of the virus.<sup>27</sup>

Fur farming is a cruel industry where the animals—including foxes, mink, rabbits, and raccoon dogs—are bred and confined in tiny and often filthy cages and are then inhumanely killed, often gassed, poisoned, or electrocuted.<sup>28</sup> These horrific practices have led consumers, fashion icons, and businesses to end their interest in fur.<sup>29</sup> In September 2020, Nordstrom’ joined several other retailers, including Macy’s and Bloomingdale’s, that have fur-free policies, announcing that it would not only go fur-free but would also stop selling products made with exotic animal skins.<sup>30</sup> This policy follows fur-free announcements made in recent years by leading fashion brands, including Prada, Gucci, Versace, and Armani.<sup>31</sup> These announcements are increasing efforts to find eco-friendly faux fur options.<sup>32</sup>

More than a dozen European countries have banned all fur farms.<sup>33</sup> In October 2020, Israel became the first country to announce that it would ban the fur trade, calling the industry “immoral.”<sup>34</sup> Moreover, the UK, the first country in Europe to ban fur farming twenty years ago, is considering a ban

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24. *Denmark to Cull Entire Mink Population after Coronavirus Mutation Spreads to Humans*, REUTERS ¶¶ 1,2,7 (Nov. 4, 2020, 11:26 AM), <https://www.reuters.com/article/idUKKBN27K1X6>.

25. Theresa Macherer, *COVID-19 Reaches Mink Farms in Utah*, SMITHSONIAN MAG. ¶ 1 (Aug. 20, 2020), <https://www.smithsonianmag.com/smart-news/covid-19-reaches-mink-farms-utah-180975605/>.

26. Sophie Lewis, *Thousands of Mink Dead from COVID-19 Outbreaks in Utah and Wisconsin*, CBS NEWS ¶ 7 (Oct. 9, 2020), <https://www.cbsnews.com/news/thousands-mink-dead-coronavirus-covid-19-disease-outbreak-utah-wisconsin-fur-farms/>.

27. *See id.* ¶ 6.

28. Rachael Bale, *Fur Farms Still Unfashionably Cruel*, NAT’L GEOGRAPHIC ¶¶ 4, 6 (Aug. 17, 2016), <https://www.nationalgeographic.com/news/2016/08/wildlife-china-fur-farming-welfare/>; Lucy Connolly, *Horrible Footage Shows Animals Electrocuted and Beaten at Fur Farm*, UNILAD ¶¶ 3,4,8,10 (Dec. 4, 2019), <https://www.unilad.co.uk/animals/horrifying-footage-shows-animals-electrocuted-and-beaten-at-fur-farm/>.

29. Kate Gibson, *Nordstrom to Stop Selling Fur and Exotic Animal Skin Products*, CBS NEWS ¶¶ 5, 6 (Sept. 29, 2020), <https://www.cbsnews.com/news/nordstrom-fur-exotic-animal-skin-to-stop-selling-products/>.

30. *Id.* at ¶¶ 1, 3.

31. Ellie Violet Bramley, *Prada Announces It Is to Go Fur-Free*, THE GUARDIAN ¶¶ 1, 4 (May 23, 2019), <https://www.theguardian.com/fashion/2019/may/23/prada-announces-it-is-to-go-fur-free>.

32. *See* Chiara Spagnoli Gabardi, *Fake Always Wins! 10 Eco Friendly Faux Fur Brands*, ELUXE MAG. § 2 (Dec. 17, 2019), <https://eluxemagazine.com/fashion/5-eco-friendly-faux-fur-brands/>.

33. *See* Vanessa Friedman, *California Fur Ban and What it Means for You*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/style/fur-ban-california.html>.

34. Aaron Reich, *Israel Set to be First Nation to Ban the Fur Trade*, JERUSALEM POST (Oct. 5, 2020), <https://www.jpost.com/israel-news/israel-set-to-be-first-nation-to-ban-the-fur-trade>.

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on fur sales after Brexit.<sup>35</sup> Nevertheless, there are more than 200 fur farms in the United States.<sup>36</sup> 2019 was the worst year financially for the fur industry in the United States as the value of mink pelts produced fell to \$59.2 million—the lowest since 1975, when the United States Department of Agriculture (USDA) began recording the data.<sup>37</sup>

In 2019, California became the first state to ban fur sales,<sup>38</sup> following similar legislation passed in the cities of Los Angeles and San Francisco.<sup>39</sup> In July 2020, Judge Seeborg in the United States District Court for the Northern District of California dismissed a lawsuit filed by the International Fur Trade Association (IFTA), which argued that the San Francisco fur trade ban violates the Dormant Commerce Clause by placing a “substantial burden on interstate and foreign commerce without a ‘legitimate local purpose.’”<sup>40</sup> Because the fur ban does not discriminate against interstate commerce or directly regulate extraterritorial conduct, it is lawful “unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>41</sup> Moreover, in the Ninth Circuit, a threshold showing of a substantial burden is necessary before the court will weigh the burdens against the benefits.<sup>42</sup> The IFTA attempted to demonstrate a substantial burden by arguing that San Francisco retailers would lose \$45 million annually, the ban regulates “wholly out-of-state conduct,” and it amounts to a “complete import and sales ban.”<sup>43</sup> The court held that the IFTA failed to demonstrate a substantial burden under these theories. First, the court held that no “absolute amount of economic impact can itself demonstrate a substantial burden.”<sup>44</sup> Second, the fact that there is no fur manufacturing within San Francisco, and thus fur sold there must be manufactured outside the jurisdiction, only means that the fur ban will have “significant out-of-state practical effects,” not that the fur ban regulates

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644590 (permits will be available for cases of “scientific research, education, for instruction and religious purposes and tradition”).

35. Lisa O’Carroll, *UK Considering Outright Ban on Fur Sales After Brexit*, THE GUARDIAN (Sept. 25, 2020, 07:40 EDT), [https://www.theguardian.com/politics/2020/sep/25/uk-considering-outright-ban-on-fur-sales-after-brexit?CMP=share\\_iOSApp\\_Other](https://www.theguardian.com/politics/2020/sep/25/uk-considering-outright-ban-on-fur-sales-after-brexit?CMP=share_iOSApp_Other).

36. Sara Amundson & Kitty Block, *Breaking News: Coronavirus Outbreak Reported at Two Utah Mink Fur Farms*, HUMANE SOC’Y LEG. FUND BLOG (Aug. 17, 2020), <https://hslf.org/blog/2020/08/breaking-news-coronavirus-outbreak-reported-two-utah-mink-fur-farms>.

37. Kitty Block, *US Mink Industry in Free Fall as Demand for Fur Plummetts*, HUMANE SOC’Y BLOG (Aug. 20, 2020), [https://blog.humanesociety.org/2020/08/u-s-mink-industry-in-freefall-as-demand-for-fur-plummetts.html?credit=blog\\_em\\_100820\\_id11712\\_blog\\_post\\_082720\\_id11623](https://blog.humanesociety.org/2020/08/u-s-mink-industry-in-freefall-as-demand-for-fur-plummetts.html?credit=blog_em_100820_id11712_blog_post_082720_id11623).

38. See AB 44, 2019 Gen. Assemb., Reg. Sess. at 1 (Cal. 2019).

39. See Friedman, *supra* note 33, § 4.

40. *Int’l Fur Trade Fed’n v. San Francisco*, 472 F. Supp. 3d 696, 697, 700–01 (N.D. Cal. 2020).

41. *Id.* at 698.

42. *Id.* at 703.

43. *Id.* at 699.

44. *Id.*

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“wholly out-of-state conduct.”<sup>45</sup> Finally, because “the Fur Ban simply precludes a preferred, and perhaps more profitable, method of selling and/or manufacturing fur, it does not impose a substantial burden” on commerce.<sup>46</sup> The court explained, “[w]hile the Fur Ban may shift business to competitors with better infrastructure to sell fur online, existing manufacturing facilities outside San Francisco, or expertise in faux fur, the Dormant Commerce Clause provides no impediment. Fur manufactured outside San Francisco may still flow freely into the city if it is purchased online; it just cannot be sold at brick-and-mortar stores.”<sup>47</sup>

### **III. China’s Response to the Pandemic Amounts to an Imperfect and Impermanent Wildlife Ban**

With the first COVID-19 illnesses having been reported in Wuhan, China on New Year’s Eve in 2019,<sup>48</sup> the coronavirus is poised to claim the lives of over 2.8 million people by the end of 2020,<sup>49</sup> making it the deadliest pandemic in modern history—one that has brought economies to a standstill and shuttered entire industries.<sup>50</sup> Although the circumstances that gave rise to the novel coronavirus have been the subject of political disinformation campaigns,<sup>51</sup> the Biodiversity Chief of the United Nations and scientists point to evidence indicating that the virus originated in bats and crossed into humans through an intermediate species—such as the highly trafficked pangolin—at a wet market in Wuhan that featured a variety of wild animals for sale as food, including turtles, rats, marmots, foxes, monkeys, masked palm civets, and more.<sup>52</sup> Notably, animals in wet markets are often kept in

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45. *Id.*

46. *Int’l Fur Trade*, 472 F. Supp. 3d at 699.

47. *Id.*

48. Simon Denyer and Lyric Li, *China bans wild animal trade until coronavirus epidemic is eliminated*, WASH. POST (Jan. 26, 2020 at 9:12 AM), [https://www.washingtonpost.com/world/asia\\_pacific/china-bans-wild-animal-trade-until-coronavirus-epidemic-eliminated/2020/01/26/0e05a964-4017-11ea-971f-4ce4f94494b4\\_story.html](https://www.washingtonpost.com/world/asia_pacific/china-bans-wild-animal-trade-until-coronavirus-epidemic-eliminated/2020/01/26/0e05a964-4017-11ea-971f-4ce4f94494b4_story.html).

49. Nurith Aizenman, *New Global Coronavirus Death Forecast Is Chilling — And Controversial*, NPR (Sept. 4, 2020, 8:41 PM), <https://www.npr.org/sections/goatsandsoda/2020/09/04/909783162/new-global-coronavirus-death-forecast-is-chilling-and-controversial>. (The worst-case scenario is far more chilling, with a projected 4 million dead if current social distancing measures were repealed.)

50. Paul Murray & John Lauerman, *Outbreaks Can Teach Us About Covid-19*, BLOOMBERG (June 27, 2020), <https://www.bloomberg.com/graphics/2020-history-of-pandemics-coronavirus-covid-19> (establishing COVID-19 as “the deadliest, fastest-moving pandemic since 1918”); Lora Jones, Daniele Palumbo & David Brown, *Coronavirus: A visual guide to the economic impact* BBC NEWS (June 30, 2020), <https://www.bbc.com/news/business-51706225>.

51. Yanzhong Huang, *How the Origins of COVID-19 Became Politicized*, *Council on Foreign Relations*, THINK GLOBAL HEALTH (Aug. 14, 2020) <https://www.thinkglobalhealth.org/article/how-origins-covid-19-became-politicized> (For example, politicians in the United States have spread misinformation arguing that the coronavirus was engineered in a Wuhan lab; in response, Chinese media and government officials have posited that the virus originated elsewhere and was later introduced to the city of Wuhan.).

