



# THE YEAR IN REVIEW

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

2017 • VOLUME 51

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*Preferred Citation:* Vol. No. ABA/SIL YIR (n.s.) page no. (year).

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## **International Legal Developments Year in Review: 2016**

JASON SCOTT PALMER\*

This publication, *International Legal Developments – Year in Review: 2016*, presents a survey of important legal and political developments in international law that occurred during 2016. The volume consists of articles from over forty committees of the American Bar Association Section of International Law, whose members live around the world and whose committees monitor and report on a diverse range of topics that have arisen in international law over the past year. While not every development in international law is included in this volume, the omission of a particular development should not be construed as meaning that it was not significant. 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 portions of articles that describe the most significant developments in their substantive practice area or geographic region. In some cases, non-section members who have particular knowledge or expertise in an area may also be contributing authors.

Committee chairs and committee editors solicited the contributing authors for each committee article. The committee editors, who are identified in each article, had the daunting task of keeping their authors' collective contributions within the tightly controlled word limits. They made difficult decisions on what to include and what to cut. After the committee editors did their work, Professor Brooke Bowman, the Assistant General Editor, formatted and organized the over forty committee submissions. Professor Jason Palmer, the General Editor, 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 General Editor reviewed the articles again before sending them to the diligent student editors at the Dedman School of Law at Southern Methodist University in Dallas, Texas. Both Jennifer Little, the Editor-in-Chief of *The International Lawyer* this year, and Trevor Spears, the Managing Editor, performed superlatively in their respective roles. They supervised an outstanding editorial team whose individual names you can read in the masthead for this volume. These intrepid students checked the sources cited and reviewed each article line by line and word by word, leaving no portion of the Bluebook unexplored.

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\* Professor Jason S. Palmer teaches at Stetson University College of Law in St. Petersburg, Florida, and is the Coordinator of the First Year Research and Writing Curriculum at Stetson.



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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 General Editor and with the student editors. We also appreciate all of the support received from Patrick Del Duca, the Publications Officer for the ABA Section of International Law, all of the Division Chairs, and the other leaders of the ABA Section of International Law. Because of all the work that goes into producing the Year In Review, the final product that you hold in your hands (or that you are viewing electronically) is a useful and reliable overview of international law events during the year 2016. Readers interested in a particular substantive or geographic area should read not only this year's summary, but also those from earlier years.

We 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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Carolyn Williams (Sandra Day O'Connor College of Law Arizona State University)

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

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## Customs Law

GEOFFREY GOODALE, JENNIFER HORVATH, GREG KANARGELIDIS,  
DANIEL KISELBACH, MATT NAKACHI, REBECCA RODRIGUEZ,  
RUTA RILEY, ZACHARY SILVER, JAMIE WILKS, VICKI WU, AND  
CLINTON YU\*

### I. Introduction

This article summarizes important developments in 2016 in customs law, including U.S. legislative, administrative, executive, and trade developments, as well as Canadian and European legal developments.<sup>1</sup>

### II. Review of Customs-Related Determinations: CBP's Interim Final Rule on AD/CVD Evasion Investigations<sup>2</sup>

Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015—commonly referred to as the Enforce and Protect Act (EAPA)—requires that the United States Customs and Border Protection (CBP) establish a formal process to investigate allegations of evasion of antidumping (AD) and countervailing duty (CVD) orders.<sup>3</sup> Accordingly, on August 22, 2016, CBP issued an interim final rule (IFR) setting forth the proposed procedures that CBP would use when conducting investigations about alleged evasion of AD and CVD orders.<sup>4</sup>

As required by the EAPA, the IFR seeks to establish a framework for a transparent administrative proceeding where parties can both participate in, and learn the outcome of, the investigation. These two aspects were absent from how CBP handled evasion allegations before the EAPA's enactment. It also provides an option for both administrative and judicial appeals of the investigation. “In addition to establishing the allegation of lodging and investigative procedures, the EAPA and implementing regulations allow CBP to take such additional enforcement measures as CBP deems appropriate, including (but not limited to) modifying CBP's procedures for

---

\* The committee editor of this article is Rebecca A. Rodriguez, Esq., an Associate Attorney with GrayRobinson, P.A. in Miami, Florida. Section editors and contributors are identified in each section.

1. For developments during 2015, *see generally* Luis Arandia, et al., *Customs Law*, 50 INT'L L. 5 (2016).

2. Section Editor: Geoffrey M. Goodale, Esq. Section Authors: Geoffrey Goodale, Esq.; Clinton Yu, Esq.

3. Enforce and Protect Act of 2015, 19 U.S.C. § 1517 (2016).

4. Investigation of Claims of Evasion of Antidumping and Countervailing Duties, 81 Fed. Reg. 56,477, 56, 490 (Aug. 22, 2016) (to be codified at 19 C.F.R. § 165.47).

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identifying future evasion, re-liquidating entries as provided by law, and referring the matter to CBP's investigative arm, Immigration and Customs Enforcement [(ICE)], for a possible civil or criminal investigation."<sup>5</sup> The procedures enumerated under the IFR, which would be codified under a new Part 165 of the Customs Regulations, would give CBP a deadline of fifteen business days to start an investigation.<sup>6</sup> Moreover, CBP typically would be required to issue its final determination within 300 calendar days, which under certain circumstances can be extended by sixty days.<sup>7</sup>

The IFR also furnishes CBP with certain enforcement mechanisms during an investigation—such as suspending liquidation of certain entries or extending the period for liquidation—or additional measures to protect revenue, such as requiring single entry bonds or cash deposits.<sup>8</sup> Although the IFR entered into effect on August 22, 2016, CBP still might choose to amend some of the IFR's provisions based on any public comments.<sup>9</sup>

### **III. Trade Promotion and Other Legislative Branch Developments and Administrative Executive Policy Developments<sup>10</sup>**

#### **A. PASSAGE OF THE CUSTOMS REAUTHORIZATION BILL AS THE TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015**

On February 24, 2016, President Obama signed the EAPA into law.<sup>11</sup> It makes significant changes to the CBP's operations and programs, adds new provisions to the antidumping and countervailing laws, establishes new measures to protect intellectual property rights, revamps laws governing drawback claims, and increases enforcement tools to strengthen CBP's ability to facilitate trade and ensure compliance. Below is a summary of the more significant changes.

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5. Braumiller & Vicky Wu, *Latest Customs Developments in the U.S. Regarding the Enforce and Protect Act, Possible Audits and False Claims Act*, BRAUMILLER L. GROUP, PLLC (Dec. 19, 2016), <http://www.braumillerlaw.com/latest-customs-developments-in-the-u-s-regarding-the-enforce-and-protect-act-possible-audits-and-false-claims-act/>.

6. Investigation of Claims of Evasion of Antidumping and Countervailing Duties at 56,480, 56,486 (to be codified at 19 C.F.R. § 165.15).

7. *Id.* at 56,480, 56,487 (to be codified at 19 C.F.R. § 165.22).

8. *Id.* at 56,481, 56,487-89 (to be codified at 19 C.F.R. §§ 165.24, 165.28).

9. Investigation of Claims of Evasion of Antidumping and Countervailing Duties – Extension of Comment Period, 81 Fed. Reg. 72,692, 72,692 (Oct. 21, 2016).

10. Section Editor: Matt Nakachi, Esq. Section Authors: Jennifer Horvath, Esq.; Matt Nakachi, Esq.; Vicki Wu, Esq.

11. *New Landmark Trade Promotion and Enforcement Legislation Now Finally Reality*, ARENT FOX 1 (Feb. 17, 2016), <http://documents.lexology.com/9f4432fb>.

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1. *Title I—Trade Facilitation and Trade Enforcement*

Title I (1) requires CBP to work with the public, private sector entities, and other federal agencies to provide meaningful trade benefits to partnership programs;<sup>12</sup> (2) establishes priorities and performance standards to measure the development of CBP programs, such as the Automated Commercial Environment System and the Centers of Excellence and Expertise;<sup>13</sup> (3) creates a National Targeting Center within the Office of Field Operations that will gather data and assess risk on each of CBP's priority trade issues;<sup>14</sup> (4) requires CBP to develop criteria for assigning importer of record identification numbers;<sup>15</sup> and (5) establishes a new program that allows CBP to set bond amounts based on identified importer risks rather than connecting the amount to past revenue formulas.<sup>16</sup>

2. *Title II—Import Health and Safety*

Title II establishes an interagency working group responsible for developing a “joint import safety rapid response plan” that sets forth protocols and practices for CBP, and other federal, state, and local authorities, to use when responding to cargo that threatens the health and safety of U.S. consumers.<sup>17</sup>

3. *Title III—Import-Related Protection of Intellectual Property Rights*

Title III enhances and supports CBP's intellectual property rights (IPR) protection efforts, such as providing CBP with the authority to share information with rights holders,<sup>18</sup> authorizing CBP to seize circumvention devices prohibited for importation and notify the copyright holder potentially injured by the seized devices,<sup>19</sup> establishing a National Intellectual Property Rights Coordination Center within CBP,<sup>20</sup> and calling for an increase in IPR enforcement personnel and training with respect to the enforcement of IPR.<sup>21</sup>

4. *Title IV—Prevention of Evasion of Antidumping and Countervailing Duty Orders*

Title IV establishes a significant new enforcement action regarding the collection of antidumping and countervailing duty orders and investigating evasion claims. Specifically, investigations of evasion can now be initiated by

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12. Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C. § 4311 (2016).

13. *Id.* §§ 4312, 4317.

14. *Id.* §§ 4312, 4317-18.

15. *Id.* § 4320.

16. *Id.* § 4321.

17. *Id.* §§ 4331-33.

18. *Id.* § 1628(a).

19. *Id.* §§ 4342-43.

20. *Id.* § 4344.

21. *Id.* §§ 4345-50.

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an interested person filing an allegation with CBP that a person has entered covered merchandise into the United States through evasion or referral by any other federal agency with information that reasonably suggests a person has entered covered merchandise into the United States through evasion. If CBP makes an affirmative determination of evasion, it will suspend liquidation of unliquidated entries of such merchandise and require cash deposits for entries entered on or after the date of initiation. CBP will also extend the period for liquidating unliquidated entries of such merchandise that are entered before the date of initiation to allow for the calculation and collection of AD/CVD duties. CBP may also take additional appropriate enforcement measures under section 592 of the Tariff Act (19 U.S.C. § 1592), seizures under section 596 of the Tariff Act (19 U.S.C. § 1596), or civil or criminal investigations by United States Immigration and Customs Enforcement (ICE). Finally, the new law requires CBP to (1) initiate an investigation within fifteen business days after receiving an allegation or a referral by another federal agency; and (2) make a determination within 300 calendar days after initiating the investigation.<sup>22</sup>

5. *Title V—Small Business and State Trade Promotion Programs*

Title V contains provisions for supporting small businesses in export-promotional activities. For instance, it establishes (among others things) additional outreach to small businesses on the potential impact of new trade agreements and grants to carry out programs, such as foreign trade missions, trade shows, and other forms of marketing and training for small businesses.<sup>23</sup>

6. *Title VI—Additional Enforcement Provisions*

The United States Trade Representative (USTR) must consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives regarding trade enforcement priorities. Title VI establishes a Trade Enforcement Trust Fund, which will be used by the USTR and other agencies to enforce U.S. trade agreements, trade rights under the WTO, and U.S. free-trade agreements.<sup>24</sup> This trust fund can also be used for trade capacity building efforts. Moreover, Title VI requires CBP and ICE to institute certain measures that stop illegal honey transshipment<sup>25</sup> and to train and employ personnel “to detect, identify, and seize cultural property, archeological or ethnological materials, and other fish, wildlife or plants that violate [federal] law[ ].”<sup>26</sup> Finally, this title also

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22. *Id.* §§ 1517, 4371-75.

23. *Id.* § 634(c).

24. *Id.* § 4405.

25. *Id.* § 4403.

26. *New Landmark Trade Promotion and Enforcement Legislation Now Finally Reality*, ARENT FOX (Feb. 17, 2016), <http://documents.lexology.com/9f4432fb-12e8-40e1-a363-067fe35fd860.pdf>.

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codifies the establishment of an interagency center on trade implementation, monitoring, and enforcement.<sup>27</sup>

7. *Title VII—Currency Manipulation*

Title VII addresses currency-undervaluation.<sup>28</sup>

8. *Title VIII—Renewal and Expansion of CBP Operations/Programs*

Title VIII formally establishes CBP and other operational offices within CBP and defines the duties of the Commissioner and Deputy Commissioner.<sup>29</sup>

9. *Title IX—Miscellaneous.*

Title IX covers a broad array of miscellaneous provisions. Among CBP's most significant changes are that it (1) increases the *de minimis* value for section 321 imports from \$200 to \$800;<sup>30</sup> (2) amends the language of subheading 9801.00.10 of the Harmonized Tariff Schedule of the United States (HTSUS) and subchapter Note 3 to HTSUS Heading 9802;<sup>31</sup> (3) removes the entry requirement for certain bulk cargo residue returning to the United States in Instruments of International Traffic;<sup>32</sup> (4) simplifies various drawback provisions and updates the process from paper-based filings to a more automated process;<sup>33</sup> (5) makes technical corrections to certain tariff classifications for recreational performance outerwear in Chapter 62 of HTSUS and to Additional United States Note, Chapter 64 of HTSUS, relating to certain footwear;<sup>34</sup> and (6) adopts specific country-of-origin marking requirements for certain castings.<sup>35</sup>

**B. CBP IMPLEMENTATION OF THE TRADE ENFORCEMENT ACT PROVISIONS**

After its passage in 2016, CBP implemented several provisions of the Trade Facilitation and Trade Enforcement Act (TFTEA). The variety of implemented provisions lends credence to the agency's efforts and commitment to enhanced trade enforcement and promotion in the United States. Main areas addressed by CBP include changes to *de minimis* value for

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27. 19 U.S.C. § 2171.

28. S. Rep. No. 114-45, 45 (2015).

29. 19 U.S.C. § 4301.

30. *Id.* § 1321.

31. U.S. INT'L TRADE COMMISSION, publ'n no. 4660, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES 3075 (2017).

32. *Id.* at 3090.

33. 19 U.S.C. § 1313(a).

34. HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, *supra* note 31, at 118-24.

35. 19 U.S.C. § 1304(e).



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formal-entry exemptions, antidumping/countervailing duty-evasion enforcement, and intellectual property rights.

The increase in the minimum amount for low-value shipments was one aspect that impacted many importers. Previously, and in accordance with the Tariff Act of 1930, imports that were valued at only \$200 or less were exempt from formal declaration to CBP.<sup>36</sup> But the minimum value was raised to \$800, greatly increasing the imports that qualify for this administrative exemption.<sup>37</sup> This exemption applies to articles imported by one person on one day, as long as the aggregate fair retail value in the country of shipment is not less than \$800.

On the intellectual property front, CBP established an additional process for copyright registration. Pursuant to Title III of the TFTEA, CBP “began accepting online applications for recordation of unregistered copyrights through the Intellectual Property Rights Electronic Recordation System (IPRR).”<sup>38</sup> “Each unregistered copyright recordation will be valid for nine months, with a potential, one-time [ninety]-day extension of time, while the copyright’s application for registration is pending with the United States Copyright Office (USCO).”<sup>39</sup> “Upon registration of the copyright application at the USCO, the copyright recordation will continue to receive” CBP’s border-enforcement benefits.<sup>40</sup> “Once recorded, unregistered copyrights will receive the same benefits of border protection and enforcement as copyrights that are registered with the USCO.”<sup>41</sup>

C. THE ITC ADMINISTERS THE MISCELLANEOUS TARIFF BILL  
PROCESS

The Miscellaneous Tariff Bill (MTB) has long existed as a helpful legislative tool for importers of goods (that are not otherwise manufactured in the United States) to obtain significant relief from customs-import duties. Such importers seek these duty exemptions (and reductions) from Congress through legislative provisions in Chapter 99 of the United States Harmonized Tariff.<sup>42</sup> In recent times, the process of lobbying members of Congress for such special treatment under a Chapter 99 tariff exemption became controversial given its potential appearance as a congressional “earmark” to a favored constituent.

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36. *Id.* § 1321.

37. U.S. Customs and Border Protection, Administrative Exemption on Value Increased for Certain Articles, 81 Fed. Reg. 58,831 (Aug. 26, 2016).

38. Press Release, U.S. Customs and Border Production, CBP Commences Online Recordation of Unregistered Copyrights for Border Enforcement in Accordance with TFTEA (Sept. 12, 2016), <https://www.cbp.gov/newsroom/national-media-release/cbp-commences-online-recordation-unregistered-copyrights-border>.

39. *Id.*

40. *Id.*

41. *Id.*

42. HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, *supra* note 31, at 3192.

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To avoid the “earmark” issue, reform legislation was initiated to create a legal framework within which the International Trade Commission (ITC) would function as an impartial administrator of the MTB process. By accepting petitions from interested parties for duty suspensions (or reductions), and by presenting the potential language to Congress for potential adoption into law, the ITC would allow all interested parties equal access to the MTB process without having to lobby federally-elected officials. This reform legislation was passed in May 2016 as the American Manufacturing Competitiveness Act of 2016 (AMCA).<sup>43</sup>

Then, in September 2016, the Federal Register published interim regulations for submitting an MTB petition.<sup>44</sup> In October 2016, ITC created an electronic portal to facilitate submissions and public review of MTB petitions.<sup>45</sup> But the time for filing MTB petitions closed on December 12, 2016.<sup>46</sup>

In January 2017, the ITC published the submitted petitions in the Federal Register, affording the opportunity for public comment within a forty-five-day window.<sup>47</sup> The ITC analyzed all comments received and investigated factors related to whether (1) there is no manufacturing capability for the petitioned article in the United States; and (2) the likely monetary impact of a proposed MTB-duty suspension that may exceed the \$500,000 annual threshold. If a proposed provision is anticipated to exceed that threshold, the ITC can change that provision from a duty suspension to a duty reduction, thereby keeping the impact within the monetary cap. After analysis—spanning between 180 and 240 days—the ITC must consolidate all eligible goods into a report issued to the House Ways and Means Committee and Senate Finance Committees.<sup>48</sup>

Congress may then choose to either adopt or reject the proposed language. It may do so on a line-by-line basis if it chooses. The consolidated MTB then might theoretically pass into law for a three-year period, as has been the case in historical legislation.

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43. *See generally* American Manufacturing Competitiveness Act of 2016, Pub. L. No. 114-159 (May 20, 2016).

44. *MTB Petition Submission and Consideration Rules Set by ITC*, SANDLER, TRAVIS & ROSENBERG, P.A. (Sept. 27, 2016), <http://www.strtrade.com/news-publications-MTB-ITC-regulations-petition-092716.html>.

45. *Id.*

46. *ITC Launches New MTB Petition Process*, THOMPSON HINE (Oct. 20, 2016), <http://www.thompsonhine.com/publications/itc-launches-new-mtb-petition-process>.

47. *See generally* Notice of Publication of Petitions for Duty Suspensions and Reductions and Opportunity to Comment on Petitions, 82 Fed. Reg. 3,357 (Feb. 24, 2017).

48. *See generally* *Committee Jurisdiction*, COMMITTEE ON WAYS AND MEANS, <https://waysandmeans.house.gov/committee-jurisdiction/> (last visited Apr. 10, 2017).

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**D. CONGRESS PASSES THE DEFEND TRADE SECRETS ACT**

The Defend Trade Secrets Act (DTSA), which became effective May 11, 2016, provides a cause of action for misappropriation.<sup>49</sup> The DTSA allows a court to seize the property necessary to prevent the propagation or dissemination of a trade secret.<sup>50</sup> The consequence of this broad provision as it applies to customs practice remains to be seen. But U.S. Customs has been previously thrust into trade-secrets enforcement,<sup>51</sup> and this trend may increase.

**E. CUSTOMS IMPLEMENTATION OF THE AUTOMATED COMMERCIAL ENVIRONMENT (ACE) AS A SINGLE WINDOW FOR THE FACILITATION OF TRADE**

A customs goal in 2016 has been for the Automated Commercial Environment (ACE) to become a Single Window for trade, meaning it would be “the primary system through which the trade community will report imports and exports and the government will determine admissibility.”<sup>52</sup> Through ACE as the Single Window, manual processes should be more streamlined and automated, and the trade community should more easily and efficiently comply with federal law and regulations.

This transition began in November 2015 when the electronic, entry-and-entry summary filings in ACE became operational, but voluntary. In February 2016, Customs began divesting support for the legacy Automated Commercial System (ACS). At that time, Customs also published notice<sup>53</sup> that ACE would become the sole authorized electronic data interchange (EDI) system for certain types of entry summary filings. On March 31, 2016, Customs ACE became the mandatory means for filing electronic entry summaries (Entry Types 01, 03, 11, 23, 51, 52), entries and entry summaries with Animal and Plant Health Inspection Service (APHIS), Lacey Act, and National Highway Traffic Safety Administration (NHTSA) data. On May 28, 2016, ACE became the mandatory method for filing electronic entries/cargo release (Entry Types 01, 03, 11, 23, 52) and electronic entries and

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49. See Defend Trade Secrets Act 2016, 18 U.S.C. § 1836(b)(1) (2016) (“[a]n owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended to use in, interstate or foreign commerce”).

50. See *id.*

51. See generally *United States v. Hanjuan Jin*, 833 F.Supp.2d 977 (N.D. Ill. 2012), *aff’d* 733 F.3d 718 (7th Cir. 2013). An O’Hare customs officer stopped an international passenger with regard to a currency declaration, and the encounter eventually led to the discovery of proprietary Motorola documents on her laptop. *Id.* at 986. The defendant was subsequently convicted for violating 18 U.S.C. § 1832 (a prohibition against the theft of trade secrets) and was sentenced to forty-eight months imprisonment. *Id.* at 1020.

52. See generally *ACE and Automated Systems*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/trade/automated> (last updated Mar. 8, 2017).

53. Notice Announcing the Automated Commercial Environment (ACE) as the Sole CBP-Authorized Electronic Data Interchange (EDI) System for Processing Certain Electronic Entry and Summary Filings, 81 Fed. Reg. 10,264, 10, 264 (Feb. 29, 2016).

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entry summaries for Entry Type 06. Finally, on June 15, 2016, ACE became the mandatory means for filing electronic entries and entry summaries with FDA data.<sup>54</sup> On July 23, 2016, ACE became the mandatory means for filing electronic entries and corresponding entry summaries for remaining Entry Types (02, 07, 12, 21, 22, 31, 32, 34, 38).<sup>55</sup>

In a series of notices,<sup>56</sup> Customs advanced the ACE Protest Module to replace electronic protest filing in ACS. The intention is eventually for all protests to be filed electronically, and for the capacity of forwarding the electronic protest file to the Court of International Trade. But that functionality has not been developed, and paper filings using the CF19 protest forms are therefore still being accepted by Customs. Certain obvious benefits to filing protests in ACE include a filer's ability to electronically ensure that a protest is timely filed.<sup>57</sup> It also saves the costly, express-courier charges to individual-port locations, all the while obtaining both a protest number and check on a protest status.

#### **IV. Canadian Legal Developments<sup>58</sup>**

##### **A. FREE TRADE AND INVESTMENT**

In 2016, Canada concluded a free trade agreement with Ukraine and with the European Union. More specifically, on July 11, 2016, Canada and Ukraine signed the Canada-Ukraine Free Trade Agreement (CUFTA).<sup>59</sup> On October 30, 2016, Canada and the European Union signed the Canada-European Union Comprehensive Economic and Trade Agreement (CETA).<sup>60</sup>

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54. *FedEx Regulatory Alerts and Updates*, FEDEX (June 7, 2016), <https://smallbusiness.fedex.com/content/dam/SMB/international/pdf/Regulatory-Alerts/RegAlert%2017-001%20-%20FDA%20Filing%20in%20ACE%20begins%20June%2015.%20June%207%202016.pdf>.

55. *See ACE Mandatory Use Dates*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/trade/automated/ace-mandatory-use-dates#> (last updated Feb. 7, 2017).

56. *See* Notice Announcing the Automated Commercial Environment (ACE) Protest Module as the Sole CBP-Authorized Method for Filing Electronic Protests, 81 Fed. Reg. 49,685 (July 28, 2016); Modification of the National Customs Automation Program (NCAP) Test Concerning the Automated Commercial Environment (ACE) Portal Accounts To Establish the Protest Filer Account and Clarification That the Terms and Conditions for Account Access Apply to All ACE Portal Accounts, 81 Fed. Reg. 52,453 (Aug. 8, 2016); National Customs Automation Program (NCAP) Test Concerning Electronic Filing of Protests in the Automated Commercial Environment (ACE), 81 Fed. Reg. 53,497 (Aug. 12, 2016).

57. *See id.* at 53,499 (stating that an electronic filing in the ACE Protect Module must be received by 11:59 P.M. EST on the final day of the filing period).

58. Section Editor: Greg Kanargelidis, Esq. Section Authors: Daniel Kiselbach, Esq.; Zachary Silver, Esq.; Jamie Wilks, Esq.

59. *See generally* Canada-Ukraine Free Trade Agreement, Can.-Ukr., July 11, 2016, <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/toc-tdm.aspx?lang=eng>.

60. *EU expects Canada to ratify CETA in coming weeks, official says*, GLOBAL NEWS (Mar. 21, 2017), <http://globalnews.ca/news/3324454/canada-eu-to-ratify-free-trade-pact/>. *See generally*

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CETA followed after several weeks of drama, during which the French-speaking region of Wallonia in Belgium jeopardized the entire agreement after taking the position that it could not support the current version of the CETA. Wallonia's consent to the CETA was necessary, as the European Commission decided in July 2016 to treat the CETA as being of "mixed competence" for ratification purposes. Such agreements must be approved not only by the European parliament, but also by each European Union national government, as well as by several regional governments, including Wallonia.<sup>61</sup> The impasse with Wallonia was ultimately resolved with no modifications to the text of the CETA, although Canada and the EU have issued a Joint Interpretive Instrument in an effort to clarify their positions on some of CETA's more contentious areas, like the controversial Investor State Dispute Settlement mechanism.

On June 23, 2016, the United Kingdom held the so-called Brexit referendum to determine whether the UK should leave the European Union.<sup>62</sup> The result: 52 percent voted in favor of leaving the EU, while only 48 percent voted in favor of remaining.<sup>63</sup> From the Canadian point of view, the Brexit vote has caused some to second-guess whether a free trade agreement with an EU that does not include the UK would still benefit Canada. Similarly, some have doubted how Brexit might delay or complicate CETA ratification and implementation. But Canada's chief CETA negotiator, Steve Verheul, has said that Canada expects the UK to be part of the EU throughout the CETA-ratification period, as well as during the initial implementation of the agreement.<sup>64</sup> Less clear is if—and how—the current parties to the CETA would wish to extend CETA's UK benefits after it leaves the EU.

On the investment front in 2016, on September 8, 2016, Canada signed the Canada-Mongolia Foreign Investment Promotion and Protection Agreement<sup>65</sup> and two other FIPAs started in 2016. The Agreement Between Canada and the Federal Republic of Senegal for the Promotion and

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Comprehensive Economic and Trade Agreement, Can.-EU, Sept. 14, 2016, No. 10973/16, <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf>.

61. Press Release, Eur. Commission, European Commission proposes signature and conclusion of EU-Canada trade deal (July 5, 2016), [http://europa.eu/rapid/press-release\\_IP-16-2371\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2371_en.htm).

62. Press Release, Eur. Commission, UK Referendum on Membership of the European Union: Questions and Answers (June 24, 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-2328\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-2328_en.htm).

63. Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Mar. 30, 2017), <http://www.bbc.com/news/uk-politics-32810887>.

64. See *Post-Brexit: What is going to happen to Canada's trade deal with Europe? Pt 2*, LIBERTY BLUE (June 30, 2016), <http://libertyblue.media/life-after-brexit-what-happens-to-canadas-trade-deal-with-europe-pt-2/>.

65. See *generally* Agreement Between Canada and Mongolia for the Promotion and Protection of Investments, Can.-Mong, Sept. 8, 2016, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5373>.

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Protection of Investments commenced on August 5, 2016,<sup>66</sup> and, on September 6, 2016, the Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments came into force.<sup>67</sup>

U.S. President-elect Donald Trump is preparing for a complete overhaul of U.S. trade policy. A memo drafted by the President-elect's transition team sets out a 200-day plan governed by five major trade objectives. The first order of business is the renegotiation or withdrawal from the North American Free Trade Agreement (NAFTA). The President-elect plans to launch a study of the process and possible consequences of a potential NAFTA withdrawal on the first day of his taking office. He will consider a formal withdrawal from the agreement by day 200.<sup>68</sup>

Government leaders have acted quickly in the wake of the U.S. election. The day after President-elect Trump's victory, Canadian Prime Minister Trudeau announced that Canada would be willing to renegotiate NAFTA.<sup>69</sup> Mexico's representatives, too, stated that they were prepared for dialogue.<sup>70</sup>

What will happen if the United States withdraws from NAFTA is unclear. The Canada–United States Free Trade Agreement might still provide for free trade between the two nations. NAFTA Article 2205 provides a NAFTA party with the right to withdraw from NAFTA on a six months' written notice. But NAFTA is a congressional-executive agreement, and Congress has ratified the North American Free Trade Agreement Implementation Act. It is thus unclear if the U.S. president can unilaterally terminate NAFTA without Congress's approval.

## B. CUSTOMS JURISPRUDENCE

### 1. *Bri-Chem – Federal Court of Appeal Affirms CITT Decision*

In 2015, the Canadian International Trade Tribunal (CITT) issued its decision in *Bri-Chem Supply Ltd. v. President of the Canada Border Services*

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66. See generally Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments, Can.-Sen., Aug. 5, 2016, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3240>.

67. See generally Agreement Between the Government of Canada and the Government of Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments, Can.-H.K., Sept. 6, 2016, Can.T.S. 8.

68. Zeeshan Aleem, *Here's what will actually happen if Trump withdraws from NAFTA. It's not pretty.*, VOX (Nov. 16, 2016), <http://www.vox.com/policy-and-politics/2016/11/16/13641944/trump-nafta-mexico-canada-recession-trade-warren-sanders-tpp>.

69. *Canada PM says ready to renegotiate NAFTA with Trump*, YAHOO! (Nov. 10, 2016), <https://www.yahoo.com/news/canada-pm-trudeau-says-ready-renegotiate-nafta-trump-165713892.html>.

70. *NAFTA can be discussed, but not renegotiated, says Mexico*, BBC (Nov. 11, 2016), <http://www.bbc.com/news/world-latin-america-37945913>.

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*Agency*.<sup>71</sup> The issue was whether an importer was permitted to file correcting entries under subsection 32.2 of the Customs Act to correct an error in tariff classification, while at the same time claiming preferential tariff treatment under NAFTA.

The CITT appeal resulted from the Canada Border Services Agency's (CBSA) refusal to allow Bri-Chem to correct the incorrect tariff classifications it had made on certain import entries: entries which Bri-Chem had declared to be of U.S. origin. During the hearing, the CBSA argued that the CITT had no jurisdiction to hear Bri-Chem's appeal because the B2 reject notifications it had issued to Bri-Chem did not constitute "decisions" that could be appealed to the CITT under section 67 of the Customs Act.

The CITT dismissed the CBSA's argument,<sup>72</sup> noting that Bri-Chem had originally declared the goods to be of U.S. origin and that the deadline contained in section 74 of the Customs Act related to refunds of monies paid, which Bri-Chem was never in a position to obtain. In allowing the appeal, the CITT memorably chastised the CBSA for abusing the process—the CITT thought that the CBSA was attempting to retry the case it had already lost in *Frito-Lay*,<sup>73</sup> stating that it "regrets that it lacks the power to award costs in such circumstances."<sup>74</sup>

The CBSA appealed the CITT's decision to the Federal Court of Appeal (FCA), which, on October 21, 2016, dismissed the appeal.<sup>75</sup> Affirming the CITT's decision, the FCA held that the CITT reasonably concluded that the CBSA had abused the process. On appeal, the Attorney General had argued that the CBSA was not required to follow previous CITT decisions. Relying on the principle that "one panel of an administrative tribunal does not bind later panels,"<sup>76</sup> the Attorney General argued that "the CBSA was free to relitigate *Frito-Lay* in another case before a later panel of the Tribunal."<sup>77</sup> The FCA granted that tribunal panels are not bound by decisions of earlier panels, but that prior decisions should not be disregarded in the absence of good reason to do so. As to the CBSA, the FCA held that the agency could decline to follow a previous CITT decision where it was presented with facts which could be distinguished from those in the prior

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71. See generally *Bri-Chem Supply Ltd. v. President of the Can. Border Services Agency*, No. AP-2014-017 (Can. Int'l Trade Trib. Sept. 18, 2015), <http://www.citt.gc.ca/en/node/7463>.

72. See generally *id.* relying on *C.B. Powell Ltd. v. President of the Can. Border Services Agency*, Nos. AP-2010-007, AP-2010-008 (Can. Int'l Trade Trib. Aug. 11, 2010), [http://www.citt.gc.ca/en/appeals/decision/archive\\_ap2k07a\\_e](http://www.citt.gc.ca/en/appeals/decision/archive_ap2k07a_e); *Frito-Lay Can., Inc. v. President of the Can. Border Services Agency*, No. AP-2010-002 (Can Int'l Trade Trib. Dec. 21, 2012), [http://www.citt.gc.ca/en/appeals/decision/archive\\_ap2k002\\_e](http://www.citt.gc.ca/en/appeals/decision/archive_ap2k002_e).

73. See generally *id.*

74. See *Bri-Chem Supply Ltd.*, *supra* note 71, at 1.

75. *Can. (Att'y Gen.) v. Bri-Chem Supply Ltd.*, (2016) FCA 257, <https://www.canlii.org/en/ca/fca/doc/2016/2016fca257/2016fca257.pdf>.

76. *Id.* ¶ 35.

77. *Id.*

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decision or when it had a “well-founded, *bona fide* concern that the earlier decision is flawed and should not be followed.”<sup>78</sup>

Noting that the appeal of the *Frito-Lay* decision had been discontinued, the FCA held that this fact placed a high tactical burden—which the CBSA did not meet—to provide the CITT with good reasons about why *Frito-Lay* should not be followed, as well as why the appeal of the *Frito-Lay* decision had been discontinued.

2. *Igloo Vikski Inc.—The SCC Takes a Swing at the Customs Tariff*

On September 29, 2016, the Supreme Court of Canada (SCC) decided *Canada (Attorney General) v. Igloo Vikski Inc. (Igloo)*, the SCC’s first opportunity to construe the General Rules for the Interpretation of the Harmonized System (GRIs), which are contained in a schedule to the Customs Act.<sup>79</sup>

The appeal related to the importation of ice hockey goaltender gloves. These were composed of both textiles and plastics, which were imported into Canada between November 2003 and December 2005. The importer had classified the goods under heading 39.26 of the List of Tariff Provisions as other articles of plastics—dutiable at 6.5 percent—whereas the CBSA had argued that the goods should be classified as gloves under heading 62.16—dutiable at 18 percent.<sup>80</sup>

The importer appealed the CBSA’s redetermination to the CITT, which followed a previous CITT decision which had found that the World Customs Organization Explanatory Notes to heading 39.26 required goods of that heading to be made by sewing or sealing sheets of plastic. As the goods at issue were not constructed in that manner, the CITT held that the goods could not even be *prima facie* classified under heading 39.26 pursuant to GRI 1—which provides that classification must begin with an attempt to classify goods by reference only to the terms of the headings and any applicable Section and Chapter Notes. The CITT ultimately sided with the CBSA, finding that classification under heading 39.26 could not be considered pursuant to GRI 2, as that rule cannot be applied where a *prima facie* classification in that heading is not possible under GRI 1.<sup>81</sup>

The importer appealed the CITT’s decision to the FCA, which allowed the appeal, finding that the CITT’s approach was unreasonable. The FCA held instead that the proper approach would have been for the CITT to consider whether or not the goods could have been classified under heading 39.26 pursuant to GRI 2. According to the FCA, the fact that the goods

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78. *Id.* ¶ 48.

79. See generally *Can. (Att’y Gen.) v. Igloo Vikski Inc.*, [2016] 2 SCR 80, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/16146/1/document.do>.

80. *Id.* at 89-90.

81. See generally *Sher-wood Hockey Inc. v. President of the Can. Border Services Agency*, No. AP-2009-045 (Can. Int’l Trade Trib. Feb. 10, 2011), [http://www.citt.gc.ca/en/appeals/decision/archive\\_ap2j045\\_e](http://www.citt.gc.ca/en/appeals/decision/archive_ap2j045_e).



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could not be classified under that heading pursuant to GRI 1 should not bar the GRI 2's potential applicability.<sup>82</sup>

The CITT appealed the FCA's decision to the SCC, which reversed the FCA's decision. Upholding the CITT's analysis and conclusion, it held that the FCA's approach was flawed because it would allow classification under a heading pursuant to GRI 2 where "no part of that good falls within the heading."

C. CANADIAN ECONOMIC SANCTIONS: CANADA RELAXES SANCTIONS ON IRAN

On February 5, 2016, Canada announced that it would significantly relax restrictions on trade with, and investment in, Iran as part of a re-engagement with that country. The Canadian announcement was made soon after the International Atomic Energy Agency confirmed, on January 16, 2016, that Iran had met its obligations under the Joint Comprehensive Plan of Action, the purpose of which was to provide assurance that Iran's nuclear program would not be used towards the development of nuclear weapons.

Before the announced amendments, Canada had imposed a fairly all-encompassing set of trade restrictions on Iran, including: (1) a prohibition against exporting, selling, supplying, or shipping goods to Iran, to a person in Iran, or for the purposes of a business carried on in Iran or operated from Iran; (2) a prohibition against the import, purchase, shipment, or transshipment of any goods exported, supplied, or shipped from Iran; (3) a prohibition against the provision or communication of technical data relating to certain listed goods, including liquefied natural gas, and; (4) a prohibition on the provision of financial services.<sup>83</sup>

By way of amendments to the Special Economic Measures (Iran) Regulations, through which Canada implements its unilateral sanctions against Iran, Canada has removed the prohibitions relating to financial services, investment, and importation, whereas the prohibitions on exportation and the provision of technical data now only apply to the proliferation-sensitive goods that are listed in Schedule 2 to the regulations.<sup>84</sup>

Furthermore, Canada has amended the Regulations Implementing the United Nations Resolutions on Iran, through which Canada implements the resolutions of the United Nations Security Council, so as to add additional prohibitions with regard to Iran's nuclear program. The new prohibitions include restrictions on any person in Canada, or any Canadian outside of Canada, from

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82. See *Iglou*, 2 SCR 80 ¶ 73.

83. See *generally* Special Economic Measures (Iran) Regulations, SOR/2010-165 (Can.), <http://laws-lois.justice.gc.ca/PDF/SOR-2010-165.pdf>.

84. *Id.* § 4.

- (i) making available any property or providing any financial or related services related to uranium mining in Canada to Iran, any person in Iran, or any person owned, held, or controlled directly or indirectly by Iran, any person in Iran, or acting on behalf of, or at the direction of Iran or any person in Iran<sup>85</sup> or
- (ii) entering into or facilitating any transaction related to uranium mining in Canada or to the production or the use of certain listed nuclear materials and technologies in Canada with Iran, with any person in Iran, or with any person who is owned, held, or controlled directly or indirectly by Iran, any person in Iran, or acting on behalf of or at the direction of Iran or any person in Iran.<sup>86</sup>

## V. European Legal Developments<sup>87</sup>

### A. THE UNION CUSTOMS CODE

On May 1, 2016, the Union Customs Code (UCC)<sup>88</sup> began to take effect, replacing the Community Customs Code (CCC)<sup>89</sup> as the new customs framework regulation.

The UCC takes force via the UCC Implementing Act (IA)<sup>90</sup> and the UCC Delegated Act (DA).<sup>91</sup> The most significant changes under the UCC are as follows:

#### 1. *Customs Valuation Rules*

##### a. Article 128(1)

The UCC eliminated the first sale rule as a permissible basis in determining the customs value of the goods under the transaction value method. Specifically, article 128(1) of UCC IA establishes that the sale occurring immediately before the goods were brought into the EU customs

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85. Regulations Implementing the United Nations on Iran, SOR/2007-44 § 4(3)(a) (Can.), <http://laws-lois.justice.gc.ca/PDF/SOR-2007-44.pdf>.

86. *Id.* § 4(3)(b).

87. Section Editor & Author: Ruta Riley, Esq.

88. Commission Regulation 952/2013, 2013 O.J. (L 269) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:269:0001:0101:EN:PDF>. Some provisions under the UCC will continue to be phased in through 2020. *UCC - Introduction*, EUR. COMMISSION, [https://ec.europa.eu/taxation\\_customs/business/union-customs-code/ucc-introduction\\_en](https://ec.europa.eu/taxation_customs/business/union-customs-code/ucc-introduction_en) (last updated Mar. 13, 2017).

89. Commission Regulation 450/2008, 2008 O.J. (L 450) 145, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:145:0001:0064:En:PDF>.

90. Commission Regulation 2015/2447, 2015 O.J. (L 343) 558, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2447&from=EN>.

91. Commission Regulation 2015/2446, 2015 O.J. (L 343) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2446&from=EN> (amended by Commission Regulation 2016/651, 2016 O.J. (L 111) 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0651&from=EN>).

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territory is the relevant sale for purposes of transaction value.<sup>92</sup> Because a later sale in a supply chain is generally priced higher than the earlier or first sale, this regulatory change will result in a higher customs value and, subsequently, an increased customs duty amount due upon importation. Importers bound by contracts referencing a first or earlier sale that were entered prior to January 18, 2016, are permitted to use the first sale basis for their transaction value determination until December 31, 2017.<sup>93</sup>

b. Article 71(1)

The UCC expanded the scope of circumstances under which royalties and license fees are dutiable. Article 71(1) of the UCC provides that royalties or license fees must be added to the price paid or payable when (1) they are not included in the price paid or payable; (2) they are related to the goods being valued; and (3) the buyer must pay them, either directly or indirectly, as a condition of sale of the goods being valued.<sup>94</sup> Under the old customs legislation, “a condition of sale” was interpreted to mean cases in which a seller or a party related to the seller is requiring the buyer to make the royalties/license fees payment, the UCC provides that royalties or license fees will be dutiable so long as the goods cannot be purchased by the buyer without payment of the royalties/license fees.<sup>95</sup> Thus, even if the seller and the licensor are unrelated, the royalties/license fees will be dutiable if the buyer must pay them in order to purchase the goods.

2. *Binding Tariff Information (BTI) Rulings*

The UCC reduced the validity of BTI rulings issued after May 1, 2016, from six to three years.<sup>96</sup> In addition, the UCC made BTIs binding on both the BTI holder as well as on customs authorities.<sup>97</sup> Thus, since May 1, 2016, the holder of a BTI will be obligated to declare and utilize their BTI ruling when importing or exporting goods.<sup>98</sup>

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92. Commission Regulation 2015/2447, *supra* note 90, at 622; Trade Facilitation and Trade Enforcement Act of 2015, *supra* note 3, art. 128(1).

93. *Id.* art. 347.

94. *Id.* art. 136(4).

95. *Id.* See also *Guidance: Customs Valuation, Implementing Act, Articles 128 and 136 UCC IA, Article 347 UCC IA*, EUR. COMMISSION (Apr. 28, 2016), [http://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/customs/customs\\_code/guidance\\_valuation\\_en.pdf/sites/taxation/files/resources/documents/customs/customs\\_code/guidance\\_valuation\\_en.pdf](http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_code/guidance_valuation_en.pdf/sites/taxation/files/resources/documents/customs/customs_code/guidance_valuation_en.pdf) (last visited Nov. 20, 2016).

96. Commission Regulation 952/2013, *supra* note 88, at 22. See generally Arandia, *supra* note 1.

97. Commission Regulation 2015/2446, *supra* note 91, at 107. See generally *Investigation of Claims of Evasion of Antidumping and Countervailing Duties*, 81 Fed. Reg. 56,477 (Aug. 22, 2016).

98. Commission Regulation 2015/2446, *supra* note 91, at 107-08.

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3. *Mandatory Guarantees*

The UCC introduced a requirement for businesses to provide a mandatory guarantee—an agreement to cover a customs debt that has arisen (actual debt) or may potentially arise (potential debt)—to operate the following customs regimes/procedures: Inward Processing (IP); Outward Processing (OP) with prior importation or under the Standard Exchange System; Temporary Admissions (TA) where the UCC does not provide for an outright guarantee exemption; end use; temporary storage (TS); and customs warehousing.<sup>99</sup>

4. *Authorized Economic Operator (AEO) Requirements*

The UCC provided for AEO Customs Simplifications (AEOC), AEO Security and Safety (AEOS), or a combination of AEOC/AEOS status authorizations. The AEOC status was primarily intended for those companies that would like to benefit from various customs procedure simplifications, whereas the AEOS holders benefit from streamlined customs controls relating to security and safety. The UCC introduced new requirements for an AEO qualification. For an AEOC status, an applicant must demonstrate practical standards of competence or professional qualifications directly related to the activity carried out. For both AEO categories, an applicant must have a record of satisfactory compliance not only with customs legislation, but also with taxation rules such as VAT, corporate income, and excise tax.<sup>100</sup>

B. BREXIT

In the Referendum held on June 23, 2016, the UK voted to exit the EU.<sup>101</sup> To accomplish this, the UK Government will notify the European Council of the UK's intention to leave, thus triggering article 50 of the Treaty of Lisbon.<sup>102</sup> Once notification is served, the UK will have two years to negotiate its withdrawal from the EU.<sup>103</sup> At this time, the UK's future relationship with EU-27 is unclear. But most commentators agree that it will be structured in one of five ways:<sup>104</sup>

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99. Commission Regulation 952/2013, *supra* note 88, at 35. See generally Arandia, *supra* note 1.

100. See generally *Authorized Economic Operators Guidelines*, EUR. COMMISSION (Mar. 11, 2016), [http://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/customs/policy\\_issues/customs\\_security/aeo\\_guidelines\\_en.pdf](http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/policy_issues/customs_security/aeo_guidelines_en.pdf).

101. Hunt & Wheeler, *supra* note 63.

102. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, art. 50.

103. *Id.* art. 50(3).

104. For a detailed description of the five scenarios, see generally *BREXIT: What the vote to leave means for your business*, BAKER & MCKENZIE (2017), <http://www.bakermckenzie.com/-/media/files/insight/publications/2016/06/brexit/brexitdec16.pdf?la=en>.

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- 1) “UK joins the EEA and EFTA.”<sup>105</sup> “Being part of the EEA would enable the UK to maintain its access to the EU internal market, and EU businesses would have access to the UK market.”<sup>106</sup> This configuration would preserve “the current free movement of goods, persons, services and capital.”<sup>107</sup> But “[t]he UK would have to contribute to the EU budget and adopt EU laws in return for maintaining its position within the EU internal market. The EU-common external tariff would not apply to the UK as it does now ‘so the UK would need to negotiate independent FTAs [ ] with third countries.’”<sup>108</sup>
- 2) Remain in the Customs Union.<sup>109</sup> This model (followed by Turkey) would remove tariffs on certain goods and would also maintain a common external tariff around the EU-27 and the UK.
- 3) Bilateral agreement between the EU and UK.<sup>110</sup> This model would require significant efforts from the UK negotiators as it would involve negotiating individual industry and sector agreements with EU-27 and FTAs with EFTA countries.<sup>111</sup> In addition, the UK companies would not automatically be granted full access to the EU-27 market.
- 4) “Free Trade Agreement (FTA) Model.”<sup>112</sup> Under this approach, “the UK would [ ] negotiate independent FTAs with third countries” and EU-27.<sup>113</sup>
- 5) Trade using a basic WTO approach.<sup>114</sup> This model would amount to the most complete form of withdrawal from the EU. The UK would not enter into any new agreements with the EU-27 or its members. The WTO rules would apply to the UK’s trade with EU countries. There would be no free movement of goods or persons and no obligation for the UK to contribute to the EU budget.

Whatever option the UK elects for its exit from the EU, article 50 calls for the process to be completed within two years (unless all parties agree to extend the period). Commentators suggest that the UK is unlikely to accomplish its exit within this window given the complexity of circumstances.<sup>115</sup>

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105. *Id.* at 3.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.*

110. *See id.* at 4.

111. *Id.* For example, Switzerland, which follows this type of arrangement with the EU, has approximately 130 separate bilateral FTAs with EU members. *See id.*

112. *Id.*

113. *Id.*

114. *See id.*

115. *See id.*

## **Export Controls and Economic Sanctions**

JOHN BOSCARIOL, PATRICK BRISCOE, ROBERT GLASGOW,  
GEOFFREY GOODALE, CHRISTOPHER STAGG,  
MARIA VAN WAGENBERG, LAWRENCE WARD\*

### **I. Introduction**

This Article summarizes important developments in 2016 in export controls and economic sanctions, including developments surrounding United States economic sanctions regulations and trade embargoes, international traffic in arms regulations, and export administration regulations. The article also discusses voluntary United States self-disclosure program for willful violations and changes to Canadian sanctions programs.

### **II. Developments Involving the Economic Sanctions Regulations and Trade Embargoes Administered by the United States Treasury Department’s Office of Foreign Assets Control**

#### **A. CUBA SANCTIONS**

In 2016, the United States Treasury Department’s Office of Foreign Assets Control (OFAC) issued three rules to amend its Cuban Assets Control Regulations (CACR). First, on January 27, 2016, OFAC published a final rule that: removed financial restrictions for non-agricultural exports; expanded air carrier services; expanded travel authorizations to Cuba pertaining to professional meetings, public performances, clinics, workshops, exhibitions, and athletic and other competitions; and expanded the list of authorized humanitarian projects to include disaster preparedness and response.<sup>1</sup>

Second, on March 16, 2016, OFAC promulgated a final rule that: further eased restrictions on certain economic activity with Cuba (*e.g.*, authorization for U.S. financial institutions to open and maintain bank accounts in the United States for Cuban nationals in Cuba to receive payments in the United States for authorized transactions and to process “U-Turn”

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\* John Boscariol, McCarthy Tétrault LLP; Patrick Briscoe, University of Minnesota; Robert Glasgow, McCarthy Tétrault LLP; Geoffrey Goodale, FisherBroyles, LLP; Christopher Stagg, Stagg PC; Maria van Wagenberg, Baker & McKenzie LLP; Lawrence Ward, Dorsey & Whitney LLP. Messrs. Stagg and Ward served as co-editors.

1. Cuban Assets Control Regulations, 81 Fed. Reg. 4,583 (Jan. 27, 2016) (to be codified at 31 C.F.R. pt. 515).

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transactions in which Cuba or a Cuban national has an interest); established new opportunities for persons subject to U.S. jurisdiction to establish a physical and/or business presence in Cuba for certain kinds of activities (*e.g.*, physical presence authorization for humanitarian projects and non-commercial activities intended to provide support for the Cuban people, and business presence authorization for exporters of goods that are authorized for export or re-export to Cuba and certain other kinds of entities that facilitate authorized transactions); and expanded the authorization to travel to Cuba for certain kinds of educational purposes.<sup>2</sup>

Finally, on October 17, 2016, OFAC issued a final rule that served to expand opportunities for scientific collaboration by authorizing certain transactions related to Cuban-origin pharmaceuticals and joint medical research; improve living conditions for Cubans by expanding existing authorizations for grants and humanitarian-related services; increase people-to-people contact in Cuba by facilitating authorized travel and commerce; facilitate safe travel between the United States and Cuba by authorizing civil aviation safety-related services; and bolster trade and commercial opportunities by expanding and streamlining authorizations relating to trade and commerce.<sup>3</sup>

**B. IRAN SANCTIONS**

On January 16, 2016, the United States and the European Union lifted certain nuclear-related sanctions on Iran in connection with the so-called “Iran deal,” *otherwise known as* the Joint Comprehensive Plan of Action (JCPOA) between Iran and the “E3/EU+3” (the European Union, France, Germany, the United Kingdom, China, Russia, and the United States), to ensure Iran’s nuclear program would be used only for peaceful purposes.<sup>4</sup> Sanctions were lifted on the same day that the International Atomic Energy Association (IAEA) reported it had verified Iran’s compliance with certain nuclear-related measures outlined in the JCPOA (a day known as Implementation Day under the agreement).<sup>5</sup>

The JCPOA was negotiated pursuant to the framework set out in a November 24, 2013 interim agreement entitled the Joint Plan of Action (JPOA), which allowed for limited sanctions relief in exchange for a short-

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2. CACR, 81 Fed. Reg. 13,989 – 13,994 (Mar. 16, 2016 (to be codified at 31 C.F.R. pt. 515).

3. CACR, 81 Fed. Reg. 71,372 (Oct. 17, 2016) (to be codified at 31 C.F.R. pt. 515).

4. Joint Statement, EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif (Jan. 01, 2016), [https://eeas.europa.eu/headquarters/headquarters-homepage/2991/joint-statement-by-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad-zarif\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/2991/joint-statement-by-eu-high-representative-federica-mogherini-and-iranian-foreign-minister-javad-zarif_en).

5. Director General of the International Atomic Energy Agency, *Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015)*, U.N. doc S/2016/57, annex and enclosure (Jan. 19, 2016); Press Statement, John F. Kerry, Sec’y of State, Confirmation of Verification of Iranian Actions Pursuant to the Joint Comprehensive Plan of Action (Jan. 16, 2016), <https://www.state.gov/documents/organization/251545.pdf>.

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term suspension of certain parts of Iran's nuclear program.<sup>6</sup> The parties subsequently agreed to the broad parameters of the JCPOA on July 14, 2015, including the types of sanctions-related commitments to be undertaken by the United States and the European Union on Implementation Day.<sup>7</sup>

In particular, the U.S. government announced the following limited Iran sanctions relief measures on Implementation Day:

1. Relaxation of Nuclear-Related Secondary Sanctions: The U.S. government relaxed its nuclear-related "secondary sanctions" on Iran, which previously allowed the U.S. government to impose certain penalties on non-U.S. persons operating outside of U.S. jurisdiction in specific, targeted Iranian sectors. The relaxations were implemented through two mechanisms: (i) the President's issuance of Executive Order 13716, which revoked Executive Orders 13574, 13590, 13622, and 13645 with respect to Iran and also re-authorized sanctions authorities for certain non-nuclear sanctions;<sup>8</sup> and (ii) the State Department's exercise of its waiver authorities under certain statutory sanctions on Iran.<sup>9</sup> As a result, non-U.S. persons generally would no longer be subject to secondary sanctions for engaging in activities outside of U.S. jurisdiction involving the following:

- a) Iran's financial and banking sectors;
- b) the provision of certain insurance, reinsurance, and underwriting services;
- c) Iran's energy, petroleum, and petrochemical sectors;
- d) Iran's shipping and shipbuilding sectors and port operators;
- e) trade with Iran in gold and other precious metals;
- f) trade with Iran in certain "materials" (including graphite, raw or semi-finished metals such as aluminum and steel, coal, and certain software), except that the transfer of certain materials to Iran must be approved by the Procurement Channel established by the JCPOA, and any materials may not be used in connection with Iran's military or ballistic missile programs; or
- g) Iran's automotive sector.

Secondary sanctions continue to apply to (a) the above activities to the extent any sanctioned persons known as Specially Designated Nationals

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6. P5+1, EU, and Iran, Joint Plan of Action, (Nov. 24, 2013), [http://eeas.europa.eu/archives/docs/statements/docs/2013/131124\\_03\\_en.pdf](http://eeas.europa.eu/archives/docs/statements/docs/2013/131124_03_en.pdf); Resource Center, Joint Plan of Action (JPOA) Archive and Joint Comprehensive Plan of Action (JCPOA) Archive (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Pages/jpoa\\_archive.aspx](https://www.treasury.gov/resource-center/sanctions/Programs/Pages/jpoa_archive.aspx).

7. Joint Comprehensive Plan of Action, July 14, 2016, <https://www.state.gov/documents/organization/245317.pdf>.

8. Exec. Order No. 13716, 81 Fed. Reg. 3693 (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_eo.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_eo.pdf).

9. U.S. Dep't. of State, JCPOA Contingent Waivers (Oct. 18, 2015), <https://www.state.gov/e/eb/rls/othr/2015/248320.htm>; *see supra*, note 5, Confirmation of Verification of Iranian Actions Pursuant to the Joint Comprehensive Plan of Action.



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(SDNs) are involved; (b) certain activities contributing to WMD proliferation, terrorism, human rights abuses, corruption, censorship, and unrest in Syria or Yemen, which are subject to separate secondary sanctions that were not lifted or waived; and (c) in any context where a party provides “significant financial, material technological, or other support to, or goods or services in support of any activity or transaction on behalf of or for the benefit of” any Iranian person on OFAC’s List of Specially Designated Nationals and Blocked Persons (SDN List).<sup>10</sup>

2. *Removal of Parties from Sanctions Lists:* In addition, OFAC removed several hundred Iranian parties from the SDN List, Foreign Sanctions Evaders List (FSE List), and Non-SDN Iran Sanctions Act List.<sup>11</sup> OFAC transferred some of the former Iranian SDNs to a separate sanctions list known as the List of Persons Identified as Blocked Solely Pursuant to Executive Order 13599 (E.O. 13599 List). The E.O. 13599 List includes Iranian SDNs designated solely pursuant to the Iranian Transactions and Sanctions Regulations, 31 C.F.R. part 560 (ITSR), under the authority of E.O. 13599, based on their status as an Iranian financial institution or a Government of Iran party. United States persons continue to be broadly prohibited from engaging in transactions with any party in Iran and must block any E.O. 13599 List party’s property or interest in property that comes within the United States or the possession/control of a U.S. person. As a result, the primary effect of delisting these parties from the SDN List was to remove the risk that non-U.S. persons operating outside U.S. jurisdiction could be “collaterally” designated as SDNs for materially supporting such listed SDNs or that foreign financial institutions could suffer sanctions for processing transactions for such SDNs.<sup>12</sup> In addition, the de-listings carry potential implications for the SEC reporting requirements pursuant to Section 219 of the Iranian Threat Reduction and Syrian Human Rights Act of 2012 (ITRA),<sup>13</sup> in relation to transactions or dealings with listed SDN parties.

3. *General License H for United States-Owned or -Controlled Entities:* OFAC also issued General License H, which authorized non-U.S. entities owned or controlled by U.S. persons to engage in Iran-

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10. Exec. Order No. 13716, *supra* note 8, at § (a)(i); U.S. Dep’t. of Treasury and U.S. Dep’t. of State, *Guidance Relating To The Lifting of Certain U.S. Sanctions Pursuant To The Joint Comprehensive Plan of Action on Implementation Day* (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement\\_guide\\_jcpoa.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/implement_guide_jcpoa.pdf).

11. Office of Foreign Assets Control, JCPOA-related Designation Removals, JCPOA Designation Updates, Foreign Sanction Evaders Removals, NS-ISA List Removals; 13599 List Changes (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/updated\\_names.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/updated_names.aspx).

12. See *Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day* *supra* note 10, at 26-28.

13. Securities Exchange Act of 1934 § (r), 15 U.S.C. 78(m) (2017).

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related transactions, subject to certain conditions.<sup>14</sup> These conditions include the restrictions on involvement of any of the following:

- a) U.S. persons (except in limited circumstances involving the alteration or establishment of corporate policies and the provision of “automated” and “globally integrated” business support systems);
- b) funds transfers to, from, or through any U.S. financial institution (including most transactions settled or processed in U.S. dollars);
- c) parties on the SDN List or FSE List;
- d) military, paramilitary, intelligence, or law enforcement entities of the Government of Iran or any agents or affiliates thereof;
- e) exports from the United States, or re-exports from third countries, of goods, services, or technology that are subject to export restrictions under the ITSR or the Export Administration Regulations (EAR) (including certain transactions involving parties on the Commerce Department’s Bureau of Industry and Security (BIS) Denied Persons’ List or Entity List); and
- f) activities subject to other sanctions targeting Iran, including those relating to WMD proliferation, ballistic missiles, and terrorism.

Non-U.S. entities owned or controlled by U.S. persons first became subject to the ITSR’s prohibitions in October 2012, pursuant to section 218 of the ITRA.<sup>15</sup> Thus, General License H represents a partial return to the scope of sanctions applicable to such non-U.S. entities before October 2012.

4. General Licenses for Iranian Carpet and Foodstuffs: OFAC reinstated certain general licenses in the ITSR relating to Iranian-origin carpets and foodstuffs.<sup>16</sup>

5. Commercial Aviation Licensing Policy: OFAC also issued a Statement of Licensing Policy for Activities Related to the Export/Reexport to Iran of Commercial Passenger Aircraft and Related Parts and Services (Aviation SLP), which expanded on the available favorable licensing policy issued under the JPOA for safe operation of Iranian commercial passenger aircraft.<sup>17</sup> The Aviation SLP allows U.S. persons and, where there is a nexus to U.S. jurisdiction, non-U.S. persons to apply for specific licenses from OFAC to export, re-export, sell, lease, or transfer to Iran commercial passenger aircraft for exclusively civil aviation or spare parts/components for commercial passenger aircraft, as well as to provide associated services (*e.g.*, warranty, maintenance,

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14. Office of Foreign Assets Control, Iranian Transactions and Sanctions Regulations, General License H, Authorizing Certain Transactions Relating to Foreign Entities Owned or Controlled by a United States Person, 31 C.F.R. pt. 560.

15. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 218, 126 Stat. 1214, 1234-35 (2012).

16. Iranian Transactions and Sanctions Regulations, 81 Fed. Reg. 3330-33 (to be codified at 31 C.F.R. pt. 560 and Appendix A to Chapter V) (Jan. 21, 2016).

17. Office of Foreign Assets Control, Iranian Transactions and Sanctions Regulations, 31 C.F.R. pt. 560, Statement of Licensing Policy For Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services (Jan. 16, 2016).

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and repair services and safety-related inspections). Separate authorizations from BIS may also be required.

Importantly, while the U.S. government lifted certain “secondary sanctions” targeting non-U.S. persons (and also authorized most Iran-related transactions by non-U.S. entities owned or controlled by U.S. persons), U.S. persons remain prohibited from engaging in virtually any Iran-related transactions, under the “primary sanctions” on Iran implemented pursuant to the ITSR. In addition, certain financial sanctions continue to be applicable under the Iranian Financial Sanctions Regulations (IFSR), 31 C.F.R. part 561, for foreign financial institutions that process targeted transactions for Iranian SDNs and certain other sanctioned activities.

Since implementation of the JCPOA, OFAC issued two additional general licenses in the context of civil aviation:

- a. General License I (issued March 24, 2016) authorizes U.S. persons to negotiate and enter into contracts for activities eligible for the Aviation SLP, provided performance under the contract is made contingent on authorization under a specific license issued by OFAC.<sup>18</sup>
- b. General License J (issued July 29, 2016) authorizes the re-export by non-U.S. persons of certain aircraft to Iran on temporary sojourn of no more than 72 hours, subject to certain conditions.<sup>19</sup> The aircraft must be a fixed-wing civil aircraft that is of U.S. origin or contains more than 10% controlled U.S. content and that is registered outside the United States in a non-sanctioned country (i.e., a country that is not in Country Group E:1 of Supplement No. 1 to Part 740 of the EAR). The non-U.S. person re-export must also maintain the rights to hire/fire the cockpit crew, dispatch the aircraft, and determine the flight route, among other conditions. The regulatory authorization for temporary sojourns of aircraft in Iran is now similar to that available for other sanctioned countries under License Exception AVS under Section 740.15 of the EAR.

### C. LIFTING OF BURMA SANCTIONS

On September 15, 2016, during State Counsellor Aung San Suu Kyi’s visit to Washington D.C., President Obama announced plans to lift U.S. sanctions on Burma in recognition of the country’s progress toward

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18. Office of Foreign Assets Control, Iranian Transactions and Sanctions Regulation, 31 C.F.R. pt. 560, Authorizing Certain Transactions Related to the Negotiation of, and Entry into, Contingent Contracts for Activities Eligible for Authorization Under the Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services (Mar. 24, 2016).

19. Iranian Transactions and Sanctions Regulation, 31 C.F.R. pt. 560, General License J, Authorizing the Reexportation of Certain Civil Aircraft to Iran on Temporary Sojourn and Related Transactions (July 29, 2016).

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democratic governance.<sup>20</sup> On October 7, 2016, U.S. sanctions against Burma were formally terminated when President Obama issued Executive Order 13742, which: (1) terminated the national emergency with respect to Burma that had been declared in Executive Order 13047 of May 20, 1997; (2) revoked Executive Orders 13310, 13448, 13464, 13619, and 13651; (3) waived the sanctions under Section 5(b) of the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008;<sup>21</sup> and (4) terminated the visa bans implemented under Presidential Proclamation 8693 of July 24, 2011.<sup>22</sup> As a result, the U.S. sanctions on Burma are no longer in effect. OFAC has announced that the Burmese Sanctions Regulations (BSR), 31 C.F.R. part 537, will be removed from the Code of Federal Regulations and that all parties designated as SDNs solely pursuant to the BSR have been removed from the SDN List. In addition, the State Department's Responsible Investment Reporting Requirements now apply on a voluntary basis only. Although Burma continues to be designated by the Financial Crimes Enforcement Network (FinCEN) as "jurisdiction of primary money laundering concern" under Section 311 of the USA PATRIOT Act, FinCEN has issued an administrative exception, which allows corresponding accounts for Burmese banks, subject to certain due diligence requirements.<sup>23</sup>

Before the termination of the U.S. sanctions against Burma, the U.S. government had taken significant steps toward liberalizing the sanctions. For example, on May 18, 2016, OFAC issued or expanded general licenses authorizing transactions relating to U.S. persons residing in Burma, exports to and from Burma, and movement within Burma; as well as most transactions involving blocked Burmese banks.<sup>24</sup>

#### D. EXPANSION OF NORTH KOREA SANCTIONS

Following an additional nuclear test by North Korea on January 6, 2016, and a rocket launch using ballistic missile technology on February 7, 2016, the U.S. government expanded its existing sanctions on North Korea to impose a comprehensive embargo on the country. On March 15, 2016, President Obama issued Executive Order 13722,<sup>25</sup> which: (1) blocks the property of the Government of North Korea and the Workers' Party of Korea; (2) prohibits exports or re-exports from the United States or by U.S. persons of goods, services (including financial services), and technology to

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20. Grace Aranow, *President Obama and Aung San Suu Kyi Celebrate Progress in Burma* (Sept. 15, 2016), <https://obamawhitehouse.archives.gov/blog/2016/09/15/president-obama-and-daw-aung-san-suu-kyi-celebrate-burmese-progress>.

21. Tom Lantos Block Burmese Jade (Junta's Anti-Democratic Efforts) Act of 2008, Pub. L. 110-286, 122 Stat. 2631-48.

22. Exec. Order 13472, 81 Fed. Reg. 70953 (Oct. 7, 2016).

23. Imposition of Special Measures Against Burma, 69 Fed. Reg. 19093 (Apr. 12, 2004) (to be codified at 31 C.F.R. pt. 103).

24. Burmese Sanctions Regulation, 81 Fed. Reg. 31169 (May 18, 2016) (to be codified at 31 C.F.R. pt. 537).

25. Exec. Order 13722, 81 Fed. Reg. 14943 (Mar. 18, 2016).

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North Korea; (3) prohibits new investment in North Korea by U.S. persons; and (4) expands the criteria under which parties may be designated as SDNs for engaging in North Korea-related activities. Executive Order 13722 implements provisions of the North Korea Sanctions and Policy Enhancement Act of 2016<sup>26</sup> and U.N. Security Council Resolution 2270 (2016).<sup>27</sup> As a result, U.S. persons are prohibited from engaging in virtually all transactions involving North Korea.

**E. OTHER OFAC DEVELOPMENTS**

In 2016, OFAC issued regulations to implement sanctions on Burundi-related SDNs (the Burundi Sanctions Regulations, 31 C.F.R. part 554), under Executive Order 13712 of November 22, 2015 (“Blocking the Property of Certain Persons Contributing to the Situation in Burundi”).<sup>28</sup> In addition, OFAC issued regulations to implement the Hizballah International Financing Prevention Act of 2015 (Hizballah Financial Sanctions Regulations, 31 C.F.R. part 566), which authorize financial sanctions on foreign financial institutions that knowingly facilitate certain significant transactions or engage in money-laundering for Hizballah or affiliated SDNs.<sup>29</sup>

Finally, the OFAC sanctions against Cote d’Ivoire-related SDNs were lifted under Executive Order 13739,<sup>30</sup> terminating the national emergency with respect to the situation in Cote d’Ivoire.

**F. OFAC ENFORCEMENT ACTIONS**

OFAC took several notable enforcement actions in 2016, which continued to focus on the parties’ lack of reasonable due diligence or their general level of wrongdoing. In the former category, Barclays Bank PLC agreed to a civil liability settlement of approximately USD 2.49 million, for alleged violations arising from transactions processed to or through the United States for Barclays Bank of Zimbabwe corporate customers that were 50 percent-or-more owned by SDNs (and are therefore deemed blocked by operation of law).<sup>31</sup> The bank did not identify the ultimate beneficial ownership by SDNs because of its failure to collect this information or to upload it from paper files to an electronic system, which was screened outside Zimbabwe

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26. North Korea Sanctions and Policy Enhancements Act of 2016, Pub. L. No. 114-122, 130 Stat. 93.

27. S.C. Res. 2270 (Mar. 2, 2016).

28. Burundi Sanctions Regulations, 81 Fed. Reg. 19878 (Apr. 6, 2016) (to be codified at 31 C.F.R. pt. 554).

29. Hizballah International Financing Prevention Act of 2015, Pub. L. 114-102, 129 Stat. 2205.

30. Exec. Order 13739, 81 Fed. Reg. 63673 (Sept. 14, 2016).

31. OFAC Enforcement Information: Barclays Bank Plc Settles Potential Civil Liability For Apparent Violations of the Zimbabwe Sanctions Regulations (Feb. 8, 2016), [https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160208\\_barclays.pdf](https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160208_barclays.pdf).

due to local regulations prohibiting compliance with U.S. sanctions and in-country screening. The case was determined to be “non-egregious,” even though Barclays processed additional transactions for the blocked persons after U.S. financial institutions blocked transactions for those persons and the bank had confirmed the blocked status of its customers.

OFAC also took several enforcement actions against agricultural and medical companies that did not comply with available OFAC licensing provisions. Of particular note, the PanAmerican Seed Company agreed to a civil liability settlement of USD 4.32 million for alleged violations arising from indirect exports of seeds (primarily flower seeds) to two Iranian distributors, via Europe and the Middle East.<sup>32</sup> The penalty far exceeded the total value of the exports, which was valued over \$770,000 in “economic benefit to Iran.” The case was not voluntarily self-disclosed and was deemed “egregious,” due to the awareness by several mid-level managers of the misconduct and the systematic concealment of the involvement of Iran.

## **II. Developments Involving the International Traffic in Arms Regulations**

### **A. REGULATORY DEVELOPMENTS**

In furtherance of the Export Control Reform (ECR) Initiative’s goals of providing clarity and harmonizing key concepts among export agencies, the State Department’s Directorate of Defense Trade Controls (DDTC) published an interim final rule on June 3, 2016, changing and adding definitions of key terms used in the International Traffic in Arms Regulations (ITAR).<sup>33</sup> The existing definitions of “export” and “reexport” were revised, while “release” and “retransfer” received their own definitions (new sections 120.50 and 120.51), in order to better describe and distinguish between the various types of transactions subject to the ITAR, both in the United States and abroad.<sup>34</sup> In a final rule issued three months later, DDTC made several additional clarifications and corrections responsive to comments submitted following the interim final rule.<sup>35</sup> In what appears to be a shift from its previous approach regarding mere “access” to technical data being an ITAR-controlled event, DDTC has now “confirm[ed] that theoretical or potential access to technical data is not a release”<sup>36</sup> for purposes of the ITAR’s approach to “deemed exports.” Several other ITAR

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32. OFAC Enforcement Information: PanAmerican Seed Company Settles Potential Civil Liability for Alleged Violations of the Iranian Transactions and Sanctions Regulations (Sept. 13, 2016), [https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160913\\_panam.pdf](https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160913_panam.pdf).

33. International Traffic in Arms: Revisions to Definition of Export and Related Definition, 81 Fed. Reg. 35611 (June 3, 2016) (to be codified at 22 C.F.R. 120, 123, 124, 125, and 126).

34. *Id.* at 35,612-14.

35. International Traffic in Arms: Revisions to Definition of Export and Related Definitions, 81 Fed. Reg. 62004 (Sept. 8, 2016) (to be codified at 22 C.F.R. pts. 120, 125, 126, and 130).

36. *Id.* at 62,005.

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terms for which revised or new definitions have been proposed, such as “defense service,” “technical data,” “public domain,” and “fundamental research,”<sup>37</sup> are still under U.S. government review and will be the subject of separate rulemakings.

DDTC also made several ECR-related changes to the U.S. Munitions List (USML) in 2016. First, a final rule promulgated on July 28, 2016, amended and clarified USML Categories XIV (Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment) and XVIII (Directed Energy Weapons).<sup>38</sup> Among other changes, this rule reflected the migration of riot control agents and certain detection, remediation, and protective equipment from the USML to the EAR’s Commerce Control List (CCL). Second, DDTC revised USML Category XII (Fire Control, Laser, Imaging, and Guidance Equipment) on October 12, 2016.<sup>39</sup> The amended Category XII excludes certain items having potential civilian uses (largely now on the CCL), and includes a number of specific defense articles that DDTC chose to move from Categories VIII (Aircraft and Associated Equipment), XIII (Auxiliary Military Equipment), and XV (Spacecraft Systems and Associated Equipment). Finally, a November 21, 2016 rulemaking amended USML Categories VIII (Aircraft and Related Articles) and XIX (Gas Turbine Engines and Associated Equipment).<sup>40</sup> The latest changes, which related chiefly to specific military aircraft components and subsystems, were intended to provide clarity, account for technological developments, and ensure that controls are calibrated to protect national security while accommodating legitimate civil uses and goals.

A rulemaking published on August 17, 2016, clarified how exports of items subject to the EAR may be exported under an ITAR license or exemption in certain cases, revised the destination control statement in the ITAR to reflect the corresponding statement in the EAR, and made several administrative and conforming changes, as part of ECR.<sup>41</sup>

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37. International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions, 80 Fed. Reg. 31,525 (June 3, 2015) (to be codified at 22 C.F.R. pts. 120, 123, 125, and 127).

38. Amendments to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories XIV and XVIII, 81 Fed. Reg. 49,531 (July 28, 2016) (to be codified at 22 C.F.R. pt. 121).

39. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XII, 81 Fed. Reg. 70,340 (Oct. 12, 2016) (to be codified at 22 C.F.R. pt. 121).

40. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories VIII and XIX, 81 Fed. Reg. 83,126 (Nov. 11, 2016) (to be codified at 22 C.F.R. pt. 121).

41. Amendment to the International Traffic in Arms Regulations: Procedures for Obtaining State Department Authorization To Export Items Subject to the Export Administration Regulations; Revision to the Destination Control Statement; and Other Changes, 81 Fed. Reg. 54,732 (Aug. 17, 2016) (to be codified at 22 C.F.R. pts. 120, 123, 124, 125, and 126).

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On September 29, DDTC issued an amendment designating Tunisia as a “major non-NATO ally” for purposes of the ITAR; adjusting the denial policy set forth in section 126.1 of the ITAR to reflect exemptions in U.N. arms embargoes against Eritrea, Somalia, and the Democratic Republic of the Congo; and terminating the applicability of section 126.1 to Liberia, Côte d’Ivoire, Sri Lanka, and Vietnam.<sup>42</sup>

**B. DEFENSE DISTRIBUTED LITIGATION**

In a 2-1 decision filed on September 20, 2016, the United States Court of Appeals for the Fifth Circuit ruled that the U.S. District Court for the Western District of Texas did not err in declining to grant a motion for a preliminary injunction against DDTC in the *Defense Distributed v. U.S. Dep’t of State* litigation.<sup>43</sup> Plaintiffs-Appellants Defense Distributed and Second Amendment Foundation Inc. had sought to enjoin DDTC from applying the ITAR in a manner that prevents the online distribution of certain unclassified, non-governmental technical information about 3D-printable firearms and components. Circuit Judges Davis and Graves found that the Government’s interest in national security outweighed the Plaintiffs-Appellants’ interest in their First and Second Amendment rights for purposes of the preliminary injunction analysis.<sup>44</sup> In a lengthy dissent, Circuit Judge Jones took issue with the majority’s reasoning: “By refusing to address the plaintiffs’ likelihood of success on the merits and relying solely on the Government’s vague invocation of national security interests, the majority leave in place a preliminary injunction that degrades First Amendment protection and implicitly sanctions the State Department’s tenuous and aggressive invasion of citizens’ rights.”<sup>45</sup>

**C. REGISTRATON GUIDANCE FOR FIREARMS MANUFACTURERS AND GUNSMITHS**

Largely in response to public debate sparked by the *Defense Distributed* litigation and aspects of the ECR Initiative, DDTC issued guidance in July intended to clarify the distinction between firearms “gunsmithing” and firearms “manufacturing” for purposes of ITAR registration.<sup>46</sup> Broadly speaking, tasks such as firearms maintenance and repair, occasional kit assembly, cosmetic changes, and after-market modifications that do not significantly improve capabilities would not constitute “manufacturing”

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42. Amendment to the International Traffic in Arms Regulations: Tunisia, Eritrea, Somalia, the Democratic Republic of the Congo, Liberia, Côte d’Ivoire, Sri Lanka, Vietnam, and Other Changes, 81 Fed. Reg. 66804 (Sept. 29, 2016) (to be codified at 22 C.F.R. pts. 120 and 126).

43. *Defense Distributed v. U.S. Dep’t of State*, 838 F.3d 451 (5th Cir. 2016).

44. *Id.* at 460.

45. *Id.* at 476.

46. Bureau of Political-Military Affairs, Applicability of the ITAR Registration Requirement to Firearms Manufacturers and Gunsmiths (July 22, 2016), <https://www.pmdtc.state.gov/compliance/documents/ITARRegReqFirearmsManufacturers.pdf>.



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activities that trigger the section 122 registration requirement. In contrast, the systematized production of parts or ammunition, or the use of specialized equipment or tooling to improve a firearm's performance beyond its original specifications, would be registerable "manufacturing" per the ITAR.

**D. SIGNIFICANT ITAR ENFORCEMENT DEVELOPMENTS**

On May 9, 2016, DDTC announced a partial relaxation of the statutory debarment imposed on Rocky Mountain Instrument Company (RMI) in 2010,<sup>47</sup> when it pleaded guilty to violating the Arms Export Control Act.<sup>48</sup> Under the modified debarment scheme, exporters other than RMI may now apply for and utilize DDTC authorizations to export RMI-origin defense articles and defense services without first having to request separate transaction exceptions to the debarment order.<sup>49</sup>

Microwave Engineering Corporation (MEC) agreed to pay a fine of USD 100,000 as part of a civil consent agreement with DDTC concluded on June 20, 2016.<sup>50</sup> MEC had voluntarily disclosed that "deficiencies in its ITAR compliance program" led to the release of controlled technical data concerning communications equipment to a scientist from China employed on an H-1B visa, on several occasions from December 2009 to June 2010.<sup>51</sup>

On October 5, 2016, Marc Turi and Turi Defense Group, Inc. (collectively, "Turi") agreed to a suspended \$200,000 fine, and to refrain from engaging in ITAR-controlled activities for four years, to settle charges of certain unauthorized activities subject to the ITAR.<sup>52</sup> Specifically, DDTC alleged that in 2011, Turi unlawfully proposed and brokered the sale of Eastern European weapons and ammunition to persons in Libya without authorization (although no actual deliveries were made).<sup>53</sup> The civil settlement coincided with a Department of Justice decision to request

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47. Bureau of Political-Military Affairs; Modification of Statutory Debarment Imposed Pursuant to Section 127.7(c) of the International Traffic in Arms Regulations – Rocky Mountain Instrument Company, 81 Fed. Reg. 28113 (May 9, 2016).

48. Notice of Debarment Pursuant to Section 127.7(c) of the International Traffic in Arms Regulations, 75 Fed. Reg. 54692 (Sept. 8, 2010).

49. Bureau of Political-Military Affairs, *supra* note 47.

50. Microwave Engineering Corporation (U.S. Dep't of State, Bureau of Political-Military Affairs, June 20, 2016) (consent agreement), [https://www.pmdrtc.state.gov/compliance/consent\\_agreements/pdf/MEC\\_CA.pdf](https://www.pmdrtc.state.gov/compliance/consent_agreements/pdf/MEC_CA.pdf).

51. Letter from Sue Gainor, Office of Def. Trade Controls Compliance, to Suzanne Wright, Chair of Board/President, Microwave Engineering Corp., [https://www.pmdrtc.state.gov/compliance/consent\\_agreements/pdf/MEC\\_CA.pdf](https://www.pmdrtc.state.gov/compliance/consent_agreements/pdf/MEC_CA.pdf).

52. Consent Agreement, Marc Turi and Turi Defense Group, Inc., (U.S. Dep't of State, Bureau of Political Military Affairs, Oct. 5, 2016), [https://www.pmdrtc.state.gov/compliance/consent\\_agreements/pdf/Turi\\_CA.pdf](https://www.pmdrtc.state.gov/compliance/consent_agreements/pdf/Turi_CA.pdf).

53. Letter from Arthur Shulman, Office of Def. Trade Controls Compliance, to Marc Turi, President, Turi Defense Group, Inc., *available at* [https://www.pmdrtc.state.gov/compliance/consent\\_agreements/pdf/Turi\\_PCL.pdf](https://www.pmdrtc.state.gov/compliance/consent_agreements/pdf/Turi_PCL.pdf).

dismissal of a criminal case it had commenced against Turi in connection with alleged efforts to arm anti-Qadhafi rebels in Libya.<sup>54</sup>

### **III. Developments Involving the Export Administration Regulations**

#### **A. REGULATORY DEVELOPMENTS**

In 2016, the BIS issued three final rules that were intended to liberalize certain export controls that had been imposed against Cuban entities. On January 27, 2016, the BIS promulgated a final rule that established a general policy of approval for five types of transactions (*i.e.*, transactions relating to certain telecommunications items; certain commodities and software for non-governmental entities that seek to strengthen civil society in Cuba and to U.S. news bureaus in Cuba; certain agricultural items; and certain items that are necessary to ensure the safety of civil aviation) and that stated that proposed exports and re-exports of certain items to meet the needs of the Cuban people to Cuban state-owned organizations or governmental entities would be reviewed on a case-by-case basis.<sup>55</sup> Next, on March 16, 2016, the BIS published a final rule that: (1) amended the EAR to allow cargo on a vessel that is on temporary sojourn to Cuba to transit Cuba on that vessel under a license exception; (2) created the ability for EAR99 items and items controlled for antiterrorism reasons only to be shipped pursuant to license exception to persons authorized by the Office of Foreign Assets Control to establish and maintain a physical or business presence in Cuba; and (3) adopted a policy of case-by-case review for items that would enable or facilitate exports from Cuba of items produced by the private sector.<sup>56</sup> Subsequently, on October 17, 2016, BIS issued a final rule that authorized the use of License Exception SCP for items sold directly to individuals in Cuba for personal use and License Exception AVS for cargo that is transiting Cuba on aircraft that are on temporary sojourn in Cuba, and that reduced the number of Cuban Government and Cuban Communist Party Officials who are ineligible recipients under License Exceptions GFT, CCD, and SCP.<sup>57</sup>

On March 8, 2016, the BIS added Zhongxing Telecommunications Equipment (ZTE) Corporation and certain related entities to the Entity

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54. Kenneth P. Vogel and Josh Gerstein, *Obama DOJ Drops Charges Against Alleged Broker of Libyan Weapons*, POLITICO (Oct. 5, 2016) <http://www.politico.com/story/2016/10/marc-turi-libyan-rebels-hillary-clinton-229115>.

55. Cuban Licensing Policy Revisions, 81 Fed. Reg. 4580 (Jan. 27, 2016) (to be codified at 15 C.F.R. pt. 746).

56. Cuba: Revisions to License Exceptions and Licensing Policy 81 Fed. Reg. 13972 (Mar. 16, 2016) (to be codified at 15 C.F.R. pts. 736, 740).

57. Cuba: Revisions to License Exceptions and Licensing Policy, 81 Fed. Reg. 13972 (Mar. 16, 2016) (to be codified at 15 C.F.R. pts. 736, 740, 746).

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List.<sup>58</sup> Subsequently, on March 24, 2016, the BIS issued an amendment to the EAR by adding Supplement No. 7 to EAR Part 744 to create a temporary general license to specify that exports, re-exports, and transfers of “NLR” items were allowed from March 24, 2016, through June 30, 2016.<sup>59</sup> The BIS extended the temporary general license in June, August, and November 2016.<sup>60</sup>

The Commerce Department’s Office of Export Enforcement (OEE) revised its guidance regarding administrative enforcement cases based on violations of the EAR.<sup>61</sup> In large part, the OEE guidance is consistent with OFAC’s long-standing guidance on similar cases based on violations of the laws and regulations it enforces. The guidance went into effect on July 22, 2016.<sup>62</sup>

In May, the Commerce Department amended the EAR to remove the short supply license requirements that had applied to exports of crude oil from the United States.<sup>63</sup> In July 2016, the CCL was amended to add items that no longer warranted control under USML Categories XIV (Toxicological Agents) or XVIII (Directed Energy Weapons).<sup>64</sup> The Commerce Department issued a final rule to describe how articles that no longer warranted control under USML Category XII (Fire Control, Laser, Imaging, and Guidance Equipment) were to be controlled under the EAR.<sup>65</sup>

#### B. SIGNIFICANT EAR ENFORCEMENT CASES

Fokker Services B.V. (Fokker), a Netherlands company, consented to a \$10 million fine in a settlement published on June 2, 2016.<sup>66</sup> The BIS

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58. Additions to the Entity List, 81 Fed. Reg. 12004 (Mar. 8, 2016) (to be codified at 15 C.F.R. pt. 744).

59. Temporary General License, 81 Fed. Reg. 15633 (Mar. 24, 2016) (to be codified at 15 C.F.R. pt. 744).

60. Temporary General License: Extension of Validity, 81 Fed. Reg. 41799 (June 28, 2016); Temporary General License: Extension of Validity, 81 Fed. Reg. 55372 (Aug. 19, 2016); Temporary General License: Extension of Validity, 81 Fed. Reg. 81663 (Nov. 18, 2016).

61. Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases, 81 Fed. Reg. 40499 (June 22, 2016) (to be codified at 15 C.F.R. pt. 766).

62. *Id.*

63. Removal of Short Supply License Requirements on Exports of Crude Oil, 81 Fed. Reg. 29483 (May 12, 2016) (to be codified at 15 C.F.R. pts 730, 740, 743, 744, 746, 754, 762, 772, and 774).

64. Commerce Control List: Addition of Items Determined To No Longer Warrant Control Under United States Munitions List Category XIV (Toxicological Agents) or Category XVIII (Directed Energy Weapons), 81 Fed. Reg. 49517 (July 28, 2016) (to be codified at 15 C.F.R. pts 704 and 774).

65. Revisions to the Export Administration Regulations (EAR); Control of Fire Control, Laser, Imaging, and Guidance Equipment the President Determines No Longer Warrants Control Under the United States Munitions List (USML), 81 Fed. Reg. 70320 (Oct. 12, 2016) (to be codified at 15 C.F.R. pts 734, 742, 744, 772, and 774).

66. Fokker Services B.V. (U.S. Dep’t of Commerce, Bureau of Indus. and Sec., June 2, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1060-e2458/file>.

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alleged that Fokker took steps to evade the EAR while committing 253 violations by unlawfully exporting various United States-origin aircraft parts and components to Sudan and Iran (including Iranian military end-users) from 2005 to 2010.

On June 3, 2016, BIS announced that it was fining Weiss Envirotronics, Inc. a civil penalty of \$575,000 for the unauthorized export of controlled environmental test chambers to China on twenty occasions between March 2010 and September 2013.<sup>67</sup>

Alcon Pharmaceuticals Ltd. (a Swiss company) and Alcon Laboratories, Inc. (based in Texas) reached an agreement with BIS on June 29, 2016, to pay an \$8.1 million civil penalty in connection with approximately 200 unlawful shipments of United States-origin medical devices to Iran and Syria.<sup>68</sup> BIS alleged that personnel within the Alcon group of companies were aware of the restrictions on such exports and routed the shipments through third countries in an effort to circumvent U.S. requirements.

On July 22, 2016, BIS imposed a \$500,000 fine and a five-year debarment on R&A International Trading Inc. (and its owner and president, Rukhsana Kadri) for allegedly submitting false shipper information to the U.S. government via the Automated Export System in an effort to conceal a customer's identity on multiple occasions, and for making and soliciting false statements during the BIS investigation of the inaccurate filings.<sup>69</sup>

On September 28, 2016, Technoline SAL of Beirut, Lebanon, agreed to pay a \$450,000 fine to settle charges that it unlawfully exported United States-origin spectrometers, chromatographs, and related items to Syria (a sanctioned country) on seven occasions between August 2009 and October 2010.<sup>70</sup> In addition, the company was debarred from engaging in activities subject to the EAR for a period of two years.

As part of a civil settlement announced on November 8, 2016, National Oilwell Varco (based in Texas) and Dreco Energy Services Ltd. (based in Alberta) agreed to pay \$2.5 million in connection with unauthorized shipments of United States-origin oil, gas, and manufacturing equipment to Iran and Oman in 2006, 2007, and 2012.<sup>71</sup>

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67. Weiss Envirotronics, Inc. (U.S. Dep't of Commerce, Bureau of Indus. and Sec., June 3, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1061-e2459/file>.

68. Alcon Pharmaceuticals Ltd. (U.S. Dep't of Commerce, Bureau of Indus. and Sec., June 30, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/1068-e2466/file>.

69. R&A International Trading Inc. (U.S. Dep't of Commerce, Bureau of Indus. and Sec., July 22, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1072-e2470/file>.

70. *In re* Technoline SAL (U.S. Dep't of Commerce, Bureau of Indus. and Sec., Sep. 29, 2016), *available at* <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1080-e2474/file>.

71. National Oilwell Varco and Decro Energy Services Ltd (U.S. Dep't of Commerce, Bureau of Indus. and Sec., Nov. 8, 2016) (final order), <https://efoia.bis.doc.gov/index.php/documents/export-violations/export-violations-2015/1085-e2477/file>.

#### **IV. Department of Justice Establishes Voluntary Self-Disclosure Program for Willful Violations**

In October, the Department of Justice took a highly noticeable step into export controls and economic sanctions compliance by issuing public guidance for a voluntary self-disclosure (VSD) program involving potentially willful (and hence criminal) violations.<sup>72</sup> “This Guidance memorializes the policy of [the National Security Division] to encourage business organizations to voluntarily self-disclose criminal violations of the statutes implementing the U.S. government’s primary export control and sanctions regimes” under the Arms Export Control Act (AECA) and the International Emergency Economic Powers Act (IEEPA), which includes the EAR that are currently under the authority of IEEPA.<sup>73</sup> By providing a voluntary self-disclosure, such disclosing entities may receive a “significantly reduced penalty, to include the possibility of a non-prosecution agreement (NPA), a reduced period of supervised compliance, a reduced fine and forfeiture, and no requirement for a monitor.”<sup>74</sup> The Guidance further advises that failure “to voluntarily disclose its export control and sanctions violations will rarely qualify for an NPA.”<sup>75</sup>

The government further notes that this recent development is because it has “made it a priority to pursue willful export control and sanctions violations by corporate entities and their employees” and because “business organizations and their employees are at the forefront of our enforcement efforts.”<sup>76</sup> In the Guidance, the Department of Justice notes that it presumes harm to national security when these laws are violated.<sup>77</sup> The Guidance also notes some areas where harm to national security is especially aggravated, such as where the violation involves nuclear nonproliferation, missile technology, terrorist organizations, or systemic compliance failures.<sup>78</sup> The Guidance emphasizes that it is not “intended to suggest that the government can require business organizations to voluntarily self-disclose, cooperate, or remediate. Companies remain free to reject these options.”<sup>79</sup>

Previously, the only known VSD that private parties were encouraged to provide were directly to the regulatory agencies themselves. For instance, an actual or potential violation could be voluntarily reported to DDTC where the actions involve the AECA. DDTC would then determine if consultation with the Department of Justice was warranted given the circumstances. This

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72. Guidance Regarding Voluntary Self-Disclosures, Cooperation, And Remediation In Export Control And Sanctions Investigations Involving Business Organizations, Nat’l Sec. Div., Dep’t of Justice (Oct. 2, 2016), <https://www.justice.gov/nsd/file/902491/download>.

73. *Id.* at 2.

74. *Id.* at 8.

75. *Id.* at 9.

76. *Id.* at 1-2.

77. Guidance Regarding Voluntary Self-Disclosures, *supra* note 72, at 3.

78. *Id.* at 8.

79. *Id.* at 4.

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development, however, now encourages private parties to disclose violations to the regulatory agencies and, if there are potentially willful violations, then also to the Department of Justice. As such, this Guidance purports to not affect the existing VSD processes with the Departments of State, Commerce, and Treasury.<sup>80</sup>

This new recommended VSD process, the Department of Justice notes, concerns only those violations that are willful. In its Guidance, the Department of Justice notes that

[i]n export control and sanctions cases, [the government] uses the definition of willfulness set forth in *Bryan v. United States*, 524 U.S. 184 (1998). Under *Bryan*, an act is willful if done with the knowledge that it is illegal. The U.S. government, however, is not required to show the defendant was aware of the specific law, rule, or regulation that its conduct may have violated.<sup>81</sup>

Although the U.S. government argues and stresses the *Bryan* willfulness standard applies to every situation, there is a federal circuit split on this issue.<sup>82</sup> Therefore, counsel should review the standard in the applicable jurisdiction.

As a practical matter, willfulness for private companies under the *Bryan* standard is a minimal threshold for the U.S. government to prove because businesses are virtually presumed to be knowledgeable of the regulations impacting their activities.<sup>83</sup> As a consequence, the impact of the *Bryan* standard on a private company could ensnare many otherwise civil violations into potentially criminal violations, and thus cause debate whether to submit a VSD to the Department of Justice. Additionally, this Guidance is also broader because the Department of Justice assumes that national security is harmed when these laws are violated: “Almost all criminal violations of U.S. export controls and sanctions harm the national security or have the potential to cause such harm.”<sup>84</sup> By contrast, experience with the Departments of State and Commerce have shown that they stress harm to national security in more limited contexts.<sup>85</sup>

The Guidance, however, is limited on what types of reduced liability a disclosing entity might receive. “In determining what credit to give an organization that voluntarily self-discloses illegal export control or sanctions

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80. *Id.* at 3.

81. *Id.* at 4 fn. 5.

82. *United States v. Roth*, 642 F. Supp. 2d 796 (E.D. Tenn. 2009) (describing differing standards for willfulness).

83. *See United States v. Zhen Zhou Wu*, 711 F.3d 1, 15 (1st Cir. 2013); *see also United States v. Bishop*, 740 F.3d 927 (4th Cir. 2014) (individual may have willfulness where he or she possesses ability to understand a license may be required prior to export).

84. Guidance Regarding Voluntary Self-Disclosures, *supra* note 72, at 3.

85. For instance, the ITAR distinguishes items based on whether they are designated as Significant Military Equipment. *See* 22 C.F.R. 120.7. Also, the EAR specifically identifies whether an item is controlled for national security reasons. *See* 15 C.F.R. 774.

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conduct, fully cooperates, and remediates flaws in its controls and compliance program, federal prosecutors must balance the goal of encouraging such disclosures and cooperation with the goal of deterring these very serious offenses.”<sup>86</sup> In submitting a voluntary self-disclosure, the following elements must be met:

- The company discloses the conduct “prior to an imminent threat of disclosure or government investigation,” U.S.S.G. § 8C2.5(g)(1);
- The company discloses the conduct to CES and the appropriate regulatory agency “within a reasonably prompt time after becoming aware of the offense,” U.S.S.G. § 8C2.5(g)(1), with the burden on the company to demonstrate timeliness; and
- The company discloses all relevant facts known to it, including all relevant facts about the individuals involved in any export control or sanctions violation.<sup>87</sup>

Additionally, once a VSD is made, the Department of Justice will consider a number of factors to determine whether any leniency towards the disclosing entity is appropriate.<sup>88</sup> The essence of these factors is whether the disclosing entity has provided full cooperation by participating proactively, provided all the material facts, and provided access to key employees and documents.<sup>89</sup> Furthermore, disclosing entities are also expected to implement an effective compliance program, discipline employees that caused the violations, and take further necessary steps as appropriate.<sup>90</sup> Disclosing entities that provide less than full cooperation may nevertheless receive some leniency.<sup>91</sup> The Guidance notes that “eligibility for cooperation credit is not predicated upon the waiver of the attorney-client privilege or work product protection.”<sup>92</sup>

One additional point about this Guidance is its relation to the new guidelines that were published in September 2015 (referred to as the “Yates Memo”) that altered the Department of Justice’s policy towards prosecuting employees of corporations for violations of federal laws, and providing cooperation credit for corporations.<sup>93</sup> The Guidance specifically states that its purpose is to also implement the Yates Memo by “promoting greater accountability for individual corporate defendants.”<sup>94</sup> Thus, a voluntary self-disclosure addressing potential criminal liability by the entity may result in a focus by the Department of Justice (under the Yates Memo) on the actual employees of the entity who were specifically involved in the violations.

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86. Guidance Regarding Voluntary Self-Disclosures, *supra* note 72, at 3.

87. *Id.* at 5.

88. *Id.* at 5-6.

89. *Id.*

90. *Id.* at 7-8.

91. Guidance Regarding Voluntary Self-Disclosures, *supra* note 72, at 6-7.

92. *Id.* at 6.

93. Memorandum from Sally Yates, Deputy Attorney General on Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

94. *Id.* at 2.

## **VI. Changes to Canadian Sanctions against Iran, Russia, Ukraine, Belarus, and Egypt**

The year 2016 was an active year in Canadian economic sanctions and export controls legislation and included updates in Canada's United Nations and autonomous sanctions against the Islamic Republic of Iran, autonomous sanctions against Russian and Ukraine, and the expiration of sanctions against certain Egyptian nationals. Canada also took a major step in relaxing certain export controls by beginning the process of removing Belarus from the *Area Control List*, which should significantly ease the burden for Canadian persons and entities seeking to do business in Belarus.

Canadian developments are critical for U.S. companies that have either Canadian affiliates or Canadian personnel. Given that Canadian sanctions law can found jurisdiction through nationality, actions by a foreign company using a Canadian national risks exposing personnel to personal criminal liability. Such actions can also risk tainting the Canadian affiliate either directly or via Canada's criminal corporate liability provisions.

### **A. IRAN**

On February 5, 2016, Canada's Minister of Foreign Affairs, Stéphane Dion, announced that Canada had revised its economic sanctions against Iran in the *Regulations Amending the Special Economic Measures (Iran) Regulations* (the "Iran Regulations")<sup>95</sup> and *Regulations Amending the Regulations Implementing the United Nations Resolutions on Iran* ("Canada's UN Regulations"),<sup>96</sup> enacted pursuant to the Special Economic Measures Act (SEMA)<sup>97</sup> and the United Nations Act, respectively.

In the Iran Regulations, Canada has made significant amendments to the list of designated persons, now referred to as "listed persons," who are subject to a general asset freeze and transaction ban. The number of listed individuals has been halved, from 83 to 41. The number of listed entities has been reduced from 530 to only 161.

The trade embargo has been significantly relaxed. The prohibitions against making investments in Iran, restricting port services to Iranian vessels, or providing flagging or classification services to Iranian oil tankers or cargo vessels have all been completely lifted. Canada also removed the restrictions against importing or purchasing any goods from Iran and the blanket financial services ban.

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95. Global Affairs Canada, *Regulations Amending the Special Economic Measures (Iran) Regulations* (Feb. 4, 2016), [http://www.international.gc.ca/sanctions/countries-pays/iran\\_sema\\_regulations-iran\\_lmes\\_reglement.aspx?lang=eng](http://www.international.gc.ca/sanctions/countries-pays/iran_sema_regulations-iran_lmes_reglement.aspx?lang=eng) (amending S.C. 1992, c. 17 (Can.)).

96. Global Affairs Canada, *Regulations Amending the Regulations Implementing the United Nations Resolutions on Iran* (July 20, 2015), [http://www.international.gc.ca/sanctions/countries-pays/iran\\_un\\_regulations-iran\\_onu\\_reglement.aspx?lang=eng](http://www.international.gc.ca/sanctions/countries-pays/iran_un_regulations-iran_onu_reglement.aspx?lang=eng).

97. Special Economic Measures Act, S.C. 1992, c.17 (Can.), <http://laws-lois.justice.gc.ca/eng/acts/S-14.5/FullText.html>.