52. Denyer & Li, *supra* note 48.

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crowded, unhygienic conditions that promote the spread of viruses, as well as the emergence of new viral strains.<sup>53</sup>

Given the threat posed by COVID-19 and the likely cause of its transmission, the Chinese government instituted a temporary ban on the country's wildlife trade on January 26, 2020.<sup>54</sup> Jointly promulgated by the State Forestry and Grasslands Administration, State Administration for Market Regulation, and Agriculture Ministry, the ban targeted the trade of wild animals not just at wet markets and restaurants but also via e-commerce platforms, with officials establishing a hotline for citizens to report violations and promising severe penalties for those who flout the law.<sup>55</sup> Notably, COVID-19 is not the first virus believed to have emerged out of China's wet markets, which have been characterized as "cauldron[s] of contagion."<sup>56</sup> For example, the 2002 SARS outbreak, which killed approximately 750 people around the world, has been traced to masked palm civets at a wet market in China's Guangdong province.<sup>57</sup> Critics have argued that the current pandemic could have been avoided if China's temporary ban on the wildlife trade in response to the 2002 SARS outbreak had been made permanent.<sup>58</sup> On February 24, 2020, acknowledging the hidden dangers that zoonotic diseases pose to public health, China's National People's Congress declared its intent to make the ban permanent.<sup>59</sup> Although described as "comprehensive," the resulting ban has proved to be neither comprehensive nor permanent.<sup>60</sup>

As an initial matter, the ban features problematic loopholes. Although it prohibits the trade and consumption of non-aquatic wildlife for food purposes, ostensibly targeting the "root cause" of the pandemic,<sup>61</sup> it does not ban the wildlife trade for research, clothing, or medicinal purposes—significant exceptions that could enable traffickers to circumvent the system.<sup>62</sup> For example, with respect to pangolins, which have been identified as a potential vector species for the current pandemic, the ban targets their

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53. Natasha Daly, *Chinese citizens push to abolish wildlife trade as coronavirus persists*, NAT'L GEOGRAPHIC (Jan. 30, 2020), <https://www.nationalgeographic.com/animals/2020/01/china-bans-wildlife-trade-after-coronavirus-outbreak>.

54. Denyer & Li, *supra* note 48.

55. *Id.*

56. *Id.*; Daly, *supra* note 53.

57. Denyer & Li, *supra* note 48.

58. Ronald Orenstein, *Wildlife Markets and COVID-19*, HUMANE SOC. INT'L (Apr. 2020), <https://www.hsi.org/wp-content/uploads/2020/04/Wildlife-Markets-and-COVID-19-White-Paper.pdf>.

59. James Gorman, *China's Ban on Wildlife Trade a Big Step, but Has Loopholes*, *Conservationists Say*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/science/coronavirus-pangolin-wildlife-ban-china.html>; *China bans trade, consumption of wild animals due to coronavirus*, <https://www.reuters.com/article/uk-china-health-wildlife-idAFKCN20J065>.

60. Gorman, *supra* note 59.

61. Steven Lee Myers, *China Vowed to Keep Wildlife Off the Menu, a Tough Promise to Keep*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/world/asia/china-coronavirus-wildlife-ban.html>.

62. Gorman, *supra* note 59.

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trade for meat but not for their scales for use in traditional Chinese medicine, a significant driver of total demand.<sup>63</sup> Indeed, nothing in the ban's framework prevents breeders from shifting their business model from farming wildlife for food to farming them for other uses.<sup>64</sup>

Despite the professed permanency of the ban, China has failed to formally enshrine the resolution into its national Wildlife Protection Law, undermining its long-term efficacy.<sup>65</sup> Instead, China's National People's Congress issued a directive in May 2020 to review the enforcement of its rules, a process that critics note may take in excess of a year.<sup>66</sup> This delay has prompted fears that China may quietly allow the ban to lapse, as it did with the temporary ban it instituted in the wake of the 2002 SARS outbreak.<sup>67</sup> As Aili Kang at the Wildlife Conservation Society explains, "If it's not [enshrined] into the law it won't be permanent. If it is [enshrined] into the law, it will be further force for enforcement and provide a legal foundation for government to further educate people and alert people to change their behaviour," a step that would achieve some level of assurance—perhaps for a decade or longer.<sup>68</sup>

But the passage of a comprehensive and permanent ban into law must overcome the dependence of China's rural economy on the wildlife trade, a \$76 billion industry that provides income to nearly fifteen million people and which China's government has promoted and subsidized to combat poverty.<sup>69</sup> Yet the increasing scrutiny being paid to China's wildlife trade in light of the global rise in coronavirus-related deaths offers some hope that China's government will finally take concrete and permanent steps to prevent the next epidemic "time bomb" from exploding.<sup>70</sup>

#### **IV. Pakistan's High Court Extends Legal Rights to Animals**

In a first in the country's history, a high court in Pakistan extended legal rights to animals and ruled that treating animals cruelly amounts to an infringement of the right to life guaranteed by the Constitution of

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63. *Id.*

64. *China bans trade*, *supra* note 59.

65. Myers, *supra* note 61.

66. *Id.*

67. *Id.*

68. Adam Vaughan, *Coronavirus: China wildlife trade ban could become law within months*, NEW SCIENTIST (Apr. 2, 2020), <https://www.newscientist.com/article/2239559-coronavirus-china-wildlife-trade-ban-could-become-law-within-months>.

69. David Stanway, *China legislators take on wildlife trade, but traditional medicine likely to be exempt*, REUTERS (May 20, 2020), <https://www.reuters.com/article/us-health-coronavirus-china-wildlife/china-legislators-take-on-wildlife-trade-but-traditional-medicine-likely-to-be-exempt-idUSKBN22X065>; Eva Rammeloo, *Coronavirus: China's ban on wildlife trade hits animal breeders*, DW (July 16, 2020), <https://www.dw.com/en/biodiversity-wet-markets-life-animals-covid-19-beijing-guangzhou/a-54183831>.

70. Helen Briggs, *Coronavirus: WHO developing guidance on wet markets*, BBC NEWS (Apr. 21, 2020), <https://www.bbc.com/news/science-environment-52369878>.

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Pakistan.<sup>71</sup> The case, *Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad* W.P 1155/2019,<sup>72</sup> filed in the Islamabad High Court (IHC) highlighted the abysmal conditions of the animals at the Marghzar Zoo (Zoo), a wildlife shelter-turned-zoo established in the capital city of Islamabad in 1978 housing approximately 800 animals.<sup>73</sup> At the heart of the petitioner's case was Kaavan, an Asian elephant that the Sri Lankan government had gifted to Pakistan in 1985, who has been languishing in the Zoo in chains.<sup>74</sup> Kaavan has displayed signs of psychological distress, including swaying and pressing his head into a wall, and his mistreatment at the hands of Zoo authorities has been well-documented by animal activists and the media.<sup>75</sup> By way of relief, the petitioners asked the IHC to direct the state authorities responsible for the Zoo's administration to relocate Kaavan to an international wildlife sanctuary. Because Asian elephants are extinct in Pakistan, no sanctuary exists within Pakistan for elephants.<sup>76</sup>

In the order authored by the Chief Justice of the IHC, J. Athar Minallah, the court described the conditions at the Zoo as "alarming" and inadequate to meet the physical and psychological needs of its inhabitants due to small cage sizes, lack of veterinary care, and neglect by the Zoo management.<sup>77</sup> The order stated that the caged living beings in the Zoo are undoubtedly in pain, distress and agony, definitely disproportionate to the purpose intended to be achieved by keeping them in this condition.<sup>78</sup> Similar findings of neglect and maltreatment were made by the court with respect to several animal species at the Zoo.<sup>79</sup> The decision went on to note the growing futility of zoos, highlighting that zoos are inadequate places especially for intelligent and social creatures like elephants.<sup>80</sup> The court likened zoos to prisons by stating that "zoos do not serve any purpose except to display their living inmates as exhibits to visitors."<sup>81</sup>

In determining whether Pakistani law grants rights to animals, the IHC analyzed various sources of law and jurisprudence from around the world. The court cited and discussed the cases of the primates Sandra and Cecilia<sup>82</sup> and Arturo the polar bear from Argentina<sup>83</sup> and cases from neighboring

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71. *Islamabad Wildlife Mgmt. Bd. v. Metro. Corp. Islamabad*, W.P. No. 1155/2019, (2020) 1 (Pak.) [hereinafter *IWMB v. MCI*].

72. *Id.*

73. *Id.* at 9.

74. *Id.* at 10.

75. Kashif Abbasi, *Kaavan spends whole night in rain*, DAWN (Mar. 7, 2020), <https://www.dawn.com/news/1538929>.

76. *IWMB v. MCI*, W.P. No. 1155/2019 at 4.

77. *Id.* at 10–18.

78. *Id.* at 6.

79. *Id.*

80. *Id.* at 12.

81. *Id.* at 13.

82. *IWMB v. MCI*, W.P. No. 1155/2019 at 30.

83. *Id.* at 34.



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India,<sup>84</sup> as well as case law from South Africa.<sup>85</sup> The court also referenced the cases filed by the Nonhuman Rights Project in the United States.<sup>86</sup> Since Pakistan is an Islamic Republic, the court discussed in great detail Islamic jurisprudence on animal welfare and animal rights, citing the two main sources of Islamic law: the Holy Quran and the Ahadith (sayings of the Prophet).<sup>87</sup>

Based on this analysis, the IHC concluded that animals have some basic legal rights that humans have a corresponding duty to respect.<sup>88</sup> In this case, the court expanded the right to life of humans enshrined in Article 9 of the Constitution of Pakistan as being violated when animals are treated cruelly or are neglected.<sup>89</sup> The right to life had previously been extended by the Supreme Court of Pakistan to include the right to a clean and healthy environment and has since been expanded to include other environmental protections.<sup>90</sup> Additionally, the IHC cited the link between animal abuse and violent crimes against humans as a basis for why animal welfare is part of the right to life.<sup>91</sup> The court, therefore, recognized that animals have certain natural rights, including the right to live in an environment that meets the animal's behavioral, social, and physiological needs,<sup>92</sup> the right not to be treated in a manner that subjects the animal to unnecessary pain and suffering,<sup>93</sup> the right to be respected because the animal is a living being, and the right not to be tortured or unnecessarily killed.<sup>94</sup>

Ultimately, the IHC declared that the Zoo did not have the facilities to meet the behavioral, social, or psychological needs of the animals kept in captivity and directed that Kaavan be relocated to a suitable sanctuary.<sup>95</sup> The court also ordered that all other animals at the Zoo be moved to respective sanctuaries and that no new animals be kept in the Zoo until a reputable agency specializing in zoos certifies the facilities and resources available at the Zoo.<sup>96</sup>

This position was reiterated in a subsequent order, where the IHC acknowledged that because animals are sentient, they cannot be subjected to pain and suffering by being kept captive in a zoo unless doing so is absolutely necessary and in the interest of the animals.<sup>97</sup> The order also stated

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84. *Id.* at 35, 37.

85. *Id.* at 41.

86. *Id.* at 39.

87. *Id.* at 47–51.

88. *IWMB v. MCI*, W.P. No. 1155/2019 at 55.

89. *Id.* at 61.

90. *Shehla Zia v. WAPDA*, (1994) PLD (SC) 693 (Pak.).

91. *IWMB v. MCI*, at 57.

92. *Id.* at 60.

93. *Id.*

94. *Id.*

95. *Id.* at 61–65.

96. *Id.*

97. *IWMB v. MCI*, W.P. No. 1155/2019 at 4–5.