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Under the Iran Regulations, Canada has lifted the broad supply ban by repealing that section and replacing it with a prohibition on supplying goods and technology, which lists 41 categories of items commonly used in nuclear, biological, and chemical weapons programs, including certain centrifuges, autoclaves, fibrous or filamentary materials, gamma-ray spectrometers, and specialty metals.

Canadian businesses, and American businesses with Canadian personnel or affiliates, also need to review the remaining restrictions in place under Canada's UN Regulations. These relate to activities involving nuclear proliferation, military and conventional arms programs, and ballistic missile development.

Canadian corporations are still required to obtain appropriate export permits under the *Export and Import Permits Act* (EIPA)<sup>98</sup> for any goods or technology listed on Canada's Export Control List (ECL). While Canada has now allowed trade with Iran, the Canada Border Services Agency will likely continue to scrutinize exports to Iran to ensure compliance with economic sanctions and export controls. Also, although the notice is silent in regards to items originated in the United States, all goods or technology of U.S. origin, regardless of sensitivity, should be exported or transferred to Iran with an appropriate permit from the Export Controls Division.

**B. RUSSIA AND UKRAINE**

On March 18, 2016, marking the second anniversary of the Russian occupation of the Crimean region of Ukraine, the Canadian government expanded its sanctions against Russia and Ukraine by adding 19 entities and individuals to its lists of designated blacklisted persons. The amendments also provide a new basis for which entities may be blacklisted under the Russia sanctions.

Under Schedule 1 of the *Special Economic Measures (Russia) Regulations* (the "Russia Regulations")<sup>99</sup> and the *Special Economic Measures (Ukraine) Regulations* (the "Ukraine Regulations"),<sup>100</sup> both implemented pursuant to the SEMA, Canada imposes broad prohibitions against engaging in activities involving 279 entities and individuals listed as designated persons, including these present additions.

The amendments also provide a new basis for listing persons or entities for purposes of the broad prohibitions described above. Previously, the listing of entities owned and controlled by, or acting on behalf of, a designated person did not include persons listed solely because they were an associate or family member of a designated person. This distinction has

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98. Export and Import Permits Act, R.S.C. 1985, c. E-19, <http://laws-lois.justice.gc.ca/eng/acts/E-19/>.

99. Special Economic Measures (Russia) Regulations, SOR/2014-58 (Can.), <http://laws.justice.gc.ca/eng/regulations/SOR-2014-58/FullText.html>.

100. Special Economic Measures (Ukraine) Regulations, SOR/2014-60 (Can.), <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2014-60/FullText.html>.

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been eliminated, and now entities owned or controlled by, or acting on behalf of, an associate or family member of a designated person may be listed in Schedule 1.

Under its Ukraine sanctions, Canada also imposes a broad trade embargo against the Crimea region of Ukraine, including investment, supply, sourcing, services, and technical data prohibitions. Lastly, the Russia Regulations contain prohibitions on the export or diversion of certain listed items, used heavily in the oil and gas industry, to Russia or any person in Russia for use in offshore, arctic, or shale oil exploration and production. Services associated with such goods are also prohibited.

C. BELARUS

On May 7, 2016, Canada's Minister of Foreign Affairs announced that Canada initiated a process to remove Belarus from the Area Control List ("ACL")—a regulation to the EIPA.<sup>101</sup> This decision was made due to Canada's recognition that the Belarusian government has made some progress in key areas, including releasing numerous political prisoners, conducting a presidential election, and participating in mediation efforts regarding Ukraine and the Crimean Region.

D. EGYPT

On March 10, 2016, Canada enacted the Regulations Amending the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations<sup>102</sup> that repealed provisions concerning Egypt in the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations ("Tunisia and Egypt Regulations").<sup>103</sup>

Overall, Canada introduced a number of important amendments in 2016 that had a significant impact on the way Canadian companies approach their business dealings on the market in Iran, Russia, Ukraine, Belarus, and Egypt. Given the tight economic and political bond between Canada and the United States, Canada might be expecting further significant amendments in sanctions against these and other countries after January 2017.

Of particular importance will be the impact on U.S. corporations with foreign affiliates if the executive orders made to implement the JCPOA are repealed or if key components of the Cuban economic embargo are re-implemented. These actions may create issues for companies that have begun transactions with either Iran or Cuba through Canadian subsidiaries

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101. Global Affairs Canada, *Notice to Exporters: Exports of items listed on the Export Control List to Belarus* (May 13, 2016), <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/197.aspx?lang=eng>.

102. Regulations Amending the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations, SOR/2016-41 (Can.) (Mar. 11, 2016), <http://www.gazette.gc.ca/rp-pr/p2/2016/2016-03-23/html/sor-dors41-eng.php>.

103. *Id.* (repealing selected provisions from Freezing Assets of Corrupt Foreign Officials (Tunisia) Regulations, SOR/2011-78 (Can.)).

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or affiliates. The latter case is particularly troubling because the Canadian blocking order prohibiting compliance with the embargo remains active.

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

## **International Antitrust**

MIGUEL DEL PINO, ELIZABETH M. AVERY, SALLY KIRK, ADAM S. GOODMAN, PETER WANG, YIZHE ZHANG, LAURIE-ANN GRELIER, PETER CAMESASCA, VINOD DHALL, MANSI TEWARI, SHIGEYOSHI, ANDERSON MORI & TOMOTSUNE, YOUNGJIN JUNG, GINA JEEHYUN CHOI, LARA GRANVILLE, JONATHAN TICKNER, JASVINDER NAKHWAL, AND LISL DUNLAP

This Article summarizes important developments in 2016 in international antitrust law in Argentina, Australia, Brazil, Canada, China, European Union, India, Japan, Korea, South Africa, United Kingdom, and the United States.

### **I. Argentina<sup>1</sup>**

#### **A. LEGISLATIVE DEVELOPMENTS**

In March, the new Administration of the Argentine Antitrust Commission (Commission) was appointed. The new President of the Commission is Esteban Greco, an economist who worked on several antitrust matters before joining the authority. Four new members have also been appointed: María Fernanda Viécens, Marina R. Bidart, Pablo Trevisan and Eduardo Stordeur.<sup>2</sup>

The new Administration is planning to amend the current Antitrust Law No. 25,156 (Antitrust Law). However, there is no projection on when this new Antitrust Law will take effect and if its provisions (detailed below) will pass unchanged by Congress.

#### **B. MERGERS**

In 2016, the number of notifiable merger transactions continued to increase due to the devaluation of the Argentine Peso. The USD 200,000,000 threshold that was set out in 1999 (when the Antitrust Law was enacted) is currently equivalent to approximately USD 13,000,000. Due to the significant workload from these transactions, there has been a great delay and the timeframe for review has increased. However, with the new Administration, the review timeframe decreased from thirty-six months to an average of approximately twenty-four to thirty months (even in non-

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1. The section on Argentina was authored by Miguel del Pino, Marval, O'Farrell & Mairal.

2. Pursuant to Executive Order No. 1190/2016 issued on November 22, 2016, the members of the Commission have the title of undersecretary. See Decreto 1190/2016, Nov. 22, 2016, B.O. (Arg.).

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material transactions with minimum or no overlaps). In 2016, the Commission cleared fifty transactions, while no rulings imposing remedies or rejecting transactions were issued.

Regarding merger control analysis, the proposed amendment to the current Antitrust Law would principally entail (1) an increase of the merger control thresholds and the amounts for exemptions and fines, (2) a suspensory system, (3) the inclusion of a filing fee, (4) the participation of third parties, and (5) a fast track procedure for simple notification dockets.<sup>3</sup>

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On September 1, 2016, the Commission issued Resolution No. 18,<sup>4</sup> requesting Prisma Medios de Pago S.A. and its shareholders (namely, the most important banks in Argentina and Visa International Inc.) to explain alleged antitrust conduct.

The Commission considered Prisma Medios de Pago SA and its shareholders responsible for carrying out the following antitrust conducts: a) competitive restrictions based on prices charged to users; b) competitive restrictions based on financing; and c) restrictions in order to inter-operate with competitors.

In addition to this investigation, the Commission has ordered the commencement of other market investigations in the following industries: (1) aluminum, (2) steel, (3) petrochemical, (4) mobile communications, (5) oil, (6) milk, (7) meat, (8) detergents, (9) passenger ground transportation, (10) air transportation, (11) supermarkets, and (12) pharmaceuticals.<sup>5</sup>

D. COURT DECISIONS

The Federal Court of Appeals of the City of Comodoro Rivadavia's decision that overturned the Commission's decision ordering almost all car

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3. See Alfaro Abogados, *August 2016 Newsletter: The Argentine Antitrust Agency Will Be Sending to Congress a Bill to Introduce Positive Amendments to the Antitrust Law*, available at [http://www.theworldlawgroup.com/wlg/Antitrust\\_\\_Competition.asp](http://www.theworldlawgroup.com/wlg/Antitrust__Competition.asp).

4. See Org. for Econ. Co-operation and Dev. [OECD], *Latin American and Caribbean Competition Forum Session III: Addressing Competition Challenges in Financial Markets (Contribution of Argentina)* (Mar. 23, 2017), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2017\)13&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2017)13&docLanguage=En).

5. See Esteban Pablo Ropolo, *The Argentine Antitrust Commission Initiates an Investigation Against Credit Card Issuers*, LEXOLOGY GLOBAL COMPLIANCE NEWS (Sept. 6, 2016), <http://www.lexology.com/library/detail.aspx?g=58853e3a-5d88-433c-a8c9-534f1a356360> ("The market investigation is only one of the eleven market investigations initiated by the Antitrust Commission under its new leadership (other investigations include the meat market, the laundry soaps market, mobile telecommunications market and passenger transport market, among others)").

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terminals active in Argentina to pay the highest fine ever for price fixing is still under review.<sup>6</sup>

## II. Australia<sup>7</sup>

### A. LEGISLATIVE DEVELOPMENTS

In March 2015, the Competition Policy Review (“The Harper Review”) issued its final report, completing the first major review of Australian competition law in over two decades and containing fifty-six recommendations on Australian competition policies and institutions.

In 2016, Australian Government released “Exposure Draft Legislation” (*Competition and Consumer Amendment (Competition and Policy Review) Bill 2016*), aimed at implementing the majority of the Harper Review recommendations.<sup>8</sup>

Significantly, the Exposure Draft purports to amend section 45 of the *Competition and Consumer Act (CCA)* to provide that a corporation must not “engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect of substantially lessening competition.” This language will replace the presently narrower iteration of section 45, which requires “contracts, arrangements or understandings” to demonstrably affect competition before attracting liability.<sup>9</sup>

Further, the Bill included an “effects test” to the “misuse of market power” under section 46 of the *CCA*. The amended section prohibits corporations with a “substantial degree of [market] power” from engaging in conduct that “has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.”<sup>10</sup> This will replace the current section 46 test, which requires that corporations “take advantage” of their substantial market power for some illegal purpose.

Legislation amending section 46 of the Act was introduced into Parliament on December 1, 2016, with the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*, while the additional

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6. Julián Peña & Federico Rossi, *Argentina—Court of Appeals Revokes Highest Cartel Fine Imposed by Argentina’s Antitrust Authority* (Dec. 2015), [http://www.ibanet.org/LPD/Antitrust\\_Trade\\_Law\\_Section/Antitrust/Publications.aspx](http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/Publications.aspx).

7. The section on Australia was authored by Elizabeth M Avery and Sally Kirk, Gilbert & Tobin.

8. *Exposure Draft – Competition and Consumer Amendment (Competition Policy Review) Bill 2016* (Austl.), [https://consult.treasury.gov.au/market-and-competition-policy-division/ed\\_competition\\_law\\_amendments/supporting\\_documents/Exposure\\_Draft.pdf](https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments/supporting_documents/Exposure_Draft.pdf).

9. Elizabeth Avery, Simon Muys, & Matt Rubinstein, *Rethinking the Competition and Consumer Act: Exposure Draft Legislation Lays Groundwork for the Most Significant Change in a Generation*, GILBERT & TOBIN INSIGHTS (Dec. 9, 2016), <https://www.gtlaw.com.au/insights/rethinking-competition-and-consumer-act-exposure-draft-legislation-lays-groundwork-most-significant>.

10. *Competition and Consumer Act 2010* (Cth) § 46 (Austl.).

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amendments contained in the Exposure Draft are set to be finalized in early 2017.<sup>11</sup>

**B. MERGERS**

During 2016, the Australian Competition and Consumer Commission (“ACCC”) made thirty-one informal merger clearance decisions<sup>12</sup> and provided six “public competition assessments.” Generally, such assessments are made when a merger is rejected, but also may occur when an application is approved subject to enforceable undertakings, or raises issues that the ACCC considers in the public interest.<sup>13</sup> The ACCC did not oppose any of the six assessment applications, and only three were approved subject to enforceable undertakings.<sup>14</sup>

On February 18, 2016, the ACCC announced it would no longer oppose the acquisition of Cova Parts by GPF Asia Pacific Pty Ltd (GPC) from Automotive Holdings Group Limited (AHG).<sup>15</sup> Previously, in December 2015, the ACCC rejected GPC’s original proposal, but accepted that a revised version, made subject to the attachment of a section 87B enforceable undertaking, would be unlikely to contravene section 50 of the CCA (prohibiting acquisitions likely to have the effect of “substantially lessening competition” in any market). Accordingly, the transaction was modified to exclude store acquisitions in certain areas.

In the Australian Competition Tribunal, a total of eleven decisions were delivered in 2016. Only one authorization application was made and granted, namely, Sea Swift’s proposed acquisition of Northern Territory and far north Queensland marine freight business, Toll Marine Logistics Australia. The Tribunal handed down this decision on July 1, 2016, following the ACCC’s opposition to an informal clearance application in July 2015.<sup>16</sup> The authorization, granted subject to conditions on “public

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11. Scott Morrison, *Delivering Strengthened Competition Law – Section 46 Legislation Introduced*, TREASURER OF THE COMMONWEALTH OF AUSTRALIA (Dec. 1, 2016), <http://sjm.ministers.treasury.gov.au/media-release/125-2016/>.

12. AUSTRALIAN COMPETITION & CONSUMER COMM’N (ACCC), *Public Competition Assessments*, <http://registers.acc.gov.au/content/index.phtml/itemId/751043/year/2016> (last visited Apr. 8, 2017).

13. *Id.*

14. *See id.*

15. ACCC, *Public Competition Assessment: GPC Asia Pacific Pty Ltd – Proposed Acquisition of Cova Parts From Automotive Holdings Group Limited* (Mar. 23, 2016), <http://registers.acc.gov.au/content/index.phtml/itemId/501191>.

16. Luke Woodward, Gina Cass-Gottlieb, Genevieve Rahman & Petria Lewis, *Australian Competition Tribunal Authorises Sea Swift’s Acquisition of Toll’s Marine Freight Assets*, GILBERT & TOBIN INSIGHTS (Apr. 7, 2016), <https://www.gtlaw.com.au/australian-competition-tribunal-authorises-sea-swifts-acquisition-tolls-marine-freight-assets>; *See also* AUSTRALIAN COMPETITION & CONSUMER COMM’N, *ACCC Opposes Sea Swift Pty Ltd’s Proposed Acquisition of Toll Marine Logistics*, MR 118/15 (July 9, 2015), <https://www.acc.gov.au/media-release/acc-opposes-sea-swift-pty-ltd%E2%80%99s-proposed-acquisition-of-toll-marine-logistics>.

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benefits” grounds, marked only the second Tribunal determination of a merger authorization application since this avenue was introduced in 2007.<sup>17</sup>

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

In 2016, the ACCC also commenced proceedings against two global shipping companies, Nippon Yusen Kabushiki Kaisha (NYK) and Kawasaki Kisen Kaise (K-Line), alleging cartel conduct in the transportation of vehicles from Japan to Australia between 2009 and 2012.<sup>18</sup> These are the first two criminal proceedings brought pursuant to the criminal cartel provisions introduced in 2009 under the *Competition and Consumer Act 2010* (Cth). While NYK pled guilty to its charges on 18 July 2016,<sup>19</sup> K-Line has not yet entered any plea, receiving a first mention in court on 15 November 2016. Sentencing for NYK is scheduled for April 2017.

In February, the Federal Court also delivered its trial judgment in the “Egg Cartel Case.” This case involved allegations by the ACCC that the Australian Egg Corporation Limited (AECL), as well as prominent egg suppliers, Farm Pride and Twelve Oaks Poultry, engaged in cartel behaviour to maintain high prices, and thwart oversupply of eggs in the market.<sup>20</sup> Justice White of the Federal Court dismissed the case, ruling that, although the defendants “intended” that members of the AECL would take action to address the oversupply, there was no attempt to induce any agreement or understanding involving culling hens or otherwise disposing of surplus eggs (as was alleged).<sup>21</sup> The ACCC subsequently appealed; judgment was reserved at the time of writing.

**D. DOMINANCE**

In April, \$18.6 million in penalties were ordered against Cement Australia Pty Ltd. and related companies for entering into anti-competitive “flyash”

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17. Woodward, Cass-Gottlieb, Rahman & Lewis, *supra* note 16.

18. The Queen v Nippon Yusen Kabushiki Kaisha [2016] NSW (Austl.), <http://www.australiancompetitionlaw.org/cases/current/2016-nsd1143-nyk.html>.

19. Elizabeth Avery, Chris Boyd, Gina Cass-Gottlieb, Steven Glass, Andrew Floro & Stephanie Wee, *Japanese Shipping Company NYK Pleads Guilty to Criminal Cartel Conduct in Inaugural Australian Prosecution*, GILBERT & TOBIN INSIGHTS (July 21, 2016), <https://www.gtlaw.com.au/insights/japanese-shipping-company-nyk-pleads-guilty-criminal-cartel-conduct-inaugural-australian-prosecution>; Rebecca Thurlow, *Japanese Shipping Company NYK Pleads Guilty to Criminal-Cartel Conduct in Australia’s Federal Court*, WALL ST. J. (July 17, 2016), <http://www.wsj.com/articles/japanese-shipping-company-nyk-pleads-guilty-to-criminal-cartel-conduct-in-australian-court-1468810382?mg=id-wsj>.

20. ACCC, *ACCC Takes Action Following Alleged Egg Cartel Attempt* (May 28, 2014), <https://www.accc.gov.au/media-release/accc-takes-action-following-alleged-egg-cartel-attempt>.

21. Sarah Danckert, *Judge Scrambles ACCC’s Egg Cartel Case*, SYDNEY MORNING HERALD (Feb. 10, 2016), <http://www.smh.com.au/business/consumer-affairs/judge-scrambles-acccs-egg-cartel-case-20160210-gmqira.html>.



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agreements, in contravention of section 45 of the CCA.<sup>22</sup> Justice Greenwood, in the Federal Court of Australia, found that contracts entered between the parties had the purpose and effect of preventing competitors from entering the concrete market, and thus, of substantially lessening competition.<sup>23</sup> In this case, the ACCC also alleged that the same conduct amounted to a misuse of market power under the current iteration of section 46 of the CCA. However, this claim was dismissed, as there was insufficient evidence to show that the defendants were “taking advantage” of their substantial market power. This was the only instance of alleged misuse of market power in 2016.

### III. Brazil

#### A. LEGISLATIVE DEVELOPMENTS

On 6 September 2016, the Administrative Council for Economic Defense (CADE) published a new resolution establishing a deadline of thirty days to complete the analysis of fast-track merger filings.<sup>24</sup> Although the General Superintendence of the agency previously observed the deadline informally, the new provision provides for more legal certainty and predictability in the timing of clearance. On October 18, 2016, CADE also approved a new resolution regarding the notification of associative agreements, which are commercial contracts—generally between competitors and vertically related players—that require pre-merger notification in Brazil if certain conditions are met.<sup>25</sup> The great innovation of Resolution No. 17/2016 is the removal of the vertical relationship threshold for notification, observed, for instance, in supply and distribution agreements. It means that from November 2016 on, only certain commercial agreements between competitors will require antitrust clearance.

The third amendment on the regulation in 2016 relates to how CADE defines the relevant business activities’ revenues that will be used to calculate fines. Resolution 3, in force since 2012, provides a list of activities defendants should consider to calculate their revenues that will serve as basis for fine calculation (fines resulting from convictions for anticompetitive

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22. Media Release, ACCC, *ACCC Appeals Cement Australia Level of Penalties* (June 6, 2016), <https://www.accc.gov.au/media-release/accc-appeals-cement-australia-level-of-penalties>.

23. Media Release, ACCC, *\$18.6 Million Penalties Ordered Against Cement Australia Companies For Anti-Competitive Flash Agreements* (Apr. 29, 2016), <https://www.accc.gov.au/media-release/186-million-penalties-ordered-against-cement-australia-companies-for-anti-competitive-flyash-agreements>.

24. Resolução No. 16, de 1 de Setembro de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.9.2016 (Braz.), [http://sei.cade.gov.br/sei/institucional/pesquisa/documento\\_consulta\\_externa.php?NMVKAaTPZCcA-E\\_-x95f1SHaQ8ki5cBEA8QlNRGQF44sW-07Q0WLpuBsOxNy-tVe-toJFAG\\_3jAlj5dQOyMpA](http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?NMVKAaTPZCcA-E_-x95f1SHaQ8ki5cBEA8QlNRGQF44sW-07Q0WLpuBsOxNy-tVe-toJFAG_3jAlj5dQOyMpA).

25. Resolução No. 17, de 18 de Outubro de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 18.10.2016 (Braz.), [http://sei.cade.gov.br/sei/institucional/pesquisa/documento\\_consulta\\_externa.php?ssjK4QTNM7ViqHpNE\\_48iLwuyZi8GbS8y0qA8QG-4hgSOtYmh59AA8GGKDFAgD1vCoXBwp2SQL6YqZEwffSBQA](http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?ssjK4QTNM7ViqHpNE_48iLwuyZi8GbS8y0qA8QG-4hgSOtYmh59AA8GGKDFAgD1vCoXBwp2SQL6YqZEwffSBQA).

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practices). CADE realized that because the existing definitions were too broad, the resulting fines were not necessarily proportionate. The new rule affords CADE more flexibility when applying Resolution 3, if they view fines as disproportionate or unfair.

**B. MERGERS**

On 30 March 2016, Fedex/TNT, the deal that created the largest global delivery services company and faced strong opposition from the competitor UPS, was unconditionally approved by CADE after a long review period (161 days).<sup>26</sup> CADE also approved the joint venture among broadcast TV companies SBT, Record, and RedeTV.<sup>27</sup>

The new company will create and distribute TV content, channels, and programs, as well as license the digital signal for pay-TV operators. As a condition for clearance, parties agreed to behavioral remedies,<sup>28</sup> including committing to invest in content and subsidize small and medium operators.

CADE has also approved the acquisition of HSBC by Bradesco, subject to a settlement of behavioral remedies, and also the acquisition of the sexual well-being business by Reckitt Benckiser from Hypermarcas, conditioned to the divestment of the K-Y brand of personal lubricants in Brazil.

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

In July 2015, following several other jurisdictions, CADE opened what is internationally known as the “Forex investigation,” related to the manipulation of foreign exchange rates. The inquiry started based on a Leniency Agreement.<sup>29</sup>

In 2016, CADE opened five inquiries related to the so called “Car Wash Operation,” in addition to two proceedings that began in 2015.<sup>30</sup> CADE’s General Superintendent has told the press that over 30 inquiries involving the Car Wash Operation are currently under scrutiny. So far, only seven of them have been made public. They involve public tenders related to: onshore platforms; construction of a nuclear power plant (“Angra III”) and of a hydroelectric plant; railways; urbanization projects; large size buildings; and soccer stadiums.

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26. Ato de Concentração No. 08700.009559/2015-12, de 30 de março de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.4.2016 (Braz.).

27. Ato de Concentração No. 08700.006723/2015-21, de 22 de junho de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.6.2016 (Braz.).

28. Ato de Concentração No. 08700.010790/2015-41, de 17 de junho de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.6.2016 (Braz.).

29. Recesso Administrativo No. 08700.004633/2015-04, de 1 de julho de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.7.2015 (Braz.).

30. See, e.g., CONSELHO ADMINISTRATIVO DE DEFESA ECONOMICA (CADE), *Within the Scope of the Car Wash Operation, CADE Investigates Another Cartel in Petrobras Public Bids Leniency Agreement* (last updated Dec. 6, 2016 2:33 PM), <http://en.cade.gov.br/press-releases/within-the-scope-of-the-car-wash-operation-cade-investigates-another-cartel-in-petrobras-public-bids>.

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Two important cartel convictions took place in February 2016: the chemical company Solvay was fined BRL17.4 million for taking part in an international cartel in the sodium-perborate market, which would have affected the Brazilian market. The investigation was opened following a leniency agreement signed between CADE and Evonik Degussa. The second one relates to bid rigging in public tenders for laundry services in Rio de Janeiro. The fines imposed totaled R\$27.3 million. CADE has also prohibited the company Brasil Sul Industria e Comércio—deemed the cartel leader—from contracting with Government entities for the five year period.<sup>31</sup>

**D. DOMINANCE**

In February, CADE convicted three port operators (Tecon Salvador and Tecon Rio Grande—both part of the Wilson Sons Group—and Intermarítima Terminais) for imposing abusive port storage fees, applying the combined fine of R\$10.6 million.<sup>32</sup>

Also in 2015, CADE convicted Eli Lilly for the practice of sham litigation, imposing a fine of R\$36,679,586.16.<sup>33</sup> CADE took the view that Eli Lilly managed to sustain a monopoly of an active ingredient used in pharmaceuticals for cancer treatments, by preventing the entry of competitors and by means of numerous court actions in multiple jurisdictions.

**E. COURT DECISIONS**

A lawsuit related to the merger between the chocolate companies Nestle and Garoto, which lasted approximately eleven years, is finally about to end, after an out of court settlement reached between CADE and the parties. The merger took place in 2002 and was fully rejected by CADE in 2005, when parties decided to challenge the decision in Court. CADE, Nestlé, and Garoto agreed on late remedies to end judicial discussions (remedies agreed were deemed confidential and have not been made public).<sup>34</sup>

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31. CADE, *Cade Condemns Bids for Hospital Laundries in Rio* (last updated Mar.3, 2016 12:44 PM), <http://webcache.googleusercontent.com/search?q=cache:http://www.cade.gov.br/noticias/cade-condena-cartel-de-licitacoes-de-lavanderias-hospitalares-no-rio>.

32. CADE, *Cade Fines Ports of Salvador (BA) and Rio Grande (RS) for Abuse of Dominant Position* (last updated Apr. 18, 2016 3:12 PM), <http://webcache.googleusercontent.com/search?q=cache:http://www.cade.gov.br/noticias/cade-multa-portos-de-salvador-ba-e-rio-grande-rs-por-abuso-de-posicao-dominante>.

33. Processo Administrativo No. 08012.011508/2007-91, de 24 de junho de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30.6.2015 (Braz.).

34. Eric Kroh, *Nestle Reaches Deal with Brazil to Complete Garoto Buy*, LAW360.COM (Oct. 5, 2016), <https://www.law360.com/articles/848511/nestle-reaches-deal-with-brazil-to-complete-garoto-buy>.

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**IV. Canada<sup>35</sup>**

**A. LEGISLATIVE DEVELOPMENTS**

In September 2016, the federal government introduced Bill C-25,<sup>36</sup> which, when passed, will amend the affiliation rules in the Competition Act (Act)<sup>37</sup> to treat partnerships, trusts, sole proprietorships, and non-incorporated business entities similarly to how corporations are treated.

The Competition Bureau (Bureau) also released new Intellectual Property Enforcement Guidelines, providing guidance regarding the Bureau's enforcement approach to product switching, patent assertion entities, patent settlements, and standard essential patents.<sup>38</sup>

**B. MERGERS**

Several high profile transactions cleared in 2016 without remedies.<sup>39</sup> Following abandonment by the parties, the Bureau withdrew its challenge of Staples' proposed acquisition of Office Depot<sup>40</sup> and cleared Superior Plus' acquisition of Canexus based on efficiencies.<sup>41</sup>

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35. The section on Canada was authored by Adam S. Goodman, Dentons Canada LLP.

36. An Act to Amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-For-Profits Corporation Act and the Competition Act, Bill C-25, 1st Sess., 42nd Parl. (2015-2016) (Can.).

37. Competition Act, R.S.C. 1985, c. C-34 (Can.).

38. COMPETITION BUREAU CANADA (CCB), *Enforcement Guidelines: Intellectual Property* (Mar. 31, 2016), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-IPEG-e.pdf/\\$file/cb-IPEG-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-IPEG-e.pdf/$file/cb-IPEG-e.pdf).

39. See CCB, *Competition Bureau Backgrounder Regarding the Proposed Acquisition by Shaw of WIND* (Feb. 4, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04027.html>; Position Statement, CCB, *Competition Bureau Statement Regarding the Proposed Acquisition by Lowe's of RONA* (May 12, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04085.html>; Press Release, CCB, *Competition Bureau Satisfied That Proposed Sale of St-Hubert Will Not Limit Consumer Choice* (May 18, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04089.html>; Position Statement, CCB, *Competition Bureau Statement Regarding Anheuser-Busch InBev's Proposed Acquisition of SABMiller and the Concurrent Divestiture of Certain Miller Brands to Molson Coors* (May 31, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04097.html>; Position Statement, CCB, *Competition Bureau Statement Regarding the Proposed Amalgamation of Modular Space Corporation and Williams Scotsman International, Inc.* (June 23, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04107.html>; Press Release, CCB, *Competition Bureau Does Not Oppose Hydro One's Acquisition of Great Lakes Power* (July 8, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04115.html>.

40. Press Release, CCB, *Competition Bureau Withdrawing its Court Challenge of Staples' Acquisition of Office Depot* (May 19, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04080.html>.

41. The efficiencies defence was established in Canada notwithstanding a challenge by the FTC in the United States and the subsequent abandonment of the transaction by the parties. See Position Statement, CCB, *Competition Bureau Statement Regarding Superior's Proposed Acquisition of Canexus* (June 28, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html>.

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The Bureau obtained six gas station divestitures from Parkland regarding its acquisition of Pioneer;<sup>42</sup> six local divestitures from Iron Mountain regarding its acquisition of Recall;<sup>43</sup> two pharmaceutical product divestitures from Teva regarding its acquisition of Allergan;<sup>44</sup> three location/asset divestitures from Crop Production Services (CPS) regarding its acquisition of WendlandAg;<sup>45</sup> four location divestitures from CPS again regarding its acquisition of Andrukow Group Solutions;<sup>46</sup> two gas station/supply agreement divestitures from Harnois regarding its acquisition of Therrien's gasoline supply agreements;<sup>47</sup> and two gas station divestitures from Couche-Tard regarding its acquisition of gas stations from Imperial Oil.<sup>48</sup>

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

2016 saw further guilty pleas related to the Québec construction industry, related to bid-rigging for sewer services,<sup>49</sup> as well as to bid-rigging for a private ventilation contract.<sup>50</sup>

Concerning the ongoing auto parts investigation, Shinowa was fined \$13 million by the Ontario Superior Court of Justice for bid-rigging related to

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42. Press Release, CCB, Competition Bureau and Parkland Reach Mediated Resolution That Will See Gas Stations and Assets Sold in Ontario and Manitoba (Mar. 29, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04049.html>; Commissioner of Competition v. Parkland Industries Ltd. and Parkland Fuel Corp. (2016), Consent Agreement, Comp. Trib., File No. CT-2015-003 (Can.), [http://www.ct-tc.gc.ca/CMFiles/CT-2015-003\\_Registered%20Consent%20Agreement\\_113\\_38\\_3-29-2016\\_2824.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2015-003_Registered%20Consent%20Agreement_113_38_3-29-2016_2824.pdf).

43. Position Statement, CCB, *Competition Bureau Statement Regarding Iron Mountain's Acquisition of Recall* (Mar. 31, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04055.html>.

44. Position Statement, CCB, *Competition Bureau Statement Regarding Teva's Acquisition of Allergan's Generic Pharmaceuticals Business* (Apr. 28, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04065.html>.

45. Position Statement, CCB, *Competition Bureau Statement Regarding the Acquisition of WendlandAg's Agri-product Retail Locations by CPS* (May 2, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04070.html>.

46. Position Statement, CCB, *Competition Bureau Statement Regarding CPS' Proposed Acquisition of Andrukow* (Sept. 1, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04135.html>.

47. Position Statement, CCB, *Competition Bureau Statement Regarding Le Groupe Harnois Inc.'s Proposed Acquisition of Distributions Petrolieres Therrien Inc.'s Gasoline Supply Arrangements* (June 23, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04106.html>.

48. Position Statement, CCB, *Competition Bureau Statement Regarding Couche-Tard's Proposed Acquisition of Retail Gasoline Sites from Imperial Oil* (Sept. 7, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04137.html>.

49. Press Release, CCB, Quebec Company Fined \$118,000 For Participating in Sewer Services Cartel (Feb. 8, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04028.html>.

50. Press Release, CCB, Bid-Rigging Scheme Leads to \$140,000 Fines for Quebec Company and its President (Mar. 14, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04042.html>.

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electronic power steering gears.<sup>51</sup> Nishikawa Rubber pled guilty and was fined USD \$130 million in the United States related to sales in both Canada and the US.<sup>52</sup>

**D. ABUSE OF DOMINANCE**

In April 2016, the Competition Tribunal (Tribunal) found that the Toronto Real Estate Board (TREB) had engaged in abuse of dominance by restricting access to and use of proprietary Multiple Listing Service data, adversely affecting innovation, quality, and range of real estate brokerage services in Toronto.<sup>53</sup> Although TREB did not itself compete in the adversely affected market,<sup>54</sup> the Tribunal found that it had a “plausible competitive interest” in protecting some of its members from new entrants in that market.<sup>55</sup> Following this decision, the Bureau commenced an application against the Vancouver Airport Authority for restricting access for the supply of in-flight catering at Vancouver International Airport, another market in which the alleged dominant firm did not compete.<sup>56</sup>

In 2016, the Bureau closed its investigation into Google’s online search services<sup>57</sup> and TMX Group’s restrictions on market data.<sup>58</sup>

**E. COURT DECISIONS**

In 2015, the Ontario Court of Appeal ruled that the “discoverability” principle<sup>59</sup> applied to private actions for damages based on the breach of the cartel conspiracy provisions of the Act, potentially extending the time to

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51. Press Release, CCB, Japanese Auto Parts Company Fined \$13 Million for Participating in a Bid-Rigging Conspiracy (Apr. 1, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04058.html>.

52. Press Release, CCB, Unprecedented Cooperation with US Antitrust Enforcement Authority Leads to Major Cartel Crackdown (July 20, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04122.html>.

53. Commissioner of Competition v. Toronto Real Estate Board, 2016 Comp. Trib. 7, para. 2, 3, 4 (Can.).

54. *Id.* ¶1.

55. *Id.* ¶ 279-80.

56. Press Release, CCB, Competition Bureau Takes Action Against Vancouver Airport Authority (Sept. 29, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04144.html>.

57. Position Statement, CCB, *Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by Google* (Apr. 19, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html>.

58. Position Statement, CCB, *Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by TMX Group Limited* (Nov. 21, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04157.html>.

59. The discovery principle is a common law rule which provides that a limitation period begins to run not necessarily from the defendant’s conduct but from when “the material facts on which [the claim] is based are have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.” See *Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation, et al.*, 2016 ONCA 621, para. 32 (Can.).

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advance claims.<sup>60</sup> In the same case, the court also ruled that the statutory cause of action in the Act did not foreclose the ability of the plaintiff to claim damages pursuant to tort law.<sup>61</sup>

In certifying the cathode ray tube class action, the Ontario Superior Court of Justice held that “umbrella” purchasers (who purchased alleged cartelized products from non-defendants) had valid causes of action against the named defendants pursuant to restitutionary law.<sup>62</sup>

## V. China<sup>63</sup>

### A. LEGISLATIVE DEVELOPMENTS

In 2016, the Draft Amendment of the PRC Anti-Unfair Competition Law (the law hereinafter the “AUCL”, the draft amendment hereinafter the “Draft Amendment”) passed State Council review and is anticipated to be adopted as law during 2017.<sup>64</sup> Notably, the Draft Amendment introduces two controversial new unfair competition behaviors, i.e., abuse of superior market position and unfair competition involving the internet.

### B. MERGERS

In the first three quarters of 2016, the Ministry of Commerce (“MOFCOM”) unconditionally cleared 259 merger cases,<sup>65</sup> including 197 cases under its simple case procedure.<sup>66</sup> Most cases under the simplified procedure were cleared within phase I of the statutory review period.

In 2016, MOFCOM imposed conditions only on one merger case, while also lifting conditions previously imposed in another case. In SABMiller/Anheuser-Busch InBev, MOFCOM required that SABMiller divest its 49% interest in China Resources Snow Breweries to its JV partner.<sup>67</sup> This is the first MOFCOM published decision distinguishing relevant product markets

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60. *See id.*

61. *See id.* ¶ 85.

62. *Fanshawe College v. Hitachi, Ltd. et al.*, 2016 ONSC 5118, paras. 46-47 (Can. Ont. Sup. Ct. J.).

63. This section on China was authored by Peter Wang & Yizhe Zhang, China.

64. *See* (中华人民共和国反不正当竞争法 (修订草案送审稿)) [Draft Amendment of PRC Anti-Unfair Competition Law] (promulgated by State Council Legis. Office, Feb. 25, 2016) (China).

65. *The List of Concentration Cases Approved by the Operators in the First Quarter of 2016*, MOFCOM (Apr. 6, 2016 3:51 PM), <http://fldj.mofcom.gov.cn/article/zcfb/201604/20160401290524.shtml>; *The List of Concentration Cases Approved by the Operators in the Second Quarter of 2016*, MOFCOM (July 5, 2016 2:16 PM), <http://fldj.mofcom.gov.cn/article/zcfb/201607/20160701353023.shtml>; *The List of Concentration Cases Approved by the Operators in the Third Quarter of 2016*, MOFCOM (Oct. 10, 2016 8:48 AM), <http://fldj.mofcom.gov.cn/article/zcfb/201610/20161001405824.shtml>.

66. *Operators Focused on Simple Cases*, MOFCOM (last visited Apr. 15, 2017), <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/>.

67. *See Ministry of Commerce Announcement No. 38 of 2016*, MOFCOM (July 29, 2016 6:21 PM), <http://fldj.mofcom.gov.cn/article/ztxx/201607/20160701369044.shtml>.

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based on mass versus mid-to-high-end brands and defining geographic markets according to individual Chinese provinces rather than as China-wide.

MOFCOM published three penalty decisions for transactions that were not properly notified. Two of those cases involved joint ventures,<sup>68</sup> while the third involved gun-jumping in a two-step acquisition.<sup>69</sup> In all three cases, MOFCOM found that the unnotified transactions did not give rise to competition concerns, and thus only imposed fines and did not require reversal of the transactions.

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

In 2016, the National Development and Reform Commission (“NDRC”), the antitrust authority responsible for price-related conduct violations, issued large fines in several high-profile cases, including: (1) a fine of RMB 12 million against Haier for restricting the minimum resale price, in a case where the NDRC explicitly cited as evidence screenshots of text and chat messages contained on employees’ personal devices;<sup>70</sup> (2) a fine of RMB 2.96 million against five natural gas suppliers, including two subsidiaries of China National Petroleum Corp., for abusing their dominant positions in the construction of non-residential natural gas networks in local markets;<sup>71</sup> (3) a fine of RMB 1,686,900 against Chongqing Qingyang Pharmaceutical and a fine of RMB 118,300 against Chongqing Datong Pharmaceutical for price fixing and market division,<sup>72</sup> where the NDRC regarded the two affiliated companies as single economic entity due to their common largest shareholder and common sales manager.

The State Administration of Industry and Commerce (“SAIC”), the antitrust authority responsible for non-price-related conduct violations, fined Tetra Pak RMB 667.7 million for abuse of dominant market position.

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68. See *Ministry of Commerce Administrative Penalty Decision (Commercial Law [2016] No. 174*, MOFCOM (May 4, 2016 2:15 PM), <http://fdj.mofcom.gov.cn/article/ztxx/201605/20160501311081.shtml>; *Ministry of Commerce Administrative Penalty Decision (Commercial Law [2016] No. 175*, MOFCOM (May 4, 2016 2:11 PM), <http://fdj.mofcom.gov.cn/article/ztxx/201605/20160501311092.shtml>.

69. See *Ministry of Commerce Administrative Penalty Determination Letter (Commercial Law [2016] No. 173*, MOFCOM (May 4, 2016 2:03 PM), <http://fdj.mofcom.gov.cn/article/ztxx/201605/20160501311079.shtml>.

70. See *Shanghai Municipal Bureau of Price Administration on the Decision on the Administrative Penalty (Chongqing, Japan and Japan Daily Necessities Sales Co., Ltd. Shanghai Branch, and Three Other Companies*, NAT’L DEV. & REFORM COMM’N (Aug. 12, 2016 10:21 AM), <http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjds/24137.htm?sukey=3997c0719f151520d9d8ab22467f976c98c4d515fe7612d065f5b252164f77246e2681dc3fe38a088feeff499b492570>.

71. See Press Release, NDRC, Hubei Provincial Price Bureau on the Five Natural Gas Company Price Monopoly Punishment (July 12, 2016), [http://www.sdpc.gov.cn/xwzx/xwfb/201607/t20160712\\_811004.html](http://www.sdpc.gov.cn/xwzx/xwfb/201607/t20160712_811004.html).

72. See *Decision of the National Development and Reform Commission on Administrative Punishment [2016] No. 1*, NAT’L DEV. & REFORM COMM’N (Feb. 2, 2016), [http://www.sdpc.gov.cn/fzgggz/jgdyfld/fjgld/201602/t20160202\\_774116.html](http://www.sdpc.gov.cn/fzgggz/jgdyfld/fjgld/201602/t20160202_774116.html).



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This is the highest fine imposed by SAIC to date, representing 7 percent of Tetra Pak's relevant sales in China during 2011. The accused conduct included incentives that Tetra Pak employed—performance testing, warranty limitations, accumulative volume discounts, and customized purchase requirements—to encourage customers owning or leasing Tetra Pak packaging equipment to also purchase Tetra Pak's packaging materials and aftermarket services.<sup>73</sup>

**D. COURT DECISIONS**

As of November 28, 2016, courts nationwide had published 611 unfair competition and antitrust decisions, fifteen of which were issued under the Anti-Monopoly Law (“AML”).<sup>74</sup>

In *Yingding v. Sinopec*, plaintiff Yunnan Yingding Bio-energy, a privately-owned bioenergy manufacturer, alleged that Sinopec, a major state-owned oil company, and its Yunnan branch abused their dominant market position by refusing to incorporate plaintiff's biofuel into Sinopec's distribution system without justification. In 2014, the Kunming Intermediate People's Court ruled in favor of the plaintiff. In 2015, the Yunnan High People's Court reversed the first-instance decision and remanded the case.<sup>75</sup> In 2016, the Kunming Intermediate People's Court rejected all the plaintiff's claims, finding no abuse of dominance on the grounds that (1) although the defendants had a duty to purchase biofuel from the plaintiff under the energy laws, the lack of implementing rules regarding the sales amount, price, and methods had rendered the defendants practically unable to establish a transactional relationship with the plaintiff, so defendants did not violate such duty by refusing to do so because their refusal to deal was due to objective reasons; and (2) there was no competition relationship between the parties regarding the sales of biofuel so the defendants' conduct did not give rise to negative effect on competition.<sup>76</sup>

*Junwei TIAN vs. Abbott* is the first follow-on antitrust civil litigation filed by a consumer following an earlier NDRC decision against baby formula manufacturers including Abbott. The Beijing High People's Court ruled that the NDRC decision did not identify Carrefour as the other party that agreed with Abbott to implement resale price maintenance, and thus the plaintiff failed to prove the existence of an anticompetitive agreement

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73. See *State Administration for Industry and Commerce Administrative Penalty Decision (Industrial and Commercial Case [2016] No. 1)*, SAIC (Nov. 16, 2016), [http://www.saic.gov.cn/zwgk/gggs/jzzf/201611/t20161116\\_172375.html](http://www.saic.gov.cn/zwgk/gggs/jzzf/201611/t20161116_172375.html).

74. See CHINA REFERENCE DOCUMENTS NETWORK, <http://wenshu.court.gov.cn/>.

75. See *Yingding v. Sinopec* (Yunnan Higher People's Ct. Aug. 13, 2015) (China), available at [http://www.pkulaw.cn/case/pfnl\\_1970324845016952.html?keywords=%E4%BA%91%E5%8D%97%E7%9B%88%E9%BC%8E&match=Exact&tiao=1](http://www.pkulaw.cn/case/pfnl_1970324845016952.html?keywords=%E4%BA%91%E5%8D%97%E7%9B%88%E9%BC%8E&match=Exact&tiao=1).

76. See *Yunnan Trench Oil Biodiesel Private Enterprises in the Petrochemical Refusal to Resume Trial Will Still Appeal*, XINHUA NEWS AGENCY (Nov. 26, 2016 4:50 PM), [http://news.xinhuanet.com/legal/2016-11/02/c\\_1119837390.htm](http://news.xinhuanet.com/legal/2016-11/02/c_1119837390.htm).

between Abbott and Carrefour.<sup>77</sup> Therefore, the plaintiff did not establish that he suffered loss from his purchase of Abbott product at Carrefour as a result of Abbott's violation of the AML.

## **VI. European Union<sup>78</sup>**

### **A. LEGISLATIVE DEVELOPMENTS**

Aside from facing the unprecedented challenge of handling the UK's Brexit vote, the European Commission (EC) has continued other policy efforts this year. It released the preliminary results of its sector inquiry into online commerce and digital markets, finding that obstacles remain to achieving a borderless EU-wide marketplace and signaling the potential for follow-up enforcement.<sup>79</sup> The EC also encouraged national governments to speed up efforts to bring their legal systems in line with EU principles before the end of the year, to further facilitate antitrust damage litigation.<sup>80</sup>

### **B. MERGERS<sup>81</sup>**

The ongoing wave of telecom transactions has continued to attract close scrutiny after the EC blocked Hutchison's proposed acquisition of Telefonica UK, a decision which Hutchison is challenging before the EU courts. The EC cleared the proposed Italian joint venture between Vimpelcom and Hutchinson, as well as Belgian operator Telenet's takeover of BASE, but only after in-depth investigations and securing fix-it-first divestments to allow for the creation of new market operators. The deals also further fueled the broader political debate on pan-European telecom integration.

Consolidation in the agrochemical space has equally triggered mounting attention as the EC opened an in-depth investigation into ChemChina's planned takeover of Syngenta and twice prolonged its ongoing review of the planned Dow-Dupont merger.

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77. See Junwei TIAN v. Abbott (Beijing Higher People's Ct. Nov. 4, 2016) (China), *available at* <http://wenshu.court.gov.cn/content/content?DocID=7ad234f9-cfdc-453a-ae0a-a8f22dc22004>.

78. The section on the European Union was authored by Laurie-Anne Grelier & Peter Camesasca, Covington & Burling.

79. Margrethe Vestager, Comm'r, *E-commerce: A Fair Deal for Consumers Online*, Speech at the Stakeholder Conference on Preliminary Findings of the E-commerce Sector Inquiry (Oct. 6, 2016), *available at* [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/e-commerce-fair-deal-consumers-online\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/e-commerce-fair-deal-consumers-online_en).

80. Margrethe Vestager, Comm'r, *Defending Competition throughout the EU*, Speech at the Eur. Competition Day (Nov. 23, 2016), *available at* [https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-throughout-eu\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-throughout-eu_en).

81. See *Merger Cases*, Eur. Comm'n, <http://ec.europa.eu/competition/mergers/cases/> (listing merger cases starting from Sept. 21, 1990).

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C. ANTI-COMPETITIVE PRACTICES

Cartel fine levels broke new records as the EC imposed fines totaling 2.9 billion (approximately US\$3.2 billion) against five companies allegedly involved in the Trucks cartel case, the largest amount fined in a single case. The EC has issued three other cartel decisions thus far in 2016, levying fines totaling nearly 150 million (approximately US\$167 million).<sup>82</sup>

The EC also issued its first decision on the controversial issue of price signaling since the Wood Pulp setback more than 20 years ago. It accepted commitments from 14 container shipping carriers to modify their public price announcements, and closed its investigation without making any infringement determination.<sup>83</sup>

D. ABUSES OF A DOMINANT POSITION

Continuing investigations against Google that it commenced in 2010, the EC supplemented its initial charges against the technology company by forming a preliminary conclusion that Google had favoured its own internet comparison shopping products in search result pages. The EC also issued new charges targeting the company's practices towards third parties in online search advertising.<sup>84</sup>

E. COURT DECISIONS

In the first EU judgment on reverse-payment patent settlements, the General Court (GC) upheld the EC's 146 million fine (approximately US\$162 million) against Lundbeck and four generic producers for agreements allegedly aimed at delaying generic entry for citalopram. The GC found that the agreements amounted to market sharing between rivals, such that the EC did not need to demonstrate that they adversely affected competition.<sup>85</sup>

The EU's highest court, the Court of Justice, clarified in *VM Remonts* the conditions under which companies can be accountable for their independent agents' anticompetitive actions.<sup>86</sup> It also gave guidance in *Eturas* to assess

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82. Press Release, Comm'r Vestager, Statement by Commissioner Vestager on decision to fine truck producers 2.93 billion for participating in a cartel (Jul. 19, 2016), available at [http://europa.eu/rapid/press-release\\_STATEMENT-16-2585\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-16-2585_en.htm).

83. Press Release, Eur. Comm'n, Antitrust: Commission accepts commitments by container liner shipping companies on price transparency (Jul. 7, 2016), available at [http://europa.eu/rapid/press-release\\_IP-16-2446\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2446_en.htm).

84. Press Release, Eur. Comm'n, Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules (Jul. 14, 2016), available at [http://europa.eu/rapid/press-release\\_IP-16-2532\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2532_en.htm).

85. Case T-472/13, *H. Lundbeck A/S and Lundbeck Ltd. v. Comm'n*, EU:T:2016:449, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183148&pageIn dex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=389862>.

86. Case C-542/14, *SIA 'VM Remonts', formerly SIA 'DIV un KO' and SIA 'Ausma grupa', v. Konkurences padome, and Konkurences padome, v. SIA 'Pārtikas kompānija'*, EU:C:2016:578,

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competitor coordination through online platforms and the platform provider's facilitator role.<sup>87</sup>

## VII. India<sup>88</sup>

### A. LEGISLATIVE DEVELOPMENTS

This year witnessed a number of measures to further liberalize merger provisions. The Government extended the target based *de minimis* exemption from filing for acquisitions, while also increasing the thresholds. The regular merger notification thresholds contained in the *Competition Act* were also enhanced substantially. The Government additionally exempted groups exercising less than 50% of voting rights from the application of section 5 of the *Competition Act*.<sup>89</sup> The Competition Commission of India (CCI) amended its merger regulations to clarify the conditions for the exemption from filing for minority acquisitions, provide parties a right of hearing before invalidation of a filing, further ease the filing process, and clarify the trigger document for filing in the absence of a binding agreement.<sup>90</sup>

### B. CARTELS AND OTHER AGREEMENTS

After the Competition Appellate Tribunal (COMPAT) set aside fines imposed by the CCI on cement companies on procedural grounds last year, the CCI re-heard the parties and issued a fresh decision. This decision imposed penalties of USD 1 billion on ten cement companies and their trade association for indulging in price-fixing and sharing of commercially sensitive information.<sup>91</sup> Trade associations continued to be on the CCI's radar as it imposed penalties for controlling entry into the market on a chemist and druggist association in Karnataka. Lupin, a pharmaceutical

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*available at* <http://curia.europa.eu/juris/document/document.jsf?text=&docid=181950&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=397904>.

87. Case C-74/14, 'Eturas' UAB and Others v. Lietuvos Respublikos konkurencijos taryba, EU:C:2016:42, *available at* <http://curia.europa.eu/juris/document/document.jsf?text=&docid=173680&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=447079>.

88. The section on India was authored by Vinod Dhall and Mansi Tewari.

89. Ministry of Corporate Affairs, 2016, Gazette of India, pt. II sec. 3(ii) (Mar. 4, 2016), <http://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf>.

90. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016, Gazette of India, pt. III sec. 4 (Jan. 7, 2016), [http://www.cci.gov.in/sites/default/files/regulation\\_pdf/167506.pdf](http://www.cci.gov.in/sites/default/files/regulation_pdf/167506.pdf).

91. *In re: Alleged Cartelisation by Cement Manufacturers* (2016) RTPE No. 52 of 2006, MRTPE Comm'n, *available at* [http://cci.gov.in/sites/default/files/522006\\_1.pdf](http://cci.gov.in/sites/default/files/522006_1.pdf).

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

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company was also penalized in this case for entering into an anti-competitive agreement with the association.<sup>92</sup>

C. MERGERS

The CCI imposed a hybrid remedies package as a condition for approval of PVR's proposed acquisition of multiplex/single screen cinema halls from DT Cinemas. Apart from directing the parties to exclude certain assets from the scope of the deal, the CCI imposed commitments on the parties, including an undertaking not to expand in the affected relevant markets for five years, modification of the non-compete clause, and removal of a right of first offer to PVR for the seller's future projects.<sup>93</sup>

D. DOMINANCE

The CCI initiated an investigation against the Gas Authority of India Limited for alleged abuse of dominance by imposing one-sided and discriminatory terms in its dealings with customers.<sup>94</sup>

E. COURT DECISIONS

The Delhi High Court brought much needed clarity on the issue of interaction between patent law and competition law by ruling that the CCI has jurisdiction to investigate cases of abuse of dominance by standard essential patent holders. It also noted that although the two overlap to some extent, there is no irreconcilable conflict between patent law and competition law in India.<sup>95</sup>

The CCI suffered setbacks when the COMPAT set aside several of its decisions, both on procedural and substantive grounds. The CCI's penalty of USD 258 million imposed on Coal India for abuse of dominance was set aside on due process grounds, as a few members of the CCI who signed the order were not present during the hearings. COMPAT also set aside the

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92. *M/s Maruti & Company v. Karnataka Chemists & Druggists Association and Others* (2016) Case No. 71 of 2013, Competition Comm'n of India, at 38, 43-44, *available at* <http://www.cci.gov.in/sites/default/files/712013.pdf>.

93. Notice under Section 6(2) of the Competition Act, 2002 given by PVR Ltd., 2016, C-2015/07/288, at 5-6 of Appendix-A, *available at* [http://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/C-2015-07-288.pdf](http://www.cci.gov.in/sites/default/files/Notice_order_document/C-2015-07-288.pdf).

94. *In Re: Rico Auto Industries Limited, In Re: Omax Autos Limited, In Re: Omax Autos Limited, In Re: Rico Auto Industries Limited, In Re: Rico Castings Limited v. GAIL (India) Limited* (2016) Cases No. 16, 17, 18, 19 and 20 of 2016, Competition Comm'n of India, at 4, 13-14, *available at* [http://www.cci.gov.in/sites/default/files/Case%2016-20\\_2016%20S%2026%281%29%2003102016.pdf](http://www.cci.gov.in/sites/default/files/Case%2016-20_2016%20S%2026%281%29%2003102016.pdf).

95. *Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Comm'n of India and Another*, W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014, at 129-30, 161, High Ct. of Delhi (Mar. 30, 2016), <http://lobis.nic.in/dair/dhc/VIB/judgement/30-03-2016/VIB30032016CW4642014.pdf>.

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penalties on Sanofi and GlaxoSmithKline for alleged bid rigging, due to the lack of sufficient evidence.<sup>96</sup>

### **VIII. Japan<sup>97</sup>**

#### **A. LEGISLATIVE DEVELOPMENTS**

In May, the Japan Fair Trade Commission (JFTC) amended the “Guidelines Concerning Distribution Systems and Business Practices Under the *Antimonopoly Act*” to broaden the scope of conduct that falls within the “safe harbor”<sup>98</sup> of the Guidelines. According to the new guidelines, some types of non-price related restrictions on distributors (such as restrictions on selling competitive products and area of distribution) will not be illegal if they are imposed by a business entity which is a new entrant in the market or which has a market share of 20% or less.<sup>99</sup>

#### **B. MERGERS**

In 2016, the JFTC cleared two cases after Phase II review without conditions: the acquisition of shares by Osaka Steel in Tokyo Kohtetsu, and the business alliance between Nippon Paper Industries and Tokushu Tokai Paper.<sup>100</sup> Several other Phase II cases, including the contemplated business integration between JX Group and Tonen General Group,<sup>101</sup> are still pending as of the date of this writing.

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96. Competition Appellate Tribunal New Delhi, In the Matter of GlaxoSmithKline Pharmaceuticals Ltd. v. Competition Comm’n of Ind., Bio-Med (P) Ltd., Sanofi Pasteur Ind. Private Ltd., & Director General (Stores), Medical Store Depot, Ministry of Health and Family Welfare, Appeal No. 85/2015 at 144-46 (Nov. 8, 2016), *available at* <http://compat.nic.in/Judgements.aspx>.

97. The section on Japan was authored by Shigeyoshi Ezaki, Anderson Mori & Tomotsune.

98. Prior to the amendment, the safe harbor was a market share of less than 10% and ranking lower than 4th place in the relevant market. See Jones Day, *Partial Amendments to the “Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act”*, JAPAN LEGAL UPDATE, July 2016, vol. 16, <http://www.jonesday.com/files/Publication/4cb3f87f-5e37-448e-b2d0-17f048aaf296/Presentation/PublicationAttachment/40b908ba-be8f-4a21-a8f5-3149cc2de755/Japan%20Legal%20Update%20July%202016.pdf>.

99. Press Release, Secretary General of the Japan Fair Trade Comm’n, Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act, at 34 (May 27, 2016), *available at* [http://www.jftc.go.jp/en/pressreleases/yearly-2016/May/160527.files/160527\\_2.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2016/May/160527.files/160527_2.pdf).

100. See Press Release, Japan Fair Trade Comm’n, The JFTC Reviewed the Proposed Acquisition of Shares of Tokyo Kohtetsu Co., Ltd. by Osaka Steel Co., Ltd. (Jan. 28, 2016), *available at* <http://www.jftc.go.jp/en/pressreleases/yearly-2016/January/160128.html>; See also Press Release, Japan Fair Trade Comm’n, The JFTC Reviewed the Proposed Transactions including Establishment of Joint Selling Company for Containerboards etc by Nippon Paper Industries Co., Ltd. and Tokushu Tokai Paper Co., Ltd. (Mar. 18, 2016), *available at* <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160318.html>.

101. Press Release, Japan Fair Trade Comm’n, The JFTC Opens Secondary Review Concerning the Proposed Business Integration Between JX Group and TonenGeneral group

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In June, the JFTC made an unusual statement on Canon's acquisition of share options in Toshiba Medical Systems, stating that the acquisition was part of an entire acquisition scheme. As Canon failed to notify the JFTC of the acquisition, the JFTC considered that such activity could lead to a possible violation of the *Antimonopoly Act*. Though the JFTC decided not to impose a penalty in this case, it issued a caution to Canon and warned companies to notify the JFTC prior to entering similar transactions.<sup>102</sup>

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March, the JFTC imposed administrative fines of approximately JPY 6.7 billion to five out of seven manufacturers of aluminum and tantalum electrolytic capacitor products that were investigated for cartel conduct.<sup>103</sup> This is the only decision JFTC issued in 2016 that involved an international cartel.

In November, the JFTC made an announcement that the conduct of One-Blue LLC, a patent pool of standard essential patents (SEPs) relating to Blu-ray discs, constituted an unfair trade practice under the Antimonopoly Act.<sup>104</sup> According to the JFTC, One-Blue, whose patent holders declared that they will license the SEPs on FRAND terms but were not able to reach a license-fee agreement with Imation (a manufacturer of Blu-ray discs), unlawfully interfered in the transactions between Imation and its distributors in Japan. One-Blue's conduct involved sending letters to these distributors, warning that the patent holders had a right to demand an injunction against them. The JFTC, however, merely made the above announcement and did not issue an order against One-Blue, as it had discontinued the conduct in question.

D. COURT DECISIONS

In January, the Tokyo Appellate Court rejected an appeal from Samsung SDI (Malaysia) Bhd. in a cartel case relating to the production and sale of television cathode-ray tubes (CRTs) by foreign companies such as Samsung.<sup>105</sup> Samsung disputed the JFTC's ability to apply the *Antimonopoly*

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and Solicits Comments from Third Parties (Mar. 30, 2016), *available at* <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160330.html>.

102. Press Release, Japan Fair Trade Comm'n, Regarding the proposed acquisition of shares of Toshiba Medical Systems Corporation by Canon Inc. (Jun. 30, 2016), *available at* <http://www.jftc.go.jp/en/pressreleases/yearly-2016/June/160630.html>.

103. Press Release, Japan Fair Trade Comm'n, The JFTC Issues Cease and Desist Orders and Surcharge Payment Orders to the Manufacturers Selling Aluminum Electrolytic Capacitor and Tantalum Electrolytic Capacitor (Mar. 29, 2016), *available at* <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160329.html>.

104. Press Release, Japan Fair Trade Comm'n, Closing the investigation on the suspected violation by One-Blue, LLC of the Antimonopoly Act (Nov. 18, 2016), *available at* <http://www.jftc.go.jp/en/pressreleases/yearly-2016/November/161118.html>.

105. In 2009 and 2010, the JFTC ordered administrative fines of approximately JPY 4.2 billion against six CRT manufacturers that were involved in a cartel conduct to manipulate the prices

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*Act* to foreign companies.<sup>106</sup> The Tokyo Appellate Court ruled that the *Antimonopoly Act* was applicable because the cartel was targeting the Japanese television manufacturers who were the main purchasers of the CRTs.<sup>107</sup>

## **IX. Korea<sup>108</sup>**

### **A. LEGISLATIVE DEVELOPMENTS**

During 2016, the Korea Fair Trade (KFTC) made a series of amendments to the leniency regime in cartel investigations. As part of these changes, on March 29, 2016, the Monopoly Regulation and Fair Trade Law (FTL) was amended to introduce a new provision that denied leniency benefits to an applicant that had previously benefitted from the program in the last five years.<sup>109</sup> Effective April 15, 2016, the KFTC further amended the regime to require officers or employees of the applicant to attend the KFTC hearing and imposed non-disclosure obligations.

On July 26, 2016, the KFTC proposed to amend the Fair Transactions in Franchise Business Act to, among other things, toll the statute of limitations on claims that may be brought before judicial courts while mediation is pending.<sup>110</sup>

### **B. MERGERS**

In 2016, the KFTC remained active and continued to strengthen its review of global mergers and acquisitions. During the first half of 2016, KFTC reviewed a total of 272 business combination filings totalling KRW

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of CRTs. This was the first time the JFTC ordered fines against foreign companies. These orders were upheld at the subsequent hearing procedures of the JFTC. See Josh Gottlieb, *Appeals against JFTC fines for foreign CRT cartel go down the tube*, LEXOLOGY, June 8, 2015, <http://www.lexology.com/library/detail.aspx?g=67a9b94c-cd0b-450b-922b-ac138e694f1f>.

106. In 2009 and 2010, the JFTC ordered administrative fines of approximately JPY 4.2 billion against six CRT manufacturers that were involved in a cartel conduct to manipulate the prices of CRTs. This was the first time the JFTC ordered fines against foreign companies. These orders were upheld at the subsequent hearing procedures of the JFTC. See Josh Gottlieb, *Appeals against JFTC fines for foreign CRT cartel go down the tube*, LEXOLOGY, June 8, 2015, <http://www.lexology.com/library/detail.aspx?g=67a9b94c-cd0b-450b-922b-ac138e694f1f>.

107. The summary of the Jan. 29, 2016 Tokyo Appellate Court decision is found in JFTC's Feb. 9, 2016 issue, *available at* LEX/DB L07120373, <http://www.jftc.go.jp/houdou/merumaga/backnumber/2016/160209.html>.

108. The section on Korea was authored by Youngjin Jung & Gina Jeehyun Choi, Kim & Chang.

109. See KFTC Press Release on Monopoly Regulation and Fair Trade Law, 28 April 2016, *available at* [http://www.ftc.go.kr/policy/legi/legiView.jsp?lgslt\\_noti\\_no=218&type\\_cd=&currpage=4&searchKey=&searchVal=&search\\_start\\_date=&search\\_end\\_date](http://www.ftc.go.kr/policy/legi/legiView.jsp?lgslt_noti_no=218&type_cd=&currpage=4&searchKey=&searchVal=&search_start_date=&search_end_date).

110. See KFTC Press Release on Fair Transactions in Franchise Business Act, 26 July 2016, *available at* [http://www.ftc.go.kr/news/ftc/reportboView.jsp?report\\_data\\_no=6864&tribu\\_type\\_cd=&report\\_data\\_div\\_cd=&currpage=1&searchKey=&searchVal=&search\\_start\\_date=&search\\_end\\_date=](http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6864&tribu_type_cd=&report_data_div_cd=&currpage=1&searchKey=&searchVal=&search_start_date=&search_end_date=).

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266 trillion, of which 63 combinations (aggregate value of KRW 253 trillion) involved an overseas entity.<sup>111</sup>

The KFTC, in conjunction with the U.S. Department of Justice and MOFCOM also probed into the proposed merger of Lam Research Corp. (“Lam”) and KLA-Tencor Corp. (“KLA-Tencor”). After nearly ten months, Lam and KLA-Tencor formally withdrew their application for approval of the business combination and called off the merger.<sup>112</sup>

In November of 2016, the KFTC imposed a corrective order regarding the asset swap deal between Boehringer Ingelheim International GmbH and Sanofi SA and ordered one of the companies to sell off its assets in Korea related to certain pet pharmaceutical products.<sup>113</sup>

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

In March 2016, the KFTC imposed a KRW 59 million fine against two financial institutions in Korea for colluding on foreign exchange swap bids.<sup>114</sup> This was the first time the KFTC imposed a fine against banks for colluding in the foreign exchange market.

In April 2016, the KFTC imposed a combined fine of KRW 351.6 billion against thirteen construction companies, including Samsung C&T and Hyundai Engineering & Construction, for bid rigging projects to construct liquefied natural gas (LNG) tanks.<sup>115</sup>

**D. DOMINANCE**

In February 2016, the KFTC imposed a fine of KRW 3.2 billion against Incheon International Airport Corp. (“Incheon Airport”) for abusing its

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111. See Press Release, KFTC, 2016년 상반기 기업결합 동향 [Trend of Business Combination – 1H 2016] (Sept. 13, 2016), available at [http://www.ftc.go.kr/news/ftc/reportboView.jsp?report\\_data\\_no=6927&tribu\\_type\\_cd=&report\\_data\\_div\\_cd=&currpage=1&searchKey=3&searchVal=기업결합&startdate=&enddate=](http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6927&tribu_type_cd=&report_data_div_cd=&currpage=1&searchKey=3&searchVal=기업결합&startdate=&enddate=).

112. See Press Release, KFTC, 세계 2, 5위 글로벌 반도체 제조장비 업체 간 합병 철회 건 [The Withdrawal of LAM Research-KLA Tencor Merger] (Oct. 7, 2016), available at [http://www.ftc.go.kr/news/ftc/reportboView.jsp?report\\_data\\_no=6964&tribu\\_type\\_cd=&report\\_data\\_div\\_cd=&currpage=8&searchKey=&searchVal=&startdate=&enddate=](http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6964&tribu_type_cd=&report_data_div_cd=&currpage=8&searchKey=&searchVal=&startdate=&enddate=).

113. See Press Release, KFTC, 글로벌 동물약품 제조사 간 기업결합에 시정조치 [The Boehringer Ingelheim International GmbH-Sanofi Merger] (Nov. 23, 2016), available at [http://www.ftc.go.kr/news/ftc/reportboView.jsp?report\\_data\\_no=7060&tribu\\_type\\_cd=&report\\_data\\_div\\_cd=&currpage=1&searchKey=3&searchVal=사노피&startdate=&enddate=](http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=7060&tribu_type_cd=&report_data_div_cd=&currpage=1&searchKey=3&searchVal=사노피&startdate=&enddate=).

114. See Press Release, KFTC, 외환스왑 관련 외국계은행 2개 사업자의 부당한 공동행위 건 [Foreign Exchange Swap Bid] (Mar. 15, 2016), available at [http://www.ftc.go.kr/news/ftc/reportboView.jsp?report\\_data\\_no=6615&tribu\\_type\\_cd=&report\\_data\\_div\\_cd=&currpage=32&searchKey=&searchVal=&startdate=&enddate=](http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6615&tribu_type_cd=&report_data_div_cd=&currpage=32&searchKey=&searchVal=&startdate=&enddate=).

115. See Press Release, KFTC, 한국가스공사 발주 LNG 저장탱크 건설공사 입찰 관련 13개 사업자의 [Korea Gas Corporation LNG Tank Bid Rigging Case] (Apr. 26, 2016), available at [http://www.ftc.go.kr/news/ftc/reportboView.jsp?report\\_data\\_no=6701&tribu\\_type\\_cd=&report\\_data\\_div\\_cd=&currpage=26&searchKey=&searchVal=&startdate=&enddate=](http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6701&tribu_type_cd=&report_data_div_cd=&currpage=26&searchKey=&searchVal=&startdate=&enddate=).

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market dominant position against Hanjin Heavy Industries, its contractor in the development of a terminal.<sup>116</sup>

**E. COURT DECISIONS**

On August 17, 2016, the Seoul High Court overturned the corrective orders and administrative fines charged by the KFTC against three commercial freight vehicle manufacturers for allegedly colluding to fix prices.<sup>117</sup>

**X. South Africa<sup>118</sup>**

**A. LEGISLATIVE DEVELOPMENTS**

Criminal liability for certain competition law breaches was introduced in South Africa through section 73A of the Competition Amendment Act, No 1 of 2009.<sup>119</sup> This law provides that directors and persons with management authority which cause a firm to engage in collusion are guilty of an offense and may be liable for a fine and/or imprisonment.<sup>120</sup> The amendment had been on the books, waiting for promulgation, since 2009.

The Competition Commission (Commission) published its final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation.<sup>121</sup> The guidelines are intended to clarify how the Commission will evaluate the public interest consequences of mergers (including impacts on employment).

**B. MERGERS**

The Competition Tribunal (Tribunal) imposed the highest administrative penalty to date for failure to notify a merger and prior implementation when it confirmed a consent agreement between the Competition Commission

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116. See KFTC Press Release on Incheon International Airport's Abuse of Market Dominance Case, 23 February 2016, available at [http://www.ftc.go.kr/news/ftc/reportboView.jsp?report\\_data\\_no=6579&tribu\\_type\\_cd=&report\\_data\\_div\\_cd=&currpage=36&searchKey=searchVal=&state=&enddate=](http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6579&tribu_type_cd=&report_data_div_cd=&currpage=36&searchKey=searchVal=&state=&enddate=).

117. See Seoul High Court Decision, decision numbers 2014nu46951, 2014nu719 and 2014nu41239, 17 Aug. 2016.

118. The section on South Africa was authored by Lara Granville. The Author would like to thank Roxanne Bain for her assistance.

119. Proclamation No. 25 of 2016, GG 39952 (22 April 2016), available at [http://www.gov.za/sites/www.gov.za/files/39952\\_proc25.pdf](http://www.gov.za/sites/www.gov.za/files/39952_proc25.pdf).

120. Section 73A of the Competition Amendment Act, 2009, GN 875 of GG 32533, at 16 (28 August 2009), available at [http://www.gov.za/sites/www.gov.za/files/32533\\_875.pdf](http://www.gov.za/sites/www.gov.za/files/32533_875.pdf).

121. Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998, GN 309 of GG 40039 (31 May 2016), available at [http://www.gov.za/sites/www.gov.za/files/40039\\_gen309.pdf](http://www.gov.za/sites/www.gov.za/files/40039_gen309.pdf).

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and Life Healthcare Group (Proprietary) Limited and Joint Medical Holdings Limited, under which the parties agreed to pay (R10 million).<sup>122</sup>

The Tribunal approved the mergers between Anheuser-Busch Inbev SA/ NV and SABMiller plc (ABInbev/SABMiller)<sup>123</sup> and Coca-Cola Beverages Africa Limited and Various Coca-Cola Bottling and Related Operations (Coca-Cola).<sup>124</sup> Both mergers included the imposition of stringent conditions to address public interest concerns following extensive engagement with the Minister of Economic Development. In ABInbev/ SABMiller, in addition to a moratorium on retrenchments which is to endure indefinitely, the merging parties undertook to invest R1 billion for the development of agricultural outputs and the promotion of black farmers in South Africa. Similarly, in Coca-Cola, the merging parties agreed to establish an enterprise development fund to which they must contribute at least R400 million.

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

After many years of facing multiple competition complaints for its conduct in the flat steel, long steel, and scrap metal sectors, ArcelorMittal South Africa Limited (AMSA) agreed to settle all the complaints against it and pay an administrative penalty of R1.5 billion.<sup>125</sup> This amount is the largest fine for anticompetitive conduct imposed on a single company in South Africa's history. Furthermore, AMSA agreed to cap its profits over a period of five years and committed to R4.5 billion capital expenditure over the same period.

The Commission conducted several dawn raids at companies operating in the glass, packaging, and cargo shipping industries as part of its investigations into alleged anticompetitive practices.<sup>126</sup>

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122. *Competition Comm'n v. Life Healthcare Group Ltd. and Joint Medical Holdings, Ltd.* 2016, Competition Tribunal (S. Afr.), available at [http://www.comptrib.co.za/cases/consent-order/retrieve\\_case/2056](http://www.comptrib.co.za/cases/consent-order/retrieve_case/2056).

123. Anheuser-Busch Inbev SA/NV and Sabmiller PLC, Annexure A: Conditions, LM211JAN16(023283), Competition Tribunal at 10, 19-20, 23, available at <http://www.comptrib.co.za/assets/Uploads/INBEV/Final-Conditions-PUBLIC-VERSION-signature-document-2.pdf>.

124. Mergers and Acquisitions' Report, CT Case No. 021154, Competition Tribunal, at 118 (19 March 2015), available at <http://www.comptrib.co.za/assets/Uploads/Coca-Cola/Non-confidential%20report%20with%20additional%20confidential%20info%20redacted%2020%201%20...pdf>.

125. In the matter between Competition Comm'n of S. Afr. And Arcelorimttal S. Africa Ltd., CR092Jan07/SA090Aug16, Competition Tribunal at 18 (22 Aug. 2016), available at <http://www.compcom.co.za/wp-content/uploads/2016/01/AMSA-Non-Confidential.pdf>.

126. See Media Release, Competition Comm'n Raids Cargo Shipping Companies, Competition Comm'n (28 Sept. 2016), [http://www.compcom.co.za/wp-content/uploads/2016/01/Media-Statement\\_Competition-Commission-raids-cargo-shipping-companies\\_28Sep16.pdf](http://www.compcom.co.za/wp-content/uploads/2016/01/Media-Statement_Competition-Commission-raids-cargo-shipping-companies_28Sep16.pdf); Media Release, Competition Comm'n Raids Offices of Suppliers of Packaging Paper, Competition Comm'n (26 May 2016), <http://www.compcom.co.za/wp-content/uploads/2016/01/Competition-Commission-raids-offices-of-suppliers-of-paper-packaging-products.pdf>.

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The Commission's market inquiries into the healthcare sector, the retail grocery sector and the liquid petroleum gas industry are still ongoing. The healthcare inquiry panel released papers for comment on medical schemes claims data, market definition for the financing of healthcare, and a consumer survey.<sup>127</sup> The retail grocery inquiry panel has received submissions on its statement of issues.<sup>128</sup> The Commission has released draft recommendations in the LPG inquiry.<sup>129</sup>

**D. ABUSES OF DOMINANCE**

Media24 was found to have contravened section 8(c) of the Act by engaging in predatory pricing to force a rival newspaper out of the market.<sup>130</sup> As this was Media24's first contravention of section 8(c), an administrative penalty was not imposed. The Tribunal therefore imposed a "credit guarantee remedy" under which Media24 was to ensure that current or new participants in the relevant market shall be entitled to credit terms with an associate company of Media24. Media 24 has appealed both the finding of a contravention as well as the remedy imposed, while the Commission has lodged a cross-appeal, seeking an order that Media24 contravened section 8(d)(iv) of the Act, namely "selling goods or services below their marginal or average variable cost," rather than section 8(c). This offense trigger an administrative penalty for a first time offender.

**E. Court Decisions**

In August 2016, the High Court of South Africa ordered South African Airways Limited to pay R104.6 million in damages to Nationwide Airlines Proprietary Limited (Nationwide) for abusing its dominance in the airline industry and causing Nationwide's demise.<sup>131</sup>

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127. *Healthcare Inquiry*, THE COMPETITION COMM'N OF S. AFR. (Nov. 18, 2016), <http://www.compcom.co.za/healthcare-inquiry/>.

128. *Retail Market Inquiry*, THE COMPETITION COMM'N OF S. AFR., <http://www.compcom.co.za/retail-market-inquiry/>.

129. *Liquefied Petroleum Gas ("LPG") Market Inquiry*, THE COMPETITION COMM'N OF S. AFR. (May 2016), <http://www.compcom.co.za/wp-content/uploads/2014/09/LPG-Market-Inquiry-recommendations-for-Comments-10052016F.pdf>.

130. Supplementary Affidavit, *In the matter between: The Competition Comm'n and Media24 Ltd.*, 92/CR/OCT11 at 3, available at <http://www.comptrib.co.za/assets/Uploads/Media24/Supplementary-Affidavit.pdf>.

131. *Nationwide Airlines (Pty) Ltd. (In Liquidation) v. South Africa Airways (Pty) Ltd.* 2016 ZAGPJHC 213, (6) SA 19 (GJ), (4) All SA 153 (GJ), <http://www.saflii.org/za/cases/ZAGPJHC/2016/213.html>.

## **XI. United Kingdom<sup>132</sup>**

### **A. LEGISLATIVE DEVELOPMENTS**

In comparison to 2015, when the enactment of the *Consumer Rights Act 2015* substantially changed the landscape for private enforcement of competition law violations, there have been far fewer legislative developments of note. The most significant change of 2016 is yet to occur, when before December 27, 2016, the UK Government is required to implement the EU Damages Directive, which is intended to harmonize the rules governing private enforcement of competition claims across the EU.<sup>133</sup>

The UK's private enforcement regime already largely conforms to the Damages Directive, but there are several areas requiring legislative changes for compliance. The most significant changes will be codifying the right of defendants to use the passing-on defense, the nature and scope of which is currently unclear under UK law, and giving courts the power to quantify harm where it is excessively difficult for a claimant to do so on the evidence. The Damages Directive also introduces a rebuttable presumption that cartels cause harm.<sup>134</sup>

Although not a legislative development in itself, the UK's decision in June to leave the EU has wide-ranging implications for the nature and enforcement of competition law in the UK. Currently, the UK is still subject to the obligation to transpose EU directives into UK law.

### **B. MERGERS**

In July, the CMA provisionally approved Celesio's takeover of Sainsbury's 277 pharmacies (which are mostly located within Sainsbury's own supermarkets). To avoid a substantial reduction of competition, the CMA has required Celesio, which already operates around 1540 pharmacies across the UK, to sell pharmacies in twelve areas where it currently competes particularly closely with Sainsbury's for the takeover to go ahead. It may not close the pharmacies.<sup>135</sup>

### **C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES**

To date, no prosecutions have been brought under the new criminal cartel offense introduced in 2014, but in March an individual, Barry Cooper,

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132. The section on the United Kingdom was authored by Jonathan Tickner & Jasvinder Nakhwal, Peters & Peters.

133. Cleary Gottlieb Steen & Hamilton, *UK Implementation of EU Antitrust Damages Directive: Significant Changes to Rules on Antitrust Damages Actions* (Jan. 25, 2017), <https://www.law.ox.ac.uk/business-law-blog/blog/2017/01/uk-implementation-eu-antitrust-damages-directive-significant-changes>.

134. *Id.*

135. Press Release, Competition and Markets Authority, *Pharmacy Merger Gets Conditional Go-Ahead* (July 29, 2016), <https://www.gov.uk/government/news/pharmacy-merger-gets-conditional-go-ahead>.

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pleaded guilty under the old offense as part of an ongoing CMA investigation into “price-fixing and market-sharing in the supply of precast concrete drainage products.”<sup>136</sup> The CMA decided last year to close its other two open investigations into criminal cartels.<sup>137</sup>

Civil penalties of £2.2m and £826,000 were imposed on a fridge supplier<sup>138</sup> and a bathroom supplier<sup>139</sup> respectively, for seeking to prevent dealers or retailers offering online discounts. In its civil investigation into a cartel relating to galvanized steel tanks, which was the subject of criminal proceedings last year, the CMA announced that three parties agreed to pay £2.6m in fines.<sup>140</sup>

**D. COURT CASES**

In *Deutsche Bahn AG v MasterCard Incorporated*,<sup>141</sup> the Court made a number of comments regarding the use of counterfactuals in competition law cases. MasterCard argued in its Defence that, absent the conduct at issue, its prices would have been no different, to which the claimants replied that this was only because MasterCard was engaging in a separate form of anti-competitive conduct, about which no complaint had been made in the original claim. The Court found that a claimant may argue that any unlawful aspects of a defendant’s conduct, including those not previously at issue, should not form part of the counterfactual, even if that conduct was not raised in the Defence. Moreover, claimants may be allowed to amend their Particulars to include time-barred allegations about unlawful aspects of the defendant’s conduct, provided any new claims arise out of facts already at issue.

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136. Dr. Michael Grenfell, CMA Executive Director – Enforcement, Speech at the IFLR Competition Law Forum (Nov. 9, 2016), <https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-progress-in-enforcing-competition-law>.

137. *Id.*

138. Press Release, Competition and Markets Authority, Fridge Supplier Fined £2.2 million for Restricting Online Discounts (May 24, 2016), <https://www.gov.uk/government/news/fridge-supplier-fined-22-million-for-restricting-online-discounts>.

139. Press Release, Competition and Markets Authority, Bathroom Supplier Fined £826,000 for Restricting Online Prices (Apr. 26, 2016), <https://www.gov.uk/government/news/bathroom-supplier-fined-826000-for-restricting-online-prices>.

140. Press Release, Competition and Markets Authority, Water Tank Firms Admit Cartel and Agree to Pay £2.6 Million Fines (Mar. 21, 2016), <https://www.gov.uk/government/news/water-tank-firms-admit-cartel-and-agree-to-pay-26-million-fines>.

141. *Deutsche Bahn AG and Others v. MasterCard Inc. and Others*, [2015] 2015 EWHC 3749 (CH), *available at* <https://competitionlawblog.files.wordpress.com/2016/02/deutsche-bahn-ag-and-others-v-mastercard-incorporation-and-others.pdf>.

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**XII. United States<sup>142</sup>**

**A. LEGISLATIVE DEVELOPMENTS**

The House passed a bill to amend the Clayton and Federal Trade Commission Acts to align the merger review standards and processes for the Federal Trade Commission (FTC) with those of the Department of Justice Antitrust Division (DOJ).<sup>143</sup> The bill is now under consideration by the Senate.

**B. MERGERS**

Both agencies continued their aggressive approach to horizontal mergers, bringing several court proceedings to block transactions, resulting in the transactions being enjoined or abandoned by the parties. The most notable proceedings have been in the healthcare field.

The FTC brought district court proceedings to challenge two significant hospital mergers. In both cases, two different district courts denied the FTC a preliminary injunction on the grounds that the FTC had not met its burden to establish an appropriate geographic market.<sup>144</sup> On appeal, both decisions were overturned.<sup>145</sup> Both appellate courts endorsed the FTC's approach to geographic market definition, relying on the "hypothetical monopolist" test outlined in the agencies' Horizontal Merger Guidelines,<sup>146</sup> and stressed that in the hospital merger context the appropriate "consumers" that may be subject to immediate anticompetitive impact are insurers, not patients.

In July 2016, the DOJ sued to block two major transactions in U.S. health insurance markets: the acquisition of Cigna by Anthem, and the acquisition of Humana by Aetna. The transactions would reduce from five to three the number of large, national health insurers in the U.S., raising concerns about restricting competition in plans and services sold to large employers, as well

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142. The section on the United States was authored by Lisl Dunlop, Manatt, Phelps & Phillips, LLP.

143. H.R. 2745, 114th Cong. (2015), *available at* <https://www.congress.gov/bill/114th-congress/house-bill/2745>.

144. Fed. Trade Comm'n. v. Penn State Hershey Med. Ctr., 185 F. Supp. 3d 552, 564 (M.D. Pa. 2016), *rev'd and remanded*, 838 F.3d 327 (3d Cir. 2016); Fed. Trade Comm'n. v. Advoc. Health Care, 15 C 11473, 2016 WL 3387163, at \*13 (N.D. Ill. June 20, 2016), *rev'd and remanded sub nom*; Fed. Trade Comm'n. v. Advoc. Health Care Network, 841 F.3d 460 (7th Cir. 2016).

145. Fed. Trade Comm'n. v. Penn State Hershey Med. Ctr., 838 F.3d 327, 353-54 (3d Cir. 2016); Fed. Trade Comm'n. v. Advoc. Health Care Network, 841 F.3d 460, 476 (7th Cir. 2016).

146. *Horizontal Merger Guidelines* (August 19, 2010), U.S. Dep't of Justice & Fed. Trade Comm'n., at 8, *available at* <http://ftc.gov/os/2010/08/100819hmg.pdf>; *see Penn State*, 838 F.3d at 336; *Advoc. Health*, 841 F.3d at 473.

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as Medicare Advantage plans.<sup>147</sup> Those cases are being tried in two district court proceedings in late 2016.

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

The DOJ has focused its criminal antitrust enforcement on domestic investigations in industries such as public real estate foreclosure and tax lien auctions, water treatment chemicals, heir location services, and online poster sales. The DOJ also continues to investigate and prosecute companies and executives for conspiracies in several global industries: automotive parts; cathode ray tubes; capacitors; LIBOR; and “roll-on, roll-off” ocean cargo.

Overall, in 2016 DOJ collected approximately \$400 million in fines, obtained guilty pleas for jail terms for individual corporate executives, and obtained a number of criminal indictments for both individuals and corporations. The DOJ continues to make identifying and punishing culpable individuals a high priority.<sup>148</sup>

**D. COURT DECISIONS**

American Express successfully appealed a district court decision ruling that the company’s “anti-steering” rules violated antitrust law.<sup>149</sup> The Second Circuit Court of Appeals said that the lower court incorrectly focused on the impact of the restrictions on merchants without considering the benefits American Express delivers to consumers. The DOJ and plaintiff states have sought a rehearing en banc.

The Second Circuit also vacated a \$147 million district court judgment against two Chinese companies relating to the Vitamin C cartel at the request of the Chinese Ministry of Commerce. The Second Circuit said that “courts are bound to grant deference to a foreign government’s interpretation of its own laws and that the lower court abused its discretion by asserting jurisdiction in the case.”

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147. See *Justice Department and State Attorneys General Sue to Block Anthem’s Acquisition of Cigna, Aetna’s Acquisition of Humana*, (July 21, 2016), Dep’t of Justice, <https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s>.

148. *Deputy Assistant Attorney General Brent Snyder Delivers Remarks at the Yale Global Antitrust Enforcement Conference* (Feb. 21, 2016), Dep’t of Justice, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.

149. The anti-steering rules prohibited merchants from encouraging customers to use credit cards other than American Express. See *U.S. v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).



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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

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

RENATA ANTIQUERA, ALEXANDRE BEÇAK DAVID,  
GORDON CAMERON, ELYSE VELAGIC, FRANCISCO UGARTE,  
LUCIANO AGUILERA, DR. HERMANN J. KNOTT,  
ALESSANDRA TARISSI DE JACOBIS, CLAUDIO CORBA COLOMBO,  
EVA DAS, FREDERIK DE HOSSON, VASSILY RUDOMINO,  
ANTON DZHUPLIN, AMGAD T. HUSEIN, JONATHAN BURNS,  
ADRIENNE ELLMAN, AND JOSEPH J. BASILE\*

This Article summarizes important developments during 2016 relating to international mergers and acquisitions and joint ventures in Brazil, Canada, Chile, Germany, Italy, Netherlands, Russia, Saudi Arabia, and the United States.

### **I. Brazil**

#### **A. PRIVATE EQUITY INVESTMENT FUNDS (FIPs)**

The Brazilian Comissão de Valores Mobiliários (“CVM”), the equivalent of the American Securities and Exchange Commission, issued on August 30, 2016, Instruction no. 578<sup>1</sup> (ICVM 578), which regulates the formation, operation, and management of Private Equity Investment Funds (FIPs).<sup>2</sup> Foreigners investing in Brazil use FIPs for various reasons, including taxation. Before issuing ICVM 578, CVM held public hearings. CVM’s Superintendent of Market Development, Antonio Berwanger, stated that “[t]he public hearing process generated an ample discussion with market players and brought important modifications to the final text of the ruling, which bring local regulations to a greater proximity with those

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\* Brazil—Renata Antiquera, who also served as Committee Editor, is a partner and Alexandre Beçak David is a founding partner of David, Aniceto, Stievano, Bosschart, Antiquera e Almendro Advogados Associados. Canada—Gordon Cameron is a principal and Elyse Velagic is an associate at the New York offices of Stikeman Elliott Law Firm. Chile—Mr. Francisco Ugarte is a partner of Carey Abogados, where Mr. Luciano Aguilera is an associate. Germany—Dr. Hermann J. Knott, is a partner of Luther’s Cologne office. Italy—Alessandra Tarissi de Jacobis and Claudio Corba Colombo are partners of De Berti, Jacchia, Franchini, Forlani Studio Legale. Netherlands—Eva Das is a partner at Stibbe’s New York office and Frederik de Hosson is an associate at Stibbe’s Amsterdam office. Russia—Vassily Rudomino is a senior partner and Anton Dzhuplin is a partner of Alrud Law Firm. Saudi Arabia—Amgad T. Husein is the managing partner of Denton’s Riyadh’s office where Jonathan Burns is an associate. United States—Adrienne Ellman is an associate, and Joseph J. Basile is a partner of Foley Hoag LLP in Boston.

1. ICVM No. 578, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 08.31.2016, 1 (Braz.).

2. *Id.*

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internationally practiced, and aim to reflect more adequately market's operational reality."<sup>3</sup> Summarized below are some aspects of ICVM 578 with the most impact on the M&A market in Brazil and elsewhere.

1. *FIP Investments in Limited Liability Companies*

This is one of the most sought-after improvements of ICVM 578. Previously, FIPs were not allowed to invest in limited liability companies, one of the most common corporate forms in Brazil. That restriction either impeded acquisitions entirely or required a time and money consuming corporate reorganization of the target company.

Generally, under ICVM 578, in order for a FIP to invest in a limited liability company: (1) the FIP must participate in the decision-making process of the target limited liability company, effectively influencing its management and strategic policy, according to one of the methods listed in Article 6 of ICVM 578 and (2) the target limited liability company may have an annual gross revenue of up to BRL 300 million, depending on the investing FIP's classification.<sup>4</sup> There are exceptions to the participation in the decision-making process requirement. Under Article 6 of ICVM 578, a FIP is not required to participate in the decision-making process of the target limited liability company when (1) the FIP's investment in the company is reduced to less than half the percentage originally invested and represents less than 15 percent of the capital of the invested company or (2) the book value of the investment has been reduced to zero and, during a general shareholders' meeting, a majority of the subscribed units present vote to waive the requirement (unless a higher quorum is required by the FIP's regulations). Article 7 of ICVM 578 outlines other situations in which a FIP's participation in the decision-making process of the target limited liability company is not required.

2. *FIP Investments in Foreign Assets*

ICVM 578 also alters when FIPs may invest in foreign assets. For the purposes of ICVM 578, foreign assets are those assets whose issuer, at the moment the investment is made, is (1) headquartered outside Brazil or (2) headquartered in Brazil with assets located abroad corresponding to 50 percent or more of the total assets in its financial statements. A FIP may invest, directly or indirectly, in foreign assets up to the limitation of 20 percent of its subscribed capital, provided that (1) the assets are of the same economic nature as the eligible assets located in Brazil and (2) the FIP effectively influences the decision-making process of the foreign entity. In addition, a "multi-strategy" FIP offered exclusively to professional investors, as defined by legislation,<sup>5</sup> may invest up to the totality of its subscribed

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3. See *CVM edita normas sobre fundos de private equity*, COMISSÃO DE VALORES MOBILIÁRIOS (Aug. 30, 2016), <http://www.cvm.gov.br/noticias/arquivos/2016/20160830-2.html>.

4. See ICVM No. 578, art. 14, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 08.31.2016, 1 (Braz.).

5. See ICVM No. 554, art. 9, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], 12.17.2014, 7 (Braz.).

capital in foreign assets in certain circumstances such as if: (1) its regulation expressly allows it; (2) its regulation explicitly contemplates the exclusive participation of professional investors; and (3) the expression “Investimento no Exterior” (“Overseas Investment”) is included in the FIP’s name.

3. *FIP Advances for Future Capital Increase (AFAC)*

To the pleasure of players in the markets, ICVM 578 allows FIPs to make advances for future capital increase (AFACs) in their invested companies. A FIP may now make advances for future capital increase in publicly or privately held corporations that are included in its portfolio, provided that (1) at the time of the AFAC, the FIP was already a shareholder of the company; (2) the FIP’s regulations expressly provide for AFACs and specify the subscribed capital that can be used for making the advance; (3) any form of repentance of the advance by the FIPs is prohibited; and (4) the advance is converted into capital increase within twelve months.

B. EXPEDITED LEGALIZATION OF FOREIGN PUBLIC DOCUMENTS

Also in 2016, Brazil’s enactment of the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents became effective.<sup>6</sup> This change means that Brazilians abroad or foreigners within Brazil may use public documents quicker and for less money. It also means more efficiency and legal certainty for transactions that depend directly or indirectly on public documents, such as M&A.

**II. Canada**

On June 8, 2016, Bill 218, the Burden Reduction Act, 2016, passed the first reading in the Ontario legislature.<sup>7</sup> If enacted, Bill 218 would repeal Ontario’s 99-year-old Bulk Sales Act (Act) and also modernize certain laws affecting Ontario business and commercial practice. Although the majority of Canadian jurisdictions have repealed similar statutes, Ontario (home to Canada’s largest commercial center, Toronto) is the last Canadian common-law jurisdiction to maintain its bulk sales legislation. There is hope within the Ontario legal and business community that Royal Assent to Bill 218 will be received in this legislative session.

Historically, the Act was intended to protect creditors against the effect of an undisclosed (though valid) sale of all or substantially all of their debtors’ assets and the possible unfair distribution or disbursement of the proceeds.<sup>8</sup> But because the Act applies to *all* bulk asset sales<sup>9</sup> in Ontario, regardless of

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6. See Decreto No 8.660, de 29 de Janeiro de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.29.2016 (Braz.).

7. *Burden Reduction Act, 2016*, S.O. 2016 (Can.).

8. *Cieslok Media Ltd. v. Clarity Outdoor Media Inc.* [2016] 129 O.R. 3d 589, para 10 (Can. Ont. Sup. Ct. J.).

9. *Bulk Sales Act, R.S.O. 1990, c B.14, s. 2* (Can.).

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whether the seller is solvent or not, it is significantly flawed. As a result of the Act's wide-reaching application, as early as 1950, the Canadian legal community noted that such undifferentiating compliance is onerous in commercial M&A transactions that are structured as asset deals.<sup>10</sup>

To comply with the Act, a purchaser of assets in Ontario must request and receive from the seller, and the seller is required to deliver to the purchaser a statement of creditors verified by affidavit.<sup>11</sup> Complying with the Act can be expensive and time-consuming, and accordingly asset-transaction parties often rely on compliance waivers and indemnities from failure to comply as a practical solution. Yet Ontario courts have been clear that waivers do not exempt sales of assets from the application of the Act.<sup>12</sup> As recently as 2016, in *Cieslok Media Ltd. v. Clarity Outdoor Media Inc.*, the Ontario Superior Court acknowledged that other provinces have repealed their bulk sales legislation in favor of something less onerous,<sup>13</sup> and observed that in Ontario the Act is still law and lacks a mechanism for parties to waive its requirements.<sup>14</sup>

While a seller may ask a court to exempt a sale from the Act,<sup>15</sup> the cost and time involved makes such applications burdensome and rare. But failure to comply with the Act can have significant consequences, as the Act allows courts to unwind a transaction and impose personal liability on a purchaser.<sup>16</sup>

Once Bill 218 receives Royal Assent, parties to asset deals or acquisition financings with assets located in Ontario will see a decrease of legal costs and deal risks. Having passed the first reading, on June 8, 2016, Bill 218 was referred to a committee of the legislature for further review before being voted on and passed into law at a later point in the current legislative session.

### III. Chile

For the past two years, the Chilean economy has suffered a deceleration due partly to the end of the commodities super cycle. In 2015 M&A activity in Chile substantially decreased.<sup>17</sup> But this year, M&A activity in Chile has made an impressive comeback with transactions totaling over USD 20 billion. This rise is partially due to the favorable USD/CLP exchange rate and the conclusion of various government reforms.<sup>18</sup> Also, many

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10. Fred M. Catzman, Q.C. "The Bulk Sales Act (Ontario)", 1 Can. Bar J. 38.

11. *Supra* note 9, at § 4.

12. *Cieslok Media Ltd.* 129 O.R. 3d. at para. 12.

13. *Id.* at para. 10.

14. *Id.* at para. 13.

15. *Supra* note 9, at § 3(1).

16. *Id.* at § 16(1).

17. Ximena Celedón, *Transacciones de M&A en mercado chileno cayeron casi un 60% durante 2015*, PULSO (Jan. 25, 2016), <http://static.pulso.cl/20160124/2245065.pdf>.

18. *Fusiones y adquisiciones aumentan 19% en América Latina a octubre*, DIARIO FINANCIERO (Nov. 15, 2016), <https://www.df.cl/noticias/mercados/mercados-en-accion/fusiones-y-adquisiciones-aumentan-19-en-america-latina-a-octubre/2016-11-14/195347.html>.

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international rankings still consider Chile strong with respect to perceived corruption and investment opportunities in the region.<sup>19</sup>

A. AMENDMENTS TO THE CHILEAN COMPETITION STATUTE

On August 30, 2016, Law Decree No. 211 (the Chilean Competition Statute) was amended by Law No. 20, 945.<sup>20</sup> Changes included redefining the standard of collusion and introducing applicable criminal penalties and mandatory consultation for certain mergers and acquisitions before the competent authority.<sup>21</sup>

Concentration transactions that exceed certain thresholds determined by the National Economic Prosecutor (*Fiscalía Nacional Económica* or FNE) are now subject to mandatory reporting. Concentration transactions are defined as any event, act, agreement, or combination thereof that cuts off an economic agent's independence. This includes mergers and direct or indirect acquisitions that allow the purchaser to exercise a decisive influence in the management of the competitor, joint ventures that form an independent economic agent, and acquisitions of the control of competitors' assets.

If applicable thresholds are met, the concentration transaction must be reported to and approved by the FNE. The transaction is suspended during FNE consideration. Within thirty days after the concentration transaction has been reported, the FNE must either (1) unconditionally approve the transaction, if convinced that the transaction does not substantially reduce competition; (2) approve the transaction provided that certain conditions are complied with, if convinced that the transaction does not substantially reduce competition; or (3) extend the investigation for an additional ninety-day period in order to gather more information. If the FNE remains silent after the expiration of the thirty-day period, the transaction is deemed approved. On the other hand, if the FNE has extended the investigation, upon the expiration of the investigation term, the FNE must affirmatively act, either approving the transaction (conditionally or unconditionally) or prohibiting it.

The amendment to the Chilean Competition Statute will probably delay closing of many future M&A transactions. But merger-control ultimately will benefit free-market competition, finally adapting Chilean practice to international standards.

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19. See *2015-2016 Scorecard*, LAVCA (2016), <https://lavca.org/wp-content/uploads/2015/11/UPDATED-FINAL-Scorecard-15-16.pdf>.

20. *Chile: Competition Law Amendments*, GUERRERO OLIVOS, [http://www.guerrero.cl/prontus\\_guerrero/site/artic/20161012/pags/20161012125459.html](http://www.guerrero.cl/prontus_guerrero/site/artic/20161012/pags/20161012125459.html).

21. *Id.*

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**B. COURT OF APPEAL HOLDS THAT MERGERS ARE RELATED-PARTY TRANSACTIONS**

On March 22, 2016, the Court of Appeals of Santiago held that mergers qualify as related-party transactions and are, thus, subject to the provisions of Title XVI (Related Party Transactions) of the Corporations Act, Law No. 18,046.<sup>22</sup> Title XVI applies to “any” transaction with a related party. In light of that wording, the Court determined that a related-party transaction is a broad and universal concept and, as such, does not exclude mergers. As a result, before shareholder approval of a merger, the requirements and procedures applicable to related-party transactions must be satisfied with respect to each merging entity. This decision came after the Chilean Securities and Insurance Commission had held, in light of the corporate reorganization of a leading electric company, that mergers of corporations (*sociedades anónimas*) were not related-party transactions, and consequently, were not subject to Title XVI of the Corporations Act.<sup>23</sup>

**C. EXPEDITED LEGALIZATION OF FOREIGN PUBLIC DOCUMENTS**

As of August 30, 2016, Chile finally became a member of The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents,<sup>24</sup> doing away with the red tape previously required in connection with these documents. Foreign documents—such as powers of attorney, bylaws, articles of incorporation, and certificates of good standing—no longer require a lengthy legalization process, because a simple apostille will suffice. As soon as a competent authority affixes an apostille to the foreign document, the document is valid in Chile. Likewise, if documents issued in Chile are apostilled, then they will be valid in all other Member States to The Hague Convention.

**IV. GERMANY**

**A. MARKET DEVELOPMENTS**

In Q1 through Q3 2016, Germany has attracted 599 deals worth EUR 51.0bn, a 13.3 % increase by value over the same period of 2015 (610 deals, EUR 45.0bn). “Industrials & Chemicals” was the most coveted sector by value, with 207 deals worth EUR 18.2bn increasing 30.4 percent compared to the same period of 2015 (186 deals, EUR 13.9bn).<sup>25</sup> In 2016 the cross-border activities of German companies have significantly increased, the best

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22. Corte de Apelaciones de Santiago [C. Apel.] [Court of Appeals of Santiago], 20 julio 2015, “Administradora de Fondos de Pensiones Habitat S.A c. Superintendencia de Valores y Seguros,” Rol de la causa: 8,069-2015 (Chile).

23. Letter from Superintendencia de Valores y Seguros to Gerente General No.15443 (July 20, 2015), available at [http://www.svs.cl/documentos/ofo/ofo\\_15443\\_2015.xml](http://www.svs.cl/documentos/ofo/ofo_15443_2015.xml).

24. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, T.I.A.S. No 10072, 33 U.S.T. 883.

25. Mergermarket trend report Q1-Q3 2016 for Germany.

illustration being the EUR 58.2bn takeover of Monsanto by Bayer,<sup>26</sup> which is still awaiting antitrust clearance.

China continues to invest heavily in Germany, with twenty-six deals worth EUR 8.8bn prompting some critics to describe this phenomenon as the sell-out of the German economy.<sup>27</sup> The reality appears to be more nuanced. Although some “black sheep” may try to enter the German market, serious-minded Chinese investors pursue a clear long-term strategy: they are willing to invest in research and development activities and jobs in order to be able to rely on technology “Made in Germany.”

Another deal driver has been domestic restructuring like the carve-out of the conventional energy generation division from E.ON into Uniper. The UK’s Brexit-vote is likely to cause foreign investors to divert their investments to the continent, potentially increasing German inbound M&A, although the weak pound may cause some opportunistic deals in the UK.

#### B. IMPUTATION OF DIRECTORS’ MISCONDUCT IN BUY-OUTS

A recent decision of the Higher District Court of Dusseldorf,<sup>28</sup> which is on appeal with the Federal Supreme Court, addresses the imputation of knowledge and misconduct of a target’s managing directors in a management buy-out situation. Following the buyer’s acquisition of all shares in several targets, two managing directors of the targets became shareholders of the buyer and one of them was appointed managing director of the buyer. Six months after the transaction, two targets had to file for insolvency proceedings. It was discovered that the two aforementioned managing directors knowingly had manipulated the balance sheets of the now-insolvent targets. The buyer sued the seller, seeking damages and rescission of the acquisition agreement on the basis of pre-contractual liability. The Higher District Court of Dusseldorf ruled in favor of the buyer, reasoning that the two managing directors had to be considered as agents (*Erfüllunggehilfen*) of the seller. Therefore, their manipulations were imputable to the seller, at least in so far as the seller had based its actions on the documents that the directors had prepared during SPA negotiations.<sup>29</sup> Another issue was whether the buyer’s claims should be precluded because knowledge of the manipulations was imputable to the buyer. The Court held that the buyer’s claims were not precluded because the parties had agreed in the SPA that any imputation of knowledge applied only to independent guarantees and not to pre-contractual liability. Buyers should

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<sup>26.</sup> *Bayer confirms \$66bn Monsanto takeover*, BBC NEWS (Sept. 14, 2016), <http://www.bbc.com/news/business-37361556>.

<sup>27.</sup> See M&A Review 10/2016, p. V.

<sup>28.</sup> Oberlandesgericht Düsseldorf [Higher District Court of Dusseldorf], I-6 U 20/15, June 16, 2016 (Ger.).

<sup>29.</sup> See *id.* (German contract law allows for the exclusion of liability for the willful behavior of auxiliary persons).



seek to structure SPAs to exclude such imputation in as far-reaching terms as possible.

In light of this decision, the German M&A community has focused on best practices for drafting of contractual indemnity clauses in the context of M&A agreements. Such clauses should address the start date and the duration of the limitation period because there is a risk that the indemnification claim may be time-barred before the third-party claim against the target is due. One drafting solution is a time limitation that is dependent on the timeline for a third-party claim, in particular the buyer's (the indemnified party) notification to the seller (the indemnifying party) of a third-party claim: "Any indemnification claim pursuant to this clause shall be time-barred upon expiration of a period of . . . years after the purchaser has become aware of the facts giving rise to the claim."<sup>30</sup>

## V. Italy

An issue that frequently arises at the decision stage of drafting SPAs is whether the target company (or its subsidiaries), instead of the purchaser, may be the beneficiary of an indemnity clause. Traditionally, target companies could not be indemnified in SPAs for the following reasons: (1) the parties to an SPA generally did not want to grant target companies any rights; (2) target companies were not subject to the arbitration clause of SPAs that would apply to the contractual parties; and (3) it might not be possible to compensate target companies under an indemnity clause if the purchase price had not yet been paid. Supporters of this approach refer to an old Italian case<sup>31</sup> in which the Supreme Court stated that, in similar cases, article 1411 of the Italian Civil Code, regulating the "agreement in favor of third parties," does not apply.<sup>32</sup> Therefore, a third party (*e.g.*, the target company) cannot be identified as the beneficiary of an indemnity clause in an SPA.

On the other hand, others note that the Court did not expressly prohibit such indemnity clauses in SPAs. Those commentators suggest that a target-company indemnity clause might be qualified as a special arrangement in favor of a third party with internal effects between the contractual parties ("*contratto a favore di terzi con efficacia interna*" or "*contratto con prestazione al terzo*").<sup>33</sup> According to this interpretation, the indemnity in favor of the target company takes effect, not from and by virtue of the agreement, but rather by its performance. This means that the parties to the SPA are obligated only *vis-à-vis* each other, but they can decide to grant the target company indemnity in accordance with the provisions of the indemnity clause.

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30. Hilgard, BB 2016, p. 1218, 1233.

31. Italian Supreme Court (Cassazione civile), May 27th 1985, no. 2155, *Foro italiano*, 1987, I, 3124/3129.

32. *Id.*

33. See TARTAGLIA, *Acquisto di quote societarie e pacchetti azionari*, Maggioli, 2014, 114.

Now, however, the Court of Milan has made clear that tortured reasoning is not necessary. In a case issued on November 27, 2015,<sup>34</sup> the Court clearly stated that an indemnity clause that expressly identifies the target company as an indemnity beneficiary shall be admitted under Italian Law and will be governed by the provisions of Article 1411 of the Italian Civil Code. In light of that decision, the validity of target-company indemnity clauses cannot be denied any more. Further discussions, if any, might arise only on its exact legal qualification.

In light of this development, when drafting this type of clause, attention should be paid in order to (1) make clear and explicit the will of the parties to grant an “advantage” to the target company (or, should that be the case, its subsidiaries) and (2) make the granting of the indemnity to the target company, in any case, subject to the request of the purchaser party.

## **VI. Netherlands**

During the negotiations of a public takeover, parties must attend to the managing of inside information and to ensuring compliance with the applicable rules on disclosure of inside information. A new European market-abuse regime entered into force on July 3, 2016.<sup>35</sup> The new European rules on market abuse are primarily documented in the regulation on market abuse<sup>36</sup> (the “Regulation”) and the new directive on market abuse<sup>37</sup> (the “Directive”). The new European market-abuse regime aims to keep pace with market developments and to strengthen regulators’ investigative and sanctioning powers, and repeals the market abuse directive from 2003.<sup>38</sup> The new European market abuse regime entails certain changes for the Netherlands, including (1) the rules on the publication of inside information and (2) the administrative fines that can be imposed in case of infringement.

The now-repealed Dutch market-abuse rules required listed companies to publish inside information as soon as possible.<sup>39</sup> Listed companies were, however, allowed to delay the disclosure of such information if, and only if, three cumulative requirements were met.<sup>40</sup> The Regulation, in principle, comprises the same requirements for delaying the publication of inside information. Under the regulation, listed companies may delay disclosure if (1) disclosure would likely prejudice legitimate interests of the listed company, (2) delay is not likely to mislead the public, and (3) confidentiality

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34. Court of Milan, November 27th 2015, no. 13407, retrieved on the database <https://www.iusexplorer.it>. The Court has been partially preceded by other decisions of Italian Local Courts; see Court of Salerno, March 6th 2013, and Court of Appeal of Rome, June 3rd 2008.

35. See Commission Regulation 596/2014, 2014 O.J. (L 173) (EU).

36. See Commission Regulation 596/2014, 2014 O.J. (L 173) (EU).

37. See Council Directive 2014/57, art. 2, 2014 O.J. (L 173)(EU).

38. See Council Directive 2003/6, 2003 O.J. (L 96) (EC).

39. Wet op het financieel toezicht, Sep. 28 2006, Stb. 2007 (Neth.).

40. See generally *id.*

can be ensured.<sup>41</sup> The regulation, however, introduces certain additional administrative requirements. Under the new regime, listed companies must (1) notify the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten) of the delay immediately after the information is disclosed to the public<sup>42</sup> and (2) keep a record of the date and time when the inside information first existed, the moment when the decision to delay was taken, who was responsible for the decision, and evidence supporting each condition for the delay.<sup>43</sup>

The new market-abuse regime also imposes tougher administrative sanctions on a listed company that violates the rules on the publication of inside information. In particular, the administrative fines for serious infringements have been raised in the Netherlands. The base amount for administrative fines for serious infringements has been raised from EUR 2 million to EUR 2.5 million and the maximum fine from EUR 4 million to EUR 5 million.<sup>44</sup> As a result, the maximum fine for repeat infringements is now EUR 20 million,<sup>45</sup> provided that a maximum fine of up to 15% of net annual turnover has been introduced for large enterprises.<sup>46</sup> The AFM also has the power to impose a fine of three times the profits gained or losses avoided by an infringement.<sup>47</sup>

## VII. Russia

In Russia, recent developments in civil law, arbitration reform, and litigation procedure are likely to affect the Russian M&A market. Global tendencies, economic sanctions imposed on Russia, and depreciation of the Russian Ruble have resulted in an acute need for the Russian economy to access new financial markets, increase in incoming external investments, improve the investment climate, and increase the number of internal M&A deals. In that context, a set of amendments mainly aimed at liberalization of the national legal system was introduced into the Russian legal system. During the previous year, the Russian legislature adopted a number of principles and mechanisms generally used in many other jurisdictions.

### A. CONTRACT LAW AMENDMENTS TO THE CIVIL CODE

The newly amended Russian Civil Code includes many changes in the area of contract law. The principle of good faith has been elevated above all

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41. *See generally id.*

42. *See generally id.*

43. *See* Commission Implementing Regulation 2016/1055, 2016 O.J. (L173) (EU).

44. *Financial Markets in brief-new regulation and other developments*, DE BRAUW BLACKSTONE WESTBROEK (July 13, 2016), <http://www.debrauw.com/newsletter/financial-markets-brief-new-regulation-developments-3/#>.

45. *Id.*

46. *Id.*

47. *Id.*

other contractual provisions.<sup>48</sup> As part of implementation of this principle, new legislation prohibits parties from entering into any negotiations without serious intentions and provides remedies for a party's groundless withdrawal from negotiations.<sup>49</sup>

Several new contract principles have been added. A "warranties" concept has been adopted.<sup>50</sup> Now, if a contract contains a warranties provision, a party is entitled to claim damages and in some cases termination of the contract upon the breach of such warranties even if no contractual obligations were breached.<sup>51</sup> Under the indemnification of losses concept, parties to a contract may now specify that, if certain events occur, one party will be obliged to indemnify the other party for the losses incurred as the result such events.<sup>52</sup> The amount of indemnification should, however, be measurable and the indemnified risk should arise out of the contract.<sup>53</sup> New injunction provisions allow a creditor to enforce a negative obligation (obligation not to perform certain actions) if there is a real threat of a breach of such obligation.<sup>54</sup> Now, when a party waives a contractual right, that waiver is binding on that party unless the waiver is prohibited by mandatory rules.<sup>55</sup> Option contracts and options to conclude a contract are now available.<sup>56</sup> Reversing the previous approach of jurisprudence, parties may now conclude options subject to potestative conditions (*i.e.*, conditions entirely within the control of one of the parties). Accordingly, a principal obligation may be entered into or performed unilaterally.

Additional changes to the code include:

- Under the new termination-fee concept, parties may unilaterally change or repudiate an obligation upon the payment of a specific fee.<sup>57</sup>
- The concept of a bank guarantee as a way to secure the obligations was replaced with a concept of independent guarantee, which may be issued not only by a credit institution, but also by any commercial organization.<sup>58</sup>
- Another newly introduced means for securing obligations is a so-called security deposit widely used in lease agreements.<sup>59</sup>

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48. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 307(Russ.).

49. *Id.* at art. 434.1.

50. *Id.* at art. 431.2.

51. *Id.* at art. 431.2, para. 2.

52. *Id.* at art. 406.1.

53. *Id.* at art. 406.1, para 1.

54. GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 450.1 (Russ.).

55. *Id.* at art. 450.1.

56. *Id.* at art. 429.3.

57. *Id.* at art. 310, para. 3.

58. *Id.* at art. 368.

59. *Id.* at art. 381.1.

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**B. ARBITRATION REFORM**

As of September 1, 2016, new legislation is in force in Russia governing international and domestic arbitration.<sup>60</sup> This legislation replaced the previous law in its entirety.<sup>61</sup>

The new legislation primarily focuses on bringing the Russian arbitration system further in line with the UNCITRAL Model Law. It accomplishes this by, among other things, adopting a more flexible approach to the form and contents of arbitration agreements,<sup>62</sup> introducing relatively clear-cut rules on the arbitrability of different types of disputes,<sup>63</sup> expanding the types of disputes subject to arbitration and improving communications between the court, arbitration tribunal, and arbitration institution.

**C. LITIGATION PROCEDURE**

Among other litigation developments, courts no longer may reduce the size of the penalty upon its discretion. Such reduction is subject to the other party's respective claim and to proof of an explicit disproportion between the damages and penalties.<sup>64</sup> There are also further positive developments on the recognition and enforcement of foreign judgments.<sup>65</sup>

In summary, the above-mentioned changes result in a shift in choice of law in favor of Russian legal system at least for domestic M&A transactions taking place on the Russian market. Russia increasingly becomes compliant to the best world practices, becoming more flexible and providing better opportunities to the expanding demands of the market.

**VIII. Saudi Arabia**

Prior to Saudi Arabia's 2005 accession to the World Trade Organization (WTO), non-Gulf Cooperation Council (GCC)<sup>66</sup> investors could hold only

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60. Federal'nyy zakon Ob arbitrazhe v Rossiyskoy Federatsii [Federal Law On Arbitration in the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ.

61. See generally GRAZHDANSKII KODEKS ROSSIYSKOI FEDERATSII [GK RF] [Civil Code] (Russ.).

62. Federal'nyy zakon Ob arbitrazhe v Rossiyskoy Federatsii [Federal Law On Arbitration in the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 7.

63. Arbitrazhnyy protsessual'nyy kodeks Rossiyskoy Federatsii [Arbitrazh Procedural Code of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 95-FZ, art. 225.1.

64. GRAZHDANSKII KODEKS ROSSIYSKOI FEDERATSII [GK RF] [Civil Code] art. 333 (Russ.).

65. Federal'nyy zakon Ob arbitrazhe v Rossiyskoy Federatsii [Federal Law On Arbitration in the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44, para. 3.

66. See *List of GCC Gulf Countries*, DUBAIFAQS.COM, (April 17, 2017) <http://www.dubaifaqs.com/list-of-gcc-countries.php> (the GCC member states consist of Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates, and Oman).

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up to 51 percent ownership in wholesale and retail trading entities. As part of the 2005 WTO accession, however, Saudi Arabia liberalized this restriction and allowed non-GCC investors to hold up to 75 percent ownership in such entities. Thus, since 2005, foreign investors seeking to establish a presence in Saudi Arabia to engage in wholesale and retail trade activities have been required to enter into a joint venture with a Saudi partner who holds a minimum 25 percent ownership interest in the entity.

In September 2015, the Saudi Arabian General Investment Authority (SAGIA—the government authority responsible for evaluating and issuing foreign investment applications and licenses) announced that foreign investors would be permitted to establish wholly owned wholesale and retail trade entities. At that time, SAGIA did not describe any conditions or restrictions that would apply, instead it merely invited interested parties to express their interest to SAGIA on a case-by-case basis. But on June 15, 2016, SAGIA released its Rules for Full Foreign Ownership of Retail and Wholesale Operations (the Rules), which provide as follows:<sup>67</sup>

**Capital Requirements:** The minimum paid-up capital for a wholly foreign owned wholesale and retail trading entity is SAR 30 million (about USD 8 million). In addition, the owner must invest at least SAR 200 million (about USD 53 million) in the entity over the course of five years beginning from the date of license issuance.<sup>68</sup>

**Applicability:** The owner of a wholly foreign owned wholesale and retail trading entity must be of a reputable nature such that it has a local presence in at least three international markets. In addition, only those foreign manufacturers who wish to sell their own products in Saudi Arabia may establish a wholly foreign owned entity. That is, a foreign investor who wishes to engage in wholesale or retail trade of other companies' products is still limited to the preexisting model that requires a minimum 25 percent local shareholding.<sup>69</sup>

**Local Requirements:** The foreign owner must manufacture a minimum of 30 percent of its products in-Kingdom.<sup>70</sup> Further, the foreign owner must establish an in-Kingdom logistics services and distribution hub and must invest at least 5 percent of its sales in in-Kingdom research and development programs.<sup>71</sup> But those local requirements are waived if the foreign owner invests an additional SAR 100 million (about USD 27 million) in the entity over the course of five years beginning from the date of license issuance—for a total of SAR 300 million (about USD 80 million) over five years.<sup>72</sup>

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67. *Saudi Arabia Update—July 2016*, LEXOLOGY (July 27, 2016), <http://www.lexology.com/library/detail.aspx?g=585f003a-2711-406d-a34b-ff385b3c877e>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

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Saudization: Related to the local requirements, the foreign owner must fulfill additional Saudization<sup>73</sup> requirements. Particularly, the entity must train at least 30 percent of its Saudi employees annually and commit to employing Saudi employees in leadership positions over the course of the first five years beginning from the date of license issuance. In addition, the foreign owner must employ a sufficient ratio of Saudi Arabian nationals in accordance with the requirements of the Ministry of Labor.<sup>74</sup>

According to public reports, only two wholly foreign owned wholesale and retail trading entities that have been licensed and established in Saudi Arabia as of yet—Dow Chemical Co. and 3M. The media report that high-level talks to establish such entities for companies including Pfizer and Apple are underway. Those companies provide examples of the types of foreign investors that the Rules appear to be targeting at this time. It will be interesting to see if the Saudi authorities, over time, seek to further liberalize this sector by allowing smaller capitalized foreign investors to wholly own retail and wholesale trading entities.

Relatedly, it is uncertain whether the Rules will remain consistent and how the various Saudi authorities will apply and respond to the Rules. Particularly, Saudization requirements tend to be a moving target and can fluctuate based on several factors including global market conditions, the domestic and regional economy, unemployment numbers, and the current political climate and rhetoric. It will be interesting to see how foreign investors will react to this inherent unpredictability when considering establishing a wholly owned wholesale and retail trading entity.

Similarly, the Kingdom is currently in a strong economic liberalization movement, which some experts have suggested is mostly motivated by globally low oil prices and, thus, requires the Kingdom to open up more to foreign direct investment to make up for its losses. As global oil prices continue to stabilize and rise, it will be interesting to see if this movement continues, stagnates, or, in the alternative, regresses as the perceived need for foreign investment in Saudi Arabia decreases with the comfort brought by higher-priced oil.

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73. “Saudization” is a colloquial term used to refer to the government’s official policy of encouraging the employment of Saudi nationals over foreigners and is implemented using various methods and programs. Companies are required to maintain a certain proportion of Saudi versus non-Saudi employees based on their size and the industry in which they operate, with large, high-paying, and high-tech companies often requiring the highest Saudization proportions, while small businesses and companies operating in manual labor and similar fields require lower proportions. Failure to adhere to Saudization requirements may result in denial of government services, including non-renewal of commercial and foreign investment licenses and employment visas for existing non-Saudi employees, as well as non-issuance of employment visas for new employees.

74. *Id.*

## **IX. United States**

As in past years, one need not look beyond Delaware for the most important developments in United States M&A law during 2016. Building on its decision in *Corwin v. KKR Financial Holdings LLC*,<sup>75</sup> the Delaware Supreme Court in *Singh v. Attenborough*<sup>76</sup> reiterated the principle that a corporate board's decision to approve a merger will be subject to the lenient "business judgment rule" standard of review if the merger was adopted by a fully-informed, uncoerced, disinterested majority of stockholders.<sup>77</sup> The Delaware Supreme Court in *Singh* went on to state that approval of a merger by fully-informed, uncoerced, disinterested stockholders has the further effect of limiting judicial review to issues of "waste," with the burden of proof on the party attacking the transaction.<sup>78</sup> Because a determination of waste is supported only in limited circumstances when "no person of [ordinary] sound business judgment" could consider the change of control fair to the stockholders,<sup>79</sup> a scenario with little real-world likelihood if stockholders approve the deal, *Singh* effectively insulates corporate boards from liability in mergers that receive fully-informed, uncoerced, disinterested stockholder approval.<sup>80</sup>

*Singh* also addressed potential aiding and abetting liability for a board's financial adviser, a much-discussed issue since the Delaware Chancery Court's decision in *In re Rural/Metro Corporation Stockholders Litigation*.<sup>81</sup> The Court upheld the dismissal of claims against the financial advisor because the plaintiffs had not pled facts showing that the advisor "knowingly" misled the board. By requiring such a high standard of scienter, the Court effectively foreclosed aiding and abetting claims against financial advisors except in the most egregious circumstances.

The Delaware Chancery Court also extended the principles in *Corwin* to the tender offer context.<sup>82</sup> In *In re Volcano Corporation Stockholder Litigation*,<sup>83</sup> the Court dismissed the plaintiffs' claims, holding that the tendering of shares by a majority of fully-informed, uncoerced, disinterested stockholders in a tender offer has the same effect as the cleansing vote of a fully-informed, uncoerced, disinterested stockholder majority in a merger.<sup>84</sup> The Delaware Chancery Court reasoned that the rationale behind the *Corwin* holding that "a transaction approved pursuant to a statutorily required stockholder vote [should be afforded] the benefit of the irrebuttable business judgment rule

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75. *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015).

76. *Singh v. Attenborough*, 137 A.3d 151 (Del. 2016).

77. *Id.* at 151.

78. *Id.*

79. *Id.* at 152 (quoting *Saxe v. Bracy*, 184 A.2d 602, 610 (Del. Ch. 1962)).

80. *Id.*

81. *In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014), *aff'd sub nom* RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 862 (Del. 2015).

82. *In re Volcano Corp.*, 143 A.3d 727 (Del. Ch. 2016).

83. *Id.* at 727.

84. *Id.*



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presumption”<sup>85</sup>—applied equally in a tender offer and, in any event, that a stockholder acceptance of a tender offer constitutes stockholder approval of a change of control transaction under Delaware law.<sup>86</sup>

Finally, in a much discussed appraisal decision, the Delaware Chancery Court in *In re: Appraisal of Dell Inc.* determined that the “fair value” of the plaintiffs’ stock was \$17.62 per share rather than the \$13.75 transaction price, resulting in a 28 percent increase to the price resulting from the auction process.<sup>87</sup> The Court pointed to, among other things, the fact that all bidders were financial buyers who used LBO pricing models that, in the Chancery Court’s view, value transactions below “fair value” within the meaning of the Delaware appraisal statute.<sup>88</sup> The Court reasoned that “[w]hat a [financial buyer] is willing to pay diverges from fair value because of (i) the financial sponsor’s need to achieve [internal rates of return] of 20% or more to satisfy its own investors and (ii) limits on the amount of leverage that the company can support and the sponsor can use to finance the deal.”<sup>89</sup> While Delaware case law has long recognized that the merger price is not necessarily the same as “fair value” for purposes of the appraisal statute, many practitioners had grown to expect that the merger price for a public company determined by an auction process would likely approximate “fair value.” But *In re Appraisal of Dell Inc.* signals that financial buyers approaching deals should factor in the possibility of an unfavorable appraisal outcome.

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85. *Id.* at 743.

86. *Id.* at 744.

87. *In re Appraisal of Dell Inc.*, C.A. No. 9322-VCL (Del. Ch. May 31, 2016).

88. DEL. CODE ANN. tit. 8, § 262 (West 2017).

89. *In re Appraisal of Dell Inc.*, C.A. No. 9322-VCL at 64.

## **International Trade**

BRIAN BOMBASSARO, TESSA CAPELOTO, SYLVIA Y. CHEN,  
DHARMENDRA CHOUDHARY, SHANE T. DEVINS, LAURA EL-SABAAWI,  
CYNTHIA GALVEZ, GEOFFREY GOODALE, SAHAR HAFEEZ,  
ALEXANDRA LANDIS, YING LIN, ELIZABETH LEE, CYNTHIA LIU,  
DIANE MACDONALD, YUJIN K. MCNAMARA, DAVID SELLA-VILLA,  
AND SARAH SPRINKLE\*

This Article outlines the most important developments in international trade law during 2016. It summarizes developments in international trade negotiations, World Trade Organization (“WTO”) dispute settlement activities, U.S. legislation, and U.S. trade remedies and enforcement cases at the Department of Commerce (“Commerce”), International Trade Commission (“ITC”), and Court of Appeals for the Federal Circuit (“CAFC”).

### **I. WTO Dispute Settlement Activity**

In 2016, thirteen disputes were filed in the WTO Dispute Settlement Body.<sup>1</sup> Currently, nine disputes are in consultations. Panels have been composed in two disputes, while panels have been established, but not composed, in two other disputes.<sup>2</sup> Notable among the disputes are the following: a dispute filed by India against the U.S. for its measures concerning non-immigrant visas; a dispute filed by the U.S. against China for its domestic support programs for wheat, rice, and corn; disputes filed by the U.S. and EU against China’s duties on the export of raw materials; and several trade remedy-related disputes.<sup>3</sup>

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\* This Article surveys developments in international trade law during 2016. The committee editors of this article were Sylvia Chen, Arnold and Porter Kaye Scholer LLP; Cynthia Galvez, Wiley Rein, LLP; and David Sella-Villa, South Carolina Department of Administration. The authors were Yujin McNamara and Cynthia Liu, Akin Gump Strauss Hauer & Feld LLP; Brian Bombassaro, Arnold and Porter Kaye Scholer LLP; Geoffrey Goodale, Fisher Broyles, LLP; Laura El-Sabaawi, Tessa Capeloto, Ying Lin, Elizabeth Lee, Alexandra Landis, Wiley Rein LLP; Dharmendra Choudhary, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP; Diane MacDonald, Sandler Travis LLP; Shane Devins, Ervin Cohen & Jessup LLP; Sarah Sprinkle, Morris, Manning & Martin, LLP; and Sahar Hafeez, Stewart and Stewart.

1. See *Chronological List of Disputes Cases*, WORLD TRADE ORGANIZATION (Nov. 29, 2016 8:59 PM), [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) [hereinafter *Chronological List*].

2. *Id.*

3. *Id.*

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A. UNITES STATES-WASHING MACHINES

The Dispute Settlement Body issued both the Panel Report and the Appellate Body Report for this dispute in 2016.<sup>4</sup> This was the latest in a long series of disputes challenging the United States Department of Commerce’s “zeroing” practice. While the Appellate Body has found the use of zeroing in investigations and reviews to be impermissible under the Anti-Dumping Agreement, the *US-Washing Machines* dispute was the first to address whether zeroing can be applied in situations of alleged “targeted” dumping, which seeks to unmask “dumping that is targeted to certain purchasers . . . regions, or . . . certain time periods.”<sup>5</sup>

Korea challenged Commerce’s targeted dumping and differential pricing methodologies. The panel found that the targeted dumping methodology in the underlying *Washers from Korea* investigation was inconsistent with the second sentence of Article 2.4.2, because it applied the weighted average-to-transaction methodology comparison method to all transactions, including transactions other than those that constitute patterns of transactions that Commerce had determined to exist.<sup>6</sup> Notably, the panel also ruled that Commerce’s differential pricing methodology, which replaced the targeted dumping methodology in the administrative review of the order, was also inconsistent with Article 2.4.2 “as such” because this method did not “properly establish ‘a pattern of export prices which differ significantly among different purchasers, regions or time periods.’”<sup>7</sup> The Appellate Body upheld the panel’s ruling with respect to these findings.<sup>8</sup>

Also at issue in this dispute was Commerce’s determination in the parallel countervailing duty (“CVD”) investigation of *Washers from Korea*. The panel found, and the Appellate Body affirmed, that the subsidies conferred to respondent Samsung were “regionally specific” under Article 2.2 of the SCM Agreement because it excluded the Seoul metropolitan region.<sup>9</sup> However, the Appellate Body overturned the panel’s finding that the subsidies at issue were not tied to any particular product, faulting the panel’s reliance on the intended use of the proceeds to reach its conclusion.<sup>10</sup> Based on this, and other, reasoning, the Appellate Body concluded that Commerce acted inconsistently with Articles 19.4 of the SCM Agreement and Article

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4. Panel Report, *United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/R (Mar. 11, 2016); Appellate Body Report, *United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/AB/R (Sept. 7, 2016).

5. Panel Report, *US–Washing Machines*, ¶ 7.141 (citing Appellate Body Report, *European Communities–Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, ¶ 62).

6. *Id.* ¶ 8.1.

7. *Id.* ¶ 7.147.

8. Appellate Body Report, *US–Washing Machines*, ¶¶ 6.3–6.4.

9. See Panel Report, *US–Washing Machines*, ¶¶ 7.257, 7.289; Appellate Body Report, *US–Washing Machines*, ¶¶ 5.240–5.241.

10. Appellate Body Report, *US–Washing Machines*, ¶¶ 5.273–274.

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VI:3 of the GATT 1994 in its calculation of the subsidy rate applicable to Samsung.<sup>11</sup>

**B. EU-BIODIESEL**

Both the Panel Report and the Appellate Body Report for the *EU-Biodiesel* dispute were issued in 2016.<sup>12</sup> In this case, Argentina challenged two EU measures: (1) a provision of the EU's Basic Regulation that allegedly instructed the authority to adjust or reject a producer's cost data if the cost reflected prices that are "abnormally or artificially low because the market is regulated or because of some alleged distortion,"<sup>13</sup> and (2) the EU authorities' dumping determination on biodiesel from Argentina, in which the authorities calculated the cost of soybeans used in the production of biodiesel based on the average reference price of soybeans published by the Argentine Ministry of Agriculture for export to Argentina, rather than the producers' price records.<sup>14</sup> Argentina argued that both measures violated Article 2.2.1.1 of the Anti-Dumping Agreement,<sup>15</sup> which requires the authority to use the producer's cost records as long as these records are maintained under generally accepted accounting principles, and reasonably reflect the cost of producing the subject merchandise.<sup>16</sup>

With respect to the EU's Basic Regulation, the panel rejected Argentina's "as such" claim because the panel found that the Basic Regulation does not provide any criteria to determine whether costs are reasonably reflected in a producer's records, but only "lays down what the authorities can do . . . after they have made a determination . . . that the records do not reasonably reflect the costs."<sup>17</sup>

However, the panel agreed with Argentina that the EU authorities' dumping determination was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement. The panel found that Article 2.2.1.1 requires a comparison between the costs reported in the producer/exporters' records, and the costs that the producer/exporter actually incurred.<sup>18</sup> The panel found that the "artificially lower" price of the inputs purchased by producers did not provide sufficient basis for the authorities to reject the producers' actual cost records.<sup>19</sup> The panel separately found that the EU's dumping

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11. Appellate Body Report, *US-Washing Machines*, ¶¶ 5.284-286, 5.305-306.

12. Panel Report, *European Union-Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R (March 29, 2016); Appellate Body Report, *European Union-Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R (October 6, 2016).

13. Panel Report, *EU-Biodiesel*, ¶ 7.74.

14. *Id.* ¶ 7.182.

15. *Id.* ¶ 3.1.

16. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.2.1.1, Apr. 15, 1994, [https://www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](https://www.wto.org/english/docs_e/legal_e/19-adp.pdf).

17. Panel Report, *EU-Biodiesel*, ¶¶ 7.133-134 (internal emphasis omitted).

18. Panel Report, *EU-Biodiesel*, ¶ 7.242.

19. Panel Report, *EU-Biodiesel*, ¶ 7.248.

determination was inconsistent with Article 2.2 of the Anti-Dumping Agreement because it used a cost that was not “in the country of origin.”<sup>20</sup>

The Appellate Body upheld the panel’s determination that the EU authorities had not provided a sufficient reason to disregard the producers’ costs, and that the price that the authorities used to calculate cost of production was not a cost “in the country of origin.”<sup>21</sup> In upholding the panel’s findings, however, the Appellate Body also confirmed that the “cost of production. . . in the country of origin” does not mean that the sources of information to establish the cost must originate from the country of origin, but that if out-of-country information be used, the authority may need to adapt that information to ensure that it is used to arrive at the “cost of production in the country of origin.”<sup>22</sup>

### C. UNITED STATES—ANTI-DUMPING METHODOLOGIES (CHINA)

The Panel Report for this dispute was circulated on October 19, 2016.<sup>23</sup> This case was largely considered a victory for China. China alleged violations with respect to three issues concerning certain anti-dumping measures imposed by Commerce, namely, (1) the Commerce’s use of the weighted average-to-transaction (WA-T) methodology, including its use of zeroing under this methodology; (2) Commerce’s treatment of multiple companies as a non-market economy-wide entity (NME-wide entity), pursuant to the Single Rate Presumption; and (3) Commerce’s use of facts available in determining anti-dumping duty rates for such entities, as well as the level of such duty rates.<sup>24</sup>

With respect to the Single Rate Presumption, China argued that Commerce applied a presumption that all exporters from a NME country comprise a single entity under common government control and assigned a single dumping margin to that entity.<sup>25</sup> China asserted that as a norm of general and prospective application, the Single Rate Presumption was “as such” and “as applied” in 38 anti-dumping determinations, inconsistent with Articles 6.10, 9.2, and the second sentence of Article 9.4 of the Anti-Dumping Agreement.<sup>26</sup> The panel agreed that the Single Rate Presumption is a norm of general and prospective application that can be challenged as such.<sup>27</sup> The panel also agreed that the Single Rate Presumption violated, “as such and as applied,” Articles 6.10 and 9.2 by presuming governmental control for Chinese exporters and subjecting them to a single, country-wide dumping margin, unless they demonstrated an absence of *de jure* and *de facto*

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20. Panel Report, *EU-Biodiesel*, ¶ 7.258.

21. Appellate Body Report, *EU-Biodiesel*, ¶¶ 6.56, 6.82.

22. Appellate Body Report, *EU-Biodiesel*, ¶ 6.82.

23. Panel Report, *United States—Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS471/R (October 19, 2016).

24. Panel Report, *US—Anti-Dumping Methodologies (China)*, ¶¶ 2.1-4.

25. *Id.* ¶ 7.275.

26. *Id.*

27. *Id.* ¶¶ 7.303-339.

governmental control over their export operations.<sup>28</sup> In doing so, the panel also found that this presumption was not justified by paragraph 15 of China's Accession Protocol.<sup>29</sup> The panel exercised judicial economy with respect to China's Article 9.4 claim.<sup>30</sup>

## II. U.S. Trade Remedies

### A. SIGNIFICANT COMMERCE CASES

This year was another active year for AD/CVD litigation at the U.S. Department of Commerce. Commerce initiated over forty-three AD and CVD investigations, involving at least fifteen different countries and products ranging from steel products, to ammonium sulfate, to amorphous silica fabric.<sup>31</sup>

#### 1. *"Solar I" and "Solar II" Proceedings*

The proceedings on Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China ("Solar I") and Crystalline Silicon Photovoltaic Products from China and Taiwan ("Solar II") continued this year, with ongoing administrative reviews in each. The final results of Solar I's second AD/CVD administrative reviews were issued in June and July 2016, calculating combined duty margins ranging between 24–33%, with a 259.89% margin for the China-wide entity.<sup>32</sup> Preliminary results are expected in the Solar I third administrative reviews in late December 2016 and in the Solar II first administrative reviews in early 2017.

Commerce also investigated several scope claims in 2016. Notably, in June and July 2016, Commerce found that two types of so-called "hybrid" solar cells, which contain both a crystalline silicon component and thin film component, fall within the scope of the Solar I orders and thus, are subject to duties.<sup>33</sup> These scope determinations are currently on appeal at the Court of International Trade.

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28. *Id.* ¶¶ 7.303–.339.

29. *Id.* 7.346–.348.

30. *Id.* 7.383–.388.

31. See *Antidumping and Countervailing Duty Investigations Initiated After January 01, 2000*, ENFORCEMENT AND COMPLIANCE (Nov. 30, 2016), <http://enforcement.trade.gov/stats/inv-initiations-2000-current.html>.

32. See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 81 Fed. Reg. 39,905 (June 20, 2016); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 81 Fed. Reg. 46,904 (July 19, 2016).

33. See *e.g.*, *Supreme Inc. v. United States*, Court No. 16–00171, Slip Op. 16–93 at 18–22 (Ct. Int'l Trade 2016).

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2. *Aluminum Extrusions from China*

In 2016, Commerce continued to wrestle with the “finished goods kit” definition following CIT decisions that questioned Commerce’s position that products containing solely aluminum extrusions and fasteners are not finished goods and therefore remain within the scope of the AD/CVD orders on aluminum extrusions from China.<sup>34</sup> On multiple occasions, Commerce found “under protest” that products consisting only of aluminum extrusions and fasteners are excluded.<sup>35</sup> However, Commerce has stuck to its position that finished products must contain aluminum extrusions as parts and an additional component.<sup>36</sup>

Furthermore, pursuant to the 2015 anti-circumvention petition regarding certain “5xxx series” aluminum extruded products,<sup>37</sup> Commerce made an affirmative preliminary determination that extruded aluminum products from China meeting the chemical specification for 5050-grade aluminum alloy circumvent the Orders.<sup>38</sup>

3. *Flat-Rolled Steel Investigations*

In 2016, Commerce made affirmative final determinations in the AD/CVD investigations of corrosion-resistant, cold-rolled, and hot-rolled steel from several countries. Notably, Commerce calculated a 58.68% subsidy margin for POSCO, a top Korean steel supplier, in the hot-rolled steel CVD investigation and a 3.89% for other Korean producers.<sup>39</sup> Commerce terminated its CVD investigation on hot-rolled steel from Turkey due to the ITC’s finding that subsidized Turkish imports were negligible.<sup>40</sup> Moreover, the agency did not issue orders on cold-rolled steel from Russia, despite its affirmative final AD/CVD determinations, because of the ITC’s negligibility

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34. See, e.g., *Whirlpool v. United States*, Court No. 14-00199, Slip Op. 16-8 (Ct. Int’l Trade 2016).

35. See, e.g., Remand Results, *Whirlpool Corp. v. United States*, Court No. 14-000199, Slip Op. 16-08 (Ct. Int’l Trade 2016).

36. See e.g., Memorandum to Christian Marsh, Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations, Final Scope Ruling on Agilent Technologies, Inc.’s Mass Filter Radiator (Aug. 10, 2016); Memorandum to Christian Marsh, Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations, Final Scope Ruling on Plexus Corporation’s Silver Spring Networks Enclosure Kit (Jan. 5, 2016).

37. See Letter from Wiley Rein LLP to Sec’y Commerce, re: *Aluminum Extrusions from the People’s Republic of China: Scope Clarification and Circumvention Inquiry Request* (Oct. 22, 2015).

38. Memorandum to Paul Picado, Assistant Sec’y for Enforcement and Compliance, Anti-Circumvention Inquiry Regarding the Antidumping Duty and Countervailing Duty Orders on Aluminum Extrusions from the People’s Republic of China (Nov. 3, 2016).

39. Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea Hot-Rolled Steel, 81 Fed. Reg. 67,960, 67,961 (Dept. Comm. Aug. 12, 2016).

40. See Certain Hot-Rolled Steel Flat Products From Brazil and the Republic of Korea, 81 Fed. Reg. 67,960 n.1 (Oct. 3, 2016).

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decision concerning Russia.<sup>41</sup> The ITC's decisions on subsidized hot-rolled steel from Turkey and cold-rolled steel from Russia are on appeal.

4. *Green Tubes from China*

In February 2014, Commerce had issued a scope ruling in *Certain Oil Country Tubular Goods from the People's Republic of China* finding that Chinese green tubes (unfinished OCTG) finished in a third country are within the scope of the orders on OCTG from China.<sup>42</sup> On appeal, however, the CIT remanded this decision,<sup>43</sup> and Commerce thereafter found "under protest" that the scope was not limited to direct imports from China.<sup>44</sup>

The court then ordered a second remand,<sup>45</sup> and in August 2016, Commerce concluded that the scope does not cover Chinese OCTG finished in third countries, and that imports of finished OCTG from Indonesia manufactured from Chinese green tubes do not circumvent the Orders.<sup>46</sup> The court subsequently sustained these results. Going forward, however, this case has significant implications for the domestic industry's definition of the scope in their petitions. Critically, the industry will now be compelled to draft language that explicitly includes third-country processing to ensure that such processing does not take subject merchandise outside the scope.

B. SIGNIFICANT INTERNATIONAL TRADE COMMISSION CASES

1. *Rebar from Japan, Taiwan, and Turkey*

In November 2016, the Commission issued an affirmative determination in the preliminary phase of the AD/CVD investigations regarding steel concrete reinforcing bar (rebar) from Japan, Taiwan, and Turkey.<sup>47</sup> Petitioner, the Rebar Trade Action Coalition (RTAC), filed its petition against a broad background of existing AD duties on rebar from other countries, some of which have been in place since 2001 and others since 2014.<sup>48</sup> As to RTAC's latest petition, the Commission voted unanimously to find that there is reasonable indication of injury to the domestic industry by

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41. See *Certain Cold-Rolled Steel Flat Products from Brazil, India, the Republic of Korea, and the United Kingdom*, 81 Fed. Reg. 64,432, 64,433 (Sept. 20, 2016); *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea*, 81 Fed. Reg. 64,436, 64,437 n.5 (Sept. 20, 2016).

42. *Certain Oil Country Tubular Goods From the People's Republic of China*, 82 Fed. Reg. 6490, 6491 (Jan. 19, 2017).

43. *Bell Supply Co., LLC v. United States*, 83 F. Supp. 3d 1311 (Ct. Int'l Trade 2015).

44. See *Bell Supply Company, LLC v. United States*, Ct. No. 14-00066 (Ct. Int'l Trade 2015) (Final Results of Redetermination Pursuant to Remand).

45. *Bell Supply Company, LLC, v. United States*, 179 F. Supp. 3d 1082 (Ct. Int'l Trade 2016).

46. See *Bell Supply Company, LLC v. United States*, Slip Op. 16-41 (Ct. Int'l Trade 2016) (Second Remand Results).

47. *Steel Concrete Reinforcing Bar from Japan, Taiwan, and Turkey*, Inv. Nos. 701-TA-564 and 731-TA-1338-1340, USITC Pub. No. 4648 (Nov. 2016) (Prelim).

48. *Id.* at 4.



dumped imports from Japan, Taiwan, and Turkey and subsidized imports from Turkey.<sup>49</sup> Preliminary AD/CVD margins are expected by February 2017 and December 2016, respectively.<sup>50</sup>

## 2. *Flat-Rolled Steel Investigations*

The Commission issued a series of historic affirmative determinations this year on flat-rolled steel from eleven countries, marking a crucial step towards addressing the steel trade crisis in the U.S. market. In June, the Commission made an affirmative final determination in *Certain Corrosion-Resistant Steel Products from China, India, Italy, Korea, and Taiwan*.<sup>51</sup> All six Commissioners voted in the affirmative, finding injury to the domestic industry by unfairly traded imports from all subject countries.<sup>52</sup> That same month, all six Commissioners again voted in the affirmative in *Cold-Rolled Steel Flat Products from China and Japan*, finding injury by imports from China and Japan.<sup>53</sup>

In September, the Commission issued another affirmative final determination in *Cold-Rolled Steel Flat Products from Brazil, India, Korea, Russia, and the United Kingdom* regarding imports from all subject countries except for Russia, which were found to be negligible.<sup>54</sup> The Commission found injury by imports from Brazil, India, Korea, and the UK and threat of injury by reason of subsidized Indian imports.<sup>55</sup> As noted above, the ITC's finding with respect to Russia is currently on appeal. Also in September, the Commission issued an affirmative final determination in *Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*.<sup>56</sup> The Commission found injury by reason of imports from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the UK.<sup>57</sup> The Commission also found that subsidized Turkish imports were negligible,<sup>58</sup> although this decision is on appeal.

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49. *See id.* at 31-32.

50. *See* News Release, USITC, USITC Votes to Continue Investigations on Steel Concrete Reinforcing Bar from Japan, Taiwan, and Turkey (Nov. 3, 2016), [https://www.usitc.gov/press\\_room/news\\_release/2016/er110311680.htm](https://www.usitc.gov/press_room/news_release/2016/er110311680.htm).

51. *Certain Corrosion-Resistant Steel Products from China, India, Italy, Korea, and Taiwan*, Inv. Nos. 701-TA-534-537 and 731-TA-1274-1278, USITC Pub. 4620 (July 2016) (Final) ("CORE Determination").

52. *Id.* at 1.

53. *Cold-Rolled Steel Flat Products from China and Japan*, Inv. Nos. 701-TA-541 and 731-TA-1284 and 1286, USITC Pub. 4619 (July 2016) (Final).

54. *Cold-Rolled Steel Flat Products from Brazil, India, Korea, Russia, and the United Kingdom*, Inv. Nos. 701-TA-540, 542-544 and 731-TA-1283, 1285, 1287, and 1289-1290, USITC Pub. 4637 (September 2016) (Final).

55. *Id.*

56. *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*, Inv. Nos. 701-TA-545-547 and 731-TA-1291-1297 USITC Pub. 4638 (September 2016) (Final).

57. *Id.*

58. *Id.*

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3. *Uncoated Paper from Australia, Brazil, China, Indonesia, and Portugal*

In February 2016, the Commission issued an affirmative material injury determination regarding uncoated paper from Australia, Brazil, China, Indonesia, and Portugal.<sup>59</sup> In *Certain Uncoated Paper from Australia, Brazil, China, Indonesia, and Portugal*, the Commission determined that dumped imports from all five countries and subsidized imports from China and Indonesia materially injured the U.S. industry.<sup>60</sup> Ultimately, the Commission found that subject import volumes were significant and increased throughout the investigation period, at prices that undersold the U.S. product and had significant price effects.<sup>61</sup>

C. COURT APPEALS

The CAFC addressed several significant aspects of U.S. trade remedies law in 2016.

1. *Deacero S.A. de C.V. v. Untied States*

In *Deacero*, the CAFC held that, to effectively combat circumvention of AD/CVD orders in accordance with 19 U.S.C. § 1677j(c), Commerce may determine that certain types of articles are within the scope of an AD or CVD duty order, even when the articles do not fall in the literal scope of the order. The CAFC noted that the purpose of minor alteration anti-circumvention inquiries “is to determine whether articles not expressly within the literal scope of a duty order may nonetheless be found within its scope as a result of a minor alteration to the merchandise covered in the investigation.”<sup>62</sup>

2. *JBLU v. United States*

In *JBLU Inc. v. United States*, the CAFC determined that the word “trademark” in 19 C.F.R. § 134.47 unambiguously includes both registered and nonregistered trademarks.<sup>63</sup> Therefore, goods with trademarked names that appear on imported articles which include words, letters, or names referring to geographical locations only have to comply with the lesser marking requirements of 19 C.F.R. § 134.47, even if the trademark is not registered and does not have an application pending.

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59. See *Certain Uncoated Paper from Australia, Brazil, China, Indonesia, and Portugal*, Inv. Nos. 701-TA-528-529 and 731-TA-1264-1268, USITC Pub. 4592 (Feb. 2016) (Final) (“Paper ITC Determination”).

60. Paper ITC Determination at 1.

61. *Id.* at 29.

62. *Deacero S.A. de C.V. v. United States*, 817 F.3d 1332, 1338 (Fed. Cir. 2016).

63. *JBLU Inc. v. United States*, 813 F.3d 1377 (Fed. Cir. 2016).

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3. *Nan Ya Plastics Corp. v. United States*

*Nan Ya* dealt with Commerce’s use of adverse facts available (AFA) for non-cooperative respondents in the context of AD/CVD proceedings. Under 19 U.S.C. § 1677e(b)(4), when respondents fail to act to “the best of their abilities,” Commerce may rely on “any other information placed on the record” to fill in gaps created by missing information, including making assumptions adverse to the non-cooperative respondent. But such adverse inferences must be corroborated with other information on the record in accordance with 19 U.S.C. § 1677e(c). The CAFC had previously held that the corroboration provision required assigned rates to reflect the “commercial reality” of the non-cooperative respondent and be an “accurate” reflection of the rates a respondent could have received. In *Nan Ya*, the CAFC clarified its use of these terms, noting that “a Commerce determination (1) is ‘accurate’ if it is correct as a mathematical and factual matter, thus supported by substantial evidence; and (2) reflects ‘commercial reality’ if it is consistent with the method provided in the statute, thus in accordance with law.”<sup>64</sup>

4. *United States v. Nitek Elecs. Inc.*

In *Nitek*, the CAFC found that the Government of the United States was precluded from bringing a penalty claim against an importer for a lesser culpability level than what Customs asserted in its pre-penalty notice because, by not including the lesser culpability level in the pre-penalty notice, the Government failed to exhaust administrative remedies prior to seeking judicial enforcement of the administrative action. The CAFC held that, as the underlying administrative penalty under 19 U.S.C. § 1592(e) was based on gross negligence, the Government failed to state a claim when it brought a case alleging a violation based on negligence.<sup>65</sup>

D. SECTION 337 DEVELOPMENTS

Several significant Section 337 developments in 2016 included: (1) key decisions by the CAFC; (2) a number of seminal determinations by the ITC

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64. *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333 (Fed. Cir. 2016). Although not applicable to the litigation related to this case, the *American Trade Enforcement Effectiveness Act*, H.R.2523, 114th Cong. (2015), broadened Commerce’s authority to apply AFA and removed the requirement that AFA rates reflect “commercial reality” or provide an “accurate” measure of a respondent’s actual rate, noting that Commerce “is not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.” 19 U.S.C. § 1677e(b)(1)(B) (2015). However, the corroboration provision of the statute was not altered by the new law. 19 U.S.C. § 1677e(c). Thus, it remains unclear how the courts will interpret the corroboration provision and its effect on Commerce’s AFA determinations in the future.

65. *United States v. Nitek Elecs. Inc.*, 806 F.3d 1376 (Fed. Cir. 2016).

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(or “Commission”); and (3) a novel complaint filed by U.S. Steel Corporation.

With respect to CAFC decisions, the CAFC issued an order denying a petition filed by the respondent for rehearing *en banc* of the ruling in the *Delorme* case.<sup>66</sup> In the CAFC panel decision, the Court had held that a respondent who violated the terms of a Consent Order could have civil penalties imposed on it, even if the patent on which the Consent Order was based was subsequently deemed to be an invalid by a federal district court.<sup>67</sup> An *en banc* rehearing was requested. Following the CAFC’s denial of the request for the *en banc* rehearing, the respondent subsequently filed a petition for a writ of certiorari, but that petition was denied by the U.S. Supreme Court on November 28, 2016.<sup>68</sup>

The CAFC also issued an order denying a petition filed by the respondent for rehearing *en banc* of the ruling in the *Sino Legend* case.<sup>69</sup> In the CAFC panel judgment, the Court, pursuant to CAFC Rule 36, had summarily affirmed the ITC’s decision in the *Rubber Resins* investigation in which the ITC concluded that it could impose a limited exclusion order for misappropriation of trade secrets (resulting in a violation of Section 337) even when the misappropriation occurred entirely outside of the U.S. The decision was made in accordance with the ruling in the *TianRui* case that the CAFC had issued in 2011.<sup>70</sup> Following the CAFC’s denial of the request for *en banc* rehearing, the respondent subsequently filed a petition for a writ of certiorari, which has not yet been ruled on by the U.S. Supreme Court.

The ITC also issued a number of seminal rulings in 2016. In accordance with the decision issued by the U.S. Supreme Court in the *Alice* case,<sup>71</sup> the Commission issued several rulings in which it dismissed claims on the grounds of Section 101 patent ineligibility relating to the subject patents.<sup>72</sup> In addition, the Commission issued several opinions in which it concluded that the 100-day procedure should not be used in certain circumstances.<sup>73</sup>

Finally, an extremely novel Section 337 complaint was filed by U.S. Steel Corporation (U.S. Steel) on April 26, 2016, which was subsequently instituted by ITC on June 2, 2016.<sup>74</sup> In the complaint, U.S. Steel asserted that the importation into the United States of certain Chinese-origin carbon

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66. *Delorme Publ’g Co. v. Int’l Trade Comm’n*, 805 F.3d 1328 (Fed. Cir. 2016).

67. *Id.*

68. *DBN Holding, Inc. v. Int’l Trade Com’n.*, 137 S. Ct. 538 (2016).

69. *See Sino Legend (Zhangjiagang) Chemical Co. v. Int’l Trade Comm’n*, 623 F. App’x 1016 (Fed. Cir. 2015).

70. *Id.*; *TianRui Group Co. Ltd. v. Int’l Trade Com’n*, 661 F.3d 1322 (Fed. Cir. 2011).

71. *Alice Corp. Pty. Ltd. v. CLS Bank Intern.*, 134 S. Ct. 2347 (2014).

72. *See, e.g., Activity Tracking Devices*, Inv. No. 337-TA-963, (USITC Apr. 4, 2016); *Portable Electronic Devices and Components Thereof*, Inv. No. 337-TA-994, (USITC Sept. 21, 2016).

73. *See, e.g., Quartz Slabs and Portions Thereof*, Inv. No. 337-TA-1017, (USITC Aug. 11, 2016); *Industrial Control System Software*, Inv. No. 337-TA-1020, (USITC Sept. 13, 2016), Inv. No. 337-TA-1020, (USITC Sept. 13, 2016).

74. *Certain Carbon and Alloy Steel Products*; Institution of Investigation, 81 Fed. Reg. 35,381 (Dep’t Commerce, June 2, 2016) (hereinafter the “Investigation Institution Notice”).

and alloy steel products violated Section 337, because they involved the following types of inappropriate actions: (1) a conspiracy to fix prices and control output and export volumes of the subject products (*i.e.*, antitrust violations); (2) misappropriation of trade secrets; and (3) false designation of origin or manufacturer(s) in an effort to avoid AD/CVD orders imposed on certain Chinese-origin carbon and alloy steel products imposed by the U.S. Government.<sup>75</sup> While the Administrative Law Judge dismissed the antitrust claims on the grounds that U.S. Steel lacked standing to make such claims, the remaining claims are still the subject of investigation as of this time, and if U.S. Steel prevails on the merits on these remaining claims, the ITC could issue relief to U.S. Steel that could effectively prohibit many kinds of Chinese-origin carbon and alloy steel products from being imported into or sold in the United States.

### III. Negotiation Developments

#### A. WTO UPDATES

At the Tenth Ministerial Conference of the WTO, in Nairobi, Kenya held through the 15th-18th of December 2015, Ministers adopted the “Nairobi Package,”<sup>76</sup> At the same Conference, Members finally acknowledged that the long-running Doha Round of negotiations was dead.<sup>77</sup>

The Nairobi Package decisions include

- Agriculture:<sup>78</sup>
  - Special Safeguard Mechanism (SSM) for Developing Countries—allowing temporary increases in tariffs during import surges or market crashes. SSM is a long-running issue in market access negotiations and will continue to be debated in the Agriculture Committee in Special Session.<sup>79</sup>
  - Decision on Public Stockholding for Food Security Purposes—Ministers committed to negotiating a permanent solution.<sup>80</sup> At issue is the public stockholding of food by some developing countries at fixed prices, which is subject to Aggregate Measure of Support limits.<sup>81</sup>

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75. *Id.*

76. See World Trade Organization, Nairobi Ministerial Declaration, WT/MIN(15)/DEC, Part II, para 22 (adopted Dec. 19, 2015).

77. *Id.* at Part III, para 30.

78. World Trade Organization, Tenth WTO Ministerial Conference, (Nairobi 2015), Briefing Note: Agriculture issues, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_agriculture\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm).

79. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/43 (2015).

80. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/44 (2015).

81. Briefing Note: Agriculture issues, *supra* note 78.

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- Export Competition—developed countries committed to immediately removing export subsidies for agricultural products and developing countries committed to doing so by 2018.<sup>82</sup> This achievement concluded a long-standing and contentious issue. So as not to undermine this decision, Ministers also agreed to new rules for: maximum repayment terms for export financing when there is government support, agricultural exports from state trading enterprises, and food aid.<sup>83</sup>
- Cotton—Ministers also agreed to eliminate cotton export subsidies immediately for developed countries and by 2017 for developing countries and that cotton from least developed countries will be given quota- and duty-free access to developed and developing (if possible) countries beginning in 2016.<sup>84</sup>
- Least Developed Countries (“LDCs”): Ministers adopted a decision on preferential rules of origin that assists products from LDCs to qualify for the benefits of a free trade agreement (including a stipulation that Members consider allowing the use of up to 75 percent of non-originating materials when conferring origin); and a provision that Members consider simplifying documentary requirements for products from LDCs (for example, self-certification).<sup>85</sup> Members also extended the “LDC Services Waiver,” first agreed to in 2011, which granted preferential access for LDC services for 15 years; the Waiver was extended to the end of 2030.<sup>86</sup>

**B. CHINA’S MARKET ECONOMY STATUS**

China’s non-market economy (“NME”) status expired on December 11, 2016, fifteen years after its WTO accession. When China acceded to the WTO on December 11, 2001,<sup>87</sup> all parties agreed that Chinese prices and costs did not necessarily provide a suitable basis for calculating anti-dumping duty (AD) margins. Therefore, WTO members whose national laws contained market economy (ME) criteria were allowed to utilize alternative NME methodologies for measuring AD margins of Chinese companies.<sup>88</sup>

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82. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/45, para. 7 (2015).

83. *Id.*

84. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/46, para. 9 (2015).

85. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/47 (2015).

86. World Trade Organization, Ministerial Decision of 19 December 2015, WT/MIN(15)/48 (2015).

87. World Trade Organization, *China and the WTO*, MEMBER INFORMATION (Nov. 29, 2016 9:45 AM), [https://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/china_e.htm).

88. See World Trade Organization, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 35, 86 (Oct. 1, 2001).

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Sub-paragraph 15(a)(i) of China's Protocol of Accession to the WTO provides that, if Chinese producers can show that ME conditions prevail in a given industry, the importing WTO member must base its dumping calculations on Chinese prices and costs.<sup>89</sup> Sub-paragraph 15 (a)(ii) establishes the converse.<sup>90</sup>

Sub-paragraph 15(d) contains rules on the termination of sub-paragraph 15(a).<sup>91</sup> Should China establish the prevalence of NME conditions either country-wide or within a specific industry, the provisions of sub-paragraph 15(a) either shall be terminated or shall no longer be applicable to that industrial sector.<sup>92</sup>

At this moment, the question remained, whether, beginning on December 11, 2016, which provision would be the correct legal interpretation of the residual portions. Chinese exporters assert that the expiration of sub-paragraph 15(a)(ii) unambiguously *requires* an automatic extension of ME methodology to all Chinese anti-dumping cases.<sup>93</sup> Conversely, US policy seems to argue that the remainder of paragraph 15(a) requires that Chinese exporters affirmatively establish the prevalence of ME conditions under the domestic laws of importing countries in order to be eligible for a dumping methodology based on Chinese prices and costs.<sup>94</sup>

USTR annual reports to Congress on China's WTO compliance have regularly maintained that the NME methodology in Chinese AD cases was available for fifteen years only.<sup>95</sup> The WTO recognized the need for a new interpretation of sub-paragraph 15(a). Indeed, in *European Communities*, the WTO Appellate Body endorsed the conclusion that WTO members treat China as a ME country starting on December 11, 2016.<sup>96</sup> It is unclear

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89. World Trade Organization, *Accession of the People's Republic of China*, WT/L/432, Part I, para. 15 (Nov. 23, 2001) [hereinafter Accession Protocol].

90. *Id.*

91. *Id.*

92. *Id.*

93. Gary Clyde Hufbauer & Cathleen Cimino-Isaacs, *Looming US-China Trade Battles?: Market Economy Status (Part II)*, PETERSON INST. INT'L ECON. (Nov. 29, 2016, 10:13 AM), <https://piie.com/blogs/trade-investment-policy-watch/looming-us-china-trade-battles-market-economy-status-part-ii>.

94. K. William Watson, *Eleven Months Left to Revoke China's Nonmarket Economy Status*, CATO INSTITUTE (Nov. 29, 2016, 10:09 AM), <https://www.cato.org/blog/eleven-months-left-revoke-chinas-nonmarket-economy-status>.

95. See UNITED STATES TRADE REPRESENTATIVE, *2012 Report to Congress on China's WTO Compliance*, (Dec. 2012), at 20, <https://ustr.gov/sites/default/files/uploads/2012%20Report%20to%20Congress%20-%20Dec%202012%20Final.pdf> ("this China-specific authority expires after 15 years, running from the date of China's WTO accession"). *But see*, UNITED STATES TRADE REPRESENTATIVE, *2013 Report to Congress on China's WTO Compliance*, (Dec. 2013), <https://ustr.gov/sites/default/files/2013-Report-to-Congress-China-WTO-Compliance.pdf> (including no mention of the 15 year term).

96. World Trade Organization, Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶ 289, WT/DS397/AB/R (July 15, 2011).

whether WTO Members will continue to apply NME methodology in Chinese AD cases after the anniversary date.

### C. REGIONAL NEGOTIATIONS

#### 1. *Trans-Pacific Partnership*

The finalized proposal for the Trans Pacific Partnership (TPP) was signed by the twelve participating countries.<sup>97</sup> The TPP still remains subject to the ratification of at least six of the participating countries.<sup>98</sup> It appears unlikely that the TPP will be approved or ratified by the United States.<sup>99</sup> On November 11, 2016, the Obama Administration stated it would no longer pursue the passage of the TPP.<sup>100</sup> As a result, Vietnam has indicated it does not intend to ratify the TPP.<sup>101</sup>

The unlikely ratification by the United States and Vietnam has led many to speculate that the TPP will not be implemented and that the Regional Comprehensive Economic Partnership (which already includes seven TPP-participating countries, but excludes the United States) will instead gain momentum.<sup>102</sup> But despite these issues with ratification, no participating country has officially abandoned the TPP, although President-elect Trump has pledged to do so.<sup>103</sup>

#### 2. *Transatlantic Trade and Investment Partnership*

Similar to the TPP, the future of the T-TIP remains uncertain, especially in light of the United Kingdom's approval of a referendum to exit the European Union<sup>104</sup> and the election of Donald Trump.<sup>105</sup> On November 11,

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97. Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, but Years of Negotiations Still to Come*, REUTERS (Feb. 4, 2016), <http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S>.

98. *Id.*

99. Vicki Needham, *White House Gives Up on Passing the TPP*, THE HILL (Nov. 11, 2016), <http://thehill.com/policy/finance/305668-white-house-gives-up-on-passing-the-tpp>.

100. Jackie Northam, *Obama Isn't Expected To Push Congress On Trans-Pacific Partnership Trade Deal*, NATIONAL PUBLIC RADIO (Nov. 11, 2016), <http://www.npr.org/sections/thetwo-way/2016/11/11/501778485/obama-not-expected-to-push-congress-on-trans-pacific-partnership-trade-deal> (referencing comments from a former White House economic advisor).

101. Xiang Wang, *Good News for China? No TPP for the U.S., and Now Vietnam*, FORBES (Nov. 17, 2016), <http://www.forbes.com/sites/xiangwang/2016/11/17/good-news-for-china-no-tpp-for-the-u-s-and-now-vietnam/#412a16f03dc8>.

102. *Id.*; Michael Martina, *With Trump Win, China Looks to Seize Asia Free Trade Leadership*, REUTERS (Nov. 18, 2016), <http://www.reuters.com/article/us-usa-trump-china-apec-idUSKBN13D0BI>.

103. Charlie Campbell, *Donald Trump's Pledge to Withdraw U.S. From TPP Opens the Door for China*, TIME (Nov. 21, 2016), <http://time.com/4579580/china-donald-trump-tpp-obama-asia-rcep-business-trade>; see also Martina, *supra* note 102.

104. Marianne Schneider-Petsinger, *Brexit Clouds TTIP Negotiations but may not Scupper Deal*, CHATHAM HOUSE – THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS (July 11, 2016), <https://www.chathamhouse.org/expert/comment/brexit-clouds-ttip-negotiations-may-not-scupper-deal>.



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2016, EU Trade Commissioner Malmström indicated that, as a result, she believed the T-TIP negotiations would be stalled for “quite a long time.”<sup>106</sup> German Chancellor Angela Merkel also indicated that, despite the progress of negotiations, the T-TIP would “not be concluded now” and she was “quite certain” the negotiations would be revisited in the future.<sup>107</sup> Despite four successful rounds of negotiations in 2016,<sup>108</sup> it is unclear when or if the negotiations will resume.

**D. U.S. INVESTMENT TREATY NEGOTIATIONS**

In 2016, developments in United States investment treaty practice centered on the TPP and negotiations toward a bilateral investment treaty (BIT) with the People’s Republic of China (PRC).<sup>109</sup> United States BIT negotiations with India, Pakistan, and Mauritius appear to be ongoing as well.

Chapter 9 of the TPP, “Investment,” closely resembles a BIT. Substantively, the provisions of the TPP investment chapter have “an exceedingly close resemblance to the 2004 U.S. Model BIT.”<sup>110</sup> In February 2016, the United States was among twelve governments to sign the TPP;<sup>111</sup> however, the TPP has been criticized and disavowed by President-elect Trump.<sup>112</sup>

Progress toward a U.S.–PRC BIT was modest in 2016. The scope of the PRC negative list (of sectors to be excluded from the BIT) reportedly was a

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105. Simon Marks and Hans Von Der Burchard, *Europe to Trump: Don’t Give Up on Free Trade*, POLITICO (Nov. 14, 2016), <http://www.politico.eu/article/europe-to-donald-trump-dont-give-up-on-free-trade-ttip-ceta-us-eu/>.

106. Viktoria Dendrinou, *Trump Election Likely to Put U.S.–EU Trade Talks on Ice*, WALL STREET JOURNAL (Nov. 11, 2016), <http://www.wsj.com/articles/trump-election-likely-to-put-u-s-eu-trade-talks-on-ice-1478880276>.

107. James Carstensen, *With TTIP All but Abandoned, Obama and Merkel Argue ‘Cooperation is Now More Urgent than Ever’*, CNSNEWS (Nov. 17, 2016), <https://www.cnsnews.com/news/article/james-carstensen/ttip-all-abandoned-obama-and-merkel-argue-cooperation-now-more-urgent>.

108. European Commission, IN FOCUS: TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP), *Documents and events: Negotiation Rounds – Press Material*, (Nov. 22, 2016, 9:33:00 PM), [http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#negotiation-rounds](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds).

109. European Commission, *Trade for All - New EU Trade and Investment Strategy*, (Apr. 4, 2016), <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy>.

110. Charles H. Brower II, *Trans-Pacific Partnership: Continuity and Breakthroughs in U.S. Investment Treaty Practice*, 27 AM. REV. INT’L ARB. 145, 180 (2016).

111. Office of the U.S. Trade Representative, *Trans-Pacific Partnership Ministers’ Statement*, (Feb. 4, 2016) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>.

112. Eric Beech, *Trump Says Will Quit Pacific Trade Deal on Day One of Presidency*, REUTERS (Nov. 21, 2016), <http://www.reuters.com/article/us-usa-trump-video-idUSKBN13G2K8>.

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point of contention in 2016,<sup>113</sup> as well as U.S.–proposed provisions not typically found in prior U.S. BITs, including provisions governing data flows, state-owned enterprises, discriminatory law enforcement, and forced technology transfer.<sup>114</sup> In April 2016, Senator Bob Corker, advisor to President-elect Trump at that time, invoked “strategic challenges” with the PRC and a “trade dispute over solar panels” as potential obstacles to a PRC–U.S. BIT.<sup>115</sup>

U.S. BIT negotiations with India, Pakistan, and Mauritius appear to be ongoing. India published a new model BIT and sought to terminate or modify its existing BITs in 2016,<sup>116</sup> drawing skepticism about the potential success of India–U.S. BIT negotiations.<sup>117</sup> Meanwhile, BIT negotiations are “currently in progress” between Mauritius and the United States,<sup>118</sup> while the U.S. and Pakistan, which commenced BIT negotiations in 2004,<sup>119</sup> “have a five-year action plan” regarding trade and investment.<sup>120</sup>

#### **IV. Legislative Developments**

President Obama signed the Trade Facilitation and Trade Enforcement Act of 2015 into law in February 2016. One of the provisions of the TFTEA eliminated this consumptive demand exception to the prohibition on importation of such goods made with convict labor, forced labor, or

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113. Adam Behsudi, *Latest China BIT offer enough to keep talks going*, POLITICO (July 6, 2016), <http://www.politico.com/tipsheets/morning-trade/2016/07/latest-china-bit-offer-enough-to-keep-talks-going-215180>.

114. Jack Caporal, *U.S.-China BIT Negotiations Intensify as Administration Aims To Cement Deal*, INSIDE U.S. TRADE (Nov. 10, 2016), <https://insidetrade.com/inside-us-trade/us-china-bit-negotiations-intensify-administration-aims-cement-deal>.

115. U.S. Senate Comm. on Foreign Relations, *Corker: China's Provocative Territorial Claims Threaten U.S. Strategic Interests in Asia-Pacific*, (Apr. 27, 2016), <http://www.foreign.senate.gov/press/chair/release/corker-chinas-provocative-territorial-claims-threaten-us-strategic-interests-in-asia-pacific>.

116. Int'l Inst. for Sustainable Development, *India takes steps to reform its investment policy framework after approving new model BIT*, INVESTMENT TREATY NEWS (Aug. 10, 2016), <https://www.iisd.org/itn/2016/08/10/india-takes-steps-to-reform-its-investment-policy-framework-after-approving-new-model-bit/>.

117. See Bryan Mercurio, *Negotiations on the United States-India Bilateral Investment Treaty: An Exercise in Futility*, TRADE PACTS (Sept. 7, 2016), <http://tradepacts.com/index.php/2016/09/07/negotiations-united-states-india-bilateral-investment-treaty-exercise-futility/>.

118. See Office of the United States Trade Representative, *Fiscal Year 2017 Budget*, (Feb. 2016), at 9, <https://ustr.gov/sites/default/files/notices/FY2017%20USTR%20Congressional%20Budget%20Submission.pdf>.

119. U.S. Dep't of State, *United States, Pakistan Begin Bilateral Investment Treaty Negotiations*, (Sept. 28, 2004), <https://2001-2009.state.gov/e/eeb/rls/prsr/2004/36573.htm>.

120. U.S. Embassy & Consulates in Pakistan, *Senior U.S. Official Reaffirms Commitment to Trade with Pakistan*, (Aug. 30, 2016), <https://pk.usembassy.gov/senior-u-s-official-reaffirms-commitment-trade-pakistan/>.

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indentured labor, making Section 307's import prohibition an absolute bar.<sup>121</sup>

Section 307 of the Tariff Act of 1930 (Section 307) prohibits the importation of “[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor.”<sup>122</sup> Prior to the enactment of TFTEA, U.S. Customs and Border Protection (CBP) was exempted from prohibiting the importation of merchandise made with forced labor if the good produced domestically was not available in sufficient quantities to meet United States demand.

The elimination of the consumptive demand loophole appears to have raised the profile of Section 307. Since February this year, there has been a significant increase in instances of enforcement of this provision, “with the detention of imports from the specialty chemicals industry and the food and beverage industry.”<sup>123</sup> Prior to February, the last detention order or withhold release order was issued in 2000.<sup>124</sup> CBP also has established a taskforce charged with identifying potential violations of Section 307.<sup>125</sup> CBP public affairs officer, Rick Pauza, stated that the Taskforce “will augment forced labor efforts and work proactively to research and bring forced labor cases that will generate additional withhold-release orders.”<sup>126</sup>

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121. TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015, PL 114-125, 130 Stat 122 (2016), § 910.

122. 19 U.S.C. § 1307.

123. *Recent Initiatives by the U.S. Government to Combat Forced Labor Practices*, AMERICAN BAR ASSOCIATION (Nov. 3, 2016), <https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=258015921>.

124. U.S. Customs and Border Protection, *Forced Labor*, <https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations>.

125. U.S. Customs and Border Protection, *CBP Creates Trade Enforcement Task Force*, (May 2, 2016), <https://www.cbp.gov/newsroom/national-media-release/cbp-creates-trade-enforcement-task-force>.

126. *CBP, Backed By New Law, To Step Up Fight Against Forced Labor Goods*, INSIDE U.S. TRADE (May 11, 2016), <https://insidetrade.com/daily-news/cbp-commissioner-says-he-plans-block-all-forced-labor-imports-use-self-initiation>.

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## **International Arbitration**

MANUEL LIATOWITSCH, JEFFREY ROSENTHAL, MARTINE FORNERET,  
EMILY SCHERKER, PETER ASHFORD, SABRINA JANZIK,  
MATTHEW J. WELDON, ROBERT L. HOUSTON, CHRISTOPHER BOOG,  
BENJAMIN GOTTLIEB, GERARD MEIJER, VALERIE VERBERNE,  
MICHAEL NUEBER, ALEXANDER BEZBORODOV, SERGEY MOROZOV,  
BRUNO GUANDALINI, HANNS-CHRISTIAN SALGER,  
THOMAS FÖRSTERLING, DIEPIRIYE ANGA, SAE YOUN KIM,  
ANDREW WHITE, ANNE HOFFMANN, CHAD CATTERWELL,  
CYRIL COTTERALL-DEBAY, WILLIAM LANGRAN, TIMUR I. SEN,  
HELEN TANG, REBECCA SOQUIER, TRACEY CUI, BRIANA YOUNG,  
JONATHAN BLANK, GUIDO CARDUCCI, CLIFFORD J. HENDEL,  
TAMARI J. LAGVILAVA, KEARA A. BERGIN, AND  
CHRISTOPHER P. DENICOLA\*

### **I. Introduction**

This article surveys developments in International Arbitration in 2015–2016. The first section highlights significant arbitration developments in U.S. courts, and the second section highlights developments around the

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\* Manuel Liatowitsch of Schellenberg Wittmer AG in Zurich was the general editor of this article; Jeffrey Rosenthal, Martine Forneret, and Emily Scherker of Cleary Gottlieb Steen & Hamilton LLP in New York contributed Section II; the following authors contributed to section III: Peter Ashford and Sabrina Janzik of Fox Williams LLP in London (on England & Wales); Matthew J. Weldon and Robert L. Houston of K&L Gates LLP in New York and Singapore (on Singapore & Hong Kong); Christopher Boog and Benjamin Gottlieb of Schellenberg Wittmer AG in Zurich (on Switzerland); Gerard Meijer and Valerie Verberne of NautaDutilh in Amsterdam (on the Netherlands); Michael Nueber of zeiler.partners in Vienna (on Austria); Alexander Bezborodov and Sergey Morozov of Beiten Burkhardt in Moscow (on Russia); Bruno Guandalini of CMTL in São Paulo (on Brazil); Hanns-Christian Salger and Thomas Försterling of Salger Rechtsanwälte in Frankfurt am Main (on Germany); Diepiriye Anga (on Nigeria); Sae Youn Kim and Andrew White of Yulchon LLC in Seoul (on South Korea); Anne Hoffmann, Chad Catterwell and Cyril Cotterall-Debay of Herbert Smith Freehills (on Australia); William Langran of Advokatfirmen Lindahl KB in Stockholm (on Sweden); Timur I. Sen of Sen Law Firm in Istanbul (on Turkey); Helen Tang, Rebecca Soquier, Tracey Cui, and Briana Young of Herbert Smith Freehills (on Mainland China); Jonathan Blank of Surana & Surana International Attorneys in Chennai (on India); Guido Carducci of Carducci Arbitration in Paris and Rome (on Italy); Clifford J. Hendel of Araoz & Rueda Abogados in Madrid (on Spain); Tamari J. Lagvilava, Law Clerk to The Honorable Delissa A. Ridgway, U.S. Court of International Trade (on the ICC - the views expressed in this article are offered in the author's personal capacity and do not reflect the views of the Court or any judge on the Court.); Keara A. Bergin and Christopher P. DeNicola of Dewey Pegno & Kramarsky LLP in New York (on ICSID)

world, including England and Wales, Singapore, Hong Kong, Switzerland, Netherlands, Austria, Russia, Brazil, Germany, Nigeria, South Korea, Australia, Sweden, Turkey, China, India, Italy, and Spain, and at the ICC and ICSID.

## II. Arbitration Developments in United States Courts

### A. ENFORCEMENT OF ARBITRAL AWARDS

#### 1. *Enforcement of an Annulled Award*

Several courts addressed the issue of whether a party can seek to enforce an arbitral award in a U.S. Court when that award has been nullified by the arbitral panel or by a foreign court.

Most significantly, in *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*,<sup>1</sup> the United States Court of Appeals for the Second Circuit upheld the confirmation of a Mexican arbitration award that was annulled by a Mexican court.<sup>2</sup> The arbitration concerned a contract dispute between Corporación Mexicana De Mantenimiento Integral (COMMISA), a Mexican subsidiary of a U.S. construction company, and Pemex-Exploración Y Producción (PEP), a state-owned Mexican oil and gas company, regarding a series of offshore oil platforms. COMMISA filed an arbitration demand with the International Chamber of Commerce (ICC) and was awarded approximately \$300 million in damages, which was subsequently affirmed by the United States District Court for the Southern District of New York. Thereafter, Mexico's Eleventh Collegiate Court for the Federal District annulled the arbitration award in a nearly 500-page opinion. As a result, PEP moved to vacate the district court's judgment confirming the arbitration award. The United States Court of Appeals for the Second Circuit remanded the case to the district judge to consider the effect of the Mexican annulment. The district judge again affirmed the award on the ground that annulment "violated basic notions of justice in that it applied a law that was not in existence at the time the parties' contract was formed."<sup>3</sup> PEP again appealed to the Second Circuit.

On appeal, the Second Circuit acknowledged that "a final judgment obtained through sound procedures in a foreign country is generally conclusive . . . unless . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought."<sup>4</sup> However, the court declared that concerns for international comity were overcome by its

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1. *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016).

2. *Id.* at 107. This decision is seemingly at odds with the D.C. Circuit's leading opinion in *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

3. *Id.* at 100 (quoting *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción*, 962 F. Supp. 2d 642, 644 (S.D.N.Y. 2013)).

4. *Id.* at 106.

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view that the Mexican annulment was “repugnant to fundamental notions of what is decent and just” in the United States and that not affirming the award would “undermine public confidence in laws and diminish rights of personal liberty and property.”<sup>5</sup> Despite the support of the governments of both the United States and Mexico, PEP’s request for en banc review was denied.<sup>6</sup>

Among other controversial aspects of this decision, the Second Circuit rejected the legitimacy of the Eleventh Collegiate Court’s decision, *inter alia*, on the basis that the Mexican Court relied upon “repugnan[t] retroactive legislation that disrupts contractual expectations;”<sup>7</sup> when, in fact, the voluminous and detailed Mexican opinion concluded that the recent legislation did not change existing law.

In contrast, other U.S. courts reaffirmed the importance of international comity in cases such as *In re Arbitration of Certain Controversies Between Getma Int’l and Republic of Guinea*,<sup>8</sup> where the United States District Court for the District of Columbia refused to enforce an award annulled by the Common Court of Justice and Arbitration (CCJA)<sup>9</sup> on the ground that the annulment was not against public policy and did not violate basic notions of justice.<sup>10</sup> The district court reasoned that while the New York Convention allowed courts to enforce annulled awards, that discretion is not so broad as to allow courts to second guess the judgment of a foreign court of competent jurisdiction<sup>11</sup> and would undermine a tenet that “an arbitration award does not exist to be enforced in . . . [this Court] if it has been lawfully ‘set aside’ by a competent authority in the [foreign] State in which the award was made.”<sup>12</sup>

Encountering a slightly different issue in *Hulley Enterprises Ltd. v. Russian Federation*,<sup>13</sup> the United States District Court for the District of Columbia granted a stay of proceedings in the long-standing Yukos arbitration pending the resolution of an appeal of an annulment decision in the Netherlands.<sup>14</sup>

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5. *Id.* at 111.

6. The Second Circuit also rejected PEP’s venue and jurisdictional challenges on the basis that PEP effectively forfeited these challenges by allegedly seeking affirmative relief from the Southern District of New York and the Second Circuit, *id.* at 100-04, and found that the jurisdictional protections of the Due Process Clause did not apply to PEP because it is owned by a foreign sovereign. *Id.* at 102-03.

7. *Id.* at 107–09.

8. *In re Arbitration of Certain Controversies Between Getma Int’l & Republic of Guinea*, 191 F.Supp.3d 43 (D.D.C. 2016) [hereinafter *Getma International*].

9. The CCJA was established by the OHADA Treaty, which was signed by certain West and Central African states, including Guinea, to create a uniform system of commercial dispute resolution.

10. *Id.* at 55.

11. *Id.* at 49.

12. *Id.* at 55 (quoting *TermoRio*, 487 F.3d at 936).

13. *Hulley Entrs. Ltd. v. Russian Fed’n*, No. 14-1996, 2016 WL 5675348 (D.D.C. Sept. 30, 2016).

14. *Id.* at \*1.

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Plaintiffs, shareholders of Yukos, a Russian privatized oil company, alleged that the Russian Federation attempted to bankrupt the company and appropriate its assets. Plaintiffs initiated arbitration proceedings pursuant to the Energy Charter Treaty's arbitration provision and were awarded more than \$50 billion USD in damages.<sup>15</sup>

Around the same time that the shareholders initiated confirmation proceedings in the District Court for the District of Columbia pursuant to the Federal Arbitration Act (FAA),<sup>16</sup> the Russian Federation moved the District Court of The Hague (the situs of the arbitration) to annul the awards. The Hague Court found that the Tribunal lacked jurisdiction to issue the awards because the Russian Federation had never agreed to arbitrate under the Energy Charter Treaty (the Hague Judgment).<sup>17</sup> The shareholders sought a stay of the D.C. District Court proceeding while appealing the Hague Judgment, which was granted on the grounds that the Hague Court's determination as to the existence of an agreement to arbitrate was relevant to the determination of whether the awards fell within the scope of the Foreign Sovereign Immunities Act and the New York Convention.<sup>18</sup>

2. *Interpretation of the "Evident Partiality" Standard*

Several United States courts examined the "evident partiality" standard under section 10 of the FAA,<sup>19</sup> which provides grounds for vacatur of an arbitration decision and award "where there was evident partiality or corruption in the arbitrators."<sup>20</sup> In a widely publicized lawsuit, the Second Circuit reviewed the arbitration decision issued in connection with the "Deflategate" scandal in *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*.<sup>21</sup> The dispute arose out of the National Football League's (NFL) suspension of New England Patriots's quarterback, Tom Brady, for his involvement in a scheme to deflate footballs leading up to the Super Bowl. The NFL Commissioner, acting as arbitrator pursuant to his authority in the league's collective bargaining agreement (CBA), affirmed Brady's suspension<sup>22</sup> and the parties sought judicial review in the United

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15. *Id.* at \*2.

16. *Id.*

17. *Id.*

18. *Id.* at \*9–12.

19. *See* Republic of Argentina v. AWG Grp. Ltd., No. 15-1057, 2016 WL 5928464 (D.C.C. Sept. 30, 2016), *appeal docketed*, No. 16-7134 (D.C.C. Oct. 31, 2016) (adopting the reasonable person standard used by the First, Second, and Sixth Circuits and denying vacatur based on lack of evidence of bias by the challenged arbitrator); *Nat'l Indemnity Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457 (S.D.N.Y. 2016) (holding that concurrent arbitral assignments were not sufficient to meet the reasonable person standard of partiality and that arbitrators have no duty of timely disclosure).

20. 9 U.S.C. § 10 (2002).

21. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2016).

22. *Id.* at 533-35.

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States District Court for the Southern District of New York. The district court denied the NFL's motion to affirm the suspension under the Labor Management Relations Act (LMRA)<sup>23</sup> and granted the NFL Players Association's (NFLPA) motion to vacate the award, finding that Brady lacked notice of a possible suspension and was deprived of fundamental fairness based on the manner in which the arbitration was conducted.<sup>24</sup> On appeal, the Second Circuit reversed this decision and remanded the case to the district court with instructions to affirm the award.

Recognizing the limited scope of appellate review of an arbitral award under the LMRA, the Second Circuit noted that its "obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the [LMRA]."<sup>25</sup> The Court considered, inter alia, the NFLPA's claim that the Commissioner was "evidently partial" because he adjudicated the propriety of his own conduct with respect to disciplining Brady. The Court explained that "arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen."<sup>26</sup> Critical to the Court's determination was its finding that the CBA made clear that the Commissioner was allowed to sit as the arbitrator, and the parties could have, but did not, limit the Commissioner's authority by agreement.<sup>27</sup> The Court concluded that "[i]f the arbitrator acts within the scope of this authority, the remedy for a dissatisfied party 'is not judicial intervention.'"<sup>28</sup>

**B. EXAMINATION OF THE VADEN "LOOK THROUGH" APPROACH TO FEDERAL JURISDICTION**

This year, the Second and Third Circuits both examined the Supreme Court's decision in *Vaden v. Discover Bank*,<sup>29</sup> which held that a federal court may "look through" to the underlying substance of an arbitration "to determine whether it is predicated on an action that 'arises under' federal law," and thus merits federal-question jurisdiction, when a petition seeks to compel arbitration under section 4 of the Federal Arbitration Act (FAA).<sup>30</sup> The Second Circuit in *Doscher v. Sea Port Group Securities*<sup>31</sup> held that federal courts may take the *Vaden* "look through" approach to determine if federal subject matter jurisdiction exists over a petition to vacate an award under

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23. 29 U.S.C. § 141 (2002). While the FAA does not apply to arbitrations under the LMRA, federal courts have often looked to the FAA for guidance in cases such as this. See *Nat'l Football League Mgmt. Council*, 820 F.3d at 545, n.13.

24. *Nat'l Football League Mgmt. Council*, 820 F.3d at 538–47.

25. *Id.* at 532.

26. *Id.* at 548.

27. *Id.*

28. *Id.* at 537.

29. *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

30. *Id.* at 61.

31. *Doscher v. Sea Port Grp. Sec.*, 832 F.3d 372 (2d Cir. 2016).



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section 10 of the FAA.<sup>32</sup> The Court interpreted *Vaden* broadly to conclude that the “look through” approach may be taken across the board under Chapter 1 of the FAA, and is not limited to section 4 petitions to compel.<sup>33</sup> In doing so, the Court overruled prior Second Circuit precedent, *Greenberg v. Bear, Stearns & Co.*,<sup>34</sup> which held that a district court may exercise federal question jurisdiction over an FAA petition to vacate *only* if the petition states a substantial federal question on its face.

In contrast, the Third Circuit in *Goldman v. Citigroup Global Markets*<sup>35</sup> held that a district court may not “look through” to the underlying subject matter of a section 10 motion to vacate to establish federal-question jurisdiction and limited the *Vaden* “look through” approach to section 4 motions to compel arbitration.<sup>36</sup> The Third Circuit distinguished the Supreme Court’s holding in *Vaden* as premised upon and limited to the specific language of section 4, which permits a court to “assume the absence of the arbitration agreement” to determine if it would have jurisdiction without it.<sup>37</sup> The Third Circuit found that a section 10 petition to vacate, on the other hand, must satisfy the well-pleaded complaint rule and raise on its face a federal issue in order to establish federal jurisdiction.<sup>38</sup> In reaching this conclusion, the Court reasoned that the FAA does not create federal jurisdiction and expressed concerns about usurping the role of state courts as enforcers of arbitration agreements.<sup>39</sup>

### III. Arbitration Developments around the World

In ENGLAND & WALES, punitive damages are generally not awarded under English law for breach of contract. Despite the general unenforceability of penalty clauses, it was held that the English rule against enforcing penalty clauses was not a sufficient reason to refuse enforcement of an award under the New York Convention.<sup>40</sup>

In 2016, the English High Court interpreted several provision of the Arbitration Act 1996. In a landmark decision the English High Court refused a challenge under section 68(2)(b) of the Arbitration Act 1996 and held that an arbitrator did not exceed his powers in allowing a party to recover its third-party litigation funding costs as “other costs” under section 59(1)(c) of the Arbitration Act 1996.<sup>41</sup> The Court accepted that the terms of

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32. *Id.* at 388-89.

33. *Id.* at 381-89.

34. *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22 (2d Cir. 2000), *overruled by* *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372 (2d Cir. 2016).

35. *Goldman v. Citigroup Glob. Mkts, Inc.*, 834 F.3d 242 (3d Cir. 2016).

36. *Id.* at 252-55.

37. *Id.* at 253 (quoting *Vaden*, 556 U.S. at 62).

38. *Id.* at 254-55.

39. *Id.* at 249-50, 257.

40. *Pencil Hill Ltd. v. US Citta di Palermo SpA*, [2016] EWHC 71 (QB) [32].

41. *Essar Oilfields Servs. Ltd. v. Norscot Rig Mgmt. PVT Ltd.*, [2016] EWHC 2361 (Comm) [77].

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section 59(1)(c), referring to “legal and other costs,” was wide enough to permit the recovery of third-party funding costs and that the correct test is to consider what other costs were incurred in bringing or defending a claim.

Section 44 of the Arbitration Act 1996 gives the court powers to make orders in support of arbitral proceedings, including the granting of an interim injunction, if or to the extent that, the arbitral tribunal has no power or is unable for the time being to act effectively. The Court ruled that the emergency arbitrator provisions in the London Court of International Arbitration (LCIA) Rules have the effect of limiting the scope of the court’s jurisdiction to grant interim injunctions in support of arbitration under section 44, such that where the powers of the court and the LCIA emergency arbitrator overlap, the court is not entitled to intervene.<sup>42</sup>

The Arbitration Act of 1996 does not require the disclosure of potential conflicts. Nevertheless, the IBA Guidelines on Conflicts of Interest are frequently referred to in English arbitration. In one case, an arbitrator was removed after failing to disclose that eighteen percent of his appointments and twenty-five percent of his income were in some way related to one party’s representative.<sup>43</sup> In another, the court commended the objective of the IBA Guidelines, but explained why some of the provisions dealing with non-waiver of certain conflict of interest situations were weak and could not be given judicial approval.<sup>44</sup>

In SINGAPORE, on August 1, 2016, the new Arbitration Rules for the Singapore International Arbitration Centre (SIAC) came into effect.<sup>45</sup> In November, Singapore’s Ministry of Law submitted a bill to permit third-party funding in arbitration.<sup>46</sup>

During 2016, the Singapore High Court heard cases regarding both the validity of award and arbitrability. The Singapore High Court set aside an award that was made based on an argument that the winning party had never raised at any point during the case.<sup>47</sup> The High Court also upheld the validity of an arbitration clause that granted one of the parties the right to elect whether to arbitrate a dispute.<sup>48</sup> Finally, the Singapore Court of Appeal upheld a High Court decision that found that a claim arising out of promissory notes issued under a supply agreement did not fall within the scope of the supply agreement’s arbitration clause.<sup>49</sup>

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42. *Gerald Metals SA v. Trs. of the Timis Trust*, [2016] EWHC 2327 (Ch) [67].

43. *Cofely Ltd. v. Bingham*, [2016] EWHC 240 (Comm) [118].

44. *W Ltd. v. M SDN BHD* [2016] EWHC 422 (Comm) [33]-[45].

45. SINGAPORE INT’L ARBITRATION CENTRE RULES (2016).

46. *See Singapore Endorses Third-Party Litigation Finance*, SINGAPORE LAW WATCH (Nov. 18, 2016), [http://www.singaporelawwatch.sg/slw/component/blog\\_calendar/16/11.html](http://www.singaporelawwatch.sg/slw/component/blog_calendar/16/11.html).

47. *JVL Agro Indus. Ltd. v. Agritrade Int’l Pte Ltd.* [2016] SGCH 126 [228].

48. *Dyna-Jet v. Wilson Taylor Asia Pacific Pte Ltd.* [2016] SGHC 238 [174].

49. *Rals International Pte Ltd. v. Cassa di Risparmio di Parma e Piacenza SpA* [2016] SGCA 53 [56].

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In HONG KONG, on October 12, 2016, the Law Reform Commission recommended that third-party funding for arbitrations be permitted.<sup>50</sup> Courts in Hong Kong also ruled on the validity of arbitration awards. The Hong Kong Court of First Instance set aside an award issued against a respondent who had been imprisoned throughout the duration of an arbitration commenced against him without his knowledge because he did not have proper notice and was not able to present his case.<sup>51</sup> The Taizhou Intermediate People's Court invoked a public policy exception and refused to enforce an ICC award rendered after the court had already held that the arbitration clause relied on was invalid since it failed to designate a seat or governing law.<sup>52</sup>

In SWITZERLAND, the Swiss Supreme Court rendered forty-seven decisions regarding motions to set aside arbitral awards issued by international arbitral tribunals seated in Switzerland. Among the most important decisions are the following three:

The court affirmed a sole arbitrator's jurisdiction arising from an arbitration clause contained in a draft contract.<sup>53</sup> While the main contract containing the arbitration clause was ultimately not signed, the arbitrator had found that the parties had entered into an arbitration agreement during their negotiations of the main contract. The court upheld this decision, finding that this was a proper application of the separability doctrine under the circumstances.

The court also overturned an arbitral tribunal's jurisdictional award. According to the award, the contractually agreed pre-arbitral dispute resolution tier had been complied with.<sup>54</sup> The court found that the claimant had launched the arbitration prematurely, and then proceeded to decide the long-open question of the consequence for failure to comply with mandatory pre-tier to arbitration. It found that such failure results in the stay of the arbitral proceedings until the pre-arbitral tier has been conducted. The modalities of the stay should be set by the arbitral tribunal.

Finally, the court reviewed whether the subsequent discovery of grounds for recusal could serve as a basis for the revision of an arbitral award.<sup>55</sup> It gave strong indications that it believed that the discovery of circumstances that might raise doubts as to the independence and impartiality of an

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50. H.K. LAW REFORM COMM'N, THIRD PARTY FUNDING FOR ARBITRATION SUBCOMM., CONSULTATION PAPER, THIRD PARTY FUNDING FOR ARBITRATION (Oct. 2015).

51. Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd., [2016] HKEC 2128 (C.F.I.).

52. See Poon, Anthony, *Failure to Specify Arbitral Seat in the Arbitration Clause May Result in Unenforceable Award*, GLOBAL ARBITRATION NEWS (Sept. 21, 2016), <https://globalarbitrationnews.com/failure-specify-arbitral-seat-arbitration-clause-may-result-unenforceable-award/>.

53. Bundesgericht [BGer] [Federal Supreme Court] Feb. 18, 2016 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 142 III 239.

54. Bundesgericht [BGer] [Federal Supreme Court] Mar. 16, 2016 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 142 III 296.

55. Bundesgericht [BGer] [Federal Supreme Court] Sept. 7, 2016 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 142 III 521.

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arbitrator could constitute grounds for a revision. However, rather than ruling on the issue, it chose to take the rather unorthodox step of referring the matter to Parliament to be dealt with in the forthcoming revision of the Swiss law on international arbitration.

In the NETHERLANDS, 2016 was the first full year that the New Dutch Arbitration Act<sup>56</sup> and the New Arbitration Rules of the Netherlands Arbitration Institute<sup>57</sup> were put in practice. Both the Act and the Institute entered into force in 2015.<sup>58</sup> The new Act contains improvements for Netherlands as a venue for international arbitration, including consolidation of arbitral proceedings, emergency arbitration, introduction of e-Arbitration, exclusive jurisdiction of arbitration institutes to decide challenges of arbitrators' confidentiality of arbitration and the non-liability of arbitrators.<sup>59</sup> The Dutch legislature also worked to limit Dutch courts' involvement in arbitrations and streamline the process; this objective was strongly confirmed by case law in 2016.<sup>60</sup>

In AUSTRIA, since 2014, the Austrian Supreme Court has been the first and last instance in proceedings to challenge an arbitral award. This new function of the court resulted in rich case law in 2016. In a landmark decision, the court clarified that only a violation of the right to be heard, which would also amount to an annulment ground of court judgments, could lead to a successful challenge of an arbitral award.<sup>61</sup> In another decision, the court held that where an arbitral tribunal does not decide on the whole matter in dispute (decision *infra petita*), the arbitral award can only be amended but not successfully challenged.<sup>62</sup>

In RUSSIA, 2016 was the year of global reform in arbitration law. The new Russian Law on Arbitration<sup>63</sup> and the satellite Law No. 409-FZ<sup>64</sup> were signed on December 29, 2015 and became effective on September 1, 2016. The laws reflect the most progressive arbitration trends and are intended to improve the quality of arbitration in Russia and to promote it as a place for arbitration.

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56. Netherlands Arbitration Act (2014).

57. NETHERLANDS ARBITRATION INSTITUTE, ARBITRATION RULES (2015).

58. *Id.*

59. *Id.*

60. *Id.*

61. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 23, 2016, 18 OCg 3/15p, ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ].

62. Oberster Gerichtshof [OGH] [Supreme Court] Sept. 28, 2016, 18 OCg 3/16i, ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ].

63. Federal'niy Zakon RF Ob Arbitrazhe (Treteyskom Razbiratelstve) v Rossiyskoy Federatsii [Federal Law of the Russian Federation on Arbitration in the Russian Federation], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 31, 2015, No. 382-FZ.

64. Federal'niy Zakon RF O Vnesenii Izmeneniy v. Otdel'niye Zakonodatel'niye Akti Rossiysoy Federatsii [Federal Law on Amendments to Certain Legislative Acts of the Russian Federation], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 31 2015, No. 409-FZ.

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The main goals of the reforms include reducing the number of arbitration institutions (which currently number around 2,500) and combatting so-called “pocket” arbitration institutions. Arbitral institutions now need a permit from the government. Foreign arbitration institutions must also have the status of a permanent arbitration institution in Russia, otherwise their awards will be considered ad hoc awards.

Corporate disputes are now recognized as arbitrable (with certain exceptions) and are subject to proceedings under special rules in permanent arbitration institutions. A list of non-arbitrable disputes includes insolvency cases, public procurement, certain IP disputes, class actions, and disputes on privatization of state or municipal property.<sup>65</sup>

The laws contain detailed provisions on assistance and supervision by the state courts. The parties may agree to exclude the state courts’ authority regarding the appointment and termination of arbitrators and arbitral jurisdiction; and also their authority to set aside a final award rendered in the Russian Federation.<sup>66</sup>

In BRAZIL, in 2016, the New Code of Civil Procedure entered into force, which has improved the relationship between the arbitral tribunal and the courts. This also established an obligation to take precedents into consideration,<sup>67</sup> which could also extend to arbitrators applying Brazilian Law.

In a recent decision, the Superior Court of Justice (STJ) held that all franchise agreements should be considered “adhesion contracts” by definition,<sup>68</sup> therefore requiring a special form of consent for the arbitration clause.<sup>69</sup> It also held that courts have the competence to rule on an arbitration clause that appears prima facie to be pathological, notwithstanding the negative effect of competence-competence.<sup>70</sup> It also recognized the validity of arbitration clauses by reference in documents that were not signed.<sup>71</sup>

In GERMANY, the German Federal Supreme Court (BGH)<sup>72</sup> overruled a decision of the Court of Appeals regarding the German skater, Claudia Pechstein, and thereby safeguarded an award by the Court of Arbitration for Sport (CAS) in Lausanne that confirmed a decision by the International Skating Union (ISU) to ban Pechstein for two years from skating

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65. Federal Law Nos. 382-FZ, 409-FZ, *supra* note 63, 64.