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unequivocally that “the practice of capturing animals and keeping them in captivity is a relic of the past.”<sup>98</sup>

The initial decision, while a huge win for the Zoo’s animals, was far from the end. Since the order announcing its decision that the animals of the Zoo be relocated, the court has repeatedly had to issue subsequent rulings monitoring the animals’ relocation. For instance, in late July, two lions died while being relocated from the Islamabad Zoo to a private breeding farm in Lahore.<sup>99</sup> Videos emerged online showing the people responsible for the transfer igniting fires inside one lion’s cage instead of using tranquilizers to subdue the animal.<sup>100</sup> Criminal complaints were filed against the people responsible, and the Adviser to the Prime Minister on Climate Change formed an inquiry committee to investigate the deaths of the lions.<sup>101</sup> The IHC issued an order taking notice of the “negligence, carelessness, unprofessional and brutal handling of the lions by the Islamabad Wildlife Management Board.”<sup>102</sup> Holding the Chairman and each member of the Islamabad Wildlife Management Board jointly and severally responsible for the welfare of the Zoo’s animals during relocation, the court decided to proceed against the Islamabad Wildlife Management Board for contempt of court.<sup>103</sup>

Furthermore, while relocating the animals, another problem encountered was the ability to find sanctuaries to accommodate them. This problem was particularly prominent in the case of the two Himalayan brown bears at the Zoo, whom two provincial wildlife departments and one bear sanctuary refused to accept, reasoning that the needs of the bears could not be met at the existing bear sanctuary.<sup>104</sup> It was thus decided that the bears would be moved to a sanctuary in Jordan, and their CITES import permits, along with the CITES permit to relocate Kaavan to Cambodia, were recently issued.<sup>105</sup> Preparations for Kaavan’s journey to a local elephant sanctuary in Cambodia were undertaken and he arrived in Cambodia at the end of November 2020.<sup>106</sup>

The success of the petitioners in this case has led to similar litigation in other provinces, including a recently filed petition pending before the Sindh

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98. *Id.* at 7.

99. *Lions death in Islamabad Zoo: Caretakers lacked professional capacity to shift animals*, THE NEWS.COM.PK (Aug. 7, 2020), <https://www.thenews.com.pk/print/697240-lions-death-in-islamabad-zoo-caretakers-lacked-professional-capacity-to-shift-animals>.

100. *Id.*

101. *Three booked for torturing lions at Islamabad zoo*, DAWN (Aug. 2, 2020), <https://www.dawn.com/news/1572210>.

102. *IWMB v. MCI*, W.P. No. 1155/2019 at 1.

103. *Id.* at 3.

104. *Id.*

105. Zubair Qureshi, *Pakistan: Islamabad zoo bears, elephant to be relocated to Jordan and Cambodia*, GULFNEWS.COM (Oct. 22, 2020), <https://gulfnews.com/world/asia/pakistan/pakistan-islamabad-zoo-bears-elephant-to-be-relocated-to-jordan-and-cambodia-1.74744136>.

106. *Kaavan Quickly Adapts to New Home in Cambodia*, THE TRIBUNE (Dec. 19, 2020), <https://tribune.com.pk/story/2276571/kaavan-quickly-adapts-to-new-home-in-cambodia>.

High Court asking for the relocation of a lone baby bear from the Karachi Zoo to a sanctuary.<sup>107</sup> While the judgment provides a basis for future animal legal advocacy in Pakistan, it is unclear how the legal rights enunciated by the court translate in practice, since the court did not abolish the property status of animals or grant them a way to bring cases in their own name to enforce these legal rights. Furthermore, the practical obstacles faced in Islamabad while relocating the animals illustrate how difficult it can be to surpass bureaucratic hurdles and enforce meaningful animal protection even when the legal machinery supports such a change. Therefore, while the IHC's decision in this case marks a new era for animal law in Pakistan, much infrastructure still needs to be developed in this sphere if zoos are indeed to become "a relic of the past."

## V. African Elephant Deaths in 2020

Mass deaths of wildlife species are a continual concern for governments, wildlife advocates, and scientists. This year, Botswana and Zimbabwe joined the world's collective history of unexpected wildlife deaths when the two countries discovered herds of elephants who died near watering holes within the countries' borders. The deaths are significant because the elephants died from environmental toxins. Protecting elephant populations from environmental factors will likely require comprehensive international collaboration. These protections will need to extend further than those that the Convention on International Trade of Endangered Species ("CITES") and other initiatives have established to protect elephants through trade regulations.<sup>108</sup>

In 2020, researchers estimated that Botswana's elephant population totaled 130,000–156,000, which is the largest elephant population in the world.<sup>109</sup> During Botswana's rainy season (May–July) this year, approximately—350 elephants unexpectedly died near watering holes in the Okavango Delta.<sup>110</sup> Seventy percent of those deaths occurred near watering holes that were hosts to algal blooms that contained neurotoxin-producing cyanobacteria.<sup>111</sup> Zimbabwe tested tissue samples to confirm the elephants died from these neurotoxins.<sup>112</sup>

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107. *SHC issues notices to zoo authorities for keeping baby bear in poor condition*, DAWN (Oct. 2, 2020), <https://www.dawn.com/news/1582688>.

108. For general information regarding CITES and its current elephant protections, see generally CITES, <https://cites.org/eng> (last visited Oct. 30, 2020).

109. Sounak Mitra, *Zimbabwe's Elephant Death Toll Climbs to 22, More Expected as Probe Continues*, REPUBLICWORLD.COM (Sept. 3, 2020), <https://www.republicworld.com/world-news/africa/zimbabwes-elephant-death-toll-climbs-to-22-more-expected-as-probe-co.html>.

110. *Id.*; Phoebe Weston, *Botswana says it has solved mystery of mass elephant die-off*, THE GUARDIAN (Sept. 21, 2020), <https://www.theguardian.com/environment/2020/sep/21/botswana-says-it-has-solved-mystery-of-mass-elephant-die-off-age-of-extinction-aoe>.

111. Weston, *supra*, note 110.

112. *Id.* (Scientists must test tissue samples soon after death occurs in order to obtain accurate results regarding the cyanobacteria's presence.).

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Zimbabwe's current elephant population totals approximately 85,000, which is the world's second-largest elephant population.<sup>113</sup> During Zimbabwe's rainy season, twenty-five elephants also suddenly died near watering holes, following a mass death due to drought in the Hwange National Park in 2019.<sup>114</sup> These watering holes were located between the Hwange National Park and Victoria Falls, which is more than 330 miles east of the Okavango Delta.<sup>115</sup> The park's rangers found the deceased elephants with intact tusks, which meant the deaths likely occurred because of environmental factors rather than poaching.<sup>116</sup> Initially, scientists were concerned that the elephants' cause of death was the same *Pasteurella multocida* bacteria that killed 200,000 saiga antelope in Kazakhstan in 2015.<sup>117</sup> Now, scientists theorize that a link may exist between the cyanobacteria's presence in both Botswanan and Zimbabwean water sources.<sup>118</sup> For this reason, scientists are concerned the bacteria's presence will increase its geographical span of water sources during next year's rainy season.<sup>119</sup>

Cyanobacteria are microscopic organisms, which people often refer to as blue-green algae.<sup>120</sup> These microorganisms are common in fresh water and salt-water sources that are warm, stagnant, and nutrient-rich with phosphorous and nitrogen.<sup>121</sup> Industrial agriculture's use of fertilizer is one of the primary producers of phosphorous and nitrogen runoff that enters natural water sources.<sup>122</sup> Therefore, cyanobacteria may exist throughout the world, wherever fertilizer is present. Climate change increases the presence of cyanobacteria and algal blooms in natural water sources because of the

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113. Mitra, *supra*, note 109.

114. Reuters, *Mysterious elephant deaths in Botswana caused by toxins in water linked to climate change*, N.Y. POST (Sept. 22, 2020), <https://nypost.com/2020/09/22/botswana-says-toxins-in-water-killed-hundreds-of-elephants/>; Nqobani Ndlovu, *Does Zimbabwe need an elephant cull?*, ARTICLE (Sept. 20, 2020), <https://www.thearticle.com/does-zimbabwe-need-an-elephant-cull>.

115. See Google Maps, <https://maps.google.com> (last visited Oct. 29, 2020) (The distance in this article is an estimate the author based on Google Maps measurements. The distance between the Okavango Delta in Botswana and Hwange, Zimbabwe is approximately 334 miles. The Hwange National Park lies adjacent to the city. The distance between Victoria Falls and Hwange spans approximately 63 miles.).

116. Reuters, *supra* note 114.

117. Henry Nicholls, *Mass deaths of saiga antelope in Kazakhstan caused by bacteria*, THE GUARDIAN (Apr. 14, 2016), <https://www.theguardian.com/science/animal-magic/2016/apr/14/mass-death-saiga-antelope-kazakhstan-bacterial-infection>.

118. Aylin Woodward, *Researchers figured out why hundreds of elephants dropped dead in Botswana this year: Their water was poisoned by algae*, BUS. INSIDER (Sept. 23, 2020), <https://www.businessinsider.com/mass-elephant-die-off-botswana-toxic-algae-2020-9>.

119. *Id.* (Botswana and Zimbabwe established international collaborations to determine the elephants' cause of death.); see Weston, *supra* note 110.

120. *What is a cyanobacterial harmful algal bloom (cHAB)?*, CDC (last reviewed Aug. 24, 2018), <https://www.cdc.gov/habs/materials/factsheet-cyanobacterial-habs.html> [hereinafter CDC].

121. *Id.* Cyanobacteria also exist in soil.

122. *Id.*

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increased global temperatures it causes.<sup>123</sup> Not all cyanobacteria produce neurotoxins that poison wildlife and destroy ecosystems;<sup>124</sup> however, scientists have discovered that increased global temperatures increase the presence of cyanobacteria that do produce neurotoxins.<sup>125</sup> Cyanobacteria harm the health of humans and non-human animals.<sup>126</sup> Living beings expose themselves by inhaling or swallowing cyanobacteria, or letting cyanobacteria seep into their skin.<sup>127</sup> The neurotoxins cause gastrointestinal issues, paralysis, loss of motor functions, and death.<sup>128</sup>

Elephants manifest neurotoxin poisoning by becoming “lost and disoriented,” walking in circles, falling forward on their faces—all examples of motor function loss—and subsequently, dying.<sup>129</sup> Elephants are particularly susceptible to toxin poisoning from water sources because they spend substantial periods of time bathing and drink up to fifty gallons of water per day, which increases toxicity exposure.<sup>130</sup> Interestingly, the neurotoxins in the Botswanan and Zimbabwean water holes did not poison animals that consumed the elephant carcasses.<sup>131</sup> This may have occurred because the neurotoxin concentration levels that animals consumed from the elephant carcasses were diluted compared to concentration levels that elephants consumed directly from water. In order to prevent deaths during the next rainy season, park officials will monitor watering holes within the area to detect any algal bloom growth and bloom growth rates, review elephant mortality rates, review injuries on this year’s elephant carcasses, consistently test water samples, and establish regional warning systems to alert neighboring officials of deaths.<sup>132</sup>

In 1999, CITES banned culling elephants as part of an international ivory trade ban<sup>133</sup>; however, in 2019, Botswana lifted its own five-year ban on non-commercial elephant hunting because of increased human-elephant conflicts.<sup>134</sup> Now, across the border, Zimbabwe has proposed a non-commercial elephant cull.<sup>135</sup> Zimbabwean officials claim the current

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123. Reuters, *supra* note 114.

124. CDC, *supra* note 120.

125. Reuters, *supra* note 114.

126. CDC, *supra* note 120.

127. *Id.*

128. *Id.*

129. Phoebe Weston, *Why are elephants dying? The race to solve the mystery of mass die-offs*, THE GUARDIAN (Sept. 3, 2020), <https://www.theguardian.com/environment/2020/sep/03/why-are-elephants-dying-the-race-to-solve-the-mystery-of-mass-die-offs-aoe>.

130. *Id.*; Weston, *supra* note 110; *Elephant Basics*, NAT’L ELEPHANT CTR. (last visited Oct. 29, 2020), <http://www.nationalelephantcenter.org/learn>.

131. Woodward, *supra* note 118.

132. Weston, *supra* note 110.

133. See, e.g., Ndlovu, *supra* note 114; Mpho Tebele, *The tide is turning Botswana lifts ban on elephant hunting*, SOUTHERN TIMES (Jul. 2, 2018), <https://southerntimesafrica.com/site/news/the-tide-is-turning-botswana-lifts-ban-on-elephant-hunting>.