66. *Id.*

67. See CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 489.

68. S.T.J., No. 1.602.076 – SP (2016/0134010-1), Relator: Ministra Nancy Andrighi, 15.9.2016, SUPERIOR TRIBUNAL DE JUSTIÇA JURISPRUDÊNCIA [S.T.J.J.].

69. In adhesion contracts, arbitration clauses shall be in bold and with a special signature or in a separate document with a special signature. Lei No. 9.307/96 de 26 de Maio 2015, art. 4/2.

70. S.T.J., Recurso Especial No. 1602696/PI, Relator: Min. Moura Ribeiro, 23.09.2016, Diário da Justiça Eletrônico [D.J.e.], 16.08.2016.

71. S.T.J., Recurso Especial No. 1569422/RJ, Relator: Min. Marco Aurelio Belizze, 26.04.2016, Diário da Justiça Eletrônico [D.J.e.], 20.05.2016.

72. Bundesgerichtshof [BGH] [Federal Court of Justice] June 7, 2016, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (2016).

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competitions for doping. The BGH held that the arbitration agreement was valid and that the ISU did not abuse its dominant position by requiring athletes to sign an arbitration agreement. It further held that the CAS is a true arbitral tribunal, in the sense of German procedural law, even though the arbitrators must be chosen from a list drawn up by the CAS, in which Olympic committees have a dominant position.

In other noteworthy decisions, the Court of Appeals of Brandenburg held that in enforcement proceedings a court does not need to review the validity of the arbitration agreement if a foreign state court has already done so and allowed the enforcement.<sup>73</sup> The BGH, however, annulled a decision of the Court of Appeals on the ground that it had failed to properly address submissions regarding core issues of the arbitration.<sup>74</sup>

In NIGERIA, government and private organizations have increasingly advocated for the use of arbitration. The reasons for this support include the comparative effectiveness of arbitration compared to litigation in Nigeria, as well as the role that effective dispute resolution mechanisms can play in a country when seeking to attract foreign and local investments.<sup>75</sup>

As part of the “Arbitration in Lagos Project,” the Lagos Chamber of Commerce and Industry launched an international arbitration center (LACIAC).<sup>76</sup> It is part of the project’s overall mission “to put Lagos on the map as a reliable, efficient, and transparent hub for international arbitration.”<sup>77</sup>

In SOUTH KOREA, the amended Korean Arbitration Act has taken effect as of November 30, 2016. It introduces changes that closely follow the 2006 UNCITRAL Model Law.<sup>78</sup> Key amendments include: (1) broader scope of arbitrability; (2) alleviation of the “in writing” requirement for arbitration agreements; (3) expansion of the scope of interim measures; (4) new provisions ensuring more effective investigation of evidence; and (5) simplified procedures for recognition and enforcement of arbitral awards.<sup>79</sup>

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73. Oberlandesgericht [OLG] [Brandenburg Higher Regional Court] July 24, 2015, RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] (2015).

74. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 31, 2016, ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (2016).

75. *Foreign Investments: NICA Advocates Out-of-Court Settlements*, THE GUARDIAN (Nov. 18, 2016), <http://guardian.ng/business-services/foreign-investments-nica-advocates-out-of-court-settlements/>.

76. Segun Adebawale, *LCCI Creates Alternative Dispute Resolution Centre*, THE EAGLE ONLINE (Nov. 15, 2016), <http://theeagleonline.com.ng/lcci-creates-alternative-dispute-resolution-centre/>; PUNCH, *ADR Campaign Thrives as Ailing Court System Defies Solutions* (Nov. 24, 2016), <http://punchng.com/adr-campaign-thrives-ailing-court-system-defies-solutions/>.

77. LAGOS CHAMBER OF COMMERCE, INT’L ARBITRATION CENTRE, *Vision and Mission* (Dec. 6, 2016), <http://www.laciac.org/vision/>.

78. See generally Sae Youn Kim and Harald Sippel, *Korea’s Arbitration Act is Revised for a New World*, THE LAWYER, (Yulchon LLC, Seoul) June 27, 2016.

79. KCAB INT’L ARBITRATION RULES (2016); see generally Harald Sippel & Marieke Minkinen, *The New KCAB Rules*, 34 ASA BULLETIN 569 (2016).

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The Korean Commercial Arbitration Board (the KCAB) also revised its International Arbitration Rules. The revised rules are more in line with other international arbitration rules such as those of the ICC, SIAC, and LCIA. Key revisions include: (1) ease of the requirements for expedited procedure; (2) new provisions on joinder and consolidation of claims; (3) introduction of emergency arbitrator proceedings; and (4) change in the selection of arbitrators to ensure the quality, impartiality and independence of the arbitral tribunal.<sup>80</sup>

In AUSTRALIA, in *Ye v. Zeng*, the Federal Court of Australia considered whether there should be a default rule providing that indemnity costs be awarded against a party that unsuccessfully seeks to set aside or resist enforcement of an arbitral award, as is currently the case, for example, in Hong Kong.<sup>81</sup>

The court in *Ye v. Zeng* noted *obiter* the “powerful considerations” underlying the Hong Kong approach in the context of distinguishing between “conduct that reflects no more than an attempt to delay or impede payment and the reasonable invocation of the proper protections” built into the New York Convention and Australian arbitration legislation.<sup>82</sup> The court declined to follow the Hong Kong approach. However, it did award indemnity costs against the party seeking to resist enforcement, ostensibly on the basis that, in seeking to resist enforcement, the respondents had never attempted to “agitate any legitimate ground” but had “acted in their own perceived commercial interests and without merit and should pay the commercial price of doing so.”<sup>83</sup>

In *Gutnick & Anor v. Indian Farmers Fertiliser Cooperative Ltd. & Anor*,<sup>84</sup> the applicants sought to resist the enforcement of an arbitral award on public policy grounds, as contemplated in Australian arbitration legislation incorporating the NYC and the UNCITRAL Model Law. The applicants alleged that enforcing the award would lead to double recovery. In dismissing the challenge, the Victorian Supreme Court of Appeal affirmed that the public policy exception should be construed narrowly as referring to the most basic, fundamental principles of morality and justice.<sup>85</sup> The court also noted that an award that did, in fact, permit double recovery would be contrary to public policy.<sup>86</sup> However, in this case the Court found that the award did not permit double recovery.

In SWEDEN, in January 2016, the Svea Court of Appeal ruled that an arbitral tribunal lacked jurisdiction to decide an investment treaty claim brought by Spanish investors against the Russian Federation.<sup>87</sup> The dispute

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80. KCAB INT'L RULES, *supra* note 79; *see generally* Sippel, *supra* note 79.

81. *Ye v. Zeng* (No. 5) [2016] FCA 850.

82. *Id.* at para. 23.

83. *Id.* at para. 19.

84. *Gutnick & Anor v Indian Farmers Fertiliser Coop. Ltd. & Anor* [2016] VSCA 5.

85. *Id.* at paras. 17, 19.

86. *Id.* at para. 29.

87. Svea Hövratt [HovR] [Court of Appeals] 2016-01-18 no. T 9128-14.

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arose out of the Russian Federation's alleged expropriation of Yukos investments held by a group of holders of American Depositary Receipts. Following a 2012 award against Russia, it sought negative declaratory relief before the Swedish courts to the effect that the tribunal lacked jurisdiction pursuant to the Spain-USSR bilateral investment treaty (BIT).

Setting aside the award, the Court of Appeal ruled that the Spain-USSR BIT did not entitle the investors to pursue expropriation claims against Russia. The court held that the treaty's diagonal dispute resolution clause did not permit the tribunal to consider whether an investment had been expropriated. Rather, applying Article 31 of the Vienna Convention on the Law of Treaties, the court found that the clause only vested an arbitral tribunal with jurisdiction over disputes relating to the amount or method of payment of compensation due when an expropriation was already established. Similarly, the court found against the investors' additional arguments that, by virtue of more expansive diagonal dispute resolution clauses in other Russian BITs, this treaty's most-favored-nation clause gave the tribunal jurisdiction over questions of expropriation. The Swedish Supreme Court declined to hear an appeal on the decision.

In TURKEY, a new regime was established for decisions on interim measures issued by Courts of First Instance. Under Article 6 of the Turkish International Arbitration Law (TIAL) No. 4686, parties may request an interlocutory injunction or an interim attachment decision from the court before or during the arbitration proceedings.<sup>88</sup> If the court issues interim relief before the commencement of the arbitration, the requesting party must initiate arbitration within thirty days from the order, otherwise it will be lifted automatically.<sup>89</sup> If the Court rejects the request the requesting party may file an appeal before the Regional Court of Appeal, whose decision is final and binding.<sup>90</sup>

In MAINLAND CHINA, in November 2015, in deciding to enforce a SIAC award, the Shanghai Intermediate People's Court found that a case was foreign-related even though it was between two Chinese parties.<sup>91</sup> In reaching its decision, the court relied on the "catch-all provision" under People's Republic of China (PRC) law that there are other circumstances that may be deemed foreign-related.<sup>92</sup> Specifically, the court referred to the facts that (1) both parties to that dispute were wholly-owned foreign invested enterprises registered in the Shanghai Free Trade Zone and thus their capitals, profits and management operations were closely related to their

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88. TURKISH INT'L ARBITRATION LAW [TIAL] June 21, 2001, No. 4686, art. 6.

89. *Id.* at art. 10/A.

90. *Id.*

91. *See* Siemens Int'l Trading (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Co., Ltd., 2013 Min Ren (Wai Zhong) Zi No. 2 (Shanghai Interm. People's Ct. Nov. 27, 2015) [hereinafter *Golden Landmark*].

92. *See* Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations" (I), 2012, Art. 1 (P.R.C.).



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foreign investors; and (2) the subject matter of the contract had to be imported from abroad to the Shanghai Free Trade Zone and go through customs clearance procedures, which is more akin to international sales of goods than domestic sales.<sup>93</sup>

Chinese courts have traditionally taken a strict approach in applying the criteria for foreign-related disputes and have been reluctant to apply the “catch-all” provision. The judgment was therefore welcomed by arbitration practitioners in China, who hope that the decision will encourage other courts to adopt a more liberal approach when interpreting the “foreign-related” issue. However, as it is an intermediate court judgment, it does not have a binding effect on other Chinese courts. Therefore, it remains to be seen how much impact this decision would have on the development of arbitration practice in China.

On June 2, 2016, the Intermediate People’s Court of Taizhou denied the recognition and enforcement of an ICC award seated in Hong Kong on the basis of the public policy exception under article 7 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR.<sup>94</sup> In reaching its decision, the Taizhou Court underscored that nineteen months prior to the award being rendered, another state court—the Jiangsu High Court—found that the arbitration agreement was invalid under Chinese Law for failing to specify an arbitration institution.<sup>95</sup> Under the Arbitration Law of China and its Judicial Interpretation, parties must specify the arbitration institution to have an effective arbitration agreement.<sup>96</sup> In the present case, the parties had only agreed to arbitrate under the ICC Rules, and according to the ICC Rules applicable at that time, it could not be inferred that the parties had chosen a specific and particular arbitration institution.

Following the opening of the Hong Kong International Arbitration Centre (HKIAC)’s representative office in mainland China in November 2015,<sup>97</sup> two other international arbitration institutions followed suit: the ICC<sup>98</sup> and SIAC<sup>99</sup> each opened a representative office in the Shanghai Free Trade Zone. While the newly opened offices do not currently administer foreign-related disputes seated in mainland China, the establishment of on-

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93. See *Golden Landmark*.

94. See *Taizhou Haopu Inv. Co., Ltd. v. Wicor Holding AG*, 2015 Tai Zhong Shang Zhong Shen Zi, No. 0004 (Taizhou Interm. People’s Ct., June 2, 2016).

95. See *Su Shang Wai Xia Zhong Zi*, 2012, No. 0012 (Jiangsu High Ct., Dec. 11, 2012).

96. See Arbitration Law (adopted by Standing Comm. of Nat’l People’s Cong., promulgated by Order No. 31 of the President, Aug. 31, 1994, effective Sept. 1, 1995), art. 18.

97. See Press Release, Hong Kong Gov’t (Nov. 19, 2015), available at <http://www.info.gov.hk/gia/general/201511/19/P201511190763.htm>.

98. See *New Shanghai Office Lays Groundwork for ICC Asia Developments*, ICC (Feb. 24, 2016), <https://iccwbo.org/media-wall/news-speeches/new-shanghai-office-lays-groundwork-for-icc-asia-developments/>.

99. See Press Release, Singapore International Arbitration Centre, Opening of SIAC Office in Shanghai, (Jan. 25, 2016), available at <http://www.siac.org.sg/113-resources/press-releases/press-release-2016/467-opening-of-siac-office-in-shanghai>.

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the-ground presences in mainland China are encouraging signs to help promote international best practices in mainland China and to facilitate the development of PRC arbitration law.

On October 26, 2016, the Shenzhen Court of International Arbitration (SCIA), formerly known as Shenzhen sub-commission of China International Economic and Trade Arbitration Commission (CIETAC), published its new arbitration rules which took effect on December 1, 2016.<sup>100</sup> SCIA is the first domestic arbitration institution to revise its arbitration rules to cater for the administration of investor-state arbitrations under UNCITRAL rules.

In INDIA, in an effort to encourage domestic arbitration and attract international arbitrations to venues in India, the Government adopted the Arbitration and Conciliation (Amendment) Act, 2015<sup>101</sup> in March 2016. Implementation of the Act by the courts has been consistent with the intention of improving the administration of arbitrations in India. The limitations on the applicability of the Act have been narrowly construed to apply only to arbitrations conducted before its implementation date, but not court challenges subsequently filed.<sup>102</sup> In one noted case, the court quashed the appointment of an arbitrator appointed by a state entity because the arbitrator was an employee of the state.<sup>103</sup> Courts have also recognized the limited scope of interference in both domestic<sup>104</sup> and international<sup>105</sup> awards, and observed that the grounds for interference into foreign awards previously cited in *Renusagar*<sup>106</sup> and *Shri Lal Mahal*<sup>107</sup> are no longer available.

In ITALY, the Italian Supreme Court, the Corte di Cassazione, in a ruling on August 2, 2016<sup>108</sup> confirmed the clear position it took in 2013—that arbitration in Italian law has a jurisdictional nature with various consequences.<sup>109</sup> It also held that a judgment on the jurisdiction of an arbitral tribunal can directly be challenged before the Corte di Cassazione.

SPAIN has become the poster child for Energy Charter Treaty arbitration, finding itself on the receiving end of nearly three dozen claims.<sup>110</sup> The vast majority of these claims have been filed with ICSID, but a handful (as

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100. [Shenzhen Court of International Arbitration Rules], (effective Dec. 1, 2016), (P.R.C.), available at [http://www.scietac.org/web/doc/view\\_rules/861.html](http://www.scietac.org/web/doc/view_rules/861.html).

101. Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Act of Parliament, 2016.

102. See *ICI-SOMA JV v. Simplex Infrastructures Ltd.*, 2016 I.A. 11337.

103. See *Alternative for India Development v. The State of Jharkhand* (2016), available at <http://jhr.nic.in/hcjudge/data/61-1-2016-15072016.pdf>.

104. *Rail Land Dev. Auth. v. Bhagwati Rail Infra Pvt. Ltd.*, 2016 I.A. 9484.

105. *XSTRATA Coal Marketing AG v. Dalmia Bharat*, 2016 Delhi H.C. 257.

106. See *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) S.C.C. 644.

107. See *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (2014) 2 S.C.C. 433.

108. Cass., sez. un., 2 agosto 2016, n. 16058, Giur. it. 2016, 12, 270.

109. Cass., sez. un., 10 ottobre 2013, n. 24153, available at [http://www.tedioli.com/Cass\\_sez\\_un\\_ord\\_24153\\_2013.pdf](http://www.tedioli.com/Cass_sez_un_ord_24153_2013.pdf).

110. See generally Clifford J. Hendel, *The Energy Charter Treaty and the Spanish Renewable Energy Awards*, in *INVESTMENT TREATY ARBITRATION REVIEW* (Barton Legum ed., Apr. 2016).

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permitted by the Energy Charter) have been brought before the Arbitration Institute of the Stockholm Chamber of Commerce or under the UNCITRAL Rules.

The jurisprudence that will flow from these cases is likely to provide important guidance on some key issues of ECT law and practice, particularly involving the scope of the protection against indirect expropriation and the borderline between legitimate expectations and host state regulatory power.

In 2016, the ICC made a number of changes to its policies and amended the ICC Rules of Arbitration in an effort to increase the efficiency and transparency of arbitrations.

Beginning in January 2016, the ICC started publishing on its website the names of sitting arbitrators, their nationality, and whether their appointment was made by the ICC or by the parties.<sup>111</sup> The ICC also began penalizing arbitrators who do not meet the three-month deadline to submit draft arbitration awards by reducing their compensation (by five to ten percent, or if the delay is seven to ten months by ten to twenty percent, and by twenty percent or more if it exceeds ten months).

On November 6, 2016, the ICC published new rules aimed at promoting the efficiency of the proceedings.<sup>112</sup> The amendment to the ICC Rules of Arbitration, which becomes effective on March 1, 2017, provides expedited procedure for arbitrations where the amount in dispute is less than \$2 million USD. Parties may, by agreement, opt-in and arbitrate cases with more than \$2 million USD in dispute under the expedited procedure. In cases decided under the expedited procedure rules, the arbitration award must generally be made within six months of the case management conference. In addition, the ICC will only appoint a sole arbitrator, regardless of any contrary terms in the arbitration agreement. The tribunal will have the discretion to decide the arbitration based on documents only—without a hearing, requests for production of documents, and examination of witnesses. Arbitration fees will be significantly less for cases decided through the expedited process. Parties may by agreement opt out of the expedited procedure. Also, upon request of a party and on a case-by-case basis, the ICC may determine that expedited procedure is inappropriate.<sup>113</sup>

On July 8, 2016, a tribunal of the International Centre for the Settlement of Investment Disputes (ICSID) issued an award in *Phillip Morris Brands SARL v. Oriental Republic of Uruguay* dismissing claims brought by investors concerning tobacco regulations.<sup>114</sup> The claimants alleged that Uruguay's

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111. *ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency*, ICC (Jan. 5, 2016), <http://www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>.

112. *ICC Court Amends its Rules to Enhance Transparency and Efficiency*, ICC (Apr. 11, 2016), <http://www.iccwbo.org/News/Articles/2016/ICC-Court-amends-its-Rules-to-enhance-transparency-and-efficiency/>.

113. ICC, Arbitration Rules, art. 30.

114. *Phillip Morris Brands et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 18, 2016).

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adoption of two tobacco regulations, including a ban on selling different variants of the same brand of cigarettes (e.g., “light,” “mild,” “menthol”) and a requirement that graphic health warnings on cigarette packages increase from fifty percent to eighty percent, violated the applicable bilateral investment treaty and caused their investments to lose value. In response, Uruguay argued that the regulations were a reasonable and good faith exercise of its sovereign power to protect public health. Following a merits hearing, the tribunal held that Uruguay had adopted the regulations in good faith and in a non-discriminatory manner that was proportionate to a legitimate public health concern and dismissed all claims.<sup>115</sup> The claimants do not intend to challenge the tribunal’s decision.<sup>116</sup>

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115. This award comes on the heels of an earlier case brought before the Permanent Court of Arbitration regarding tobacco regulations adopted by Australia, in which the tribunal issued an award dismissing all claims on jurisdictional grounds. *Phillip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015).

116. Malena Castaldi & Anthony Esposito, *Philip Morris Loses Tough-on-Tobacco Lawsuit in Uruguay*, REUTERS July 8, 2016, <http://www.reuters.com/article/us-pmi-uruguay-lawsuit-idUSKCN0ZO2LZ>.

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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

## International Courts

PAULA F. HENIN, ZOE COOPER SUTTON, SARA L. OCHS, JOSEPH KLINGLER, NICK RENZLER, MELISSA STEWART, KABIR DUGGAL, ROBYN LYM, AND SEAN STEPHENSON\*

This Article reviews some of the most significant developments in the work of international courts and tribunals in 2016.

### I. The International Court of Justice (ICJ)

In 2016, which marked the ICJ's 70th anniversary, the Court issued five judgments on preliminary objections relating to two important controversies: the maritime boundary and sovereign rights dispute between Nicaragua and Colombia (*NICOL II*<sup>1</sup> and *NICOL III*<sup>2</sup>), and the Marshall Islands' complaints against India, Pakistan and the United Kingdom concerning their obligations to negotiate the cessation of the nuclear arms race and nuclear disarmament (*Marshall Islands*<sup>3</sup>).

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\* The Committee Editor is Paula F. Henin, Associate at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"). Paula F. Henin and Zoe Cooper Sutton, Trainee Solicitor at Skadden, authored Section II. Sara L. Ochs, Associate at Simon, Peragine, Smith & Redfearn LLP, contributed Section III. Joseph Klingler, Nick Renzler and Melissa Stewart, Associates at Foley Hoag LLP, wrote Section IV. Kabir Duggal and Robyn Lym, Associates at Baker & McKenzie LLP, authored Section V. Sean Stephenson, Associate at Appleton & Associates, contributed Section VI. The views expressed in this article are the authors' own and do not necessarily represent the views of their law firms or their firms' clients.

1. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Judgment, Preliminary Objections (Mar. 17, 2016), *available at* <http://www.icj-cij.org/docket/files/154/18956.pdf> [hereinafter *NICOL II*].

2. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Judgment, Preliminary Objections (Mar. 17, 2016), *available at* <http://www.icj-cij.org/docket/files/155/18948.pdf> [hereinafter *NICOL III*].

3. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, Jurisdiction of the Court and Admissibility of the Application (Oct. 5, 2016), *available at* <http://www.icj-cij.org/docket/files/158/19134.pdf> [hereinafter *Marshall Islands v. India*]; Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Judgment of the Court and Admissibility of the Application (Oct. 5, 2016), *available at* <http://www.icj-cij.org/docket/files/159/19166.pdf> [hereinafter *Marshall Islands v. Pakistan*]; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, Preliminary Objections (Oct. 5, 2016), *available at* <http://www.icj-cij.org/docket/files/160/19198.pdf> [hereinafter *Marshall Islands v. UK*].

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In these judgments, the ICJ shed additional light on the notion of a legal “dispute” in international law, addressing the following questions: when does a “dispute” arise; when is a dispute considered finally and definitively settled by a judgment; and where does the line lie between the enforcement of a judgment settling an “old” dispute and the bringing of a “new” dispute to judicial settlement?

A. EXISTENCE OF A “DISPUTE”

In each of its 2016 judgments, the Court reaffirmed that its jurisdiction is conditional upon the existence, on the date of filing of the application, of an “actual dispute between the Parties.”<sup>4</sup>

The established case law of the Court defines a dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests” and emphasizes that the existence of a dispute “is a matter for objective determination” turning on “an examination of the facts. The matter is one of substance, not of form.”<sup>5</sup> “It must be shown that the claim of one party is positively opposed by the other.”<sup>6</sup> The ICJ reaffirmed these broad principles in each of its 2016 judgments.

However, in *Marshall Islands*, the Court (by a narrow majority) introduced a new “awareness” test for the existence of a “dispute,” drawing upon its holding in *NICOL III* that “Colombia was aware that its [conduct was] positively opposed by Nicaragua,”<sup>7</sup> and thus that a dispute did exist concerning Nicaragua’s first claim.<sup>8</sup> In *Marshall Islands*, the Court fully articulated the new test as follows: “a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were ‘positively opposed’ by the applicant.”<sup>9</sup>

The Court’s departure from its previous case law and the subjective character of its new “awareness” criterion were severely criticized in several dissenting and separate opinions in *Marshall Islands*, which also opposed the Court’s strict and formalistic application of the general requirement that a dispute exist on the date of the application, arguing that post-application events crystallizing the dispute should have been taken into account.

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4. *NICOL II*, *supra* note 1, ¶ 124.

5. *See NICOL III*, *supra* note 2, ¶ 50.

6. *Id.*

7. *Id.* ¶ 73.

8. *NICOL III*, *supra* note 2, ¶ 58 (Caron, J., dissenting) (criticizing the holding and arguing that there was no basis in the case law of the ICJ to infer the assertion of a claim where that claim was never communicated to the respondent), *available at* [www.icj-cij.org/docket/files/155/18964.pdf](http://www.icj-cij.org/docket/files/155/18964.pdf).

9. *Marshall Islands v. UK*, *supra* note 3, ¶ 41; *Marshall Islands v. India*, *supra* note 3, ¶ 38; *Marshall Islands v. Pakistan*, *supra* note 3, ¶ 38.

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**B. RES JUDICATA**

In *NICOL II*, Nicaragua's First Request was that the Court adjudge and declare "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court"<sup>10</sup> in its 2012 judgment in *NICOL I* (the "2012 Judgment").<sup>11</sup>

Colombia objected to the Court's jurisdiction on the ground that the principle of res judicata barred it from examining Nicaragua's request.<sup>12</sup> Colombia argued that the Court had already disposed of Nicaragua's First Request in subparagraph 3 of the operative clause of its 2012 Judgment,<sup>13</sup> in which the Court expressly found that it "could not uphold" Nicaragua's request that the Court adjudge and declare that "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties."<sup>14</sup> According to Colombia, the Court, in its 2012 Judgment, found Nicaragua's request admissible but rejected it on the merits due to lack of evidence.<sup>15</sup> Thus, Colombia reasoned, the 2012 Judgment contained a decision on the merits of that request, which carried res judicata effect.

For its part, Nicaragua argued that the Court in *NICOL I* refused to rule on the merits of the relevant request because Nicaragua had failed to fulfill a procedural and institutional requirement: the completion of its submission to the Commission on the Limits of the Continental Shelf (CLCS) as required by Article 76(8) of the United Nations Convention on the Law of the Sea (UNCLOS),<sup>16</sup> a Convention to which Nicaragua—unlike Colombia—was a party.<sup>17</sup> According to Nicaragua, the Court in its 2012 Judgment only decided whether it was then "in a position to determine 'a continental shelf boundary . . .'"<sup>18</sup> and concluded that it was not, because Nicaragua had only provided the CLCS with "Preliminary Information."<sup>19</sup>

Re-characterizing Colombia's preliminary objection as one of admissibility rather than jurisdiction,<sup>20</sup> the Court "examined subparagraph 3 of the operative clause of the 2012 Judgment in its context, namely by reference to the reasoning which underpins its adoption and accordingly

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10. *NICOL II*, *supra* note 1, ¶ 10.

11. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624 (Nov. 19) [hereinafter *NICOL I* or the "2012 Judgment"].

12. *NICOL II*, *supra* note 1, ¶ 47.

13. *Id.* ¶ 49.

14. *Id.* (citing *NICOL I*, *supra* note 11, ¶ 17).

15. *NICOL II*, *supra* note 1, ¶¶ 51, 56, 63–67.

16. United Nations Convention on the Law of the Sea annex VII art. 9, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *UNCLOS*].

17. *NICOL II*, *supra* note 1, ¶¶ 68–71.

18. *NICOL II*, *supra* note 1, ¶ 69 (citing *NICOL I*, *supra* note 11, ¶ 129).

19. *NICOL II*, *supra* note 1, ¶¶ 69–70 (citing *NICOL I*, *supra* note 11, ¶¶ 113, 227–29).

20. *NICOL II*, *supra* note 1, ¶ 48.



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serves to clarify its meaning.”<sup>21</sup> The Court, ascribing particular weight to Paragraph 129 of its 2012 Judgment, ultimately agreed with Nicaragua’s interpretation and concluded that “[t]he Court . . . did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so.”<sup>22</sup> Thus, the Court held, *res judicata* did not attach to the 2012 Judgment with respect to that issue.<sup>23</sup>

The Court adopted this decision by the thinnest possible margin, in an eight to eight vote decided by the President’s casting vote. The Court’s majority opinion was accompanied by a joint dissenting opinion signed by seven judges, and three additional separate and dissenting opinions on the issue—all arguing that the 2012 Judgment was a decision on the merits having *res judicata* effect, either in respect of all, or only some, of the overlapping entitlements between Nicaragua and Colombia.<sup>24</sup>

C. ENFORCEMENT OF A JUDGMENT VS. NEW DISPUTE  
CONCERNING RELATED RIGHTS

In *NICOL III*, the Court addressed Colombia’s preliminary objection to a separate application brought by Nicaragua, which Colombia argued was an attempt to enforce the Court’s 2012 Judgment rather than a “new” claim, as Nicaragua maintained. According to Colombia, the Court lacked post-adjudicative enforcement jurisdiction, which is reserved for the Security Council in accordance with Article 94(2) of the UN Charter, and therefore could not entertain Nicaragua’s application.

By fifteen votes to one, the Court rejected Colombia’s preliminary objection.<sup>25</sup> The Court held that, even though the 2012 Judgment was “undoubtedly relevant to [the] dispute,”<sup>26</sup> “Nicaragua [did] not seek to enforce the 2012 Judgment as such,” but rather

ask[ed] the Court to adjudge and declare that Colombia ha[d] breached ‘its obligation not to violate Nicaragua’s maritime zones as delimited in [NICOL I] as well as Nicaragua’s sovereign rights and jurisdiction in these zones’ and ‘that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.’<sup>27</sup>

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21. *Id.* ¶ 75.

22. *Id.* ¶ 85.

23. *Id.* ¶ 88.

24. See *NICOL II*, *supra* note 1 (joint dissenting opinion) (Owada, J., separate opinion) (Greenwood, J., separate opinion) (Donoghue, J., dissenting opinion), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=02&case=154&code=nicolb&p3=4>.

25. *NICOL III*, *supra* note 2, ¶¶ 110, 111(1).

26. *Id.* ¶ 109.

27. *Id.*

Judge Bandhari voted against this holding, and in a separate Declaration explained his disagreement with the majority's factual conclusion that Nicaragua did not seek to enforce the 2012 Judgment.<sup>28</sup>

For his part, Judge Cançado Trindade wrote a Separate Opinion criticizing the Court's unwillingness to engage with Nicaragua's alternative argument that the Court has "inherent power to pronounce on the actions required by its Judgment[ ],"<sup>29</sup> which in his view the Court possesses, and argued that nothing in the text of Article 94(2) of the UN Charter confers on the Security Council exclusive authority to secure compliance with ICJ judgments.<sup>30</sup>

## II. Developments in International Criminal Law

2016 has marked yet another transformational year for international criminal courts and tribunals. In the past twelve months, several of the individuals responsible for the world's most horrific contemporary human rights violations and war crimes have been brought to justice. Judgments have been issued and specific developments have been made by the International Criminal Court (ICC), the Mechanism for International Criminal Tribunals (MICT) and the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Extraordinary African Chambers (EAC), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL).

### A. THE ICC

This year, the ICC took a notable step by imposing its first conviction for crimes of sexual violence since the Court's inception in 2002. The Court convicted Jean-Pierre Bemba Gombo, the military commander of the Movement of Liberation of Congo (MLC), a highly violent rebel faction in the Central African Republic, for the atrocities committed by MLC troops under his leadership between 2002 and 2003.<sup>31</sup> On June 21, 2016, Bemba was convicted on two counts of crimes against humanity for rape and murder, and three counts of war crimes for murder, rape, and pillaging, for which he was sentenced to eighteen years imprisonment.<sup>32</sup> Bemba's appeal of this judgment remains pending at the time of publication.

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28. *Id.* ¶ 109 (Bandhari, J., declaration), available at [www.icj-cij.org/docket/files/155/18962.pdf](http://www.icj-cij.org/docket/files/155/18962.pdf).

29. *NICOL III*, *supra* note 2, ¶ 102.

30. *NICOL III*, *supra* note 2, ¶¶ 67–82 (Cançado Trindade, J., separate opinion), available at [www.icj-cij.org/docket/files/155/18960.pdf](http://www.icj-cij.org/docket/files/155/18960.pdf).

31. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (Mar. 21, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf).

32. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Sentence pursuant to Article 76 of the Statute, ¶¶ 95–96 (Jun. 21, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_04476.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_04476.pdf).

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Several months after his conviction, Bemba, along with his case manager, lawyer, and two witnesses in his trial, were convicted of corruptly influencing witnesses and falsifying evidence.<sup>33</sup> The Court has yet to impose a sentence for these convictions.

**B. THE INTERNATIONAL CRIMINAL TRIBUNALS**

Since July 2012, the ICTY has been operating under the jurisdiction and administration of the MICT. The MICT was established by the United Nations Security Council to carry out the essential functions of the ICTY and the International Criminal Tribunal for Rwanda, which closed in 2015 following the completion of all trials and appeals.<sup>34</sup>

On March 24, 2016, the ICTY convicted Radovan Karadžić of various crimes against humanity and violations of customs of war associated with the Bosnian War, including genocide, murder, terror, unlawful attacks on civilians, and hostage-taking, for which he was sentenced to forty years imprisonment.<sup>35</sup> Karadžić, a founding member and president of the Serbian Democratic Party and the President and Supreme Commander of the armed forces of Republika Sprska, directed the extermination and forced removal of Bosnian Muslims and Croat inhabitants from Bosnia and Herzegovina, and served a vital role in the massacre at Srebrenica.<sup>36</sup> His conviction represents the successful prosecution of the most senior Bosnian Serb leader.

In addition, on June 30, 2016, the Appeals Chamber of the ICTY affirmed the convictions and sentences of twenty-two years imprisonment for both Mićo Stanišić and Stojan Župljanin.<sup>37</sup> Stanišić served as the Minister of the Ministry of Interior of the Republika Sprska, and Župljanin held the title of Chief of the Regional Security Services Centre.<sup>38</sup> Both men participated in the forced removal and extermination of Bosnian Muslims and Croats from Serbia, and were ultimately convicted by the Trial Chamber on March 27, 2013, of forcible transfer, deportation and persecution as crimes against

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33. Prosecutor v. Jean-Pierre Bemba Gombo, et al., Case No. ICC 01/05-01/13, Public Redacted Version of Judgment pursuant to Article 76 of the Statute (Oct. 19, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_18527.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_18527.pdf).

34. See *About the MICT*, UNITED NATIONS MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS, <http://www.unmict.org/en/about> (last visited June 7, 2012).

35. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016), [http://www.icty.org/x/cases/Karadzic/tjug/en160324\\_judgment.pdf](http://www.icty.org/x/cases/Karadzic/tjug/en160324_judgment.pdf).

36. Prosecutor v. Karadžić, Case No. IT-95-5/18, Case Information Sheet (Int'l Crim. Trib. for the Former Yugoslavia), [www.icty.org/x/cases/karadzic/cis/en/cis\\_karadzic\\_en.pdf](http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf) (last visited Apr. 5, 2017).

37. Prosecutor v. Stanišić & Župljanin, Case No. IT-08-91-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jun. 30, 2016), [http://www.icty.org/x/cases/zupljanin\\_stanismic/acjug/en/160630.pdf](http://www.icty.org/x/cases/zupljanin_stanismic/acjug/en/160630.pdf).

38. Prosecutor v. Stanišić & Župljanin, Case No. IT-08-91, Case Information Sheet (Int'l Crim. Trib. for the Former Yugoslavia), [www.icty.org/x/cases/zupljanin\\_stanismic/cis/en/cis\\_stanisc\\_zupljanin\\_en.pdf](http://www.icty.org/x/cases/zupljanin_stanismic/cis/en/cis_stanisc_zupljanin_en.pdf) (last visited Apr. 12, 2017).

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humanity, and murder and torture as violations of the laws and customs of war.<sup>39</sup>

The ICTY also proceeded with the trial of Ratko Mladić, the prior colonel general and commander of the army of Republika Srpska, who faces a number of charges, including two counts of genocide.<sup>40</sup> Closing arguments were held in December 2016.<sup>41</sup>

### C. THE EAC

The EAC was established in 2012 with the mission of prosecuting former Chadian Prime Minister Hissène Habré and members of his government for war crimes and crimes against humanity committed during his rule between 1982 and 1990. Four years after its establishment, the EAC reached a conviction, ultimately sentencing Habré to life imprisonment for a number of crimes, including torture, murder, abduction, and unlawful detention.<sup>42</sup>

The EAC's conviction and sentencing of Habré represents an extremely significant milestone for the Chambers. Habré's counsel appealed the judgment on June 13, 2016, marking the first appeal to be made in the EAC and necessitating the creation of the Extraordinary African Chamber of Assizes of Appeal.<sup>43</sup>

### D. THE ECCC

In 2016, the ECCC proceeded with the prosecution of Nuon Chea, the prior Deputy Secretary of the Communist Party of Kampuchea (the official name of the Khmer Rouge regime) and Khieu Samphan, the prior Chairman of the People's Representative Assembly and the Acting Prime Minister of Democratic Kampuchea.<sup>44</sup> The litigation against Chea and Samphan had previously been severed into two separate trials, the first of which was focused solely on charges related to the forced movement of persons from

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39. Prosecutor v. Stanišić & ũpljanin, Case No. IT-08-91-T, Judgment, vol. 2 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013), [http://www.icty.org/x/cases/zupljanin\\_stanisic/tjug/en/130327-2.pdf](http://www.icty.org/x/cases/zupljanin_stanisic/tjug/en/130327-2.pdf).

40. Prosecutor v. Mladić, IT-09-92, Case Information Sheet (Int'l Crim. Trib. for the Former Yugoslavia), [http://www.icty.org/x/cases/mladic/cis/en/cis\\_mladic\\_en.pdf](http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf) (last visited Apr. 12, 2017).

41. *Id.*

42. Prosecutor v. Hissen Habré, Delivery and Summary of Judgment (Assize Ct. of the Extraordinary African Chambers May 30, 2016), [http://www.chambresafricaines.org/pdf/Prononc%C3%A9-r%C3%A9sum%C3%A9%20du%20Jugement%20HH%2020160528%20\[620786\].pdf](http://www.chambresafricaines.org/pdf/Prononc%C3%A9-r%C3%A9sum%C3%A9%20du%20Jugement%20HH%2020160528%20[620786].pdf).

43. Press Release, Extraordinary African Chambers, Defense Lawyers Appeal (June 13, 2016), *available at* <http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/640-les-avocats-de-la-d%C3%A9fense-interjettent-appel.html>.

44. Prosecutor v. Chea & Samphan, Case No. 002/01, Summary of Judgment in Case 002/01 (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014), <https://www.eccc.gov.kh/sites/default/files/articles/20140807%20FINAL%20Summary%20of%20Judgement%20ENG.pdf>.

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Phnom Penh and other regions of the country, as well as the execution of Khmer Republic soldiers at the Tuol Po Chrey execution site in 1975.<sup>45</sup> In the first trial, both Chea and Samphan were convicted of these charges and were sentenced to life imprisonment.<sup>46</sup> Following the defendants' appeal, on November 23, 2016, the Supreme Court Chamber of the ECCC issued a judgment quashing the defendant's convictions pertaining to crimes against humanity of extermination and persecution on political grounds.<sup>47</sup> However, in the same judgment, the Chamber upheld the defendants' convictions for crimes against humanity of murder and other inhumane acts, thereby affirming the sentences of life imprisonment.<sup>48</sup>

This year, the ECCC also proceeded with the prosecution of Chea and Samphan in the second of the two severed trials. This trial focuses on the remaining charges against the two defendants, including crimes against humanity relating to their involvement in the genocide of Cham and Vietnamese peoples, forced marriages, rape, and the operation of the S-21 Security Centre, in which thousands of persons were tortured and executed at the hands of the Khmer Rouge.<sup>49</sup> For the past several months, dozens of witnesses have testified against Chea and Samphan regarding these charges, but a date for the issuance of a judgment has yet to be scheduled.

Investigation also remains ongoing with regard to Case 003 against Meas Muth, Case 004 against Ao An and Yim Tith, and Case 004-01 against Im Chaem.

#### E. THE STL

The STL, which was created to prosecute the persons involved in carrying out the February 14, 2005, Beirut bombings, which killed 22 people, including then Lebanese Prime Minister Rafiq Hariri, issued several contempt judgments in 2016 related to the publication of information on confidential witnesses. The STL imposed contempt fines of \$20,000 and \$6,000 on Ibrahim Al Amin and the media company Akhbar Beirut S.A.L.,

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45. Prosecutor v. Chea & Samphan, Case No. 002/02, Decision on Additional Severance of Case 002 and Scope of Case 002/02, ¶¶ 41–44 (Extraordinary Chambers in the Cts. of Cambodia Apr. 4, 2014), [https://www.eccc.gov/kh/sites/default/files/documents/courtdoc/2014-04-07%2016:12/E301\\_9\\_1\\_EN-optimized.pdf](https://www.eccc.gov/kh/sites/default/files/documents/courtdoc/2014-04-07%2016:12/E301_9_1_EN-optimized.pdf).

46. Prosecutor v. Chea & Samphan, Case No. 002/01, Case 002/01 Judgment (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014), <https://www.eccc.gov/kh/sites/default/files/articles/20140807%20FINAL%20Summary%20of%20Judgement%20ENG.pdf>.

47. Prosecutor v. Chea & Samphan, Case No. 002/01, Appeal Judgment (Extraordinary Chambers in the Cts. of Cambodia Nov. 23, 2016), [https://www.eccc.gov/kh/sites/default/files/documents/courtdoc/2016-11-23%2011:55/Case%20002\\_01%20Appeal%20Judgment.pdf](https://www.eccc.gov/kh/sites/default/files/documents/courtdoc/2016-11-23%2011:55/Case%20002_01%20Appeal%20Judgment.pdf).

48. *Id.*

49. Prosecutor v. Chea & Samphan, Case No. 002/02, Case Information Sheet (Extraordinary Chambers in the Cts. of Cambodia), <https://www.eccc.gov/kh/en/case/topic/1299> (last visited Apr. 12, 2017).

respectively,<sup>50</sup> but affirmed the acquittal of media company Al Jadeed and reversed the conviction of Al Jadeed TV's Deputy Head of News and Political Programs, Ms. Karma Al Khayat, for similar charges.<sup>51</sup>

### III. The South China Sea Arbitration Award

On July 12, 2016, a Tribunal constituted under Annex VII of UNCLOS (or the "Convention") issued its long-awaited Award in the *South China Sea Arbitration* between the Philippines and China.<sup>52</sup> This article describes five of the decision's most notable contributions to international law.

#### A. CHINA'S NON-PARTICIPATION

China declined to participate in the arbitration and publicly rejected its legitimacy and legality.<sup>53</sup> The Tribunal's procedural actions sought to safeguard China's rights and bolster the legitimacy of its decisions notwithstanding China's non-appearance. In conformity with the Convention and the Tribunal's Rules of Procedure,<sup>54</sup> the Tribunal recognized that China's non-participation was not a bar to the proceedings or to China's status as a "Party to the arbitration," and determined that China "shall be bound by any award the Tribunal issues."<sup>55</sup> Additionally, the Tribunal recognized that China's non-participation engendered a "special responsibility . . . to satisfy itself 'not only that it ha[d] jurisdiction over the dispute but also that the claim [was] well founded in fact and law,'"<sup>56</sup> and took a number of steps to do so.<sup>57</sup>

First, the Tribunal decided that certain statements made by China outside of the arbitration, including a legal memorandum submitted by China individually to each of the five arbitrators but not formally to them as a Tribunal, constituted pleas on jurisdiction.<sup>58</sup> The Tribunal bifurcated the

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50. Prosecutor v. Akhbar Beirut S.A.L. & Al Amin, Case No. STL-14-06, Public Redacted Version of the Judgment (Special Trib. for Leb. July 5, 2016), <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/judgments-stl-14-06/5092-f0262prv>.

51. Prosecutor v. Al Jadeed S.A.L. & Al Khayat, Case No. STL-14-05, Public Redacted Version of Judgment on Appeal (Special Trib. for Leb. Mar. 8, 2016), <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05/filings-stl-14-05/appeal-1/judgments-stl-14-05/4823-f0028>.

52. South China Sea Arbitration (Phil. v. China), Case No. 2013-2019, Award (Perm. Ct. Arb. July 12, 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/..PH-CN-20160712-Award.pdf> [hereinafter *Award*].

53. *Id.* ¶ 11.

54. See e.g., UNCLOS, *supra* note 16.

55. *Award*, *supra* note 52, ¶ 12.

56. *Id.*

57. See South China Sea Arbitration (Phil. v. China), Case No. 2013-2019, Award on Jurisdiction and Admissibility, ¶¶ 39, 58 (Perm. Ct. Arb. Oct. 29, 2015), <http://www.pcacases.com/web/sendAttach/1506> [hereinafter *Award on Jurisdiction*].

58. *Id.* ¶¶ 55-56, 132.

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proceedings<sup>59</sup> and put numerous questions to the Philippines regarding potential additional jurisdictional objections not raised by China.<sup>60</sup> Second, the Tribunal sought neutral sources of information to assist it in “establishing whether the Philippines’ claims [were] well founded in fact and law,”<sup>61</sup> including by appointing various independent experts.<sup>62</sup> Third, the Tribunal “invit[ed] comments from both Parties on materials that were not originally part of the record submitted to the Tribunal by the Philippines”<sup>63</sup> – these materials included both information that the Tribunal had sought out itself and that had been published by the Taiwan Authority of China and related entities<sup>64</sup>. Finally, the Tribunal provided China with ample opportunity to comment on various aspects of the proceedings, “consistently remind[ing] China that it remained open to it to participate in [the] proceedings at any stage.”<sup>65</sup>

**B. ENTITLEMENT AND DELIMITATION**

China objected to the Tribunal’s jurisdiction on the basis of its UNCLOS Article 298(1)(a)(i) declaration, which excludes disputes regarding maritime boundary delimitation from compulsory dispute resolution. According to China, the issues presented by the Philippines, in particular “maritime claims, the legal nature of maritime features, [and] the extent of relevant maritime rights,” were “part and parcel of maritime delimitation,” and were therefore covered by the declaration.<sup>66</sup> The Tribunal disagreed, deciding that a “dispute concerning the existence of an entitlement to maritime zones is distinct from a dispute concerning the delimitation of those zones in an area where the entitlements of parties overlap.”<sup>67</sup> Entitlement is a separate determination that precedes delimitation, and thus, the Tribunal could determine those entitlements without engaging in delimitation.<sup>68</sup>

**C. HISTORIC AND OTHER RIGHTS**

The Philippines sought to challenge China’s claims to sovereign and historic rights within the maritime area of the South China Sea encompassed by the “nine-dash line.” The Tribunal found that China’s “claim of historic rights to living and non-living resources is not compatible with the Convention . . . .”<sup>69</sup>

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59. South China Sea Arbitration (Phil. v. China), Case No. 2013-2019, Procedural Order No. 4, ¶¶ 1.1–1.4 (Perm. Ct. Arb. Apr. 21, 2015), <https://www.pcacases.com/web/sendAttach/1807>.

60. *Award on Jurisdiction*, *supra* note 57, ¶¶ 92, 120, 197.

61. *Award*, *supra* note 52, ¶ 15.

62. *Id.* ¶¶ 58, 136, 138.

63. *Id.* ¶¶ 15, 89.

64. *Id.* ¶ 89.

65. *Id.* ¶ 27.

66. *Award on Jurisdiction*, *supra* note 57, ¶ 138.

67. *Id.* ¶ 156.

68. *Id.* ¶ 156–157.

69. *Award*, *supra* note 52, ¶ 272.

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In reaching this conclusion, the Tribunal determined that UNCLOS Article 62 was clear in affording “sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal State *alone*,” and not to any other State.<sup>70</sup> The same principle applied to the continental shelf under Article 77.<sup>71</sup> Importantly, the Tribunal observed that “the Convention is comprehensive in setting out the nature of the exclusive economic zone and continental shelf and the rights of other States within those zones.”<sup>72</sup> In the absence of any provisions in the Convention preserving historic (or other) rights within those zones, China’s claims to such rights within the nine-dash line beyond 200 meters from China’s coast were incompatible with, and had been superseded by, the Convention, and were “without lawful effect.”<sup>73</sup> In any event, the Tribunal rejected China’s claim to historic rights under pre-Convention law, finding that “[h]istorical navigation and fishing, beyond the territorial sea, cannot . . . form the basis for the emergence of a historic right.”<sup>74</sup>

The Tribunal also distinguished between historic rights to maritime space, which attach to the State, and traditional fishing rights, which attach to individuals. Traditional fishing rights within the territorial sea remain protected under international law, and were unaltered by the Convention;<sup>75</sup> thus, the Tribunal recognized and protected those rights within the territorial sea of Scarborough Shoal.<sup>76</sup> By contrast, traditional fishing rights in the exclusive economic zone (EEZ) were expressly extinguished by the Convention, “except insofar as Article 62(3) specifies that ‘the need to minimize economic dislocation in States whose nationals have habitually fished in the zone’ shall constitute one of the factors to be taken into account by the coastal State in giving access to any surplus in the allowable catch.”<sup>77</sup>

**D. THE REGIME OF ISLANDS**

UNCLOS Article 121(3) provides that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>78</sup> Only once before had Article 121 been applied to determine whether a particular feature was a “rock,” and in that case, the issue was not whether the feature in question was a “rock” or a fully-entitled “island” (as in the *South China Sea Arbitration*), but rather whether it was a “rock” or a “low-tide elevation.”<sup>79</sup>

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70. *Id.* ¶ 243 (emphasis added).

71. *Id.* ¶ 244.

72. *Id.* ¶ 246.

73. *Id.* ¶¶ 246–247, 278.

74. *Id.* ¶¶ 263–71.

75. *Id.* ¶ 804(c).

76. *Id.* ¶¶ 806–07, 811–12.

77. *Id.* ¶ 804(b) (citing United Nations Convention on the Law of the Sea art. 62(3)).

78. United Nations Convention on the Law of the Sea art. 121(3), Dec. 10, 1982, U.N.T.S. 397.

79. See *NICOL I*, *supra* note 11, ¶¶ 27–38, 181–83.



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In determining whether various features in the South China Sea fell under Article 121(3), the Tribunal established a number of guidelines, including: (1) “size cannot be dispositive . . . and is not, on its own, a relevant factor”;<sup>80</sup> (2) “human habitation entails more than the mere survival of humans on a feature and that economic life entails more than the presence of resources”;<sup>81</sup> (3) “a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation”;<sup>82</sup> and (4) “purely extractive economic activities, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as ‘of its own.’”<sup>83</sup> Moreover, a feature is to be assessed in its *natural* condition, or the feature’s condition before there were any man-made enhancements by a State claiming sovereignty over it.<sup>84</sup> Finally, a tribunal’s inability to rule on *sovereignty* over a feature should not prevent it from assessing that feature’s *status* under Article 121(3), which can be done without considering or prejudicing disputed sovereignty claims.<sup>85</sup>

The Tribunal concluded that none of the features at issue were “capable of sustaining human habitation or economic life of their own,” and therefore they could not generate entitlements to an EEZ or a continental shelf.<sup>86</sup>

E. THE MARINE ENVIRONMENT

The Tribunal was also the first to reach the merits stage to determine the content and scope of UNCLOS’s environmental provisions.

As a starting point, the Tribunal observed that the Convention’s substantive environmental provisions apply to all States, within and beyond their national jurisdictions. The Tribunal ruled that Article 192 “entails the positive obligation to take an active measure to protect and preserve the marine environment,” or, in other words, a “duty to prevent,” but also “the negative obligation not to degrade the marine environment.”<sup>87</sup> Additionally, Article 194 encompasses a duty of due diligence.<sup>88</sup>

With respect to the protection of endangered species, the due diligence obligation includes the duty to prevent “the direct harvesting” of endangered species, as well as the destruction of their habitat.<sup>89</sup> The duty of due diligence is fulfilled by the adoption of “rules and measures to prevent” certain acts under States’ jurisdiction or control, and through enforcement.<sup>90</sup>

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80. *Award*, *supra* note 52, ¶ 538.

81. *Id.* ¶ 546.

82. *Id.* ¶ 550.

83. *Id.* ¶ 500.

84. *Id.* ¶ 508.

85. *Id.* ¶ 545.

86. *Id.* ¶ 626.

87. *Id.* ¶ 941.

88. *Id.* ¶ 944.

89. *Id.* ¶ 959.

90. *Id.* ¶ 961.

Further, the Tribunal reaffirmed that State Parties have a “direct obligation” to conduct environmental impact assessments.<sup>91</sup> They must, “as far as practicable,” conduct such an assessment when there are “reasonable grounds for believing that planned activities under their jurisdiction or control may cause significant and harmful changes to the marine environment,”<sup>92</sup> and they must also communicate the results to “competent international organizations.”<sup>93</sup>

China’s activities in the South China Sea, including its unprecedented island-building activities and its tolerance of the harvesting of endangered species, led the Tribunal to conclude that China violated its environmental obligations under the Convention.<sup>94</sup>

#### **IV. The International Centre for Settlement of Investment Disputes**

The ICSID Convention celebrated its fiftieth anniversary on October 14, 2016.<sup>95</sup> The year 2016 also marked a number of noteworthy developments in ICSID arbitration.

##### **A. TREATY DEFINITION OF INVESTOR’S SEAT**

In *Tenaris S.A. v. Venezuela*, the applicable Bilateral Investment Treaties (BITs) required the investor to be incorporated and have its seat in the home state.<sup>96</sup> Venezuela argued that the investors did not qualify under the treaties because they did not have any genuine links to either of the two countries, and the bulk of the employees were in a third country.<sup>97</sup> The Tribunal rejected this argument, noting that the seat requirement could not be equated with the “real economic activities” criteria.<sup>98</sup> Applying a “flexible” test, the Tribunal concluded that even though both companies were holding companies, they were effectively seated in those countries, because it was in those countries that their holding activities were carried out.<sup>99</sup>

But in *CEAC v. Montenegro*, the Tribunal found (in a two-to-one decision) that the claimant’s registered office being located in Cyprus was insufficient grounds to meet the “seat” requirement under the Cyprus-Montenegro

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91. *Id.* ¶¶ 947–48.

92. *Id.* ¶ 987 (quoting United Nations Convention on the Law of the Sea art. 206).

93. *Award*, *supra* note 52, ¶¶ 948, 991.

94. *Id.* ¶ 993.

95. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

96. *Tenaris S.A. & Talta-Trading E Mktg. Sociedade Unipessoal LDA v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/11/26, Award, ¶ 115 (Jan. 29, 2016), [icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1820/DC7492\\_En.pdf](https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1820/DC7492_En.pdf).

97. *Id.* ¶¶ 119–120.

98. *Id.* ¶¶ 142–143.

99. *Id.* ¶¶ 200, 206–16.

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BIT.<sup>100</sup> In this case, the respondent presented un rebutted evidence that the Cypriot registered office was unoccupied and was not used for commercial activity.<sup>101</sup> Further, the majority noted that there were very few documents that dealt with the company's actual activities in Cyprus, despite representations to the contrary.<sup>102</sup>

**B. MERITS**

In *Rusoro Mining v. Venezuela*, the Tribunal found that Venezuela unlawfully expropriated Rusoro's investment by implementing a series of measures that regulated the country's gold production market, and then passed a decree that transferred its mining rights to the State, deprived the investment of its economic value, and failed to provide adequate compensation.<sup>103</sup> The Tribunal also found that a 2010 resolution, which limited the amount of gold that foreign investors could export, breached the Annex to the BIT, which prohibits restrictions on the export of products by volume.<sup>104</sup> But the Tribunal dismissed a creeping expropriation claim, finding that there was no evidence that the measures were interconnected, because measures taken in 2010 that partially re-liberated the gold market seemed to undo the more stringent restrictions implemented in 2009.<sup>105</sup> The Tribunal also found that several measures did not breach Venezuela's commitment to provide fair and equitable treatment (FET),<sup>106</sup> and ordered Venezuela to pay \$971,079,502 in damages, interest, and costs.<sup>107</sup>

In *Crystallex Int'l Corp. v. Venezuela*, the Tribunal found that Venezuela breached the Canada-Venezuela BIT by denying a key environmental permit, and then rescinding a concession contract owned by Crystallex.<sup>108</sup> The Tribunal found that a letter from Venezuela requesting that Crystallex post a construction compliance bond created a legitimate expectation that the permit was forthcoming, and that Venezuela breached its FET obligations by denying the permit and rescinding the contract.<sup>109</sup> The Tribunal also found a breach based on a creeping expropriation arising from the denial of the permit, the issuance of political statements indicating a political intention to oust the investor, and the subsequent recession of the

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100. CEAC Holdings Ltd. v. Montenegro, ICSID Case No. ARB/14/8, Award, ¶ 148 (July 26, 2016), [icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3424/DC8694\\_en.pdf](https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3424/DC8694_en.pdf).

101. *Id.* ¶ 191.

102. *Id.* ¶¶ 205–07.

103. *Rusoro Mining Ltd. v. Bolivarian Republic Venez.*, ICSID Case No. ARB(AF)/12/5, Award, ¶¶ 373–410 (Aug. 22, 2016), [www.italaw.com/sites/default/files/case-documents/italaw7507.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7507.pdf).

104. *Id.* ¶¶ 584–97.

105. *Id.* ¶¶ 430–38.

106. *Id.* ¶¶ 527–41.

107. *Id.* ¶ 904.

108. *Crystallex Int'l Corp. v. Bolivarian Republic Venez.*, ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 18–63 (Apr. 4, 2016), [www.italaw.com/sites/default/files/case-documents/italaw7194.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf).

109. *Id.* ¶¶ 575, 623.

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contract.<sup>110</sup> Like in *Rusoro*, the course of events was also found to be an unlawful direct expropriation.<sup>111</sup> The tribunal awarded the investor \$1.202 million plus interest.<sup>112</sup>

In *Philip Morris v. Uruguay*, the Tribunal dismissed Philip Morris's claims brought under the Switzerland-Uruguay BIT.<sup>113</sup> The case arose from Uruguay's imposition of tobacco control measures; the prohibition on marketing more than one variant of cigarette per brand family; and the 80/80 Regulation, which increased the size of health warnings on cigarette packaging to 80 percent.<sup>114</sup> The Tribunal embraced the police powers exception to the expropriation claim, noting Uruguay's interest in the health of its citizens<sup>115</sup> and the fact that there can be no "indirect expropriation" where the business retains "sufficient value."<sup>116</sup> Further, the Tribunal found that the implemented measures did not constitute an FET breach and were not arbitrary or discriminatory because they were reasonable attempts to protect public health.<sup>117</sup> Gary Born, in a dissent, stated that the single presentation requirement was an FET breach; that the World Health Organization Framework Convention on Tobacco Control did not explicitly recommend a similar measure; and that the measure was implemented in a mere few days.<sup>118</sup>

C. ABUSE OF PROCESS

In *Transglobal Green Energy, LLC v. Panama*, the Tribunal declined jurisdiction, finding that the investor's attempt to invoke international jurisdiction over a domestic dispute was an abuse of the investment treaty process.<sup>119</sup> La Mina, a Panamanian company, had entered into a concession contract with The National Authority of Public Services (ASEP), Panama's agency regulating public utilities, to "build and operate a hydroelectric power plant."<sup>120</sup> ASEP issued a resolution terminating the concession contract when La Mina failed to commence construction by the agreed upon

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110. *Id.* ¶¶ 668–708.

111. *Id.* ¶¶ 711–18.

112. *Id.* ¶ 961.

113. Philip Morris Brands Sàrl, Philip Morris Prod. S.A. & Abal Hermanos S.A. v. Oriental Republic of Urug., ICSID Case No. ARB/10/7, Award, ¶ 590 (July 8, 2016), [icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1000/DC9012_En.pdf).

114. *Id.* ¶¶ 108–32.

115. *Id.* ¶¶ 291–307.

116. *Id.* ¶ 286.

117. *Id.* ¶¶ 388–420.

118. Philip Morris Brands Sàrl, Philip Morris Prod. S.A. & Abal Hermanos S.A. v. Oriental Republic of Urug., ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion (Born, Arbitrator), ¶¶ 192–97 (July 8, 2016), [www.italaw.com/sites/default/files/case-documents/italaw7428.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7428.pdf).

119. Transglobal Green Energy, LLC & Transglobal Green Pan., S.A. v. Republic of Pan., ICSID Case No. ARB/13/28, Award, ¶¶ 118, 130 (June 2, 2016), [icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3144/DC8333\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3144/DC8333_En.pdf).

120. *Id.* ¶ 50.

deadline.<sup>121</sup> The Supreme Court held that La Mina’s concession contract remained in force and ordered restitution of the concession.<sup>122</sup> While awaiting implementation of the court order, the owner of La Mina signed a memorandum of understanding (MOU) and a partnership and transfer agreement with Transglobal Green Energy, LLC, a company incorporated in the United States, in order to create a special-purpose entity to undertake the project—Transglobal Green Energy (TGGE Panama), a company to be incorporated in Panama.<sup>123</sup> But, ASEP denied several requests to enforce the Supreme Court decision or transfer the concession to TGGE Panama.<sup>124</sup>

Panama argued that the claimants wrongfully invoked “international jurisdiction over a domestic dispute,” which essentially pertained to Panama’s efforts to implement the Supreme Court decision by creating international ownership.<sup>125</sup> In evaluating the abuse of process objection, the Tribunal considered the circumstances of the BIT claim, including “the timing of the purported investment, the timing of the [international] claim, the substance of the transaction, the true nature of the operation, and the degree of foreseeability of the governmental action at the time of restructuring.”<sup>126</sup> The Tribunal recognized that while Transglobal created the new company to effectuate the Supreme Court’s ruling, Transglobal retained de facto control over the investment through voting rights, and it twice sought arbitration suspensions based on developments in the Panama proceedings.<sup>127</sup>

## V. The EU-Led Permanent Investment Court

In October 2015, the European Union (EU) set out a fundamentally new investor-state dispute settlement (ISDS) policy in response to widespread criticism of the ad hoc ISDS system, which became evident during the 2014 public consultation on the US-EU Transatlantic Trade and Investment Partnership (TTIP). In its “Trade for All” policy, the European Commission stated that the “status quo [of ad hoc investment arbitration] is not an option”<sup>128</sup> for future investment treaty models. Nearly in tandem, the European Commission published a concept paper setting out the proposed

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121. *Id.* ¶ 52.

122. *Id.* ¶¶ 54–58.

123. *Id.* ¶¶ 59–64.

124. *Id.* ¶¶ 65–74.

125. *Id.* ¶ 85.

126. *Id.* ¶ 103.

127. *Id.* ¶¶ 104–18.

128. *Trade for All: Towards a more responsible trade and investment policy*, EUR. COMM’N, at 21 (2015), available at [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

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investment court,<sup>129</sup> which was shortly followed by a full proposal deployed in the course of TTIP negotiations.<sup>130</sup>

The EU has since acted on its new investment policy and proposal, incorporating the investment court model in its recent trade and investment agreements including, among others, the Canada-EU Comprehensive Economic and Trade Agreement (CETA), signed on October 30, 2016, and the EU-Vietnam Free Trade Agreement (FTA). It is clear that, at least for the EU, the investment court model is the way forward.

At present, each treaty envisages its own bilateral permanent Investment Court. Although their features are broadly similar, some differences do exist. The TTIP and CETA Investment Courts would have a court of first instance (the Tribunal), comprised of fifteen judges,<sup>131</sup> while the EU-Vietnam FTA provides for nine judges.<sup>132</sup> The TTIP and the EU-Vietnam FTA provide for an appeal tribunal with six members.<sup>133</sup> The CETA provides for an appellate tribunal with an unspecified number of members, to be determined by a committee.<sup>134</sup> All judges are to be appointed by State parties to these treaties. The Court of First Instance is to sit in benches of three members each, chosen at random.

The courts would be administered by a multilateral institution: CETA proceedings are to be administered by ICSID,<sup>135</sup> while the TTIP and the EU-Vietnam FTA give parties the option between ICSID and the Permanent Court of Arbitration.<sup>136</sup> The function of the Court is largely left to the discretion of the appointed members and treaty parties. At present, it is not clear where such an institution would be physically located. The treaty texts do not provide for an arbitral seat, thus allowing for the possibility of a virtual seat, with arbitrations being held in one location.

In response to critiques from civil society and the international bar, ethical obligations have become mandatory under each treaty's text. The ethics provisions prohibit members of the Investment Court from acting as legal counsel in investment dispute cases and improves transparency for arbitrator challenges. Appointed members may act as arbitrators outside of the

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129. *Concept Paper: Investment in TTIP and beyond – the path for reform*, EUR. COMM'N, at 4 (May 5, 2015), available at [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.pdf](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf).

130. Transatlantic Trade and Investment Partnership (EU, Proposed Official Draft Nov. 12, 2015), available at [trade.ec.europa.eu/doclib/html/153955.htm](http://trade.ec.europa.eu/doclib/html/153955.htm).

131. TTIP art. 9(2); Canada – European Union Comprehensive Economic Trade Agreement [hereinafter CETA] art. 8.27(2) (signed on Oct. 30, 2016), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/10.aspx?lang=eng>.

132. European Union – Vietnam Free Trade Agreement [hereinafter EU-Vietnam FTA] art. 12(2) (published on Feb. 1, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

133. TTIP art. 10(2); EU-Vietnam FTA art. 13(2).

134. CETA art. 8.28(7)(f).

135. CETA art. 8.27(16). The CETA does not identify who will administer the Appellate Tribunal. Pursuant to Article 8.28(7), this is a decision that will have to be made by the Committee.

136. TTIP art. 9(16) and art. 10(15). The administering institution remains in bracketed text in the November draft. See also EU-Vietnam FTA art. 12(18) and art. 13(18).

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Investment Court. The CETA provides for an ethical code and requires that the judges follow the International Bar Association's *Guidelines on Conflict of Interest for Arbitrators*. It remains to be seen how effective these mandatory provisions will be in practice.

To date, there have been several commentaries on the Investment Court proposal.<sup>137</sup> The ABA's Investment Treaty Working Group's *Task Force Report on the Investment Court* analyzed in detail the Investment Court proposal, and concluded that the Investment Court System, as currently articulated, is a work in progress. Concerns were raised about the appointment system, the functioning of the Court, and the enforceability of its awards. Some of these concerns may be addressed if the Investment Court is multi-lateralized through a further instrument.

Each treaty text provides that the Investment Court will be multi-lateralized, with only one institution deciding disputes brought under all EU treaties (and potentially others as well).<sup>138</sup> The EU has started the process towards a multilateral investment court by creating a parallel path alongside the bilateral texts with the publication of a multilateralization road. But the EU is currently conducting an impact assessment,<sup>139</sup> and it may affect how the Investment Court will be multi-lateralized.

At the time of writing this article, it is doubtful that the TTIP will advance under a Trump administration. But it is clear that the EU will move forward with the Investment Court through other agreements, such as the CETA and the EU-Vietnam FTA, and that the Investment Court is likely to be established in either a bilateral or multilateral form in the coming years.

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137. See, e.g., *Investment Treaty Working Group: Task Force Report on the Investment Court System Proposal*, AMERICAN BAR ASSOCIATION, (Oct. 14, 2016), <http://apps.americanbar.org/dch/committee.cfm?com=IC730000>; Koorosh Ameli et al., *EFILA Task Force Paper Regarding the Proposed International Court System (ICS)*, at 15, (Feb. 1, 2016), [http://efila.org/wp-content/uploads/2016/02/EFILA\\_TASK\\_FORCE\\_on\\_ICS\\_proposal\\_1-2-2016.pdf](http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf)

138. TTIP art. 12; CETA art. 8.29; EU-Vietnam FTA art. 15.

139. *Establishment of a Multilateral Investment Court for investment dispute resolution*, EUROPEAN COMMISSION, [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_trade\\_024\\_court\\_on\\_investment\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf).

## **International Family Law**

ROBERT G. SPECTOR & MELISSA A. KUCINSKI\*

This past year saw a significant number of developments in the area of international family law. In addition to a significant treaty ratification by the United States, the federal courts have issued decisions in numerous cases brought under international conventions and federal statutes, and state courts have continued to deal with issues relating to marriage, divorce, child custody, and a host of related issues.

### **I. International Conventions, Federal Law**

On September 7, 2016, the United States deposited its instrument of ratification of the Child Support Convention, which entered into force on January 1, 2017.<sup>1</sup> Every United States jurisdiction enacted the 2008 amendments to the Uniform Interstate Family Support Act (UIFSA) to comport with the Child Support Convention.<sup>2</sup>

### **II. International Litigation**

#### **A. THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (“THE CHILD ABDUCTION CONVENTION”)**

Much of the international family law litigation in the United States involved the Child Abduction Convention<sup>3</sup> and its implementing legislation, the International Child Abduction Remedies Act (ICARA).<sup>4</sup> United States

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\* Robert G. Spector is the Glenn R. Watson Chair and Centennial Professor of Law Emeritus at the University of Oklahoma Law Center. Melissa A. Kucinski is a private practice family lawyer and mediator in Washington, D.C. and Maryland.

1. Press Statement, John Kerry, Sec’y, U.S. Dep’t of State, United States Deposits Its Instrument of Ratification for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Sept. 7, 2016), <https://2009-2017.state.gov/secretary/remarks/2016/09/261631.htm>.

2. OFFICE OF CHILD SUPPORT ENF’T, DEP’T OF HEALTH & HUMAN SERV., IM-15-01, INFORMATION MEMORANDUM ON UNIFORM INTERSTATE FAMILY SUPPORT ACT (2008) AND HAGUE TREATY PROVISIONS (Apr. 13, 2015), <https://www.acf.hhs.gov/css/resource/uniform-interstate-family-support-act-2008-and-hague-treaty-provisions>.

3. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

4. International Child Abduction Remedies Act, 42 U.S.C. § 11601 (2015).



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federal and state courts have concurrent jurisdiction to decide a request for return of a child under the Child Abduction Convention.<sup>5</sup>

The Child Abduction Convention operates to promptly return children to their habitual residence. To obtain an order returning the child, a petitioner must prove that the child was wrongfully removed from, or retained outside of, the child's "habitual residence," and that the petitioner had "a right of custody," which he/she was "actually exercising" (or would have exercised, but for the abduction) under the law of the habitual residence.<sup>6</sup>

1. *Habitual Residence of the Child*

The Child Abduction Convention does not define the term "habitual residence." Therefore, courts have made this fact-based determination in a number of cases, leading to a split among the circuits as to its definition. Regardless of the test used, a child can have only one habitual residence. In a Third Circuit case, the family resided in Dutch Sint Maarten, but the children attended school and saw doctors in French Saint Martin.<sup>7</sup> The Third Circuit found that the child was habitually resident in Dutch Sint Maarten, a country that does not recognize the Abduction Convention, and could not have two habitual residences to permit a petition for return to French Saint Martin, where the Abduction Convention is in force.<sup>8</sup>

a. Intent Cases

The majority view, pioneered by the Ninth Circuit, looks to the parents' shared intent in determining their child's habitual residence. Under this approach, the fact that a very young child remained in Mexico for two years did not qualify Mexico as the child's habitual residence because the child's parents still had significant ties to the United States, and therefore had not clearly abandoned the United States as their habitual residence.<sup>9</sup>

On the other hand, when the parents hired an architect to remodel a family residence in Sri Lanka, obtained the necessary authorization to transport the family pets to that country, sold or shipped to Sri Lanka a majority of their possessions, enrolled the children in school upon arrival, and lived with both sets of grandparents until their home renovations were complete, they demonstrated an intent to abandon the United States and make Sri Lanka the child's habitual residence.<sup>10</sup>

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5. International Child Abduction Remedies Act, 42 U.S.C. § 9003(a) (2015).

6. Hague Convention, *supra* note 3, at art. 13.

7. *Didon v. Castillo*, 838 F.3d 313, 316 (3d Cir. 2016).

8. *Id.*

9. *Wild v. Elliott*, 147 F. Supp. 3d 49, 54–55 (D. Conn. 2015). *See also* *Martinez v. Cahue*, 826 F.3d 983, 990–94 (7th Cir. 2016) (lack of a shared intent of the parties to change the child's habitual residence to Mexico outweighs the child's acclimatization to Mexico). Note, however, if the father of the child does not have a right of custody at the time the child moves with the mother to Mexico, then his intent regarding the child's habitual residence does not matter. *Id.*

10. *Kulapala v. Delgoda*, No. 3:15-cv-01890-BR, 2016 WL 107958, at \*1–2, \*3 (D. Ore. Jan. 8, 2016).

In another case, a child's habitual residence shifted to Singapore from California. The parties moved furniture and personal items to Singapore, turned their San Diego house into a vacation rental, and held a good-bye party. The father resigned from his job in the United States and the mother gave her employer notice to leave. In Singapore, the parents rented a four-story apartment, opened bank accounts, enrolled the child in preschool, and purchased more furniture to complete their home.<sup>11</sup> When the marriage fell apart, the couple sought the assistance of a Singapore law firm to facilitate their separation. Although each parent had significant ties to the United States, they intended that San Diego be their vacation destination, not the city that would remain their habitual residence. The court held that their actions demonstrated intent to leave San Diego behind. The court also noted that the child had become acclimatized to Singapore.<sup>12</sup>

A court also found that a child's habitual residence changed from Honduras to the United States because, even though the parents agreed that the child should live in Honduras, the child had in fact lived in the United States from the time it was eighteen-months-old until the case was decided, when the child was five.<sup>13</sup> In another case, a child had relocated from Israel to the United States, but the parties disputed whether that was intended to be permanent. When the parties jointly applied for their child's naturalization as a United States citizen, the court determined that the child's habitual residence had changed from Israel to the United States.<sup>14</sup>

The newborn child's habitual residence may be difficult to determine because there is often no shared parental intent. A court determined that when a mother gave birth to a child in the United States, the United States did not become the child's habitual residence, particularly when the child had resided in Guatemala for four months.<sup>15</sup>

#### b. Acclimatization Cases

A federal district court in Tennessee declined to use the parental intent test, and determined that it must consider all available evidence—looking backward and focusing on the child's past experience, and looking closely at the facts and circumstances of each case—to determine the child's habitual residence.<sup>16</sup>

### 2. *Rights of Custody*

A child's removal or retention is only wrongful if the left-behind parent had a right of custody and was "actually exercising" that right at the time of

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11. *Albani v. Albani*, No. 15cv1980, 2016 WL 158583, at \*5–6 (S.D. Cal. Jan. 12, 2016).

12. *Id.* at \*8–9, \*11–12.

13. *In re R.C.G.J.*, No. 5:16cv69-RH/GRJ, 2016 WL 3198285, at \*4 (N.D. Fla. June 8, 2016).

14. *Cohen v. Cohen*, No. 4:15–CV–01756 JAR, 2016 WL 4546980, at \*5–6 (E.D. Mo. Sept. 1, 2016).

15. *Ovalle v. Perez*, No. 16-cv-62134-BLOOM, 2016 WL 6082404, at \*8, \*10 (S.D. Fla. Oct. 17, 2016).

16. *Ahmed v. Ahmed*, No. 3:16-CV-142, 2016 WL 4691599, at \*9 (E.D. Tenn. Sept. 7, 2016).

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removal, or would have exercised that right but for the removal. A court refused to terminate, suspend, or limit a parent's *patria potestas* rights under Mexican law for unmarried parents, and found that neither a custody agreement nor anything like one could do so. The court read Mexican law as not containing a general provision for the judicial surrender of parental authority and responsibility.<sup>17</sup> In so holding, the court disagreed with decisions to the contrary from other circuits.<sup>18</sup>

The Fifth Circuit reaffirmed the traditional American position that a father who appeared about once every six weeks was still exercising his custody rights.<sup>19</sup>

### 3. *Defenses*

There are a number of defenses that a respondent may assert in arguing that a child should not be returned to his or her habitual residence.

#### a. Child is Settled in His or Her New Environment

Article 12 of the Child Abduction Convention provides that the authorities need not return a child if more than one year has elapsed between the child's abduction or retention, and the child is now settled in its new environment.<sup>20</sup> The one-year period runs from the date the retention or removal became "wrongful."<sup>21</sup> The factual findings used in determining the "now settled" defense are reviewed under the clear error standard.

In one case, even though the child had been in the United States for more than one year, the trial court found he was not settled there because he had not been enrolled in or attended a traditional school, had very little in-person interaction with other children, did not participate in any team sports, clubs, or other activities aside from those that met online, and did not have any friends locally.<sup>22</sup>

However, a court found that a child, who, in one year had become proficient in English, was doing well in school, and who had extensive family in the area was settled, even though his immigration status was uncertain.<sup>23</sup>

Although normally children who are settled in their new environment are not returned to their habitual residence, trial courts still have discretion to do so.<sup>24</sup>

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17. *Garcia v. Pinelo*, 808 F.3d 1158, 11967 (7th Cir. 2015).

18. *See, e.g., Gonzalez v. Gutierrez*, 311 F.3d 942, 954 (9th Cir. 2002).

19. *Rodriguez v. Yanez*, 817 F.3d 466, 473 (5th Cir. 2016).

20. Hague Convention, *supra* note 3, at art. 12.

21. *Id.*

22. *In re K.J.*, No. 9:16-CV-80177-RLR, 2016 WL 874360, at \*5 (S.D. Fla. Mar. 8, 2016).

23. *Alcala v. Hernandez*, 826 F.3d 161, 172–74 (4th Cir. 2016).

24. *Fuentes-Rangel v. Woodman*, 617 Fed. Appx. 920, 922–23 (11th Cir. 2015).

b. Grave Risk of Harm/Intolerable Situation

Under Article 13(b) of the Child Abduction Convention, 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>25</sup> In one case, a trial court violated a mother’s due process rights when it ordered a child returned to Denmark without holding a hearing on the mother’s Article 13(b) defense.<sup>26</sup>

Sometimes courts will return children, even where there is a risk of harm, if the respondent pledges certain undertakings. However, when crafting undertakings to ensure the safe return of a child, the court may not require the abducting parent to return with the child, nor condition the return on that parent obtaining a protective order from a court of the habitual residence.<sup>27</sup>

A court determined that a “grave risk of harm” existed in Venezuela based on evidence of the mother’s death threats against the father, as well as evidence of her and her new husband’s likely involvement in acts of violence directed against the father and his immediate circle of friends and relatives.<sup>28</sup>

It is not uncommon that a taking parent pleads a grave risk of harm if the family situation involved some type of abuse. In the Seventh Circuit, a grave risk of harm occurred when there was credible testimony of spousal abuse that was carried out in the presence of the child at issue.<sup>29</sup> A child’s return may also be denied because of sexual abuse,<sup>30</sup> or because of physical abuse to the mother and the children.<sup>31</sup>

In a case rejecting an Article 13(b) defense, a court found that returning an American-born child to Mexico was not akin to sending him to a war zone. Rebuffing this “grave risk” defense, the court held that no credible evidence was presented supporting the claim.<sup>32</sup>

c. Mature Child’s Objection

In applying this defense, the court must consider whether the child objects to being returned to the child’s habitual residence, and not whether the child has a preference to live in one country.<sup>33</sup>

A court determined that two children, one fifteen-and-a-half-years-old and the other fourteen-and-a-half, should not be returned to Peru, noting that the closer the children are to the age of sixteen, the more their wishes

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25. Hague Convention, *supra* note 3, at art. 13(b).

26. *Noergaard v. Noergaard*, 197 Cal. Rptr. 3d 546, 559 (Ct. App. 2015).

27. *L.G. v. M.M.*, No. D067027, 2015 WL 8296831, at \*4–5 (Cal. Ct. App. Dec. 9, 2015).

28. *Gomez v. Fuenmayor*, 812 F.3d 1005, 1015 (11th Cir. 2016).

29. For a recent case *see Hernandez v. Cardozo*, No. 15-cv-11460, 2016 WL 3742858, at \*2 (N.D. Ill. July 13, 2016).

30. *Gonzalez v. Pena*, 194 F. Supp. 3d 897, 902 (D. Ariz. 2016).

31. *Sadoun v. Guigui*, No. 1:16-cv-22349-KMM, 2016 WL 4444890, at \*4–5 (S.D. Fla. Aug. 22, 2016).

32. *Mendoza v. Pascual*, No. CV 615-40, 2016 WL 320951, at \*6 (S.D. Ga. Jan. 26, 2016).

33. *Rodriguez v. Yanez*, 817 F.3d 466, 476–77 (5th Cir. 2016).

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should be respected.<sup>34</sup> Another court held that, although it was a close case, a trial court had the discretion to send an objecting thirteen-year-old boy back to Mexico with his father.<sup>35</sup> In yet another case, the court found that a nine-year-old who was immature for his age should be returned to Mexico even though the child wished to stay in the United States.<sup>36</sup>

d. Human Rights and Fundamental Freedoms

Article 20 of the Child Abduction Convention provides that the return of a child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.<sup>37</sup>

e. Consent/Acquiescence to the Removal

The left-behind parent's consent (or acquiescence) is also a defense to returning a child to his or her habitual residence.<sup>38</sup> A court noted that "consistent attempts to secure the return of his child defeats [the mother's] postulation that [the father] has acquiesced to the child's removal."<sup>39</sup> Consent remains a defense even if it was obtained by a misrepresentation.<sup>40</sup>

4. *Other Issues Under the Child Abduction Convention and ICARA*

a. Attorney's Fees

Section 9003 of ICARA provides:

Any court ordering the return of a child pursuant to an action brought under this [Act] shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.<sup>41</sup>

Under this provision, courts carefully scrutinize attorney fee requests to ensure that awards are reasonable. For example, a mother was entitled to a fee award after successfully petitioning for her children's return to Germany. But the amount requested for her pro bono counsel was reduced because the hours claimed by the mother's attorneys were excessive, and the fee award was not necessary to restore her to the position she would have been in had

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34. *Custodio v. Samillan*, No. 4:15-CV-01162 JAR, 2015 WL 9477429, at \*4-6 (E.D. Mo. Dec. 29, 2015).

35. *Garcia v. Pinelo*, 808 F.3d 1158, 1168 (7th Cir. 2015).

36. *Pascual*, 2016 WL 320951, at \*6.

37. Hague Convention, *supra* note 3, art. 20.

38. *Id.* art. 13(a).

39. *Toufighjou v. Tritschler*, No. 8:16-cv-1709-T-33JSS, 2016 WL 3883193, at \*3 (M.D. Fla. July 18, 2016).

40. *Flores-Aldape v. Kamash*, 202 F. Supp. 3d 793, 800-01 (N.D. Ohio 2016).

41. International Child Abduction Remedies Act, 42 U.S.C. § 9007(b)(3) (2015).

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there been no retention.<sup>42</sup> In a different case considering the good faith factor, however, a federal district court in New York concluded that attorney's fees were inappropriate because the retaining father had a good faith belief that it was lawful for him to retain the child.<sup>43</sup>

Determining whether fees are "clearly inappropriate" requires a review of equitable considerations, including factors such as intimate partner violence. In one case, the court determined that "because [the respondent] established that [the petitioner] had committed multiple unilateral acts of intimate partner violence against her, and that her removal of the child from the habitual country was related to that violence, an award of expenses to [the petitioner], given the absence of countervailing equitable factors, was clearly inappropriate."<sup>44</sup> In another case, the fee award was temporarily denied because the petitioner presented no evidence as to the prevailing hourly rate for attorneys and as to the reasonableness of the hours expended by her counsel.<sup>45</sup>

In yet another case, six years after the district court issued an order establishing the petitioner's entitlement to fees and costs, and five years after the Eleventh Circuit's affirmance on the merits, the petitioner renewed her application for fees and costs. The district court denied the respondent's motion to dismiss because he had not suffered actual prejudice from the unreasonable delay.<sup>46</sup> When a respondent argues that a fee award is "clearly inappropriate," he ought to, at a minimum, submit a financial affidavit to show his inability to pay.<sup>47</sup>

Petitioners should also be careful not to neglect state statutes that may provide some relief for them. For example, an abducting mother was ordered to pay restitution to the left-behind father for expenses incurred in obtaining the return of the children.<sup>48</sup>

**b. Procedural Issues**

A Hague return petition must be filed in the place where the child is located. If it is filed in the wrong district, the court may transfer the case to the correct federal district court.<sup>49</sup> An attorney can be appointed for the

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42. Smedley v. Smedley, No. 7:14-CV-66-F, 2015 WL 5139286, at \*3-4 (E.D. N.C. Sept. 1, 2015).

43. Onrust v. Larson, No. 15 Civ. 122(PAE), 2015 WL 6971472, at \*10-11 (S.D. N.Y. Nov. 10, 2015).

44. Souratgar v. Lee Jen Fair, 818 F.3d 72, 75, 81 (2d Cir. 2016).

45. Cillikova v. Cillik, No. 15-2823 (MCA) (LDW), 2016 WL 541134, at \*4 (D. N.J. Feb. 9, 2016).

46. Sewald v. Reisinger, No. 8:08-cv-2313-T-27TBM, 2015 WL 6964290, at \*1-2 (M.D. Fla. Nov. 10, 2015).

47. Godoy v. De Batres, No. 15-cv-00568-MSK-CBS, 2016 WL 397471, at \*1 (D. Colo. Feb. 2, 2016).

48. Strout v. Florida, 180 So. 3d 1052, 1054-55 (Fla. Dist. Ct. App. 2015). For another case where attorney fees were permitted, see *Albani*, 2016 WL 3074407, at \*2.

49. Flores Perla v. Perla Velasquez, No. PWG-16-95, 2016 WL 3878495, at \*7-8 (D. Md. July 18, 2016).

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respondent in a Hague return case after the court considers all the appropriate reasons for appointing counsel.<sup>50</sup> The petitioner in a Hague return action may join the respondent's father to prevent him from concealing the child in the future, and that father could possibly be responsible for the petitioner's expenses and fees.<sup>51</sup> A father's petition for the return of his child may be served on the defendant by alternative methods, including email and Facebook, but the petitioner must also effect service by certified mail, return receipt requested, on defendant's last known address, and on the defendant's relative residing at the same location.<sup>52</sup>

A petitioner may compel the respondent to produce documents relating to her immigration status in the United States because "the mother cannot use information about her immigration proceedings as a defense to the father's petition seeking return of the children to Honduras, and hide behind the confidentiality of this evidence as a shield to allowing the father's opportunity to challenge the evidence."<sup>53</sup>

c. Stays

In determining whether to stay a return order pending appeal, a court should consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."<sup>54</sup> Where the respondent is asserting consent as a defense, the trial court's factual determinations are likely to be conclusive and thus denying a stay based on those facts is justified.<sup>55</sup>

d. Injunctive Relief

A petitioner seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. Of particular importance is respondent's history in secreting the child.<sup>56</sup> A federal district court in North Carolina noted that a temporary restraining order prohibiting a mother (or anyone acting on her behalf) from removing her son, pending disposition of his father's Hague Convention petition for the child's return to France, was "more appropriate" than a show cause order barring such

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50. Shafaq v. Malik, No. 15-7645 (RMB/JS), 2015 WL 6739797, at \*2 (D. N.J. Nov. 4, 2015).

51. Litowchak v. Litowchak, No. 2:15-cv-185, 2015 WL 7428573, at \*2 (D. Vt. Nov. 20, 2015).

52. Ferrarese v. Shaw, 164 F. Supp. 3d 361, 367–68 (E.D.N.Y. 2016).

53. Garcia v. Padilla, No. 2:15-cv-735-FtM-29CM, 2016 WL 881143, at \*5 (M.D. Fla. Mar. 8, 2016).

54. Neumann v. Neumann, 197 F. Supp. 3d 977, 979 (E.D. Mich. 2016) (quoting Chafin v. Chafin, 133 S. Ct. 1017, 1027 (2013)).

55. *Id.* at 990.

56. Guevara v. Soto, No. 3:15-CV-548-TAV-CCS, 2015 WL 9484502, at \*2, \*4–5 (E.D. Tenn. Dec. 29, 2015).

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removal. If the mother violated the temporary restraining order, then she would be in criminal contempt and the court would have reason to take custody of the child.<sup>57</sup>

e. Other Procedural Issues

During the past year, the courts have dealt with a variety of other procedural issues relating to the transnational aspects of child custody. In one case, for example, the fact that the state court awarded custody to the father pending the mother's appeal from an order refusing return did not render the appeal moot.<sup>58</sup> In other cases, courts held that a question of foreign law arising in a Hague return proceeding is to be treated as any other issue of foreign law under the Federal Rule of Civil Procedure 44.1.<sup>59</sup> And that a mother who received only two days' notice of a Hague return hearing, and failed to object to such at trial, was not entitled to a reversal of the return order.<sup>60</sup>

A federal court should abstain from deciding a Hague return petition when it is clear that the state proceeding is one in which the petitioner has raised, litigated, and been given a ruling on the Hague Convention claim, because any subsequent ruling by the federal court on these same issues would constitute interference.<sup>61</sup>

B. THE HAGUE SERVICE CONVENTION

If not raised at trial, issues involving the Hague Service Convention cannot be raised for the first time on appeal.<sup>62</sup> Failure to serve a father, who was in England, for example, required vacating a default judgment against him for child support arrears.<sup>63</sup> A court also held that a Mexican father's objection that he was not served in accordance with the Hague Service Convention was waived because he participated in the dependency proceeding for more than two years without raising his objection to the sufficiency of service.<sup>64</sup>

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57. *Smith v. Smith*, No. 1:16-cv-00264-MOC-DLH, 2016 WL 4154938, \*2-3 (W.D.N.C. 2016).

58. *Tann v. Bennett*, 807 F.3d 51, 52-53 (2d Cir. 2015).

59. *Garcia v. Pinelo*, 808 F.3d 1158, 1162-63 (7th Cir. 2015).

60. *Bounouar v. Fa'alofa*, No. D066948, 2016 WL 192677, at \*8-9 (Cal. Ct. App. Jan. 14, 2016).

61. *Minette v. Minette*, 162 F. Supp. 3d 643, 652 (S.D. Ohio 2016).

62. *In re Marriage of Yacoub & Dawoud*, No. B261334 c/w B262471, 2016 WL 1179057, at \*5 (Cal. Ct. App. Mar. 25, 2016).

63. *State ex rel. Creighton v. Hayner*, No. M2014-02503-COA-R3-JV, 2016 WL 1222619, \*2-3 (Tenn. Ct. App. Mar. 28, 2016).

64. *Dep't of Human Serv.s v. M.C.-C. (In re A.C.-E.)*, 365 P.3d 533, 124-25 (Ore. Ct. App. 2015).



### III. Other Cases Involving International Family Law Litigation

During the past year, U.S. federal and state courts have dealt with numerous other family law issues—notably marriage, divorce, child custody, and miscellaneous related issues—in addition to cases involving the international conventions and ICARA, discussed above.

#### A. MARRIAGE AND DIVORCE—JURISDICTION AND RECOGNITION OF FOREIGN MARRIAGES AND DIVORCE

Federal and state courts dealt with issues this year involving waiver, sufficiency of evidence, laches, comity, public policy, and default judgments.

A Dominican citizen did not qualify for a waiver from removal because he failed to show that his marriage to a U.S. citizen, since ended, was in “good faith” because he could not remember any details of his marriage ceremony.<sup>65</sup> In another immigration case, the Seventh Circuit held that, because a man’s first marriage was fraudulent, his second marriage, although legitimate, was ineffective for immigration purposes.<sup>66</sup>

In another case, a wife presented sufficient evidence in a divorce action that her proxy marriage to her husband in Nigeria was valid and existing at the time that the divorce action was filed. In so doing, she overcame a presumption of validity for her later marriage to her husband’s co-worker, which was entered into for immigration purposes. An expert on Nigerian matrimonial law testified regarding the requirements and validity of proxy marriages (where the parties are not physically present at the ceremony) under Nigerian customary law. The wife testified that her first marriage (the proxy marriage) took place, and also introduced contemporaneous letters supporting that fact. The wife testified that the couple lived together, moved together, bought a home together, had three children, and held themselves out as being married. The wife testified that she only met the co-worker once, their marriage was never consummated, and the co-worker had subsequently died. Her husband’s brother testified that he attended the couple’s traditional wedding in Nigeria.<sup>67</sup> A trial court in Ohio did not err in finding that a couple’s 1992 religious marriage in India was valid for purposes of establishing its validity in Ohio in connection with the wife’s petition to dissolve it.<sup>68</sup>

In a case in the District of Columbia, a court opined that the trial court should have applied a preponderance of the evidence standard when determining the date on which a couple was married. The couple had

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65. Valdez v. Lynch, 813 F.3d 407, 411–12 (1st Cir. 2016).

66. Sehgal v. Lynch, 2016 WL 696565 (7th Cir. 2016).

67. Adeleye v. Driscal, No. 14-14-00822-CV, 2016 Tex. App. LEXIS 2386, at \*25–29 (App.—Houston [14th Dist.] Mar. 8, 2016), *withdrawn, reh’g granted*, 488 S.W.3d 498 (Tex. App.—Houston [14th Dist.] 2016) (withdrawn and superseded based on concurrent pendency of bankruptcy proceeding in a different jurisdiction involving husband).

68. Hussain v. Hussain, No. CA2015–07–127, 2016 WL 3057493, at \*3 (Ohio Ct. App. May 31, 2016).

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cohabitated in Serbia as a non-married couple, and in the District of Columbia as a common law marriage, before holding a marriage ceremony in Las Vegas.<sup>69</sup>

In a case regarding the doctrine of laches as applied to void orders, the evidence was sufficient to support a finding that a wife, who lived in Albania, lacked notice of her husband's divorce until the husband's death approximately fifty years later. Thus, laches did not bar the wife's action to vacate the divorce judgment. The wife testified that she first learned of the divorce when her husband died. The wife was still receiving social security benefits on the husband's account. She further testified that when he visited her in Albania—in years after entry of the divorce judgment—they had lived as a married couple.<sup>70</sup>

In a Hawaiian court decision, a court applied principles of comity to a Taiwanese non-judicial divorce agreement that, following its registration, was recognized in Taiwan as having dissolved the parties' marriage. The trial court properly dismissed the husband's subsequent Hawaiian petition to dissolve their marriage; however, the court may have erred in finding it lacked jurisdiction to divide property owned by the spouses in the state, where the Taiwan divorce only addressed their property in that country.<sup>71</sup>

Regarding service of process, a default judgment against a wife who had returned to her native Poland had to be vacated because there was no evidence that the husband tried to serve her in Poland even though he knew she was residing there, was in regular contact with her by email, and had sent items to her home in Poland.<sup>72</sup>

## B. CHILDREN'S ISSUES

As with issues of marriage and divorce, courts were faced with a broad variety of international law-related issues relating to the custody and well-being of children.

### 1. *Custody*

Maine cannot adjudicate custody for a child whose home is Guatemala and who has never been in Maine.<sup>73</sup> Maryland adopted a "totality of circumstances" test for determining whether an absence from Maryland is temporary when looking at the mother's postings to Africa as part of her job with the United Nations, that are, by definition, temporary in nature. (The mother went to each country for a year at a time, each assignment being finite in duration, and she had been posted to at least three different

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69. *Cerovic v. Stojkov*, 134 A.3d 766, 774–78 (D.C. 2016).

70. *Panagiotis v. Panagiotis (In re Estate of Panagiotis)*, No. 1–14–2244, 2016 WL 1622508, at \*12 (Ill. App. Ct. Apr. 22, 2016).

71. *Hseih v. Sun*, 365 P.3d 1019, 1024–25 (Haw. Ct. App. 2015).

72. *Cancino v. Cancino*, No. 03-14-00115-CV, 2016 WL 234514, at \*5–7 (Tex. App.—Austin Jan. 13, 2016, no pet.) (mem. op.).

73. *Seekins v. Hamm*, 129 A.3d 940, 943 (Me. 2015).

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countries over the life of the case).<sup>74</sup> And a Nevada court did not abuse its discretion in holding that Nevada was an inconvenient forum for determining the custody of a Polish child without having held an evidentiary hearing.<sup>75</sup>

Rhode Island determined that a trial court gave insufficient credit to the parties' "agreed to" divorce decree when the trial court determined that Ireland would be a more convenient forum for future child custody determinations. The divorce decree provided that the mother could relocate to Ireland, but that Rhode Island would retain jurisdiction.<sup>76</sup>

Texas cannot exercise emergency jurisdiction over a Finnish child who is subject to the continuing jurisdiction of a Finnish court and who could not be proved to be in Texas.<sup>77</sup>

## 2. *Relocation*

California allowed a mother to relocate to Ireland with her child when the Irish court accorded "grave consideration" to the California visitation orders and imposed substantially equivalent orders in Ireland. The Irish court, however, would not promise that it would not, under any circumstances, issue orders to protect the child's best interest, if such orders appeared to be necessary.<sup>78</sup> A New Jersey attorney representing a mother was held responsible for the father's attorney's fees, in addition to damages, when the attorney violated an escrow agreement by returning the child's passports to the mother, resulting in her fleeing the country with her child.<sup>79</sup> In a case where a mother sought the return of her children to Ethiopia from Washington, D.C., a trial court committed reversible error when it did not consider the wishes of the children, received no evidence relating to the children's wishes, and did not interview the children, the oldest of whom was fourteen-years-old.<sup>80</sup>

## 3. *Parentage, Child Support, and Juvenile Cases*

Florida cannot exercise jurisdiction for child support over a Swedish defendant who has never visited Florida.<sup>81</sup> A Colorado trial court's decision to register an English support order was reversed and remanded the for a

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74. Garba v. Ndiaye, 132 A.3d 908, 914–15 (Md. Ct. Spec. App. 2016).

75. Adamski v. Adamska, No. 67328, 2016 WL 3488597, at \*1 (Nev. June 23, 2016).

76. Hogan v. McAndrew, 131 A.3d 717, 726 (R.I. 2016).

77. *In re Salminen*, 492 S.W.3d 31, 41 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

78. S.K. v. E.L., No. C074407 and C076695, 2016 WL 770017, at \*6 (Cal. Ct. App. Feb. 29, 2016).

79. Innes v. Marzano–Lesnevich, 136 A.3d 108, 116–17 (N.J. 2016).

80. Duguma v. Ayalew, 145 A.3d 517, 521 (D.C. 2016). The District's custody statute specifically provides for consideration of children's wishes, where practicable. D.C. Code § 16-914(a)(3)(A) (2013).

81. Gustafsson v. Levine, 186 So. 3d 562, 564 (Fla. Dist. Ct. App. 2015).

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determination as to whether an English court exercised jurisdiction in a manner consistent with the U.S. view of due process of law.<sup>82</sup>

A German court that entered an arrearage order against a Florida father lacked jurisdiction over the father according a Florida court. Although the father had married the subject child's mother in Germany, and their first child was born there, the child who was the subject of the arrearage order was born a decade later in the U.S.<sup>83</sup>

When a Swiss judgment establishing paternity and child support is registered in California for enforcement purposes under the Uniform Interstate Family Support Act ("UIFSA"), a California court order may not order genetic testing to challenge registration of that order.<sup>84</sup>

New York did not have jurisdiction to modify a Swedish child support order, because, even though the father lived for a number of years in Singapore, he kept his Swedish residence.<sup>85</sup>

The Connecticut Supreme Court reversed a parental rights termination order after finding that the state failed to make reasonable efforts to unite an American-born, adjudicated dependent child with his father in Nigeria. It said the state should have provided the trial court with post-petition evidence concerning the ill child's ability to travel and the medical care available in Nigeria.<sup>86</sup> A German father's parental rights were properly terminated even though Iowa authorities did not contact the German Consulate, as required by the Vienna Convention on Consular Relations, because the father could not show that notification would have had any effect on the decision.<sup>87</sup>

#### 4. *Immigration Issues*

A child hoping to avoid deportation may obtain "special immigrant juvenile" (SIJ) status<sup>88</sup> in a parentage proceeding, but must join the father when he is known, even though he is in another country.<sup>89</sup> However, a guardian *ad litem* can be appointed for the child in such a proceeding without notice to the other parent.<sup>90</sup> Massachusetts determined that state

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82. *In re Marriage of Lohman*, 361 P.3d 1110, 1120 (Colo. App. 2015).

83. *Server v. Dep't of Revenue*, 189 So. 3d 997, 1000-01 (Fla. Dist. Ct. App. 2016).

84. *Cty. of L.A. Child Support Serv.s Dep't v. Super. Ct.*, 196 Cal. Rptr. 3d 345, 350 (Ct. App. 2015).

85. *Ardell v. Ardell*, 34 N.Y.S.3d 106, 108 (App. Div. 2016).

86. *In re Oreoluwa O.*, 139 A.3d 674, 686-87 (Conn. 2016).

87. *In re J.O.*, No. 16-1101, 2016 WL 4803714, at \*3-4 (Iowa Ct. App. 2016) (disposition referenced at 886 N.W.2d 618 (Table)).

88. "Special immigrant juvenile" status is a classification created by Congress (William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044) to provide special immigration protection to undocumented, unaccompanied children entering the United States who have been the victims of parental abuse, neglect, abandonment or some similar circumstance. *See* 8 U.S.C. § 1101(a)(27)(J) (2015).