134. Ndlovu, *supra* note 114.

135. See, e.g., *id.*

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population exceeds the country's sustainable limits.<sup>136</sup> The Zimbabwe Parks and Wildlife Management Authority states that its wildlife-dedicated lands can sustain 45,000 elephants, approximately half of Zimbabwe's current population.<sup>137</sup> Additionally, tensions have risen from human-elephant conflicts when elephants entered villages in search of water during recent droughts.<sup>138</sup> In the mid-20th century, Zimbabwe used to engage in elephant culling;<sup>139</sup> however, those culls occurred before natural disasters and unforeseen toxin producing agents, like cyanobacteria, became prevalent. Now, a human-induced elephant cull may no longer be a viable—or justifiable—option. For instance, between 1965 and 1988, Zimbabwe killed 40,000 elephants, approximately 1,818 elephants killed per year.<sup>140</sup> This death toll surpasses the number of elephants that the cyanobacteria killed in 2020 (almost 400 individuals); however, Zimbabwe would need to calculate deaths from natural disasters (noting their increased frequency), poaching and other illegal kills, and natural deaths to determine whether culls would be a sustainable option now.

The sudden deaths of large groups of megafauna and keystone species—elephants this year and antelope in 2015—illustrate the fact that poachers and wildlife trafficking are not the only threats to species' survival. Increased global temperatures,<sup>141</sup> in conjunction with humans' use of environmentally hazardous products like fertilizer for agriculture, threaten species' existence into future decades. Initiatives and treaties, such as CITES, will need to grapple with species protections that may not currently consider the compounded death tolls of animals from trade and natural disasters. Countries like Botswana and Zimbabwe may need to combat these cyanobacteria-based deaths by re-establishing hunting prohibitions and choosing not to initiate annual culls. Prohibiting hunting for entertainment and for population management would ensure elephant herds maintain adequate genetic diversity to maintain healthy birth rates. Healthy birth rates would prevent the countries' populations from dwindling to near extinction should mass deaths from natural causes continue in the future.

Neurotoxins may establish themselves as one existential threat to elephants and other hydrophilic species; however, other toxins and natural disasters will likely increase in the near future because of climate change and human activities. These toxic variables will reach species through multiple pathways, including water, soil, and air. These expected—but for now, unknown—variables will compromise the survival rates of megafauna throughout the world. And in turn, these species' deaths will compromise

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Ndlovu, *supra* note 114.

141. Woodward, *supra* note 118 (Southern Africa's temperatures are rising twice as quickly as the global average rate.); Reuters, *supra* note 114.

the health of ecosystems in which all other species, including humans, survive.

**VI. Bambi's New Life In Sanctuary: *Fórum Animal De Proteção E Defesa Animal V. Município De Ribeirão Preto***

The 2019 *Year in Review* discussed the story of a rescued elephant called Ramba.<sup>142</sup> In that case, the Brazilian state court of Mato Grosso do Sul recognized that Ramba was not simply a commodity and that she had the right to live in a sanctuary, “far away from what human evil ha[d] already caused her.”<sup>143</sup> Sadly, Ramba—who had existing health problems from years of neglect—died two months after her arrival at the sanctuary.<sup>144</sup>

Ramba's legacy remains in the hearts of the animal rights activists who fought for her and who continue to work so that other animals who are victims of human exploitation can live in more dignified conditions. From the Brazilian courts this year comes the story of Bambi, a fifty-eight-year-old elephant who spent most of her life in a circus and in zoos. Bambi is blind in her left eye and suffers from jaw problems.<sup>145</sup> The Santuário de Elefantes Brasil (Brazil Elephants Sanctuary, hereinafter “the Sanctuary”), which is the same sanctuary that rescued Ramba, has been trying to rescue Bambi from Ribeirão Preto's municipal zoo (the Zoo) since 2018. Following negotiations involving the São Paulo State Attorney General's Office and the São Paulo State Department of Fauna, the Attorney General's Office opened an investigation, which is still pending.<sup>146</sup>

In July 2019, the Brazilian non-governmental organization Fórum Animal de Proteção e Defesa Animal (Fórum) filed a public civil action seeking an injunction for Bambi's transfer from the Zoo, where she had been living for the past six years, to the Sanctuary.<sup>147</sup> The defendants were the Zoo and the São Paulo Secretariat for Infrastructure and Environment. The São Paulo Court of Justice initially denied the requested injunction on the grounds that “transporting the elephant to the Sanctuary, considering its poor health

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142. 54 ABA/ILS YIR 370 (2020).

143. *Id.*

144. Heloísa Cristaldo, *Elephant Ramba Dies in Sanctuary in Chapada Dos Guimarães*, *Agência Brasil*, AGENCIABRASIL, <https://agenciabrasil.etc.com.br/geral/noticia/2019-12/elefanta-ramba-morre-em-santuário-na-chapada-dos-guimaraes> (last visited Nov. 2, 2020).

145. Kessillen Lopes, *Elephant Bambi arrives at sanctuary in MT after 1,200 km trip*, G1, <https://g1.globo.com/mt/mato-grosso/noticia/2020/09/26/elefanta-bambi-chega-a-mt-apos-viagem-de-12-mil-quilometros.ghtml> (last visited Nov. 2, 2020).

146. *Id.*

147. Vinícius Alves, *Court authorizes transfer of elephant from Ribeirão Preto Zoo, SP, to Sanctuary in Mato Grosso*, G1, <https://g1.globo.com/sp/ribeirao-preto-franca/noticia/2020/08/18/justica-autoriza-transferencia-de-elefanta-do-zoo-de-ribeirao-preto-sp-para-santuário-no-mato-grosso.ghtml> (last visited Nov. 2, 2020).

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conditions and the complexity of logistics, would matter in practically derailing its return to the Zoo if the action is dismissed.”<sup>148</sup>

Fórum appealed this decision and received a positive response from the São Paulo appellate court, which granted the injunction to transfer Bambi to the Sanctuary:

I highlight the existence of images and technical reports giving plausibility to the allegations of mistreatment, strengthened by popular dissatisfaction, in addition to the existing danger, from the very prolongation of suffering itself, of possible death of the elephant, and the [Sanctuary’s] specialization for hosting [her].<sup>149</sup>

One of the most interesting aspects of this decision is the recognition by the court of the “popular dissatisfaction” with Bambi’s treatment, which had been proven by an online petition with more than 217,000 signatures.<sup>150</sup> Thus, the court looked not only to the photographic evidence and technical reports showing Bambi’s inadequate living conditions, but also to the public’s interest.

Following the grant of the injunction, the merits of the case are still pending in the lower court, which will eventually decide whether Bambi can stay permanently at the Sanctuary and whether the Sanctuary will be designated her owner. To help cover the costs of Bambi’s ongoing care, Fórum is also seeking moral damages of \$200,000 for the environmental damages caused to society. In Brazil, if awarded, moral damages are paid into a government-managed fund and allocated to benefit society.<sup>151</sup>

In the meantime, Bambi has been living at the Sanctuary since September 26, 2020.<sup>152</sup> The Sanctuary is documenting her adaptation process:

Bambi is already getting used to life at the Sanctuary. She is a little anxious to live her life to the fullest, which can leave her a little confused. Everything is still very exciting and new for her. She seems to want to experience everything at once. Bambi is like a child in an amusement park or, more realistically, like a prisoner who suddenly has access to everyday life

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148. *Fórum Nacional de Proteção e Defesa Animal v. Município de Ribeirão Preto Case*: 1020351-16.2020.8.26.0506 (Sept. 24, 2020) (Braz.), <https://esaj.tjsp.jus.br/>.

149. *Id.*

150. TJSP, No. 2188754-91.2020.8.26.0000, D.J.S.P., 20.08.20, 1255 (Braz.), available at <https://www.jusbrasil.com.br/diarios/312448567/djsp-judicial-2a-instancia-19-08-2020-pg-1255>; see, e.g., *Liberdade Para A Elefante Bambi*, CHANGE.ORG (Aug. 18, 2020), <https://www.change.org/p/duarte-nogueira-libertem-a-elefante-bambi> (Aug. 18, 2020).

151. Patricia Helena Marta Martins & Luciana Bazan Martins Bisetti, *Collective protection of consumers in Brazil: the controversy on the territorial scope of rulings in public civil action*, INT’L BAR ASS’N (June 16, 2020), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=66A1DDB3-4129-478A-A700-C99FAA52D312>.

152. *Bambi is Home!*, GLOB. SANCTUARY FOR ELEPHANTS (Sept. 26, 2020), <https://globalelephants.org/bambi-is-home/>.



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after decades in a tiny solitary confinement cell. It is very exciting in a positive way. There is so much for her to see, feel and touch.<sup>153</sup>

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153. *Santuário de Elefantes Brasil*, Facebook (Oct. 30, 2020, 6:43 PM), <https://www.facebook.com/santuariodeelefantes/posts/2971304506304347?> (last visited Nov. 23, 2020).

## **International Trade**

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This article outlines the most important developments in international trade law during 2020. It summarizes developments in U.S. trade policy, U.S. trade cases at the Department of Commerce (Commerce), the International Trade Commission (USITC), and the U.S. courts of appeals, as well as Section 337 and enforcement investigations.

### **I. U.S. Trade Policy Developments**

#### **A. CUSTOMS TRADE PARTNERSHIP AGAINST TERRORISM (CTPAT)**

The Customs Trade Partnership Against Terrorism (CTPAT) is a voluntary compliance program designed and implemented by Customs and Border Protection (CBP) to improve international supply chain security.<sup>2</sup> The program was created, following the September 11, 2001 terrorist attacks, in response to the increased threat of terrorism against the United States.<sup>3</sup> Members of the CTPAT program must implement supply chain security policies and procedures outlined by CBP. In exchange, members enjoy benefits like fewer examinations, faster processing times, and eligibility for other U.S. government programs.<sup>4</sup> The scope of the program's security policies and procedures includes the production, transportation, importation, and exportation of goods.<sup>5</sup> Consequently, CTPAT members must work with actors throughout their international supply chain (i.e.,

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1. This article surveys developments in international trade law during 2020. The committee editors of this article were Cynthia Galvez of Wiley Rein LLP and Dharmendra N. Choudhary of Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP. The authors were: Geoffrey Goodale, Duane Morris LLP; Molly O'Casey, KPMG; Jordan C. Kahn, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP; Theodore P. Brackemyre, Jake Frischknecht, and Vidushi Shrimali, Wiley Rein LLP. The views expressed in this section do not necessarily reflect the views of the authors' respective employers.

2. U.S. Dep't of Homeland Security, DHS/CBP/PIA-013, Privacy Impact Assessment for the Customs-Trade Partnership Against Terrorism (C-TPAT) (2013).

3. See *CTPAT: Customs Trade Partnership Against Terrorism*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/border-security/ports-entry/cargo-security/ctpat> (referencing 6 U.S.C. §§ 961–73 (2006)) (last modified March 12, 2021).

4. *Id.*

5. 6 U.S.C. § 963 (2006).