89. *Bianka M. v. Super. Ct.*, 199 Cal. Rptr. 3d 849, 856-67 (Ct. App. 2016).

90. *Alex R. v. Super. Ct.*, 203 Cal. Rptr. 3d 251, 256-60 (Ct. App. 2016).

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juvenile, probate, and family courts have general equity jurisdiction over undocumented youths between the ages of eighteen and twenty-one to make the special findings necessary in applying for “special immigrant juvenile” status. Normally their jurisdiction would end when a child turns age eighteen.<sup>91</sup> However, a Minnesota court ruled that a district court’s exercise of jurisdiction over an undocumented Mexican teenager’s juvenile traffic offenses, and his resulting placement on probation, did not satisfy federal law requirements for “special immigrant juvenile” status.<sup>92</sup>

#### **IV. Other Cases**

##### **A. CRIMINAL LAW**

Another chapter was entered in the long-running saga of the Miller-Jenkins case when the Second Circuit upheld the conviction of Kenneth Miller for aiding and abetting an international parental kidnapping. The court held that when the essence of a crime is committed overseas, venue will lie in the district where the defendant is arrested.<sup>93</sup>

##### **B. AGREEMENTS**

A German woman that did not understand the purpose and consequences of the premarital agreement presented by the man she was dating—to whom she became engaged after she signed it—is not bound by the agreement in their later divorce.<sup>94</sup>

##### **C. PROPERTY DIVISION**

A Florida court held that an ex-wife should not have been ordered to either sell three Cayman Islands properties or purchase her ex-husband’s interest in those parcels upon his death. Under Cayman law, the properties were still jointly owned after their divorce, which had occurred three years prior to his death.<sup>95</sup>

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91. *Recinos v. Escobar*, 46 N.E.3d 60, 65–66 (Mass. 2016).

92. *In re Welfare of A.S.*, 882 N.W.2d 633, 639 (Minn. Ct. App. 2016).

93. *United States v. Miller*, 808 F.3d 607, 620 (2d Cir. 2015).

94. *In re Marriage of Porter*, 381 P.3d 873, 879–80 (Or. Ct. App. 2016).

95. *Ebanks v. Ebanks*, 198 So. 3d 712, 715–16 (Fla. Dist. Ct. App. 2016).

## **International Litigation**

AARON MARR PAGE, JONATHAN I. BLACKMAN, CARMINE D. BOCCUZZI, THEODORE J. FOLKMAN, PHILLIP B. DYE, JR., MATTHEW D. SLATER, HOWARD S. ZELBO, IGOR V. TIMOFEYEV, CHARLES A. PATRIZIA, AND JOSEPH R. PROFZAIZER\*

### **I. Foreign Sovereign Immunities Act**

Foreign states are presumptively immune from suit and their property presumptively immune from attachment and execution, unless an exception in the Foreign Sovereign Immunities Act (FSIA) applies.<sup>1</sup>

#### **A. GENERAL EXCEPTIONS**

In *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, the United States Court of Appeals for the Second Circuit affirmed the denial of a Kazakhstan sovereign wealth fund's motion to dismiss on sovereign immunity grounds.<sup>2</sup> The court held that the FSIA does not immunize an instrumentality of a foreign sovereign against claims that it violated federal securities laws by making misrepresentations outside the United States concerning the value of securities purchased by investors within the United States. The court found that the "direct-effect clause" of the commercial activity exception to immunity, Section 1605(a)(2) of the Foreign Sovereign Immunities Act, was satisfied where the effect of the securities fraud—plaintiff's loss—occurred in the United States, at least

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\* This Article summarizes developments in international litigation during 2015. The article was edited by Aaron Marr Page, managing attorney at Forum Nobis PLLC in Washington, D.C. Jonathan I. Blackman and Carmine D. Boccuzzi, partners at Cleary Gottlieb Steen & Hamilton LLP in London and New York, respectively, authored Section I and VII, with assistance from James Blakemore and Elizabeth Block, associates at the same firm. Theodore J. Folkman, a shareholder at Murphy & King 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 Liane Noble and Page Somerville Robinson, associates at the same firm. Matthew D. Slater, a partner at Cleary Gottlieb Steen & Hamilton LLP in Washington, D.C., authored Section IV, with assistance from Caroline Stanton and Robin Rabinowitz, associates at the same firm. Howard S. Zelbo, a partner at Cleary Gottlieb Steen & Hamilton LLP in New York, authored Section V, with assistance from Paul Kleist, an associate at the same firm. Igor V. Timofeyev, Charles A. Patrizia, and Joseph R. Profaizer, partners at Paul Hastings LLP in Washington, D.C., authored Section VI and IX, with assistance from Sabin Chung and Peter S. Larson, associates at the same firm.

1. See 28 U.S.C. § 1602 (1976).

2. *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016).

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where the securities were marketed in the United States and “the defendant contemplated and acted to encourage investment by United States persons.”<sup>3</sup>

In *Arch Trading Corporation v. Republic of Ecuador*, the United States Court of Appeals for the Second Circuit affirmed the dismissal of a suit brought by several entities claiming that the Republic of Ecuador and two of its instrumentalities unlawfully seized their property in Ecuador. The entities claimed that this conduct fell within the FSIA’s “expropriation” exception in Section 1605(a)(3).<sup>4</sup> The court held that the exception did not apply where plaintiffs alleged only that entities affiliated with government instrumentalities engaged in commercial activity in the United States. Plaintiffs’ allegations did not overcome the presumption of separateness laid out in *Bancec*<sup>5</sup> because they did not allege that the instrumentalities themselves exercised significant and repeated control over the day-to-day operations of the distinct, non-governmental entities.<sup>6</sup> As a result, the commercial activity of the non-governmental entities could not be imputed to the instrumentalities and did not destroy the immunity afforded to Ecuador and its instrumentalities.

**B. EXECUTION EXCEPTIONS**

The United States Court of Appeals for the Seventh and Ninth Circuits have split in two decisions analyzing the scope of FSIA’s “terrorism” exception in Section 1610(g). In *Rubin v. Islamic Republic of Iran*, victims of terrorism sought to satisfy their multi-million dollar default judgment against Iran by executing on several collections of ancient Persian artifacts located in the United States.<sup>7</sup> The Seventh Circuit rejected plaintiffs’ argument that Section 1610(g), added in 2008 to ease “the collection process for victims of state-sponsored terrorism by eliminating the *Bancec* rule that foreign sovereigns and their instrumentalities are treated separately for execution purposes,” is itself a “freestanding exception to execution immunity.”<sup>8</sup> Thus, a plaintiff that seeks to execute on property pursuant to Section 1610(g) must still satisfy a Section 1610 exception to execution immunity, e.g., the commercial activity exception. But in *Bennett v. Islamic Republic of Iran*, the Ninth Circuit disagreed, holding that subsection (g) does contain “a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities,” and that once plaintiffs had satisfied Section 1610(g), they were free to execute on the judgment debtors’ United States property.<sup>9</sup>

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3. *Id.* at 110–11.

4. *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193 (2d Cir. 2016).

5. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

6. *Arch Trading*, 839 F.3d at 201–207.

7. *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 473 (7th Cir. 2016).

8. *Id.* at 481.

9. *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 959 (9th Cir. 2016).

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In *Kirschenbaum v. 650 Fifth Avenue and Related Properties*, the United States Court of Appeals for the Second Circuit reversed a lower court grant of summary judgment on terrorism victims' turnover actions, by which the victims had sought to satisfy their judgments by seizing properties held by companies allegedly linked to Iran.<sup>10</sup> The court found that the company from which turnover was sought did not bear the attributes of statehood and therefore could not be equated with Iran.<sup>11</sup> Additionally, they were not agencies or instrumentalities of Iran because the New York-based entities were United States "citizens" under § 1603(b)(3).<sup>12</sup> And there was no evidence that Iran exercised day-to-day control over the companies as would be required to treat them as alter egos of Iran.<sup>13</sup> The court allowed that on remand, the plaintiffs could seek to establish facts proving that the companies were agencies or instrumentalities of Iran under the separate definition in the Terrorism Risk Insurance Act and that the properties were "blocked assets" subject to execution under that Act.<sup>14</sup>

## II. International Service of Process

International service of process is governed by Rule 4(f) of the Federal Rules of Civil Procedure, which allows for service (A) "by internationally agreed means," such as the Hague Service Convention; or (B) "by a method that is reasonably calculated to give notice;" or (C) "by other means not prohibited by international agreement, as the court orders."<sup>15</sup>

In 2016, several courts grappled with Russia's refusal to execute requests for service of process under The Hague Service Convention<sup>16</sup> and its objections under Article 10 of the Convention to the use of alternate means such as postal service. In *Delex Inc. v. Sukhoi Civil Aircraft Co.*, the plaintiff, Delex, served process on a Russian defendant, Sukhoi, by registered mail and by personal delivery to the head of its foreign activity legal support department. Both methods were authorized by the state of Washington's corollary to Rule 4.<sup>17</sup> The Washington Court of Appeals held that the service was valid despite Russia's position on postal service, finding that

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10. *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107 (2d Cir. 2016).

11. *Id.* at 124–25.

12. Notably, the court indicated that a U.S.-based *partnership* could still qualify as an agency or instrumentality because "Congress has 'never expanded [its] grant of citizenship to include artificial entities other than corporations.'" *Id.* at 125–28. But this analysis did not affect the partnership at issue in the case because the argument was not pursued on appeal. *Id.*

13. *Id.* at 128–30.

14. *See id.* at 131.

15. *See* Fed. R. Civ. P. 4(f).

16. The ostensible reason for Russia's refusal is a dispute about whether the U.S. practice of charging a flat fee for the central authority's private contractor is consistent with Article 12. *See* Hague Service Convention, arts. 10, 12, Nov. 15, 1965, U.S.T. 361. The Special Commission of the Hague Conference on Private International Law has rejected Russia's position several times, most recently in 2014, but the dispute remains unresolved. *Id.*

17. *Delex Inc. v. Sukhoi Civil Aircraft Co.*, 372 P.3d 797, *review denied*, 385 P.3d 114 (2016).



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because Russia's refusal to execute requests "renders service under the Hague Convention impossible. . . [Delex] must be allowed to serve [Sukhoi] through alternative means."<sup>18</sup> By contrast, in *Fisher v. Petr Konchalovsky Foundation*, the court rejected a motion under Federal Rule of Civil Procedure 4(f)(3) for leave to serve by mail based on Russia's objection to postal service.<sup>19</sup> The *Fisher* court took the position that the Convention—and Russia's objections to it—remains effective notwithstanding Russia's intransigence regarding execution of service requests. But the court went on to authorize service by email, relying on questionable precedents holding that the Convention does not forbid service by email. Nevertheless, *Fisher* and *Delex* are plainly at odds about the effect of the Russian position on the Convention.

A background issue left open in both cases is the customary international law governing the effect of breaches of a multilateral treaty. The *Delex* court held that the Convention was ineffective *vis a vis* Russia without a formal U.S. withdrawal because there was no mechanism for the United States to "abrogate the [Convention] with respect to Russia but leave it in force with the [over sixty] other signatories."<sup>20</sup> But under customary international law, "[a] material breach of a multilateral agreement" generally entitles "a party specially affected" to suspend the operation of the agreement with respect to the "defaulting state."<sup>21</sup> On the other hand, to suspend the operation of a treaty, the United States would have to take some formal action of notification,<sup>22</sup> which the United States has not done.

United States courts also continued to be divided about the permissibility of postal service under Article 10 generally. A minority of courts, which focus on Article 10(a)'s use of the word "send" rather than "serve," continue to hold that service of process by mail is not authorized by the Convention. For example, the Texas Court of Appeals rejected the validity of postal service in *Menon v. Water Splash, Inc.*,<sup>23</sup> perhaps following the lead of the United States Court of Appeals for the Fifth Circuit.<sup>24</sup> But in *Mutual Benefits Offshore Fund v. Zeltser*, a New York intermediate court of appeals overruled its own precedent to allow for postal service, the position likewise supported by the United States Department of State, the Special Commission of The Hague Conference, and all other State Parties to the Convention.<sup>25</sup> A petition for certiorari has been filed in *Menon*, and in

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18. *Id.* at 802.

19. *Fisher v. Petr Konchalovsky Found.*, No. 15-CV-9831, 2016 WL 1047394 (S.D.N.Y. Mar. 10, 2016).

20. *Delex*, 193 Wash. App. at 372.

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335(2)(b) (1987).

22. *See id.* § 337(1).

23. *See Menon v. Water Splash, Inc.*, 472 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2015, pet. filed).

24. *See Nuovo Pignone, S.p.A v. Storman Asia M/V*, 310 F.3d 374 (5th Cir. 2002).

25. *Mut. Benefits Offshore Fund v. Zeltser*, 140 A.D.3d 444, 37 N.Y.S.3d 1 (N.Y. App. Div. 2016).

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September 2016 the Supreme Court of the United States called for a response to the petition.<sup>26</sup> So, 2017 may be the year when the long-standing split in authority on this issue is resolved.

### III. Personal Jurisdiction

#### A. GENERAL JURISDICTION

In 2016, lower courts continued to apply the Supreme Court of the United States' 2014 decision, *Daimler AG v. Baumann*, which states that general jurisdiction over a foreign corporation is proper only when a corporation's affiliations with the forum state are so "continuous and systematic" as to render it "essentially at home" in the forum state.<sup>27</sup> Courts consistently declined to exercise general jurisdiction outside of *Daimler's* paradigmatic forums: the defendant's place of incorporation and principal place of business.<sup>28</sup>

But courts remain split on whether a defendant who is not "at home" in a forum state may nonetheless consent to a general jurisdiction by complying with that forum state's business registration statute. In *Brown v. Lockheed Martin Corporation*, the United States Court of Appeals for the Second Circuit held that a defendant's business registration in the forum state did not constitute consent to jurisdiction because the statute did not "contain express language alerting the potential registrant that . . . it would be agreeing to submit to the general jurisdiction of the state courts."<sup>29</sup> The Second Circuit also reasoned that *Daimler* "suggest[ed] that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate 'consent'—perhaps unwitting—to the exercise of general jurisdiction by state courts."<sup>30</sup> Other courts have decided similarly, based both on *Daimler* and on the language of the particular registration statute.<sup>31</sup> But in *Bors v. Johnson & Johnson*, the United States District Court for the Eastern District of Pennsylvania held that consent to personal jurisdiction under the

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26. *Menon*, 472 S.W.3d 28.

27. *Daimler AG v. Bauman*, 571 U.S. 746, 763 (2014).

28. See *Chavez v. Dole Food Co., Inc.*, 836 F.3d 205, 223 (3d Cir. 2016); *Best Odds Corp. v. iBus Media Ltd.*, No. 14-16235, 2016 WL 3924386, at \*1 (9th Cir. 2016); *Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 234 (5th Cir. 2016).

29. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 630 (2d Cir. 2016).

30. *Id.*

31. See *Display Works, LLC v. Bartley*, No. CV 16-583, 2016 WL 1644451, at \*7 (D.N.J. Apr. 25, 2016) (holding that business registration did not constitute consent and that older cases reaching the opposite conclusion "cannot be squared with . . . *Daimler*"); *In re Zofran (Ondansetron) Prod. Liab. Litig.*, No. 1:15-CV-13760-FDS, 2016 WL 2349105, at \*4 (D. Mass. May 4, 2016) (finding no consent to jurisdiction, reasoning that "[a]s with the Connecticut statute at issue in *Brown*, the Missouri statute does not mention consent to personal jurisdiction"); and *Aclin v. PD-RX Pharm. Inc.*, No. 5:15-CV-00561-R, 2016 WL 3093246, at \*8 (W.D. Okla. June 1, 2016) (declining to exercise general jurisdiction on the basis of registration).

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Pennsylvania registration statute remained valid after *Daimler* because “Pennsylvania’s statute specifically advises the registrant of the jurisdictional effect of registering to do business.”<sup>32</sup> Similarly, in *In re Syngenta AG MIR 162 Corn Litigation*, the United States District Court for the District of Kansas found that the defendant had consented to jurisdiction by registering to do business because the “Kansas Supreme Court has already interpreted the statute to require consent to general jurisdiction, . . . making it no different than if the Court were faced with a statute that explicitly requires consent.”<sup>33</sup>

Until recently, this split in authority was nowhere more pronounced than in Delaware, where different courts considering the same registration statute reached different conclusions. Last year, the United States District Court for the District of Delaware issued two conflicting opinions on the issue.<sup>34</sup> This year, when the Federal Circuit had the opportunity to address the conflict, it declined to do so, instead basing its opinion on specific jurisdiction grounds.<sup>35</sup> But in 2016, the Supreme Court of Delaware decided *Genuine Parts Company v. Cepec*, concluding that “[i]n light of the U.S. Supreme Court’s clarification of the due-process limits on general jurisdiction in *Goodyear* and *Daimler*,” Delaware’s registration statute provided a means for service of process but not for consent to general jurisdiction.<sup>36</sup>

More broadly, until the issue is decided by the United States Supreme Court, lower courts and state courts will continue to variably interpret the provisions of the states’ different business registration statutes in light of or perhaps in spite of *Daimler*.

#### IV. The Act of State Doctrine

The Act of State Doctrine is a prudential limitation on the exercise of judicial review requiring United States courts to decline to pass judgment on the validity of official acts of a foreign state performed in its own territory.<sup>37</sup>

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32. *Bors v. Johnson & Johnson*, No. CV 16-2866, 2016 WL 5172816 at 4\* (E.D. Pa. Sept. 20, 2016).

33. *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2016 WL 2866166, at \*1 (D. Kan. May 17, 2016).

34. See *AstraZeneca AB v. Mylan Pharm., LLC*, 72 F. Supp. 3d 549, 555–56 (D. Del. 2014); *Acorda Therapeutics, Inc. v. Mylan Pharm., Inc.*, 78 F. Supp. 3d 572, 588–91 (D. Del. 2015).

35. *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755 (Fed. Cir. 2016).

36. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 148 (Del. 2016).

37. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Credit Suisse v. U.S. Dist. Ct. For the Cent. Dist. of Cal.*, 130 F.3d 1342, 1346 (9th Cir. 1997); *W.S. Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp., Int'l.*, 493 U.S. 400, 409 (1990) (doctrine “requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid”); *Salem Fin., Inc. v. United States*, 786 F.3d 932, 955 (Fed. Cir. 2015) (doctrine does not apply when court need not adjudicate validity of foreign state’s act).

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A. INTERSECTION WITH COMITY

In *In re Vitamin C Antitrust Litigation*, Chinese vitamin C suppliers sought dismissal of an antitrust suit brought by United States purchasers on the basis of an alleged conflict between Chinese law, which required defendants to set prices and reduce quantities of vitamin C sold abroad, and United States law, which prohibits such agreements between competitors.<sup>38</sup> Plaintiffs argued that there was no true conflict because defendants had petitioned the Chinese government to adopt the laws at issue.<sup>39</sup> The United States Court of Appeals for the Second Circuit held that once Chinese law was established through evidence provided by the Chinese government, the act of state doctrine barred plaintiffs' efforts to impugn the law by inquiring into "the underlying reasons and motivations for the actions of the foreign government."<sup>40</sup> The court went on to hold that principles of international comity required dismissal on jurisdictional grounds.<sup>41</sup>

B. EXTRATERRITORIAL RECOGNITION

The act of state doctrine does not always require that a United States court give effect to a foreign government's sovereign acts when those acts purport to have effect outside the foreign sovereign's territory. In *Villoldo v. Castro Ruz*, the United States Court of Appeals for the First Circuit refused to allow judgment creditors of Cuba to execute on property in the United States that Cuban law purported to expropriate.<sup>42</sup> The court declined to depart from the extraterritoriality exception where allowing plaintiffs to execute on the property would be contrary to the express wishes of the executive branch, hamper United States foreign policy by preventing the United States government from using the assets in ongoing negotiations with Cuba, and frustrate Congressional sanctions by permitting a flow of currency from the United States to Cuba.<sup>43</sup>

Conversely, in *Federal Treasury Enterprise Sojuzplodoimport v. Spirits International B.V.*, the United States Court of Appeals for the Second Circuit gave effect to a foreign government's decree assigning all of its interests in a United States trademark. Because it "was a wholly intragovernmental transfer of rights" that did not purport to alter anyone else's rights or interests, and addressed "a question of Russian law decided within Russia's borders, rather than a matter of United States law with a situs in the United

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38. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

39. *Id.* at 191–92.

40. *Id.* at 191 (quoting *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987)).

41. *Id.* at 194–95.

42. *Villoldo v. Castro Ruz*, 821 F.3d 196, 206 (1st Cir. 2016).

43. *Id.* at 203.

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States,” the decree was a sovereign—and not commercial—act whose validity cannot be questioned in a United States court.<sup>44</sup>

And in two other cases, district courts accepted that they could not inquire into the validity of a foreign expropriation, yet found they could adjudicate related acts taken in the United States: a foreign state’s compliance with the by-laws of the company whose shares it had expropriated,<sup>45</sup> in one; and in the other, allegations of fraudulent conveyance in the United States to avoid the consequences of an international arbitration concerning the alleged expropriation.<sup>46</sup>

C. FOREIGN CRIMINAL ALLEGATIONS

In *Ates v. Gulen*, plaintiffs alleged that certain Turkish officials conspired to persecute them by planting evidence, fabricating search warrants, securing illegal wiretaps, and arresting and detaining them without lawful basis.<sup>47</sup> The district court dismissed in part on act of state grounds, finding that adjudicating the claims risked inquiry into the legal validity of the alleged conspirators’ conduct as well as of the subsequent actions of the Turkish government to indict them.<sup>48</sup>

V. International Discovery

A. OBTAINING UNITED STATES DISCOVERY FOR USE IN FOREIGN PROCEEDINGS

In 2016, several United States courts considered whether to order discovery for use in proceedings before foreign or international tribunals, pursuant to 28 U.S.C. § 1782(a) and *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>49</sup> While many courts granted discovery requests,<sup>50</sup> a similar number rejected them, citing, among other factors, the burdensome nature of the request,<sup>51</sup> the foreign tribunal’s opposition to U.S. judicial assistance,<sup>52</sup> and

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44. Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l B.V., 809 F.3d 737, 744 (2d Cir. 2016).

45. Petersen Energia Inversora, S.A.U. v. Argentine Republic, 2016 WL 4735367, at \*7–8 (S.D.N.Y. Sept. 9, 2016).

46. Crystallex International Corp. v. Petróleo de Venezuela, S.A., 2016 WL 5724777, at \*9–10 (D. Del. Sept. 30, 2016).

47. *Ates v. Gulen*, No. 3:15-CV-2354, 2016 WL 3568190, at \*1 (M.D. Pa. June 29, 2016).

48. *Id.* at \*16.

49. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256–66 (2004).

50. See, e.g., *In re Michael Kors, LLC*, No. 2:15-cv-1978 (CCC) (JBC), 2016 WL 4472950 (D.N.J. Aug. 23, 2016); *In re Porsche Automobil Holding SE*, No. 15-mc-417 (LAK), 2016 WL 702327 (S.D.N.Y. Feb. 18, 2016).

51. *Andover Healthcare, Inc. v. 3M Co.*, 817 F.3d 621, 623–24 (8th Cir. 2016); *In re Global Energy Horizons Corp.*, 647 F. App’x 83, 86–87 (3d Cir. 2016).

52. *In re Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1040, 42 (N.D. Cal. 2016).

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the requesting party's failure to exhaust discovery-related remedies in the foreign tribunal.<sup>53</sup>

In a 2016 decision notable for its expansive view of the geographic scope of § 1782(a), the Eleventh Circuit, in *Sergeeva v. Tripleton International Limited*, upheld an order requiring an Atlanta-based company to produce documents maintained by its Bahamian affiliate.<sup>54</sup> In so holding, the Eleventh Circuit rejected the company's argument that it should not be required to produce documents located outside of the United States; in the court's view, based on the plain language of § 1782(a) and the significant discretion afforded district courts thereunder, the "location of responsive documents and electronically stored information . . . does not establish a *per se* bar to discovery."<sup>55</sup>

**B. OBTAINING DISCOVERY FROM ABROAD FOR USE IN U.S. PROCEEDINGS**

In 2016, several United States courts also considered whether to order the production of discovery abroad for use in United States proceedings. Among them was the District Court for the Northern District of Illinois, which declined to require two foreign, non-party banks with small branch offices in Chicago to search for and produce information from their overseas entities, reasoning based on *Daimler AG v. Bauman*,<sup>56</sup> that it lacked personal jurisdiction over the banks, and that comity concerns militated against requiring them to comply with the plaintiff's "broad discovery requests."<sup>57</sup> Wielding its judicial power less reservedly, the United States District Court for the Southern District of New York, in a case arising out of the alleged

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53. *In re Elvis Presley Enters. LLC*, No. 15mc386 (DLC), 2016 WL 843380, at \*3 (S.D.N.Y. Mar. 1, 2016).

54. *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194 (11th Cir. 2016).

55. *Id.* at 1200. Three federal appellate courts, in cases pre-dating *Sergeeva*, suggested in dicta that § 1782 does *not* permit the production of documents located abroad. See *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*, 362 F.3d 401, 404 (7th Cir. 2004) (quoting commentary from one of the principal drafters of the statute that § 1782 "was not intended to enable litigants to obtain in Spain evidence located in Spain that could not be obtained through proceedings in Spain"); *Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1079-80 (9th Cir. 2002) (stating there is "some support" for the view that § 1782 does not "encompass[] the discovery of material located in foreign countries" and affirming the denial of discovery of overseas materials); *In re Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997) (observing that while § 1782 does not, "[o]n its face . . . limit its discovery power to documents located in the United States," the legislative history suggests that "Congress intended to reach only evidence located" here). Most district courts have adopted this view. See *In re Certain Funds, Accounts, and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC*, No. 14 Civ. 1801 (NRB), 2014 WL 3404955, at \*4 (S.D.N.Y. July 9, 2014) ("In examining a party's request to conduct discovery for use in a foreign proceeding, courts have read into § 1782 a threshold requirement that the material sought be located in the United States."); *but see In re Gemeinschaftspraxis*, No. M19-88 (BSJ), 2006 WL 3844464, at \*5 (S.D.N.Y. Dec. 29, 2006) (declining to impose such a requirement).

56. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

57. *Leibovitch v. Iran*, No. 08 C 1939, 2016 WL 2977273, at \*6-17 (N.D. Ill. May 19, 2016).

manipulation of London interbank offer rates for yen, ordered multiple bank defendants to produce documents received from and delivered to UK regulators, notwithstanding a regulator's objection and the fact that disclosure would risk violating the UK data privacy law.<sup>58</sup>

## VI. Extraterritorial Application of United States Law

### A. RICO

In *RJR Nabisco, Inc. v. European Community*, the Supreme Court of the United States held that the substantive prohibitions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(b)-(c), apply extraterritorially, but only if foreign conduct violates a predicate offense that itself is intended to apply extraterritorially.<sup>59</sup> Applying the framework of *Morrison v. National Australia Bank, Ltd.*<sup>60</sup> and *Kiobel v. Royal Dutch Petroleum Co.*,<sup>61</sup> the Court found “a clear indication” that RICO applies extraterritorially, thereby rebutting the extraterritoriality presumption. Even though RICO does not contain “an express statement of extraterritoriality,” Congress “has defined ‘racketeering activity’ . . . to encompass violations of predicate statutes that *do* expressly apply extraterritoriality,” making RICO “the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.”<sup>62</sup>

The Supreme Court, however, reversed the Second Circuit's holding that 18 U.S.C. § 1964(c), RICO's private right of action, permits suits premised on injuries that occurred abroad.<sup>63</sup> The Court held that the extraterritoriality presumption must be applied separately to RICO's private right of action, and concluded that section 1964(c) lacked “a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.”<sup>64</sup> Thus, a private RICO plaintiff “must allege and prove a *domestic* injury to its business or property.”<sup>65</sup>

Justice Ginsburg, joined by Justices Breyer and Kagan, dissented in part, and would have held that RICO's private right of action does not contain a domestic injury requirement.<sup>66</sup> Justice Breyer also wrote separately, arguing against deference to the United States Government's view that allowing civil RICO actions for foreign injuries may cause international friction.<sup>67</sup>

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58. *Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419 (GBD) (HBP), 2016 WL 1718387, at \*2–15 & n.17 (S.D.N.Y. Apr. 29, 2016).

59. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101–02 (2016).

60. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

61. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

62. *RJR Nabisco*, 136 S. Ct. at 2102–03.

63. *Id.* at 2106. Last year's Year in Review discussed the Second Circuit's decision.

64. *Id.* at 2106–11.

65. *RJR Nabisco*, 136 S. Ct. at 2106.

66. *Id.* at 2112–13 (Ginsburg, J., concurring in part and dissenting in part).

67. *Id.* at 2116–17 (Breyer, J., concurring in part and dissenting in part).

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**B. FOURTH AND FIFTH AMENDMENTS**

The United States Supreme Court granted certiorari in *Hernandez v. Mesa*, a case where a Mexican teenager, standing on the Mexican side of the United States-Mexico border, was shot and killed by a United States Border Patrol agent standing on the United States side.<sup>68</sup> In the *en banc* decision below, the United States Court of Appeals for the Fifth Circuit held that the plaintiff could not assert a claim under the Fourth Amendment and the agent was entitled to qualified immunity.<sup>69</sup> The Court added a question to the grant of certiorari—likely inspired by the United States government’s amicus brief—requiring the parties to brief whether *Bivens v. Six Unknown Federal Narcotics Agents*<sup>70</sup> would even permit the claim at issue.<sup>71</sup>

**C. STORED COMMUNICATIONS ACT**

Applying *RJR Nabisco*, the United States Court of Appeals for the Second Circuit held that Congress did not intend the warrant provisions of the Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq., to apply extraterritorially, thus quashing a government warrant seeking customer e-mail content stored at Microsoft’s datacenter in Ireland.<sup>72</sup> The court relied heavily on the fact that the SCA’s focus was on protecting a user’s privacy in stored communications.<sup>73</sup>

**D. ANTITRUST**

As noted above, in *In re Vitamin C Antitrust Litigation*, the United States Court of Appeals for the Second Circuit dismissed an antitrust suit against Chinese manufacturers and California-based sellers alleging a price and supply-fixing conspiracy where the Chinese Government filed an amicus brief asserting that Chinese law compelled the defendants’ actions.<sup>74</sup> The Second Circuit held that it should defer to the foreign government’s representation concerning “the construction and effect of its laws and regulations,” and that principles of international comity justified abstention from exercising jurisdiction.<sup>75</sup>

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68. *Hernandez v. Mesa*, 137 S. Ct. 291 (2016).

69. *Hernandez v. United States*, 785 F.3d 117, 119–21 (5th Cir. 2015) (analyzed in last year’s Year in Review).

70. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

71. *Mesa*, 137 S. Ct. 291.

72. *In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, 829 F.3d 197, 211–21 (2d Cir. 2016).

73. *Id.* at 216–20, 231–33 (Lynch, J., concurring in the judgment). In a separate concurrence, Judge Lynch called on Congress to update the SCA.

74. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

75. *Id.* at 188–94.



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E. TRADEMARK

Addressing the reach of the Lanham Act, the United States Court of Appeals for the Ninth Circuit reaffirmed that *Morrison* extraterritoriality is a merits question, not a question of federal courts' subject-matter jurisdiction.<sup>76</sup> The court of appeals then applied *RJR Nabisco* and its own precedent of *Timberlane Lumber Co. v. Bank of American National Trust & Savings Association*<sup>77</sup> to hold that the Lanham Act applied extraterritorially where a Canadian retailer was purchasing United States trademarked grocery products and reselling them without authorization in Canada, potentially causing reputational harm.<sup>78</sup>

**VII. Recognition and Enforcement of Foreign Judgments**

In United States courts, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, otherwise known as the "New York Convention," governs the recognition and enforcement of most foreign arbitral awards.<sup>79</sup> State law, however, governs the recognition and enforcement of foreign court judgments.

A. FOREIGN ARBITRAL AWARDS

In *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, the United States Court of Appeals for the Second Circuit held that a district court did not abuse its discretion by confirming an arbitral award nullified by a foreign judgment at the seat of the arbitration where that foreign judgment was found to be contrary to United States public policy.<sup>80</sup> During an arbitration between the petitioner COMMISA and PEP, an instrumentality of the Mexican government, the Mexican Congress enacted a statute making clear that Mexican law did not permit arbitration for the types of administrative claims brought by COMMISA.<sup>81</sup> After the arbitral tribunal issued an award in COMMISA's favor, the Mexican analog of the D.C. Court of Appeals held that PEP's actions were not subject to arbitration and therefore annulled the award.<sup>82</sup>

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76. *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 966–69 (9th Cir. 2016).

77. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

78. *Trader Joe's Co. v. Hallatt*, 835 F.3d 960, 969–75 (9th Cir. 2016).

79. The Convention is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act ("FAA"). See United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, Art. 21, June 10, 1958, U.S.T. 2517; 9 U.S.C. § 201–08 (2013). The Inter-American Convention on International Commercial Arbitration governs the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified it. The Inter-American Convention is implemented in Chapter 3 of the FAA. See 9 U.S.C. § 301–307 (2013).

80. *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 97 (2d Cir. 2016).

81. *Id.* at 99, 108–09.

82. *Id.*

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The district court refused to grant comity to the Mexican judgment and the Second Circuit affirmed, ruling that the Mexican judgment “violated basic notions of justice” by, in the United States court’s eyes, retroactively disrupting contractual expectations in favor of a state enterprise and leaving COMMISA without a remedy, although the Mexican court, as a matter of Mexican law, had found no retroactivity.<sup>83</sup>

In *GSS Group Ltd. v. National Port Authority of Liberia*, the United States Court of Appeals for the D.C. Circuit held that subject matter jurisdiction could not be exercised over Liberia to confirm an arbitral award under an agency theory in which Liberia ordered its Port Authority to cancel a construction contract.<sup>84</sup> Although the wholly state-owned corporation had no discretion to ignore Liberia’s order, the court found that Liberia was exercising its authority as a regulator, rather than a shareholder, as the Port Authority had entered into the contract without the competitive bidding required by state contract procurement procedures.<sup>85</sup>

In *Human v. Czech Republic—Ministry of Health*, the United States Court of Appeals for the D.C. Circuit addressed whether subject matter jurisdiction existed to enforce an arbitral award against the Czech Republic arising from an agreement to supply medical technology and services in exchange for a share of processed blood plasma.<sup>86</sup> The court found the Czech Republic was not entitled to sovereign immunity under the FSIA’s arbitration exception because its relationship with the claimant was a legal, although not necessarily a contractual, relationship that “may be governed” by an international agreement, namely the New York Convention.<sup>87</sup> The FAA’s additional requirement that the legal relationship be “considered as commercial” for purpose of enforcement in the United States of Convention awards was satisfied because, despite the lack of monetary payment under the parties’ relationship, there was clearly an exchange of valuable commodities.<sup>88</sup>

## B. FOREIGN COURT JUDGMENTS

In *Chevron Corporation v. Donziger*, the United States Court of Appeals for the Second Circuit affirmed an order enjoining enforcement of defendants’ foreign court judgment anywhere in the United States and imposing a constructive trust on any property acquired by Donziger and two Ecuadorian defendants anywhere in the world traceable to the judgment.<sup>89</sup> Affirming the district court’s findings that defendants had obtained their \$8.646 billion judgment by, among other things, bribing the Ecuadorian

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83. *Id.* at 100, 107–08.

84. *GSS Grp. Ltd. v. Nat’l Port Auth. of Liberia*, 822 F.3d 598, 606 (D.C. Cir. 2016).

85. *Id.*

86. *Human v. Czech Republic—Ministry of Health*, 824 F.3d 131,133–34 (D.C. Cir. 2016).

87. *Id.* at 135–36 (quoting 28 U.S.C. § 1605(a)(6)).

88. *Id.* (quoting 9 U.S.C. § 201).

89. *Chevron Corp. v. Donziger*, 833 F.3d 74, 80–81 (2d Cir. 2016).

judge who issued it and ghostwriting his decision, the district court exercised its equitable powers under New York common law to grant the judgment debtor relief from a judgment procured by fraud.<sup>90</sup> The court rejected the argument that New York's Uniform Foreign Country Money-Judgments Recognition Act, which authorizes defensive but not affirmative challenges to the validity of a foreign judgment, supplanted Chevron's common-law cause of action.<sup>91</sup> Nor did the district court order offend international comity, as it exercised power only over individuals subject to the court's jurisdiction, was limited to the United States, and did not invalidate the foreign judgment itself, so that other judgment creditors not before the court were free to continue to seek to enforcement in other countries.<sup>92</sup>

### **VIII. Forum Non Conveniens**

#### **A. FORUM SELECTION CLAUSES**

In *Atlantic Marine Construction Company, Inc. v. United States District Court*, the United States Supreme Court held that a valid forum-selection clause mandating a foreign forum usually requires dismissal for *forum non conveniens*, except in the unusual instance when the public interest factors outweigh the forum-selection clause.<sup>93</sup> Two years later, courts continue to define the boundaries of *Atlantic Marine*. In one case, the United States Court of Appeals for the Fifth Circuit defined the standards that apply to different aspects of the *Atlantic Marine* inquiry, and in another decision, it identified, without deciding, an important conflict-of-laws issue that could impact future disputes.

In *Weber v. PACT XPP Techs., AG*, the United States Court of Appeals for the Fifth Circuit defined the different bodies of law that apply to the interpretation versus the enforceability of a forum selection clause, and also adopted a mixed standard of review for the *Atlantic Marine* analysis.<sup>94</sup> The case arose from an employment contract between a CEO and a German company. The contract provided that the CEO was entitled to proceeds earned in patent litigation and contained a forum selection clause electing Germany as the proper forum.<sup>95</sup> The dispute followed a jury verdict in favor of PACT in a patent suit, an event that might have given rise to a substantial payday for the plaintiff CEO.<sup>96</sup> After the verdict but before the judgment was entered, the company voted the CEO out of office.<sup>97</sup> The CEO sued the company for breach of contract, *quantum meruit*, and promissory

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90. *Id.* at 117–19.

91. *Id.* at 140–43.

92. *Id.* at 143–45.

93. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013).

94. *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 768 (5th Cir. 2016).

95. *Id.* at 763.

96. *Id.*

97. *Id.* at 763–764

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estoppel.<sup>98</sup> The company moved to dismiss on *forum non conveniens* grounds, arguing that Germany was the proper forum. The district court dismissed.<sup>99</sup>

On appeal, the Fifth Circuit identified two distinct issues related to the forum-selection clause: one issue involved the legal interpretation of the clause and the other issue involved its enforceability. The court held that while the interpretation of the clause in a diversity case is governed by the forum state's choice-of-law rules, the enforceability of the clause is governed by federal law.<sup>100</sup> The court also held that it would review both interpretation and enforceability of forum-selection clauses *de novo*, and would review the court's application of the *forum non conveniens* balancing test for abuse of discretion. It ultimately affirmed the district court's dismissal.<sup>101</sup>

Subsequently, in *Barnett v. DynCorp International*, the United States Court of Appeals for the Fifth Circuit affirmed a district court's dismissal for *forum non conveniens* due to a foreign forum-selection clause while leaving unresolved the issue of what law applies to determine whether a forum-selection clause is valid in the first place—that is, whether under the *Weber* framework just discussed, validity is a matter of interpretation or enforceability.<sup>102</sup> The dispute arose from an employment agreement between an employee and a Texas-based company containing a forum-selection clause electing Kuwait as the proper forum.<sup>103</sup> After the company terminated the employee and promised to pay his benefits and unpaid wages, the employee sued in federal court in Texas, alleging that he never received those benefits.<sup>104</sup> The district court granted the company's motion to dismiss for *forum non conveniens* over the employee's objections that the forum-selection clause was void under Texas law and unenforceable under federal law.<sup>105</sup> On appeal, the Fifth Circuit noted that contractual validity was not at issue in *Atlantic Marine* and that neither the Fifth Circuit nor the Supreme Court had specified what source of law governs validity of a forum-selection clause.<sup>106</sup> The employee argued that validity is a matter of substantive contract law and should thus be decided under Texas law, while the company argued that validity is really a matter of enforceability, and therefore was governed by federal law.<sup>107</sup> The Fifth Circuit found support for both positions, but determined that it need not decide the issue because

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98. After the CEO filed suit, PACT filed the civil law equivalent of a declaratory judgment action in Germany, requesting a declaration that the compensation agreement was invalid under German law because it had not been ratified by PACT's shareholders. *Id.* at 764.

99. *Id.* at 766.

100. *Id.* at 770.

101. *Id.* at 768, 775–76.

102. *Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296 (5th Cir. 2016).

103. *Id.* at 299.

104. *Id.*

105. *Id.* at 301.

106. *Id.* at 301.

107. *Id.* at 301–02.

dismissal was proper under both Texas and federal law.<sup>108</sup> The question thus continues to exist as a gap exists in post-*Atlantic Marine* jurisprudence.

## **IX. Parallel Proceedings**

### **A. INTERNATIONAL ABSTENTION**

Federal courts continue to apply the general policy that “[a]bstention from exercise of federal jurisdiction is the exception, not the rule.”<sup>109</sup> In *Custom Polymers PET, LLC v. Gamma Meccanica SPA*, the court rejected the defendant’s motion to stay parallel court proceedings in Italy, concluding that the comity analysis favored exercising jurisdiction and proceeding with the suit.<sup>110</sup> Although the defendant’s Italian lawsuit preceded the plaintiff’s suit, the other factors—such as the forum selection clause and the location of witnesses—weighed against abstention.<sup>111</sup>

Similarly, district courts in the Second Circuit confirmed that a court should decline to exercise jurisdiction only in exceptional circumstances. In *Schenker A.G. v. Société Air France*, the district court refused to stay or dismiss a German freight forwarder’s antitrust action against several airlines despite a pending Dutch action.<sup>112</sup> The court first observed that the parties in the two actions were different, so abstention would leave claims against certain defendants unresolved for a long time.<sup>113</sup> The court next reasoned that the general preference for deferring to the initially filed action does not apply when that action seeks declaratory relief in response to a direct threat of litigation.<sup>114</sup> In *C.D.S. Inc. v. Zetler*,<sup>115</sup> the district court refused to abstain in deference to a proceeding in French court where the parties were not French companies, the connection with France was weak, and French law did not govern.<sup>116</sup> The court concluded it would be inappropriate for a French court to decide U.S. copyright law issues and resolve United States law violations between parties that conduct business primarily within the United States.<sup>117</sup> Indeed, even where foreign law applied, as in *In re Atari, Inc.*,<sup>118</sup> the bankruptcy court refused to abstain in favor of a French court because the dispute concerned the interpretation and enforcement of the bankruptcy court’s own confirmation order.<sup>119</sup>

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108. *Id.* at 302–303.

109. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

110. *Custom Polymers PET, LLC v. Gamma Meccanica SpA*, 185 F. Supp. 3d 741, 29–30 (D.S.C. 2016), *appeal dismissed* (Sept. 22, 2016).

111. *Id.* at 756–57.

112. *Schenker A.G. v. Societe Air Fr.*, 2016 U.S. Dist. LEXIS 50422 (E.D.N.Y. Apr. 13, 2016).

113. *Id.* at \*6.

114. *Id.* at \*8.

115. *C.D.S. Inc. v. Zetler*, 2016 U.S. Dist. LEXIS 104318 (S.D.N.Y. Aug. 3, 2016).

116. *Id.* at \*18.

117. *Id.* at \*16.

118. *In re Atari, Inc.*, No. 13-10176, 2016 Bankr. LEXIS 1779 (U.S. Bankr. S.D.N.Y. Apr. 20, 2016).

119. *Id.* at \*45–46.

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The Seventh Circuit in *Deb v. Sirva, Inc.* distinguished the abstention doctrine from *forum non conveniens*.<sup>120</sup> The court of appeals noted that abstention “conserve[s] judicial resources by abstaining from accepting jurisdiction when there is a parallel proceeding elsewhere,” whereas the *forum non conveniens* determination considers “the adequacy of the forum along with a balancing of the [parties’] interests.”<sup>121</sup>

**B. ANTI-SUIT INJUNCTIONS**

Federal circuits remain split in their approach to enjoining foreign litigation. In *BAE Systems Technology Solution & Services v. Republic of Korea’s Defense Acquisition Program Administration*,<sup>122</sup> the district court enjoined the defendants from taking any action in Korea, after analyzing both the factors governing both preliminary injunctions and anti-suit injunctions under Fourth Circuit standards,<sup>123</sup> but limited the injunction’s duration in light of jurisdictional concerns, potential comity, and national security implications, and urged the parties to agree to stay the Korean action.<sup>124</sup> In contrast, courts in the Ninth Circuit have followed a more liberal approach, which does not require a likelihood of success on the merits to obtain an anti-suit injunction. For example, in *Tahaya MISR Inv., Inc. v. Helwan Cement S.A.E.*, the district court enjoined an Egyptian action as a violation of the parties’ forum selection clause after considering only whether the two suits involved the same parties, the possible frustration of the forum’s policy, and the impact on comity.<sup>125</sup>

The Second Circuit considered a request for an anti-suit injunction in a context involving novel questions of bankruptcy law, maritime law, and the federal interpleader statute. In *Hapag-Lloyd Aktiengesellschaft v. United States Oil Trading LLC*, after finding subject-matter and *in rem* jurisdiction, the United States Court of Appeals for the Second Circuit held that a district court may enter a foreign anti-suit injunction under the federal interpleader injunction statute, 28 U.S.C. § 2361.<sup>126</sup> The court explained that “while the statute itself has no extraterritorial reach, federal courts have long possessed the inherent power to restrain the parties before them from engaging in suits in foreign jurisdictions.”<sup>127</sup> The Second Circuit then

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120. *Deb v. SIRVA, Inc.*, 832 F.3d 800, 814–15 (7th Cir. 2016).

121. *Id.*

122. *BAE Sys. Tech. Solution & Servs. v. Republic of Korea’s Def. Acquisition Program Admin.*, 2016 U.S. Dist. LEXIS 94028 (D. Md. July 19, 2016).

123. *Id.* at \*6–9, \*16, \*53.

124. *Id.* at \*52–53.

125. *Tahaya MISR Inv., Inc. v. Helwan Cement S.A.E.*, No. 2:16-cv-01001-CAS(AFMx), 2016 U.S. Dist. LEXIS 98888 at \*7–18 (C.D. Cal. July 27, 2016).

126. *See Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146, 154 (2d Cir. 2016).

127. *Id.* (citing *China Trade Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987)).

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remanded the case to the district court for a proper analysis regarding the injunction's scope.<sup>128</sup>

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128. *Id.* at 155.

## **Corporate Social Responsibility**

CONSTANCE Z. WAGNER, CLAUDIA FELDKAMP, SRI KATRAGADDA,  
CORINNE LEWIS, KELLY SMALLMON, AND CINDY WOODS\*

### **I. Introduction**

This Article highlights important developments in 2016 in the field of corporate social responsibility as well as the field of business and human rights. This Article includes developments in the areas of corporate non-financial reporting, corporate climate change risk disclosure, Alien Tort Statute litigation in United States federal courts, corporate liability for environmental destruction in the International Criminal Court, promotion of the business and human rights agenda by various intergovernmental and non-governmental organizations, international anti-corruption efforts, and use of export credit financing to promote cleaner energy use to combat climate.

### **II. European Union: Non-Financial Reporting Directive**

Pursuant to European Union Directive 2014/95/EU (2014 EU Directive), Member States of the European Union (EU) are required to enact laws requiring disclosure of non-financial information by certain large undertakings and groups by December 6, 2016.<sup>1</sup> Such requirements became effective for fiscal years beginning on January 1, 2017, or during calendar year 2017.<sup>2</sup> The 2014 EU Directive applies only to large public-interest entities (PIEs) with more than 500 employees.<sup>3</sup> It also applies to large groups, of which a PIE is the parent entity, that meet the criterion of more than 500 employees on a consolidated basis.<sup>4</sup> PIEs include companies listed in EU markets, as well as some unlisted companies, such as credit institutions, insurance companies, and other companies that are so

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\* The Committee Editor is Professor Constance Wagner, Saint Louis University School of Law. She was assisted by Kelly Smallmon and Martha Gallagher, faculty research assistants. Constance Wagner wrote Sections II, III (with Kelly Smallmon) and IV. Corinne Lewis, Partner, Lex Justi, wrote Section V. Cindy Woods, Legal and Policy Associate, International Corporate Accountability Roundtable, wrote Section VI. Claudia Feldkamp, Counsel, Fasken, Martineau, wrote Section VII. Sri Katragadda, formerly Project Coordinator for Global Pro Bono, Pro Bono Institute, wrote Section VIII.

1. Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain undertakings and groups, 2014 O.J. (L 330), 1, 8.

2. *Id.*

3. *Id.* at 4.

4. *Id.* at 6.



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designated by Member States because of their activities, size, or number of employees.<sup>5</sup> The European Commission (EC) estimates that the new reporting requirements will apply to approximately 6,000 entities and groups across the EU.<sup>6</sup>

The 2014 EU Directive states that “as a minimum” four categories of information must be covered, namely “environmental, social and employee matters, respect for human rights, and anti-corruption and bribery matters.”<sup>7</sup> But there are no specific requirements for what must be disclosed in each category. The 2014 EU Directive adopts a “comply or explain” approach to disclosure, meaning that companies are required to report only on issues that are covered by their policies. If a company does not pursue a policy on a particular issue mandated by the 2014 EU Directive, it does not need to adopt a policy to be in compliance. It must, however, give a “clear and reasoned explanation” for why it has no policy in place.<sup>8</sup> This approach gives great latitude to companies to design their own approaches to non-financial reporting and to their corporate social responsibility policies.

The 2014 EU Directive takes a minimum harmonization approach to the reporting standards for non-financial disclosures. It does not contain detailed rules for the content of non-financial reporting and does not impose mandatory EU standards. Instead, companies may choose to present such disclosures in the way they consider most useful.<sup>9</sup> They may rely on the following:

[N]ational frameworks, Union-based EU frameworks such as the Eco-Management and Audit Scheme (EMAS), or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN ‘Protect, Respect and Remedy’ Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organization for Standardisation’s ISO 26000, the International Labor Organization’s Tripartite Declaration of principles concerning multinational

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5. Directive 2013/34/EU, of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182), 19, 26 – 27.

6. European Commission Statement/14/29, Disclosure of non-financial information: Europe’s largest companies to be more transparent on social and environmental issues (Sept. 29, 2014).

7. Directive 2014/95/EU at 4.

8. *Id.* at 5.

9. Commission Consultation Document (EC) on Non-Binding Guidelines for Reporting of Non-Financial Information by Companies, at 4.

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enterprises and social policy, the Global Reporting Initiative, or other recognised international frameworks.<sup>10</sup>

The minimum harmonization approach means that companies must at least meet the requirements of the 2014 EU Directive in their national laws, but may also go beyond those requirements if they choose.

The minimum harmonization approach will probably result in companies using very different formats in their reporting, leading to wide variations in quantity and quality of reporting. These variations will likely make it difficult for the users of these reports to make meaningful comparisons across companies. To mitigate this problem as well as to facilitate the disclosure of non-financial information by companies, the 2014 EU Directive requires the EC to prepare “non-binding guidelines on methodology for reporting non-financial information, including non-financial key performance indicators, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-financial information by undertakings” by December 2016.<sup>11</sup> Such non-binding guidance had not been promulgated as of this writing.

Denmark was the first EU Member State to adopt implementing legislation under the 2014 EU Directive.<sup>12</sup> It had first introduced non-financial reporting requirements for certain businesses in 2008 through an amendment to the Danish Financial Statements Act (FSA).<sup>13</sup> Additional reporting requirements were adopted through further FSA amendments in 2012.<sup>14</sup> The Danish implementing legislation was adopted in 2015 as additional FSA amendments.<sup>15</sup> Such legislation expands the coverage of the 2014 EU Directive to include a wider group of companies. But it does not provide greater specificity on the contents of required non-financial reporting than the 2014 EU Directive, nor does it recommend or require a specific reporting standard. While the Danish approach provides great flexibility to covered companies, it does not solve the problem of comparability among companies. While it may lead to a greater quantity of non-financial reporting, it will not necessarily lead to an improvement in quality.

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10. Directive 2014/95/EU at 2; Commission Consultation Document, *supra* note 9, at 4 (“Companies may also consider the sectorial OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, as appropriate.”).

11. Directive 2014/95/EU at 8.

12. *Denmark Transposes EU NFR Directive*, GRI, (July 1, 2015), <https://www.globalreporting.org/information/news-and-press-center/Pages/DENMARK-TRANPOSES-EU-NFR-DIRECTIVE.aspx>.

13. Danish Financial Statements Act (“Årsregnskabsloven”), cf. Consolidated Act no. 647 of 15 June 2006.

14. *Id.*

15. Danish Business Authority, Implementation in Denmark of EU Directive 2014/95/EU on the Disclosure of Non-Financial Information, (May 2015), <http://csrgov.dk/file/557863/implementation-of-eu-directive.pdf>.

### **III. United States State Attorneys General: Actions on Misleading Corporate Climate Change Risk Disclosure**

Several state attorneys general (A.G.s) in the United States have taken action to jointly address climate change, including launching investigations into suspected misleading corporate climate change risk disclosure.

On March 29, 2016, former United States Vice President and Chairman of the Climate Reality Project Al Gore and New York A.G. Eric Schneiderman announced the formation of a coalition called “A.G.s United for Clean Power.”<sup>16</sup> State A.G.s from California, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington, as well as the A.G.s of the District of Columbia and the Virgin Islands, formed the coalition. One of several tactics proposed by the coalition was facilitating ongoing and potential joint investigations into fossil fuel companies and industry groups suspected of misleading the public about the dangers of climate change or the viability of renewable energy resources.

An example of such an investigation was the much-publicized investigation initiated by New York A.G. Schneiderman against Peabody Energy Corporation (Peabody) in 2013. On November 9, 2015, A.G. Schneiderman announced his office’s finding that Peabody “violated New York laws prohibiting false and misleading conduct in the company’s statements to the public and investors regarding financial risks associated with climate change and potential regulatory responses.”<sup>17</sup> The investigation found that the company repeatedly denied in its public financial filings to the U.S. Securities and Exchange Commission (SEC) its ability to predict the impact that potential regulation of climate change pollution would certainly have on its business, “even though Peabody and its consultants actually made projections that such regulation would have severe impacts on the company.”<sup>18</sup>

The New York A.G.’s investigation found that the SEC filings and public communications provided incomplete or one-sided discussions of the findings of the International Energy Agency (IEA), which makes predictions about coal demand based on various scenarios for future world energy production, despite the fact that the IEA had predicted that future actions to combat climate change would significantly lessen the global demand for coal.<sup>19</sup> Peabody and the A.G. reached an agreement for Peabody to end certain representations to investors and the public that minimize the

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16. *Al Gore and New York Attorney General Eric Schneiderman Launch AGS United for Clean Power Coalition*, THE CLIMATE REALITY PROJECT (Mar. 30, 2016, 10:00 AM), <https://www.climatealityproject.org/blog/al-gore-and-new-york-attorney-general-eric-schneiderman-launch-ags-united-clean-power-coalition>.

17. Press Release, New York Attorney General, New York State Office of the Att’y Gen., A.G. Schneiderman Secures Unprecedented Agreement With Peabody Energy To End Misleading Statements And Disclose Risks Arising From Climate Change (Nov. 9, 2015).

18. *Id.*

19. *Id.*

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company's financial risks related to climate change.<sup>20</sup> Peabody agreed to (1) correctly and in good faith describe all of IEA's scenarios for global demand in its public communications; (2) provide disclosures in its November 9, 2015, quarterly report filed with the SEC concerning company projections regarding impact on its business of certain potential laws, regulations, and policies involving climate change; and (3) "not represent in any public communication that it cannot reasonably project or predict the range of impacts that any future laws, regulations, or policies relating to climate change or coal would have on Peabody's markets, operations, financial condition, or cash flow."<sup>21</sup>

Another much-publicized investigation involved joint action against ExxonMobil by the state A.G.s of New York, California, Massachusetts, and the Virgin Islands. On November 4, 2015, New York A.G. Schneiderman issued ExxonMobil a subpoena, initiating an investigation into the corporation's statements about climate change to determine whether they were false or deceptive.<sup>22</sup> The New York A.G.'s office stated that it launched this investigation after an unnamed news series revealed that the company may have misled investors about the risks of climate change.<sup>23</sup> The initial subpoena demanded ExxonMobil turn over the following:

[A]ll documents and information requested in the attached Schedule in accordance with the instructions and definitions contained therein in connection with an investigation to determine whether an action or proceeding should be instituted with respect to repeated fraud or illegality as set forth in the New York State Executive Law Article 5, Section 63(12), violations of the deceptive acts and practices law as set forth in New York State General Business Law Article 22-A, potential fraudulent practices in respect to stocks, bonds and other securities as set forth in New York State General Business Law Article 23-A, and any related violations, or any matter which the Attorney General deems pertinent thereto.<sup>24</sup> The investigation is ongoing.<sup>25</sup>

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20. *Id.*

21. Assurance of Discontinuance at 9, In the Matter of Investigation by Eric T. Schneiderman, Attorney General of the State of New York, or Peabody Energy Corporation, Assurance No. 15-242 (Nov. 28, 2015).

22. See Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html>.

23. NEW YORK STATE OFFICE OF THE ATT'Y GEN., COMBATTING CLIMATE CHANGE, (Feb. 5, 2016), <http://www.ag.ny.gov/press-release/combating-climate-change>.

24. Benjamin Hulac, *Original Subpoena Finally Surfaces in Exxon Case*, E&E NEWS (Oct. 24, 2016), <http://www.eenews.net/stories/1060044697>.

25. As of September 16, 2016, the New York A.G. office was still conducting this investigation. During the probe, the A.G. has also begun investigating some of the business's accounting practices. See Tom DiChristopher, *Exxon Mobil Accounting Practices probed by New York Attorney General*, CNBC (Sept. 16, 2016, 7:17 AM), <http://www.cnbc.com/2016/09/16/exxonmobil-accounting-practices-probed-by-new-york-attorney-general.html>.

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According to several sources, California A.G. Kamala Harris also announced an investigation of ExxonMobil in January of 2016,<sup>26</sup> but there has been no evidence of a subpoena of ExxonMobil or any communication from the California A.G.'s office regarding this matter. As of March 29, 2016, the A.G.s of Massachusetts and the Virgin Islands also announced investigations into ExxonMobil's statements about the risks of climate change.<sup>27</sup> But on June 28, 2016, the Virgin Island A.G. Claude Walker withdrew his Exxon subpoena after an agreement with the company.<sup>28</sup> ExxonMobil told a federal court that A.G. Walker agreed to withdraw the subpoena if the company agreed to drop a related lawsuit alleging that the subpoena violated its rights under the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and the laws of its home state of Texas.<sup>29</sup> In addition to the suit against Virgin Islands A.G. Walker, ExxonMobil sued Massachusetts A.G. Maura Healy on June 17, 2016, over her investigation seeking injunctive relief barring enforcement of a civil demand to ExxonMobil as it violates ExxonMobil's rights under state and federal law.<sup>30</sup> This federal suit is still ongoing and A.G. Healy continues to argue that there is sufficient reason to investigate into ExxonMobil's practices.<sup>31</sup>

On July 13, 2016, the U.S. House of Representatives Committee on Science, Space, and Technology (House Committee) issued subpoenas to Massachusetts A.G. Healy and New York A.G. Schneiderman regarding their probe of ExxonMobil, as well as eight environmental and legal organizations, about their inquiries into ExxonMobil.<sup>32</sup> A.G. Healy responded with a letter claiming this demand to be "sweeping in its scope and completely unprecedented in its intended interference with an ongoing regulatory investigation."<sup>33</sup> In August 2016, the SEC joined the

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26. Ivan Penn, *California to investigate whether Exxon Mobil lied about climate-change risks*, L.A. TIMES (Jan. 20, 2016, 3:00 AM), <http://www.latimes.com/business/la-fi-exxon-global-warming-20160120-story.html>.

27. Valerie Volcovici & Sarah N. Lynch, *Probe of Exxon's climate change disclosures expands*, THOMPSON REUTERS (Mar. 29, 2016, 4:43 PM), <http://www.reuters.com/article/us-massachusetts-climatechange-exxon-mob-idUSKCN0WV24K>.

28. Lachlan Markay, *Virgin Islands AG Drops Exxon Subpoena*, FREE BEACON (June 29, 2016, 8:20 PM), <http://freebeacon.com/issues/virgin-islands-ag-drops-exxon-subpoena/>.

29. *Id.*

30. See ExxonMobil's Complaint for Declaratory and Injunctive Relief, Exxon Mobil Corp. v. Healy, 2016 WL 6091249, No. 4:16-cv-569.

31. David Hasemeyer, *Massachusetts AG Criticizes Exxon for Continuing Climate Deceit*, INSIDE CLIMATE NEWS (Aug. 9, 2016), <https://insideclimatenews.org/news/09082016/massachusetts-ag-maura-healey-criticizes-exxon-continuing-climate-deceit>.

32. Michelle Williams, *House Committee Subpoenas Massachusetts Attorney General Maura Healey Over Exxon Investigation*, MASS LIVE (July 14, 2016, 7:25 AM), [http://www.masslive.com/politics/index.ssf/2016/07/house\\_committee\\_subpoenas\\_mass.html](http://www.masslive.com/politics/index.ssf/2016/07/house_committee_subpoenas_mass.html).

33. Letter from Richard Johnson, Chief Legal Counsel for Mass Att'y Gen. Maura Healy, to Lamar Smith, U.S. Rep., House Comm. On Science, Space, and Technology (July 26, 2016).

investigation of ExxonMobil in regards to climate change risk disclosure.<sup>34</sup> But the House Committee issued a letter to SEC Chair Mary Jo White on September 29, 2016, detailing its concerns about the SEC's and New York A.G.'s investigations.<sup>35</sup> The House Committee Chair Lamar Smith expressed his concern "that the SEC, by wielding its enforcement authority against companies like ExxonMobil for its collection of and reliance on what is perhaps in the SEC's view inadequate climate change data used to value its assets, advances a prescriptive climate change orthodoxy that may chill further climate change research throughout the public and private scientific R&D sector."<sup>36</sup> The House Committee has launched its own investigation into the SEC's investigation, and demanded all related documents.<sup>37</sup> Both the SEC's and the House Committee's investigations are ongoing as of December 1, 2016.

#### **IV. United States: Federal Court Decisions on Alien Tort Statute Claims**

Litigation over Alien Tort Statute (ATS) claims continued in lower United States federal courts in 2016. Such litigation centered on legal issues left open by the United States Supreme Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), including the meaning of the "touch and concern" test for displacing the presumption against extraterritorial application of the ATS, whether corporations can be sued under the ATS, as well as the appropriate mens rea needed for aiding and abetting liability under the ATS. Several cases were decided in federal courts in the Second, Fourth, Ninth, and Eleventh Circuits.

Of particular interest was the decision in *Nestle U.S.A., Inc., et al. v. John Doe I, et al.*, in which the United States Supreme Court denied a petition for writ of certiorari to the U.S. Court of Appeals to the Ninth Circuit on January 11, 2016.<sup>38</sup> The case involved allegations that Nestle U.S.A., Inc., along with Archer-Daniels-Midland Company and Cargill, aided and abetted violations of the ATS through their purchase of cocoa and provision of crop-related assistance to cocoa farmers who committed labor abuses involving the use of child labor.<sup>39</sup> Petitioners requested that the United States Supreme Court grant certiorari to resolve a circuit split on the three issues left open by the Court's decision in *Kiobel*. The Ninth Circuit's decision had held that (1) specific intent, i.e., acting with the purpose of

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34. Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon Over Accounting for Climate Change*, WALL ST. J. (Sept. 20, 2016, 7:55 PM), <https://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593>.

35. Letter from Lamar Smith, U.S. Rep., House Comm. On Science, Space, and Technology, to Mary Jo White, Chair, SEC (Sept. 29, 2016).

36. *Id.*

37. *Id.*

38. *Nestle U.S.A., Inc. v. John Doe I*, 136 S. Ct. 798 (2016); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014).

39. Petition for Writ of Certiorari, *Nestle U.S.A.*, 2015 WL 5530188, 1–2 (No. 15-349).

causing the injury complained of, was not required; (2) the focus test set out in *Morrison v. National Australian Bank, Ltd.*, 561 U.S. 247 (2010) does not govern whether a proposed application of the ATS would be impermissibly extraterritorial under *Kiobel*; and (3) corporations can be subject to liability under the ATS. By denying certiorari, the Court let stand the Ninth Circuit's decision. As such, it failed to resolve what the petitioners claimed were several splits among the federal circuit courts of appeal on these issues. On the first issue, petitioners claimed that the Ninth Circuit's position conflicted with that taken by the Second and Fourth Circuits, in which aiding and abetting liability attaches only when a defendant purposefully aids the violation of international law.<sup>40</sup> On the second issue, petitioners claimed that the Ninth Circuit's position conflicted with that taken by the Second and Eleventh Circuits, in which the location of the conduct that is either in direct violation of international law or constitutes aiding and abetting another's violation of international law must be sufficiently focused in the United States to overcome the *Kiobel* presumption against extraterritorial application.<sup>41</sup> On the third issue, petitioners claimed that the Ninth Circuit's position, with which the Seventh and Eleventh Circuits have agreed, conflicted with the Second Circuit's position that corporations are not subject to ATS liability.<sup>42</sup> Due to the Court's unwillingness to provide clarity on these issues, decisions under the ATS in the United States federal courts will continue to diverge on important points as lower courts wrestle with the questions left open by the Court's decision in *Kiobel*.

## **V. International Criminal Court in The Hague: Prosecutorial Policy and Potential Liability of Business Officials**

The Office of the Prosecutor for the International Criminal Court (ICC)<sup>43</sup> has signaled, in its September 15, 2016, Policy Paper on Case Selection and Prioritisation (2016 Policy Paper), that in selecting cases, the Office "will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."<sup>44</sup> Consequently, business officials could find themselves held accountable before the ICC for complicity in governmental acts or for acts they perpetrate through their own businesses,

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40. *Id.* at 13.

41. *Id.* at 25.

42. *Id.* at 35.

43. The ICC, created in 1998 when 120 States adopted the Rome Statute, 2187 UNTS 90 (entered into force July 1, 2002) has as its primary purpose to end impunity for serious crimes and to prevent such crimes. See International Criminal Court, *Understanding the International Criminal Court*, ¶ 1, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> [hereinafter Rome Statute].

44. International Criminal Court, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, ¶ 41 (Sept. 15, 2016), [https://www.icc-cpi.int/itemsdocuments/20160915\\_otp-policy\\_case-selection\\_eng.pdf](https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf).

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because the ICC can prosecute any individual who has committed a crime within the ICC's jurisdiction.

The 2016 Policy Paper outlines the general principles and criteria guiding the prosecutorial discretion exercised by the ICC's Office of the Prosecutor in its selection and prioritization of cases to investigate and prosecute.<sup>45</sup> With its limited resources, the Office of the Prosecutor cannot prosecute all specific incidents which give rise to crimes within the ICC's jurisdiction and therefore, must select cases for investigation and prosecution.<sup>46</sup> To date, the ICC has only prosecuted a handful of cases, although some of these involved several individuals. The 2016 Policy Paper complements the 2013 Policy Paper on Preliminary Examinations,<sup>47</sup> which addresses how the Office of the Prosecutor assesses whether a situation merits investigation.

The 2016 Policy Paper was issued by the Office of the Prosecutor amid continued challenges to its impartiality by African States. In October, Gambia stated its plan to withdraw from the ICC and cited the ICC's targeting of Africans for prosecution while ignoring crimes committed by Western countries.<sup>48</sup> The same month, two other African States, Burundi and South Africa, also declared their intention to withdraw from the ICC.<sup>49</sup> Moreover, the United States, China, and Russia, three of the world's major powers, have never joined the ICC and have not indicated that they intend to do so any time soon. Yet, while they abstain from membership in the ICC, they can simultaneously impede the referral of situations by the UN Security Council to the Office of the Prosecutor through their veto power.

To date, the three main criteria used by the Office of the Prosecutor for selection of cases has been (1) gravity of the crimes; (2) degree of responsibility of the alleged perpetrators; and (3) potential charges.<sup>50</sup> In assessing the gravity of the crime, the ICC considers several factors, one of which is the impact of the crime. This includes an evaluation of "inter alia the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities."<sup>51</sup>

In noting its intention to pay particular consideration to crimes that involve environmental destruction, "land grabbing," or unauthorized

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45. *Id.* at ¶ 4.

46. *Id.* at ¶ 11.

47. See International Criminal Court, Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (Nov. 2013).

48. Joe Bavier, *Gambia announces withdrawal from International Criminal Court*, REUTERS (Oct. 26, 2016, 11:22 AM), <http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0>.

49. *Gambia joins South Africa and Burundi in exodus from International Criminal Court*, INDEPENDENT (Oct. 26, 2016, 6:43 BST), <http://www.independent.co.uk/news/world/africa/gambia-international-criminal-court-hague-yahya-jammeh-south-africa-burundi-a7380516.html>.

50. *Policy Paper on Case Selection and Prioritisation*, *supra* note 44, ¶ 34.

51. *Id.* at ¶ 41. The other factors considered as part of this assessment are the scale, nature, and manner of commission of the crime. International Criminal Court, *Regulations of the Office of the Prosecutor*, reg. 29(2), ICC-BD/05-01-09 (Apr. 23, 2009).



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exploitation of natural resources, the Office of the Prosecutor is not expanding the crimes it can prosecute; these remain war crimes, crimes against humanity, genocide, and crimes of aggression.<sup>52</sup> Nor is the Office enlarging its prosecutorial ambit to include corporations; the option of including potential liability of corporations was considered during the drafting of the Rome Statute,<sup>53</sup> but was firmly rejected. The personal jurisdiction of the ICC remains over natural persons rather than legal persons, such as businesses, although the ICC's use of the concept of "indirect perpetration through an organization" holds the potential for prosecuting businesspersons who use their business enterprises to commit the crimes.<sup>54</sup>

The Office of the Prosecutor does appear to be highlighting readiness to move beyond its traditional ambit of investigating and prosecuting war crimes primarily in African countries. Cases involving significant harm to the environment, natural resources, and land use could arise in a peacetime context and be framed as crimes against humanity. "Crimes against humanity" under the ICC's Statute are "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" and include: deportation or forcible transfer of population, imprisonment, rape, and persecution on political, racial, national, ethnic, cultural, religious, gender, or other grounds.<sup>55</sup>

In pursuing such cases, the ICC is not entering into a completely uncharted area. The ICC heard a case concerning destruction of historical and religious monuments in Timbuktu, Mali in August 2016 and found the accused guilty of the "war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion."<sup>56</sup> Also, in 2014, a "Communication" was submitted to the Office of the Prosecutor that asked it to investigate acts, including forced population transfers, illegal imprisonment, and persecution, in connection with illegal land seizures carried out by Cambodian governmental officials and security forces as well as individuals in government-connected businesses.<sup>57</sup>

The 2016 Policy Paper, which states the ICC's intention to give particular consideration to crimes that entail environmental destruction, illegal exploitation of natural resources or illegal dispossession of land in its

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52. Rome Statute, *supra* note 43, art. 5.

53. Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of Respondents, 17 – 18, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491).

54. Joanna Kyriakakis, *Developments in International Criminal Law and the Case of Business Involvement in International Crimes*, 94(887) INT'L REV. OF THE RED CROSS 981, 992 – 997 (2012).

55. Rome Statute, *supra* note 43, art. 7(1).

56. Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Information Sheet, ICC-PIDS-CIS-MAL-01-08/16\_Eng (Oct. 7, 2016).

57. FIDH & Global Diligence, *Questions & Answers: Crimes against humanity in Cambodia from July 2002 until present*, 4 (Oct. 2014).

selection of cases for investigation and prosecution, may create greater global awareness of the consequences of these acts for those most frequently affected: minorities, indigenous peoples, and the rural poor. The announcement also underlines that governmental officials, members of militias or rebel forces, and business officials who participate in international crimes, may be held accountable before the ICC.

## **VI. Business and Human Rights Developments**

### **A. UN NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS**

Since 2013, the UN Working Group on Business and Human Rights (Working Group) has encouraged States to develop a national action plan (NAP) on business and human rights as a way to operationalize the UN Guiding Principles on Business and Human Rights (UNGPs) at the State level.

On December 9, 2015, the Colombian government published the Colombia NAP, becoming the first non-European country to do so.<sup>58</sup> The Presidential Advisory Office led the process, along with the Ministry of the Presidency and a multi-stakeholder steering committee.<sup>59</sup> The NAP is based on the three pillars of the UN Guiding Principles, and develops eleven key lines of action, which prioritize the energy, mining, agro-industry, and road infrastructure sectors.<sup>60</sup> The NAP, whose aim is to “guarantee respect of human rights in business activities,” is valid for three years and developed to align with both the Colombian National Strategy on Human Rights 2014–2014 and the Guidelines for a Public Policy on Business and Human Rights, published by the government in 2014.<sup>61</sup> The Plan was developed with the following factors in mind: a human rights based approach, coherence with other international norms and standards, a differential approach, territorial emphasis, sectorial prioritization, input into the post-conflict and peace building situation, coordination and articulation, and shared leadership in implementation.<sup>62</sup>

The Chilean government announced its intention to draft a National Action Plan at the Annual UN Forum on Business and Human Rights in

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58. See *Presidente Santos lanza Plan Nacional de Acción sobre Derechos Humanos y Empresas*, Presidencia de la República (Dec. 9, 2015), [http://wp.presidencia.gov.co/Noticias/2015/Diciembre/Paginas/20151209\\_04-Presidente-Santos-lanza-Plan-Nacional-Accion-Derechos-Humanos-Empresas.aspx](http://wp.presidencia.gov.co/Noticias/2015/Diciembre/Paginas/20151209_04-Presidente-Santos-lanza-Plan-Nacional-Accion-Derechos-Humanos-Empresas.aspx).

59. *Presidente Juan Manuel Santos lanza el Plan Nacional de Acción en Derechos Humanos y Empresas* (Dec. 9 2015), <http://www.derechoshumanos.gov.co/Prensa/2015/Paginas/Plan-Nacional-de-Accion-Empresa-y-DDHH.aspx>.

60. *Id.* at 3, 7–8.

61. *Id.* at 6.

62. *Id.* at 6–8.

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November 2014.<sup>63</sup> During the course of 2016, the government held dialogues in four regions of the country with business and trade unions, civil society, and indigenous peoples, in order to feed into the NAP content.<sup>64</sup> The government, in partnership with the Human Rights Center at the University of Diego Portales Faculty of Law, undertook a national baseline assessment (NBA) on the current status and implementation of domestic laws and policies which impact business respect for human rights and access to remedies for corporate-related human rights abuses.<sup>65</sup> The baseline was launched in March 2016. Chile's actions are in line with international best practice, which prescribes the creation of an NBA before the publication of an NAP, in order to inform the content of an NAP and create a more reactive and responsive plan to the identified gaps in implementing the UNGPs and other business and human rights frameworks.<sup>66</sup>

In November 2015, the Mexican government announced its intention at the UN Annual Forum on Business and Human Rights to draft an NAP.<sup>67</sup> The Ministry of the Interior and the Ministry of Foreign Affairs are leading the process, along with a multi-stakeholder working group comprised of civil society organizations, unions, business, and academics.<sup>68</sup> In line with international best practice, the Mexican government has arranged to utilize an NBA conducted by the Mexican Civil Society Focal Group on Business and Human Rights.<sup>69</sup> The baseline is expected to be published in November 2016. The government has also entered into a formal agreement with the

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63. *Subsecretario Edgardo Riveros participó en Foro Anual sobre Derechos Humanos y Empresas en Naciones Unidas*, Ministerio de Relaciones Exteriores de Chile (Dec. 2, 2014), <http://minrel.gob.cl/subsecretario-edgardo-riveros-participo-en-foro-anual-sobre-derechos-humanos-y-empresas-en-naciones-unidas/minrel/2014-12-03/100147.html>.

64. *Judith Schönsteiner lidera equipo que efectuará primer estudio línea base sobre empresas y derechos humanos en Latinoamérica*, CENTRO DE DERECHOS HUMANOS DE LA UNIVERSIDAD DIEGO PORTALES (June 1, 2015), <http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/dummy-category-4/item/152-judith-schoensteiner-lidera-equipo-que-efectuara-primer-estudio-linea-base-sobre-empresas-y-derechos-humanos-en-latinoamerica>.

65. See generally, *Estudio de Línea Base Sobre Empresas y Derechos Humanos*, CENTRO DE DERECHOS HUMANOS, UNIVERSIDAD DE DIEGO PORTALES FACULTAD DE DERECHOS, (Mar. 2016), [https://business-humanrights.org/sites/default/files/documents/Sch%C3%B6nsteiner\\_Estudio%20Línea%20Base%20Chile%202016.pdf](https://business-humanrights.org/sites/default/files/documents/Sch%C3%B6nsteiner_Estudio%20Línea%20Base%20Chile%202016.pdf).

66. See generally, Danish Institute for Human Rights & International Corporate Accountability Roundtable, *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (2014), <http://icar.ngo/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>. <https://www.icar.ngo/news/2014/6/30/national-action-plans-on-business-and-human-rights-a-toolkit-for-the-development-implementation-and-review-of-state-commitments-to-business-and-human-rights-frameworks>.

67. *Llama México a empresarios a promover derechos humanos de su personal*, ONCE NOTICIAS (Nov. 17, 2015, 5:10 PM), <http://oncenoticias.tv/index.php?modulo=interior&nota=148&dt=2015-11-17>.

68. Secretaría de Gobernación, *Grupo de Trabajo sobre Empresas y Derechos Humanos. Segunda Sesión*. (Feb. 2016), [https://businesshumanrights.org/sites/default/files/documents/SEGUNDA\\_SESION\\_GRUPO\\_EMPRESAS\\_DDHH\\_18\\_febrero\\_2016.pdf](https://businesshumanrights.org/sites/default/files/documents/SEGUNDA_SESION_GRUPO_EMPRESAS_DDHH_18_febrero_2016.pdf).

69. *Id.*

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Danish Institute for Human Rights to receive expert advice on business and human rights capacity building, and on the methodology for public consultations and production of the NAP.<sup>70</sup>

**B. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM**

In 2016, the Organization of American States (OAS) continued to show interest in the subject of business and human rights. In 2014, the OAS General Assembly endorsed the UNGPs and requested that the Inter-American Commission on Human Rights (IACHR) “continue supporting States in the promotion and application of State and business commitments in the area of human rights and business.”<sup>71</sup> In June 2016, the OAS General Assembly reiterated and strengthened these calls by resolving to continue to “urge member states and their respective national human rights institutes . . . to disseminate these [Guiding] principles as broadly as possible, promoting the exchange of information and sharing best practices on the promotion and protection of human rights in business”<sup>72</sup> The General Assembly also specifically requested the IACHR to “contribute to the progressive development of standards in the area of human rights in business, including, among other initiatives, support to develop national action plans on human rights and business.”<sup>73</sup> The IACHR was also requested to conduct “by the last half of 2016, a study on inter-American standards on business and human rights based on an analysis of conventions, case law, and reports issued by the inter-American system” to be used in NAPs processes and other business and human rights initiatives.<sup>74</sup> This resolution by the OAS signals its increasing interest and engagement with the issue. This focus is particularly timely given the increase in interest of Latin American countries in drafting NAPs.

**C. HUMAN RIGHTS DEFENDERS**

In 2016, the challenges and risks faced by human rights defenders organizing against extractive operations, large-scale infrastructure development projects, and other mega-projects were brought to international attention. This amplified interest resulted in part due to the high-profile assassination in March 2016 of human rights defender Berta

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70. *New Agreement for Cooperation with Mexico*, DANISH INSTITUTE FOR HUMAN RIGHTS (Apr. 12, 2016), <http://www.humanrights.dk/news/new-agreement-cooperation-mexico>.

71. Organization of American States, Resolution Promotion and Protection of Human Rights in Business, OAS AG/RES. 2840 ¶ 4 (XLIV-O/14) (June 4, 2014).

72. Organization of American States, Resolution Promotion and Protection of Human Rights in Business, OAS AG/RES. 2887 ¶ ii, 1 (XLVI-O/16) (June 14, 2016).

73. *Id.* at ¶ ii, 3.

74. *Id.* at ¶ ii, 4.

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Caceres in Honduras, in retaliation for her work against the Agua Zarca Dam project.<sup>75</sup>

In June 2016, the International Corporate Accountability Roundtable and the International Service for Human Rights launched the “Human Rights Defenders in National Action Plans (NAPs) on Business and Human Rights.”<sup>76</sup> The aim is to provide guidance to States on how the rights and needs of human rights defenders can be addressed in NAPs and other similar policies, and how human rights defenders can and should be substantially engaged and consulted in the process of creating a NAP. In seeking to protect against rights violations by business activities, human rights defenders often face threats, criminalization, attacks, and even murder. The document is important and timely because as more States continue to develop NAPs, it is critical for them to understand not only the risks faced by defenders working on these issues, but also how to engage with human rights defenders in a meaningful and rights-respecting way. The guidance contains two tools to help guide States in these considerations: a “Human Rights Defenders in NAP Processes Checklist” (Checklist) and a “Human Rights Defenders National Baseline Assessment (NBA) Template” (Template). The Checklist “contains the minimum elements needed for States to ensure adequate human rights defender participation in NAP processes.”<sup>77</sup> The Template “highlights key areas of concern regarding defenders working on business and human rights, drawing out issues likely to be of particular salience.”<sup>78</sup> It is divided into four sections: Legal and Policy Framework; Expectations, Incentives, and Sanctions on Business; Redress and Remedy; and Context.<sup>79</sup>

On December 31, 2015, the IACHR published a thematic report, “Criminalization of the Work of Human Rights Defenders,” in response to a number of “alarming reports of a trend indicating that human rights defenders in various contexts are systematically subjected to unfounded criminal proceedings in order to paralyze or delegitimize their causes.”<sup>80</sup> The report “identified the contexts and groups of defenders who are most

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75. See Jonathan Watts, *Berta Cáceres, Honduran human rights and environmental activist, murdered*, THE GUARDIAN (Mar. 4, 2016, 2:20 EST), <https://www.theguardian.com/world/2016/mar/03/honduras-bertha-caceres-murder-environment-activist-human-rights>.

76. See generally, Ben Leather, Michael Ineichen, Tania Morris Diaz, & Cindy Woods, *Human Rights Defenders in National Action Plans (NAPs) on Business and Human Rights*, INTERNATIONAL SERVICE FOR HUMAN RIGHTS & INTERNATIONAL CORPORATE ACCOUNTABILITY ROUND TABLE (2016), [https://www.ishr.ch/sites/default/files/documents/ishr\\_icar\\_hrds\\_in\\_naps\\_guidance\\_eng.pdf](https://www.ishr.ch/sites/default/files/documents/ishr_icar_hrds_in_naps_guidance_eng.pdf).

77. *Id.* at 11.

78. *Id.* at 13.

79. *Id.* at 13-25.

80. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *Criminalization of Human Rights Defenders* OEA/Ser.L/V/IL Doc. 49/15 (2015), ¶ 1, <http://www.oas.org/en/iachr/reports/pdfs/Criminalization2016.pdf>.

affected by this practice,” highlighting the business and human rights nexus with this alarmingly increasing trend of criminalization.<sup>81</sup>

### **VII. Canada: Supreme Court Decision on International Anti-Corruption Efforts**

On April 29, 2016, the Supreme Court of Canada (SCC) released its decision in *World Bank Group v. Wallace*<sup>82</sup> upholding the immunities of the World Bank Group and its personnel. The SCC’s decision was strongly informed by its recognition of the critical role of a cooperative, global response from state and non-state actors in combatting corruption in development projects. By upholding the immunities of the World Bank Group, the SCC is lending support to information sharing between the investigative units of development banks and domestic enforcement agencies. In doing so, the SCC is also making it less likely that individuals and organizations charged under domestic anti-corruption legislation in Canada will have access to the details of any related investigation by an international organization. Whether this will have a chilling effect on voluntary cooperation by individuals and organizations with investigations conducted by international organizations remains to be seen.

The *World Bank* case arose in the context of a criminal case involving four former executives of SNC Lavalin charged with offences under the Corruption of Foreign Public Officials Act (CFPOA).<sup>83</sup> The World Bank’s independent anti-corruption and anti-fraud investigative unit, the Integrity Vice Presidency (INT), shared the information collected through its investigation of whistleblower complaints including copies of whistleblower e-mails, the investigation reports, and other related documents with the Royal Canadian Mounted Police (RCMP), the Canadian law enforcement authorities.<sup>84</sup> This information supported the RCMP’s request for wiretap authorizations and search warrants against the executives and resulted in charges being laid by the RCMP against the former executives under the CFPOA.

The alleged corruption was in connection with the bidding procurement process for the Padma road and railway bridge development project in Bangladesh, which was financed with a US\$1.2 billion loan extended by a consortium of development banks and agencies including the International Development Association (IDA) of the World Bank Group. SNC-Lavalin was one of the engineering companies that bid on the construction project.

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81. *Id.* at ¶ 2.

82. *World Bank Group v. Wallace*, [2016] 1 S.C.R. 207.

83. S.C. 1998, c.34.

84. Development banks increasingly share information received through their investigations with partner governments’ domestic enforcement agencies. Consequently, in addition to the sanctions that may be imposed by the development bank (and other participating banks further to cross-debarment agreements), the investigation may be used by state enforcement agencies to pursue criminal charges under domestic anti-corruption legislation.

In 2010, the INT received information through its whistleblower mechanism alleging that employees of SNC Lavalin had attempted to bribe Bangladesh officials to gain an unfair advantage in the procurement process for the Padma project.

The former executives charged under the CFPOA challenged the wiretap authorizations and sought a court order requiring that the World Bank produce the documents shared with the RCMP, and the validation of two subpoenas issued to two senior investigators at INT with which the investigators did not comply. The decision of the trial judge to order production of certain documents and validate the subpoenas was appealed by the World Bank Group, with leave, to the SCC.

The SCC set aside the production order of the trial court. On the documents being sought by the respondents, the SCC held that the documents were protected by a broad “archival immunity” which protects all documents and records held by the World Bank from production in any court proceedings. Furthermore, the archival immunity cannot be waived. The subpoenas were invalid on the basis of a “personnel immunity” protecting all employees of the World Bank Group from civil suits and criminal prosecution when acting in their official capacity. Personnel immunity can be waived, but the waiver must be express to ensure control over when World Bank personnel can be compelled to give testimony.

### **VIII. OECD: New Sector Understanding on Export Credit Financing of Coal-Fired Power Plants**

The new United States President, Donald Trump, promises to “cancel”<sup>85</sup> U.S. participation in the Paris Agreement regarding climate change concluded December 2015.<sup>86</sup> While consequences remain uncertain, it is worth understanding the “New Rules,”<sup>87</sup> adopted by members of the Organization for Economic Cooperation & Development (OECD) in November 2015, in the run-up to the Paris Agreement, focused on coal-fired power plant financing.<sup>88</sup> Published February 2016 as Annex VI to the OECD’s Arrangement on Officially Supported Export Credits and scheduled to come into force January 2017, the New Rules are intended to

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85. *Donald Trump would ‘cancel’ Paris climate deal*, BBC (May 27, 2016), <http://www.bbc.com/news/election-us-2016-36401174>.

86. Paris COP Decision & Paris Agreement, Dec. 12, 2015, UN Doc. FCCC/CP/2015/L.9/Rev.1, <https://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>.

87. *See generally*, Arrangement on Officially Supported Export Credits, Organisation for Economic Co-operation and Development, TAD/PG(2016)1, Annex VI – Sector Understanding on Export Credits for Coal-Fired Electricity Generation Projects (Feb 1, 2016), [http://www.oecd.org/officialdocuments/displaydocument/?doclanguage=en&cote=tad/pg\(2016\)1](http://www.oecd.org/officialdocuments/displaydocument/?doclanguage=en&cote=tad/pg(2016)1) [hereinafter OECD New Rules].

88. *See generally*, *OECD restricts ECAS on Coal IPPS*, ASHURST, (Mar. 1, 2016), [https://www.ashurst.com/doc.aspx?id\\_Content=12914](https://www.ashurst.com/doc.aspx?id_Content=12914).

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shift financing of coal power plants, a relatively dirty and high greenhouse gas emitting source of electricity,<sup>89</sup> into a lower emissions direction.

Some background is in order. National export credit agencies (ECAs), such as the Export-Import Bank of the United States, provide government guarantees to lower the investor risk associated with overseas projects of their companies, like power plant construction. ECA financing is big business: G20 nations financed seventy-six billion dollars of international coal projects between 2007 and 2015.<sup>90</sup> Although the United States, some parts of the EU, and some multilateral development banks had already adopted environmentally-conscious ECA restrictions, the OECD decision adds additional countries to this list,<sup>91</sup> such as Japan, which plans to finance ten billion dollars in future international coal projects.<sup>92</sup>

As background to the below summary of the New Rules,<sup>93</sup> coal power plants with the most efficient technology (ultra-supercritical) produce lower emissions per generated megawatt,<sup>94</sup> as compared to supercritical, and finally the least efficient technology, subcritical. IDA-eligible countries are developing countries eligible for International Development Association (IDA) resources.<sup>95</sup>

Under the New Rules, plants using ultra-supercritical technology, or having emissions less than 750 g CO<sub>2</sub>/kWh, of any size, remain eligible for export credit support subject to a maximum 12-year repayment term.

Plants using supercritical technology or having emissions between 750 and 850 g CO<sub>2</sub>/kWh are (1) ineligible if large (above 500MW), or (2) eligible if medium (between 300 – 500MW) or small (less than 300MW), for a 10-year repayment term, and only in (a) IDA-eligible countries, (b) non-IDA countries with a National Electrification Rate of 90% or below, or (c) non-IDA countries with special circumstances such as geographic isolation and where less carbon-intensive alternatives are not viable.

Plants using subcritical technology or having emissions greater than 850 g CO<sub>2</sub>/kWh are (1) ineligible if they are large or medium, or (2) eligible if they are small, for a 10-year repayment term, and only in countries falling under (1), (2) or (3) noted above.

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89. Thomas Bruckner, et al., *Climate Change 2014: Mitigation of Climate Change* (Edenhofer, O., et al. eds., 2014), 517, [http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc\\_wg3\\_ar5\\_chapter7.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/wg3/ipcc_wg3_ar5_chapter7.pdf).

90. Nat. Res. Def. Council, *Carbon Trap: How International Coal Finance Undermines the Paris Agreement*, Nov. 2016, at 4, <https://www.nrdc.org/sites/default/files/carbon-trap-international-coal-finance-report.pdf>.

91. *OECD members reach deal to limit export finance for coal technologies*, BIORES (Dec. 1, 2015), <http://www.ictsd.org/bridges-news/biores/news/oecd-members-reach-deal-to-limit-export-finance-for-coal-technologies>.

92. Nat. Res. Def. Council, *supra* note 90, at 4.

93. OECD New Rules, *supra* note 87, at 121.

94. *Supercritical & Ultra-supercritical Technology*, GREENFACTS.ORG, <http://www.greenfacts.org/glossary/pqrs/supercritical-ultra-supercritical-technology.htm>.

95. OECD New Rules, *supra* note 87, at 122.



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In crafting these rules, the OECD ostensibly struck a balance between poor countries' continuing need to generate electricity while not undermining wealthy countries' emission reduction commitments.<sup>96</sup> As might be expected, stakeholder response has been mixed. The World Coal Association believes coal is necessary to affordably meet poor countries' electricity needs and thus welcomes any continuation of ECA financing.<sup>97</sup> Some experts fear that despite environmentally conscious intentions, a lot of coal financing will slip through allowable exceptions.<sup>98</sup> And finally, environmental groups contend that any continuation of ECA funding for coal power plants needlessly undermines wealthy countries' climate emission commitments, and has negative local environmental and health impacts. While recognizing that the New Rules may represent the beginning of the end of using scarce public funds to support overseas coal expansion,<sup>99</sup> environmentalists ask why wealthy country ECA's cannot simply drop the financing for coal altogether, and instead support clean energies like wind and solar, whose efficiencies have dramatically improved over time.<sup>100</sup>

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96. BIoRES, *supra* note 91.

97. *Id.*

98. *Id.*

99. *Id.*

100. Nat. Res. Def. Council, *supra* note 90, at 14.

## **International Commercial Transactions, Franchising, and Distribution**

KATYA STEPANISHCHEVA, NICOLA BROADHURST, AND ANDREA  
GREGORY\*

This article reviews 2016 legal developments to the field of international commercial transactions, franchising, and distribution in Canada and the United Kingdom.

### **I. Franchising in Canada**

#### **A. ONTARIO COURT DECISION SAYS FRANCHISE GRANT CAN BE “PREMATURE”**

It is not uncommon in the Ontario franchise industry to conduct the site selection process after the issuance of a disclosure document and the execution of a franchise agreement. Where franchisors or their affiliates act as head leaseholders for the purpose of sub-leasing the premises to the franchisees, franchisors are reluctant to spend time and money for securing a site unless a franchisee commits to the franchise by signing a franchise agreement or paying a deposit. A recent decision of the Ontario Superior Court of Justice startled the franchising industry in the Province and the Ontario franchise bar, when it held in *Raibex Canada Ltd. v. ASWR Franchising Corp.*<sup>1</sup> that this well-established practice may result in grounds for rescission of the franchise agreement. The practical implications of this decision could be quite disruptive for franchisors whose common practice is to provide disclosure and enter into a franchise agreement for an undetermined location.

The plaintiff, Raibex Canada Ltd. (“Raibex”), an intended franchisee with ASWR Franchising Corp. (“ASWR”), entered into a franchise agreement to obtain an AllStar Wings and Ribs franchise in November 2012.<sup>2</sup> The Franchise Disclosure Document (“FDD”) provided to Raibex did not contain head lease details as the franchisor had not yet found a location for the new restaurant.<sup>3</sup> After ASWR issued Raibex a C\$120,000 invoice for the

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\* The authors for the corresponding contributions to this article are Katya Stepanishcheva, Jones & Co. (Canada) and Nicola Broadhurst, Stevens & Bolton LLP (United Kingdom). Andrea Gregory, Hogan Lovells US LLP (United States), served as committee editor.

1. See *Raibex Canada Ltd. v. ASWR Franchising Corp.*, 2016 O.N.S.C. 5575 (Can.) [hereinafter *Raibex*].

2. *Id.* ¶ 23.

3. See *id.* ¶ 25.

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prepaid rent and security deposit under the head lease in July 2014, Raibex rescinded the franchise agreement and took ASWR to court claiming damages in excess of C\$1 million.<sup>4</sup>

Ontario franchise law requires a franchisor to disclose to a prospective franchisee all material facts about the franchise at least fourteen days before the signing of a franchise agreement.<sup>5</sup> “Material facts” include information that would reasonably be expected to have a significant effect on the value or price of the franchise or the decision to acquire the franchise.<sup>6</sup> If the franchisor failed to provide timely and complete disclosure, the franchisee may rescind the franchise agreement within sixty days after receiving the FDD; if there was no disclosure at all, then the franchisee is entitled to rescind the agreement within two years after signing it.<sup>7</sup>

The judge in *Raibex* held that not only was the FDD delivered by ASWR incomplete due to the lack of head lease provisions and associated costs, but also that the omission of this information was so detrimental to the franchisee as to amount to no disclosure at all.<sup>8</sup> As a result, the judge ordered rescission of the franchise agreement, dismissing ASWR’s argument that disclosure was impossible because no lease existed at the time.<sup>9</sup> The court’s concern was that premature grants of franchises based on deficient disclosure documents can be a way for franchisors to simply avoid disclosing important information to their franchisees.<sup>10</sup> If the franchisor does not know all material facts, the franchise grant is “premature” and the franchisor must wait until all material facts are known.<sup>11</sup>

This proposition creates a lot of uncertainty about timing of disclosure obligations. Ontario franchise laws do not require disclosure to be made at a certain time. What if a franchisee is supposed to find and lease premises directly from a landlord, rather than sublease them from the franchisor—in this context, should the terms of the lease be known at the time of disclosure? Is there ever a time when the franchisor is certain that he or she knows all material facts? The Ontario court did not close the door on the possibility that proper disclosure could be made even if no location is found at the time of disclosure.<sup>12</sup> But there is no guidance regarding the circumstances in which such disclosure would be considered sufficient by the courts. Franchisors should keep the *Raibex* holding in mind when entering into franchise agreements in Ontario.

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4. *Id.* ¶¶ 29, 32, 34.

5. See Arthur Wishart Act (Franchise Disclosure), S.O. 2000, cl. 3, § 5(1) (Can.), available at <https://www.ontario.ca/laws/statute/00a03>.

6. *Id.* § 1(1).

7. *Id.* §§ 6(1), 6(2).

8. See *Raibex*, *supra* note 1, ¶114.

9. See *id.* ¶¶72, 73.

10. *Id.* ¶76.

11. *Id.* ¶¶76, 78.

12. *Id.* ¶ 77.

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*Raibex* is already being followed by Ontario courts.<sup>13</sup> In *2122994 Ontario Inc. v. Lettieri*,<sup>14</sup> the court rescinded a franchise agreement because the FDD did not contain audited financial statements for the most recent financial year, as required by the franchise disclosure regulations. Although the franchisor provided audited financial statements for the previous year, the court held that the franchisor should have waited until the audited financial statements for the most recent year became available. Citing *Raibex* with approval, the court in *Lettieri* pronounced that the franchisor must refrain from delivering an FDD prematurely,<sup>15</sup> until all material facts are determined and can be properly disclosed to the franchisee.

While *Raibex* is being appealed, it remains to be seen whether other Canadian provinces with similar franchise regulations will follow suit.

**B. ONTARIO CATCHES UP ON ELECTRONIC DISCLOSURE**

Since July 1, 2016, franchisors in Ontario are permitted to deliver FDDs electronically.<sup>16</sup> Before the amendment, electronic delivery of franchise disclosure was explicitly permitted only in Manitoba, New Brunswick, and Prince Edward Island.<sup>17</sup> New British Columbia franchise law and regulations, coming into force in February 2017, will also permit electronic delivery.<sup>18</sup> As such, Alberta remains the only province with franchise regulation that does not explicitly permit this practice, although electronic delivery is widely used there.

Ontario, as well as Manitoba, Prince Edward Island, and British Columbia require franchisors to obtain a written acknowledgment of receipt of the electronic FDD.<sup>19</sup> By virtue of provincial Electronic Commerce Acts,<sup>20</sup> such written acknowledgment can be signed and delivered electronically, for

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13. See *2122994 Ontario Inc. v. Lettieri*, 2016 O.N.S.C. 6209 (Can.).

14. *Id.*

15. *Id.* ¶ 21.

16. General, O. Reg. 581/00, as amended by O. Reg. 164/16 (Can.), available at <https://www.ontario.ca/laws/regulation/000581>.

17. See Franchises Regulation, Manitoba Regulation 29/2012, § 5(1)(b) (Can.), available at [http://web2.gov.mb.ca/laws/regs/current/\\_pdf-regs.php?reg=29/2012](http://web2.gov.mb.ca/laws/regs/current/_pdf-regs.php?reg=29/2012) [hereinafter Man. Reg.]; Franchises Act, New Brunswick Regulation 2010-92, § 3(1)(b) (Can.), available at <http://www.gnb.ca/0062/acts/BBR-2010/2010-92.pdf> [hereinafter NB Reg.]; Franchises Act Regulations, P.E.I. Regulation EC232/06, § 2(b) (Can.), available at <https://www.canlii.org/en/pe/laws/regu/pei-reg-ec232-06/latest/pei-reg-ec232-06.html> [hereinafter P.E.I. Reg.].

18. See Franchises Act, Bill 38 – 2015, § 5(2) (Can.), available at <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/40th-parliament/4th-session/bills/third-reading/gov38-3>; Franchises Regulation, B.C. Reg. 238/2016 [hereinafter B.C. Reg.], § 8(1)(b) (Can.), available at [http://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/small-business/.franchises\\_regulation.pdf](http://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/business-management/small-business/.franchises_regulation.pdf).

19. See General, O. Reg. 581/00, *supra* note 16, § 12(1)(d); Man. Reg., *supra* note 17, § 5(1)(b)(ii); P.E.I. Reg., *supra* note 17, § 2(b)(iii); B.C. Reg., *supra* note 18, § 8(1)(b)(iii).

20. See Electronic Commerce Act, S.O. 2000, c. 17 (Can.); Electronic Commerce and Information Act, C.C.S.M. c. E55 (Can.); Electronic Commerce Act, R.S.P.E.I. 1988, c. E-4.1 (Can.); Electronic Transactions Act, S.B.C. 2001, c. 10 (Can.).

example, by using electronic signatures and document management software.