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importers, carriers, brokers, manufacturers, etc.) to implement CTPAT requirements.<sup>6</sup>

Currently, there are 11,400 CTPAT-certified partners, accounting for over fifty-two percent of all cargo, by value, imported into the United States.<sup>7</sup> Each year, CTPAT members must complete a “security profile,” which is a questionnaire to document and assess members’ supply chain security.<sup>8</sup> The security profile is organized around the “Minimum Security Criteria (MSC),” which are categories of supply chain security criteria.<sup>9</sup> As of May 2019, the MSC include Security Vision and Responsibility (alternatively, Upper Management Responsibility), Risk Assessment, Business Partners, Cybersecurity, Conveyance and Instruments of International Traffic Security (IIT), Seal Security, Procedural Security, Agricultural Security, Physical Access Controls, Physical Security, Personnel Security, as well as Education, Training, and Awareness.<sup>10</sup>

In January 2020, following “several major maritime incidents,” CBP updated two of the MSCs.<sup>11</sup> For Procedural Security, once members become aware their supply chain may have been compromised, as soon as feasibly possible, they must initiate a post-incident analysis and document their findings.<sup>12</sup> For Personnel Security, members must have an Employee Code of Conduct that outlines expectations, acceptable behaviors, penalties, and disciplinary procedures.<sup>13</sup> Members must have relevant Codes of Conduct, which must be signed and acknowledged.<sup>14</sup> This acknowledgment must be kept on file.<sup>15</sup>

The Commercial Customs Operations Advisory Committee (COAC) has suggested further reform of the CTPAT program. COAC advises the Secretary of Homeland Security, the Secretary of the Treasury, and the Commissioner of CBP on issues relating to the commercial operations of CBP and related functions within the Department of Homeland Security and the Department of the Treasury.<sup>16</sup> These suggested reforms include a CTPAT study project with the University of Houston, the integration of forced labor requirements and associated benefits, and the development of

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6. *CTPAT: Customs Trade Partnership Against Terrorism*, *supra* note 3.

7. *Id.*

8. *Id.*

9. *Id.*

10. See generally *Minimum Security Criteria – U.S. Importers*, U.S. CUSTOMS AND BORDER PROT. (2020), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Apr/CTPAT%20U.S.%20Importers%20MSC%20March%202020.pdf>.

11. *CTPAT MSC Announcements*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/border-security/ports-entry/cargo-security/ctpat/ctpat-msc-announcements> (last modified June 1, 2020).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. See Notice of Federal Advisory Committee Meeting, 85 Fed. Reg. 75,346 (Nov. 25, 2020).

metrics that evaluate and mutually quantify benefit effectiveness for industry and government.<sup>17</sup>

## II. U.S. Trade Remedies

2020 was a particularly active year for antidumping and countervailing duty (AD/CVD) litigation at Commerce and the USITC. Commerce initiated more than one hundred AD and CVD investigations, involving at least thirty-five different countries and a variety of products ranging from utility-scale wind towers, to mattresses, to forged steel fluid end blocks, to silicon metal.<sup>18</sup> A selection of Commerce and USITC proceedings are discussed below.

### A. SIGNIFICANT COMMERCE CASES

#### 1. *4th Tier Cigarettes from Korea*

In December 2020, Commerce issued its final determination in the antidumping duty investigation of 4th tier cigarettes from Korea in response to a petition filed with the USITC and Commerce by the Coalition Against Korean Cigarettes.<sup>19</sup> Commerce made an affirmative final determination, calculating an antidumping duty margin of 5.48 percent for all companies.<sup>20</sup> Throughout this investigation, Commerce encountered unique issues regarding its treatment of taxes paid by the mandatory respondent, KT&G Corporation (KT&G).<sup>21</sup> For instance, Commerce considered whether it should deduct certain Korean taxes in its normal value calculations as well as whether to deduct U.S. taxes from KT&G's U.S. prices.<sup>22</sup> In its final determination, Commerce decided to continue to deduct KT&G's U.S. taxes from U.S. prices in calculating its final dumping margin.<sup>23</sup>

#### 2. *Stainless Steel Flanges from India*

In July 2020, Commerce began investigating additional subsidies Indian stainless steel flange producers received from the central government and state governments in the 2018 administrative review of the countervailing

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17. See Commercial Customs Operations Advisory Comm. (COAC), *Secured Trade Lanes Subcommittee: Executive Summary* 4 (2020), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Oct/STL%20Exec%20Summary%20V1.pdf>.

18. See *ACCESS*, INT'L TRADE ADMIN., <https://access.trade.gov/login.aspx> (for list of filed investigations).

19. 4th Tier Cigarettes From the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Negative Determination of Critical Circumstances, 85 Fed. Reg. 79,994, 74,995 (Dec. 11, 2020) [hereinafter 4th Tier Cigarettes from Korea AD].

20. *Id.*

21. See generally 4th Tier Cigarettes from Korea AD, *supra* note 19.

22. See *id.* at 21–25, 35–40.

23. See *id.* at 35–40.

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duty order on *Stainless Steel Flanges from India*.<sup>24</sup> The subsidies include grants the Ministry of Steel provided to make the Indian steel industry more globally competitive, high-grade iron ore for less than adequate remuneration, and tax and duty exemptions provided by the Gujarat and Uttar Pradesh state governments.<sup>25</sup> Commerce should issue its preliminary results in the 2018 administrative review by February 2021.<sup>26</sup> In December 2020, Commerce also initiated the 2019 administrative review of the order and is scheduled to issue preliminary results in July or October 2021.<sup>27</sup>

3. *Large Vertical Shaft Engines from China*

At the beginning of the year, Commerce began its investigation into an antidumping and countervailing duty petition involving certain large vertical shaft engines (LVSEs) from China.<sup>28</sup> LVSEs are primarily used in riding lawnmowers and other non-handheld outdoor power equipment such as power washers.<sup>29</sup> The investigation affects hundreds of millions of dollars worth of these engines imported annually into the United States, mostly by U.S. lawnmower producers.<sup>30</sup> On June 19, 2020, Commerce published its preliminary determination of subsidy rates ranging from 19.61 percent and 37.75 percent.<sup>31</sup> On August 19, 2020, Commerce published its preliminary determination of dumping ranging from 219 percent to 543 percent.<sup>32</sup> Commerce should reach its final decision at the beginning of 2021.<sup>33</sup> These

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24. Memorandum from Eliza Siordia, Int'l Trade Compliance Analyst to Shawn Thompson, Dir., Off. V, AD/CVD Operations, re: *Administrative Review of the Countervailing Duty Order on Stainless Steel Flanges from India: New Subsidy Allegations Memorandum* (July 9, 2020) (PUBLIC DOCUMENT) (ACCESS Barcode 3998866).

25. *Id.*

26. Memorandum from Eliza Siordia, Int'l Trade Compliance Analyst, through Shawn Thompson, Dir. Off. V, to James Maeder, Deputy Assistant Sec'y, AD/CVD Operations, re: *Stainless Steel Flanges from India: Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review, 2018* (Oct. 1, 2020) (PUBLIC DOCUMENT) (ACCESS Barcode 4035194).

27. Notice of Initiation of Antidumping and Countervailing Duty Reviews, 85 Fed. Reg. 78,990, 78,991 (Dec. 8, 2020).

28. Certain Vertical Shaft Engines Between 225cc and 999cc, and Parts Thereof, From the People's Republic of China, 85 Fed. Reg. 51,015, 51,015, 51,017 (Aug. 19, 2020) (preliminary affirmative determination of sales at less than fair value, preliminary affirmative determination of critical circumstances, postponement of final determination and extension of provisional measures) [hereinafter *Engines AD Preliminary Determination*]; Certain Vertical Shaft Engines Between 225cc and 999cc, and Parts Thereof, From the People's Republic of China, 85 Fed. Reg. 37,061, 37,061 (June 19, 2020) (preliminary affirmative countervailing duty determination, preliminary negative critical circumstances determination, and alignment of final determination with final antidumping duty determination) [hereinafter *Engines CVD Preliminary Determination*].

29. *Engines CVD Preliminary Determination*, 85 Fed. Reg. at 37,063.

30. *Id.*

31. *Engines CVD Preliminary Determination*, 85 Fed. Reg. 37,062.

32. *Engines AD Preliminary Determination*, 85 Fed. Reg. 51,016.

33. *Engines AD Preliminary Determination*, 85 Fed. Reg. at 51,017; *see also* *Engines CVD Preliminary Determination*, 85 Fed. Reg. at 37,062.

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investigations are among the most recent in a long line of investigations that show significant subsidies from the Government of China and dumping practices from the Chinese industry.

**B. SIGNIFICANT INTERNATIONAL TRADE COMMISSION CASES**

**1. 4th Tier Cigarettes from Korea**

On February 7, 2020, in response to petitions filed by the Coalition Against Korean Cigarettes, Xcaliber International (Pryor, Oklahoma) and Cheyenne International (Grover, North Carolina), the USITC issued affirmative preliminary determinations against imports of 4th tier cigarettes from Korea, finding a reasonable indication that a U.S. industry is materially injured by these imports that are alleged to be sold in the U.S. at less than fair value.<sup>34</sup> The Commissioners unanimously voted in the affirmative.<sup>35</sup> The USITC defined a single domestic like product coextensive with the scope of the investigations, which includes only 4th tier cigarettes.<sup>36</sup> Briefing for the final phase of the USITC's investigation is scheduled for December 2020, and the USITC likely will issue its final determination in early 2021.<sup>37</sup>

**III. Court Appeals**

The CAFC and the CIT decided several notable cases in 2020, with important implications for the United States' administration of its trade laws.

**A. PARTICULAR MARKET SITUATION APPEALS**

There were significant developments in the jurisprudence of Particular Market Situation (PMS) where CIT issued thirteen opinions during 2020, most of them in Korean steel pipe cases.<sup>38</sup>

Prior to the enactment of the Trade Preferences Extension Act (TPEA) of 2015, the U.S. trade statutes only provided for sales-based PMS, i.e., a home market sales price of finished goods could be disregarded if there was evidence that it was distorted by a PMS.<sup>39</sup> In such a case, it could be replaced by either a third-country sales price, provided it was undistorted by

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34. 4th Tier Cigarettes from Korea, *supra* note 19, at 7,330.

35. 4th Tier Cigarettes from Korea, Inv. No. 731-TA-1465, USITC Pub. 5016 (Feb. 2020) (Preliminary), at 1.

36. *Id.* at 8, 11.

37. 4th Tier Cigarettes from the Republic of Korea: Postponement of Final Determination of Sales at Less-Than-Fair-Value Investigation, 85 Fed. Reg. 51,011 (Aug. 19, 2020) [hereinafter Postponement of Final Determination].

38. *See, e.g.*, *Husteel Co., Ltd. v. United States*, 426 F. Supp. 3d 1376, 1380 (Ct. Int'l Trade 2020).

39. *Id.* at 1388–89.

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PMS, or a Constructed Value (CV) based on applying the respondent's own costs.

The TPEA amendment inaugurated cost-based PMS in the context of CV, by establishing that a "particular market situation exists [when] the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."<sup>40</sup> In the case of cost-based PMS, Commerce, in computing CV, may replace the producer's actual costs using "any other calculation methodology."<sup>41</sup> TPEA also expanded the ambit of sales outside the ordinary course of trade (OCOT) where the PMS "prevents a proper comparison with the export price or constructed export price."<sup>42</sup>

In steel pipe cases, cost-based PMS' have been alleged in an exporting country, primarily to the U.S. due to a global phenomenon: Chinese oversupply of steel, which manifested uniquely in terms of the consequences, such as grants of subsidies to local industries and trade remedy measures undertaken against Chinese importers by exporting countries and impositions of CVD by the U.S.<sup>43</sup>

But the Court of International Trade (CIT) has pushed back aggressively on several fronts. First, it rejected a localized PMS arising from the potential universal effect of cheap Chinese imports.<sup>44</sup> Second, it disabused the notion to equate subsidies with government policies or mandates that distort the cost of production (COP) of the subject merchandise.<sup>45</sup> Third, even assuming that PMS distorted the COP, courts have held, "Commerce fails to explain how these distortions prevent a proper comparison" of home market price with the U.S. price because, ordinarily, a PMS should equally affect both prices.<sup>46</sup>

Finally, in a series of rulings, the court has narrowed the ambit of the PMS adjustment, such that it can only be applied in cases of CV, and cannot be applied in building up the "cost of production" for a below-cost analysis.<sup>47</sup> Rejection of a PMS uplift for COP leaves a larger number of above-COP sales for price comparisons.<sup>48</sup> Due to a lower COP, the average prices for viable home market sales will be lower, resulting in a lower AD margin.<sup>49</sup>

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40. 19 U.S.C. § 1677b(e).