## **II. Commercial Transactions in the United Kingdom**

### **A. Modern Slavery Act**

Although the Modern Slavery Act (the “Act”)<sup>21</sup> came into force in 2015 and the reporting requirement for applicable organizations to prepare an annual slavery and human trafficking statement contained in Section 54(9) came into force on October 29, 2015,<sup>22</sup> the effect of the reporting requirement is only now being seen. This is due to the lead-in time provided under the Act, which waived the 2016 reporting requirement for organizations whose financial year ended on or before March 30, 2016;<sup>23</sup> although eligible organizations whose financial year ended after March, 31 2016, must still publish the statement for 2016.

The Modern Slavery Act 2015 consolidated previous offences of slavery and trafficking and addresses the role of businesses in preventing modern slavery in their supply chains and organizations. Under the Act, all commercial organizations with a global turnover of £36 million or more that carry on any business in the UK must publish a “slavery and human trafficking statement” for each financial year.<sup>24</sup> The statement must set out the actions they have taken to ensure their supply chains and all aspects of their business are free from slavery and human trafficking, increasing transparency for the public, consumers, employees, and investors.<sup>25</sup>

The statement must be approved by the board of directors and signed by a director.<sup>26</sup> It must then be published each financial year on the organization’s website, and include a link to the slavery and human trafficking statement in a prominent place on that website’s homepage so it is easily accessible.<sup>27</sup> For organizations without a website, the statement must be made available to anyone who asks within thirty days.<sup>28</sup>

If foreign subsidiaries are part of the parent company’s supply chain or own business, the parent’s statement should cover any action taken in relation to that subsidiary.<sup>29</sup> A non-UK subsidiary may also produce its own

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21. Modern Slavery Act 2015, *available at* <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (UK) [hereinafter Modern Slavery Act].

22. *See* Modern Slavery Act 2015 (Commencement No.3 and Transitional Provision) Regulations 2015, S.I. 2015/1816 (c. 113) (UK), *available at* [http://www.legislation.gov.uk/uksi/2015/1816/pdfs/uksi\\_20151816\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/1816/pdfs/uksi_20151816_en.pdf).

23. *Id.*

24. Modern Slavery Act, *supra* note 21, §54(1).

25. *See id.* §§ 54(4), 54(7).

26. *Id.* § 54(6).

27. *Id.* § 54(7).

28. *Id.* § 54(8).

29. *Id.* § 54(5).

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statement, which is highly recommended in cases where the non-UK subsidiary is in a high risk industry or location.

Government guidance issued on October 29, 2015<sup>30</sup> recommends that the statement includes the following:

- details of the organizational structure and supply chains, including countries used to source goods especially high risk countries where modern forms of slavery are prevalent;
- minimum labor standards;
- process for contracting with suppliers;
- due diligence processes in respect of the supply chains;
- policies to support whistle-blowing; and
- adoption of risk assessment policies and procedures and training available to employees.<sup>31</sup>

The Act has not introduced any formal penalties for non-compliance. But failure to comply or the production of a statement reporting that an organization has taken no steps, may damage the reputation of the business, and consumers and investors may apply pressure where they believe a business has not taken sufficient steps.

The Secretary of State (in the UK, called the “Home Secretary”) can separately impose penalties through an injunction requiring the organization to comply,<sup>32</sup> although it is unlikely to do so without prior warnings.

## B. INTERPRETATION OF CONTRACTUAL DRAFTING

In a recent case,<sup>33</sup> the Court of Appeal considered whether a ship owner could terminate a charterparty for a failure to pay. Although the facts of the case involved charterparties, the decision in this case has a wide impact as the Court reviewed more generally the principles of conditions and warranties, time is of the essence clauses, anticipatory repudiatory breach, and the drafting of termination clauses.<sup>34</sup>

### 1. *Contractual Interpretation*

The Court of Appeal in this case reviewed the principles of contractual construction in determining whether a clause requiring punctual payment of hire by charterers was a condition of the contract.<sup>35</sup> As a matter of common law and for the purposes of termination rights, a contract term can be

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30. HOME OFFICE, *Transparency in Supply Chains etc. A Practical Guide* (Oct. 29, 2015) (UK), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/471996/Transparency\\_in\\_Supply\\_Chains\\_etc\\_\\_A\\_practical\\_guide\\_final\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide_final_.pdf).

31. *Id.*

32. Modern Slavery Act, *supra* note 21, §54(11).

33. Grand China Logistics Holding (Group) Co. Ltd. v. Spar Shipping AS, [2016] EWCA (Civ) 982 (Gr. Brit.).

34. *See id.*

35. *See id.* ¶¶ 41-56.

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classified as a condition, a warranty, or an innominate term.<sup>36</sup> Any breach of a condition justifies termination, but no breach of a warranty (however serious) can justify termination; while breach of an innominate term will justify termination only if it deprives the aggrieved party of substantially all the benefit of the contract.<sup>37</sup> Based on general U.K. common law principles, the wording “time is of the essence” will make a deadline for performance a condition; breach of which would justify termination.<sup>38</sup> This approach was followed by the Court of Appeal (upholding the High Court decision). In reaching these conclusions, the Court of Appeal referred to and followed certain authorities to the effect that, in the absence of a clear indication to the contrary, courts lean against the interpretation of a contractual term as a condition.<sup>39</sup> It also held that there is no general presumption in a mercantile contract that a stipulated time for payment is a contractual condition without further wording expressly stating this (e.g., time is of the essence).<sup>40</sup>

The conclusion from the judgment of the Court of Appeal is that as the classification of contractual terms as conditions, warranties, or innominate terms depends on contractual interpretation, in the absence of express wording, drafters should clearly state the intention behind a contractual term. Because conditions and warranties can have extreme effects if breached, the tendency is to find contractual terms to be innominate terms unless otherwise stated. Therefore, if a contracting party wishes to ensure that it can rely on a breach of a term to terminate the contract, it should be expressed as a condition of the contract.

*2. Renunciation (Anticipatory Repudiatory Breach)*

It is clear from the Court of Appeal’s judgment that the classification of the contractual term is also important in relation to the calculation of damages that may be available to the aggrieved party.

When a contracting party refuses to perform a contract the aggrieved party may accept the renunciation and end the contract even before the time for performance.<sup>41</sup> This would also be the case if there is a threatened breach of a condition or other threatened repudiatory breach.<sup>42</sup>

The innocent party can claim damages for loss caused by breach of contract.<sup>43</sup> If, however, a contract is terminated for breach of a condition or a repudiatory breach, then these damages can include compensation for loss for the remainder of the contract term.<sup>44</sup> This would not necessarily be the case if the innocent party terminated the contract on some other ground

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36. *See id.* ¶ 52.

37. *See id.* ¶ 20.

38. *See id.* ¶ 104.

39. *See id.* ¶¶ 35, 65.

40. *See id.* ¶ 65.

41. *Id.* ¶ 21.

42. *Id.*

43. *See id.* ¶ 17.

44. *See id.* ¶¶ 16, 17, 26.

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(e.g., a contractual right to terminate under a termination clause for a breach of a term that is not a condition or where it is not a repudiatory breach).

C. Brexit

It remains to be seen how Brexit will affect international commercial, franchising, and distribution arrangements, but it is expected that there will be an increasing attempt to impose trigger mechanisms in contracts to force contractual review or even exit rights in the event that tariffs or other less favorable trading conditions are imposed on the UK as a result of Brexit.



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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

## **International Intellectual Property Law**

PAMELA BENZÁN ARBAJE, VIRGINIA BROWN KEYDER, SUSAN BRUSHABER, RALPH CATHCART, DANIEL COOPER, AMANDA COVINGTON, MANISH DHINGRA, ROBIN S. FAHLBERG, FABIO GUZMÁN SALADIN, DANIEL B. KOBURGER, MRITYUNJAY KUMAR, HOLLY B. LANCE, DAVID TAYLOR, SAMEEP VIJAYVERGIYA, AND MICHELLE WYNNE\*

This article summarizes patent, trade secret, trademark, domain name, and copyright law developments in 2016, across multiple jurisdictions worldwide.<sup>1</sup>

### **I. Patents<sup>2</sup>**

#### **A. UNITED STATES**

Many federal court decisions in the past year have attempted to define the boundaries of the Supreme Court's broad language in precedent cases on the issue of patent eligible subject matter, specifically in the area of life sciences with respect to their interpretations of the holdings in *Mayo v. Prometheus*, *Ass'n for Molecular Pathology v. Myriad Genetics Inc.*, and in the area of computer science as a result of interpretations of *Alice Corp. v. CLS Bank Int'l*.<sup>3</sup>

Guidance in life science technology came this year regarding the application of the precedents set by *Mayo* and *Myriad*, in which the Supreme Court ruled that a law of nature is not eligible for a patent.<sup>4</sup> In *Rapid Litigation v. Cellzdirect*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) found the processes for cryogenically freezing liver

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\* Susan Brushaber, Reinhardt LLP, Denver, Colorado served as the editor for this 2016 review. Amanda Covington, Denver, Colorado, was assistant editor. Section editors are identified in each section.

1. For developments during 2015, see Susan J. Brushaber et al., *International Intellectual Property Law*, 50 Int'l Law. 193-209 (2015).

2. Patents Section Editor: Robin Fahlberg, State Farm Insurance Company, Bloomington, Illinois. Authors: Amanda Covington, Denver, Colorado (on the United States); Fabio Guzmán Saladin and Pamela Benzán Arbaje, Guzmán Ariza, Santo Domingo, the Dominican Republic (on the Dominican Republic).

3. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics Inc.*, 133 S. Ct. 2107 (2013); *Mayo Collaborative Services v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012).

4. Sean Sheridan, *How Mayo, Myriad and Alice May Impact Patent Valuations*, LAW 360 (Mar. 4, 2015, 8:48 AM), <http://www.law360.com/articles/626370/how-mayo-myriad-and-alice-may-impact-patent-valuations>.

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cells to be patent eligible because they were directed toward an improved process of saving a type of liver cell called “Hepatocytes.”<sup>5</sup> The inventors had found that the process of preserving cells could be improved upon by separating the viable cells from the non-viable ones and refreezing the viable cells.<sup>6</sup> The twice-frozen cells behaved like once-frozen cells.<sup>7</sup> The claims were patent eligible because they did more than identify or observe a concept; the claims were directed to a new cell preservation method.<sup>8</sup> This case signals that the Federal Circuit may apply the Supreme Court’s decisions with a narrower viewpoint in the life science realm.

Under *Alice*, patents may be subject matter ineligible due to the broad language stating that inventions using a computer to implement an abstract idea are not patent worthy.<sup>9</sup> This past year, the Federal Circuit applied *Alice* in two different cases involving computer technology and held that in each case the subject matter was patent eligible. The Federal Circuit held in *Enfish v. Microsoft Corp.* that the claims were patent eligible because they improved upon the way a computer operates by using a self-referential table to store data, which is superior to conventional databases.<sup>10</sup> Similarly, in *Bascom Global v. AT&T Mobility* the Federal Circuit held that an improvement on computer function by the process of filtering internet content was not an abstract idea.<sup>11</sup> These rulings give some hope and guidance to software inventors. Until further direction is given by the Court, together *Enfish* and *Bascom* provide signposts to help inventors, patent practitioners, and litigants determine what is a patent subject matter eligible claim in a software patent.

## B. THE DOMINICAN REPUBLIC

In September 2016 the National Office of Industrial Property (ONAPI) for the first time granted a national utility model patent to the Instituto Tecnológico de Santo Domingo, a Dominican university (INTEC). The registration involved the invention of an automatic heating catalyst in internal combustion engines. Two twenty-one-year-old engineering students developed the invention with the guidance of their professors and the help of the Technology and Innovation Support Center (TISC) of ONAPI based in INTEC. The invention is considered to be green and innovative because it seeks to inhibit the emission of vehicle gases, thus diminishing the pollution caused by such emissions.<sup>12</sup> After this favorable

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5. *Rapid Litig. Mgmt. v. Cellzdirect, Inc.*, 827 F.3d 1042 (Fed. Cir. 2016).

6. *Id.* at 1047-48.

7. *Id.* at 1045.

8. *Id.* at 1048.

9. *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347, 2352 (2014).

10. *Enfish, LLC v. Microsoft Corp.*, 822 F. 3d 1327, 1337-38 (2016).

11. *Bascom Glob. Internet Services, Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1353-54 (Fed. Cir. 2016).

12. INTEC recibe primera Patente Nacional otorgada por ONAPI a una Universidad dominicana, ONAPI, <http://www.onapi.gov.do/noticiascomunicaciones/191-septiembre-2016/924-intec->

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private-public experience, ONAPI has entered into diverse collaboration agreements with other universities all over the Dominican territory for the opening of new TISCs.<sup>13</sup>

On May 27, 2016, the Supreme Court of Justice revoked and declared unconstitutional Article 157 of Law 20-00 on Industrial Property, which states that the resolutions issued by the General Director of ONAPI could be appealed to the Court of Appeals. In the decision, the Supreme Court indicated that resolutions issued by ONAPI are administrative acts; and therefore, according to the Dominican Constitution, the jurisdiction belongs to the Administrative Courts which are charged with ensuring the legality of the administrative proceedings.<sup>14</sup> This decision invalidated the decision rendered by the Administrative Court on 2013 declaring it had no jurisdiction to rule on claims regarding resolutions issued by ONAPI.<sup>15</sup>

According to ONAPI statistics, from January 1, 2016 to October 13, 2016, 267 applications were filed for patents, of which 44 were national and 223 were international. Of the 267 applications, 213 of the applications were filed for patents, 14 for utility models and 40 for industrial designs. From 2010 to 2015 the number of patent applications declined significantly, with 406 applications in 2010 and only 309 in 2015.<sup>16</sup>

## II. Trade Secrets<sup>17</sup>

### A. UNITED STATES

On May 11, 2016, after unanimous passage in the Senate, and passage by a 410-2 vote in the House,<sup>18</sup> President Obama signed into law the Defend Trade Secrets Act (DTSA).<sup>19</sup> The DTSA, which was effective immediately,<sup>20</sup> amends the 1996 Industrial Espionage Act<sup>21</sup> by creating a federal civil cause

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recibe-primera-patente-nacional-otorgada-por-onapi-a-una-universidad-dominicana.html (last visited Nov. 7, 2016).

13. *ONAPI instalará Centro de Apoyo en Universidad de La Vega*, ONAPI, <http://www.onapi.gov.do/noticiascomunicaciones/145-marzo-2014/760-onapi-instalara-centro-de-apoyo-en-universidad-de-la-vega.html> (last visited Nov. 7, 2016).

14. *Shell Int'l Brands AG v. ONAPI*, S. Ct. of Justice, Third chamber, decision No. 237 (May 27, 2015).

15. *Barthel Intertrade Inc. v. ONAPI*, Super. Admin. Ct., decision No. 489-2013 (Dec. 27, 2013).

16. *Gráficas Estadísticas de Publicaciones*, ONAPI, <http://www.onapi.gov.do/graficas-estadisticas-publicaciones.html> (last visited Nov. 9, 2016).

17. Trade Secrets Section Editor: Susan J. Brushaber, Reinhardt LLP, Denver, CO. Authors: Amanda Covington, Denver, Colorado (on the United States); Virginia Brown, Keyder, New York (on Europe).

18. *S.1890 - Defend Trade Secrets Act of 2016*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1890/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D>.

19. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (2016).

20. Defend Trade Secrets Act amending US Code 18, s. 1836.

21. 18 U.S.C. §§ 1831-1839

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of action joining state law as embodied in the Uniform Trade Secrets Act (UTSA) adopted by forty-eight states to allow for a federal cause of action for the misappropriation of a trade secret. The DTSA allows for new remedies to be sought under federal law instead of only through state law claims.

While there are some similarities with state trade secret laws, the DTSA does create some new remedies and caveats. One similarity is that the DTSA's definition of a trade secrets is the same as that of the Uniform Trade Secrets Act.<sup>22</sup> Also, like the Uniform Trade Secrets Act, the DTSA provides for a three-year statute of limitations. Its damage remedies also mirror those of the Uniform Trade Secrets Act.<sup>23</sup>

Other provisions in the DTSA do not have a parallel in the Uniform Trade Secrets Act. In the case of misappropriation, the DTSA provides a new seizure procedure in cases where the party being ordered would have to “destroy, move, hide, or otherwise make such matter inaccessible to the court” in order for the court to prevent dissemination of the trade secret.<sup>24</sup> It also creates protection for whistleblowers from any retaliatory accusations of a trade secret misappropriation. But this protection only exists so long as the whistleblower discloses the information pertinent to the trade secret to court or government officials in confidence.<sup>25</sup>

The DTSA gives plaintiffs some new options and even though some of the provisions of the DTSA resemble those in the Uniform Trade Secrets Act, the DTSA does not preempt existing state law.<sup>26</sup> Thus, with the passage of the DTSA, plaintiffs can choose to file in state court or federal court. The benefit of filing in federal court, in addition to some new remedies, is that if the courts in a state are back-logged, the ability to file in federal court will generally expedite adjudication. While in-house preventative measures are the best course of action to secure trade secrets from being misappropriated, now there is an alternative avenue to pursue a claim of misappropriation.

## B. EUROPE

In 2016, intellectual property (IP)—based on disclosure and secrecy—joined forces in new legislation enacted in both the United States and the European Union. Trade secrets, in the public mind centered around the formula for Coca Cola, dovetailed in an effort to provide a less costly and potentially longer-term form of protection of inventions than provided by

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22. John Carson & Cameron Cushman, *DTSA Versus UTSA: A Comparison of Major Provisions*, LAW 360 (June 8, 2016), <https://www.law360.com/articles/803049/dtsa-versus-utsa-a-comparison-of-major-provisions>.

23. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376, 380 (2016).

24. Defend Trade Secrets Act of 2016, § 2, 130 Stat. at 377 (2016).

25. Defend Trade Secrets Act of 2016, § 7, 130 Stat. at 385 (2016).

26. Defend Trade Secrets Act of 2016, § 2, 130 Stat. at 382 (2016).

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patents, a common standard for employee non-compete clauses, and default protection of data, whether valuable or damaging.

The EU Directive<sup>27</sup> (the Directive) sets out harmonizing legislative goals, which EU Member States have until June 9, 2018 to implement. For readers unfamiliar with the structure of EU law, this basically means that the core provisions of the Directive will be inserted into national law where they will become subject to general principles of EU law, including fundamental rights, proportionality, protection against abuse of process, free movement of goods, services, capital and people, and legal certainty. Provisions of national law enacted pursuant to the Directive are also subject to the interpretation of the European Court of Justice.

At present, laws of the EU member states vary widely on the subject of trade secrets, with only Sweden having a specific Act on the Protection of Trade Secrets.<sup>28</sup> Other Member States situate and define trade secrets in a variety of categories from common law confidentiality in the UK, to unfair competition and provisions of Civil and Commercial Codes in other Member States.<sup>29</sup>

The Directive institutes a common definition of “trade secret.”<sup>30</sup> Exceptions to its application include: freedom of expression and information; freedom and pluralism of the media; the public interest in disclosure for administrative or judicial authorities; disclosure of information submitted by businesses where necessary; and collective agreements.<sup>31</sup> Article 1, § 3 of the Directive provides that mobility of workers shall not be hindered.

Article 3 identifies methods of legal acquisition of trade secrets that include independent discovery, reverse engineering by someone in legal possession of the object, information acquired through workers’ rights and honest commercial practice. Unlawful means of acquisition of trade secrets includes “unauthorized access to . . . any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret

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27. Council Directive 2016/9433, art. 1–18, 2016 O.J. (L 157) 1, 1.

28. Om Skydd För Företagshemligheter, Lag (1990:409), (Swe.) *translated in*, *Act on the Protection of Trade Secrets (1990:409)*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/wipolex/en/details.jsp?id=3610>.

29. See *Study on Trade Secrets and Confidential Business Information in the Internal Market*, EUROPEAN COMMISSION (Apr. 2013), [http://ec.europa.eu/internal\\_market/iprenforcement/docs/trade-secrets/130711\\_final-study\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf).

30. Council Directive 2016/9433, *supra* note 27, at 9.

For the purposes of this Directive, the following definitions apply: (1) ‘trade secret’ means information which meets all of the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

31. *Id.* Art. 1 § 2.

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holder, containing the trade secret or from which the trade secret can be deduced,”<sup>32</sup> and other conduct contrary to honest commercial practices.

Use of a trade secret is deemed unlawful if carried out by anyone who acquired it unlawfully, is in breach of a confidentiality agreement (or other duty not to disclose), or is in breach of a contractual duty to limit its use.<sup>33</sup> An action for disclosure will be dismissed where the disclosure involves the exercise of freedom of expression, as mentioned above, revealing of misconduct or illegal activity, disclosure by workers to their representatives, or protecting a legitimate interest recognized by EU or national law.<sup>34</sup>

Extensive measures for protection of trade secrets during legal proceedings and for protection of personal data are contained in Article 9. Provisional and precautionary measures include cessation or prohibition of the use of the trade secret, prohibition of the production, marketing, importation, export, or storage of infringing goods, and seizure of suspected infringing goods, including imported goods.<sup>35</sup> Finally, Article 11 lists factors to be considered by the judicial authority and the nature of specific circumstances to be evaluated are also set out in detail.<sup>36</sup>

Article 12 remedies—injunctions and corrective measures—include the “destruction of all or part of any document, object, material, substance or electronic file containing or embodying the trade secret or, where appropriate, the delivery up to the applicant of all or part of those documents, objects, materials, substances or electronic files.”<sup>37</sup>

Pecuniary compensation may also be awarded in place of injunctions and corrective measures and damages may be awarded when the infringer “knew or ought to have known that he, she or it was engaging in unlawful acquisition, use or disclosure of a trade secret.”<sup>38</sup> Member States may “limit the liability for damages of employees towards their employers for the unlawful acquisition, use or disclosure of a trade secret of the employer where they act without intent.”<sup>39</sup>

Although the Directive provides no criminal sanctions and expressly refrains from creating a new form of intellectual property, which leaves it outside the scope of application of the EU Enforcement Directive,<sup>40</sup> like its IP counterpart in the United States it risks undermining the basic justifications for intellectual property: that disclosure in return for monopoly fosters prosperity; and that individuals should be the beneficiaries of their own creative and inventive ideas. It makes the goose that laid the golden egg very uncomfortable.

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32. *Id.* Art. 4 § 2.

33. *Id.* Art. 4 § 3.

34. *Id.* Art. 5.

35. *Id.* Art. 10.

36. *Id.* Art. 11.

37. *Id.* Art. 12.

38. *Id.* Art. 14.

39. *Id.*

40. Council Directive 2004/48, art. 2, 2004 O.J. (L 157) 16, 19.

### III. Trademarks<sup>41</sup>

#### A. UNITED STATES

The Federal Circuit issued a landmark decision, *In re Tam*,<sup>42</sup> holding that the federal prohibition on registration of “disparaging” trademarks is unconstitutional and in conflict with the First Amendment. In the case, applicant Mr. Simon Shiao Tam was denied registration of the mark THE SLANTS in connection with musical entertainment services. The court reasoned that the mark was disparaging to people of Asian descent. The Federal Circuit acknowledged that the district court correctly applied the disparagement test. In so holding the Federal Circuit overturned a thirty-five-year old case *In re McGinley*,<sup>43</sup> which had held that section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), does not implicate the First Amendment. After the Federal Circuit’s decision issued, the U.S. Department of Justice submitted a letter brief to the Federal Circuit stating its disagreement with the holding. The Department of Justice suggested that the ruling in *In re Tam* would lead to undesirable consequences because under the decision trademark registration would extend to scandalous and immoral marks covered under section 2(a) of the Lanham Act.<sup>44</sup> The USPTO’s reaction has been to suspend action on the SLANTS application as well as all applications that it has determined are disparaging, immoral or scandalous, on the ground that it is awaiting further court instruction. On April 20, 2016, the USPTO filed a petition for a writ of certiorari seeking Supreme Court review, which was granted in September 2016.

In *Belmora LLC v. Bayer Consumer Care AG*,<sup>45</sup> the Fourth Circuit overturned the United States District Court for the Eastern District of Virginia and held that the Lanham Act permits an owner of a foreign mark, even one who does not use its mark in the United States, to assert priority rights over a mark that is registered and used by another party domestically. Bayer Consumer Care AG (Bayer) sells naproxen sodium tablets in Mexico under the brand name FLANAX. In 2004, Belmora LLC (Belmora) began selling naproxen sodium tablets in the United States under the brand name FLANAX, and obtained a federal registration for FLANAX in 2005. Bayer petitioned to cancel the FLANAX registration in 2007, and seven years later, the Trademark Trial and Appeal Board (TTAB) cancelled the registration,

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41. Trademarks Section Editor: Susan J. Brushaber, Reinhardt LLP, Denver, CO. Authors: Holly B. Lance, Smith, Gambrell & Russell, Washington D.C. (on the United States); Daniel Cooper, Cooper & Kurz, Stamford CT (on Europe); Fabio Guzmán Saladin and Pamela Benzán Arbaje, Guzmán Ariza, Santo Domingo, the Dominican Republic (on the Dominican Republic). Manish Dhingra, Mrityunjay Kumar, Sameep Vijayvergiya, Dhingra & Singh, Attorneys at Law, Delhi, India (on India); and David Taylor, Hogan Lovells, Paris (on Domain Names).

42. *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015).

43. *In re McGinley* 660, F.2d 481, 484 (C.C.P.A. 1981).

44. See Letter from U.S. Dept. of Justice, to Daniel E. O’Toole, Clerk, U.S. Court of Appeals for the Federal Circuit (Jan. 21, 2016), <http://src.bna.com/cd6>.

45. *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697 (4th Cir. 2016).



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holding that Belmora was using the FLANAX mark to misrepresent the source of the goods. Belmora appealed the TTAB's decision to the district court, and Bayer sued Belmora for false designation of origin and false advertising. The district court, applying the Supreme Court decision *Lexmark Int'l, Inc. v. Static Control Components, Inc.*,<sup>46</sup> dismissed Bayer's claims. The Fourth Circuit held that the district court erred in its analysis, and that the Lanham Act does not require ownership and use of a mark in the U.S. as a threshold requirement. It further held that Bayer's claims fell within the statute's protected zone of interests and should be permitted to proceed. In October 2016, Belmora filed a petition for a writ of certiorari from the Supreme Court.

**B. EUROPE**

In mid-December 2015, the European Union issued a new directive and a new regulation, respectively, on the law of trademarks. The Directive came into effect in January 2016, and the Regulation came into force in March.<sup>47</sup> Implementation of the directive by EU Member States is required by January 2019. Several of the changes from previous EU trademark law are procedural and, indeed, one is cosmetic. Under the new Regulation, the European trademark office—which used to be known as the Office for Harmonization in the Internal Market (OHIM)—is now more appropriately called the “European Union Intellectual Property Office,” or EUIPO.<sup>48</sup> Similarly, when a trademark holder registers a trademark with this new office, the mark will be known as a “European Union trade mark” rather than a “Community trade mark” as it was formerly known.<sup>49</sup>

On the more consequential side, under the new goods and services classification structure, only goods and services falling within the literal meaning of an individual item will be considered covered by the specification.<sup>50</sup> This amendment implements procedural changes made necessary by the Court of Justice's decision in the 2012 “IP Translator” case.<sup>51</sup> Further, for International Registrations designating the European Union, the EU has amended the scope of the opposition period from six to nine months after publication to one to four months after publication. The three-month opposition period does not change. Also, trademark renewals must be applied for by the expiration date of the registration, not by the end of the month of the expiration date, as was the former practice.

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46. *Id.* at 715.

47. Council Directive 2015/2424, art. 4, 2015 O.J. (L 341) 21, 88.

48. *Id.* at 27.

49. *Id.*

50. *Id.* at 35.

51. See, e.g., case C-307/10, *Chartered Inst. of Patent Attorneys v. Registrar of Trade Marks*, 2012 E.C.R., ¶ 56 (holding that the 2008 EU Trademark Directive did not preclude the use of class headings in a specification of goods and services so long as the specification identified with sufficient clarity and precision the goods and/or services for which protection is sought).

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On the substantive end, perhaps the most sweeping change is one that for many trademark practitioners in the United States is a welcome one as it puts European substantive trademark law on par with the United States. Previously, under EU law the right to register a mark was limited to graphic marks only. There was no way to register a sound mark or a scent mark, for example. As of March 23, 2016, Article 3 of the new Directive removes this obstacle for mark holders. Under the new Directive and Regulation there is no longer a requirement that a trademark must be represented graphically in order to be afforded protection.<sup>52</sup> As a result, the owners of both sound marks and scent marks can now apply to the EUIPO and national intellectual property offices for registration of these marks.

As for case law, perhaps the most significant intellectual property decision of the past year was the September 2015 decision by the Court of Justice of the European Union in *Societe des Produits Nestle SA*. In that case, the CJEU held, inter alia, that the bar to registration under the EU Trademarks Directive for signs that consist of a shape that is “necessary to obtain a technical result” (what U.S. practitioners might call utilitarian functionality) must be interpreted by reference to the *function* of the shape sought to be trademarked. The determination of whether the sign can be registered should not be made by reference to the method of manufacture of the goods whose shape is sought to be trademarked.<sup>53</sup> The Court further held that a sign that is held to be functional under the Article 3(e) bar to registration can never achieve acquired distinctiveness. The case was remanded to the High Court of England and Wales, where Justice Arnold held that the shape of the Kit Kat bar could not be registered. As a result, Nestle lost the latest round in a long-running battle between itself and Cadbury in the protection of the shape of the Kit Kat bar.

C. THE DOMINICAN REPUBLIC

In a decision that contradicts the principles of Law 20-00 on Industrial Property, the Court of First Instance of Santiago has held that a request to enjoin the use of a registered trademark on the grounds of confusing similarity must be based on a registered trademark.<sup>54</sup> According to this decision, tribunals cannot enjoin the use of a registered trademark on the grounds that it is substantially similar to an unregistered trademark, even if the unregistered trademark was in use prior to the registration date of the registered trademark. This decision contradicts the principles Article 113 of Law 20-00 on Industrial Property which establishes that the exclusive right to a trademark is acquired with its first use in commerce and not by registration.

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52. *Cf.*, Council Directive 2015/2436, art. 3, 2015 O.J. (L 336) 1, 7; Council Directive 2008/95, art. 2, 2008 O.J. (L 299) 25, 26.

53. Case C-215/14, *Societe des Produits Nestle S.A. v. Cadbury UK Ltd.*, 2015 E.C.R. ¶ 57.

54. Court of First Instance of Santiago, Ordinance no. 514-15-00466, Sept. 15, 2015.

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The Court of First Instance of Santiago has also established that the use of a third party trademark constitutes unfair competition under Law 20-00 on Industrial Property. The decision indicates that the mere use of a trademark without the consent and authorization of the owner is unfair competition.<sup>55</sup>

The Constitutional Court found that the fact that a company promotes its products as the best in the market alone is not unfair competition under the dispositions of Law 20-00 on Industrial Property. The decision establishes that unfair competition arises only when a company attacks competing products in the market with negative information.<sup>56</sup>

The Supreme Court declared valid and legal the refusal to register a foreign trademark in the Dominican Republic, even though the mark was already registered in other countries, because the design was common and not distinctive in the Dominican Republic. This decision was based on Article 6 of the Paris Convention for the Protection of Industrial Property.<sup>57</sup>

On December 2015, the Supreme Court of Justice declared that the prosecution for violations of law 20-00 on Industrial Property have to follow the same procedure established in the Dominican Criminal Procedural Code in all its aspects, including the claim for compensation due to a violation of a registered trademark owner's rights.<sup>58</sup>

The statistics of the National Office of Industrial Property (ONAPI) show that during the last four years, from 2012 to 2016, there has been an increase in the registration applications for trademarks, especially for trade names, and a slight decrease in the registration applications for slogans.<sup>59</sup> The statistics also show that for the period of January 1, 2016 through September 30, 2016, 34,347 applications were filed for the registry of trade names and trademarks. Of these applications, 26,237 were for trade names, 7,734 for trademarks, 374 for slogans, and 2 for denominations of origin. Moreover, the statistics demonstrate that 3,516 applications were filed for trademark renewal and 1,046 for trade name renewals.

#### D. INDIA

In an important ruling, the Supreme Court of India provided clarification as to the place where a suit can be instituted by the plaintiff under the Copyright Act, 1957 and the Trade Marks Act, 1999.<sup>60</sup> The Court agreed that the very language of section 62<sup>61</sup> of the Copyright Act and section 134<sup>62</sup> of the Trade Marks Act provides an alternative forum, in addition to section 20 of Civil Procedure Code (the CPC) by including a district court within

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55. Court of First Instance of Santiago, Decision 365-15-00769, June 02, 2015, *Loto Real del Cibao S.A. v. Banca Redy Miguel y/o Miguel C. Jáquez Espinal*.

56. Constitutional Court, decision TC/0600/15, Dec. 17, 2015, *Unilever Caribe, S.A.*

57. Supreme Court of Justice, decision No. 42, Feb. 12, 2014.

58. Supreme Court of Justice, decision No. 523, Dec. 21, 2015.

59. *Gráficas Estadísticas de Publicaciones*, *supra* note 16 (last visited Nov. 9, 2016).

60. *See Indian Performing Rights Society Ltd. v. Sanjay Dalia & Anr.*, (2015) 63 SCR 49 (India).

61. *See id.* at 10.

62. *See id.* at 7–10.

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whose limits the plaintiff actually and voluntarily resides or carries on business or personally works for gain:

On a due and anxious consideration of the provisions contained in section 20 of the CPC, section 62 of the Copyright Act and section 134 of the Trade Marks Act, and the object with which the latter provisions have been enacted, it is clear that if a cause of action has arisen wholly or in part, where the plaintiff is residing or having its principal office/ carries on business or personally works for gain, the suit can be filed at such place/s. But, this right to institute suit at such a place has to be read subject to certain restrictions, such as in case plaintiff is residing or carrying on business at a particular place/having its head office and at such place cause of action has also arisen wholly or in part, plaintiff cannot ignore such a place under the guise that he is carrying on business at other far flung places also.

**E. DOMAIN NAMES**

The Internet experienced a historic and transitional year in 2016. After years of work and consultation, the Internet Corporation for Assigned Names and Numbers (ICANN) finally completed the transition of the functions of the Internet Assigned Names Authority (IANA) from the United States Department of Commerce's National Telecommunications and Information Administration (NTIA) to the global multi-stakeholder community. On March 10, 2016, the last day of the ICANN 55 Meeting in Marrakech, Morocco, the ICANN Board transmitted the IANA Stewardship Transition Proposal, a plan developed by the international Internet community, to the NTIA for approval. In early June, the NTIA informed ICANN that it had determined that the IANA Stewardship Proposal satisfied its strict transition criteria. Thus, on October 1, 2016, after nearly two decades of US government control, the contract between ICANN and the NTIA to perform IANA functions officially expired, and the IANA function was handed over to the global Internet community.<sup>63</sup>

Eight years after the approval of the New generic Top-Level Domain (gTLD) Program in 2008, the first round of the gTLD Program is nearing completion, with the delegation of over 1,200 new gTLDs. Overall, the number of domain name registrations continues to grow exponentially, with approximately 335 million domain name registrations across all TLDs. As reported in the Verisign Domain Name Industry Brief, this growth represents an increase of 12.9 percent (or 38.2 million domain name registrations) compared to 2015.<sup>64</sup> Together under both .COM and .NET, 143.2 million domain names are registered. The number represents a 7.3

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<sup>63</sup>. *Stewardship of IANA? Functions Transitions to Global Internet Community as Contract with U.S. Government Ends*, ICANN (Oct. 1, 2016), <https://www.icann.org/news/announcement-2016-10-01-en>.

<sup>64</sup>. *Internet Grows to 334.6 Million Domain Name Registrations in the Second Quarter of 2016*, VERISIGN (Sept. 15, 2016), <https://investor.verisign.com/releasedetail.cfm?releaseid=989318>.

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percent increase year over year. At least 149.9 million domain name registrations are registered under country code Top Level Domains (ccTLDs). This number represents an 8.5 percent growth (or 11.7 million domain name registrations) year over year. Domain name registrations under new gTLDs have also experienced considerable growth, with over 22 million domain name registrations, representing 6.6 percent of total domain name registrations. The top five new gTLDs in terms of domain name registrations, XYZ, .TOP, .WANG, .WIN and .CLUB, account for over 50 percent of all new gTLD domain names. Overall, the 10 largest TLDs are .COM, .TK (Tokelau), .CN (China), .DE (Germany), .NET, .ORG, .UK (United Kingdom), XYZ, .RU (Russian Federation) and .NL (Netherlands).<sup>65</sup>

Cybersquatting continues to be a growing problem for rights holders, and the number of complaints filed has increased considerably with the introduction of new gTLDs. For instance, the number of complaints filed under the UDRP before the World Intellectual Property Organisation (WIPO), has been steadily increasing since the introduction of the first new gTLDs in 2013. While the number of domain name disputes filed with WIPO in 2015 did not surpass the record high of 2,884 cases filed in 2012, it did reach the third highest level since 1999. As reported by the WIPO, domain name disputes under new gTLDs accounted for an impressive 10.5 percent of all UDRPs filed with WIPO in 2015,<sup>66</sup> with .XYZ, .CLUB and .EMAIL amongst the new gTLDs with most disputed domain names. As of November 2016, 2,647 complaints had been filed with WIPO in 2016 with the figure undoubtedly going up as a direct result of the introduction of new gTLDs into the DNS.

It is also worth noting that 71 ccTLD Registries have adopted the UDRP (or a variation of it) and have designated the WIPO as dispute resolution provider. As a result, ccTLD disputes represented 13.7 percent of cases filed with the WIPO in 2015, a figure which is also likely to increase this year. Furthermore, many trademark owners have now opted to file Uniform Rapid Suspension (URS) complaints instead of a UDRP, which has likely slowed the growth of UDRP complaints. Since the first URS case was filed in 2013, over 600 URS complaints have been filed before the Forum (formerly known as NAF), with a considerably high number of cases resulting in a decision in favor of complainants.

While the URS was originally designed for new gTLDs and is not an ICANN consensus policy, it is proving to be a useful and cost-effective mechanism for protecting rights, although clearly it has been subject to criticism as it only provides for the suspension of a domain name (as opposed to transfer) as remedy. Several legacy gTLDs have voluntarily adopted the

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65. *The Verisign Domain Name Industry Brief*, VERISIGN, [https://www.verisign.com/en\\_US/domain-names/dnib/index.xhtml#home](https://www.verisign.com/en_US/domain-names/dnib/index.xhtml#home).

66. *Cybersquatting Cases Up in 2015, Driven by New gTLDs*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Mar. 18, 2016), [http://www.wipo.int/pressroom/en/articles/2016/article\\_0003.html](http://www.wipo.int/pressroom/en/articles/2016/article_0003.html).

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URS, including .TRAVEL, .PRO, .CAT and, more recently, .TEL and .XXX.

### III. Copyright<sup>67</sup>

#### A. UNITED STATES

The jury in a federal district court in California returned a stunning verdict determining that Google was shielded from liability for copyright infringement based on the affirmative defense of fair use.<sup>68</sup> Previously, the Federal Circuit Court of Appeals had reversed the lower court, ruling that Google's unauthorized copying of declaratory code for thirty-seven distinct application programming interfaces (APIs) from Oracle's popular JAVA computer program constituted copyright infringement.<sup>69</sup> Google had simply copied the APIs, rather than writing its own code for its Android software for smartphones,<sup>70</sup> but the lower court had ruled that the API structure was not copyrightable under section 102(b) of the Copyright Act because it was a system or method of operation. The Federal Circuit Court, however, found that the APIs contained sufficient "expression" to be deserving of copyright protection and remanded the case to the lower court for a determination of Google's affirmative defense of fair use.<sup>71</sup> Google filed a petition for a writ of certiorari before the Supreme Court, but the Supreme Court declined to hear the case on appeal.<sup>72</sup>

The fair use doctrine is codified in the United States Copyright Act.<sup>73</sup> In determining whether the unauthorized copying of a work is protected by the fair use doctrine, the court considers several factors, including the nature of the work, the purpose of the use (*e.g.*, for profit vs. critical commentary or social good), the substantiality of the copying in relation to the work, and whether such copying adversely affects the market for the author's work.<sup>74</sup> On May 26, 2016, the jury returned a unanimous verdict holding that Google's use constituted fair use under the U.S. Copyright Act.<sup>75</sup>

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67. Copyright Section Editor: Michelle Wynne, Zillow Group, Inc., Seattle, WA. Authors: United States: Ralph H. Cathcart, Ladas & Parry LLP, New York, NY; European Union: Daniel B. Koburger, Benjamin N. Cordozo School of Law, New York, NY and Daniel Cooper, Cooper and Kurz, Stamford, CT.; India: Manish Dhingra, Dhingra & Singh, Delhi, India; Dominican Republic: Fabio Jose Guzman Saladin, and Pamela Benzán Arbaje, Guzmán Ariza, Santo Domingo, Dominican Republic.

68. *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2016 WL 3181206, at \*1–\*2 (N.D. Cal. June 8, 2016).

69. *Oracle America, Inc. v. Google, Inc.*, 750 F.3d 1339, 1348 (Fed. Cir. 2014).

70. *Id.* at 1370.

71. *Id.* at 1381.

72. *Oracle America, Inc. v. Google, Inc.*, 750 F.3d 1339 (Fed. Cir. 2014); *cert. denied*, 2014 WL 5319724 (U.S. Oct. 6, 2014) (No. 14-410).

73. 17 U.S.C. § 107 (2016).

74. *Id.*

75. *Oracle Am., Inc.*, WL 3181206 at \*1.

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The verdict has far ranging implications, both for software developers and Oracle, who stood poised to demand over nine billion dollars in damages.<sup>76</sup> Further, as Google's Android products prospered, Oracle's JAVA licensing business, which relied heavily on "feature-phones," cratered.<sup>77</sup> Oracle immediately vowed it would appeal the verdict<sup>78</sup> and, on October 26, 2016, Oracle formally filed a notice of appeal before the Federal Circuit Court, seeking to appeal the jury's verdict.<sup>79</sup>

In another case involving Google, the Supreme Court of the United States rejected Authors Guild's petition for writ of certiorari<sup>80</sup> to appeal the Second Circuit's ruling, which held that "Google Books" does not infringe the copyrights of published authors.<sup>81</sup> In 2004, Google launched the "Google Library Project" and "Google Books Project," in cooperation with major research libraries around the world, to scan and digitally catalogue tens of millions of books.<sup>82</sup> To date, Google has digitally copied approximately thirty million books to the Google Books digital catalog.<sup>83</sup> Essentially, Google copied (without permission) each book in its entirety, extracting and indexing the book's machine readable text.<sup>84</sup> Internet users could not view the entire book, but instead were limited to "text mining" where only small snippets containing the specific text searched were viewable by the public.<sup>85</sup> Google does not charge a fee or directly feature any advertising in connection with the Google Books Project.

Section 107 of the United States Copyright Act sets forth several factors relevant to identifying whether a particular use qualifies as a fair use.<sup>86</sup> Fair use is an affirmative defense to copyright infringement and thus does not negate the elements for a finding of infringement. Rather, the defense operates to excuse the infringer from liability and damages. The Second Circuit determined that Google was shielded from liability because 1) its unauthorized use promoted the arts and sciences; 2) Google's profit motivation did not outweigh the transformative nature of Google's use; 3) the "snippets" were not substantial in terms of copying expressive content;

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76. Joe Mullin, *Google Beats Oracle-Android Makes "Fair Use" of JAVA APIs*, ARSTECHNICA (May 26, 2016), <https://arstechnica.com/tech-policy/2016/05/google-wins-trial-against-oracle-as-jury-finds-android-is-fair-use/>.

77. *Id.*

78. *Id.*

79. *Oracle America, Inc. v. Google, Inc.*, No. C 10-03561 WHA, 2016 U.S. Dist. LEXIS 74931 (Northern District of California entered June 8, 2016), *appeal filed*, No. CV 10-03561 WHA (9th Cir. Oct. 26, 2016).

80. *Google, Inc. v. Oracle America, Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 84 U.S.L.W. 3357 (U.S. Apr. 18, 2016) (No. 15-849).

81. *Authors Guild*, 804 F.3d 202, 228 (2d Cir. 2015).

82. *Id.* at 208.

83. Tim Wu, *What Ever Happened to Google Books?*, THE NEW YORKER (Sept. 11, 2015), <http://www.newyorker.com/business/currency/what-ever-happened-to-google-books>.

84. *Authors Guild*, 804 F.3d at 209.

85. *Id.* at 208-210.

86. 17 U.S.C. § 107 (2016).

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and 4) the use did not adversely affect the market for the authors' books or provide a substitute therefor.<sup>87</sup> The Court was especially focused on the highly transformative nature of Google Books and the fact that the text which was made available to users was sufficiently limited so as not to provide a market substitute for the full versions of the books.<sup>88</sup>

Google has always maintained that Google Books provided the public with a new way to discover books of interest and that increased public awareness would help authors.<sup>89</sup> By using Google's tool, people would be able to formulate their own queries, review search results, and find books that they otherwise may not have found.<sup>90</sup> Of course, many authors vehemently disagree and view Google's actions as an infringement of both the Constitutional and statutory monopoly afforded to authors concerning their exclusive rights to copy, distribute, display, and make derivative works of their works. Indeed, the president of the Authors Guild, Roxana Robinson, remarked that "what we are seeing is a trend of redistribution of wealth from the creative sector to the tech sector across the entire spectrum of the arts."<sup>91</sup> In either case, the Supreme Court's denial of certiorari appears to have "closed the book," if you will, on this chapter of the epic battle between Google and the Authors Guild.<sup>92</sup>

**B. EUROPE**

The judgments by the Court of Justice of the European Union (CJEU) that received the most recognition in 2016 were *GS Media*<sup>93</sup> and *McFadden*.<sup>94</sup> Beyond these judicial landmarks, the EU has seen a policy-driven event with an unforeseeable and potentially wide-ranging scope: the EU copyright reform proposal.<sup>95</sup>

One case, *GS Media*, referred to the CJEU by the Dutch Supreme Court,<sup>96</sup> concerned the liability of an individual who hyperlinked, without

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87. *Authors Guild*, 804 F.3d at 207-208.

88. *Id.* at 229.

89. *Id.*

90. Adam Liptak & Alexandra Alter, *Challenge to Google Books is Declined by Supreme Court*, N.Y. TIMES (Apr. 18, 2016), <http://www.nytimes.com/2016/04/19/technology/google-books-case.html>.

91. *Id.*

92. Zosha Millman, *Closing the Book on Authors Guild v. Google Books*, THE LEXIBLOG NETWORK (Apr. 18, 2016), <http://www.lexbn.com/2016/04/18/closing-the-book-on-authors-guild-v-google-books/>.

93. Case C 160/15, *GS Media BV v. Sanoma Media Netherlands BV et al.*, ECLI:EU:C:2016:644.

94. Case C 484/14, *Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH*, EU:C:2016:689.

95. Commission of the European Communities Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016) 593 Final (September 2016).

96. HR 3 April 2015, ECLI 2015, 841 m.nt. (*GS Media B.V./Sanoma Media Netherlands B.V. c.s.*) (Neth.).



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consent, to photographs from a *Playboy* magazine photoshoot, which were initially made freely available online without authorization.<sup>97</sup> The CJEU clarified that holding someone responsible for infringing through ‘communication to the public’<sup>98</sup> in a case of linking to content made available without authorization, required an individual assessment.<sup>99</sup> The Court emphasized the role of the user and the deliberate nature of the user’s actions,<sup>100</sup> including: (1) if the actor did not act for personal gain, could he reasonably not have known the work had been made available on the internet without the copyright holder’s permission; (2) if the actor ought to have known; and (3) if the actor acted for personal gain, could he rebut the presumption that he had full knowledge.<sup>101</sup> Thus, in the case, the CJEU allowed a distinction between hyperlinking as an ordinary internet user and hyperlinking to seek profit. It extended *Svensson*, where the CJEU referred to content made available with consent, which the CJEU held does not constitute “communication to the public.”<sup>102</sup>

The second case, *McFadden*, was referred to the CJEU by the Regional Court, Munich I, Germany.<sup>103</sup> In *McFadden*, the issue was whether a rights holder can demand an injunction against an intermediary internet service provider that grants free access for purposes of its actual business services (e.g., a café) when a user makes a protected work available to the public through the intermediary without the right holder’s consent.<sup>104</sup> The CJEU held that it was permissible to require password protection by the intermediary,<sup>105</sup> but not to require monitoring of the data flow or termination of the connection.<sup>106</sup> The former is a dissuasive measurement if the users are required to identify themselves<sup>107</sup> and it is a measurement that does not damage the intermediary’s freedom to conduct business<sup>108</sup> or undermine the user’s right of freedom of information.<sup>109</sup> But, the CJEU did not answer who bears the costs of an injunction where the service provider cannot be held liable.

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97. *GS Media*, ¶ 24.

98. Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. L 167/11, art. 3(1).

99. *GS Media*, ¶ 33.

100. *GS Media*, ¶ 35.

101. *Id.* at ¶¶ 47, 49, 51.

102. *Id.* at ¶ 42.

103. Landgericht München I [LG München I] [Regional Court of Appeals, Munich I] September 9, 2014, 7 O 14719/12, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 2015, 70.

104. *McFadden*, ¶ 2.

105. *Id.* at ¶¶ 90-96.

106. *Id.* at ¶¶ 87-88.

107. *Id.* at ¶ 96.

108. *Id.* at ¶ 91; Directive 2001/29/EC of the European Parliament and of the Council on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. L 17/07, at art. 15(1).

109. *McFadden*, ¶ 92.

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On December 9, 2015, the Commission unveiled its proposed regulation on the portability of copyrighted content aimed at furthering the Digital Single Market initiative.<sup>110</sup> Under the regulation, providers of subscription-based online content must enable subscribers to that content from one EU member state who are “temporarily present” in another EU member state to access and use the subscription content in the second EU state.<sup>111</sup> While it is currently unclear what “temporarily present” means,<sup>112</sup> it does seem clear that the purpose of the new regulation is to allow users to be able to take the copyrighted content they have license to listen to, view, etc., with them across the borders of EU member countries. Concomitantly, the proposed regulation provides that the copyright license flowing from such subscription-based content—and the infringement of copyright that would come from actions violating the terms of the license—deal solely with the subscriber’s “member state of residence.”<sup>113</sup> This obviates the need for, and eliminates the ability of, content providers to condition access to content outside the subscriber’s home jurisdiction on the agreement to a license in each EU member state wherein the subscriber attempts to access or use that content.

C. INDIA

The Delhi High Court elaborated on the interpretation of Section 15<sup>114</sup> of the Copyright Act which in part states that, if copyright in a design is capable of registration under the Designs Act, even if the design is not registered, the copyright in the design will cease to exist as soon as the product or article incorporating the design is produced more than fifty times through an industrial process.

The Court first commented on the rationale behind Section 15<sup>115</sup> of the Act and said, “[a]s evident from the language of Section 15<sup>116</sup> of the Copyright Act, copyright does not subsist in a registered design.” The rationale for this is that someone’s choice of design registration is a conscious decision to use the underlying work for mass production. The design has a commercial element and reaches a wider audience through the medium of the product or the article. This is of course possible in the cases of designs of products and articles that are sold widely or have an expansive market. But, that is not always so in the case of an artistic work— typically a painting, a drawing or even a sculpture, for instance (which are the closest species of copyrights that overlap with designs). Yet the transformation of a work of art into a design results in the possibility of its protection as a

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110. E.C. Reg. 2015/0284 (COD), art. 1 (Dec. 9, 2015).

111. *Id.* at art. 3(1).

112. *See id.* at art. 2(d) (defining “temporarily present” as presence in a Member State “other than the Member State of residence”).

113. *Id.* at arts. 4, 5(1).

114. *See* Indian Copyright Act (1957) at art. 15.

115. *Id.*

116. *Id.*

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design. Section 15(1)<sup>117</sup> dictates that if this kind of work is registered as a design, there is no copyright protection. Section 15(2)<sup>118</sup> on the other hand, says that if a work is capable of design registration, and is not registered, but replicated as a product or article through a design more than 50 times through mechanical process, copyright in that work ceases. The Court said,

We do hold that in the original work of art, copyright would exist and the author/holder would continue enjoying the longer protection granted under the Copyright Act in respect of the original artistic work. Thus, for instance a famous painting will continue to enjoy the protection available to an artistic work under the Copyright Act. A design created from that painting for the purpose of industrial application on an article so as to produce an article which has features of shape, or configuration or pattern or ornament or composition of lines or colors and which appeals to the eye would also be entitled design protection in terms of the provisions of the Designs Act. Therefore, if the design is registered under the Designs Act, the Design would lose its copyright protection under the Copyright Act but not the original painting.

**D. DOMINICAN REPUBLIC**

In April 2015, the Court of Appeals of the National District established a distinction between ideas and copyrightable work, choosing to follow the international jurisprudence criteria on the topic. The Court determined that, ideas alone, which are described, explained, illustrated or incorporated in a play, are protectable only in their form of expression, which must be original. Using this logic, the Court found that the use in an advertisement of a phrase contained in a musical piece does not by itself constitute a non-authorized reproduction if the phrase is not synced with the rhythm of the musical piece. In this particular case, the claimants were the copyright owners of a popular song in the Dominican Republic named “*El Teke*,” and the defendant was a lottery named *Loteka* that used a phrase of that song in an advertisement to promote their business. As part of its reasoning, the Constitutional Court analyzed the significance of the expression “*el teke*” in the national territory, the context in which the phrase was used, and the intention of the advertisement. The Court concluded that, in the context of the advertisement, the defendants were using the phrase because of its meaning and, because they did not use a musical rhythm, it could not be linked to the song of the claimants.<sup>119</sup>

The Court of First Instance of the Duarte Province has ruled that the collective rights of management organizations must demonstrate the repertoire over which they have rights to be able to collect on behalf of authors and composers. This ruling goes against the jurisprudential criteria

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117. *Id.*

118. *Id.*

119. Court of Appeal of the National District, Decision 286-15, April 30, 2015, *José Rafael Colón y Carlos Napoleón Santana vs. Loteka SRL y Mario Peguero*.

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of other countries that presume these organizations represent an unnamed repertoire.<sup>120</sup> Moreover, in a case regarding the collection of royalties, the Court of First Instance of the Duarte Province established that the collective rights management organizations must justify the origin and amount of the debt for which they request interim measures.<sup>121</sup>

In a case regarding architectural plagiarism, the Court of Appeal of the National District, when referring to the appointment of experts for performing studies and presenting reports, indicated that the fact that an appointed expert in architecture was a member of the same university that previously issued a study on the case could be considered a reason for recusal.<sup>122</sup>

On July 20, 2016, the Constitutional Court declared in conformity with the constitution that the Beijing Treaty on Audiovisual Performances, which is currently awaiting ratification by the Congress, conforms to the constitution, thus exercising the preventive control of constitutionality conceived in article 185, numeral 2 of the Dominican Constitution.<sup>123</sup> This is an important measure to protect the performers in relation to their interpretations in audiovisual performances. The Dominican legislation does not have any national law in this regard and the WIPO Performances and Phonograms Treaty, ratified by the Dominican Republic in 2006, does not cover the protections established in the Beijing Treaty.

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120. Court of First Instance of Duarte. Resolution number 00034/2015, September 7, 2015. *Sgacedom vs. El Tanque y Wellington Genao*.

121. Court of First Instance of Duarte. Resolution number 40/2015, July 27, 2015, *Sociedad de Autores Compositores y Editores Dominicanos de musica Inc. (SGACEDOM) vs Bomba La Fortuna y Alex Serrata*.

122. Court of Appeal of the National District, resolution No. 27-2015, October 19, 2015, *Jesus Osiris Garcia Pérez vs Víctor Durán & Asociados, S.A. and Víctor Manuel Durán Núñez*.

123. Constitutional Court, TC/0302/16, July 20, 2016.

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## **International Procurement**

MARTIN G. MASSE, ERIN BROWN, SAMUEL W. JACK, STEVEN D.  
TIBBETS, DANIEL CAREY BROWN AND KRISTINA DAHMANN\*

This Article reviews international law developments in 2016 in the field of international procurement.

### **I. Bidders Beware: Updates in Canadian Procurement Law**

Developments in Canada's procurement landscape in the past year have imposed significant new requirements on bidders, but have also created new procurement opportunities by opening new markets and allowing bid challenges of previously exempt procurements.

#### **A. NEW REQUIREMENTS FOR BIDDERS UNDER THE INTEGRITY REGIME**

On April 4, 2016, Public Works and Government Services Canada (PWGSC) introduced changes to its Integrity Regime (Regime), which is made up of the Ineligibility and Suspension Policy and associated integrity provisions, and are incorporated into Canadian federal solicitations, contracts, and leases.<sup>1</sup> The Regime came into force in summer 2015 to replace 2012's federal Integrity Framework.

Pursuant to the Regime, suppliers who have been convicted of, or who have pleaded guilty to, certain offences become ineligible to bid on government contracts, either indefinitely or for ten years, depending on the offence. Suppliers can also become ineligible as a result of the actions of

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\* Martin G. Masse and Erin Brown of Norton Rose Fulbright Canada LLP authored Section I entitled "Bidders Beware: Updates in Canadian Procurement Law." Samuel W. Jack, an Attorney Advisor for the U.S. Agency for International Development (USAID), authored Section II entitled "Social Impact Bonds: An Emerging Public Financing Mechanism." Mr. Jack also served as the editor of the International Procurement Committee's Year in Review for 2016. Steven D. Tibbets, Managing Senior Counsel with CA Technologies, authored Section III entitled "Evolving Country of Origin Rules for Software could have Significant Consequences for U.S. Government Vendors." Daniel Carey Brown and Kristina Dahmann authored Section IV entitled "Advanced Biofuels: American and Japanese Perspectives," and recently completed concurrent clerkships with the Honorable Algenon Marbley and the Honorable Michael H. Watson of the Southern District of Ohio, respectively. The views of the authors are not attributable to their law firms, companies, or government agencies. The article covers developments during 2016.

1. See PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, GOVERNMENT OF CANADA'S INTEGRITY REGIME (2016), *available at* <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html> [hereinafter Update to Integrity Regime].

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subcontractors or of affiliates they control. Additionally, PWGSC has considerable discretion to suspend suppliers who have been charged with or have admitted guilt to certain offences.

However, a number of remedies exist for suppliers. Cooperative suppliers may see their ten-year periods of ineligibility reduced to five years; suppliers may have the option of entering an administrative agreement to gain relief from ineligibility; and the Government may invoke the public interest exception to do business with suppliers who would otherwise be ineligible.<sup>2</sup>

The April 4, 2016 changes to the Regime include the requirement that bidders disclose all foreign criminal charges and convictions, as well as anti-avoidance provisions. The updated disclosure requirement mandates that bidders, as part of their bid, provide “a complete list of all foreign criminal charges and convictions that may be similar to the Canadian offences listed in the Ineligibility and Suspension Policy pertaining to itself, its affiliates and its proposed first tier subcontractors.”<sup>3</sup> When submitting bids, bidders will have to certify that they have provided a list of all foreign criminal charges and convictions. A supplier that provides a false or misleading certification, including one that is false or misleading with respect to foreign criminal charges and convictions, will become automatically ineligible to bid on government contracts.<sup>4</sup>

In terms of anti-avoidance, under the revised Regime, mergers, acquisitions, divestitures, spin-offs, and other successions and corporate reorganizations may not be used to circumvent ineligibility or suspension. Where the purpose or result of a corporate restructuring or succession is to avoid an ineligibility or suspension determination, PWGSC has the discretion to determine that the successor entity is also ineligible or suspended.<sup>5</sup>

**B. ENTRY INTO THE CANADA-EU COMPREHENSIVE ECONOMIC  
TRADE AGREEMENT**

Canada’s entry into the Comprehensive Economic Trade Agreement (CETA) with the European Union on October 30, 2016, presents exciting new opportunities for both Canadian and EU businesses. CETA’s procurement chapter covers a wide range of contracting entities and includes

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2. See *id.* (updating Supply Manual §§ 4.21.1., 4.22.1, among other changes).

3. See *id.*; see also PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, INTEGRITY DECLARATION FORM (Apr. 4, 2016) available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/declaration-eng.html>. The obligation to disclose charges, convictions and other circumstances is ongoing. See PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, INELIGIBILITY AND SUSPENSION POLICY at § 17(c), (Apr. 4, 2016), available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html> [hereinafter Ineligibility and Suspension Policy].

4. See Update to Integrity Regime, *supra* note 1.

5. See Ineligibility and Suspension Policy, *supra* note 3, at § 10

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commitments to ensure that procurement is transparent, accountable, impartial, and non-discriminatory.<sup>6</sup>

Under CETA, EU companies will be able to bid on Canadian procurement contracts, including at the municipal level, where the value of procurement is understood to significantly exceed that of the federal government. Given that the EU's government procurement market is estimated at approximately \$3.3 trillion annually,<sup>7</sup> CETA also creates significant opportunities for Canadian companies to supply goods and services to a wide range of EU government contracting entities.<sup>8</sup>

These landmark procurement obligations are expected to be provisionally applied as early as spring 2017.

**C. SUCCESSFUL CHALLENGE TO THE NATIONAL SECURITY EXEMPTION**

The last year also saw a narrowing in the scope of the National Security Exemption (NSE), which the Government of Canada routinely relies on to avoid the bid challenge mechanism that is typically available to potential suppliers in other competitive procurements.

In its August 2016 decision in *MD Charlton Co. Ltd.*,<sup>9</sup> the Canadian International Trade Tribunal (CITT) determined that PWGSC violated the Agreement on Internal Trade (AIT) by failing to tailor the scope of the NSE. *Charlton* involved PWGSC's procurement of night-vision binoculars on behalf of the Royal Canadian Mounted Police (RCMP), the end-user of the binoculars. The RCMP had indicated that, as a matter of national security, technical specifications could not be disclosed. However, when PWGSC invoked the NSE, it applied a blanket exemption to the solicitation from all disciplines of the trade agreements. Rather than making the request for standing offer publicly available, PWGSC sent it to a pre-determined list of three potential bidders.

In response to the complainant's allegation that the NSE was improperly invoked, the CITT determined that, since the non-disclosure of technical specifications would have sufficed, the purchaser provided no rationale for the blanket exemption. The CITT ultimately held that while trade agreements like the AIT allow government institutions to take any action they consider necessary to protect national security, the NSE cannot be invoked to automatically and completely remove solicitations from the purview of trade agreements without further scrutiny.

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6. GOVERNMENT OF CANADA, CHAPTER SUMMARIES, *available at* [http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter\\_summary-resume\\_chapitre.aspx?lang=eng#a20](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter_summary-resume_chapitre.aspx?lang=eng#a20).

7. *Id.*

8. The specific government entities that are subject to the Agreement's procurement obligations are set out in annexes. *See, e.g.*, Comprehensive Economic And Trade Agreement, Can.-E.U., *available at* [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf).

9. (May 13, 2016), PR-2016-007 (CITT).



#### D. CONCLUSION

While the last year has ushered in new requirements for suppliers to remain eligible to bid on Canadian government contracts, it has also seen an ambitious new trade agreement with a landmark procurement chapter. Additionally, the scope of the NSE exemption has been narrowed. Overall, these developments should create new opportunities for suppliers in the Canadian marketplace.

## **II. Social Impact Bonds: An Emerging Public Financing Mechanism**

In the last few years, social impact bonds have emerged as a means of accessing private capital to finance preventative solutions to pervasive, public social problems.<sup>10</sup> This private sector financing arrangement is based on the principle of “pay-for-success,” whereby a government pays a third party based on the achievement of pre-defined performance targets. Given the ubiquity of shrinking budgets and political gridlock in the United States and many European countries, this financing instrument is likely to continue to grow in popularity. By unlocking private capital and focusing on results-oriented approaches, social impact bonds could improve the effectiveness of social programs. The social impact bond model and similar funding instruments also have the potential to become useful tools for international development. However, the long-term success of the model will depend on governments’ ability to devise social impact programs that are susceptible to rigorous measurement and quantifiable results.

#### A. HOW IT WORKS

A common social impact bond structure is shown in Figure 1 below and involves the following steps: (1) private sector investors—often philanthropic organizations or sustainability funds of commercial lenders—lend money to finance the up-front costs and working capital for the program; (2) a project manager—often a non-profit organization—contracts with the relevant government entity, receives the funding from the investors, and manages the service provider; (3) the service provider provides direct services to the recipients utilizing operating funds provided by the project manager; (4) independent evaluators measure the performance outcomes achieved by the service provider against the pre-established performance targets; (5) depending on the extent to which the performance targets are met, the government pays the project manager based on an agreed upon formula; and (6) assuming the project manager receives payment from the

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10. From a public finance perspective, social impact bonds are not “bonds” because they do not entail the issuance of public debt. Although these arrangements are more accurately characterized as a series of contracts, the term “social impact bond” has been popularized because the structure entails a government payment to a private financier. To avoid confusion, social impact bonds are often described as a form of “pay-for-success” contract.

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government, the project manager repays the investors, potentially including interest.

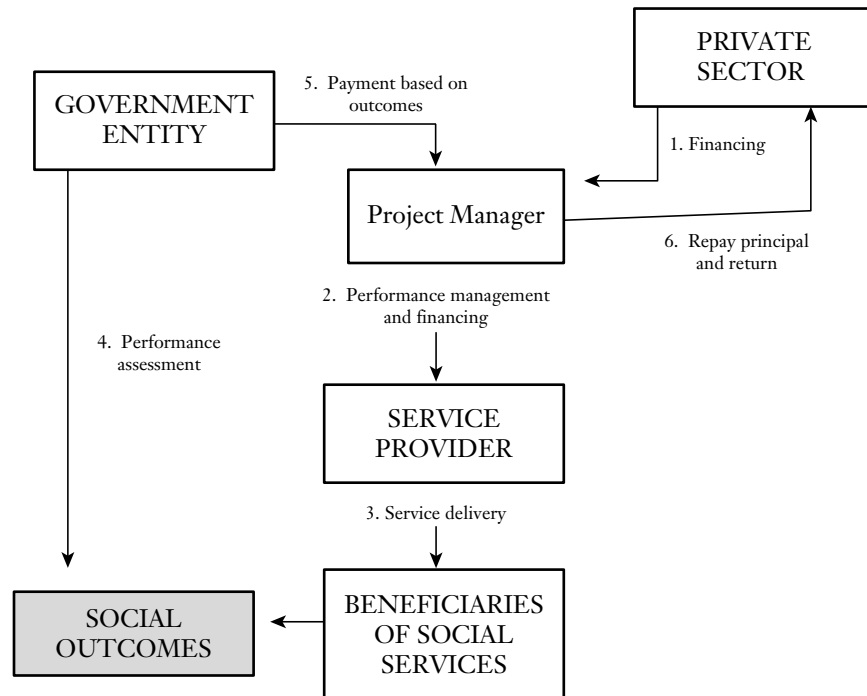


FIGURE 1

At the center of this arrangement is typically a tripartite contract between the government entity, the project manager, and the service provider.<sup>11</sup> This agreement will establish the services to be performed and the performance targets; funding levels; oversight and reporting obligations; applicable statutory provisions; the formula for calculating success payments; as well as standard legal provisions, including the representations and warranties of the parties, remedies, and liability provisions.<sup>12</sup> Although the lenders may not be a party to the agreement—they typically finance the project through separate financing instruments—lenders may participate in the project’s oversight committee and may be entitled to certain consent rights that are established in the tripartite agreement. The government entity will also separately contract with the independent evaluator to assess the achievement of project goals. As noted below, there are many potential variations on this

11. See, e.g., *Pay for Success Contract among the Commonwealth of Massachusetts, Roca, Inc., and Youth Services Inc.* (Jan. 7, 2014), [http://www.payforsuccess.org/sites/default/files/final\\_pay\\_for\\_success\\_contract\\_executed\\_1\\_7\\_2013.pdf](http://www.payforsuccess.org/sites/default/files/final_pay_for_success_contract_executed_1_7_2013.pdf).

12. See *id.*

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structure, and the parties may change the order in which the transaction steps occur to suit their circumstances.

**B. ADVANTAGES OF THE MODEL**

There are many potential benefits of the social impact bond financing arrangement. Most immediately, the model fills a gap by connecting private capital with service providers to address public needs, which can be particularly attractive to cash-strapped government entities. Although these services (arguably) should be financed with state or local tax dollars, governments are often unable to identify the necessary up-front funding or face other legal and political hurdles to directly financing such projects. The social impact bond arrangement allows the government to address an unmet need without incurring debt. In addition, because—unlike under standard government contracting methods—the government is only required to pay for successful outcomes, its risk is minimized. This risk transfer allows governments to experiment with new approaches to social services without jeopardizing limited tax dollars.

Importantly, the provision of preventative services allows the government to achieve long-term savings by mitigating the need for costly, mitigation measures. Modern governments tend to be reactionary in responding to social problems—even if policymakers recognize a community challenge, the government may not have the resources to effectively address the problem. Tight budgets, institutional limitations, and legal constraints often result in governments treating the symptoms of these problems, not the causes. As a result, governments invest in mitigation measures—be they homeless shelters, emergency medical services, or prisons—even if it would be far less expensive to address the underlying social issues.

The other parties to the agreement also stand to gain. For the investors, social impact bonds can be an attractive means of fulfilling a charitable mission and, depending on the success of the program, earning a modest return on investment. Most importantly, the public gains because this instrument can provide social outcomes that improve communities and reduce the need for follow-on interventions.

**C. GROWTH IN THE UNITED STATES**

The first social impact bond in the United States was implemented by the City of New York on August 2, 2012.<sup>13</sup> The program, known as the Adolescent Behavioral Learning Experience (ABLE) program, was designed to provide education, training, and counseling to approximately 3,000 young men incarcerated at the Rikers Island prison, with the goal of reducing the

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13. Stu Loeser & Samantha Levine, *Mayor Bloomberg, Deputy Mayor Gibbs and Corrections Commissioner Schirri Announce Nation's First Social Impact Bond Program*, CITY OF NEW YORK (Aug. 2, 2012), <http://www1.nyc.gov/office-of-the-mayor/news/285-12/mayor-bloomberg-deputy-mayor-gibbs-corrections-commissioner-schirri-nation-s-first#/0>.

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likelihood of recidivism.<sup>14</sup> The agreement called for Goldman Sachs to provide a \$9.6 million loan to MDRC, a nonprofit education and social policy research organization that oversaw the ABLE project implementation.<sup>15</sup> Goldman Sachs was to receive its capital back only if the prison readmission rate—measured in total jail days avoided—was reduced by 10 percent or more.<sup>16</sup> Under the loan terms, if the reduction exceeded 11 percent, Goldman Sachs became eligible for a financial return between \$500,000 and \$2.1 million, depending on rate of reduction.<sup>17</sup>

The ABLE program was ultimately discontinued in August 2015 after achieving mixed results. The Vera Institute of Justice, which provided the independent evaluation of the program, reported that it did not lead to a reduction in recidivism, and the program did not meet the target required for the city to repay the investors.<sup>18</sup> Goldman Sachs ultimately loaned \$7.2 million to MDRC, of which \$6 million was guaranteed by Bloomberg Philanthropies.<sup>19</sup> Having failed to meet the 10 percent threshold necessary to trigger the city's repayment obligation, Goldman Sachs took a \$1.2 million loss. Despite this result, advocates for social impact bonds have argued that the financing arrangement “worked as it was supposed to”<sup>20</sup> because the city (and its taxpayers) did not pay for a program that did not produce the desired results.<sup>21</sup>

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14. *Id.*

15. See CITY OF NEW YORK, FACT SHEET: THE NYC ABLE PROJECT FOR INCARCERATED YOUTH (2012), available at [http://www.nyc.gov/html/om/pdf/2012/sib\\_fact\\_sheet.pdf](http://www.nyc.gov/html/om/pdf/2012/sib_fact_sheet.pdf). The program also benefited from a \$7.2 million grant from Bloomberg Philanthropies, the charity of former Mayor Michael Bloomberg, which guaranteed a portion of Goldman Sachs's loan and thereby reduced its risk.

16. *Id.*

17. *Id.*; see also Donald Cohen & Jennifer Zelnick, *What We Learned from the Failure of the Rikers Island Social Impact Bond*, NONPROFIT QUARTERLY (Aug. 7, 2015), <https://nonprofitquarterly.org/2015/08/07/what-we-learned-from-the-failure-of-the-rikers-island-social-impact-bond/>.

18. VERA INSTITUTE OF JUSTICE, IMPACT EVALUATION OF THE ADOLESCENT BEHAVIORAL LEARNING EXPERIENCE (ABLE) PROGRAM AT RIKERS ISLAND (July 2015) available at <https://www.vera.org/publications/impact-evaluation-of-the-adolescent-behavioral-learning-experience-able-program-at-rikers-island>.

19. See Paul Burton, *No Success Like Failure: N.Y. See Social Impact Bond Pluses*, THE BOND BUYER (July 2, 2015), <http://www.bondbuyer.com/news/regionalnews/ny-city-officials-social-impact-bond-big-plus-1077971-1.html>.

20. See MDRC, MDRC STATEMENT ON THE VERA INSTITUTE'S STUDY OF ADOLESCENT BEHAVIORAL LEARNING EXPERIENCE (ABLE) PROGRAM AT RIKERS ISLAND (July 2015), available at <http://www.mdrc.org/news/announcement/mdrc-statement-vera-institute-s-study-adolescent-behavioral-learning-experience>; see also James Anderson & Andrea Phillips, *Op-Ed: What We Learned from the Nation's First Social Impact Bond*, HUFFINGTON POST (July 2, 2015), [http://www.huffingtonpost.com/james-anderson/what-we-learned-from-the-\\_1\\_b\\_7710272.html](http://www.huffingtonpost.com/james-anderson/what-we-learned-from-the-_1_b_7710272.html).

21. By contrast, under a traditional government procurement approach, the city would have been required to pay the service providers pursuant to the contract terms, regardless of whether the program was successful.

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Building on New York's experience with the ABLE program, several jurisdictions have since launched social impact bond programs.<sup>22</sup> By the end of 2016, "pay-for-success" projects, primarily social impact bonds, had been launched in eleven states, and local jurisdictions in several other states were exploring this option.<sup>23</sup> Project issue areas include homelessness, child welfare, criminal justice, early childhood development, behavioral health, and workforce development, among others.

Among the more notable of these programs was the Massachusetts Juvenile Justice Pay for Success Initiative, which was launched by the Commonwealth of Massachusetts in January 2014.<sup>24</sup> Like the ABLE program, Massachusetts addressed recidivism among young, male offenders. A tripartite agreement was executed on January 7, 2014, between the Commonwealth of Massachusetts, Roca, Inc. (the service provider), and Third Sector Capital Partners (the project manager).<sup>25</sup> Several commercial and philanthropic lenders, including the Goldman Sachs Social Impact Fund as the senior lender, provided the up-front funding for the services.<sup>26</sup> This was the first time that a state had used a competitive procurement to select the project manager and services manager under the social impact bond model.<sup>27</sup> As of late 2016, the \$27 million that Massachusetts will make available in "success payments" over the seven-year project is the largest financial investment of its type.<sup>28</sup> Massachusetts made its first payments under the program in May 2015.<sup>29</sup>

Along with the expansion of social impact bonds across the United States at the state and local levels, the federal government has continued to study their use. The Office of Management and Budget has encouraged federal

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22. Although the ABLE program was a trailblazer in the United States, it involved political actors, namely Bloomberg Philanthropies, which put it in a unique position to succeed. The subsequent programs have tested this model under circumstances without similar forces at play. See Pay for Success U.S. Activity Map, NONPROFIT FINANCE FUND, <http://www.payforsuccess.org/pay-success-deals-united-states>.

23. See *id.*

24. See FACT SHEET: *The Massachusetts Juvenile Justice Pay for Success Initiative*, NONPROFIT FINANCE FUND, <http://www.goldmansachs.com/our-thinking/trends-in-our-business/massachusetts-social-impact-bond/MA-juvenile-justice-pay-for-success-initiative.pdf>.

25. Third Sector formed a subsidiary supporting organization, Youth Services, Inc., to serve as the legal entity for performing the project. *Id.*; see also *Pay for Success Contract among the Commonwealth of Massachusetts, Roca, Inc., and Youth Services Inc.*, *supra* note 11.

26. FACT SHEET: *The Massachusetts Juvenile Justice Pay for Success Initiative*, *supra* note 24. The U.S. Department of Labor made a "first-of-its-kind" grant of \$11.7 million grant to Massachusetts to make success payments under this agreement. See *id.*

27. See COMMONWEALTH OF MASSACHUSETTS, MASSACHUSETTS RFR 2012, available at <http://www.payforsuccess.org/opportunity/massachusetts-rfr-2012>.

28. See FACT SHEET: *The Massachusetts Juvenile Justice Pay for Success Initiative*, *supra* note 24.

29. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PAY FOR SUCCESS: COLLABORATION AMONG FEDERAL AGENCIES WOULD BE HELPFUL AS GOVERNMENTS EXPLORE NEW FINANCING MECHANISMS, GAO-15-646 at 13 (Sept. 2015), available at <http://www.gao.gov/assets/680/672363.pdf>.

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agencies to explore the use of pay-for-success contracts, including social impact bonds, “where appropriate,” and at least four federal agencies have awarded pay-for-success grants or are developing such proposals.<sup>30</sup> Although there is currently no formal, government-wide program, President Obama proposed the establishment of a \$300 million fund to expand the federal government’s role in supporting state and local pay-for-success initiatives.<sup>31</sup> Members of Congress have also introduced legislation to expand federal support for these projects.<sup>32</sup> Given President Trump’s campaign promise to significantly increase infrastructure spending—relying, in particular, on “new private infrastructure investments”—it is conceivable that social impact bonds will play a broader role at the federal level during his administration.<sup>33</sup>

**D. USE AS AN INTERNATIONAL DEVELOPMENT TOOL**

While the popularity of social impact bonds has grown most rapidly in the United States, the model was first implemented in the United Kingdom and has since been used in several European countries.<sup>34</sup> The social impact bond model has also been proposed as a new means of providing assistance to developing countries in service of the world’s poorest people. Referred to as “development impact bonds” in this context, this financing mechanism operates in largely the same manner, except that the (local) government payor is typically replaced by a foundation or foreign donor government.<sup>35</sup>

In the international development setting in particular, impact bonds have the potential to be a powerful tool to stimulate public and private donor organizations that seek a clear link between funding and results. Given the political scrutiny that foreign assistance faces in many developed countries, the development bond model can demonstrate aid effectiveness using quantifiable metrics. This focus on rigorous measurement, and learning

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30. *See id.* at 5.

31. *See id.* at 2.

32. *Id.* (citing Social Impact Partnership Act, H.R. 1336, 114th Cong. (2015); Social Impact Partnership Act, S. 1089, 114th Cong. (2015); Social Impact Bond Act, H.R. 4885, 113th Cong. (2014); Pay for Performance Act, S. 2691, 113th Cong. (2014)).

33. *See* Melanie Zanona, *Ryan offers picture of public-private spending in Trump’s infrastructure plan*, THE HILL (Jan. 19, 2017), <http://thehill.com/policy/transportation/315110-ryan-offers-picture-of-private-public-spending-in-trumps-infrastructure>.

34. *See* Emma Disley, Chris Giacomantonio, Kristy Kruithof and Megan Sim, *The payment by results Social Impact Bond pilot at HMP Peterborough: final process evaluation report*, RAND EUROPE REPORT TO THE U.K. MINISTRY OF JUSTICE, 2015, *available at* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/486512/social-impact-bond-pilot-peterborough-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486512/social-impact-bond-pilot-peterborough-report.pdf).

35. *See generally* Adva Saldinger, *Have development impact bonds moved beyond the hype?* DEVEX (July 8, 2016), <https://www.devex.com/news/have-development-impact-bonds-moved-beyond-the-hype-88372>.

from past interventions, also has the potential to provide important “lessons learned” to the entire international development community.<sup>36</sup>

#### E. THE FUTURE OF SOCIAL IMPACT BONDS

While social impact bonds have grown in popularity in recent years, their continued growth will depend on overcoming certain challenges. Most importantly, they require pinpointing outcomes that can be linked to a service and are susceptible to objective measurement. To date, a small number of social services have been identified that can attract investor interest. Many social problems are simply too complex or cannot meet the need for near-term results. Although the risk-shifting that is inherent in this mechanism is beneficial to governments, private sector investors may lack mandates to provide social impact funding. As a result, many commercial investors are unwilling to take the financial risk in exchange for a minimal return on investment.

In addition, at the outset of a project it can be challenging to draft requirements and evaluation methodologies that will adequately gauge the effectiveness of the services, particularly when the services are innovative and previously untested. The lack of properly-defined requirements can create ambiguity or inconsistent results, even if the services are otherwise successfully implemented. It can also be costly and labor-intensive to negotiate and draft the large number of agreements that constitute a social impact bond. It can take months, if not years, to properly develop and structure the necessary business arrangements. As a result, the process requires considerable resolve and commitment from all sides to reach a final agreement.

Despite these challenges, social impact bonds offer an attractive financing option for government services. By sustaining a focus on performance and preventative services, social impact bonds may lead to significant advances in how these services are delivered and measured. While they may not be appropriate for all projects, it is likely that—as more projects are implemented—the cumulative results will provide a better model for what works.

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36. Of course, the impact bond model faces additional challenges in the developing world. Impact bonds are significantly more complex than standard development instruments and the time and expense of setting up an impact bond may not be justified based on the project scope. In addition, language barriers and the limited number of actors in the development industry, as well as political and legal constraints in host countries, pose potential challenges. See A. Saldinger, *supra* note 35.

### **III. Evolving Country of Origin Rules for Software Could Have Significant Consequences for United States Government Vendors**

The U.S. Government purchases approximately \$6 billion of software each year.<sup>37</sup> Federal acquisition laws limit government agencies to purchasing software for which the country of origin is the United States or a “designated country” under the Trade Agreements Act.<sup>38</sup> This rule makes products originating in certain software-development hotbeds like Hyderabad, India ineligible for sale to United States government agencies.

However, recent country of origin determinations issued by the United States Bureau of Customs and Border Protection (Customs) have clarified that the location where code is *compiled* is the country of origin for government procurement purposes, regardless of where the code is initially developed. These determinations provide reasons to believe that software manufacturers may leverage lower-cost development work in non-“designated countries” without jeopardizing access to the United States government market.<sup>39</sup>

The Federal Acquisition Regulation (FAR) implements a number of policies and statutes that observe preferences for goods manufactured in the United States or in countries with which the United States has favorable trade relations.<sup>40</sup> The FAR implements the Buy American Act (BAA), which establishes a preference for domestic items, *i.e.*, items for which the country of origin is the United States. Federal agencies must purchase only domestic products unless a BAA exception applies.<sup>41</sup>

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37. See OMB Memorandum M-16-12, *Category Management Policy 16-1: Improving the Acquisition and Management of Common Information Technology: Software Licensing*, June 2, 2016, at 1, available at <https://www.actiac.org/omb-memorandum-m-16-121-category-management-policy-16-1-improving-acquisition-and-management-common>.

38. See Trade Agreements Act of 1979 (19 U.S.C. 2513).

39. Certainly, this assurance could be undermined by further evolution of Customs’ country of origin jurisprudence.

40. See generally 48 C.F.R. pt. 25.

41. See 48 C.F.R. § 25.001(a)(1). The BAA also does not apply if “the contracting officer determines that the price of the lowest domestic offer is unreasonable.” *Id.* There is also an exception to BAA requirements for commercial information technology, such as software. 48 C.F.R. § 25.103(e). Ostensibly, if commercial information technology is exempt from the BAA country of origin restrictions, and the TAA just provides another exception to the BAA, then the information technology exception would seem to be dispositive – *i.e.*, if a contracting officer is not required to purchase domestic items, then a rule partially prohibiting discrimination against non-domestic items would seem not to apply. Contrary to this logic, U.S. Government agencies universally assume that they may only purchase supplies with a U.S. or “designated country” origin in procurements covered by the TAA. See Jeffrey A. Belkin & Donald G. Brown, *The Buy American Act information technology exception: Should it apply to the Trade Agreement Act-covered contracts?* 24:6 WESTLAW J. GOV’T CONTRACT, July 26, 2010, available at <http://www.alston.com/Files/Publication/def44ccb-05d6-4184-8639>. In addition, while TAA requirements typically do not apply unless the value of a procurement meets a certain threshold—\$204,000 as of late 2016, 48 C.F.R. § 25.402(b)—agencies generally assume smaller purchases are subject to TAA limitations based on the overall value of the contract vehicles under which they are



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The Trade Agreements Act (TAA) establishes the main exception to the BAA's domestic item requirement. For procurements that meet specific minimum dollar value thresholds, agencies may purchase either domestic items or items with TAA "designated country" of origin and may not discriminate in favor of domestic items.<sup>42</sup> Practically speaking, commercial software vendors who wish to sell even a modest volume of products to the U.S. Government must offer products with TAA-compliant countries of origin.

In some cases, the country of origin of a product is clear, because it was manufactured entirely within a particular country. In other cases, where different parts of the manufacturing process occur in different countries, the "substantial transformation" test governs the country of origin. Under the "substantial transformation" test, the country of origin is the location where the components of an item underwent the change, or the changes, which caused them to become an end item with a new "name, character, or use."<sup>43</sup> Parties that are unsure about a product's country of origin may seek a ruling from Customs, which has authority to issue binding country of origin rulings for purposes of U.S. Government procurement contracts.<sup>44</sup> Recent Customs rulings on the origin of software have further defined these requirements.

Individual software products are usually developed in multiple jurisdictions and over a long period of time, as bits and pieces of code are repurposed for use in new products and cross-border teams of coders work together to develop and improve products. Prior to 2012, there was very limited guidance for determining the country of origin of software. In 2012, however, Customs issued a non-binding advisory ruling on the topic, identifying seven stages of software development: (1) research; (2) development of a graphical user interface; (3) development and writing of software specifications and architecture; (4) programming of source code; (5) software build; (6) testing and validation; and (7) preparation of the software for distribution (burning the software onto server media from which it will be downloaded when purchased).<sup>45</sup> Customs explained that the "software build" is "the process of methodically converting source code files into standalone lines, routines and subroutines of software object code files into standalone lines, routines and subroutines of software object code that can be run by a computer"<sup>46</sup> and concluded that the software build substantially

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purchased. *Id.* These factors combine to render wide swaths of software procurements subject to TAA "designated country" origin restrictions.

42. See 48 C.F.R. § 25.502(b)(1).

43. See 48 C.F.R. § 25.001(c)(2).

44. 19 C.F.R. pt. 177, subpt. B.

45. U.S. CUSTOMS AND BORDER PROTECTION, FINAL DETERMINATION HQ H192146 (June 8, 2012), available at <http://www.steptoe.com/assets/htmldocuments/Talend.pdf>.

46. See generally Daniel S. Lin, Matthew Sag & Ronald S. Laurie, *Source Code versus Object Code: Patent Implications for the Open Source Community*, 18 SANTA CLARA HIGH TECH. L. J. 235, 238 (2002) (Discussing the differences between source code and object code: "Source code has been described as a computer program written in a high level human readable language. In contrast, the related object code is the same computer program written in computer readable

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transformed the software into an end item with a different character and use than its predecessor components. Thus, wherever the “software build” process occurs is the country of origin, regardless of where the source code was developed.<sup>47</sup>

In early 2016, a binding customs ruling further clarified and affirmed a rule that the location where source code is compiled into object code is the country of origin. In that case, Customs ruled that source code developed in Malaysia (not a “designated country” under the TAA) by a Malaysia-based firm called e-Lock was substantially transformed when it was compiled into usable object code in the United States.<sup>48</sup> The final software product in that case was a U.S.-origin item, despite the fact that *all* of the source code was developed in Malaysia. The e-Lock determination solidified the principle that compilation of source code into object code constitutes substantial transformation.

A primary reason companies outsource software development is to reduce costs. A number of jurisdictions in which software development is especially affordable, like India and Malaysia, are not “designated countries” under the TAA. The recent Customs determination concerning e-Lock gives software vendors greater assurance that they may outsource software development to non-“designated countries” without jeopardizing their ability to meet country of origin requirements for United States government contractors.

#### **IV. Advanced Biofuels: American and Japanese Perspectives**

As the earth’s temperature continues to rise, with potentially dire consequences, governments around the world have begun to take steps to combat climate change. These steps include initiatives to encourage renewable or alternative energy, both in the form of statutes and regulations, as well as through grants and contracts.<sup>49</sup> The United States and Japan are two notable “super economies” that have focused on developing alternative energy.<sup>50</sup> This section will review recent developments in each country’s renewable fuel economy.

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format, which is required for the program’s execution by a computer. One important difference between source code and object code is that source code is generally platform-independent, meaning that it does not refer to the intricacies of any particular type of computer. In contrast, object code is platform-specific and must necessarily refer to the inner workings of the particular computer.”).

47. U.S. CUSTOMS AND BORDER PROTECTION, FINAL DETERMINATION HQ H192146 (June 8, 2012), available at <http://www.steptoe.com/assets/htmldocuments/Talend.pdf>.

48. See 81 Fed. Reg. 8733, 8735 (Feb. 22, 2016) (discussing Final Determination HQ H268858, Feb. 12, 2016).

49. See Collin O’Mara, *Climate Prosperity: A New Way of Thinking Forging A Responsible Environmental Policy Can Offer Big Economic Benefits*, DEL. LAW, Summer 2009, at 14; see also Peter M. Goodloe, *Simplification-A Federal Legislative Perspective*, 105 DICK. L. REV. 247 (2001).

50. See Jim Lane, *Biofuels Mandates Around the World: 2016*, BIOFUELSDIGEST (Jan. 3, 2006), <http://www.biofuelsdigest.com/bdigest/2016/01/03/biofuels-mandates-around-the-world-2016/>.

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A. ADVANCED BIOFUELS IN THE UNITED STATES

The U.S. Government has expended considerable political energy to foster the alternative fuel sector and has established a mandate-driven alternative fuel economy.<sup>51</sup> The EPA is required to set an annual standard (*i.e.*, usage requirement) for cellulosic biofuels<sup>52</sup> under the Renewable Fuel Standard if the “projected volume of cellulosic biofuel production is less than the volume specified in the statute (*i.e.*, the mandate).”<sup>53</sup> Under these standards, there has been a continued increase of mandated cellulosic biofuels, including a notable jump in fiscal year 2016.<sup>54</sup> The system is dependent on sufficient production of each fuel to meet the mandated volume requirements, which has been highly problematic.<sup>55</sup>

To jump-start the production of biofuel, the U.S. Government has awarded contracts and grants to assist in the development of the industry. Notably, funding has come from several agencies, including the EPA and the Department of Agriculture (USDA), as well as the Departments of the Navy, Transportation, Treasury, and Energy. To encourage cellulosic biofuel production, the Department of Energy’s Loan Guarantee Program,<sup>56</sup> the USDA Biorefinery Renewable Chemical Program, and Biobased Manufacturing Assistance Program,<sup>57</sup> as well as various tax incentives, have been implemented to assist in the research, development, development and deployment of cellulosic biofuels.

B. ADVANCED BIOFUELS IN JAPAN

Like the U.S. Government, the Government of Japan (GOJ) has a keen interest in developing and promoting alternative energy sources, especially cellulosic biofuels. During its industrialization after World War II, Japan’s primary energy use shifted from coal to hydrocarbons, which were mostly

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51. Energy Independence and Security Act (“the EISA”), Pub. L. No. 110–140, §§ 201–04, 121 Stat. 1492 (codified as amended at 42 U.S.C. § 7545(o) (Supp. II 2008) (the implanting policies will be referred to as the Renewable Fuel Standard (“RFS”)).

52. In the United States, cellulosic biofuels are statutorily defined as a “renewable fuel derived from any cellulose, hemi-cellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the [Environmental Protection Agency (EPA)].” Kelsi Bracmort, *The Renewable Fuel Standard (RFS): Cellulosic Biofuels*, CONGRESSIONAL RESEARCH SERVICE, Report R41106, Aug. 31, 2015, at 6.

53. *See id.* at 5.

54. *Final Renewable Fuel Standards for 2017, and the Biomass-Based Diesel Volume for 2018*, available at [www.epa.gov](http://www.epa.gov); *see also* Final Rule: Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 40 C.F.R. § 80.1405, amend. 40 C.F.R. pt. 80.

55. *See* Bracmort, *supra* note 63, for a comprehensive overview of the changes that have occurred since EISA’s enactment.

56. The program was first created from the Energy Policy Act of 2005, 42 U.S.C. § 16513 (2005).

57. *See* Lynn J. Cunningham, Beth A. Roberts, Bill Canis, and Brent D. Yacobucci, *Alternative Fuel and Advanced Vehicle Technology Incentives: A Summary of Federal Programs*, CONGRESSIONAL RESEARCH SERVICE, Report R42566, Jan. 10, 2013, at 20–21.

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imported.<sup>58</sup> In 2012, Japan was second only to China among the largest net importers of fossil fuels worldwide<sup>59</sup> and, as of November 2016, Japan needed to import approximately 84 percent of its energy requirements.<sup>60</sup> Although nuclear energy production had been a GOJ strategic priority since 1973, seismic forces have rendered nuclear energy an unreliable fuel source. Nuclear power provided 30 percent of Japan's electricity as of early 2011, and was projected to provide 40 percent by 2017,<sup>61</sup> but consequences of the March 2011 Tohoku earthquake and tsunami have made for a rocky interim. As of September 2016, Japan was receiving only 1 percent of its energy from nuclear power.<sup>62</sup>

Cellulosic biofuels, however, are poised to ease Japan's energy burdens with little to no apparent political cost. Because their sources do not compete as fiercely with food crops as first-generation biofuels, advanced biofuels are especially attractive to GOJ. The Japanese public is largely suspicious of using farmland for energy production,<sup>63</sup> as Japan has a dearth of agricultural and arable land compared to many other industrialized countries. Based on total calories consumed, Japan now imports approximately 60 percent of its food annually.<sup>64</sup> Unsurprisingly, Japan was among the first countries to invest in advanced biofuel technology and production. In 2007, it began operating the first commercial wood-to-ethanol plant, which had a capacity of 1.4 million liters per year.<sup>65</sup> Japan remains focused on researching and promoting biofuel sources that do not

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58. See VACLAV SMIL, *ENERGY TRANSITIONS: HISTORY, REQUIREMENTS, PROSPECTS* 93 (Praeger Publishers, 2010)

59. U.S. ENERGY INFORMATION ADMINISTRATION, *TODAY IN ENERGY: JAPAN IS THE SECOND LARGEST NET IMPORTER OF FOSSIL FUELS IN THE WORLD* (Nov. 7, 2013), *available at* <http://www.eia.gov/todayinenergy/detail.php?id=13711>.

60. See WORLD NUCLEAR ASSOCIATION, *NUCLEAR POWER IN JAPAN*, *available at* <http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/japan-nuclear-power.aspx>.

61. *Id.*

62. Mayumi Negishi, *Japan's Shift to Renewable Energy Loses Power*, *THE WALL STREET JOURNAL*, Sept. 14, 2016, <http://www.wsj.com/articles/japans-shift-to-renewable-energy-loses-power-1473818581>.

63. See USDA FOREIGN AGRICULTURAL SERVICE, *MARKET FOR LIQUID TRANSPORT BIOFUELS REMAINS STEADY AS JAPAN REMAINS FOCUSED ON ADVANCED FUELS* (Aug. 1, 2016), *available at* [http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Biofuels%20Annual\\_Tokyo\\_Japan\\_8-26-2016.pdf](http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Biofuels%20Annual_Tokyo_Japan_8-26-2016.pdf).

64. See USDA ECONOMIC RESEARCH SERVICE, *JAPAN/TRADE*, *available at* <https://www.ers.usda.gov/topics/international-markets-trade/countries-regions/japan/trade/>.

65. Renewable Energy Policy Network for the 21st Century, *Renewables 2007: Global Status Report* at 19 (2008), *available at* <http://www.worldwatch.org/files/pdf/renewables2007.pdf>.

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compete with food production,<sup>66</sup> and Japanese universities and research institutions are expected to expend significant resources to make advances.<sup>67</sup>

In Japan, the terms of resource procurements are generally negotiated between private parties, with the government's role being mainly facilitative. GOJ's 2014 five-year Strategic Energy Plan envisions the government becoming even more involved in encouraging private negotiation and collaboration in this sector, and states as follows:

GOJ needs to improve the environment that enables discussions on diversification of terms and conditions of transactions, such as the pricing mechanisms and destination clauses. They also need to support strategic efforts to procure stable and competitive resources, including strengthening the bargaining power through the strategic use of new joint procurement schemes.

Specifically, communications between energy producers and consuming nations will be facilitated and collaboration between consuming nations will be strengthened by providing many opportunities for international dialogue, such as the LNG Producer-Consumer Conference, and Japan-South Korea Gas Dialogue.<sup>68</sup>

As GOJ hoped, private actors have engaged in discussions. In July of 2015, the Initiative for Next Generation Aviation Fuels, a consortium of forty-six organizations (including Boeing, All Nippon Airways, Japan Airlines, the University of Tokyo, and GOJ), announced a five-year roadmap to both hasten and increase the use of advanced biofuels in anticipation of the 2020 Tokyo Summer Olympic and Paralympic Games.<sup>69</sup> The roadmap includes a section for future discussion items, including a consideration of costs, the business promotion framework, issues in business implementation, and guidance for dispute resolution.<sup>70</sup>

In conclusion, it is evident that the United States' and Japan's governments have differing approaches to the development of the renewable

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66. USDA FOREIGN AGRICULTURAL SERVICE, MARKET FOR LIQUID TRANSPORT BIOFUELS REMAINS STEADY AS JAPAN REMAINS FOCUSED ON ADVANCED FUELS (Aug. 1, 2016), *available at* [http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Biofuels%20Annual\\_Tokyo\\_Japan\\_8-26-2016.pdf](http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Biofuels%20Annual_Tokyo_Japan_8-26-2016.pdf).

67. *Id.* Of special interest are algal cellulosic sources for jet fuel. A Tokyo venture firm that owns a farm in Okinawa hopes to produce as much as 125 million liters of algal biomass-based jet fuel annually by 2020.

68. JAPANESE MINISTRY OF ECONOMY, TRADE, AND INDUSTRY, STRATEGIC ENERGY PLAN (Provisional Translation) at 33 (Apr. 2014), *available at* [http://www.enecho.meti.go.jp/en/category/others/basic\\_plan/pdf/4th\\_strategic\\_energy\\_plan.pdf](http://www.enecho.meti.go.jp/en/category/others/basic_plan/pdf/4th_strategic_energy_plan.pdf).

69. See The Boeing Company, *Boeing, Japanese Aviation Industry Unveil Biofuel 'Roadmap' to 2020 Olympics*, (July 8, 2015), <http://boeing.mediaroom.com/2015-07-08-Boeing-Japanese-Aviation-Industry-Unveil-Biofuel-Roadmap-to-2020-Olympics> (citing Initiatives for Next Generation Aviation Fuels, *Roadmap for Establishing Supply Chain for Next-Generation Aviation Fuels*, July 2015, *available at* [http://aviation.u-tokyo.ac.jp/inaf/roadmap\\_en.pdf](http://aviation.u-tokyo.ac.jp/inaf/roadmap_en.pdf)) [hereinafter *Roadmap*].

70. See *Roadmap*, *supra* note 69, at 44–47.

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energy industry. The United States, on one side, has annual mandates that require production volumes by certain dates, and GOJ, on the other side, provides no deadlines or definitive numbers, acting merely as an active observer and facilitator in the economics of the industry. Especially considering changing political climates, only time will tell which approach will achieve the best result.<sup>71</sup>

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<sup>71</sup> See Steven Mufson, *EPA sets new biofuel targets. Troubled program could end up on Trump's chopping block*, WASH. POST (Nov. 23, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2016/11/23/epa-sets-new-biofuel-targets-troubled-program-could-end-up-on-trumps-chopping-block/?utm\\_term=.fa9bcd8085cf](https://www.washingtonpost.com/news/energy-environment/wp/2016/11/23/epa-sets-new-biofuel-targets-troubled-program-could-end-up-on-trumps-chopping-block/?utm_term=.fa9bcd8085cf).

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

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## **International Financial Products and Services**

ALAN B. RABKIN, IBRAHIM SATTOUT, JAMES STULL, LAURENT  
LEVAC, MOHAMED HASHISH, OSAMA AUDI, POUYAN BOHLOUL,  
AND WALTER STUBER<sup>1\*</sup>

### **I. Developments in Brazil<sup>2</sup>**

The procedures applicable to public tender offers for the total or partial voluntary acquisition of units issued by real estate investment funds (Fundos de Investimento Imobiliário – FII), executed through auction on the trading system of BM&FBOVESPA S.A. - Bolsa de Valores, Mercadorias e Futuros (BVMF), are presently regulated by BVMF Circular-Letter No. 050/2016-DP, dated May 31, 2016 (CL 50).<sup>3</sup> This type of transaction is known as Oferta Pública de Aquisição de Cotas (OPAC).

The OPAC will observe a number of principles for these transactions, including: (a) to be directed without distinction to all holders of units issued by the FII; (b) to be carried out in such a way as to ensure equal treatment to the recipients, allowing them adequate information as to the background of the FII and the offeror so that the recipients may have the necessary elements to decide about the acceptance of the OPAC; (c) to be represented by a Full Trading Participant or a Trading Participant authorized to trade by

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\* The committee editor of this Year In Review is Mohamed Hashish, Soliman, Hashish & Partners, Egypt. The authors are Alan B. Rabkin, USA, Ibrahim Sattout, ASAR- Al Ruwayeh & Partners, Kuwait, James Stull, King & Spalding, KSA and UAE, Laurent Levac, ASAR - Al Ruwayeh & Partners, Kuwait, Osama Audi, King & Spalding, KSA and UAE, Pouyan Bohلول, Iran, and Walter Stuber, Walter Stuber Consultoria Jurídica, Brazil. The International Financial Products and Services Committee is a very active and vibrant committee focusing on international and comparative legal, regulatory, and supervisory issues related to financial institutions worldwide. We are the primary committee of the Section that provides a broad look at worldwide financial laws, rules and regulations that community banks, commercial banks, investment banks, central banks, pension companies, insurance carriers, investment companies and related financial service providers care the most about. Our membership includes some of the finest financial services lawyers in the world and our world-wide focus is often cutting edge and very current and allows practitioners from within and outside of the United States to quickly and efficiently learn about U.S. laws and world-wide trends. Whether it is a cross-border merger of banks, the legality of Bitcoin in a country or the use of microfinancing in a region, we have the knowledge, programs and resources to assist you as a member of the Committee.

2. Authored by Walter Stuber, Walter Stuber Consultoria Jurídica, São Paulo, Brazil.

3. Edemir Pinto & Cícero Augusto Vieira Neto, *Circular Letter 050/2016-DP*, BM&FBOVESPA (May 31, 2016), available at [http://www.bmfbovespa.com.br/en\\_us/regulation/circular-letters-and-external-communications/](http://www.bmfbovespa.com.br/en_us/regulation/circular-letters-and-external-communications/). CL 50 was issued pursuant to the terms of article 6, section 3 of Instruction 472/2008, amended by Instruction 571/2015, by the Brazilian Securities and Exchange Commission (CVM). *Id.*



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BVMF (the intermediary institution), which should ensure the financial settlement of the OPAC and the payment of the acquisition of remaining units; (d) to be launched with uniform price and payment terms; (e) to be paid at sight and in currency; (f) to be executed through auction on the trading system of BVMF; and (g) to be allowed the conduct or interference of a competing OPAC formulated by a third party other than the offeror or person linked to the offeror.

For the purposes of CL 50, “person linked” means any individual, legal entity, fund, or universality of rights representing the same interest of another individual, legal entity, fund, or universality of rights. Consequently, “outstanding units” mean those units which are not owned by the offeror or any person linked to the offeror.<sup>4</sup>

The offeror, the intermediary institution, the persons linked to them involved in the OPAC (determined or designed), and the persons with whom they are working or assisting in any way will be restricted from trading units issued by the FII object of the offer, and they shall adopt appropriate procedures to ensure compliance with this restriction.

The prohibition of trading referred to above does not apply to the following situations: (a) negotiation on behalf of third parties; (b) operations clearly designed to track real estate reference indices; (c) transactions carried out as a market-maker pursuant to the CVM rules in force; or (d) discretionary portfolio management.

This restriction is applicable based on the protocol of the notice or disclosure to the market of the intention to carry out the offer or the date of the intermediation contract, whichever occurs first, until the close of the auction of the OPAC.

In order to obtain the request for authorization to perform the OPAC, the intermediary institution must send a number of documents and specific information depending on the structure of the OPAC. The competing OPAC shall occur within five days before the date of the auction by a price that it is at least 5 percent higher than the price of the OPAC. The subsequent offers must be at least 1 percent above the price of the highest bidder registered until then. The competing OPAC will acquire the minimum amount of 10 percent of the total units of the FII’s original offer, except if the original offer is made to acquire more than two-thirds of the units of the FII, in which case, the competing OPAC must have the same number of units as the original offer.<sup>5</sup>

The buyer interference at the auction will be allowed, provided that the same conditions applying to the competing OPAC are observed, other than the release of the public notice. The interested party that is willing to

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4. Walter Stuber, *Brazil: Procedures for Public Tender Offers for Brazilian Real Estate Investment Fund Units*, MONDAQ (June 9 2016), <http://www.mondaq.com/brazil/x/499100/Project+Finance+PPP+PFI/Procedures+For+Public+Tender+Offers+For+Brazilian+Real+Estate+Investment+Fund+Units>.

5. *Id.*

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interfere in the auction shall inform the Chief Operating Officer at BVMF of its intention, in addition to providing him with information about price, quantity of units, and complete data of the interfering party and of the intermediary institution. BVMF will have a period of ten business days to review the notice of the OPAC. The offeror will also have a period of ten business days from the receipt of the notice analyzed by BVMF to meet the requirements. After receipt of the notice of the OPAC with the requested changes, BVMF will have a deadline of three business days to authorize the holding of the auction of the OPAC.<sup>6</sup>

After examining the documentation and approval of the final version of the notice, the Chief Operating Officer of BVMF shall authorize the auction be held. Once the authorization to hold the OPAC is granted, the offeror shall forward the notice to the administrator of the FII in order to give notice of the offer to the unitholders through the disclosure of the notice on the website of the FII and develop and make public a reasoned opinion based on any OPAC for the issuance of units of the FII covering: (a) the convenience and opportunity of the offer as to the interest of all unitholders and the liquidity of their units; (b) the impact of the offer on any tax benefits applicable to the FII; (c) strategic plans disclosed by the offeror in connection with the FII; and (d) other points deemed to be relevant.

The FII administrator must express a reasoned opinion favorable or contrary to the acceptance of the OPAC, warning that each unitholder is responsible for accepting or not accepting the OPAC. The manifestation about the conditions of the offer will have to be made public until five days before the auction. Any manifestation of the FII manager whose units are the object of the OPAC, if published by the administrator, shall supply the obligation in the offer.

The deadline for disclosure of the notice is a maximum fifteen business days after the approval of BVMF. The deadline for completion of the auction after the disclosure of the notice is at least fifteen and no more than thirty business days. Should the offer be modified, the date of the auction may be extended if the change occurs after seven business days of the date of publication of the notice.

BVMF may determine at any time: (a) the disclosure of any additional information other than those laid down in CL 50; (b) the suspension of the OPAC procedure, if it is found that the identified irregularity can be corrected, keeping the suspension until such correction happens; or (c) the cancellation of the OPAC, if it concludes that the identified irregularity or illegality cannot be corrected. Exceptional situations, omissions, or cases not provided for in CL 50 will be decided by BVMF based on the particularities of the fact at hand.

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6. *Id.*

## II. Developments in Iran<sup>7</sup>

On March 17, 2016, the Islamic Republic of Iran (Iran) enacted for the first time a new law on Combating Terrorism Finance (Law)<sup>8</sup> that may be summarized as follows.

### A. METHODS OF FINANCING

Article 1 of the Law has put together a non-exclusive list of financing methods that constitute terrorist financing. The list is non-exclusive and encompasses a broad scope of financial activities. The list includes, *inter alia*, foreign currency smuggling, accepting assets or funds as charity, transfer of funds, purchase and sale of financial papers and credit, and direct or indirect opening of bank account.<sup>9</sup>

One example that has become widespread in the past few years around the world is fundraising for “start-ups” or fundraising for charities aiming at international humanitarian reliefs. This financing begs for a comprehensive and sophisticated due diligence and anti-corruption compliance program for the purpose of complying with the Law in order to detect suspicious activities and avoid violations of the Law, as well as to avoid audits or subpoenas.

### B. TERRORIST FINANCING CRIME

Commission of the following crimes with the knowledge and intent of affecting policy, decisions, or actions of Iran by organizations having a representative office in Iran or in other countries also constitutes terrorist financing and is punishable by the Law. These acts are:

- Committing or threatening to commit any act of violence such as murder, assassination, kidnapping, and hostage-taking of individuals;
- Knowing acts of violence or endangering the life or liberty of individuals with legal immunity;
- Sabotaging public assets and utilities of the public or private sector;
- Inflicting severe damage to the environment;
- Manufacturing, assuming ownership, transferring, carrying, keeping, distributing, stealing, acquiring by deceit, and smuggling of:
  - Pesticides;
  - Radioactive elements; and
  - Chemical, biological, and biochemical articles; or
- Manufacturing, acquiring, purchasing, selling, illegally using, or smuggling:
  - Explosives;
  - Guns; and

7. Authored by Pouyan Bohloul, Esq.

8. See The Law of Combating Financing of Terrorism (CFT law) of 17 Mar. 2016, art. 1 (Iran).

9. See *id.*

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- Ammunition.<sup>10</sup>

C. CONDUCTS ILLEGAL PER SE

Certain enumerated acts constitute terrorism financing per se regardless of the specific intent or the outcome of the case. But it is noteworthy that these crimes are separately punishable by Iranian law as well as under the current Law. These acts are:

- Commission of dangerous acts against the safety of aerospace, airplanes, and vessels;
- Commission of dangerous acts against the safety of crew and passengers;
- Piracy;
- Illegal possession or taking control of vessels, ports, and endangering the life of the crew; or
- Implanting bomb(s) in the public, government facilities, infrastructures, and public transportation facilities.<sup>11</sup>

D. INTERNATIONALLY RECOGNIZED TERRORIST CRIMES

Finally, article 1 of the Law recognizes terrorist crimes according to international conventions to which Iran is a signatory and to other Iranian laws and regulations as they may apply. Terrorism as described by the Law includes “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”<sup>12</sup> But as an important exception to the general rule of article 1, the legislator has delegated an important authority to the High National Security Council to identify and exempt nations, people, and groups who are fighting against foreign occupation, colonialism, and discrimination.<sup>13</sup>

E. COMPLIANCE MEASURES & THE DUTY TO INFORM

According to the Law, judicial authorities and law enforcement personnel under the direction of a judicial authority must identify and block the funds and assets procured and collected for terrorist activities.<sup>14</sup> All individuals and entities falling under the auspices of Iran Anti-Money Laundering law shall, for the period of no less than five years, maintain records of all suspicious transactions and customers.<sup>15</sup> Any suspicious activity shall be reported to the High Commission of Anti-Money Laundering for further action.<sup>16</sup> Failure

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

11. *Id.* art. 1(c).

12. 28 C.F.R. § 0.85(l) (2015).

13. The Law of Combating Financing of Terrorism (CFT law), *supra* note 8, art. 1, n. 2.

14. *See id.* arts. 5(a)-(b).

15. *Id.* arts. 13(a)-(b).

16. *Id.* art. 14.

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to report is deemed as an accessory to the crime and if the failure is due to negligence of the personnel, administrative penalties shall follow.<sup>17</sup> But it is prescribed that reporting such activities shall not constitute a violation of privacy laws and regulations.<sup>18</sup>

**F. PROSECUTION**

Generally speaking, Iran exercises long-arm jurisdiction in prosecuting matters of a criminal nature and has codified its extraterritorial reach in its penal code.<sup>19</sup> Therefore, if under an international convention or a special law, an accused should be prosecuted and sentenced in the country in which he or she was found. If he or she is found in Iran or extradited to Iran, he or she will be prosecuted and sentenced according to the Iranian laws.<sup>20</sup> The Law also provides that, upon reciprocity, Iran commits to prosecute and sentence a financier of a terrorist activity aimed at another country, regardless of the nationality of the accused, place of residence, or place of the commission of the crime.<sup>21</sup>

**G. SENTENCING**

A terrorist financier who is convicted under the Iranian laws, if not convicted as Mohareb or Efsad-e-fel-arz, shall be subject to a penalty from two to five years of imprisonment, expropriation of assets, and a civil fine from two to five times the value of the funds collected, payable to the local government.<sup>22</sup>

The presiding judge shall also, as part of the judgment, impose a complimentary punishment through deprivation of at least two social rights enumerated under Iran's Penal Code.<sup>23</sup> If the terrorist financing activities also lead to money laundering, the court shall impose the more severe of the two sentences.<sup>24</sup> Finally, assuming a leadership role in a terrorist financing scheme increases the sentence.<sup>25</sup>

**H. INTERNATIONAL COOPERATION**

Article 16 allows for the judicial and intelligence cooperation of the government of Iran with other countries in compliance with guidelines of article 77 of the Iranian Constitution. There is a great deal of debate left on the table around the enforceability of the Law at the moment. The debate

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17. *Id.* art. 14, n. 1.

18. *Id.* art. 14, n. 2.

19. See MAJMU'AH JAVANINI JAZAI [CODE OF CRIMINAL LAWS] Tehran 1392 [2013], arts. 8-9 (Iran).

20. See The law of Combating Financing of Terrorism, *supra* note 8, art. 11.

21. *Id.* art. 1, n. 1.

22. *Id.* art. 2.

23. *Id.* art. 6.

24. *Id.* art. 15.

25. *Id.* art. 7.

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derives from the language of Principle 77 of the Iranian Constitution that requires treaties, transactions, contracts, and all international agreements to be ratified by the Islamic Consultative Assembly.

### III. Developments in Saudi Arabia<sup>26</sup>

#### A. AMENDMENTS TO INVESTMENT FUNDS REGULATIONS

In May 2016, the Saudi Arabian Capital Market Authority (CMA) issued amended Investment Funds Regulations (New Funds Regulations) to replace the previous funds regulations issued in 2006.<sup>27</sup> These New Funds Regulations became effective on November 6, 2016. The CMA intends the New Fund Regulations to provide clarity and to encourage more managers to launch funds. These regulations have been a long time coming. It has been public knowledge for years that the CMA has intended to revamp the 2006 regulations in order to codify unwritten practices of the CMA to address problems of investor protection that arose during the financial downturn, and cover the launch of a diverse range of new funds, many of which were not contemplated by the 2006 regulations.

The processes for launching a private fund remains essentially unchanged, but the required documentation has been detailed, particularly regarding real estate funds. The process for launching a public fund, which has been opaque in the past, has been expanded, with managers required to prepare an information memorandum, the form of which is set out in the New Funds Regulations.<sup>28</sup> The information memorandum contains much greater disclosure requirements than the 2006 regulations.

Under the New Fund Regulations, the fund manager may not restrict investors of certain nationalities without the approval of the CMA. The CMA has indicated that the only restrictions it will apply will be those on private real estate funds, which invest in the cities of Mecca and Medina to Saudi Arabian nationals only.<sup>29</sup>

Further, all funds must have an independent custodian. Accordingly, the role of the custodian has been expanded so that they control cash flow. Previously, independent custodians were required only for public funds and real estate funds. This new requirement potentially adds significant costs to the fund, though the CMA has determined that the heightened protection for investors outweighs the costs.<sup>30</sup>

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26. Authored by James Stull and Osama Audi, King & Spalding LLP.

27. See generally *Real Estate Investment Funds Regulations*, CAP. MKT. AUTH. (July 15, 2006) (Saudi Arabia), [https://cma.org.sa/en/RulesRegulations/Regulations/Documents/REAL%20ESTATE%20INVE%20FUND%20REG\\_\\_.pdf](https://cma.org.sa/en/RulesRegulations/Regulations/Documents/REAL%20ESTATE%20INVE%20FUND%20REG__.pdf); *Investment Funds Regulations*, CAP. MKT. AUTH. (May 23, 2016) (Saudi Arabia), <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/IFRs%20Regulations-%20Final%20English.pdf>.

28. *Id.* art. 32.

29. *Id.* art. 8.

30. *Id.* art. 15.

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Administrators, advisers, and certain other corporate service providers performing activities in relation to a fund investing in Saudi Arabia must be licensed by the CMA.<sup>31</sup> The fund manager and its affiliates are not entitled to vote on any units they hold in an investment fund under the New Funds Regulations. Previously, the fund manager was treated equal to other third-party investors in the fund.<sup>32</sup>

Unitholders are also afforded statutory rights under the New Funds Regulations. Now the manager must obtain the consent of the unitholders prior to making material changes to the fund's documentation, such as changing the strategy or the risk profile or significantly increasing fees and expenses, which would reasonably be expected to cause the unitholders to reconsider participation in the fund.<sup>33</sup>

The fund manager may be removed by a supermajority vote of the unitholders and the process for replacing the fund manager has been clarified under the New Funds Regulations.<sup>34</sup> The 2006 regulations, by comparison, were silent on this issue, which created a grey area due to the nature of a CMA fund. A CMA fund is a contract between the manager and the investors. It had been widely assumed that if the manager was removed, the contract would become void, and, as such, the fund would be terminated.

**B. AMENDMENTS TO CAPITAL MARKETS AUTHORITY LISTING RULES**

In March 2016, the CMA adopted amendments and clarifications to the existing Listing Rules which clarified the CMA's existing practice.<sup>35</sup> Such clarifications include, among others, the issues summarized below.

1. Listed companies wanting to undertake a capital reduction are required to appoint legal and financial advisors to advise on such a reduction. Accordingly, the listed company must submit the letters of appointment of the legal and financial advisors to the CMA as part of the application with respect to the capital reduction.<sup>36</sup>
2. Listed companies who undertake capital increases for the purpose of acquiring a company or an asset are required to prepare legal and financial due diligence reports and submit such reports to the CMA.<sup>37</sup>
3. Listed companies or new issuers may now apply to the CMA for a waiver from disclosing a matter which the disclosure obligations under the Listing Rules would otherwise require to be disclosed. Such a waiver would only be granted if the listed company or issuer is

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31. *Id.* art. 13.

32. *Id.* art. 11.

33. *Id.* arts. 20, 40, 45.

34. *Id.* art. 14.

35. See generally *Listing Rules*, CAP. MKT. AUTH. (May 26, 2016) (Saudi Arabia), <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/ListingRules-En.pdf>.

36. *Id.* art. 7(a).

37. *Id.* art. 8(b)(2).

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of the opinion that disclosure would be harmful to the company and that non-disclosure would not mislead investors. If the CMA approves such non-disclosure it can, at a later stage, require the company to disclose the relevant information.<sup>38</sup>

4. Listed companies must now determine whether a public announcement is required to address rumors of “material developments” with respect to the listed company. The CMA has the right to require a company to make an announcement with respect to any such rumor.<sup>39</sup>

**C. REAL ESTATE INVESTMENT TRADED FUNDS INSTRUCTIONS**

In August 2016, the CMA released draft Real Estate Investment Traded Funds Instructions (REIT Regulations), which provide for certain public real estate funds to be listed on the Tadawul. These REIT Regulations were initially subject to a consultation period, which ended in late August, with final regulations adopted in October 2016.<sup>40</sup> The REIT Regulations allow managers to list public real estate funds on the Tadawul, subject to certain restrictions on the size of the funds, underlying assets, and distribution policies.

The REIT Regulations contemplate the listing of real estate funds (REITFs) on the Tadawul and are meant to focus on developed properties that generate periodic income. Such periodic income must at least be on an annual basis. At least 90 percent of the REITF’s net profits must be distributed annually to the unitholders.<sup>41</sup> REITFs must be closed-ended funds with a nominal value per unit of SAR 10.<sup>42</sup> The REITF manager must be a licensed CMA investment manager.

The REIT Regulations permit the underlying assets to have leverage. But leveraging should not exceed 50 percent of the total asset value of the REITF.<sup>43</sup> The REITF manager is required to appoint both an independent custodian<sup>44</sup> and a licensed property management company.<sup>45</sup> The custodian is to ensure that it segregates its assets from those belonging to the REITF and from the assets of its other clients. At least 75 percent of such investments must be in Saudi Arabia<sup>46</sup> in developed assets generating periodic income, resulting in the need to identify 75 percent of the assets

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38. *Id.* art. 19(e).

39. *Id.* arts. 40(d)-(e).

40. See generally *Real Estate Investment Traded Funds Instructions*, CAP. MKT. AUTH. (Oct. 24, 2016) (Saudi Arabia), <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/REITF%20Instructions%20en.pdf>.

41. *Id.* pt. 4, § B(3).

42. *Id.* § A(1).

43. *Id.* § B(5).

44. *Id.* pt. 3, § B.

45. *Id.* § G.

46. *Id.* pt. 4, § B(1).



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prior to launching the REITF.<sup>47</sup> The REIT Regulations require evidence of binding agreements in relation to the pre-identified income-generating properties.

The minimum amount to be raised is SAR 100,000,000<sup>48</sup> and must include at least fifty unitholders from the public, unrelated to the manager.<sup>49</sup> REITFs are not to invest in vacant land, but may invest up to 25 percent of the fund's assets in real estate development or the redevelopment of properties.<sup>50</sup>

#### **IV. Developments in Kuwait<sup>51</sup>**

The conducting of securities activities in Kuwait is governed by the Capital Markets Law (CML)<sup>52</sup> and the bylaws thereto (CML Bylaws and, together with the CML, the CML Rules). The CML Bylaws were amended at the end of 2015 by virtue of CMA Resolution No. 72 of 2015 (CML Amendments)<sup>53</sup> that contain significant amendments to the securities regulatory regime, and the impact thereof has been more fully assessed during 2016.

##### **A. REPO TRANSACTIONS**

The CML Amendments have for the first time introduced clarifications in the CML Bylaws with regard to repurchase transactions (repos). Article 8.11 of Module XI (Dealing in Securities) of the CML Bylaws now states that:

[c]ontracts for the sale of listed and unlisted Securities may state that the seller reserves the right to repurchase the Securities in return for payment of a certain amount during a specified period of time. Such contracts shall include an agreement to deposit the Securities concerned with a Custodian, who shall manage and dispose of them in accordance with the agreement between the seller and buyer. Such agreement shall be noted in the Securities register. Securities trading rules shall include provisions which regulate such agreements and these agreements shall

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47. *Id.*

48. *Id.* § A(2).

49. *Id.* § B(2)(a).

50. *Id.* § B(4).

51. Authored by Ibrahim Sattout (Partner) and Laurent Levac (Senior Associate), ASAR - Al Ruwayeh & Partners.

52. See generally *Law No. 7 of 2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities and its Amendments*, CAP. MKTS. AUTH. (Feb. 21, 2010) (Kuwait), <https://www.cma.gov.kw/documents/20622/347647/Law+No.+7+of+2010+-ew+logo/8468eb04-a890-4caa-81b1-0826adf37df8>.

53. See generally *Resolution No. (72) of 2015 the Issuance of the Executive Bylaws of Law No. 7 of 2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities and its Amendments*, CAP. MKTS. AUTH. (Nov. 12, 2015) (Kuwait), <https://www.cma.gov.kw/documents/20622/373579/Resolution+72/75b111a6-64dd-4bd5-9336-99425f6838fb>.

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be excluded from the trading rules of the listed Securities. The provisions of article (508) of the [Kuwait Civil Code] shall not apply to such contracts.<sup>54</sup>

Under the Law of Commerce,<sup>55</sup> upon the date of adjudication of bankruptcy, the court will fix a provisional date on which the suspension of payment of debts occurred. In the absence of such a determination, the date of adjudication of bankruptcy will be deemed the provisional date. Furthermore, the Law of Commerce<sup>56</sup> imposes a suspect/preference period. The suspect/preference period is that period of time starting from the suspension of debts and ending on the adjudication of bankruptcy. Accordingly, certain disposals, which the debtor makes after the date of suspension of payment and before the adjudication of bankruptcy, cannot be claimed against the general body of creditors and will be set aside automatically. The date of suspension of payment is a date fixed by the court based on the point in time at which the debtor has failed to make its payments as they become due.

Disposals that will be set aside include donations or gifts other than small presents that are customary, any kind of premature discharge of debt, payment of debts by any other manner than had been agreed upon prior to the suspension of payment, and every mortgage or other contractual security.<sup>57</sup> It may also include the instance where a vendor reserves a right to recover anything sold against restitution of the price and costs. In this instance, and in the absence of article 8.11 of Module XI (Dealing in Securities) of the CML Bylaws, such an agreement would be deemed to be a loan secured by a possessory mortgage in accordance with article 508 of the Kuwait Civil Code.

But the CML Bylaws now expressly exclude the application of article 508 of the Kuwait Civil Code<sup>58</sup> to repos and, therefore, repos should not set aside pursuant to the Law of Commerce.

**B. NEW DISTINCTION BETWEEN RETAIL AND PROFESSIONAL INVESTORS**

The CML Amendments have introduced a distinction in the CML Bylaws between retail and professional investors. More specifically, under the CML

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54. *Resolution No. (72) of 2015 Regarding Issuance of the Executive Bylaws of Law No. (7) of 2010 and its Amendments Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities, Module XI: Dealing in Securities*, CAP. MKTS. AUTH. art. 8.11 (Kuwait), <https://www.cma.gov.kw/pdfviewer/?file=/documents/20622/453321/Module+11-November+2016/fbf43db8-becc-4fd7-aafc-928955296bc4#page=1&zoom=page-fit,-22,849>.

55. See generally *Law No. 68 of 1980*, CAP. MKTS. AUTH. (Oct. 15, 1980) (Kuwait), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=196499](http://www.wipo.int/wipolex/en/text.jsp?file_id=196499).

56. See generally *id.*

57. There is currently no definition under the Law of Commerce for the term “other contractual security.” See generally *id.*

58. *Module XI: Dealing in Securities*, *supra* note 54.

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Amendments, a private placement of interests in collective investment schemes (i.e. investment funds) established outside of Kuwait can only be marketed to investors located in Kuwait (i.e. onshore of Kuwait) to a professional investor via a local agent.

Under the CML Bylaws, a professional investor is either a professional investor by nature or a professional investor by qualification. A professional investor by nature is now defined as: (a) a government, governmental institution, central bank, or international institution (World Bank or the IMF); (b) a Licensed Person or a regulated financial institution in Kuwait or outside of Kuwait; or (c) “a company with a paid-up capital of at least one million Kuwaiti Dinars or its equivalent.”<sup>59</sup> A professional investor by qualification is now defined as: (a) a person who trades in securities in large volumes and on average that is no less than 250,000 Kuwaiti Dinars in each quarter for the past two years; (b) an investor whose assets and funds with the Licensed Person are no less than 100,000 Kuwaiti Dinars; or (c) an investor who is working or had previously worked in the financial sector for at least one year in a position which requires knowledge of the provided services and transactions in the financial sector.<sup>60</sup>

**C. CUSTODIAN ACTIVITIES AS REGULATED SECURITIES ACTIVITIES**

In addition, the CML Rules regulate central depository systems and the treatment of client funds and assets. The CMA is the primary regulator which regulates all securities activities in Kuwait and licenses entities that engage in securities activities, including licensing and regulation of Kuwaiti central depositories and custodians of funds, collective investment schemes, and/or holding securities listed on the Kuwait Stock Exchange (KSE), collectively referred herein as Licensed Persons.

Pursuant to the CML Amendments, the definition of securities activities contained in the CML Bylaws has been amended to namely refer specifically to custodian activities. More specifically, the CML Bylaws<sup>61</sup> provide that the following activities are within the realm of securities activities:

- Security Exchange;
- Clearing Agency;
- Investment Portfolio manager;
- Collective Investment Scheme manager;

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59. *Resolution No. (72) of 2015 Regarding Issuance of the Executive Bylaws of Law No. (7) of 2010 and its Amendments Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities, Module I: Glossary*, CAP. MKTS. AUTH. at 25 (Kuwait), <https://www.cma.gov.kw/pdfviewer/?file=/documents/20622/453321/M+1+-+ec+2016/024f1605-35e4-4fb6-8f1f-515205dd7af3#page=1&zoom=page-fit,-22,849>.

60. *Id.* at 27.

61. *Resolution No. (72) of 2015 Regarding Issuance of the Executive Bylaws of Law No. (7) of 2010 and its Amendments Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities, Module 5*, CAP. MKTS. AUTH. art. 1.2. (Kuwait), <https://www.cma.gov.kw/pdfviewer/?file=/documents/20622/453321/Module+5+-+Jan+2017/004556c3-a594-4906-9e94-241e5ba4fa1f#page=1&zoom=page-fit,-22,849>.

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- Investment Advisor;
- Subscription Agent;
- Custodian;
- Market Maker;
- Securities Broker registered in the Securities Exchange;
- Securities Broker not registered in the Securities Exchange;
- Investment Controller;
- Credit Rating Agency;
- Valuation of Assets; and
- “Any other activities which the [the CMA] may specify.”<sup>62</sup>

The CML Amendments have clarified that any party (including the local Kuwait branch of a foreign bank or a subsidiary of a foreign bank) conducting custody activities in Kuwait would be required to obtain the appropriate license from the CMA in order to conduct such regulated activities and, as such, will be subject to the rules applicable to Licensed Persons under the CML Bylaws (namely with respect to client funds and assets).

**D. VOIDABILITY OF TRANSACTIONS ENTERED IN CONTRAVENTION OF THE CML RULES**

The CML now provides for the voidability of transactions entered in contravention to the CML Rules. More specifically, article 146 of the CML now provides that “[i]n all cases, the Disciplinary Council may cancel all transactions related to the violation and the entailed effects, or require the violator to pay amounts equal to the benefit he/she acquired or the value of the loss he/she avoided as a result of the violation. The amount may be multiplied if the Person repeats committing the violations.”<sup>63</sup>

**V. Developments in the United Arab Emirates<sup>64</sup>**

**A. UAE BANKRUPTCY REGULATIONS**

On September 20, 2016, the UAE Federal Law on Bankruptcy (Bankruptcy Law) was approved by the President of the United Arab Emirates (UAE).<sup>65</sup> The Bankruptcy Law became effective on December 31, 2016. Many of the points in the Bankruptcy Law will be clarified further in procedural regulations, which are anticipated to be issued by the UAE

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62. *Id.*

63. *Law No. 7 of 2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities and its Amendments, supra* note 52, ch. 11, art. 146.

64. Authored by James Stull and Osama Audi, King & Spalding LLP.

65. Vince Gordon, et al., *The New UAE Bankruptcy Law*, REED SMITH LLP (Nov. 23, 2016), <https://www.reedsmith.com/The-New-UAE-Bankruptcy-Law-11-23-2016/>. See generally Federal Law No. 9 of 2016 of 20 Sept. 2016 (U.A.E).

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Cabinet based on a proposal to be put forward by the UAE Minister of Finance.

1. *Application of the Bankruptcy Law*

The Bankruptcy Law will apply to: (a) companies subject to the Commercial Companies Law (i.e. most companies incorporated outside of the UAE free zones); (b) decree companies which are totally or partially owned by the federal or local Emirati governments and which stipulate in their bylaws, memorandum of association, or articles of association that they are subject to the law; (c) free zone companies save for companies incorporated in the financial free zones (i.e. the Dubai International Financial Centre or Abu Dhabi Global Market); (d) traders; and (e) professional civil companies (e.g. consultancies).<sup>66</sup>

2. *Committee of Financial Reorganization*

A Committee of Financial Reorganization will be formed which will be responsible for: (a) supervising financial reorganizations with the aim of reaching mutual agreement between debtors and creditors; (b) approving experts who will be tasked with undertaking the financial reorganization; (c) maintaining a register of individuals who are subject to financial reorganization; and (d) to the extent required, removing their legal capacity with respect to a company subject to a financial reorganization.<sup>67</sup>

3. *Two Forms of Protection: Preventative Composition vs. Bankruptcy*

Two forms of protection are set out in the Bankruptcy Law.

- a. Preventative composition, akin to a “pre-packaged bankruptcy,” can only be commenced by a debtor with the assent of creditors.<sup>68</sup> Such a preventative composition stays any bankruptcy filings while the filing debtor seeks court protection and assistance to reorganize its debts;<sup>69</sup> and
- b. The more serious bankruptcy procedure is akin to a court-supervised reorganization of a debt or, in certain circumstances, a liquidation of the assets of the relevant debtor for the benefit of creditors.<sup>70</sup> Unlike a preventative composition, a bankruptcy can only be triggered by the debtor or by creditors with ordinary debt of at least 100,000 AED (approximately 27,000 USD).<sup>71</sup>

While a preventive composition will not be permitted if the applicant has not paid its outstanding debts for a period greater than thirty days or is

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66. *Id.* art. 2.

67. *Id.* art. 3.

68. *Id.* art. 64.

69. *Id.* art. 65.

70. *Id.* art. 68.

71. *Id.* art. 69.

otherwise insolvent,<sup>72</sup> a bankruptcy will only be permitted if the debtor has stopped paying debts at its maturity date for more than thirty days.<sup>73</sup> In addition, in order to proceed to either a preventive composition or a bankruptcy, a debtor (or, in the case of a bankruptcy, a debtor or a creditor) must submit an application containing detailed information with respect to the debtor, anticipated cash liquidity, a list of creditors and debtors, assets of the debtor, and details of the debtor.<sup>74</sup>

With respect to a preventative composition, the debtor will also be required to deposit with the competent court (e.g. the Dubai courts) a sum of money or bank guarantee in an amount suitable to cover the expenses and costs of the court, the trustee nominated by the debtor, and any appointed expert. In a bankruptcy, the submitter of the request to commence bankruptcy proceedings shall be required to deposit 20,000 AED (5,500 USD) with the competent court to cover the court's costs and expenses unless they are waived by the court.<sup>75</sup>

#### 4. *Order of Priority of Debtors' Obligations*

The order of priority of debtors' obligations is clearly set out in the law with equality of priority being shared by: (a) judicial fees or charges including the fees of experts and the trustee; (b) employee entitlements, e.g. end of service entitlements, unpaid wages and salaries; (c) amounts due to UAE governmental bodies; (d) fees, costs, or expenses which arise with the aim of securing the debtors business after they file for the preventative composition or bankruptcy (this would presumably include legal fees though this is not explicitly set out).<sup>76</sup>

#### 5. *Suspension of Criminal Liability for Bounced Checks*

The commencement of preventative composition or bankruptcy by a debtor will stop any attempts to file criminal proceedings for a debtor who provided a bank check as a security in respect of any of their debt obligations.<sup>77</sup>

### B. INVESTMENT FUNDS REGULATIONS

In August 2016, the Emirates Securities and Commodities Authority (SCA), the federal securities regulator of the UAE, adopted new investment funds regulations (2016 Fund Regulations), which repealed the prior funds regulations (which were adopted in 2012 and amended in 2013), clarified the formation process for the establishment of locally-domiciled funds, and

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72. *Id.* art. 65.

73. *Id.* art. 68.

74. *Id.* art. 9.

75. *Id.* art. 76.

76. *Id.* art. 184.

77. *Id.* art. 212.

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introduced significant changes to the marketing of foreign-domiciled investment funds in the UAE.<sup>78</sup> The 2016 Fund Regulations impose substantial hurdles and costs<sup>79</sup> for managers seeking to promote foreign funds in the UAE and have generally been subject to negative feedback.

Managers wishing to market foreign funds onshore in the UAE now have far fewer options. They can register the fund with SCA and enter into a distribution arrangement with a locally licensed placement agent,<sup>80</sup> engage in reverse solicitation (where the investor inside the UAE initiates the transaction),<sup>81</sup> or rely on a private placement exemption when offering to sovereign entities.<sup>82</sup> Funds established in a free zone inside the UAE, including funds established in the Dubai International Financial Centre (DIFC) or the Abu Dhabi Global Market (ADGM), are considered by SCA to be foreign funds.<sup>83</sup>

**C. DIFC – INTERMEDIATE SPV REGIME**

The DIFC announced that it will soon issue regulations in relation to a new corporate form called an Intermediate SPV (ISPV).<sup>84</sup> The reference to intermediate implies that ISPVs will not be the primary holding entity, nor will they be actual operating entities further down the line in any relevant structure. In addition, only entities with a substantive presence in the DIFC will be permitted to establish ISPVs.

A party with a substantive presence in the DIFC can establish an ISPV as a joint venture vehicle so long as the entity with a substantive presence maintains control of the ISPV. Accordingly, ISPVs may be useful to regional family offices, holding companies, or funds with a presence in the DIFC in order to structure shareholder arrangements with respect to their various joint ventures or subsidiaries which are not wholly owned. The use of an ISPV will enable such parties to entrench enforceable shareholder arrangements without moving such arrangements offshore. The use of an ISPV could enable parties with a substantive presence in the DIFC to take advantage of the DIFC's flexible corporate laws, which are based on English

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78. See generally *The SCA Board of Directors' Chairman Decision No. (9/R.M) of 2016 Concerning the Regulations as to Mutual Funds*, SEC. & COMMODITIES AUTH. (June 6, 2016) (U.A.E.), <http://www.sca.gov.ae/mservices/api/regulations/GetRegulationByIdAsPdf/119>.

79. See generally *The Chairman of the Authority's Board of Directors' Decision No. (10/R. M) of 2016 Concerning the Fees of Mutual Funds*, SEC. & COMMODITIES AUTH. (June 6, 2016) (U.A.E.), <http://www.sca.gov.ae/mservices/api/regulations/GetRegulationByIdAsPdf/120>.

80. *The SCA Board of Directors' Chairman Decision No. (9/R.M) of 2016 Concerning the Regulations as to Mutual Funds*, *supra* note 78, art. 35.

81. *Id.* art. 2.

82. *Id.*

83. *Id.* art. 1.

84. The DIFC has not yet published draft or final regulations relating to the ISPV program, but some information is available on its website. *DIFC Non-Retail Activities*, DUBAI INT'L FIN. CTR., <https://www.difc.ae/operating/registrar-companies/non-financial-activities/non-retail-activities> (last visited Apr. 19, 2017). The information in this section is based on presentations provided by representatives of the DIFC.

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law and common law legal system, while also maintaining the favorable regulatory and tax treatment of a resident company of the Gulf Cooperation Council.

## **VI. Developments in the United States of America<sup>85</sup>**

### **A. CONSUMER FINANCIAL PROTECTION BUREAU (CFPB)**

The CFPB, an agency of the U.S. Government, was created as part of the major Dodd-Frank financial reform legislation in 2010, which adopted, amongst others, the following summarized significant rules and amendments in 2016 with regard to financial products and services.

#### *1. Transfer of Existing Regulations To CFPB Under the Dodd-Frank Act<sup>86</sup>*

On May 3, 2016, Title X of the Dodd-Frank Act transferred rulemaking authority for certain consumer financial protection laws to the CFPB. The CFPB republished the existing regulations implementing those laws as interim final rules with technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act.

#### *2. Mortgage Servicers May be Cited for Technology Failures<sup>87</sup>*

On June 22, 2016, the CFPB issued findings stating that some mortgage servicers continue to use failed technology that has already harmed consumers which could place an institution in violation of the CFPB's new servicing rules. In its examinations covering numerous mortgage servicers since the new CFPB rules took effect in January 2014, CFPB examiners have found repeated violations due to clearly deficient technology and process breakdowns. Specifically, examiners have observed problems with loss-mitigation and servicing transfers.

#### *3. Mortgage Servicing Safe Harbor Rules Under FDCPA<sup>88</sup>*

On August 4, 2016, the CFPB issued an interpretive rule to clarify the interaction of the FDCPA and certain mortgage servicing rules in Regulations X and Z. It provides safe harbors from FDCPA liability for servicers under certain circumstances.

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<sup>85</sup>. Authored by Alan B. Rabkin.

<sup>86</sup>. Dodd-Frank Act, 81 Fed. Reg. 25,323 (Apr. 28, 2016) (to be codified at 12 C.F.R. pts. 1002-03, 1005-16, 1022, 1024, 1026, 1030).

<sup>87</sup>. *Supervisory Highlights Mortgage Servicing Special Edition*, CONSUMER FIN. PROT. BUREAU 8 (June 2016), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Mortgage\\_Servicing\\_Supervisory\\_Highlights\\_11\\_Final\\_web\\_.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Mortgage_Servicing_Supervisory_Highlights_11_Final_web_.pdf).

<sup>88</sup>. Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (Oct. 19, 2016) (to be codified at 12 C.F.R. pts. 1024, 1026).



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4. *New Exam Procedures Under the Military Lending Act Rule Updated in 2015*<sup>89</sup>

On September 30, 2016, the CFPB issued the procedures its examiners will use in identifying consumer harm and risks related to the Military Lending Act rule, which was updated in July 2015. The exam procedures released by the CFPB provide guidance to industry on what the CFPB will be looking for during future reviews covering the amended regulation. In 2006, Congress passed the Military Lending Act to help address the problem of high-cost credit as a threat to military personnel and readiness.

5. *Final Rule Regarding Consumer Protections for Prepaid Accounts*<sup>90</sup>

On October 5, 2016, the CFPB issued a series of comprehensive consumer protections for prepaid accounts under Regulations E and Z, including tailored provisions governing disclosures, limited liability and error resolution, periodic statements, and the posting of account agreements. The final rule also regulates overdraft credit features that may be offered in conjunction with prepaid accounts.

6. *Protections for Foreign Remittance Transfers*<sup>91</sup>

On October 5, 2016, the CFPB released a final rule to correct certain clerical and non-substantive corrections to errors it had identified in Regulation E. Prior amendments to Regulation E, which became effective in 2013, provided new protections to consumers who send remittance transfers to other consumers or businesses in a foreign country.

B. THE FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC)

The FDIC, an agency of the U.S. Government, adopted, amongst others, the following summarized significant rules and amendments in 2016 with regard to financial products and services.

1. *Small Institution On-Site Examination Cycles*<sup>92</sup>

On March 4, 2016, the FDIC and the other federal financial institution regulatory agencies jointly adopted interim final rules permitting insured depository institutions (IDIs) with up to \$1 billion in total assets and that

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89. See generally *Military Lending Act (MLA), Interagency Examination Procedures—2015 Amendments*, CONSUMER FIN. PROT. BUREAU (Sept. 2016), [http://files.consumerfinance.gov/f/documents/092016\\_cfpb\\_MLAExamManualUpdate.pdf](http://files.consumerfinance.gov/f/documents/092016_cfpb_MLAExamManualUpdate.pdf).

90. Truth in Lending Act (Regulation Z), 12 C.F.R. pt. 1026 (2016); Electronic Fund Transfer Act (Regulation E), 12 C.F.R. pt. 1005 (2016).

91. *Id.*

92. *Examination Cycle: Joint Interim Final Rules and Request for Comments on Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks*, FDIC (Mar. 4, 2016), <https://www.fdic.gov/news/news/financial/2016/fil16017.pdf>.

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meet certain other criteria to qualify for an eighteen-month on-site examination cycle instead of a twelve-month cycle. The implementation of these rules allows the agencies to better focus supervisory resources on IDIs that present capital, managerial, or other issues of supervisory concern, while reducing regulatory burden on small, well-capitalized, and well-managed institutions.

2. *Deposit Insurance Assessments for Small Institutions*<sup>93</sup>

On April 26, 2016, the FDIC approved a final rule to improve the deposit insurance assessment system for small, established, and insured depository institutions (generally, those banks with less than \$10 billion in total assets that have been insured for at least five years). The final rule is effective July 1, 2016. If the reserve ratio of the Deposit Insurance Fund (DIF) reaches 1.15 percent before that date, the final rule will determine assessment rates beginning July 1, 2016. If the reserve ratio has not reached 1.15 percent by that date, the final rule will determine assessment rates beginning the calendar quarter after the reserve ratio reaches 1.15 percent.

3. *Cybersecurity and Wholesale Payment Network Risk*<sup>94</sup>

On June 7, 2017, the FDIC, as a member of the Federal Financial Institutions Examination Council (FFIEC), issued a statement advising financial institutions to actively manage the risks associated with interbank messaging and wholesale payment networks. Recent cyber-attacks have targeted interbank messaging and wholesale payment networks, resulting in large-dollar fraud at several foreign institutions. These attacks have demonstrated a capability to: (a) compromise the financial institution's wholesale payment origination environment and bypass information security controls; (b) obtain and use valid operator credentials to create, approve, and submit messages; (c) employ a sophisticated understanding of funds transfer operations and operational controls; (d) use highly customized malware to disable security logging and reporting, as well as other operational controls, to conceal and delay the detection of fraudulent transactions; and (e) quickly transfer stolen funds across multiple jurisdictions to avoid recovery. Financial institutions should conduct a risk assessment to determine whether effective risk-management practices and controls are in place. Institutions should consult their payment system provider's guidance for specific security control recommendations.

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93. *Statement of Martin J. Gruenberg Chairman, Federal Deposit Insurance Corporation on the Final Rule on Deposit Insurance Assessments for Small Banks*, FDIC (Apr. 26, 2016), <https://www.fdic.gov/news/news/speeches/spapr2616b.html>.

94. *See generally FFIEC Joint Statement on Cybersecurity of Interbank Messaging and Wholesale Payment Networks*, FDIC (June 7, 2016) <https://www.fdic.gov/news/news/financial/2016/fil16037.pdf>.

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4. *New Accounting Standard on Financial Instruments—Credit Losses*<sup>95</sup>

On June 17, 2016, the federal financial institution regulatory agencies issued a Joint Statement on the New Accounting Standard on Financial Instruments – Credit Losses regarding the Financial Accounting Standards Board’s new standard, which introduces the current expected credit losses methodology (CECL) for estimating allowances for credit losses. The joint statement also provides initial supervisory views regarding the implementation of the new accounting standard. This Financial Institution Letter applies to all FDIC-supervised banks and savings associations, including community institutions. Under CECL, the allowance for credit losses is a valuation account measured as the difference between the amortized cost basis of financial assets and the net amount expected to be collected on the assets (i.e., lifetime credit losses). The new accounting standard will take effect in 2020 or 2021, depending on the institution’s characteristics. It applies to financial assets carried at amortized cost, including loans held for investment and held-to-maturity securities. The standard allows expected credit-loss estimation approaches that build on existing credit risk-management systems and processes as well as existing methods for estimating credit losses. But certain inputs into these methods will need to change to achieve an estimate of lifetime credit losses. To estimate expected credit losses under CECL, institutions will use a broader range of data than under existing accounting standards. These data include information about past events, current conditions, and reasonable and supportable forecasts relevant to assessing the collectability of the cash flows of financial assets.

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<sup>95</sup>. *Joint Statement on the New Accounting Standard on Financial Instruments - Credit Losses*, FDIC (June 17, 2016), <https://www.fdic.gov/news/news/press/2016/pr16051a.pdf>.

## **International Investment and Development**

UCHE EWELUKWA OFODILE, TAMARI LAGVILAVA, QINGQING MIAO,  
SARAH OLIAI, GEORG DANIEL BIRBAUMER, JONATHAN BURNS,  
AMGAD HUSEIN, WILLIAM E. THOMSON, DYLAN MEFFORD,  
AND PERLETTE MICHÈLE JURA\*

### **I. Introduction**

This Article reviews 2016 developments in the field of international investment law and development. In addition to reviewing significant overarching developments in international investment rulemaking, the article highlights developments in seven countries: Bolivia, China, Cuba, Paraguay, Saudi Arabia, South Africa, and the United States.

### **II. International Investment Policy and Investment Policymaking**

The number of significant developments in the area of international investment policymaking that occurred in 2016 include the signing of comprehensive trade and investment agreements such as the Canada-European Union Comprehensive Economic and Trade Agreement, and the adoption of key policy instruments such as the *G-20 Guiding Principles for Investment Policymaking* and the *OECD/FAO Guidance for Responsible Agricultural Supply Chain*. As evident last year, 2016 was a continued push towards more responsible and more sustainable investment through the inclusion of sustainable development principles in investment agreements

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\* The Committee Co-Editors are Dr. Uche Ewelukwa Ofodile, the Arkansas Bar Foundation Professor of Law at the University of Arkansas School of Law in Fayetteville, Arkansas, and Zachary Walker, law clerk to the Honorable Delissa A. Ridgway, Judge of the U.S. Court of International Trade. Professor Uche Ofodile contributed Section II on International Investment Policy and Investment Policymaking and also Section VIII on South Africa. Tamari Lagvilava, law clerk to the Honorable Delissa A. Ridgway, Judge of the U.S. Court of International Trade, contributed Section III on the Trans-Pacific Partnership. Qingqing Miao, Associate at Lane Powell PC, contributed Section IV on China. Sarah Oliai, who recently completed a clerkship with the Honorable Delissa A. Ridgway, Judge of the U.S. Court of International Trade, contributed Section V on Cuba. Georg Daniel Birbaumer, Associate at Altra Legal in Asuncion, Paraguay and LLM Candidate at the Georgetown University Law Center, contributed Section VI on Paraguay. Jonathan Burns and Amgad Husein, both of Dentons, contributed Section VII on Saudi Arabia. William E. Thomson and Dylan Mefford, of Gibson Dunn & Crutcher LLP, contributed Section IX (A) on the United States of America. Perlette Michèle Jura and Dylan Mefford, of Gibson Dunn & Crutcher LLP, contributed Section IX(B) on the United States of America. Mauricio Becerra de la Roca Donoso, managing partner at Becerra de la Roca Donoso & Asociados, contributed a section on Bolivia that can be found in the Latin American Committee submission in this volume.

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and the reaffirmation of the government's right to regulate investment for legitimate public-policy purposes.

A. THE G-20 GUIDING PRINCIPLES FOR INVESTMENT  
POLICYMAKING

In July 2016, G20 Trade Ministers agreed to the *G20 Guiding Principles on Global Investment Policymaking* (G20 Guiding Principles).<sup>1</sup> The G20 Guiding Principles are a set of nine non-binding principles developed with the objective of “fostering an open, transparent and conducive global policy environment for investment,” “promoting coherence in national and international investment policymaking,” and “promoting inclusive economic growth and sustainable development.”<sup>2</sup>

In the G20 Guiding Principles, Trade Ministers recognize the critical role of investment as an engine of economic growth in the global economy and urge Governments to avoid protectionism in relation to cross-border investment.<sup>3</sup> The G20 Guiding Principles also declare that “[i]nvestment policies should establish open, non-discriminatory, transparent and predictable conditions for investment,”<sup>4</sup> “[i]nvestment policies should provide legal certainty and strong protection to investors and investments,”<sup>5</sup> dispute settlement procedures “should be fair, open and transparent, with appropriate safeguards to prevent abuse,”<sup>6</sup> “[r]egulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate,”<sup>7</sup> and “[i]nvestment policies and other policies that impact on investment should be coherent at both the national and international levels and aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth.”<sup>8</sup> The Guiding Principles also state that Governments have the right to regulate investment for legitimate public policy purposes,<sup>9</sup> “[p]olicies for investment promotion should . . . be effective and efficient, . . . and matched by facilitation efforts that promote transparency,”<sup>10</sup> “[i]nvestment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance,”<sup>11</sup> and that the international community “should continue to cooperate and engage in

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1. *Annex III: G20 Guiding Principles for Global Investment Policymaking*, <http://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>.

2. *Id.*

3. *Id.* principle I.

4. *Id.* principle II.

5. *Id.* principle III.

6. *Id.* principle IV.

7. *Id.* principle V.

8. *Id.* principle VI.

9. *Id.* principle VII.

10. *Id.* principle VIII.

11. *Id.* principle IX.

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dialogue with a view to maintaining an open and conducive policy environment for investment, and to address shared investment policy challenges.”<sup>12</sup> Altogether, the G-20 Guiding Principles touch on a number of important themes in investment policymaking that include non-discrimination, transparency, the right to regulate, and responsible business conduct.

**B. OECD/FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAIN**

For businesses, workers, local communities, governments and other stakeholders, risks arising along agricultural supply chains are many and growing. These risks include human rights, labour rights, health and safety, food security and nutrition, tenure rights over and access to natural resources, environmental protection, and governance. In March 2016, the Organization for Economic Co-operation and Development (OECD) and the Food and Agricultural Organization (FAO) jointly published the *OECD-FAO Guidance for Responsible Agricultural Supply Chains (Guidance)*.<sup>13</sup> The Guidance was developed “to help enterprises observe existing standards for responsible business conduct along agricultural supply chains.” The Guidance comprises four sections. In *Model enterprise policy for responsible agricultural supply chains*,<sup>14</sup> the Guidance provides “the major standards that enterprises should observe to build responsible agricultural supply chains.” In the *Five-step framework for risk-based due diligence along agricultural supply chains*,<sup>15</sup> the Guidance offers a framework for enterprises to implement in order to undertake risk-based due diligence along agricultural supply chains. In *Measures for risk mitigation and prevention along agricultural supply chains*,<sup>16</sup> the Guidance “identifies the risks of adverse impacts arising along agricultural supply chains and proposes measures to mitigate and prevent them.” Finally, in *Engagement with indigenous peoples*,<sup>17</sup> the Guidance offers direction on how businesses can engage in good-faith, effective, and meaningful consultations with indigenous communities.

**C. THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT**

The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) was signed on 30 October, 2016, at the EU-Canada Summit in Brussels.<sup>18</sup> Chapter 8, the investment chapter of CETA,

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12. *Id.* principle X.

13. OECD/FAO, *OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS* (OECD Publishing 2016), <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>.

14. *Id.* § 2.

15. *Id.* § 3.

16. *Id.* Annex A.

17. *Id.* Annex B.

18. Canada-European Union Comprehensive Economic and Trade Agreement, Can. – E.U., Oct. 30, 2016, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

addresses investment protection and promotion as well as the settlement of investment dispute. The investment chapter features standard rights and guarantees found in most bilateral investment treaties including, *inter alia*, the right to national treatment and most-favored nation (Articles 8.8 and 8.7), minimum standard of treatment for investors including “fair and equitable treatment” and “full protection and security” (Article 8.10), protection against expropriation or measures that are tantamount to expropriation (Article 8.12), and the right of investors to freely and without delay transfer capital and funds related to a covered investment (Article 8.13).<sup>19</sup>

Significantly, Chapter 8 of CETA includes an explicit reference to the right of State Parties to regulate in the public interest. In Article 8.9, State Parties explicitly “reaffirm[ed] their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.”<sup>20</sup>

One of the most unique and innovative features of the investment chapter is the new Investment Court System that will operate through a tribunal established under Article 8.27. Article 8.27(2) declares that the CETA Joint Committee “shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.” CETA also establishes an Appellate Tribunal charged with the function of review awards rendered under CETA (Article 8.28). The establishment of that Tribunal is a marked departure from the standard investor-State dispute settlement mechanism found in most BITs.<sup>21</sup>

### III. Trans-Pacific Partnership

While the text of the Trans-Pacific Partnership (TPP) was released in late 2015, the past year provided the public with time to understand more about the TPP’s many chapters and provisions.<sup>22</sup> This section focuses on Chapter 9 of the TPP, which is the agreement’s investment chapter.<sup>23</sup>

Similar to the NAFTA, the TPP’s investment chapter has a two-part structure where Section A (Articles 9.1-9.6) contains the substantive investment protection clauses, and Section B (Articles 9.17-9.29) sets out the

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19. *Id.* arts. 8.7, 8.8, 8.10, 8.12, 8.13.

20. *Id.* art. 8.9.

21. *Id.* arts. 8.27, 8.28.

22. The following twelve states are signatories to the TPP: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and the Socialist Republic of Vietnam. *Summary of the Trans-Pacific Partnership*, OFFICE OF THE U. S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (last visited Apr. 4, 2017).

23. See Trans-Pacific Partnership, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

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investor-state arbitration provisions. While the TPP's investment chapter builds on the framework of existing bilateral investment treaties (BITs), it also offers more comprehensive protections.

Section A includes standard investment provisions such as fair and equitable treatment (FET), and most favored nation (MFN) treatment, as well as protections against expropriation without compensation and performance requirements. Article 9.6 sets out the minimum standard of treatment that closely follows the United States Model BIT. That standard provides that each party must accord to covered investments fair and equitable treatment, full protection, and security under customary international law. The TPP limits state party's potential exposure to the violation of the fair and equitable treatment standard in two ways. First, Article 9.6(4) provides that a host state's failure to take an action that may be inconsistent with investor's expectations does not constitute a breach of FET, even if loss or damage to the covered investment is the result. Second, under Article 9.6(5), "[T]he mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of [FET], even if there is loss or damage to the covered investment as a result."<sup>24</sup>

The MFN provision in Article 9.5 has standard language where the host state agrees not to give preferential treatment to investment from some states over others.<sup>25</sup> Article 9.8 on expropriation contains language against expropriation and nationalization of investment by the host state.<sup>26</sup> Like other BITs, TPP does not completely prohibit expropriation of investment by the host country, but does require any expropriation to be nondiscriminatory, for public purpose, and that investor be provided with due process and fair compensation. Unlike most treaties, TPP does not allow host states to "grandfather" nonconforming expropriation measures.

Article 9.10 prohibits the host state from imposing performance requirements to benefit its domestic industry. TPP provides an important protection of intellectual property by barring the host state from demanding that investors transfer technology, production processes, or other proprietary knowledge.<sup>27</sup>

Section B of the TPP, the investor-State dispute settlement (ISDS) provisions, closely resembles the US Model BIT and the NAFTA, but provides a more sophisticated dispute settlement mechanism. The TPP allows the host state to bring a counterclaim in connection with the factual and legal basis of the claim. The counterclaim must not raise issues unrelated to the investor's original claim.

The TPP's ISDS provisions focus on transparent and efficient resolution of disputes. For example, TPP allows acceptance of *amicus curiae*

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24. *Id.* art. 9.6.

25. *Id.* art. 9.5.

26. *Id.* art. 9.8.

27. *Id.* art. 9.10.



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submissions and provides more detailed guidelines for selection and codes of arbitrators's conduct. In addition, parties are required to make certain submissions available to the public. In an effort to streamline the arbitration procedure, the TPP provides for a speedy disposal of unmeritorious claims. Unlike some other investment treaties, under the TPP's ISDS mechanism, investors bears the burden for proving all elements of their claims.

The TPP's investment chapter is not without its critics. The focus of most of the controversy has been the host states' irrevocable consent to submit to investor-state arbitration. In the United States, many have lamented that the ISDS infringes on the sovereignty of host states because it provides no appeal procedure for national courts.<sup>28</sup> Some have been concerned about the host states' inability to hold the investors responsible for harm to the host state by bringing an arbitration claim.<sup>29</sup> Others assert that the TPP's investment chapter does not go far enough to promote sustainable investment, combat corruption, and support development.<sup>30</sup>

The TPP was signed on February 4, 2016, in Auckland, New Zealand. Even with the signing, the TPP will likely face a two-year ratification period and much uncertainty. According to Article 30.5(1) of the TPP, the Agreement will enter into force sixty days after the date on which all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures. Pursuant to Article 30.5(2), if all original signatories have not made the required notification within a period of two years of the date of signature of the Agreement, the Agreement will enter into force "if at least six of the original signatories, which together account for at least 85 percent of the combined gross domestic product of the original signatories in 2013 have notified the Depositary in writing of the completion of their applicable legal procedures within this period."<sup>31</sup>

#### IV. China

In 2016, China undertook various steps to simplify and streamline administrative control over foreign investment enterprises.

On September 3, 2016, the Standing Committee of the National People's Congress resolved to amend (the 2016 Amendments) four laws currently governing foreign-invested enterprises (FIEs) that include the Sino-Foreign Equity Joint Venture Law, the Sino-Foreign Cooperative Joint Venture Law, the Wholly Foreign-Owned Enterprise Law, and the Law on the

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28. José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard?"*, IILJ WORKING PAPER 2016/3, at 9, [https://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/03/Alvarez\\_IILJ-MegaReg\\_2016-3.pdf](https://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/03/Alvarez_IILJ-MegaReg_2016-3.pdf).

29. *Id.*

30. Nathalie Bernasconi-Osterwalder, *How the Investment Chapter of the Trans-Pacific Partnership Falls Short*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT BLOG (Nov. 6, 2015), <https://www.iisd.org/blog/how-investment-chapter-trans-pacific-partnership-falls-short>.

31. Trans-Pacific Partnership, art. 30.5, Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Final-Provisions.pdf>.

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Protection of Investments by Taiwan Compatriots.<sup>32</sup> The Amendments were to take effect on October 1, 2016.<sup>33</sup>

On the same day the 2016 Amendments were announced, the Ministry of Commerce of the People's Republic of China (MOFCOM) published the draft Interim Measures on Administering the Establishment and Filing of Corporate Change of Foreign Investment Enterprises (Interim Measures) to seek public comments. The final Interim Measures were promulgated on October 8, 2016.<sup>34</sup> The 2016 Amendments intend to streamline and relax administrative control over the establishment and operation of Foreign Invested Enterprises (FIE).

One should note that in January 19, 2015, the MOFCOM released for public comments the proposed Foreign Investment Law (the Draft Law) along with the official explanation of the Draft Law.<sup>35</sup> The Draft Law would have replaced the FIE Laws. Nevertheless, as of November 2016, the Draft Law still has not yet been passed and there is not a clear date for its passage.<sup>36</sup> The 2016 Amendments resemble some of the highlighted changes in the Draft Law.

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32. *Shangwubu guanyu "Waishang Touzi Qiye Sheli ji Biangeng Bei'an Guanli Zanxing Banfa (zhengqiu yijian gao)" Gongkai Zhengqiu Yijian de Tongzhi*

(商务部关于《外商投资企业设立及变更备案管理暂行办法》(征求意见稿)公开征求意见的通知) [Ministry of Commerce of People's Republic of China's Call for Public Comments on "Interim Measures on Administering the Establishment and Filing of Corporate Change of Foreign Investment Enterprises (Draft for Public Comments)"], DEPT. OF TREATY AND LAW (June 9, 2016 12:00 PM), <http://tfs.mofcom.gov.cn/article/as/201609/20160901384826.shtml>.

33. *Id.*; *Quanguo Renmin Daibiao Dabui Changwu Weiyuanhui Guanyu Xiugai "Zhonghuarenmingongbeguo Waiziqiyefa" Deng Sibufalv de Jieding*

(全国人大常委会常务委员会关于修改《中华人民共和国外资企业法》等四部法律的决定) [the Standing Committee of the National People's Congress's Resolution on Amending the Law of Foreign Investment Enterprises and Three Other Laws], (promulgated by Standing Comm. Nat'l People's Cong., Sep. 3, 2016, effective Oct. 1, 2016), <http://law.npc.gov.cn/FLFG/flfgByID.action?flfgID=35942870&zlsxid=11> [hereinafter *the Consent*].

34. *Zhonghua Renmin Gonghe Guo Shangwu Bu Ling 2016 Nian di 3 Hao «Waishang Touzi Qiye Sheli ji Biangeng Bei'an Guanli Zanxing Banfa»*

(中华人民共和国商务部令2016年第3号《外商投资企业设立及变更备案管理暂行办法》) [Ministry of Commerce of People's Republic of China 2016 No.3 Order "Interim Measures on Administering the Establishment and Filing of Corporate Change of Foreign Investment Enterprises"], MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.mofcom.gov.cn/article/b/f/201610/20161001404974.shtml>.

35. *Shangwubu jiu "Zhonghua Renmin Gongheguo Waiguo Touzifa (cao'an zhengqiu yijian gao)" Gongkai Zhengqiu Yijian* (商务部就《中华人民共和国外国投资法(草案征求意见稿)》公开征求意见)

[Ministry of Commerce of the People's Republic of China's Call for Public Comments on the "People's Republic of China Foreign Investment Law (draft for public comments)], DEPT. OF TREATY AND LAW, <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>.

36. Ming Liu (刘明), *Waishang Touzi Guanli Tizhi Yinglai Zhongda Biange* (Xia) (外商投资管理体制迎来重大变革(下)) [Major Changes Expected in Foreign Investment Regulatory Regime (Part II)], COMNEWS (Nov. 01, 2016, 9:12 PM), <http://www.comnews.cn/focus/581894aacd91896ccc23ed67?locale=zh-CN>.

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A. THE 2016 AMENDMENTS

The 2016 Amendments replace the government approval procedure for all foreign investments with a more streamlined and simplified filing-only process.<sup>37</sup> For foreign invested enterprises (the “FIEs”) whose business scope does not fall into the industries that are restricted or prohibited (the “Negative List”), the establishment and certain corporate changes no longer need an application for preliminary approval from the authority.<sup>38</sup>

The Catalogue of Industries for Guiding Foreign Investment, which underwent major revisions in 2015, sets forth the “Negative List” and other categories.<sup>39</sup>

B. THE INTERIM MEASURES

The Interim Measures detail the filing procedure for companies whose business is not on the “Negative List.”<sup>40</sup> The preliminary approval requirement for the industries on the “Negative List” remains unchanged.

FIEs not on the “Negative List” can complete the record-filing online for corporate establishment or changes with the respective bureau of commerce with jurisdiction.<sup>41</sup> Newly established FIEs should submit record-filing materials online either before obtaining their business license or within thirty days after the issuance of the business license.<sup>42</sup> The record-filing of newly established enterprises should be completed before the issuance of a business license (but after pre-approval of the FIE’s name) or within thirty days after the issuance of a business license.<sup>43</sup>

Corporate changes include name or registered address change, change in type of entity, change in duration of operations, change in business scope, capital change, organizational change, change in controlling person,

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37. See *the Consent*, *supra* note 33.

38. Giovanni Pisacane, *Less Bureaucracy for Foreign Investments Will Make China Even More Competitive*, SHANGHAI DAILY (Sep. 29, 2016), <http://www.shanghaidaily.com/opinion/foreign-perspectives/Less-bureaucracy-for-foreign-investments-will-make-China-even-more-competitive/shdaily.shtml>.

39. See, *the Consent*, *supra* note 33; Zhonghua Renmin Gongheguo Guojia Fazhanhe Gaige Weiyuanhui Zhonghua Renmin Gongheguo Shangwubu Gonggao (中华人民共和国国家发展和改革委员会中华人民共和国商务部公告2016年第22号) [the MOFCOM and National Development and Reform Commission Joint 2016 No. 22 Announcement], NAT’L DEV. AND REFORM COMM’N, [http://www.ndrc.gov.cn/zcfb/zcfbgg/201610/t20161008\\_821973.html](http://www.ndrc.gov.cn/zcfb/zcfbgg/201610/t20161008_821973.html).

40. Ministry of Commerce of People’s Republic of China 2016 No.3 Order “Interim Measures on Administering the Establishment and Filing of Corporate Change of Foreign Investment Enterprises”, *supra* note 34, art. 2.

41. *Id.* arts. 5 – 6.

42. *Id.* art. 5.

43. *Id.*

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dissolution, merger or division, or equity transfer.<sup>44</sup> The FIEs need to submit the online record-filing form within thirty days after the change.<sup>45</sup>

When reviewing the record-filing submission, the bureau of commerce is only responsible for reviewing the completeness, accuracy, and authenticity of the submission, as well as determining whether the business falls in the “Negative List.”<sup>46</sup> The bureau of commerce is expected to complete their reviewing within three business days.<sup>47</sup> The FIEs may obtain Record-Filing Acknowledgement after the review is complete.<sup>48</sup>

The bureaus of commerce reserve the authority to conduct random inspections and audits.<sup>49</sup> FIEs are subject to civil penalties for failing to comply with the requirements specified in the Interim Measures.<sup>50</sup>

Although the 2016 Amendments and Interim Measures are less expansive than the Draft Law that would have overhauled the regulatory scheme of foreign investments in China, they effectively eliminate the preliminary administrative approval requirements for many FIEs. Amid uncertainties in the domestic and global economy, the Chinese government demonstrates its continued willingness to attract foreign investments.

## V. Cuba

“Cultivo una rosa blanca’ . . . I have come here to bury the last remnant of the Cold War in the Americas.”<sup>51</sup> Quoting the famous Cuban poet José Martí in his speech in Havana, President Barack Obama’s March 2016 visit to Cuba marked the first such visit by a sitting United States president in eighty-eight years.<sup>52</sup> This past year also saw several regulatory changes on the path toward normalization between the United States and Cuba that focused on creating opportunities for investment and development in and trade with Cuba. Scheduled air services between the United States and Cuba resumed earlier this year.<sup>53</sup> The Obama administration also eased travel restrictions and limits of the use of American dollars in transactions

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44. *Id.* art. 6.

45. *Id.*

46. *Id.* art. 19.

47. *Id.* art. 11.

48. *Id.* art. 12.

49. *Id.* art. 14.

50. *Id.* arts. 24 – 27.

51. *Remarks by President Obama to the People of Cuba*, WHITE HOUSE (Mar. 22, 2016, 10:10 AM), <https://www.whitehouse.gov/the-press-office/2016/03/22/remarks-president-obama-people-cuba>.

52. Claire Felter, Danielle Renwick, Brianna Lee & James McBride, *CFR Backgrounders: U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS (Sept. 7, 2016), <http://www.cfr.org/cuba/us-cuba-relations/p11113>.

53. *Treasury and Commerce Announce Significant Amendments to the Cuba Sanctions Regulations Ahead of President Obama’s Historic Trip to Cuba*, U.S. DEPT. OF TREASURY (Mar. 15, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/jl0379.aspx>.

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with Cuba and will allow travel to Cuba for “people to people” educational trips.<sup>54</sup>

In addition to permitting certain types of United States-dollar transactions, the Treasury Department’s Office of Foreign Assets Control (OFAC) eased banking restrictions to permit United States banks to process “U-turn” transactions.<sup>55</sup> This easing of restrictions is important to promoting investment and development in Cuba because it allows third-country commerce involving Cuba or Cuban nationals to be processed in United States dollars and through the United States financial system via United States financial institutions located in the United States that serve as intermediary banks.<sup>56</sup> Certain types of goods and services may now also be imported to the United States provided they were produced by independent Cuban entrepreneurs. Such goods and services include Cuban-origin software and mobile apps.<sup>57</sup>

Despite successful programs fighting hunger, food security remains a concern in many poorer regions of Cuba.<sup>58</sup> Recent developments may help alleviate these concerns. Earlier in 2016, OFAC approved the first American manufacturing plant in the country since 1959.<sup>59</sup> The company aims to begin production of small, low-maintenance tractors (with parts sourced from the United States) for small, private farmers in Cuba to increase agricultural production.<sup>60</sup>

2016 has also seen important opportunities for information sharing and research collaboration between the United States and Cuba. OFAC authorized certain transactions related to Cuban-origin pharmaceuticals and joint medical research, and President Obama instructed the Department of Health and Human Services to partner with the Cuban Ministry of Public Health in joint research for developing vaccines and treatments, and

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54. *Id.*; Julie Hirschfeld Davis, *U.S. Eases Restrictions on Travel to Cuba and Bank Transactions*, N.Y. TIMES (Mar. 15, 2016), <http://www.nytimes.com/2016/03/16/us/politics/white-house-cuba-restrictions.html>.

55. U.S. Department of the Treasury, *U.S. Department of the Treasury Frequently Asked Questions Related to Cuba*, at 12, 13 – 18, [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba\\_faqs\\_new.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf) [hereinafter *Updated OFAC Cuba FAQs*].

56. *Id.* at 12.

57. *Id.* at 21 – 22.

58. Elena L. Pasquini, *Cuba’s Development Priorities in the New Landscape*, DEVEX (Feb. 19, 2016), <https://www.devex.com/news/cuba-s-development-priorities-in-the-new-landscape-87683>.

59. Susan Adams, *The Unlikely Entrepreneurs Behind Cuba’s First U.S. Factory Since the Revolution*, FORBES (Feb. 16, 2016, 4:11 PM), <https://www.forbes.com/sites/forbestreptalks/2016/02/16/the-unlikely-entrepreneurs-behind-cubas-first-u-s-factory-since-the-revolution/#433f6ab741dd>.

60. *See id.*; Harold Sirkin, *Entrepreneurs Find Fertile Ground in Cuba*, FORBES (Nov. 17, 2016, 9:31 AM), <https://www.forbes.com/sites/haroldsirkin/2016/11/17/entrepreneurs-find-fertile-ground-in-cuba/#883ded53c499>.

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controlling cancer and infectious disease outbreaks.<sup>61</sup> The United States Department of Agriculture further announced approval of industry-funded research programs between the United States and Cuban agricultural sectors to engage in cooperative research and information exchanges about agricultural productivity, food security, and sustainable natural resource management.<sup>62</sup> OFAC also added a general license permitting provision of services related to repairing, maintaining, or enhancing Cuban infrastructure across multiple sectors.<sup>63</sup>

While there are critics in the Cuban government who counter that these recent measures since 2014 have not made a positive impact on Cuba's economy,<sup>64</sup> the measures from this year alone remove significant barriers to trade with and development in Cuba.<sup>65</sup>

## VI. Paraguay

In 2016, Paraguay has continued its efforts to attract international investors. Compared to its neighbors, Brazil and Argentina, Paraguay is a small country geographically. Despite its relative small size, Paraguay has excelled in the World Bank's Doing Business Ranking.<sup>66</sup> Paraguay's performance in the Doing Business Ranking is the result of a diverse set of factors. Nevertheless, some of the most important ones are recent changes in law and policy, which have been carried out with an eye towards foreign investment.

The Government of Paraguay has encouraged companies to invest in Paraguay through the *maquila* regime.<sup>67</sup> The main feature of the *maquila* regime is the tax regime.<sup>68</sup> Between 2013 and 2016, over seventy-one

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61. U.S. Dept. of Treasury, *Treasury and Commerce Announce Further Amendments to Cuba Sanctions Regulations* (Oct. 14, 2016), at 1 – 2, [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba\\_fact\\_sheet\\_10142016.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_fact_sheet_10142016.pdf).

62. *Agriculture Secretary Vilsack Announces Historic Agreements for U.S.-Cuba Agriculture Sectors*, U.S. DEPT. OF AGRICULTURE (Mar. 21, 2016), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2016/03/0069.xml>.

63. *Updated OFAC Cuba FAQs*, *supra* note 45, at 28.

64. Michael Weissenstein, *Cuba Says Obama's Easing of Embargo Hasn't Helped Economy*, THE BIG STORY (Sept. 9, 2016, 9:56 PM), <http://bigstory.ap.org/article/ae499dfddbf549998cce488dd3021e90/cuba-says-obamas-easing-embargo-hasnt-helped-economy>.

65. Meredith Rathbone, Peter Jeydel, Edward Krauland, Jack Hayes and Stephen Heifetz, *Partial Opening of US Financial System to Cuba and Easing of Other Trade Restrictions*, STEPTOE & JOHNSON LLP (Mar. 23, 2016), <http://www.steptoelaw.com/publications-11148.html>.

66. Paraguay is ranked 15 in the Latin American & Caribbean Ranking. Brazil and Argentina are ranked 22 and 18 respectively. See WORLD BANK GROUP, DOING BUSINESS 2017 EQUAL OPPORTUNITY FOR ALL, <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf>.

67. See generally MAQUILA PARAGUAY, <http://maquila.gov.py/EN/> (last visited Dec. 4, 2016).

68. Law No. 1064, Jul. 2, 1997, at Chapter IX, Article 29 (Para.), <http://maquila.gov.py/EN/leyes-relacionadas-a-la-maquila.php>.

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companies have begun operations under the *maquila* regime.<sup>69</sup> In addition, in recent years, new industries, including large slaughterhouses, have been opened, and the grain export business has been strengthened.

A. LAW 5542/2015

In the last several years, Paraguay has passed a number of new laws aimed at attracting foreign investors. The most recent, Law 5542/2015 on “*Guarantees for Investment and the Promotion to Job Creation and Economic and Social Development*,” was passed in December 2015.<sup>70</sup> The regulatory decree for Law 5542/2015 remains pending. The law will, however, improve the existing guarantees and benefits given by Law 117/1991 “[o]f Investments,” as well as those of Law 60/1990 that “[e]stablishes the Regime of Tax Incentives for Foreign and National Investment.” This section details investments covered by Law 5542/2015 and investor’s rights under it.

1. *Covered Investments*

The assets covered as investments under Law 5542/2015 are (a) national or foreign currency, and (b) tangible assets or technology. In order for the investor to enjoy the law’s benefits, there must be an investment agreement entered into between the investor and the company.<sup>71</sup>

2. *Investor Rights*

In the Second Chapter, the law spells out several specific rights that investors have under the legislation. But these rights can be divided into three main categories: (a) right to transfer abroad the capital—two years after the project initiated—and utilities that the project generates, (b) income tax rate stability, and (c) other rights.<sup>72</sup>

a. *Transfer of Capital and Profit*

Capital gains may be sent abroad under Law 5542/2015 when they come from the selling of shares or representative rights. If the equity transfer leads to the Paraguayan based company’s liquidation, the investor must pay the tax exoneration that existed at the time of importation. If this requirement is met, however, the transfer will be exempt from any tax, levy, or any other fee up to the invested amount stated in the contract. Profits, on the other hand, can be transferred abroad at any time.<sup>73</sup>

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69. See MINISTERIO DE INDUSTRIA Y COMERCIO [Ministry of Industry and Commerce], *Consideraciones Sobre Informe del Banco Central del Paraguay acerca de flujos de Inversión Extranjera Directa* [Considerations regarding the Paraguay Central Bank Report about Foreign Direct Investment flow] (2016), [http://www.mic.gov.py/mic/site/mic/pdf/destacados/INFORME\\_BCP\\_09\\_2016.pdf](http://www.mic.gov.py/mic/site/mic/pdf/destacados/INFORME_BCP_09_2016.pdf).

70. See generally Law No. 5542, Dec. 11, 2015 (Para.).

71. *Id.*

72. *Id.*

73. *Id.*

b. Income Tax Rate Stability

Among the major benefits or rights that the investor has under the new law is that the income tax levied on the activity shall remain stable. The length of time that the income tax shall remain stable depends on the invested amount. The general rule is ten years of income-tax stability if the investment is up to USD 50,000,000. The period shall extend to fifteen years for investments above USD 50,000,000 and less than USD 100,000,000. Finally, the income tax shall remain stable for twenty years if the investment is equal to or more than USD 100,000,000.<sup>74</sup>

c. Other Rights

Investments with high social impact receive additional benefits under the law. Whether a particular investment meets the social impact criteria will be decided after reviewing a number of criteria that include the work force to be used, the industrialization level, and the environmental friendliness of the project. The benefits to industries with high social impact include: (1) an exemption of the 5 percent additional income tax rate on the distribution of profits; and (2) a decrease of the 15 percent additional tax rate applied on the remittance of profits abroad at a rate of 1 percent for every 100 employment positions directly created. The job creation tax benefit is capped at up to a maximum of 50 percent of the total value of the applicable rate.<sup>75</sup>

Finally, the law provides the possibility to use arbitration, based on UNCITRAL Model Law, as a dispute resolution mechanism. Nevertheless, based on the drafting, one could argue that the arbitration seat must be Paraguay.<sup>76</sup>

## VII. Saudi Arabia

### A. OWNERSHIP OF SECURITIES

Saudi Arabia's Capital Market Authority (CMA) has historically forbade trading on Saudi Arabia's sole securities exchange, *Tadawul*, and direct ownership of Saudi Arabian listed securities by non-citizens of Gulf Cooperation Council (GCC) member-states. Nonetheless, on May 4, 2015, the CMA issued Rules for Qualified Foreign Financial Institutions Investment in Listed Shares (the "QFI Rules"), which allowed "Qualified

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74. *Id.*

75. *Id.*

76. See IBA, IBA SUBCOMMITTEE ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS, 2016 RESEARCH PROJECT: COMPARATIVE STUDY OF 'ARBITRABILITY' UNDER THE NEW YORK CONVENTION, QUESTIONNAIRE FOR THE COUNTRY REPORTERS – PARAGUAY (2016).



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Foreign Investors” (QFIs) to invest in listed shares that were subject to limits and restrictions.<sup>77</sup>

The CMA issued Amended QFI Rules, which came into effect on September 4, 2016. The amended rules have decreased the burdens on QFIs seeking to invest in Saudi Arabian securities, including *inter alia*:

- (a) Changing all references from “shares” to “securities” – thereby clarifying that QFIs can also trade in listed debt instruments and the like;
- (b) Decreasing minimum assets-under-management requirement for QFI licensing from SAR 18,750,000,000 (about USD 5 billion) to SAR 3,750,000,000 (about USD 1 billion);
- (c) Expanding potential QFI status from financial institutions only to include governments and government bodies;

\* \* \*

- (e) Increasing limitation on a QFI’s ownership in the listed shares of any single issuer from 5% to 10%;
- (f) Increasing limitation on QFIs’ ownership in the aggregate in the listed shares of any single issuer from 20% to 49%; and
- (g) Removing restrictions that limited QFIs’ ownership in the aggregate to 10% of all listed shares of all issuers listed on *Tadarwul*.<sup>78</sup>

Reports indicate that foreign investors have not responded with much enthusiasm because QFIs hold listed shares in an amount representing only 1.03 percent of the total market. It will be interesting, however, to see how QFIs react to increasing liberalization of Saudi Arabia’s capital markets, both now with the Amended QFI Rules, and in the future as further liberalizations take place in line with the goals of Saudi Arabia’s Vision 2030 to diversify its economy and create a sustainable future.<sup>79</sup>

## B. INITIAL PUBLIC OFFERINGS

On July 20, 2016, the CMA issued the Instructions of Book Building Process and Allocation Method in Initial Public Offerings (IPO Rules) to govern pre-IPO procedures including valuation of shares.<sup>80</sup> The new IPO Rules clarify that QFIs are among the types of institutions permitted to be

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77. BOARD OF THE CAPITAL MARKET AUTHORITY, RULES FOR QUALIFIED FINANCIAL INSTITUTIONS INVESTMENT IN LISTED SECURITIES (2016), <https://beta.cma.org.sa/en/Market/QFI/Documents/QFI-EN-amended.pdf>.

78. *Id.*

79. See generally Full Text of Saudi Arabia’s Vision 2030, SAUDI GAZETTE (Apr. 26, 2016), <http://saudigazette.com.sa/saudi-arabia/full-text-saudi-arabias-vision-2030/>.

80. BOARD OF THE CAPITAL MARKET AUTHORITY, THE INSTRUCTIONS OF BOOK BUILDING PROCESS AND ALLOCATION METHOD IN INITIAL PUBLIC OFFERINGS (IPOS) (2016), <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/English.pdf>.

involved and bid in the book-building process that underwriters use to price and allocate shares in IPOs.<sup>81</sup>

### **VIII. South Africa**

On December 13, 2015, the President of the Republic of South African, Jacob Zuma, assented to South Africa's *Protection of Investment Act, 2015* (Act No. 22 of 2015).<sup>82</sup> The Protection of Investment Act is comprised of sixteen articles: Definitions (Article 1), Investment (Article 2), Interpretation of Act (Article 3), Purposes of Act (Article 4), Application of Act (Article 5), Fair Administrative Treatment (Article 6), Establishment (Article 7), National Treatment (Article 8), Physical Security of Property (Article 9), Legal Protection of Investment (Article 10), Transfer of Funds (Article 11), Right to Regulate (Article 12), Dispute Resolution (Article 13), Regulations (Article 14), Transitional Arrangements (Article 15), and Short Title and Commencement (Article 16).

This particular piece of legislation has proved very controversial. While the new law offers broad protection to foreign investors and foreign investments, it also seeks to preserve the state's right to regulate the public interest. Regarding protection, Article 8(1) declares that "Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances."<sup>83</sup> Article 9 states that the Republic "must accord foreign investors and their investments a level of physical security . . . in accordance with minimum standards of customary international law and subject to available resources and capacity."<sup>84</sup> Article 10 protects the right to property,<sup>85</sup> while Article 11 guarantees investors, in respect of an investment, the right to repatriate funds subject to taxation and other applicable legislation.<sup>86</sup>

With respect to the right to regulate, one of the stated purposes of the Act is to "affirm the Republic's sovereign right to regulate investments in the public interest."<sup>87</sup> In furtherance of this right to regulate, Article 12(1) declares that

Notwithstanding anything to the contrary in this Act, the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures, which may include— (a) redressing historical, social and economic inequalities and injustices; . . . (c) upholding the rights guaranteed in the Constitution; (d) promoting and preserving cultural heritage and practices, indigenous knowledge

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81. *Id.* at Part 5(f).

82. Protection of Investment Act, No. 22 of 2015 (S. Afr.), <https://www.thedti.gov.za/gazettes/39514.pdf>.

83. *Id.*, art. 8.1.

84. *Id.* art. 9.

85. *Id.* art. 10.

86. *Id.* art. 11.

87. *Id.* art 4(b).

and biological resources related thereto, or national heritage; (e) fostering economic development, industrialisation and beneficitation; (f) achieving the progressive realisation of socio-economic rights; or (g) protecting the environment and the conservation and sustainable use of natural resources.

## **IX. United States**

### **A. INTERNATIONAL COMITY INSULATES OVERSEAS MANUFACTURERS' PRICE-FIXING**

In a decision with potentially significant implications, the United States Court of Appeals for the Second Circuit vacated a \$147 million judgment against Chinese manufacturers of vitamin C, holding that principles of international comity required the court to defer to the Chinese government's interpretation of its own laws regarding price-fixing, and refrain from exercising jurisdiction over the case, even if the alleged conduct violated American antitrust laws and had a direct effect in the United States.<sup>88</sup>

Plaintiffs, United States vitamin C purchasers, alleged that the defendants, Chinese vitamin C manufacturers, conspired to fix the price and supply of vitamin C sold to United States companies on the international market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16.<sup>89</sup> The defendants moved to dismiss and, subsequently, for summary judgment, on the grounds, *inter alia*, that principles of international comity precluded the district court from exercising jurisdiction over the claims because a conflict of law made it impossible for the defendants to comply with both Chinese and United States laws. Defendants did not deny the allegations, but asserted that Chinese government regulations required them to engage in the alleged conduct.<sup>90</sup>

The defendants and the Ministry of Commerce of the People's Republic of China (as *amicus curiae*) filed an explanation of the relevant Chinese law: "According to the Ministry, the [defendants were] an instrumentality of the State that [were] required to implement the Ministry's administrative rules and regulations with respect to the vitamin C trade."<sup>91</sup> The district court denied both motions, ruling that "'Chinese law did not compel defendants' anticompetitive conduct' in any of the relevant time periods."<sup>92</sup> The district court later held a trial, found the Defendants liable under the Sherman Act,

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88. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

89. *Id.* at 178.

90. *Id.* at 180.

91. *Id.* at 181.

92. *Id.* at 182.

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and awarded approximately \$147 million in damages and a permanent injunction barring future violations.<sup>93</sup>

The Second Circuit reversed, holding that “the district court abused its discretion by failing to abstain on international comity grounds from asserting jurisdiction . . . .”<sup>94</sup> The Second Circuit ruled that the district court erred by not deferring to the Chinese government’s explanation of Chinese law: “When, as in this instance, we receive from a foreign government an official statement explicating its own laws and regulations, we are bound to extend that explication the deference long accorded such proffers received from foreign governments.”<sup>95</sup> Because the Chinese government had “filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin C sold abroad,” and because the Defendants “could not simultaneously comply with Chinese law and United States antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case.”<sup>96</sup> The court concluded:

we reaffirm the principle that when a foreign government, acting through counsel or otherwise, directly participates in United States court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a United States court is bound to defer to those statements.<sup>97</sup>

The decision may have significant implications for foreign relations and trade. Requiring deference to a foreign government’s interpretation of its own laws may, in some circumstances, permit foreign states to insulate conduct from the reach of United States courts that clearly violates United States law and has adverse effects in the United States, at least where the interpretation proffered “is reasonable under the circumstances presented.” Depending on how longstanding and well-established the evidence of the foreign government’s interpretation is required to be, the decision may prove important in future cases where the circumstances presented are more ambiguous than those the Second Circuit confronted.

**B. AFTER *RJR*, THE DEBATE OVER THE “FOCUS” TEST IS OVER**

The Supreme Court’s decision in *RJR Nabisco, Inc. v. European Community* ends the debate about whether *Morrison*’s “focus” test controls the extraterritoriality analysis in Alien Tort Statute (ATS) cases.<sup>98</sup> *RJR* confirms

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93. *Id.*

94. *Id.* at 194.

95. *Id.* at 179.

96. *Id.*

97. *Id.* at 189.

98. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016); *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010).

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that, in determining whether the application of a statute is impermissibly extraterritorial, courts must look to the statute’s “focus.”<sup>99</sup> The ruling displaces decisions that held *Kiobel* did not adopt the “focus” test for ATS cases.

In *Morrison*, the Court cautioned the mere existence of some domestic conduct was insufficient to determine whether Petitioners alleged a permissible domestic application: “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved . . .”<sup>100</sup> The Court held that, to determine whether application of a statute is permissible, it is necessary to examine the statute’s “focus.”<sup>101</sup>

In *Kiobel v. Royal Dutch Petroleum Co.*,<sup>102</sup> the Court considered the extraterritorial application of the ATS. Holding the presumption against extraterritoriality applied to the ATS and nothing rebutted that presumption, the Court affirmed dismissal, concluding that “all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>103</sup> The Court’s use of the language “touch and concern” led some courts to conclude, erroneously, that the Court called for a different test in ATS cases.

For example, the Ninth Circuit rejected the argument that the “focus” test should apply in ATS cases and concluded “*Kiobel II* articulates a new ‘touch and concern’ test for determining when it is permissible for an ATS claim to seek the extraterritorial application of federal law.”<sup>104</sup> Similarly, the Fourth Circuit applied the “touch and concern” language rather than *Morrison*’s “focus” test.<sup>105</sup> And a district court in the Southern District of New York interpreted *Kiobel* to create a new “‘touch and concern’ standard.”<sup>106</sup>

In *RJR*, the Court clarified that the analysis of whether a statute applies extraterritorially requires a “two-step framework”: the court must first ask whether the normal “presumption against extraterritoriality” has been rebutted by a “clear, affirmative indication that [the statute] applies extraterritorially,” and only if there is no such indication, then the court must ask whether the case otherwise involves a domestic application of the statute by looking to the statute’s “focus.”<sup>107</sup> Regarding the second step, the Court explained that if conduct relevant to the statute’s focus occurred in the

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99. *RJR Nabisco*, 136 S. Ct. at 2101.

100. *Morrison*, 561 U.S. at 266.

101. *Id.*

102. 133 S. Ct. 1659 (2013).

103. *Id.* at 1669 (citing *Morrison*, 561 U.S. at 264 – 274).

104. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1027 (9th Cir. 2014).

105. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 529 (4th Cir. 2014).

106. *Tymoshenko v. Firtash*, No. 11-CV-2794, 2013 WL 4564646, at \*4 (S.D.N.Y. Aug. 28, 2013).

107. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

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United States, then the case may involve a domestic application of the statute “even if other conduct occurred abroad.”<sup>108</sup> But if the conduct relevant to the statute’s focus occurred abroad, “then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.”<sup>109</sup> The Court also clarified what it implied in *Kiobel*: that where “‘all the relevant conduct’ regarding the[ ] violations ‘t[akes] place outside the United States,’” the claim may be dismissed without the need to apply the “focus” test.<sup>110</sup>

*RJR* reaffirms *Morrison*’s “focus” test is the controlling standard in analyzing whether application of a statute is impermissibly extraterritorial, in RICO, ATS, and other cases. *RJR* provides important course correction to courts that were interpreting *Kiobel* as creating a “touch and concern” test distinct from *Morrison*’s “focus” test.

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108. *Id.*

109. *Id.*

110. *Id.*

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**PUBLISHED IN COOPERATION WITH  
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## **International Securities and Capital Markets**

JENNIFER Y. POON, WALTER STUBER, DANIEL RODRÍGUEZ BRAVO,  
JUHA KOPONEN, MARK FALCON, RAVI KINI, KEN KIYOHARA, DANIEL  
WINTERFELDT, AND WALTER VAN DORN\*

The following Article summarizes selected developments during 2016 in the regulation of international securities and capital markets in Brazil, Colombia, Finland, India, Japan, the United Kingdom, and the United States.

### **I. Developments in Brazil**

#### **A. THE BRAZILIAN PROGRAM OF ALIENATION OF ASSETS OF INSOLVENT COMPANIES**

On August 30, 2016, the Brazilian Development Bank (Banco Nacional de Desenvolvimento Econômico e Social or BNDES) announced its Program to Promote the Revitalization of Productive Assets (*Programa de Incentivo à Revitalização de Ativos Produtivos*) (the “program”),<sup>1</sup> which aims to support the transfer of economically viable (i.e., productive) assets held by insolvent companies (i.e., companies in judicial or extrajudicial recovery, bankruptcy or, at the discretion of BNDES, in economic-financial crisis and at high risk of credit default).

The new program aims to promote the exploitation, utilization, and conservation of existing assets, and prevent their deterioration and the creation of environmental liabilities.<sup>2</sup> This program will have a budget allocation of BRL 5 billion and will run until August 31, 2017.<sup>3</sup>

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\* Jennifer Y. Poon, Reed Smith LLP (London) served as the committee editor. Walter Stuber, Walter Stuber Consultoria Jurídica (Sao Paulo), contributed Brazil’s developments. Daniel Rodríguez Bravo, Rodríguez Azuero Contexto Legal (Bogotá) contributed Colombia’s developments. Juha Koponen and Mark Falcon, Borenus Attorneys Limited (Helsinki) contributed Finland’s developments. Ravi Kini, MVKini Law Firm (Mumbai) contributed India’s developments. Ken Kiyohara, CMA Partners (Tokyo) contributed Japan’s developments. Daniel Winterfeldt and Jennifer Y. Poon, Reed Smith LLP (London) contributed the United Kingdom’s developments. Walter Van Dorn, Baker & Hostetler LLP (New York) contributed the United States’ developments.

1. *BNDES aprova programa de apoio à reintegração de ativos ao sistema de produção [BNDES Approves a Program to Support the Reintegration of Assets into the Production System]*, BNDES .GOV.BR (Aug. 30, 2016), <http://www.bndes.gov.br/wps/portal/site/home/imprensa/noticias/conteudo/bndes-aprova-programa-apoio-reintegracao-ativos-sistema-producao/>. All the conditions mentioned therein are contained in this Program (the new BNDES Program).

2. *Id.*

3. *Id.*



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The alienation of viable assets of insolvent companies is a necessary step for companies that wish to acquire them to undertake economic activity and reinstate them into the production system.<sup>4</sup> The goal is that the transfer of productive assets will stimulate economic activity, preserve jobs, and generate income.<sup>5</sup> In addition, the program aspires to strengthen the adoption of best practices regarding governance and management in relation to the disposed assets<sup>6</sup>.

BNDES will provide direct support solely for purchasers in the form of loans (fixed income).<sup>7</sup> There is the added possibility of the introduction of securities subscription mechanisms.<sup>8</sup>

The indirect support through the financial agents of BNDES may only occur if the company is under judicial or extrajudicial recovery or bankruptcy proceedings.<sup>9</sup> Thus, the seller must be an insolvent company.<sup>10</sup> Companies in economic-financial crisis and at high risk of credit default are not eligible.<sup>11</sup>

The beneficiaries (i.e., purchasers) of the program will be companies and cooperatives with their headquarters and administration in Brazil fulfilling the following conditions: (1) the purchaser must have managerial capacity and be in an economic and financial situation compatible with the acquisition and intended exploitation of the asset as well as possessing the desired financing; (2) the asset must “be acquired for the purpose of undertaking an economic activity, even if different from that of the seller”; (3) the purchaser must have financial statements audited “by an independent audit firm registered with the Brazilian Securities and Exchange Commission” (*Comissão de Valores Mobiliários* or CVM); and, (4) the purchaser cannot be part of the same economic group as the seller, be a related party to the seller, or be identified as the seller’s agent.<sup>12</sup>

Among the assets intended to be financed are industrial units, commercial establishments, and equity participation representing the company’s control or part of the block control<sup>13</sup>. This financing may also be extended to “the acquisition of real estate, used machinery and equipment, and intellectual property rights. . .”<sup>14</sup> The underlying asset is expected to “be in the implementation , operational, or disabled phase.”<sup>15</sup>

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4. *Id.*

5. *Id.*

6. *Id.*

7. *BNDES aprova programa de apoio à reintegração de ativos ao sistema de produção, supra* note 1.

8. *Id.*

9. *Id.*

10. *See Id.*

11. *Id.*

12. *Id.*

13. *BNDES aprova programa de apoio à reintegração de ativos ao sistema de produção, supra* note 1.

14. *Id.*

15. *Id.*

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“Studies, projects, consultancies, and audits (in particular for the preparation of business plans, business restructuring, implementation of corporate governance practices and strategic planning)” as well as working capital associated with the acquisition and initial operation of the asset may also be financed, provided that these activities are linked to the goals of the program.<sup>16</sup>

The financial terms and conditions of the proposed financing are as follows:

- (1) interest rate: market cost benchmarks and/or financial cost equivalent to any already existing credit from BNDES by the seller of the asset, limited in this second hypothesis to the value of that credit;
- (2) maximum participation of BNDES: up to 100 percent of the eligible items;
- (3) basic spread: 1.5 percent per year;
- (4) spread of risk: according to the risk of the purchaser; and
- (5) total period: the length of a grace period and amortization must be compatible with the designed cash flow, limited to a ten-year term.<sup>17</sup>

It is anticipated that this program will be very attractive for those investors that would like to acquire productive assets from insolvent Brazilian companies in order to expand their activities in Brazil.<sup>18</sup>

## II. Developments in Colombia

The Colombian Regulatory Protection Unit and Studies of Financial Regulation (*Unidad de Proyección Normativa y Estudios de Regulación Financiera* or URF) projected a normative agenda for 2016, establishing as a departure point the general public policies and principles of the National Development Plan (*Plan Nacional de Desarrollo*) of 2014–2018.<sup>19</sup> The only goal was that the financial system be consolidated under the pillars of Solidity, Efficiency, and Social Inclusion.<sup>20</sup>

### A. MODIFICATION OF CONCENTRATION LIMITS

By the 766 Decree of 2016,<sup>21</sup> a completely new set of measures were implemented with the goal of promoting market liquidity and wider

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16. *Id.*

17. *Id.*

18. *See Id.*

19. *Agenda 2016—Unidad de Regulación Financiera (URF)*, UNIDAD DE PROYECCIÓN NORMATIVA Y ESTUDIOS DE REGULACIÓN FINANCIERA, available at [http://www.urf.gov.co/urf/ShowProperty?jsessionid=OZlRuDJjThtbVApsJKl1WGjZxilkkCz5rPKv7LUsXQyq0Gsncvj!982714394?nodeId=%2FOCS%2FMIG\\_47416605.PDF%2F%2FidcPrimaryFile&revision=latestreleased](http://www.urf.gov.co/urf/ShowProperty?jsessionid=OZlRuDJjThtbVApsJKl1WGjZxilkkCz5rPKv7LUsXQyq0Gsncvj!982714394?nodeId=%2FOCS%2FMIG_47416605.PDF%2F%2FidcPrimaryFile&revision=latestreleased).

20. *Id.*

21. Boletín No. 054, Ministerio de Hacienda y Crédito Público, MinHacienda anuncia medidas para promover liquidez y dinamizar el Mercado de valores (May 10, 2016), <http://www>

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dynamism in the Colombian stock market. These regulations provide new limits that broker dealers must follow at the time of performing repurchase operations, simultaneous operations, and temporary transfers of securities operations.<sup>22</sup> The technical equity to perform these operations with the same third party remains at the current limit of 30 percent, leaving open the possibility of increasing discretionally the margin, as long as it can be justified and incorporated in the internal risk management policies.<sup>23</sup> In addition, the maximum exposure limits are set by this new regulation according to the “free-float” or the paid-in capital of each type of share instead of the “technical equity test” which was previously measured in the following way: (1) up to 6.5 percent according to each type of every share; and (2) up to 3 percent according to the same third party.<sup>24</sup>

**B. TEMPORARY REGISTRATION OF SECURITIES**

Under the regulatory scheme governing insolvency proceedings in Colombia, a set of principles have been established to adopt innovative legal instruments that harmonize the legal environment with the economic reality of companies, especially those involved in a bankruptcy process. Following international experience, in particular practice in the United States, Colombia has been placing greater importance on the recognition of credit protection and the preservation of companies as a unit of economic exploitation and as a source of employment and prosperity. This is accomplished through the adoption of amendments that minimize the impact and adverse effects of a company’s potential insolvency. In view of the above, any aided bankruptcy process represents at some point a “race against time” because of the gradual loss of value of the company. In response to this need, the local regulation created a new financial legal instrument, which will allow the purchase of existing companies under the bankruptcy process subject to approval by a judge. As evidence of this purpose, the 1523 Decree of 2016<sup>25</sup> was enacted to provide an opportunity for companies that are using the aided bankruptcy process to create a secondary market where they can offer to the public their securities in a temporary manner (for a term of six months) through institutional mechanisms provided for by the stock exchanges.

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.minhacienda.gov.co/HomeMinhacienda/ShowProperty;jsessionid=GY4MEG\_cCTwU6u  
kfVko4xz9kf34tFhW7VQo9QWx9Ue9YKtHRU1my!741545819?nodeId=%2FOCS%2FP\_  
MHCP\_WCC-041068%2F%2FidcPrimaryFile&revision=latestreleased.

22. *Id.*

23. *Id.* at 1.

24. Decreto 766, mayo 6, 2016, (Colom.), <http://es.presidencia.gov.co/normativa/normativa/DECRETO%20766%20DEL%2006%20DE%20MAYO%20DE%202016.pdf>.