41. *Id.*

42. 19 U.S.C. § 1677b(a)(1)(B)(ii)(III).

43. See United States Dep't of Commerce: Int'l Trade Administration Fact Sheet, *Commerce Finds Dumping of Imports of Fabricated Structural Steel from Canada, China, Mexico, and Countervailing Subsidization of Imports of Fabricated Structural Steel from China and Mexico* (2020).

44. See 19 U.S.C. § 1677(15)(C) (The CIT made this determination pursuant to its authority).

45. See, e.g., *Husteel Co.*, 426 F.3d at 1389–90.

46. *Id.* at 1391.

47. See e.g., *Saha Thai Steel Pipe Pub. Co. v. United States*, 635 F.3d 1335, 1342 (Fed. Cir. 2011); see also *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 426 F.3d 1395, 1410 (Ct. Int'l Trade 2020).

48. See *Borusan Mannesmann*, 426 F.3d at 1400–01.

49. See *id.*

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The U.S. Court of Appeals for the Federal Circuit (CAFC) has yet to take up any PMS appeal as of the deadline for this submission.<sup>50</sup>

*B. Countervailing Duty Appeals*

This year featured extensive judicial appeals of CVD proceedings, most notably with the CIT remanding a dispute because the DOC had not provided a statutory basis for conducting the expedited administrative reviews provided by regulation.<sup>51</sup> The most frequently litigated issue involved China's Export Buyer's Credit Program (EBCP), with multiple CIT opinions invalidating DOC actions to countervail the EBCP based on non-cooperation by the Chinese government.<sup>52</sup> The Federal Circuit has yet to address this CVD issue but did this year (in the AD context) compel the DOC to increase U.S. sale prices by the amount that the EBCP was countervailed – as required by statute for export subsidies.<sup>53</sup> As for CVD law, the Federal Circuit this year remanded DOC's finding that the Korean government did not provide a countervailable subsidy in the form of electricity at less than adequate remuneration.<sup>54</sup>

**IV. Section 337 Developments**

Several significant Section 337 developments occurred in 2020. These developments included: (1) two key decisions by the CAFC and (2) several seminal determinations by the U.S. International Trade Commission (ITC or Commission).

In *Comcast Corp. et al.*, several parties appealed different aspects of the Commission's decision in the case concerning Certain Digital Video Receivers and Hardware and Software Components Thereof (Inv. No. 337-TA-1001), pursuant to which the Commission issued a limited exclusion order (LEO) as well as a cease and desist order (CDO) prohibiting respondents Comcast, ARRIS, and Technicolor from importing Comcast's accused X1 set-top boxes.<sup>55</sup> Comcast argued that the Commission's ruling was in error, because to the extent that Comcast induced its customers into infringing two asserted patents, such inducing conduct "[would take] place entirely domestically" and Comcast did not itself import the articles.<sup>56</sup>

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50. See Trade Updates, NEVILLE PETERSON LLP (Apr. 1, 2021), <https://www.npllptradelaw.com/trade-updates>.

51. See Comm. Overseeing Action for Lumber Int'l Trade Investigations or Negotiations v. United States, No. 19-00122, slip op. at 2-3 (Ct. Int'l Trade Nov. 19, 2020); 19 U.S.C. § 351.214(k) (2020).

52. See Changzhou Trina Solar Energy Co. v. United States, No. 17-00246, slip op. at 4 (Ct. Int'l Trade Aug. 4, 2020); Clearon Corp. v. United States, No. 17-00171, slip op. at 32 (Ct. Int'l Trade Oct. 8, 2020).

53. Changzhou Trina Solar Energy Co. v. United States, No. 20-1004, slip op. at 2-3 (Fed. Cir. 2020); 1677a(c)(1)(C) (2020).

54. POSCO v. United States, No. 19-1213, slip op. at 13 (Fed. Cir. Oct. 15, 2020).

55. Comcast Corp. v. Int'l Trade Comm'n, 951 F.3d 1301, 1305 (Fed. Cir. 2020).

56. *Id.* at 1306.



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ARRIS and Technicolor appealed the Commission's decision contending that the Commission does not have authority to issue an LEO after the Commission determined that they had not violated Section 337 and did not infringe the asserted patents.<sup>57</sup> In addition, all appellants moved for dismissal of the appeal on the grounds that the appeal had become moot because the subject patents had expired in 2019.<sup>58</sup>

To begin with, the CAFC denied the motion to dismiss given that "a case may remain alive based on collateral consequences, which may be found in the prospect that a judgment will affect future litigation or administrative action."<sup>59</sup> The CAFC then proceeded to deny Comcast's appeal on the grounds that the Commission correctly held that Section 337 applies to articles that infringe after importation and that the ITC's findings of importation by, or for, Comcast of articles used for infringement were supported by substantial evidence.<sup>60</sup> Finally, the CAFC denied the appeal of ARRIS and Technicolor, because the LEO was limited to importations on behalf of Comcast of articles whose intended use was to infringe the subject patents and was, therefore, within the Commission's discretion as being reasonably related to stopping the unlawful infringement.<sup>61</sup>

The CAFC also issued an important ruling in *Mayborn Group*, which related to an appeal of a decision of the Commission denying Mayborn's petition for rescission of a general exclusion order (GEO) that was issued in the case concerning Certain Self-Anchoring Beverage Containers (Inv. No. 337-TA-1092).<sup>62</sup> In its appeal, Mayborn contended that the Commission had erred in deciding to reject the rescission petition because the subject patent was invalid and the Commission had actual authority to rescind the GEO in accordance with 19 U.S.C. § 1337(k)(1).<sup>63</sup> As an initial matter, notwithstanding the fact that Mayborn did not participate in the underlying ITC investigation concerning Certain Self-Anchoring Beverage Containers, the CAFC ruled that Mayborn had standing to appeal because Mayborn demonstrated that it: "(1) suffered a particularized, concrete injury in fact that is (2) fairly traceable to the challenged conduct of the defendant and is (3) likely to be redressed by a favorable judicial decision."<sup>64</sup> But the CAFC affirmed the ITC's denial of Mayborn's rescission petition because "the Commission may only adjudicate patent validity when an invalidity defense is raised by a respondent in the course of an investigation or an enforcement proceeding pursuant to 19 U.S.C. § 1337(b)."<sup>65</sup>

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57. *Id.*

58. *Id.*

59. *Id.* at 1307.

60. *Id.* at 1308–10.

61. *Comcast Corp.*, 951 F.3d at 1310.

62. *Mayborn Grp., Ltd. v. Int'l Trade Comm'n*, 965 F.3d 1350, 1351 (Fed. Cir. 2020).

63. *Id.* at 1355.

64. *Id.* at 1354.

65. *Id.* at 1355.

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The Commission also issued several seminal decisions in 2020. In *Certain Beverage Dispensing Systems and Components Thereof* and in *Certain Blood Cholesterol Testing Strips and Associated Systems Containing the Same*, the Commission affirmed rulings issued by administrative law judges in support of findings of Section 337 violations.<sup>66</sup> In doing so, the Commission made clear that the statute does not contain a “time-of-importation requirement.”<sup>67</sup> In *Certain Microfluidic Devices*, given the potential effects on public health and welfare, the Commission exempted infringing GEM chips from existing research projects without a documented need that cannot be met by an alternative product.<sup>68</sup> Finally, in *Certain Unmanned Aerial Vehicles and Components Thereof*, the Commission affirmed the determination of an administrative law judge who declined to adjudicate new designs to be used in connection with certain Unmanned Aerial Vehicles (UAVs), because the key witness did not know the status of the new designs or when the UAVs incorporating them would be imported into, or sold in, the United States.<sup>69</sup>

## V. Enforce and Protect Act

2020 saw a surge of activity at CBP pertaining to investigations under the Enforce and Protect Act (EAPA).<sup>70</sup> Although it has been in effect since 2016, this procedure for CBP to investigate alleged AD/CVD evasion gained momentum in 2020 with seventeen investigations initiated and seventeen findings of evasion.<sup>71</sup> Most EAPA proceedings in 2020 involved transshipment of subject Chinese and Vietnamese merchandise through countries in Southeast Asia.<sup>72</sup> Other schemes involved misclassifying merchandise, misidentifying products as excluded and using incorrect cash deposit rates.<sup>73</sup>

In 2020, the CIT issued two rulings in EAPA appeals. In July, the CIT dismissed an interlocutory challenge to an investigation of plywood from China based on lack of jurisdiction.<sup>74</sup> CBP “refer[red] the matter” to Commerce and did not complete its investigation within the statutorily required 360-day period.<sup>75</sup> The CIT ruled that with the investigation

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66. See 84 Fed. Reg. 60452 (Nov. 8, 2019); 85 Fed. Reg. 22443 (Apr. 22, 2020).

67. See *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338, 1348 (Fed. Cir. 2015).

68. *Certain Microfluidic Devices*, Inv. No. 337-TA-1068, USITC Pub. 3239 (Dec. 18, 2019) (Terminated).

69. *Certain Unmanned Ariel Vehicles and Components Thereof*, 85 Fed. Reg. 52640 (Aug. 26, 2020).

70. See generally Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-125, tit. IV, § 421, 130 Stat. 122, 161 (2016) (codified at 19 U.S.C. § 4301).

71. *Notices of Action*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/trade/trade-enforcement/tftea/eapa/notices-action> (last visited Apr. 9, 2021).

72. See *Recent EAPA Actions*, U.S. CUSTOMS AND BORDER PROTECTION <https://www.cbp.gov/trade/trade-enforcement/tftea/eapa/recent-eapa-actions> (last visited Apr. 9, 2021).

73. See *id.*

74. *Vietnam Finewood Co. v. United States*, 466 F.3d 1273, 1287 (Ct. Int’l Trade 2020).

75. See *id.* at 1280; see also 19 U.S.C. §§ 1517(b)(4)(A), (c)(1)(B) (2020).

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“effectively stay[ing] at the administrative level pending Commerce’s scope determination and Customs’ subsequent final determination as to evasion,” the importers’ appeal was premature.<sup>76</sup> In December, the CIT remanded CBP’s finding that the AD order on pencils from China was evaded by transshipment through the Philippines.<sup>77</sup> CBP must, on remand, address its decision to not allow the rebuttal of CBP’s Verification Report and the summarization of proprietary information as required by regulation.<sup>78</sup>

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<sup>76.</sup> *Vietnam Finewood*, 466 F.3d at 1283–84.

<sup>77.</sup> *Royal Brush Mfg. v. United States*, No. 19-00198, slip op. at 25 (Ct. Int’l Trade Dec. 1, 2020).

<sup>78.</sup> *Id.*

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## **National Security Law**

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This article highlights significant legal developments relevant to national security law that took place in 2020.

### **I. Social Media Tests Limits of U.S. National Security Powers**

In 2020, U.S. Government efforts to curtail the threat posed by Chinese-owned social media apps TikTok and WeChat were met with challenges to the constitutional and statutory limits of U.S. national security powers. In separate lawsuits protesting the broad application of these powers in the context of social media, TikTok, Inc. (TikTok) and a group of U.S. WeChat users (WeChat Users) have thus far achieved limited but precedent-setting success.<sup>1</sup> These cases may have a lasting impact on the U.S. president's national security authority, the constitutional rights of U.S. citizens, and the ability of international business to leverage social media for commercial purposes.

#### A. INTRODUCTION

On August 6, 2020, President Trump issued a pair of executive orders declaring national emergencies based on concerns that the Chinese Communist Party could access the vast amounts of U.S. citizen data collected by TikTok and WeChat, and the resultant threat to U.S. national security.<sup>2</sup> TikTok, an app with a global following used to exchange short videos, has spawned a generation of “influencers” and attracted advertising from mainstream companies.<sup>3</sup> WeChat, the most popular messaging app in

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\* Orga Cadet served as the committee editor of this article. Barbara Linney, Partner at Baker & Hostetler LLP, and Orga Cadet, Associate at Baker & Hostetler LLP, co-authored “Social Media Tests Limits of U.S. National Security Powers.” Geoffrey Goodale, Partner, Duane Morris, LLP, and Jonathan Meyer, Attorney at Law, co-authored “2020 Cybersecurity Developments.”

1. See generally *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 926 (N.D. Cal. 2020); *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 75 (D.D.C. 2020).

2. Exec. Order No. 13,492, 85 Fed. Reg. 48,637 (Aug. 6, 2020) (TikTok); Exec. Order 13,943, 85 Fed. Reg. 48,641 (Aug. 6, 2020) (WeChat).

3. See Sheila Dang, *TikTok's U.S. Ad Business Roars Back as Trump's Threats Recede*, REUTERS (Feb. 16, 2021), <https://www.reuters.com/article/us-tiktok-advertising-focus/tiktoks-u-s-ad-business-roars-back-as-trumps-threats-recede-idUSKBN2AG136>.

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China, which also has payment capabilities and other uses, is used extensively within the Chinese American community.<sup>4</sup>

In early September 2020, pursuant to those executive orders, the U.S. Department of Commerce (Commerce Department) prohibited certain business and financial activities related to TikTok (TikTok Ban), WeChat (WeChat Ban), and their respective owners ByteDance Ltd. and Tencent Holdings Ltd. (the Bans).<sup>5</sup> Although use of the apps was not banned, distribution of and various forms of support for the apps were prohibited.<sup>6</sup> TikTok and the WeChat Users subsequently challenged the bans in lawsuits against the U.S. Government, as described in more detail below.<sup>7</sup>

After President Biden took office in January 2021, the U.S. Department of Commerce initiated a review of prior agency actions, including the Bans, to “conduct an evaluation of the underlying record justifying those prohibitions, which will better position the Government to determine whether the national security threat described in [President Trump’s] August 6, 2020 Executive Order[s], and the regulatory purpose of protecting the security of Americans and their data, continue to warrant the identified prohibitions.”<sup>8</sup> While the Biden administration ultimately revoked the August 6, 2020 executive orders pursuant to which the Commerce Department promulgated the Bans,<sup>9</sup> and courts considering the challenges to the Bans stayed the proceedings until the U.S. Department of Commerce

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4. See Vivian McCall, *What is WeChat? Everything You Need to Know About the Popular Messaging App, Including How to Sign Up*, BUS. INSIDER (Feb. 22, 2021), <https://www.businessinsider.com/what-is-wechat>.

5. Identification of Prohibited Transactions to Implement Exec. Order 13942 and Address the Threat Posed by TikTok and the Nat’l Emergency with Respect to the Info. And Comm’n Tech. and Services Supply Chain, 85 Fed. Reg. 60,061 (Sept. 24, 2020); *Identification of Prohibited Transactions to Implement Exec. Order 13943 and Address the Threat Posed by WeChat and the Nat’l Emergency with Respect to the Info. And Com. Tech. and Services Supply Chain*, U.S. DEP’T OF COM. (Sept. 17, 2020), <https://www.commerce.gov/sites/default/files/2020-09/WeChat%20-%20FR%20-%20Identification%20of%20Prohibited%20Transactions%20-%20Updated%20Injunction.ogc%20%281%29.pdf> (The Bans prohibit, generally, distributing or maintaining the TikTok and WeChat mobile apps, constituent codes, or mobile application updates through a mobile app store; providing internet hosting services, content delivery services, or internet transit or peering services for the TikTok and WeChat mobile apps; provision of services through the WeChat mobile app for the purpose of transferring funds or processing payments; and the utilization of the TikTok and WeChat mobile apps’ constituent codes, functions, or services in the functioning of other software or services).

6. See generally *Identification of Prohibited Transactions*, 85 Fed. Reg. at 60,061; U.S. Dep’t of Commerce, *supra* note 5.

7. See *U.S. WeChat Users*, 488 F. Supp. 3d at 917; *TikTok Inc.*, 490 F. Supp. 3d at 75.

8. *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d at Docket 151 (Feb. 12, 2021); *WeChat Users All. v. Trump*, No. 20-16908 at Docket 12000165 (9th Cir. Feb. 11, 2021); *TikTok Inc.*, 490 F. Supp. 3d at Docket 65 (Feb. 11, 2021); *TikTok Inc. et al v. Joseph Biden*, et al, No. 20-5381 at Docket 1884677 (DC Cir. Feb. 10, 2021).

9. The White House, Executive Order on Protecting Americans’ Sensitive Data from Foreign Adversaries (June 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/09/executive-order-on-protecting-americans-sensitive-data-from-foreign-adversaries>.

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completes its review—stays that are still in effect as of the date of submission for publication<sup>10</sup>—the courts’ preliminary judgments indicate that they were prepared to clarify the limits of U.S. national security laws. The lawsuits, therefore, serve, at least, as a warning to U.S. Government officials regarding the scope of their national security powers and a rare framework for future challenges to U.S. Government national security actions.

The executive orders and the Bans invoked the International Emergency Economic Powers Act (IEEPA), a law that authorizes numerous important national security powers, including the U.S. sanctions regime.<sup>11</sup> U.S. presidents have invoked the IEEPA to implement sanctions against countries and governments that threaten U.S. national security, including Russia, Iran, North Korea, Sudan, Syria, and Venezuela.<sup>12</sup> Lawsuits challenging executive actions under the IEEPA have historically been largely unsuccessful.<sup>13</sup> For instance, the Supreme Court, in 1981, upheld President Jimmy Carter’s use of the IEEPA to end the Iran hostage crisis by issuing an executive agreement settling international claims against Iran.<sup>14</sup> U.S. courts also rejected claims that the IEEPA violates the constitutional doctrine of separation of powers after President George H.W. Bush invoked it to impose sanctions on Iraq due to Iraq’s invasion of Kuwait.<sup>15</sup> Moreover, U.S. courts have considered whether applications of the IEEPA have violated the First Amendment right to free speech.<sup>16</sup> Courts have also considered a violation of the Fifth Amendment’s “due process” clause.<sup>17</sup> The president’s authorities under the IEEPA have largely survived these lawsuits, preserving the IEEPA’s broad grant of national security authorities.<sup>18</sup> However, as

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10. U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d at Docket 151 (Feb. 12, 2021); WeChat Users All. v. Trump, No. 20-16908 at Docket 12000874 (9th Cir. Feb. 11, 2021); TikTok Inc., 490 F. Supp. 3d at Minute Order of Apr. 15, 2021 (9th Cir. Apr. 15, 2021); TikTok Inc. et al v. Joseph Biden, et al, No. 20-5381 at Docket 1884920 (DC Cir. Feb. 11, 2021).

11. Int’l Emergency Econ. Powers Act, 50 U.S.C. § 1702 (2001).

12. Christopher A. Casey, Cong. Rsch. Serv., R45618, *The International Emergency Economic Powers Act: Origins, Evolution, and Use* (2020).

13. *Id.* at 33 (A number of lawsuits seeking to overturn actions taken pursuant to IEEPA have made their way through the judicial system [M]ost of these challenges have failed. The few challenges that succeeded did not seriously undermine the overarching statutory scheme for sanctions.).

14. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

15. *See United States v. Dhafir*, 461 F.3d 211, 218 (2d Cir. 2006) (affirming a lower court’s ruling that IEEPA does not improperly delegate Congress’ authority to define criminal offenses); *but see United States v. Romero-Fernandez*, 983 F.2d 195, 197 (11th Cir. 1993) (Finding that a provision in IEEPA constituted a legislative veto, but upholding the criminal conviction being appealed because the rest of the statute is severable (able to function independently of the unconstitutional provision)).

16. *See, e.g., Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003) (“there is no First Amendment right nor any other constitutional right to support terrorists”); *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 997 (9th Cir. 2012) (Applying strict scrutiny and finding that “the prohibition survives only if it is narrowly tailored to advance the concededly compelling government interest of preventing terrorism”).

17. *Al Haramain Islamic Found.*, 686 F.3d at 979.

18. *Casey*, *supra* note 12, at 33.

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discussed below, TikTok and the WeChat users may have found a critical vulnerability in IEEPA's seemingly impenetrable armor.

**B. TIKTOK AND WECHAT USERS' CHALLENGES TO U.S. NATIONAL SECURITY LAW**

TikTok and WeChat Users contend that the bans violate the U.S. Constitution's First Amendment right to free speech, the Fifth Amendment right to due process, and the IEEPA's prohibition against interference with personal communications.<sup>19</sup> Courts have thus far been sympathetic to their claims—specifically, TikTok's IEEPA-based claims and the WeChat Users' constitutional claims.<sup>20</sup>

*1. TikTok's Challenges*

The U.S. District Court for the District of Columbia did not address TikTok's constitutional arguments, except to state that these arguments pose “at least serious questions.”<sup>21</sup> The trial court instead granted a preliminary injunction against the TikTok Ban because it found that TikTok and its Chinese owner, ByteDance Ltd., are “likely to succeed on their IEEPA claims.”<sup>22</sup>

The trial court held, first, that the TikTok Ban likely violates certain exceptions to IEEPA's broad powers.<sup>23</sup> The IEEPA explicitly does not grant authority to regulate or prohibit, directly or indirectly, (a) personal communications that do not involve a transfer of anything of value and (b) “whether commercial or otherwise, . . . any information or informational materials, including but not limited to, publications, films, . . . photographs, . . . artworks, and news wire feeds,” and “regardless of format or medium of transmission.”<sup>24</sup> The trial court found that the TikTok Ban likely regulates such personal communication and “information or informational materials.”<sup>25</sup> Secondly, the trial court concluded that TikTok has “demonstrated that the [Commerce Department] likely overstepped its IEEPA powers and acted in an arbitrary and capricious manner by failing to consider obvious alternatives.”<sup>26</sup>

The U.S. Government appealed the trial court's decision to issue a preliminary injunction and the appeal remains pending as of the date of

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19. *U.S. WeChat Users*, 488 F. Supp. at 912; *TikTok Inc.*, 490 F. Supp. at 73.

20. *See U.S. WeChat Users*, 488 F. Supp. 3d at 912; *TikTok Inc.*, 490 F. Supp. at 73.

21. *TikTok Inc.*, 490 F. Supp. 3d at 75 n. 3.

22. *Id.* at 75 (Analyzing one of the prohibitions in the TikTok Ban); *TikTok Inc. v. Trump*, No. 1:20-CV-02658, 2020 WL 7233557, at \*15 (D.D.C. Dec. 7, 2020) (Analyzing the remaining prohibitions in the TikTok Ban and reaching the same conclusions).

23. *TikTok Inc.*, 490 F. Supp. 3d at 75.

24. Int'l Emergency Econ. Powers Act, 50 U.S.C. § 1702(b)(1), (3) (2001).

25. *TikTok Inc.*, 490 F. Supp. 3d at 75.

26. *TikTok*, 2020 WL 7233557, at \*15.

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submission for publication.<sup>27</sup> The Commerce Department ultimately published a notice in the Federal Register acknowledging that the TikTok Ban had “been enjoined,” and stating that the Commerce Department “is complying” with that injunction and that the TikTok Ban “will not go into effect, pending further legal developments.”<sup>28</sup> Nevertheless, TikTok’s apparently strong challenge to IEEPA persists.

## 2. *WeChat Users’ Challenges*

A group of WeChat users, the U.S. WeChat Users Alliance, sued the U.S. Government over the WeChat Ban.<sup>29</sup> The trial court issued a preliminary injunction, holding that the WeChat Users “have shown serious questions going to the merits of the First Amendment claim” because the WeChat Ban “burden[s] substantially more speech than is necessary to serve the government’s significant interest in national security, especially given the lack of substitute channels for communication.”<sup>30</sup> The U.S. Government appealed this injunction, but the appellate court declined to immediately lift the lower court’s injunction.<sup>31</sup>

Like TikTok, the WeChat Users argued in part that the WeChat Ban violated the IEEPA exception against regulating or prohibiting certain personal communications.<sup>32</sup> The trial court, however, did not reach a conclusion as to whether the WeChat Users were likely to succeed on this IEEPA claim.<sup>33</sup> But the WeChat lawsuit still presents a model for future challenges to U.S. national security law on constitutional grounds.

## C. NEW EXECUTIVE ORDER TAKES AIM AT ADDITIONAL SOFTWARE APPLICATIONS

Not content to await the outcome of the pending cases, President Trump also issued an executive order on January 5, 2021, banning yet-to-be-determined types of transactions with persons that develop or control WeChat Pay, Tencent QQ, and several other Chinese connected software applications.<sup>34</sup> Most of the apps are payment apps or other apps that do not

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27. Docket Report, *TikTok Inc. et al v. Joseph Biden, et al*, (No. 20-5381) JUSTIA DOCKETS & FILINGS (filed Dec. 29, 2020, pending), <https://dockets.justia.com/docket/circuit-courts/cadc/20-5381>.

28. *Identification of Prohibited Transactions to Implement Executive Order 13942*, 85 Fed. Reg. 73,191 (Nov. 17, 2020).

29. *See generally U.S. WeChat Users*, 488 F. Supp. at 912.

30. *Id.* at 928.

31. *WeChat Users All. v. Trump*, No. 20-16908 (9th Cir. Oct. 26, 2020) (Order denying U.S. Gov’t petition to stay injunction, finding that “Appellants have not demonstrated that they will suffer an imminent, irreparable injury during the pendency of this appeal.”).

32. *U.S. WeChat Users*, 488 F. Supp. 3d at 916.

33. *Id.* at 928 (“[T]he record and the arguments do not allow the court to conclude at this juncture that the plaintiffs are likely to succeed on the merits of their claim that the [WeChat Ban] prohibits personal communication.”).

34. Exec. Order No. 13,971, 86 Fed. Reg. 1249, 1250 (Jan. 5, 2021).



focus primarily on messaging or other forms of communication, which suggests that an attempt has been made to avoid challenges based on the IEEPA prohibition against restrictions on personal communications. Like the TikTok and WeChat Bans, the new executive order delegated the authority to identify the specific transactions that will be prohibited to the Commerce Department.<sup>35</sup> While the Biden administration ultimately revoked the January 5, 2021 executive order, it also directed the Commerce Department to prepare reports with recommendations to address the risk associated with certain software applications associated with foreign persons and to evaluate and take action regarding software applications that pose an undue or unacceptable risk to the United States.<sup>36</sup> If President Biden continues this initiative, the scene will be set for additional legal battles between software applications and national security agencies.

#### D. CONCLUSION

The TikTok and WeChat Users' lawsuits present novel challenges to U.S. national security law in the Information Age. The TikTok lawsuit exposed the limits of U.S. national security powers under IEEPA, a foundational U.S. national security law, and the WeChat Users' lawsuit emphasized the constitutional limits of U.S. national security law. These lawsuits set the stage for a generation of lawsuits pitting U.S. national security and foreign policy interests against the desire of technology developers and users to exercise their constitutional freedom of speech to the fullest possible extent. U.S. and foreign businesses should be aware that the TikTok and WeChat cases, and potentially other similar cases that may arise, could influence the types of data these businesses collect or can access, as well as the extent to which they can partner with Chinese developers and platforms. U.S. citizens should be aware that these lawsuits could impact U.S. national security and their First Amendment right of free speech.

## II. 2020 Cybersecurity Developments

Several important cybersecurity developments have occurred during the past year. As discussed below, these included: (i) the issuance of a number of important reports that identified major cybersecurity problems facing the United States and provided proposed solutions to them; (ii) the enactment of regulations requiring certain government contractors to implement robust cybersecurity measures; (iii) passage of legislation by Congress that would help to consolidate security requirements for Internet of Things (IoT) devices; and (iv) a massive cyberattack on numerous U.S. Government agencies and companies that is widely believed to have been perpetrated by Russian entities.

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<sup>35</sup>. *Id.*

<sup>36</sup>. The White House, *supra* note 9.

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In February 2020, the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) issued its #Protect2020 Strategic Plan to assist federal and state entities in developing and implementing strategies to combat any potential foreign interference in the 2020 elections, including through cyberattacks (CISA's 2020 Strategic Election Protection Plan).<sup>37</sup> Recognizing the findings that had been made by the Senate Intelligence Committee during its three-year investigation of Russian interference in the 2016 presidential election, the Strategic Plan opened with the following quote from Christopher Krebs, then-Director of CISA: "If we learned anything, I think, through 2016 and the Russian interference with our elections, it's no single organization, no single state, no locality can go at this problem alone."<sup>38</sup> Due in large part to efforts by many federal and state agencies to implement the recommendations set forth in CISA's 2020 Strategic Election Protection Plan, CISA and other federal agencies were able to issue a joint statement following the 2020 Presidential election proclaiming that "[t]he November 3rd election was the most secure in American history . . . [and that] [t]here is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised."<sup>39</sup>

In March 2020, the U.S. Cybersecurity Solarium Commission (CSC) issued its long-awaited report on cybersecurity strategies that should be adopted by the United States (March 2020 Report).<sup>40</sup> Pursuant to the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (FY 2019 NDAA), the CSC was created and tasked with addressing two fundamental questions: "What strategic approach will defend the United States against cyberattacks of significant consequences? And what policies and legislation are required to implement that strategy?"<sup>41</sup> In its March 2020 Report, the CSC addressed these questions by recommending a new strategic approach to cybersecurity: layered cyber deterrence.<sup>42</sup> Specifically,

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37. See generally U.S. Dep't of Homeland Sec., *#Project2020 Strategic Plan*, CISA CYBER + INFRASTRUCTURE (Feb. 2020), [https://www.cisa.gov/sites/default/files/publications/ESI%20Strategic%20Plan\\_FINAL%202.7.20%20508.pdf](https://www.cisa.gov/sites/default/files/publications/ESI%20Strategic%20Plan_FINAL%202.7.20%20508.pdf).

38. *Id.*; see also S. REP. NO. 116-XX vol. 5 (2020) (discussing Senate committee findings regarding Russian interference).

39. Members of GCC Exec. Comm., *Joint Statement from Elections Infrastructure Gov't Coordinating Council & The Election Infrastructure Sector Coordinating Exec. Comm.'s*, CISA (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

40. U.S. Cybersecurity Solarium Comm'n, *Final Report* (March 2020), [https://drive.google.com/file/d/1ryMCIL\\_dZ30QyifqFkff10MxIXJGT4yv/view](https://drive.google.com/file/d/1ryMCIL_dZ30QyifqFkff10MxIXJGT4yv/view).

41. *Id.* at 1 (The CSC, which is co-chaired by Senator Angus King (I-Maine) and Rep. Mike Gallagher (R-Wisconsin), has 10 Commissioners, which include four legislators and six nationally recognized experts from outside of government, and is operationally run by Executive Director Mark Montgomery, who leads a staff of experts with experience in the federal government and the private sector.).

42. U.S. Cybersecurity Solarium Comm'n, *supra* note 40, at 1.

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the March 2020 Report outlines three ways to achieve layered cyber deterrence:

- (1) Shape behavior. The United States must work with allies and partners to promote responsible behavior in cyberspace;
- (2) Deny benefits. The United States must deny benefits to adversaries who have long exploited cyberspace to their advantage, to American disadvantage, and at little cost to themselves; and
- (3) Impose costs. The United States must maintain the capability, capacity, and credibility needed to retaliate against actors who target America in and through cyberspace.<sup>43</sup>

In order to achieve these objectives, the CSC offers over eighty recommendations broken down into the following six pillars: (1) reform the U.S. Government's structure and organization for cyberspace; (2) strengthen norms and non-military tools; (3) promote national resilience; (4) re-shape the cyber ecosystem; (5) operationalize cybersecurity collaboration with the private sector; and (6) preserve and employ the military instrument of national power.<sup>44</sup> Subsequently, the CSC issued a separate report containing over fifty legislative proposals that would help support the implementation of many of the recommendations set forth in the March 2020 Report (Legislative Proposals Report).<sup>45</sup>

Consistent with several of the recommendations made by the CSC, the U.S. Department of Defense (DOD) issued an interim rule on September 29, 2020, that required defense contractors to take certain actions to improve their cybersecurity posture.<sup>46</sup> Pursuant to the interim rule, in order to be eligible for future DOD contracts, defense contractors were required to complete a self-assessment of their compliance with NIST SP 800-171 requirements and to submit results from such self-assessments to the DOD by November 30, 2020.<sup>47</sup> In addition, the interim rule provided additional information relating to the long-anticipated Cybersecurity Maturity Model Certification (CMMC) framework, which DOD will be rolling out over the next five years.<sup>48</sup>

Congress also took heed of the recommendations that were set forth in the CSC's March 2020 Report and Legislative Proposals Report, for example, in the bill relating to the National Defense Authorization Act for

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43. *Id.*

44. *See id.*

45. U.S. Cybersecurity Solarium Comm'n, Legislative Proposals Report (July 2020), <https://drive.google.com/file/d/1S5N7KvjFfxow19kCnP10nx7Mah8pK0uG/view>.

46. Def. Fed. Acquisition Reg. Supp.: Assessing Contractor Implementation of Cybersecurity Requirements, 85 Fed. Reg. 61,505 (Sep. 29, 2020).

47. *Id.* at 61,520.

48. *Id.* at 61,510.

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Fiscal Year 2021 that was passed in December 2020, Congress included over twenty-six proposals made by the CSC.<sup>49</sup>

While the actions taken by the DOD and Congress to implement some of the CSC's recommendations were certainly positive, the year ended on a sour note in terms of cybersecurity when it was discovered that a series of massive cyberattacks that the U.S. Government has stated were conducted by the Russian Foreign Intelligence Service (SVR) were perpetrated over the course of several months on over 16,000 computer systems worldwide, including those of numerous U.S. Government agencies and U.S. companies.<sup>50</sup> The attacks occurred as a result of vulnerabilities in SolarWind's software, a company based in Austin, Texas.<sup>51</sup> The full scope of the cyberattacks is not clear as of the time of this writing, but many believe that the damage caused by them has been extensive.<sup>52</sup>

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49. Press Release, Office of U.S. Senator Angus King (I-Maine), Solarium Co-Chairs Welcome 26 Recs in 2021 Nat'l Def. Authorization Act (Dec. 3, 2020), <https://www.king.senate.gov/newsroom/press-releases/solarium-co-chairs-welcome-26-recommendations-in-2021-national-defense-authorization-act>.

50. Fact Sheet, White House, Imposing Costs for Harmful Foreign Activities by the Russian Government (Apr. 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/15/fact-sheet-imposing-costs-for-harmful-foreign-activities-by-the-russian-government>.

51. David E. Sanger & Nicole Perloth, *Trump Contradicts Pompeo Over Russia's Role in Hack*, N.Y. TIMES (Dec. 19, 2020), <https://www.nytimes.com/2020/12/19/us/trump-contradicts-pompeo-over-russias-role-in-hack.html>.

52. *Id.* Given the severity of the attacks, the U.S. Government imposed sanctions on numerous Russian entities by means of Exec. Order No. 14024 of Apr. 15, 2021, 86 Fed. Reg. 20,249 (Apr. 17, 2021). In addition, due in large part to the SolarWinds incident, the U.S. Government set forth numerous actions that federal agencies and government contractors must take to improve their cybersecurity posture in Exec. Order No. 14028 of May 12, 2021, 86 Fed. Reg. 26,633 (May 17, 2021).

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