25. Decreto 1523, septiembre 29, 2016, Año CLII No. 50.011, DIARIO OFICIAL [D.O.] (Colom.), *available at* [http://www.imprenta.gov.co/diariop/diario2.pdf?p\\_tipo=02&p\\_numero=1523&p\\_fecha=29/09/2016&p\\_consec=1360936](http://www.imprenta.gov.co/diariop/diario2.pdf?p_tipo=02&p_numero=1523&p_fecha=29/09/2016&p_consec=1360936).

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

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C. MUTUAL FUNDS FINANCIAL DISCLOSURE

The existing Colombian legal mutual funds regime, enacted by 1242 Decree of 2013,<sup>26</sup> consolidated the investment opportunity of this instrument in foreign collective schemes. This provision established changes in Colombian mutual funds by expanding the spectrum of the asset management portfolio and giving local investors direct access to foreign markets that they previously would not have been able to easily access.<sup>27</sup> With the aim of improving this regulation, the 034 External Resolution (Circular Externa, in Spanish) of 2016<sup>28</sup> was enacted to describe the conditions of the particular financial disclosures of the collective incoming schemes as an acceptable asset of local mutual funds. For this purpose, this new regulation establishes that this type of investment has to be disaggregated over the type of financial and technical features. On the bright side, these specific instructions provide clarity as to the content of the security investments as well as their potential risks. This also encourages financial consumer protection, which is reinforced by information obligations and disclosure requirements over the investment policy of the local mutual fund by revealing the particular assets of the collective incoming schemes.

**III. Developments in Finalnd**

A. MARKET GENERALLY

Over the past five years, the number of initial public offerings (IPOs) on the Nasdaq Helsinki markets (the main list Helsinki Stock Exchange, and multilateral trading facility First North Finland) has been growing steadily.<sup>29</sup> There were no listings in 2011, nine in 2014, twelve in 2015 and eight in 2016<sup>30</sup> on the Helsinki Stock Exchange and First North Finland markets, collectively. This year also saw an historical first half with two inaugural companies transferring from First North Finland to the Helsinki Stock Exchange, corroborating First North Finland's purpose to offer a "stepping stone" for companies that are willing to grow into the Helsinki Stock Exchange.<sup>31</sup>

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26. Decreto 1242, junio 14, 2013, No. 48.821, DIARIO OFICIAL [D.O.] (Colom.), available at [https://normativa.colpensiones.gov.co/colpens/docs/decreto\\_1242\\_2013.htm](https://normativa.colpensiones.gov.co/colpens/docs/decreto_1242_2013.htm).

27. *Id.*

28. Superintendencia Financiera de Colombia (Colombian National Finance Authority), issued September 29, 2016 available at <https://www.superfinanciera.gov.co/jsp/loader.jsf?lServicio=Publicaciones&lTipo=publicaciones&lFuncion=loadContenidoPublicacion&id=10085860>.

29. *Why Has NASDAQ Helsinki Seen a Dramatic Increase in IPOs?*, NASDAQ (May 18, 2016), <http://business.nasdaq.com/marketinsite/2016/Why-Has-Nasdaq-Helsinki-Seen-a-Dramatic-Increase-in-IPOs.html>.

30. For the 2016 calendar year, as at November 1, 2016.

31. *Why Has NASDAQ Helsinki Seen a Dramatic Increase in IPOs?*, *supra* note 29.

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Bond offerings generally also continue to grow primarily because of supranational or governmental investor. The European Central Bank is encouraging borrowing through its bond buying program, and the Finnish state-owned financing company Finnvera has a mandate to invest in bonds.<sup>32</sup>

**B. NOTEWORTHY CAPITAL MARKETS MATTERS**

Nasdaq Nordic, the parent company of the various Nasdaq exchanges in the Nordic region, including Helsinki, was the second most active Nasdaq market in 2015, only behind the Nasdaq Stock Market located in New York.<sup>33</sup> The largest Finnish IPO in 2015 in terms of gross proceeds went to Asiakastieto Group Plc after its sole shareholder sold 76.7 percent of the company's then outstanding shares at EUR 14.75 per share for approximately EUR 170 million, providing the company with a market capitalization of approximately EUR 223 million.<sup>34</sup>

The second largest IPO was enjoyed by Pihljalainna Plc from newly issued shares representing approximately 43 percent of the then outstanding shares, which earned, together with the selling shareholders' shares priced at EUR 10.50 per share, approximately EUR 80.1 million with a company market capitalization of approximately EUR 201 million.<sup>35</sup>

Lastly, another notable IPO was that of Consti Group Plc where shareholders sold approximately 51.2 percent of the then outstanding shares of the company at EUR 9.50 per share for a market capitalization of approximately EUR 72.3 million, proving to be a very successful IPO-exit for majority shareholder Intera Fund I Ky.<sup>36</sup>

Other notable IPOs on the Helsinki Stock Exchange included the two listings that transferred from First North Finland. After three years on First North Finland, Taaleri Plc enjoyed a market capitalization of approximately EUR 250 million right after its IPO.<sup>37</sup> While not experiencing the same capitalization, Siili Solutions Plc quadrupled its value after four years on First North Finland.<sup>38</sup>

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32. *Why Has NASDAQ Helsinki Seen a Dramatic Increase in IPOs?*, *supra* note 29.

33. *FIND SOURCE*

34. Press Release, Asiakastieto Group Oyj: Asiakastieto's Share Sale Concluded Successfully-Final Sale Price Set at EUR 14.75 per Share, Asiakastieto (Mar. 26, 2015), <http://investors.asiakastieto.fi/releases/single-release/?var=http%3A%2F%2Fews.huginonline.com%2FA%2F167529%2FPR%2F201503%2F1906530.xml&date=2015032>.

35. Press Release, Pihljalainna Plc Stock Exchange Release, NASDAQ (June 3, 2015), <http://globenewswire.com/news-release/2015/06/03/741728/0/en/Pihljalainna-Oyj-The-final-subscription-price-in-Pihljalainna-s-initial-public-offering-has-been-set-at-EUR-10-50-per-share-and-Pihljalainna-will-issue-5-714-286-new-shares-in-the-.html>.

36. Press Release, Consti Group Plc: Consti's Share Sale Concluded Successfully-the Final Sale Price set at EUR 9.50 per Share, Consti (Dec. 10, 2015), <http://investor.consti.fi/releases/pr-story?ResultPageURL=http://ews.huginonline.com/C/171618/PR/201512/1972737.xml>.

37. *Nordic Surveillance Annual Report 2016*, NASDAQ (Jan. 2017), [http://www.nasdaqomx.com/digitalAssets/104/104532\\_nordic-surveillance-annual-report-2016.pdf](http://www.nasdaqomx.com/digitalAssets/104/104532_nordic-surveillance-annual-report-2016.pdf).

38. *Id.*

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Public tender offers in 2015 were also sizeable by Finnish standards. In April 2015, Nokia announced the acquisition of French-American Alcatel-Lucent in a EUR 15.6 billion exchange offer.<sup>39</sup> The transaction was the largest M&A deal in the history of Finland.<sup>40</sup> Nokia became a nearly 80 percent shareholder in Alcatel-Lucent when the public exchange offer closed in January 2016, and, as of late 2016, had likely just completed its public buy-out offer and squeeze-out in France for the remaining shares after exceeding the 95 percent ownership threshold earlier this year.<sup>41</sup>

The development of the EUR 3.9 billion Konecranes and Terex “merger of equals” announced in August 2015 attracted notice in early 2016 after two back-to-back, unsolicited cash offers from Chinese state-run Zoomlion at almost double the value of Konecranes’ offer.<sup>42</sup> After Zoomlion’s offer fell through, the deal was restructured into a sale of Terex’s material handling and port solutions (MHPS) business for EUR 1.126 billion, which accounted for roughly 20 percent of Terex’s total turnover.<sup>43</sup> While not yet completed,<sup>44</sup> the significant ongoing obstacle to the MHPS acquisition is the European Union’s (EU) competition authorities’ clearance condition that Konecranes divest its Stahl subsidiary located in Germany to a yet-to-be-approved buyer.<sup>45</sup>

### C. LEGISLATION

As part of the European Union, Finland has been subject to the same EU regulations and directives as other Member States, such as the July 3, 2016 European Securities and Markets Authority Market Abuse Regulation and Directive on Criminal Sanctions for Market Abuse (commonly referred to as MAD II) which criminalizes insider dealing and market manipulation, imposes maximum criminal penalties for the most serious market abuse offenses, and extends the scope of EU market abuse regulation to multilateral trading facilities.<sup>46</sup>

Apart from EU-related regulatory changes, there have been few regulations solely impacting Finland. The Finnish Securities Market Association is a cooperative organ established by Nasdaq Helsinki and the Finland Chamber of Commerce that publishes self-regulating guidelines

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39. Juha Koponen & Matias Keso, *The 2015 & 2016 Finnish Public Takeover Scene: How Major 2015 Deals Resolved and 2016 So Far*, INTERNATIONAL M&A AND JOINT VENTURES COMMITTEE NEWSLETTER (ABA Section of Int’l Law), Oct. 14, 2016, at 3.

40. *Nokia’s Alcatel-Lucent Merger Largest Corporate Acquisition in Finnish History*, YLE (Apr. 15, 2015), [http://yle.fi/uutiset/osasto/news/nokias\\_alcatel-lucent\\_merger\\_largest\\_corporate\\_acquisition\\_in\\_finnish\\_history/7931413](http://yle.fi/uutiset/osasto/news/nokias_alcatel-lucent_merger_largest_corporate_acquisition_in_finnish_history/7931413).

41. Koponen & Keso, *supra* note 39.

42. *Id.* at 4.

43. *Id.*

44. As at November 1, 2016.

45. *Id.*

46. *Market Abuse Regulation-MAR*, FINANSSIVALVONTA (Jan. 19, 2017), [http://www.finanssivalvonta.fi/en/Regulation/International\\_Projects/mar/Pages/Default.aspx](http://www.finanssivalvonta.fi/en/Regulation/International_Projects/mar/Pages/Default.aspx).

which complement Finnish regulations.<sup>47</sup> The Association restructured the Finnish Corporate Governance Code (the Code) effective as of January 1, 2016.<sup>48</sup> The revised Code improves the transparency of corporate governance practices and principles of listed companies and advances more uniform corporate governance reporting in line with the European Commission's 2014 recommendation on the quality of corporate governance reporting.<sup>49</sup>

#### D. FINAL THOUGHTS

The upward trend in IPO activity has seen the Helsinki Stock Exchange reinvigorated as a listing platform. In addition, government and other interested parties have set up a number of working groups, such as the Finnish Foundation for Share Promotion, to propose various reforms in the tax, general securities markets and listing regimes to increase the attractiveness of the listing platforms.<sup>50</sup> While so far very little has been done with regard to implementing regulations, the continued, albeit cautious, general economic resurgence of Finland and the lack of availability of other suitable investment alternatives should further benefit the Finnish capital markets' appeal.

### IV. Developments in India

#### A. FOREIGN PORTFOLIO INVESTMENT (FPI) IN GOVERNMENT SECURITIES

In order to increase the fund flow from foreign investors in India's capital markets, the Securities and Exchange Board of India (SEBI) has recently increased the limit of Foreign Portfolio Investors (FPIs) in government securities.<sup>51</sup>

SEBI, through its circular dated October 3, 2016, has decided to increase the limits of investment by FPIs in government securities (debt). These limits have been increased from Rs. 135400 crores<sup>52</sup> from October 1, 2016, to Rs. 148,000 crores and will be further increased to Rs. 152,000 crores effective January 2, 2017.<sup>53</sup> Investment limits for FPIs in long-term central

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47. *Id.*

48. *COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS* (Andreas M. Fleckner & Klaus J. Hopt eds., Cambridge University Press, 2013).

49. Antti Turunen, *The Finnish Corporate Governance Code*, SEC. MKT. ASS'N (last visited Apr. 17, 2017), <http://cgfinland.fi/en/recommendations/the-finnish-corporate-governance-code/>.

50. *Foundation*, FINNISH FOUND. FOR SHARE PROMOTION (last visited Apr. 17, 2017), <http://www.porssisaatio.fi/en/porssisaatio/>.

51. *SEBI Hikes FPI Investment Limit for Govt Debt*, THE TIMES OF INDIA (Mar. 29, 2016), <http://timesofindia.indiatimes.com/business/india-business/Sebi-hikes-FPI-investment-limit-for-govt-debt/articleshow/51602566.cms>.

52. SEBI Circular IMD/FPIC/CIR/P/2016/107 (Oct. 3, 2016), *available at* [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1475498739311.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1475498739311.pdf). One Crore is equal to ten million.

53. *Id.*

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government securities like sovereign wealth funds (SWFs), multilateral agencies, endowment funds, insurance funds, pension funds and foreign central banks have been increased from Rs. 44,100 crores to Rs. 62,000 crores, and will be further increased to Rs. 68,000 crores effective January 2, 2017.<sup>54</sup> Similarly, investment limits on state development loans by FPIs have been increased from Rs. 7,000 crores to Rs. 17,500 crores, and will be further increased to Rs. 21,000 crores as of January 2, 2017.<sup>55</sup>

**B. FOREIGN DIRECT INVESTMENT POLICY IN 2016 (FDI POLICY)**

FDI investment in India usually occurs through the Automatic Route or the Government Route. The Department of Industrial Policy and Promotion (DIPP) of the Government of India, has notably liberalized FDI in the insurance sector by making the entire 49 percent limit through the Automatic Route.<sup>56</sup> Investment in the pharmaceutical sector has been revised to 100 percent via the Automatic Route under the greenfield category, and 74 percent of FDI is allowed under the Automatic Route for brownfield projects.<sup>57</sup> In addition, 100 percent of investment in the airport sector has been allowed through the Automatic Route for both new and existing projects.<sup>58</sup>

**C. WILFUL DEFAULTERS**

In May 2016, the definition of wilful defaulter was inserted by SEBI in SEBI (Issue of Capital and Disclosure Requirements) Regulation, 2009 (the ICDR Regulations).<sup>59</sup> “Wilful Defaulter” means “an issuer categorized as a wilful defaulter by any bank or financial institution or consortium thereof, in accordance with the guidelines on wilful defaulter issued by Reserve Bank of India and includes an issuer whose director or promoter is categorized as such.”<sup>60</sup> Additionally, the watchdog has barred any issuer from publicly issuing equity shares or convertible debt instruments if it is a Wilful Defaulter, as defined above.<sup>61</sup> In the case of a rights issue of specified securities, a disclosure in the prescribed format shall be made with respect to Wilful Defaulters.<sup>62</sup> An entire new section (Part G) has been inserted for

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54. See *SEBI Hikes FPI Investment Limit for Govt Debt*, *supra* note 51; see also *SEBI Circular IMD/FPIC/CIR/P/2016/107*, *supra* note 52.

55. *Id.*

56. See *SEBI Circular IMD/FPIC/CIR/P/2016/107*, *supra* note 51.

57. Express Web Desk, *100% FDI: Govt Bites Reform Bullet, Open Up Defense, Civil Aviation and Pharma*, *INDIAN EXPRESS* (June 20, 2016), <http://indianexpress.com/article/business/economy/govt-bites-fdi-bullet-opens-up-defence-civil-aviation-and-pharma/>.

58. *Id.*

59. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2016, *Gazette of India*, section III(4) (May 25, 2016) [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1464245320010.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1464245320010.pdf).

60. *Id.*

61. *Id.*

62. *Id.*



detailed disclosures pertaining to Wilful Defaulters with specific disclosures and suitable cross-referencing to be made on the cover page.<sup>63</sup> In line with the above measures from SEBI to streamline disclosures, the Reserve Bank of India (RBI) is now requiring lending institutions to publish photographs of those borrowers who have been declared as Wilful Defaulters following the Master Circular on Wilful Defaulters<sup>64</sup> dated July 1, 2015 of RBI.<sup>65</sup> The publication of photographs of Wilful Defaulters includes “proprietors, partners, directors, [or] guarantors of borrower firms” or companies, but excludes non-executive directors.<sup>66</sup> In order to justify the process, the RBI has asked lending institutions to develop policies setting out the measures in connection with boards of directors for the decision leading to the publishing of photographs of such Wilful Defaulters.<sup>67</sup>

There has also been an amendment in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the Takeover Code)<sup>68</sup> with the addition of the definition of Wilful Defaulters.<sup>69</sup> The definition runs parallel with the definition under the ICDR Regulations with the further addition of the words “or partners” under the inclusive category of Wilful Defaulters.<sup>70</sup> The Takeover Code has prohibited Wilful Defaulters from public announcements with respect to the acquisition of shares in an open offer.<sup>71</sup> But, a Wilful Defaulter will not be prohibited from making a competing offer in accordance with Regulation 20 of the Takeover Code upon any company making such an open offer.<sup>72</sup>

#### D. FORMULATING DIVIDEND DECLARATION MANDATE THROUGH LISTING OBLIGATIONS

Section 24 of the Companies Act, 2013 authorizes SEBI to regulate provisions of default in payments of dividends.<sup>73</sup> In order to aid investors, SEBI, through its SEBI (Listing Obligations and Disclosure Requirements)

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63. *Id.*

64. Res. Bank of India Master Circular on Wilful Defaulter (July 1, 2015), DBR.CID.BC.No.22/20.16.003/2015-16, <http://seair.co.in/rbi-notifications/publishing-of-photographs-of-wilful-defaulters-247974.aspx>.

65. Res. Bank of India Circular on Wilful Defaulter RBI/2016-17/71 DBR. CID. BC. No. 17/20.16.003/2016-17 (Sep. 29, 2016), <http://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI71FD8F900408E14A9DA81E1D4C2BA72526.pdf>.

66. *Id.*

67. ET Bureau, *RBI Asks Banks to Publish Photographs of only Wilful Defaulters*, ECON. TIMES OF INDIA (Sept. 30, 2016), <http://economictimes.indiatimes.com/markets/stocks/news/rbi-asks-banks-to-publish-photographs-of-only-wilful-defaulters/articleshow/54600294.cms>.

68. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers)(Second Amendment) Regulations, 2016, Gazette of India, Section III(4) (May 25, 2016), [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1464245549280.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1464245549280.pdf).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2.

73. *Id.*

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Regulations, 2015 (the Listing Obligations) has asked the top 500 listed companies<sup>74</sup> to create a dividend distribution policy and make disclosure in their annual reports and websites regarding such policy.<sup>75</sup> In addition to Regulation 29 (dividend declaration prior to intimation to stock exchanges), Regulation 42 (3) (time stipulation for declaration of dividend) and Regulation 43 (disclosure and forfeiture norms for dividend) of the Listing Obligations are amended with the insertion of Regulation 43A to formulate the dividend distribution policy within the five parameters mentioned in the Circular.<sup>76</sup> An additional disclosure is required to be made in the annual report and website only by those entities which propose to declare dividends in addition to or in alteration of the set parameters.<sup>77</sup>

## V. Developments in Japan

### A. STATUS OF STEWARDSHIP CODE AND CORPORATE GOVERNANCE CODE

Following the adoption of Japan's Stewardship Code (the Stewardship Code)<sup>78</sup> in 2014 and the Corporate Governance Code (the CG Code)<sup>79</sup> in 2015, stewardship and corporate governance practices in Japan have been making steady progress. As of September 2, 2016, a total of 213 institutional investors signed up for the Stewardship Code, and after the first anniversary of the adoption of the CG Code, 2262 companies listed on the First and Second Sections of the Tokyo Stock Exchange (TSE) have reported on their compliance with the CG Code as of July 14, 2016, of which 474 companies (representing 21.0 percent) comply with all 73 principles of the CG Code, and 1,437 companies (representing 63.5 percent of the remaining 1,788

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74. Companies whose stocks are listed on a recognised stock exchange in India.

75. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (2nd Amendment) Regulations, 2016, Gazette of India, section III(4) (Jul. 8, 2016).

76. *Section 24 of Companies Act, 2013—Power of Securities and Exchange Board to Regulate Issue and Transfer of Securities, etc.*, CORP. LAW REP. (Apr. 15, 2017), [http://corporatelawreporter.com/companies\\_act/section-24-of-companies-act-2013-power-of-securities-and-exchange-board-to-regulate-issue-and-transfer-of-securities-etc/](http://corporatelawreporter.com/companies_act/section-24-of-companies-act-2013-power-of-securities-and-exchange-board-to-regulate-issue-and-transfer-of-securities-etc/).

77. *See id.*; *see also SEBI Inserted New Listing Regulation 43A in LODR Mandating Formulation of Dividend Distribution Policy*, HARESH JANI & ASSOC. (Jul. 15, 2016), <http://www.hja.legal/legal-updates/sebi/sebi-inserted-new-listing-regulation-43a-in-lodr-mandating-formulation-of-dividend-distribution-policy/>.

78. *See Principles for Responsible Institutional Investors—Japan's Stewardship Code—To Promote Sustainable Growth of Companies Through Investment and Dialogue*, THE COUNCIL OF EXPERTS CONCERNING THE JAPANESE VERSION OF THE STEWARDSHIP CODE (Feb. 26, 2014), available at <http://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf>.

79. *See Japan's Corporate Governance Code, Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid-to Long-Term*, TOKYO STOCK ECH. (June 1, 2015), available at <http://www.jpix.co.jp/english/equities/listing/cg/tvdivq000008jdy-att/20150513.pdf>.

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companies) comply with 90 percent or more of the principles of the Code.<sup>80</sup> Notably, 2,258 companies (representing 99.59 percent) have complied with Principle 5.1, requiring Policy for Constructive Dialogues with Shareholders, and engaging shareholders has now become common practice in Japan.<sup>81</sup>

To monitor the progress and to discuss necessary measures to promote governance practices, the Financial Services Agency of Japan (FSA) and the TSE announced in August 2015, the establishment of the Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code,<sup>82</sup> which was formed in September 2015, and issued in February 2016 an opinion statement reflecting issues and good practices discussed at its meetings entitled "Corporate Boards Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term" to help facilitate the implementation of good governance and to enable constructive dialogue with the shareholder.<sup>83</sup> The Council moved on to discuss the issues and practice concerning shareholder engagement in 2016.<sup>84</sup>

#### B. GOVERNANCE CODE FOR AUDIT FIRMS

In April 2015, an accounting scandal involving Toshiba Corporation (Toshiba), a leading Japanese company, surfaced in Japan, which gave rise to the renewed question about the integrity of financial reporting by Japanese listed companies and the effectiveness of the auditing process by external auditors in Japan. A committee of external lawyers and accountants was formed in May 2015 to conduct the investigation and they issued a detailed investigation report in July 2015,<sup>85</sup> following which, Toshiba filed restated financial statements. Due to the accounting misconduct by the management and the deficient internal control, TSE designated Toshiba stock as a security on alert and imposed a monetary penalty of JPY 91.2 million for violating the listing agreement in September 2015.<sup>86</sup> The FSA also imposed

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80. *How Listed Companies Have Addressed Japan's Corporate Governance Code*, TOKYO STOCK EXCH. (Sept. 13, 2016), available at <http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/b5b4pj000001akx0.pdf>.

81. *Id.*

82. See *Establishment of "Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code,"* FIN. SERV. AGENCY (Aug. 7, 2015), <http://www.fsa.go.jp/en/news/2015/20150807-1.html>.

83. The Council of Experts Concerning the Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code, *Corporate Boards Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid-to Long-Term, Opinion Statement 2*, FIN. SERV. AGENCY (Feb. 18, 2016), [http://www.fsa.go.jp/en/refer/councils/follow-up/statements\\_2.pdf](http://www.fsa.go.jp/en/refer/councils/follow-up/statements_2.pdf).

84. *Id.*

85. *Investigation Report*, INDEP. INVESTIGATION COMM. FOR TOSHIBA CORP. (July 20, 2015), [http://www.toshiba.co.jp/about/ir/en/news/20151208\\_2.pdf](http://www.toshiba.co.jp/about/ir/en/news/20151208_2.pdf).

86. *Designation of Security on Alert and Imposition of Listing Agreement Violation Penalty-Toshiba Corporation*, JAPAN EXCH. GRP. (Sept. 15, 2015), <http://www.jpx.co.jp/english/news/1021/20150915-11.html>.

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an administrative penalty charge of JPY 7.3 billion on Toshiba for making false financial statements in securities reports in December 2015.<sup>87</sup>

In the face of this accounting scandal, the Advisory Council on the Systems of Accounting and Auditing (the Advisory Council) in October 2015<sup>88</sup> was formed by the FSA to discuss proposals to address accounting and auditing issues. The Advisory Council published in March 2016 recommendations on wide-range actions to ensure confidence in audit systems, categorized under five objectives: “(1) reinforcing the management of audit firms; (2) enhancing the provision of information on audits to shareholders and other stakeholders; (3) strengthening the ability to detect corporate fraud; (4) assessing the audit quality from viewpoints of third parties; [and], (5) improving the environment for high quality audits.”<sup>89</sup> The Advisory Council’s recommendations focus primarily on facilitating good practice, rather than proposing new or stricter regulation or auditing standards, and urge audit firms, companies, and regulators to discharge their respective responsibilities for promoting better audit quality and environments that ensure higher standards in audits.<sup>90</sup>

One of the priorities of such recommendations is the Audit Firm Governance Code, the FSA established the Council of Experts on Audit Firm Governance Code in July 2016,<sup>91</sup> with the goal of adopting the Code in December 2016. This would make Japan the third country to have a governance code for audit firms, following the United Kingdom and Netherlands. It is expected that the Audit Firm Governance Code will be principle-based and will call on the leadership of audit firms to ensure exercise of professional skepticism in the auditing, quality control system and supervision, education and training, and evaluation of the firm’s activities.<sup>92</sup>

C. PRINCIPLES FOR INVESTIGATING CORPORATE SCANDALS

Japan Exchange Regulation, the self-regulatory organization (SRO) of Japan Exchange Group, Inc. (a holding company incorporated upon the merger of TSE and the Osaka Securities Exchange in January 2013) issued in February 2016 principles for investigating corporate scandals involving

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87. *Toshiba Fined Record ¥7.3 Billion Over Accounting Scandal*, JAPAN TIMES (Dec. 25, 2015), <http://www.japantimes.co.jp/news/2015/12/25/business/corporate-business/toshiba-fined-record-¥7-3-billion-over-accounting-scandal/#.WPVXoBiZOuM>.

88. *Ensuring Confidence in Audit, Recommendations from the “Advisory Council on the Systems of Accounting and Auditing,”* FIN. SERV. AGENCY (Mar. 8, 2016), <http://www.fsa.go.jp/en/news/2016/20160308-1/01.pdf>.

89. *Id.*

90. *Id.*

91. *See Principles for Effective Management of Audit Firms, the Audit Firm Governance Code*, FIN. SERV. AGENCY, <http://www.fsa.go.jp/news/28/sonota/20161215-1/02.pdf>.

92. *See id.*

listed companies (the Principles).<sup>93</sup> The Principles consist of four fundamentals that should be followed when investigating and disclosing the investigation result, but are not intended to have a binding effect.<sup>94</sup> As they reflect essential elements of internal investigation, they are expected to be followed by committees of listed companies to ensure the objectivity, independence and expert knowledge required for investigation.<sup>95</sup> TSE will consider whether the Principles are properly followed when deciding on the sanction for a listed company.<sup>96</sup>

## **VI. Developments in the United Kingdom**

### **A. DEVELOPMENTS AFFECTING EQUITY OFFERINGS**

#### *1. Listing Rules*

In 2016, the Financial Conduct Authority (FCA) has made a number of significant changes to the U.K. Listing Rules. Most of the changes relate to the implementation of the Market Abuse Regulation (MAR) across the European Union (EU) on July 3, 2016.<sup>97</sup> Following market comment periods, the Model Code was withdrawn in its entirety and changes were made to related provisions within the Listing Rules. In addition, references to the Disclosure and Transparency Rules were replaced with references to MAR, reflecting changes made to disclosure obligations for listed companies.<sup>98</sup> Furthermore, the restrictions on companies buying their own shares and the selling and transfer of treasury shares during restricted periods were also removed.<sup>99</sup>

The 80 percent control provision in relation to the cancellation of shares following a takeover offer was also removed from the Listing Rules.<sup>100</sup> In order to seek a cancellation of a listing of shares, a controlling shareholder no longer needs to obtain acceptances from 80 percent of the shareholders

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93. See *Principles for Responsive Measures by Listed Companies to Corporate Scandals*, Japan Exch. Regulation (Feb. 24, 2016). In July 2010, the Japan Federation of Bar Associations issued the guidelines for investigation of crimes, illegal conducts or other misconduct or improper acts subject to social criticism or censor (collectively, “scandals”), the “Guidelines for Third Party Committee in Corporate and Other Scandals,” subsequently revised as of December 17, 2010. *Third Party Committee Guidelines for Corporate Misconduct*, THE JAPAN FED’N BAR ASSOC. (July 15, 2010), [https://translate.google.com/translate?hl=en&sl=ja&u=https://www.nichibenren.or.jp/library/ja/opinion/report/data/100715\\_2.pdf&prev=search](https://translate.google.com/translate?hl=en&sl=ja&u=https://www.nichibenren.or.jp/library/ja/opinion/report/data/100715_2.pdf&prev=search). These Guidelines are intended to be prepared as a guide, but not requirement, providing for what is then considered to be best practices.

94. *Id.*

95. *Id.*

96. *Id.*

97. Council Regulation 596/2014, 2014 O.J. (L 173/1), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596>.

98. See *id.*

99. See *id.*

100. See Listing Rules, 5.2.5.R, FCA, available at <https://www.handbook.fca.org.uk/handbook/LR.pdf>.

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before a takeover offer can proceed.<sup>101</sup> Instead, acceptances may be obtained from independent shareholders who represent a majority of voting rights held by such shareholders before an application for the delisting of the shares can be submitted.<sup>102</sup>

2. *AIM Rules*

MAR also resulted in several changes to the AIM Rules. AIM Rule 17 which requires that directors' dealings are notified without delay, was removed since MAR now provides an appropriate level of transparency.<sup>103</sup> AIM Rule 21, which deals with close periods and restrictions on trading in an AIM-listed company's shares was replaced with the requirement for AIM-listed companies to have a share dealing policy in place which complies with a set of minimum requirements, including: establishing appropriate close periods; following procedures for obtaining clearance to deal; and, notifying the public regarding certain transactions.<sup>104</sup>

Article 17 of MAR requires that all "inside information" which directly concerns an issuer is announced to the market as soon as possible to minimize the risk of insider dealing.<sup>105</sup> Despite potential conflict with the similar, but slightly different AIM Rule 11, which requires that price-sensitive information be disclosed without delay, AIM Rule 11 was retained following the implementation of MAR.<sup>106</sup> This is because the MAR requirements potentially relate to a wider concept of inside information and the two rules are aimed at slightly different objectives. AIM-listed companies are therefore required to comply with both provisions, and the automatic AIM regulation team have made it clear that compliance with Article 17 of MAR will not mean compliance with AIM Rule 11.<sup>107</sup>

3. *AIM: Electronic Settlement System for Regulation S, Category 3 Securities*

Since the implementation of the Central Securities Depository Regulation on September 1, 2015, Regulation S, Category 3 shares (as defined in Regulation S)<sup>108</sup> trading on the London Stock Exchange (LSE) are now required to settle electronically. Previously, they were settled in certificated form and settlement often required ten days to two weeks. With electronic settlement, settlement efficiency has vastly improved, which in turn has

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101. *Id.*

102. *Id.*

103. Council Regulation 596/2014, *supra* note 97; AIM Rules for Companies, Rule 17, LONDON STOCK EXCH. (July 2016), <http://www.londonstockexchange.com/companies-and-advisors/aim/advisors/aim-notices/aimrulesforcompaniesjan16.pdf>.

104. AIM Rules for Companies, *supra* note 103 at, Rule 21.

105. *Id.* at Rule 17.

106. *See id.* at Rule 11.

107. *Id.*; *see also* Council Regulation 596/2014, *supra* note 97, at art. 17.

108. Offers or Sales of Securities by the Issuer, a Distributor, Any of their Respective Affiliates, or Any Person Acting on Behalf of Any of the Foregoing; Conditions Relating to specific Securities, 17 C.F.R. § 230.903 (2015).

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increased the liquidity and trading volumes of Regulation S, Category 3 shares. Due to the existence of the electronic settlement system for such securities, it is anticipated that the pipeline of companies looking to be admitted to AIM will continue to grow.

**B. DEVELOPMENTS AFFECTING DEBT OFFERINGS**

Yields on bonds remain at near-record lows, reflecting a continued low interest rate environment, and the ongoing impact of European Central Bank and United States Federal Reserve quantitative easing measures. The shift to a more U.S.-style market, whereby borrowers regularly utilize non-bank sources of liquidity, is likely to be a permanent feature of the U.K. debt and capital markets in coming years.

*1. High-Yield Bonds*

The high-yield European bond market continued on its downward trajectory in 2016 as financial markets faced a host of risks including declining oil prices, uncertainty in the world economy, negative interest rates, central banks' quantitative easing policies and Brexit.<sup>109</sup>

The result of this uncertainty has caused the growing shift away from covenant-lite structures, as investors started to regain more negotiation power<sup>110</sup> and portability clauses became even more liberal. This was seen in Mydentist's £425m high-yield bond issued on August 5, 2016 (only a few weeks after the Brexit vote) which contained a new type of portability clause which was particularly aggressive towards investors' interests because Mydentist would not have to buy back the bonds even if a new owner saddled the company with more debt.<sup>111</sup> Investors nevertheless accepted the clause, suggesting that there may be further changes ahead for covenant-lite bonds.

*2. Crowdfunding*

Crowdfunding has become a popular means to raise capital in the United Kingdom. In 2013, an estimated £500 million was invested on regulated crowdfunding platforms.<sup>112</sup> This grew to an estimated £2.7 billion in 2015.<sup>113</sup> The FCA is currently undertaking a full post-implementation review of its rules on crowdfunding.

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109. *AIM Notice 41*, LONDON STOCK EXCH. (Aug. 7, 2015), <http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/aim-notices/aimnotice41.pdf>.

110. See Jackson, Gavin, *Issuers on the Front Foot in Europe's Loan Market* FIN. TIMES (Sept. 6, 2016), <http://www.ft.com/cms/s/0/7ae6fc04-6a1e-11e6-ae5b-a7cc5dd5a28c.html>.

111. See Robert Smith, *Covenant Review Warns on Mydentist Bond's "New and Aggressive" Clause*, REUTERS (July 22, 2016), <http://uk.reuters.com/article/sterling-highyield-idUKL8N1A814E>.

112. *Global Transactions Forecast: The Impact of Macro Trends on Future M&A and IPO Activity*, BAKER & MCKENZIE (last visited Apr. 17, 2017), <http://www.bakermckenzie.com/-/media/files/insight/publications/2016/03/globaltransactionsforecastfinal.pdf?la=en>.

113. *Id.*

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3. *Loan-Based Crowdfunding*

Also known as peer-to-peer (P2P) lending, loan-based crowdfunding is a rapidly growing market. Such lending as a percentage of new bank loans to small businesses rose from 1 percent in 2012 to 12 percent in 2014.<sup>114</sup> In January 2016, the government announced that interest on P2P loans could be paid without deducting income tax,<sup>115</sup> while in April 2016, it became possible to hold P2P loans in Innovative Finance ISA wrappers.<sup>116</sup> With these new policies, it appears that loan-based crowdfunding will continue to grow in popularity as a source of funding for small businesses.

4. *Investment-Based Crowdfunding*

Investment-based crowdfunding gives consumers the opportunity to invest, through buying shares or debentures in new or small businesses. From November 2016, debt securities issued by companies on investment-based crowdfunding platforms can be held in an Innovative Finance ISA.<sup>117</sup> But, the situation with respect to equity securities is still being considered.

**VII. Developments in the United States**

**A. SEC ADOPTED PAYMENT DISCLOSURE RULES FOR COMPANIES ENGAGED IN RESOURCE EXTRACTION**

In 2016, the United States Securities and Exchange Commission (SEC) had adopted new rules which would have required “resource extraction issuers” to disclose annually payments that they (or subsidiaries or entities under their control) made to a foreign government or the U.S. federal government for the commercial development of oil, natural gas, or minerals.<sup>118</sup> New Rule 13q-1 and corresponding amendments to Form SD implemented Section 13(q) of the U.S. Securities Exchange Act of 1934 (the

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114. Michael Gorrie, *FCA's Crowdfunding Call for Input: Should Crowdfunding be Regulated Differently from More Traditional Forms of Financing?* ALLEN & OVERY (Oct. 26, 2016), <http://www.aoinvestigationsinsight.com/crowdfunding-fca-call-input/>.

115. *Revenue and Customs Brief 2 (2016): Deduction of Income Tax at Source from Payments of Peer-to-Peer Interest*, HM REVENUE & CUSTOMS (Jan. 8, 2016), <https://www.gov.uk/government/publications/revenue-and-customs-brief-2-2016-deduction-of-income-tax-at-source-from-payments-of-peer-to-peer-interest/revenue-and-customs-brief-2-2016-deduction-of-income-tax-at-source-from-payments-of-peer-to-peer-interest#p2p-loans>.

116. *Call for Input to the Post-Implementation Review of the FCA's Crowdfunding Rules*, FIN. CONDUCT AUTH., 20 (July 2016), <https://www.fca.org.uk/publication/call-for-input/call-input-crowdfunding-rules.pdf>.

117. *Income Tax: Crowdfunding and Individual Savings Accounts*, HM REVENUE & CUSTOMS (Aug. 9, 2016), <https://www.gov.uk/government/publications/income-tax-crowdfunding-and-individual-savings-accounts/income-tax-crowdfunding-and-individual-savings-accounts>.

118. Press Release, Sec. Exch. Comm., SEC Adopts Rules for Resource Extraction Issuers under Dodd-Frank Act (June 27, 2016), *available at* <https://www.sec.gov/news/pressrelease/2016-132.html>.



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Exchange Act),<sup>119</sup> added by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. But, Congress through use of the Congressional Review Act, which authorizes Congress to review and cancel regulations within 60 days after an agency submits a rule for congressional review, passed House Joint Resolution 41, which canceled the resource extraction disclosures.<sup>120</sup> President Trump subsequently signed the legislation, precluding the SEC from enforcing or reissuing the rules.<sup>121</sup>

**B. COMPANIES COVERED BY RULES**

The new rules would have applied to all U.S. and non-U.S. companies that (1) are required to file annual reports with the SEC pursuant to Section 13 or 15(d) of the Exchange Act on Forms 10-K, 20-F or 40-F; and (2) engage in the commercial development of oil, natural gas or minerals.<sup>122</sup>

**C. SCOPE OF THE RULES**

The disclosure obligations would have applied to any payment that:

- a company made to the U.S. federal government or a foreign government (including a foreign national government or a foreign subnational government or a company that is at least majority-owned by a foreign government);
- is in cash or in kind;
- furthered the commercial development of oil, natural gas, or minerals;
- was not *de minimis* (a single payment or a series of related payments that equals or exceeds US\$100,000 during the most recent fiscal year); and
- was one of the following types of payments for the commercial development of oil, natural gas, or minerals:
  - taxes levied on corporate profits, corporate income and production, but not taxes levied on consumption, such as value added taxes, personal income taxes or sales taxes;
  - royalties;
  - fees (including license fees, rental fees, entry fees and concession fees);
  - production entitlements;
  - bonuses (including discovery and production bonuses);
  - “community and social responsibility” payments required by law or contract;

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119. SEC Disclosure of Payments by Resource Extraction Issuers, 17 C.F.R. § 240, 249b (2016).

120. *Id.*

121. *Id.*

122. Roger Yu, *Trump Signs Legislation to Scrap Dodd-Frank Rule on Oil Extraction*, USA TODAY (Feb. 14, 2017), <https://www.usatoday.com/story/money/2017/02/14/trump-scraps-dodd-frank-rule-resource-extraction-disclosure/97912600/>.

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- dividends that are paid to a government in lieu of production entitlements or royalties, but not dividends paid to a government as a shareholder of the issuer as long as dividends are paid to the government on the same terms as to other shareholders; and
- payments for infrastructure improvements.<sup>123</sup>

**D. REQUIRED DISCLOSURE**

Covered companies would have been required to disclose payment information annually in new Exhibit 2.01 to Form SD.<sup>124</sup>

**E. EXEMPTIONS**

The rules included exemptions for payments by recently acquired companies and for payments related to exploratory activities.<sup>125</sup> The SEC also determined that the disclosure requirements of the Canadian and European Union resource extraction disclosure laws (the Extractive Sector Transparency Measures Act, or ESTMA, the EU Accounting Directive<sup>126</sup> and the EU Transparency Directive,<sup>127</sup> as well as the Extractive Industries Transparency Initiative, in which the United States is a “candidate country” (U.S. EITI)), are “substantially similar” to Rule 13q-1 and provided an additional exemption allowing resource extraction companies to satisfy the new SEC obligations by relying on public filings previously made pursuant to these regulations without having to prepare a separate report for the SEC.<sup>128</sup>

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123. 17 C.F.R. § 240, 249b.

124. *Id.*

125. *Id.* at 25.

126. Council Directive 2013/34, 2013 O.J. (L182) (EU).

127. Council Directive 2013/50, 2013 O.J. (L294) (EU).

128. 17 C.F.R. § 240, 249b.

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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

## **Aerospace and Defense Industries**

RANDY COOK, FRANCESCA HARKER, WAQAS SHAHID, NICHOLAS J. SPILIOtes, AKI BAYZ, FELIX HELMSTAEDTER, TAK-KYUN HONG, PHILIPPE SHIN, AND R. LOCKE BELL<sup>1\*</sup>

This Article reviews international law developments in the field of aerospace and defense industries in 2016.<sup>2</sup>

### **I. Modernization of Export Control Enforcement**

At a regulatory level, 2016 reflected substantial continuity with the reforming, activist trend that has characterized United States export controls in recent years. Agency leadership, particularly in the United States Department of Commerce's Bureau of Industry and Security, has continued to push an agenda of regulatory regime interoperability and modernization. The State Department also continued its push to automate and simplify agency interactions with industry, releasing or announcing new automated forms and processes for common export-control interactions. Concurrently, regulators and enforcement authorities remained vigilant and active, with increasing expectations for compliance program robustness and systems automation, and the announcement of a new voluntary self-disclosure program by the Department of Justice (DOJ) for export controls and sanctions violations. The result of the November 2016 election, however, introduces a degree of uncertainty into the prospects for continuing United States export controls reform. Particularly given the Trump administration's deep critique of current United States trade and national security policies, there is potential for retrenchment or a change in direction commencing in 2017.

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\* R. Locke Bell of Morrison & Foerster LLP served as the editor of the Aerospace and Defense Industries Committee's Year in Review for 2016. Randy Cook, Francesca Harker, and Waqas Shahid, of Ankura Consulting Group, LLC, authored Section I on the Modernization of Export Control Enforcement and Section IV on the Increased Enforcement of Anti-Corruption Laws. Nicholas J. Spiliotes, Aki Bayz, and Felix Helmstaedter, of Morrison & Foerster LLP authored Section II, titled Export Controls Update: United States and European Union Sanctions Against Iran and North Korea. Tak-Kyun Hong and Philippe Shin, of Shin & Kim, authored Section III on Developments in Korean Military Procurement and the Impact of a New Anti-Corruption Act.

2. For developments in 2015, see R. Locke Bell et al., *Aerospace and Defense Industries*, 50 INT'L LAW. 289 (2016). For developments in 2014, see William M. Pannier et al., *Aerospace and Defense Industries*, 48 INT'L LAW. 231 (2015).

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A. REGULATORY DEVELOPMENTS: EXPORT CONTROL REFORM  
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In 2016, export control reforms (ECR) focused on further integration of the State Department-administered International Traffic in Arms' Regulations (ITAR) with the Commerce Department's Export Administration Regulations (EAR) and refinement of the United States Munitions List (USML). Among other reforms, the following were implemented:

- The definitions of “export,” “reexport,” “release,” and “retransfer” in ITAR Part 120 were modified or added in order to harmonize with the EAR's preference for more specific description of transaction types. In practice, these refinements have limited impact, as all of these transactions, when involving defense articles, continue to require specific authorization under the ITAR.<sup>3</sup>
- New ECR rules were published for USML Categories XII (fire control / lasers / sensors / night vision), XIV (toxicological agents), and XVIII (directed energy weapons), while revised rules were issued for Categories VIII (aircraft) and XIX (gas turbine engines).<sup>4</sup>
- ITAR Parts 123 and 124 were amended to make clear that ITAR licenses and agreements are issued in reliance upon the representations and information in the transmittal letter and other documentations supporting the application.<sup>5</sup> These provisions effectively serve to limit the scope of any license to the terms articulated in the license application, regardless of whether those limitations are expressed as provisos or other stated scope limitations in the approved license.<sup>6</sup>
- A new ITAR exemption was created for release of technical data to a person traveling overseas, provided that person would otherwise be authorized to receive the data.<sup>7</sup> This reform addresses the sort of technical violation that previously occurred when a United States person (or authorized non-United States person) traveling overseas received an email containing technical data.<sup>8</sup>

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3. See International Traffic in Arms Regulations: Revisions to Definition of Export and Related Definitions, 81 FR 35611-01 (June 3, 2016) (to be codified at 22 C.F.R. pts. 120, 123-26).

4. See Amendment to the International Traffic in Arms Regulations: U.S. Munitions List Categories VIII and XIX, 81 FR 6797-01 (Feb. 9, 2016) (to be codified at 22 C.F.R. pt. 121); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XII, 81 Fed. Reg. 70340 (Oct. 12, 2016) (to be codified at 22 C.F.R. pt. 121); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Categories XIV and XVIII, 81 FR 49531-01 (July 28, 2016) (to be codified at 22 C.F.R. pt. 121).

5. 22 C.F.R. §§ 123.28, 124.1 (2016).

6. 22 C.F.R. §§ 123.28, 124.1 (2016).

7. 22 C.F.R. § 125.4(b)(9) (2016).

8. *Id.*

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Concurrent with these regulatory reforms, the agencies continued to focus on modernization and integration. In November, the State Department's Directorate of Defense Trade Controls (DDTC) transitioned from the previous manual submission process for commodity jurisdiction requests to an automated workflow submission platform.<sup>9</sup> DDTC intends to continue this automation initiative in 2017 with a transition from its legacy "DTrade" license submission platform to a future Defense Export Control and Compliance System (the DECCS), which is to replace the current series of "DSP" license varieties with a single automated authorization form.<sup>10</sup> Similarly, the current manual processes for submitting registration materials, advisory opinion requests, and disclosures are each to be replaced with automated modules in the DECCS.<sup>11</sup>

**B. ENFORCEMENT DEVELOPMENTS AND COMPLIANCE EXPECTATIONS**

Enforcement authorities were highly active in 2016. The most intriguing development was DOJ's initiation of a new voluntary self-disclosure process for export control and sanctions violations. This process, administered by DOJ's National Security Division, Counterintelligence and Export Control (CES) Section, complements DOJ's guidelines for assessing corporate cooperation<sup>12</sup> and is intended to encourage industry to voluntarily disclose directly to DOJ where they become aware of willful or otherwise egregious violations.<sup>13</sup> It is unclear how this process will interact with DDTC's and BIS's existing voluntary self-disclosure processes. Will DOJ give credit for self-disclosures made to the regulatory agencies, but not to CES? Will information provided to CES make its way to the regulatory agencies? What is clear is that DOJ is focused on increasing its opportunities to prosecute cases in this issue area and is dissatisfied with the information it has historically received out of the regulatory disclosure processes.

BIS's Office of Export Enforcement (OEE) continued to increase enforcement activity. In 2016, OEE issued 53 percent more administrative fines than in 2015.<sup>14</sup> The agency also doubled the number of individuals arrested for export control and sanctions violations.<sup>15</sup> OEE's principal focus

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9. U.S. DEP'T OF STATE, DIRECTORATE OF DEFENSE TRADE CONTROLS, OMB Approval No. 1405-0163, DS-4076 COMMODITY JURISDICTION (CJ) DETERMINATION FORM.

10. *DECCS Information Center*, U.S. DEP'T OF STATE, [http://www.pmdtcc.state.gov/DTAS-Online/deccs\\_info.html](http://www.pmdtcc.state.gov/DTAS-Online/deccs_info.html) (last updated Jan. 31, 2017).

11. *Id.*

12. Memorandum from Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice (Sept. 9, 2015) (on file with the U.S. Dep't of Justice).

13. U.S. DEP'T OF STATE, NATIONAL SECURITY DIVISION, GUIDANCE REGARDING VOLUNTARY SELF-DISCLOSURES, COOPERATION, AND REMEDIATION IN EXPORT CONTROL AND SANCTIONS INVESTIGATIONS INVOLVING BUSINESS ORGANIZATIONS (Oct. 2, 2016).

14. Douglas Hassebrock, Director, Office of Enft, Address at the Update 2016 Conference on Export Controls and Policy (Nov. 1, 2016).

15. *Id.*

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continues to be on illegal exports to Iran, with those cases representing over half of its enforcement caseload.<sup>16</sup> Also, investigation of illegal exports to Russia and Ukraine were a growing share of OEE's activity.<sup>17</sup>

DDTC was active as well. On the consent agreement front, DDTC announced three new consent agreements, in contrast to zero in 2015. It also announced its intent to articulate qualification and performance standards and, possibly, a training regimen for future Special Compliance Officers (SCOs) in order to address industry concern regarding varying approaches taken by different SCOs in the past.<sup>18</sup> DDTC also initiated a new form of enforcement agreement, the "oversight agreement," which is apparently intended to provide a less-intrusive, more tailored enforcement oversight option.<sup>19</sup> Finally, the agency also gained significantly stiffer civil penalty authority in 2016, with the maximum assessment for each regulatory violation more than doubling to over \$1 million.<sup>20</sup>

With regard to compliance expectations, DDTC compliance officials speaking at industry events articulated several specific elements they believe are hallmarks of an effective export compliance program, including the following:

- Centralized oversight of the international trade compliance function by the corporate parent.
- Automation of recurrent compliance processes and transactions, and integration of disparate processes into compliant systems. For example, export transactions conducted in a company's Enterprise Resource Planning system should automatically interact with classification information for the subject technology or hardware, the company's export authorization management system, and a screening function for denied parties.
- Development of detailed, automated processes to manage export authorization administrative requirements.
- Engaging engineers and other technical subject matter experts in deliberate jurisdiction and classification of technology and hardware.
- An investigation and disclosure process that proactively identifies regulatory violations, conducts effective root cause analysis, and scopes reviews and corrective actions to identify and address similar issues across the company.

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16. *Id.*

17. *Id.*

18. Chad Leezer, Compliance Specialist, Office of Def. Trade Controls Compliance, Address to the 2016 Fall International Trade Export Licensing & Compliance Conference: Consent Agreements (Oct. 25, 2016); see also *DDTC Penalty and Oversight Agreements*, U.S. DEP'T OF STATE, <http://pmdtdc.state.gov/compliance/poa.html> (last updated Oct. 5, 2016).

19. *Id.*

20. See U.S. DEP'T OF STATE, *DDTC CIVIL PENALTY INFLATION ADJUSTMENTS* (2016).

- An accountable, auditable process for effective implementation of corrective actions.<sup>21</sup>

The impending change in presidential administrations will likely affect the current approach to United States export controls and pace of ECR. But the direction and nature of this influence remains unclear. In the short term, the generally technical nature of ECR and the agencies' ongoing regulatory activities will likely insulate the issue area from drastic, immediate change.

## **II. Export Controls Update: United States and European Union Sanctions Against Iran and North Korea**

This Article summarizes changes during 2016 to sanctions laws of the United States, administered by the United States Department of Treasury Office of Foreign Assets Control (OFAC) and the European Union with respect to Iran and North Korea.<sup>22</sup>

### **A. IRANIAN SANCTIONS REGIME FOLLOWING JCPOA IMPLEMENTATION**

The announcement by the International Atomic Energy Agency on January 16, 2016,<sup>23</sup> that the Government of Iran satisfied its commitments under the Joint Comprehensive Plan of Action (JCPOA),<sup>24</sup> triggered "Implementation Day" and the lifting of Iran sanctions as detailed in the JCPOA. The immediate general impact of Implementation Day under the United States sanctions regime was the lifting of the nuclear-related "secondary sanctions."<sup>25</sup> But United States "primary sanctions" applicable to United States persons and Iranian transactions that have a United States nexus remain in full force and effect. The EU's commitments under the

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21. Leezer, *supra* note 18; see also U.S. DEP'T OF STATE, BUREAU OF POLITICAL MILITARY AFFAIRS DIRECTORATE OF DEFENSE TRADE CONTROLS OFFICE OF DEFENSE TRADE CONTROLS COMPLIANCE, DDTC COMPLIANCE PROGRAM GUIDELINES.

22. Though beyond the scope of this article, the United States instituted a number of other reforms to its export controls sanctions regime, including further liberalizing the sanctions in effect against Cuba and terminating sanctions against Myanmar (formerly Burma) and Côte d'Ivoire (or Ivory Coast).

23. Int'l Atomic Energy Agency [IAEA], *Verification and Monitoring in the Islamic Republic of Iran in light of United Nations Security Council Resolution 2231 (2015)*, IAEA Doc. No. GOV/INF/2016/1 (Jan. 16, 2016).

24. The full text of the JCPOA is available on the United States Department of State website, see *Joint Comprehensive Plan of Action*, U.S. DEP'T OF STATE, <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> (last visited Apr. 3, 2017).

25. Secondary sanctions generally are directed toward non-United States persons for specified conduct involving Iran that occurs entirely outside of United States jurisdiction. See U.S. DEP'T OF TREASURY & U.S. DEP'T OF STATE, GUIDANCE RELATING TO THE LIFTING OF CERTAIN UNITED STATES SANCTIONS PURSUANT TO THE JOINT COMPREHENSIVE PLAN OF ACTION ON IMPLEMENTATION DAY at 2 n.3 (Jan. 16, 2016). The specific United States commitments are set forth in Sections 4.1-4.7 of Annex II and Sections 17.1-17.2 of Annex V of the JCPOA.



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JCPOA were significantly broader and effectively lifted the substance of its economic and financial sanctions imposed in relation to the Iranian nuclear program, with only a limited number of restrictive measures, including the listing of certain individuals and entities, remaining in effect under the EU Iran sanctions.<sup>26</sup> This extraordinary event significantly altered the United States and EU sanctions in effect against Iran, opening the opportunity for Iran to reengage with the global economy and for non-United States companies to engage in business with Iran.

**B. UNITED STATES SANCTIONS**

*1. Removal of Nuclear Related Secondary Sanctions*

Under its JCPOA commitments, the United States government lifted the nuclear-related secondary sanctions imposed against Iran under various United States laws.<sup>27</sup> As a result, non-United States persons and entities can engage in activities that were previously subject to United States sanctions, including transactions in the following sectors: finance and banking; insurance; energy and petrochemicals; shipping, shipbuilding and ports; gold and other precious metals; software and metal; and automotive. Prior to Implementation Day, the United States could sanction non-United States persons that engaged in transactions with Iran in these sectors, or transactions with persons or entities identified on OFAC's listing of Specially Designated National and Blocked Persons (SDNs).<sup>28</sup> As part of its JCPOA commitments OFAC removed approximately 400 Iranian entities and persons from the SDN list. However, approximately 200 Iranian SDNs remain on the list.<sup>29</sup>

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26. The specific EU commitments are set forth in Sections 4.1-4.7 of Annex II and Sections 16.1-16.4 of Annex V of the JCPOA.

27. The primary United States laws that impose secondary sanctions on Iran include: Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, 124 Stat. 1312 (2010); Iran and Libya Sanctions Act of 1996, Pub. L. 104-172, 110 Stat. 1541 (1996); Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214 (2012); National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 1245, 125 Stat. 1298, 1311 (2011); National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, §§ 1241-55, 126 Stat. 1632, 2004 (2013); and various Executive Orders (E.O.s), including, Exec. Order No. 13574, 76 F.R. 30,505 (May 23, 2011); Exec. Order No. 13590, 76 F.R. 72,609 (Nov. 20, 2011); Exec. Order No. 13622, 77 F.R. 45,897 (July 30, 2012); Exec. Order No. 13628, 77 F.R. 62,139 (Oct. 9, 2012); Exec. Order No. 13645, 78 F.R. 33,945 (June 3, 2013).

28. The full SDN list, which is updated regularly, is available at <https://sanctionssearch.ofac.treas.gov/>. See *Sanctions List Search*, OFFICE OF FOREIGN ASSETS CONTROL, <https://sanctionssearch.ofac.treas.gov/> (last visited Apr. 4, 2017). In addition, any entity that is 50 percent or more owned by one or more SDNs is also considered an SDN even if not specifically identified on the SDN list. See U.S. DEP'T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, REVISED GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (2014).

29. *Sanctions List Search*, OFFICE OF FOREIGN ASSETS CONTROL, <https://sanctionssearch.ofac.treas.gov/> (last visited Apr. 4, 2017).

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Since 2012, United States sanctions prohibited foreign subsidiaries owned or controlled by a United States person from engaging in transactions, directly or indirectly, with Iran and any person subject to the jurisdiction of the Government of Iran that would be prohibited if undertaken by a United States person.<sup>30</sup> Consistent with its JCPOA commitments, OFAC issued General License H (GL H) that expressly authorizes non-United States subsidiaries of United States persons to engage in Iran-related transactions and permits United States persons to establish operating procedures to implement the activities covered by GL H.<sup>31</sup> In addition, GL H authorizes a United States person to make available to its owned or controlled non-United States entities that may be engaged in Iran-related transactions any “automated” and “globally integrated” computer, accounting, email, telecommunications, or other business support system, platform, database, application, or server necessary to store, collect, transmit, generate, or otherwise process documents or information related to the Iran transactions of the non-United States owned or controlled entity.<sup>32</sup> However, this authorization does not extend to cover any systems used to transfer funds through the United States financial system.<sup>33</sup>

2. *Continuation of Primary and Certain Secondary Sanctions*

The “primary” sanctions in effect against Iran—that is, sanctions that apply to transactions that have a United States nexus—remain in full force and effect.<sup>34</sup> Additionally, notwithstanding the JCPOA commitments, the United States retains certain secondary sanctions and OFAC can sanction non-United States persons and entities that engage in transactions (a) with Iranian SDNs<sup>35</sup> or (b) that materially contribute to the ability of Iran to develop weapons of mass destruction and support acts of terrorism.<sup>36</sup>

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30. Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214, 1234 (2012).

31. U.S. DEP’T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, GENERAL LICENSE H: AUTHORIZING CERTAIN TRANSACTIONS RELATING TO FOREIGN ENTITIES OWNED OR CONTROLLED BY A UNITED STATES PERSON 1 (2016).

32. *Id.*

33. *Id.* at 2.

34. These sanctions are primarily set forth in the Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. pt. 560 (2016). A transaction will generally have a United States nexus if it involves a United States person, United States goods, technology or services, or use of the United States financial system.

35. National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 1241(c)(1), 126 Stat. 1632, 2006-07 (2013).

36. *See, e.g.*, Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Pub. L. 111-195, §§ 105, 105A, 105B, 124 Stat. 1312, 1335 (2010); and Exec. Order No. 13553, 75 F.R. 60,567 (Sept. 28, 2010).

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3. *Licensing Policy*

To the extent an Iran related activity is prohibited under the ITSR or other applicable law, an OFAC license is required in order to engage in such transaction. As a general matter of licensing policy, OFAC will deny such license applications unless consistent with United States objectives. In furtherance of its JCPOA commitment, OFAC will license, on a case-by-case basis, United States persons and, where there is a United States jurisdictional nexus, non-United States persons, to export or transfer to Iran commercial passenger aircraft and components for exclusively civil aviation end-use and to provide associated services, provided that licensed items and services are used exclusively for commercial passenger aviation.<sup>37</sup> Such licenses will include conditions to ensure that licensed activities do not involve, and no licensed aircraft, goods, or services are re-sold or re-transferred to, any person on the SDN list or other sanctioned parties (such as individuals and entities listed on the Department of Commerce Bureau of Industry and Security (BIS) Denied Persons List).<sup>38</sup>

C. EU SANCTIONS

The EU sanctions relief, effective January 16, 2016, removed a broad range of restrictive measures, allowing EU companies to re-engage in business with Iranian partners in a variety of business areas.<sup>39</sup> A certain number of persons, entities, and bodies have been de-listed from the applicable EU sanctions lists and their assets have been unfrozen. However, certain activities remain restricted and the EU also keeps several individuals and entities on the EU watchlist. EU companies are therefore still obliged to conduct proper diligence and comply with remaining sanctions law restrictions as well as general obligations under EU and national export control laws.<sup>40</sup>

*Financial, Banking and Insurance Measures:* Under the softened EU sanctions regime, most importantly, financial transfers to and from Iran are permitted and do not need prior authorization, to the extent that the Iranian persons, entities or bodies involved are not listed on the remaining EU lists of designated persons, entities, or bodies. At the same time, certain Iranian

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37. See U.S. DEP'T OF TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, STATEMENT OF LICENSING POLICY FOR ACTIVITIES RELATED TO THE EXPORT OR RE-EXPORT TO IRAN OF COMMERCIAL PASSENGER AIRCRAFT AND RELATED PARTS AND SERVICES (2016).

38. See *id.*

39. The implementation of the EU sanctions relief occurred through several legislative acts beginning with the measures taken on October 18, 2015 which took effect on Implementation Day. For a detailed summary, see *Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA)* (Jan. 23, 2016), [http://eeas.europa.eu/archives/docs/top\\_stories/pdf/iran\\_implementation/information\\_note\\_eu\\_sanctions\\_jcpoa\\_en.pdf](http://eeas.europa.eu/archives/docs/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf). The description herein is based on the legislative acts cited in the Information Note as well as on the Information Note itself.

40. See *id.*

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banks and financial institutions will continue to be listed under the EU sanctions regime against Iran.<sup>41</sup>

*Oil, Gas and Petrochemical Sectors:* It is permissible to import, purchase, swap and transport crude oil and petroleum products, gas, and petrochemical products from Iran, and to export equipment or technology to be used in Iran for business activities in this industry.<sup>42</sup>

*Software:* Trade with software and related services are permitted, but remain subject to a licensing requirement if the software is designed for use in nuclear or military industries. Authorization may be obtained from the competent EU Member State authorities.

*Other Activities Affected by the EU Sanctions Relief:* The broad range of released activities also concerns the shipping, shipbuilding, and transport sectors, as well as the trade with gold and other precious metals, banknotes, and coinage. Authorization requirements however remain with respect to graphite and raw or semi-finished metals.<sup>43</sup>

*Continuation of Certain EU Sanctions:* The EU maintains an arms embargo against Iran and restrictive measures related to missile technology and on specific nuclear-related transfers and activities, resulting in a set of prohibited activities and certain authorization requirements. Some of these restrictions, such as the arms embargo, will only be lifted following Transition Day as defined by the JCPOA (i.e., October 18, 2023). Further, restrictive measures imposed by the EU in connection with human rights violations, support of terrorism, or for other reasons will continue to have effect.<sup>44</sup>

Exports from certain EU Member States to Iran, including Germany, increased in 2016 following Implementation Day, though the overall volume was smaller than many stakeholders in the industry had expected.<sup>45</sup> While certain large deals have been reported, such as the sale of Boeing and Airbus airplanes to the Iranian air transport industry, hesitance of the banking sector and other factors certainly have tempered the expectations to immediately re-install trade relations as they had existed between many EU countries and Iran prior to the implementation of the strict sanctions regime. Further developments will largely depend on whether businesses can sufficiently rely on the current status of the United States and EU restrictive measures, which at the end of 2016 is hard to predict.

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41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. According to figures published by the German-Iranian Chamber of Commerce (Deutsch-Iranische Handelskammer e.V.), exports to Iran increased by approximately 15 percent between January 2016 to August 2016 compared to the exports in the respective period in 2015, data available at *Exports to Iran Continue to Grow*, DEUTSCH-IRANISCHE HANDELSKAMMER E.V., <http://www.dihkev.de/de/news/6397-Exporte-nach-Iran-wachsen-weiter> (last visited April 4, 2017).

D. NORTH KOREA SANCTIONS

In response to North Korea's test of a nuclear weapon and ballistic missile technology in January and February 2016, on March 2, 2016, the United Nations Security Council (UNSC) unanimously adopted Resolution 2270.<sup>46</sup> The most significant provisions include: crackdown on illicit foreign trade channels; shipping and transport limitations requiring Member States to inspect cargo that originated in North Korea for items shipped in violation of sanctions; limitation of rare earth and other mineral exports from North Korea; and placing significant restrictions on both North Korean and Member State financial institutions.<sup>47</sup> Member States must prohibit new North Korean banks in their territories and close existing North Korean banks in their territories by May 31, 2016, and enhance arms control measures.<sup>48</sup> On November 30, 2016, the UN Security Council adopted a new Resolution to impose further restrictive measures as a reaction to North Korea's nuclear test on September 9, 2016, limiting scientific or technical cooperation and the number of bank accounts for North Korean diplomatic missions.<sup>49</sup>

1. *Implementation by the United States, and Additional United States Sanctions*

The United States already had in place a stringent North Korean sanctions regime.<sup>50</sup> On February 18, 2016, before the United Nations agreed upon Resolution 2270, the United States enacted The North Korea Sanctions and Policy Enhancement Act of 2016<sup>51</sup> that specified both mandatory and discretionary categories of entities that the President should sanction.<sup>52</sup> The President subsequently issued E.O. 13722<sup>53</sup> placing additional sanctions on North Korea, including the following: blocking all property or interests of the North Korean government, the Workers' Party of Korea, and other entities within the United States or within possession or control of any United States person; prohibiting all exportation from the United States or by a United States person of any good, service, or technology to North Korea; and prohibiting approval, financing, facilitation, or guarantee by any United States person of an action by a foreign person that would be prohibited under United States law.

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46. S.C. Res. 2270 (Mar. 2, 2016).

47. *Id.* at ¶¶ 18, 30, 32, 34.

48. *Id.* at ¶ 6.

49. S.C. Res. 2321, ¶ 16 (Nov. 30, 2016).

50. See North Korea Sanctions Regulations (NKSr), 31 C.F.R. pt. 510 (2016).

51. North Korea Sanctions and Policy Enhancement Act of 2016, Pub. L. 114-122, 130 Stat. 93 (2016).

52. For example, there was no discussion of human rights abuses in the Resolution; however, the NKSPEA requires the President to sanction any entities who were knowingly and significantly involved in them. See *id.*

53. Exec. Order No. 13722, 81 F.R. 14,943 (Mar. 15, 2016).

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*2. Implementation by the European Union*

The EU maintains restrictive measures against North Korea since the implementation of UN Security Council Resolution 1718 ten years ago.<sup>54</sup> In 2016, following the adoption of UN Resolution 2270, the EU has implemented restrictive measures in line with the broadened scope of the UN sanctions regime. In particular, in order to prevent asset flight, the EU Commission immediately aligned the list of persons and entities subject to the freeze of assets and continued to add further persons in May 2016.<sup>55</sup>

The transposition of the more complex new sectoral sanctions included in UN Resolution 2270 aimed at, amongst others, the prohibition of sale or supply of aviation fuel and the prohibition to establish new joint ventures with North Korean banks and the jurisdiction of EU Member States.<sup>56</sup> The Council of the European Union, on May 27, 2016, decided to impose additional restrictive measures going beyond the prohibitions and restrictions implemented in transposition of UNSC resolutions (so-called autonomous sanctions), arguing that it considered North Korea's nuclear and ballistic tests in early 2016 to be a grave threat to international peace and security.<sup>57</sup> These new measures include (i) prohibitions on the import of petroleum products, luxury goods and additional dual-use goods from North Korea, (ii) restrictions of financial support for trade with North Korea or prohibition on transferring funds to and from the country without prior authorization, (iii) prohibition on investments by North Korea in the EU and investments by EU persons in certain sectors in North Korea, and (iv) obligations of the EU Member States to deny permission to land in, take off from or overfly their territory to any aircraft operated by North Korean carriers or originating from North Korea.<sup>58</sup>

*3. Conclusion*

In 2016, apart from its sanctions activities in relation to Iran and North Korea, the EU decided to extend existing sanctions regimes, particularly those relating to the Ukraine crises and the conflict in Syria.<sup>59</sup> The EU also

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54. This resolution was a reaction to North Korea's nuclear test on 9 October 2006 and was implemented by the Council of the European Union's common position. See Council Common Position 2006/795/CFSP of 20 November 2006, 2006 O.J. (L 322) 32; Council Regulation (EC) No. 329/2007 of 27 March 2007, 2007 O.J. (L 88) 1.

55. Commission Implementing Regulation (EU) 2016/780 of 19 May 2016, 2016 O.J. (L 131) 55 (adding 16 individuals and 12 entities; Commission Implementing Regulation (EU) 2016/780 of 4 March 2016, 2016 O.J. (L 60) 62 (adding 18 individuals and one entity).

56. Council Decision (CFSP) 2016/476 of 31 March 2016, 2016 O.J. (L 85) 38; Council Regulation (EU) 2016/682 of 29 April 2016, 2016 O.J. (L 117) 1.

57. Council Decision (CFSP) 2016/849 of 27 May 2016, 2016 O.J. (L 141) 79; Council Regulation (EU) 2016/841 of 27 May 2016, 2016 O.J. (L 141) 36.

58. *Id.*

59. Press Release, EEAS, EU Restrictive Measures in Response to the Crisis in Ukraine (Mar. 16, 2017) (on file with the EEAS); Press Release, European Council, Council of the EU, Syria: EU Extends Sanctions Against the Regime by One Year (May 27, 2016) (on file with author).

implemented, for the first time, additional autonomous sanctions targeting terrorist groups ISIL (Da'esh) and Al-Qaeda.<sup>60</sup> Going forward, the UK European Union membership referendum's result (Brexit referendum) may however impact future decision making processes, as the UK strongly supported the implementation of the EU's restrictive measures over the past years. In the United States, the pending change in President, coupled with the Republican control of both the United States House of Representatives and Senate, raises the issue of potential changes in United States sanctions policies with respect to Iran, Cuba, and potentially other countries.

### **III. Developments in Korean Military Procurement and the Impact of a New Anti-Corruption Act**

Defense contracts are an area with high risks of corruption, and Korea is no exception. Large-scale defense contracts typically require a long time to prepare, execute, and perform, and the process has perennially been plagued with problems, such as (a) leakage of military secrets (*e.g.*, governmental plans for introduction of new weapons systems), (b) provision of economic benefits intended to secure favorable results in various evaluations, and (c) retired military officers or former public servants being employed by private businesses to act as agents or consultants, creating problems such as influence peddling or lobbying.<sup>61</sup>

Near the end of 2014, the Korean government designated defense contracts as an area which structurally presents serious irregularities and launched a "joint investigation team for defense contracting" task force consisting of about 100 investigators dispatched from the Ministry of National Defense, the National Police Agency, the Korea Customs Service and the Prosecutors' Office.<sup>62</sup> The task force conducted large-scale investigations until early 2016 which resulted in the indictment or prosecution of large numbers of active and retired military officers and public officials, as well as employees of defense contractors and weapons consultants.<sup>63</sup>

Anti-corruption investigations related to defense contracts are likely to continue in the future, in spite of concerns expressed by some at the excessive prosecution efforts by the Prosecutors' Office. For example, a former Navy Chief of Staff was found not guilty by the court after being indicted on charges of manipulating the procurement process to allow the

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60. Press Release, European Council, Council of the EU, Fight Against Terrorism: EU Strengthens its Legal Arsenal Against ISIL/Da'esh and Al-Qaida (Sept. 20, 2016) (on file with author).

61. *President Park Geun-hye's Commitment to Eradicate Corrupt Practices in the Defense Industry and Expected Follow-up Measures*, YOON & YANG LLC (Nov. 28, 2014), <http://www.lexology.com/library/detail.aspx?g=29034028-0929-4876-b28d-5a2e82354351>.

62. *Id.*

63. Amy Watson, *South Korea is Rocked by Defense Corruption Scandal*, THE SCOTSMAN (July 16, 2015), <http://www.pressreader.com/uk/the-scotsman/20150716/281951721499708>.

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purchase of hull mounted sonars (HMS) for the Tongyeong salvage and rescue ship which failed to meet the Navy's required operational capability (ROC).<sup>64</sup>

The 2014–2016 anti-corruption campaign has led to several consequences for practitioners. One noticeable consequence is the considerably reduced use of agents or consultants (which were seen as a major source of corruption) when foreign weapons manufacturers sell their products to the Defense Acquisition Program Administration (DAPA), the Korean government's military procurement office. Another consequence felt by practitioners is the tendency by certain DAPA officers to refuse to take any decision which may be interpreted against them by government auditors, opting instead to adopt an extremely rigid attitude, thus rendering negotiation and implementation of defense contracts more difficult.

Another consequence of the anti-corruption campaign has been the adoption of a very tough and thorough new anti-corruption law, effective since September 28, 2016, formally called the "Improper Solicitation and Graft Act" but better known as the "Kim Young Ran Act" (KYR Act), from the name of the Korean Supreme Court justice who initiated it.<sup>65</sup> The KYR Act applies to a wide scope of targets including not only public officials but also employees of state-owned enterprises and private media companies, teachers and employees of private schools, and private individuals performing public duties.<sup>66</sup>

Specifically, the KYR Act, which is not specific to the defense industry, has two major components: (1) prohibition of provision of economic benefits to a public official; and (2) prohibition of improper solicitation.<sup>67</sup> When the economic benefit is in excess of KRW1,000,000 (approximately U.S. \$900) at a time or KRW3,000,000 (approximately U.S. \$2,700) in total in one fiscal year, provision of such benefit is criminally punished regardless of its connection with the public official's duties and its motive.<sup>68</sup> When the economic benefit is less than the above amounts and the benefit is given in relation to the public official's duties, provision of such benefit is punished by a surcharge regardless of whether it is provided to receive an improper advantage.<sup>69</sup> Interestingly, for the ease of social relations the law provides for exceptions which reflect widely-practiced traditions of gift giving in Korean society. Some of the typical exceptions are: (i) food and beverages

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64. *Former Navy Chief Acquitted of Corruption Allegations*, KOREA TIMES (Aug. 18, 2016), [http://www.koreatimes.co.kr/www/news/nation/2016/08/205\\_212195.html](http://www.koreatimes.co.kr/www/news/nation/2016/08/205_212195.html).

65. Geumpumdeung Susuui Geumjie Gwanhan Beoblyul [Improper Solicitation and Graft Act], Act No. 13278, Mar. 27, 2015 (S. Kor.).

66. The term "public official" is defined very broadly in the KYR Act (articles 2 and 11). *See id.* arts. 2, 11. In essence, certain individuals vested with a public function or who could be viewed as such may be considered public officials under the KYR Act. The definition includes journalists, who are deemed as having the power to influence the public, and thus by extension exercise a public office.

67. *Id.* arts. 5, 8.

68. *Id.* arts. 8(1), 22(1), 22(1)(3).

69. *Id.* arts. 8(2), 23(5)(1), 23(5)(3).



worth less than KRW30,000 (U.S. \$27), gifts worth less than KRW50,000 (U.S. \$45), and congratulatory or condolence money worth less than KRW100,000 (U.S. \$90), unless the food, gift, or money is provided in return for a favor or to influence the discharge of the public official's duty; (ii) transportation, accommodation, and food and beverages, that are uniformly provided by an organizer of an official event related to the duties of a public official, to all participants to the event; and (iii) souvenirs or promotional goods distributed to people regardless of their identity.<sup>70</sup>

"Improper solicitation," in short, means requesting a public official to discharge his/her duty in violation of the laws, or beyond their authority granted under the laws.<sup>71</sup> In principle, any person engaging in improper solicitation will be subject to an administrative surcharge regardless of whether he/she received money for exerting his influence.

The KYR Act has a vicarious liability provision applicable to corporations.<sup>72</sup> Thus, any violation of the KYR Act will subject corporations to criminal and administrative punishment, unless a corporation can prove it properly supervised the conduct of its employees so as to prevent such violation.<sup>73</sup>

The KYR Act is attracting unprecedented attention both from the Korean public and from enforcement agencies. Taking this into account, defense companies doing business in Korea need to update their compliance systems and guidelines to prevent any unintended entanglement with the KYR Act.

#### **IV. Increased Enforcement of Anti-Corruption Laws**

The global anti-corruption landscape for the balance of 2016 continued recent years' ratcheting trends. Both United States and international authorities escalated their enforcement activity. Non-United States jurisdictions, in particular, witnessed enhanced anti-corruption policy attention and regulatory activity. An industry initiative led by the International Organization for Standardization (ISO) resulted in a new auditable standard for robust industry compliance. The result of the November 2016 United States election, however, introduces a degree of uncertainty into the horizon. Given President Trump's stance regarding deregulation and United States corporate competitiveness, and his own

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70. *Id.* arts. 8(3); Enforcement Decree of the Improper Solicitation and Graft Act, Presidential Decree No. 27490, Sept. 8, 2016 (S. Kor.).

71. Article 5 of the KYR Act defines 15 actions which constitute improper solicitation. *See* Improper Solicitation and Graft Act art. 5. For example, Trading in influence so that duty-related confidential information on tender, auction, development, test, patent, military affair, taxation, etc., is disclosed in violation of statutes; Trading in influence so that a specific individual, organization, or legal person is selected or rejected as a party to a contract in violation of statutes related to the contract.

72. *Id.* art. 24.

73. Before the KYR Act, official bribery and private commercial bribery used to be primarily governed by the Criminal Act which does not recognize a corporation's vicarious criminal liability. Therefore, bribery cases led to the punishment of individuals but not corporations.

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experience conducting business in high-risk environments, the ground may begin to shift for United States priorities in the new year.

Within the United States, the Department of Justice's (DOJ) decision to create a targeted FCPA enforcement division is beginning to have real impact, with the DOJ and Securities and Exchange Commission (SEC) bringing 39 enforcement actions in October 2016—the highest number of cases in a single year since 2010.<sup>74</sup> The cases resolved by the DOJ have generally been high-dollar, complex cases. The SEC has resolved a higher volume, but more of these have been against individuals or involved lower dollar amounts. With the two agencies seemingly focusing their resources in different, but complementary areas, companies and executives are left with little room for error.

While United States agencies declined more cases than in previous years and authorized several deferred prosecution agreements, those individuals and entities that are charged are facing record-setting penalties. For example, Och-Ziff Capital Management Group settled with the SEC and DOJ for \$412 million in September for violations of the FCPA's anti-bribery, books and records, and internal control provisions, marking the first time a hedge fund has been charged with FCPA violations.<sup>75</sup> The fourth largest FCPA penalty to date stemmed from allegedly improper payments made by third-party agents of Och-Ziff to government officials of several African countries.<sup>76</sup> Och-Ziff's CEO and CFO also settled charges with the SEC.<sup>77</sup> In another significant action, Embraer settled with the DOJ and SEC, agreeing to pay a total of \$205 million in fines, \$98 million of which represented disgorgement of profits and interest, one of the largest disgorgements in FCPA enforcement history.<sup>78</sup> The Brazilian based airline manufacturer allegedly made improper payments to win government contracts in several foreign countries.<sup>79</sup>

Parallel to the increased cadence of United States enforcement activity, international anti-corruption efforts accelerated as well. For example, Brazil's Operation Car Wash, an epic corruption probe, unleashed a

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74. In 2010, the SEC and DOJ had a combined 74 FCPA enforcement actions. (This number was derived from SEC and DOJ websites that list enforcement actions.). See also Kevin Y. Wang, *Valuable Nepotism?: The FCPA and Hiring Risks in China*, 49 COLUM. J.L. & SOC. PROBS. 460, 466 (2016).

75. Press Release, U.S. Dep't of Justice, Office of Public Affairs, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine (Sept. 29, 2016) (on file with the U.S. Dep't of Justice).

76. *Id.*

77. Press Release, SEC, Och-Ziff Hedge Fund Settles FCPA Charges (Sept. 29, 2016) (on file with the SEC).

78. Press Release, SEC, Embraer Paying \$205 Million to Settle FCPA Charges (Oct. 24, 2016) (on file with the SEC).

79. United States v. Embraer, No. 16-cr-60294-JIC, at A-1 (S.D. Fl. Oct. 24, 2016) (deferred prosecution agreement); SEC, *supra* note 77.

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fundamental shock to Brazil's political establishment.<sup>80</sup> Operation Car Wash focused on an alleged embezzlement scheme in which businesses bribed politicians in order to secure inflated government contracts.<sup>81</sup> To date, numerous senior officials, including two of Brazil's ex-presidents, have been charged.<sup>82</sup> Brazil recently enacted the Clean Company Act in 2014, which holds companies liable for both domestic and foreign bribery, extending anti-bribery prohibitions that previously only applied to individuals.<sup>83</sup> While Brazil's Congress is currently debating proposed legislation that would strengthen existing anti-corruption legislation, prosecutors conducting Operation Car Wash warn that the legislation would also provide for an "unofficial amnesty" of politicians linked to Operation Car Wash.<sup>84</sup> It is unclear whether the legislation is truly motivated by deterring future corruption, or insulating those political officials who have engaged in illegal bribes and might ultimately be caught in Operation Car Wash's net.

The increased attention to anti-corruption issues globally was reflected in the 2016 publication of ISO 37001 – Anti-bribery Management Systems—an auditable standard articulating international industry best practices in anti-bribery compliance.<sup>85</sup> ISO 37001 contemplates many of the same elements for assessing the robustness of corporate compliance programs as those stated in the DOJ and SEC's A Resource Guide to the Foreign Corrupt Practices Act, issued in November 2012.<sup>86</sup> Companies must implement systems designed to detect, deter, and prevent corruption; risk-appropriate policies supported by documented training of all personnel; automation of recurring compliance processes; credible, independent audits; a process for identifying, investigating, and correcting violations; and demonstration of leadership commitment to accountable compliance.<sup>87</sup> Companies can become ISO 37001 certified by an independent auditor in order to demonstrate the credibility of their compliance program and mitigate the risk of enforcement against the company in the event an employee or agent is involved in a corruption violation.<sup>88</sup>

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80. *Petrobras: Brazil Officials Forced to Give \$60m Back*, BBC NEWS (Nov. 19, 2016), <http://www.bbc.com/news/world-latin-america-38034497>.

81. *Id.*

82. *Id.*

83. Thomaz Favaro & Geert Aalbers, *Breaking Open Brazil: Large-Scale Corruption Investigation Persists, Will Expand Across Sectors*, FORBES (Aug. 4, 2016), <https://www.forbes.com/sites/riskmap/2016/08/04/breaking-open-brazil-large-scale-corruption-investigation-persists-will-expand-across-sectors/#c778b2920f5d>.

84. *Car Wash Judge: Amnesty to Corrupt Politicians a Risk to Brazil*, PLUS 55 (Nov. 24, 2016), <http://plus55.com/politics/2016/11/amnesty-corrupt-politicians-brazil>.

85. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO: 37001:2016, ANTI-BRIBERY MANAGEMENT SYSTEMS (2016).

86. See U.S. DEP'T OF JUSTICE & SEC, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT (2012).

87. International Organization for Standardization, *supra* note 85.

88. *Id.*

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The result of the United States presidential election may signal a challenge to current trends. Given the statutory status of the FCPA, DOJ's institutionalization of enforcement activity with a dedicated division, and the momentum of current actions, it is unlikely that industry will observe an immediate shift. But at a policy level, the new administration's focus on de-regulation, United States international business competitiveness, and more public safety-oriented law enforcement priorities may result in a downshift over time in United States enforcement initiatives. The ultimate impact on the global anti-corruption environment, however, is unclear.

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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

## **International Energy and Natural Resources**

PETRA STEWART, MARIANA ARDIZZONE, TONY WASSAF, MAURICIO BECERRA DE LA ROCA DONOSO, JOÃO OTÁVIO PINHEIRO OLIVÉRIO, MATHIAS DANTIN, LEONARDO SEMPETEGUI, RICARDO ALVES SILVA, SARA FRAZÃO, AND CARYL BEN BASAT\*

This Article summarizes important developments in 2016 in international energy and natural resources law in Argentina, Australia, Bolivia, Brazil, Cameroon, Ecuador, Mali, Morocco, Peru, Portugal, the Republic of Congo, and the United States.

### **I. Argentina**

#### **A. NATURAL GAS RATES HIKE ANNULLED BY NATIONAL SUPREME COURT**

In a recent decision, the National Supreme Court of Argentina annulled increases in natural gas rates applicable to residential users because a government agency issued the hikes absent public hearings. As background, the new presidential administration that took office in December 2015 prioritized reducing the fiscal deficit inherited from the previous administration. Energy subsidies were the principal source of the deficit, as the Argentine government had to assume the cost of importing natural gas to make up for a shortage in domestic production.<sup>1</sup>

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\* Petra Stewart, counsel at Mediabiz International Inc. in Montreal, Quebec, Canada, served as committee editor of this article. The following authors submitted contributions: Mariana Ardizzone, a partner with Ardizzone Abogados in Buenos Aires, Argentina, contributed the section on Argentina; Tony Wassaf, a partner at Jones Day in Sydney, Australia, contributed the section on Australia; Mauricio Becerra de la Roca Donoso, the managing partner of Becerra de la Roca Donoso & Asociados in Santa Cruz de la Sierra, Bolivia, contributed the section on Bolivia; João Otávio Pinheiró Olivério, a founding partner of Olivério Advogados in São Paulo, Brazil, contributed the section on Brazil; Mathias Dantin, a senior associate at Herbert Smith Freehills in Paris, France, contributed the sections on Cameroon, Mali, and Morocco; Leonardo Sempertegui, a partner at Sempertegui Ontaneda Abogados in Quito, Ecuador, contributed the sections on Ecuador and Peru; Ricardo Alves Silva, a partner at Miranda Alliance's Headquarters in Lisbon, Portugal and Sara Frazão, an associate at Miranda Alliance's Headquarters in Lisbon, Portugal, contributed the sections on Portugal and the Republic of Congo; and Caryl Ben Basat, a shareholder with the BenBasat Law Group in Weston, Florida, United States, contributed the section on the United States.

1. See Benedict Mander & Daniel Politi, *Macri raises hopes for Argentina's economic renewal*, FINANCIAL TIMES, (Jan. 20, 2016), <https://www.ft.com/content/e4476904-beb6-11e5-9fdb-87b8d15baec2>.

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In March 2016, the Ministry of Energy and Mining determined the new natural gas prices payable to natural gas producers for their natural gas at the common carriers' receipt point.<sup>2</sup> The Ministry also instructed the National Natural Gas Regulatory Agency (ENARGAS) to implement a comprehensive review of natural gas transportation and distribution rates.<sup>3</sup> The Argentine government had frozen natural gas transportation and distribution rates in Argentine pesos for approximately twelve years despite high inflation. Fixing the enormous lag required commensurate rate adjustments. The Argentine government and respective license holders already renegotiated the terms of their distribution and transportation rates, which the government had not previously regulated, during public hearings open to consumers.<sup>4</sup>

Without conducting further public hearings, ENARGAS issued a new set of transitory rates. The new rates entailed hikes of up to 600%<sup>5</sup> on the then existing rates. Several court claims filed by organizations, small businesses, and individuals ensued. The Center of Studies for the Promotion of Equality and Solidarity (Centro de Estudios para la Promoción de la Igualdad y la Solidaridad – “CEPIS”) registered the first collective constitutional relief action on the matter.<sup>6</sup> Other individuals and organizations joined CEPIS as plaintiffs during the course of the proceedings.

The court of first instance denied the plaintiffs' request for an injunction to suspend the transitory rate increase.<sup>7</sup> The Second Division of the Federal Court of Appeals of the City of La Plata reversed the court of first instance's decision and annulled the challenged resolutions of the Ministry of Energy and Mining, rolling back the rate hikes.<sup>8</sup>

In a remarkable decision, the National Supreme Court ultimately heard and decided the case on August 18, 2016, on grounds that the controverted issues were of institutional importance.<sup>9</sup> The National Supreme Court unanimously granted relief to residential and small consumer plaintiffs, and annulled the challenged resolutions of the Ministry of Energy and Mining.

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2. See Ministry of Energy and Mining Resolution 28/2016, Mar. 28, 2016, [33348] B.O. 6. (Arg.).

3. See Ministry of Energy and Mining Resolution 31/2016, Apr. 1, 2016, [33348] B.O. 6. (Arg.).

4. *Id.*

5. *Gas: lo que hay que saber de las nuevas tarifas* [Natural Gas: Knowing what's needed on the new rates], *ÁMBITO FINANCIERO*, (Oct. 7, 2016), <http://www.ambito.com/858000-gas-lo-que-hay-que-saber-de-las-nuevas-tarifas>.

6. Courte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/08/2016, “Centro de Estudios para la Promoción de la Igualdad y la Solidaridad c. Ministerio de Energía y Minería s/ amparo colectivo,” [FLP] (9399/2016/CS1) (Arg.), available at <http://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumento.html?idAnalisis=732788&interno=2>.

7. See *id.* at § 4.

8. See *id.* at § 6.

9. See *id.* at § 7.

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The decision, however, applied only to residential users, leaving industrial and commercial users aside.<sup>10</sup> The National Supreme Court found residential users to be the only group with a homogeneous set of individual interests, whose access to justice would be deprived if they had to assume individual litigation costs to challenge the rate increases.<sup>11</sup>

In its reasoning, the National Supreme Court also analyzed the components of natural gas end rates, including bare transmission and distribution services and the cost of natural gas at the common carriers' receipt point. The National Supreme Court found that government regulation, rather than market forces, determined the cost of natural gas at the common carriers' receipt point during the preceding years, comparable to a utility rate. By extension, the National Supreme Court found that an adjustment to the price of natural gas at the common carriers' receipt point was comparable to an adjustment to a utility rate.<sup>12</sup> Because a utility rate adjustment required a public hearing, a natural gas price adjustment equally required a public hearing.<sup>13</sup>

The National Supreme Court interpreted Section 42 of the Argentine National Constitution, which provides for the participation of users in public services, as requiring a public hearing prior to the approval of rate increases.<sup>14</sup> Although temporary, the rates issued by ENER GAS could be considered disproportionate compared to consumers' ability to pay and, by consequence, deprive consumers of access to an essential public service.<sup>15</sup>

Because of the National Supreme Court's ruling, the National Minister of Energy and Mining conducted public hearings in September 2016 and ENER GAS issued new natural gas rates in October 2016.<sup>16</sup> Those rates were capped at 300% for users R1-R23; 350% for users R31-R33; 400% for users R34; and 500% for SGP users, including small businesses.<sup>17</sup>

## II. Australia

The major downturn of the mining industry in Australia, including depressed global commodity prices, has led to an increased focus on mine and plant shutdowns, and resulting rehabilitation liabilities. These liabilities are regarded generally as future obligations but become immediate obligations in the event of a shutdown. In general, the security deposits held under mining tenements and other authorities, and the net assets held by the companies that own the mines, are inadequate to fund these obligations,

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10. *See id.* at § 37.

11. *See id.* at § 14.

12. *See Centro de Estudios para la Promoción de la Igualdad y la Solidaridad* § 20.

13. *See id.*

14. *See id.* at § 30.

15. *See id.*

16. *See* Ministry of Energy and Mining Resolution 31/2016, Apr. 1, 2016, [33348] B.O. 6 (Arg.).

17. *See id.*



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especially in an insolvency situation. Where a shortfall exists, the State is responsible for the rehabilitation liability.

In April 2016, the Queensland Parliament passed the Environmental Protection (Chain of Responsibility) Amendment Act,<sup>18</sup> which addresses the shortfall in rehabilitation funding for an insolvent company. The Act extends liability for rehabilitation beyond the mining company by creating a mechanism to make additional connected persons liable for a shortfall in rehabilitation funding;<sup>19</sup> thereby, potentially relieving the State from rehabilitation liability.

The mechanism is an environmental protection order that the Queensland Environmental Protection Agency (“EPA”) serves on related persons.<sup>20</sup> The Act defines a related person as follows:

A person is a related person of a company if—

- (a) the person is a holding company of the company; or
- (b) the person owns land on which the company carries out, or has carried out, a relevant activity<sup>21</sup> other than a [mining or other] resource activity<sup>22</sup>; or
- (c) the person—
  - (i) is an associated entity of the company; and
  - (ii) owns land on which the company carries out, or has carried out, a relevant activity that is a [mining or other] resource activity; or
- (d) the [EPA] decides the person has a relevant connection with the company.<sup>23</sup>

The EPA may base its decision that a person has a relevant connection with a company upon the EPA’s finding that

the person is capable of significantly benefiting financially,<sup>24</sup> or has significantly benefited financially, from the carrying out of a relevant activity<sup>25</sup> by the company; or . . . the person is, or has been at any time during the previous 2 years, in a position to influence the company’s conduct<sup>26</sup> in relation to the way in which, or extent to which, the

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18. *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) (Austl.).

19. *See id.* §§ 363AC-363AD.

20. *See id.*

21. “[R]elevant activity . . . means an environmentally relevant activity . . . that was, or is being, carried out by the company under an environmental order; or . . . that was, or is being, carried out by the company and has caused, or is causing or likely to cause, environmental harm.” *Id.* §§ 363AA.

22. Resource activities include mining activities. *See Environmental Protection Act 1994* (Qld) §§ 107 (Austl.).

23. *Environmental Protection (Chain of Responsibility) Amendment Act*, (Qld) §§ 363AB(1) (Austl.)

24. “Financial benefit received by a person, includes profit, income, revenue, a dividend, a distribution, money’s worth, an advantage, priority or preference, whether direct or indirect, that is received, obtained, preferred on or enjoyed by the person.” *Id.* §§ 363AB(8).

25. *Id.* at § 363AA.

26. “A reference to a person being in a position to influence a company’s conduct includes a person being in that position, whether by giving a direction or approval, by making funding available or in another way.” *Id.* §§ 363AB (3).

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company complies with its obligations under the Environmental Protection Act (“EP Act”).<sup>27</sup>

The EPA has mandatory and suggested considerations that factor into its decision to issue an environmental protection order pursuant to section 363AC or AD. The EPA “must have regard to any relevant guidelines in force.”<sup>28</sup> The EPA

may consider whether the related person took all reasonable steps, having regard to the extent to which the person was in a position to influence the company’s conduct, to ensure the company complied with its obligations under the EP Act and made adequate provision to fund the rehabilitation and restoration of the land because of environmental harm from a relevant activity carried out by the company.<sup>29</sup>

Aside from Queensland, other States and Territories of Australia have not introduced similar legislation at this stage.

### **III. Bolivia**

#### **A. OIL AND GAS INCENTIVES LAW TO PROMOTE INVESTMENT**

Bolivia enacted Law No. 767, providing a series of incentives to promote investment in hydrocarbon exploration and exploitation.<sup>30</sup> Law No. 767 is a response to Yacimientos Petrolíferos Fiscales Bolivianos’s (YPFB) inability in the ten years following “nationalization” to find new oil wells of the magnitude of San Alberto or San Antonio, which were found in the nineties.<sup>31</sup> Additionally, Law No. 767 is a response to the declining hydrocarbon fields in current production, the growing domestic demand for energy, and Bolivia’s ongoing gas export obligations under contracts with Brazil and Argentina.<sup>32</sup>

#### **B. INCENTIVES**

The incentive for the production of oil and condensate in new gas fields associated with the production of natural gas is \$30 to \$50U.S./Bbl in

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27. *Id.* §§ 363AB(2).

28. None in force as of September 16, 2016. *Id.* §§ 363ABA.

29. *Id.*

30. See Ley No. 767 of Dec. 11, 2015 ley de promoción para la inversión en exploración y explotación hidrocarburífera [Law No. 767 of Dec. 11, 2015 on the Promotion Law for investment in Hydrocarbon Exploration and Exploitation], GACETA OFICIAL DEL ESTADO PLURINACIONAL DE BOLIVIA [G.O.] [OFFICIAL GAZETTE OF BOLIVIA] (Bol.).

31. See Lidia Mamani, *El Gobierno propone ajustes a la ley de incentivos petroleros* [Government proposes adjustments to the hydrocarbons incentives law], PAGINA SIETE (May 25, 2016), <http://www.paginasiete.bo/economia/2016/5/25/gobierno-propone-ajustes-incentivos-petroleros-97578.html>.

32. See *id.*

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traditional areas and \$35 to \$55 U.S./Bbl in non-traditional areas.<sup>33</sup> For the two areas, a term of up to twenty years and twenty-five years, respectively, is established (the period to be regulated according to technical and economic criteria by Supreme Decree).<sup>34</sup> Limitations on eligibility for these incentives are set according to the effective date of oil service contracts, as follows:

- contracts with an effective date at the publication of Law No. 767, must start exploratory drilling activities before January 1, 2019;
- contracts in traditional areas with an effective date after the publication of Law 767, must start exploration drilling activities on or before the last day of the fourth year of the contract from the effective date;
- contracts in non-traditional areas with an effective date after the publication of Law No. 767, must start exploration drilling activities on or before the last day of the fifth year of the contract from the effective date.<sup>35</sup>

Furthermore, Law No. 767 provides a third incentive applicable to the additional production of condensate for fields in current production in traditional areas from \$0 to \$30 U.S./Bbl, for a period of up to ten years. The same is subject, however, to a production base defined by YPF based on reserves, additional investments, international prices, and production levels.<sup>36</sup>

Finally, for areas classified as Gas Fields with Dry Gas Reservoirs,<sup>37</sup> marginal or small, Law No. 767 also provides an incentive, consisting of the priority allocation of export markets for natural gas according to parameters and procedures set out by Supreme Decree.<sup>38</sup>

### C. FINANCING

Incentives for crude oil production in existing fields, both in traditional and non-traditional areas, will be financed by Tax Credit Notes (NOCRE's) to be issued by the Ministry of Economy and Public Finance. In new fields, both in traditional and non-traditional areas, incentives will be financed with funds from the *Fondo de Promoción a la Inversión en Exploración y Explotación Hidrocarbúrfera* (FPIEEH).<sup>39</sup>

Incentives for additional condensate production in existing fields and condensate production in new fields will be financed with funds from FPIEEH,<sup>40</sup> based on a formula established by Supreme Decree.<sup>41</sup> Incentives

33. See Law No. 767 of Dec. 11, 2015, art. 6.

34. See *id.* at art. 8.

35. See *id.*

36. See *id.* at art. 9.

37. See *id.* at art. 5 (definitions of capitalized terms).

38. See *id.* at art. 10.

39. See Law No. 767 of Dec. 11, 2015, art. 14. FPIEEH is a fund created with the objective of promoting exploration and exploitation of hydrocarbons and is funded by a portion of the revenue from direct taxes on hydrocarbons. See *id.* at art. 11–12.

40. See *id.* at art. 15.

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for the production of condensate in new fields may also be financed through the issuance of NOCREs if FPIEEH funds are insufficient.<sup>42</sup>

**D. PERSPECTIVES**

The Minister of Hydrocarbons credits the incentives program for oil companies' planned investment of close to one billion dollars in hydrocarbon exploration and development.<sup>43</sup> The main exploration projects are Boyuy (potential 4 TCFs) and Boicobo (1.13 TCFs) in the Caipipendi area south of La Paz.<sup>44</sup> A consortium formed by Repsol, PAE, and Shell signed an agreement with YPFB in October 2016 to extend the term of a production contract for the Caipipendi area for up to fifteen years (until 2046), which includes a minimum investment by the consortium of 500 million dollars in the next few years.<sup>45</sup>

Moreover, YPFB and Petrobras signed a contract in November 2016 for exploration of the San Telmo and Astillero fields (estimated reserve of 4 TCFs) that includes an investment of 1.2 billion dollars, which can guarantee extending Bolivia's gas sale contract with Brazil beyond 2019.<sup>46</sup>

**IV. Brazil**

**A. RENEWABLE ENERGY**

Brazil experienced significant development in the renewable energy sector in 2016, especially in view of changes to the distributed generation and net metering rules enacted at the end of 2015.

On November 24, 2015, the Brazilian Electricity Regulatory Agency (ANEEL) issued Resolution No. 687 (RN 687), which amends and modifies Resolution No. 482 of April 17, 2012 (RN 482), and provides for a regulatory framework that enables generated distribution and net metering.<sup>47</sup> RN 687 came into force in March 2016,<sup>48</sup> allowing renewable

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41. See Decreto Supremo 2830 de Julio 6, 2016 [Supreme Decree 2830 of July 6, 2016], GACETA OFICIAL DEL ESTADO PLURINACIONAL DE BOLIVIA [G.O.] [OFFICIAL GAZETTE OF BOLIVIA] (Bol.).

42. See Law No. 767 of Dec. 11, 2015, art. 16.

43. See Xinhua, *Ministro dice que Ley de Incentivos genera creciente inversión en hidrocarburos en Bolivia* [Minister says Law of Incentives generates growing investment in hydrocarbons in Bolivia], AMERICA ECONOMIA (Oct. 30, 2016), <http://www.americaeconomia.com/negocios-industrias/ministro-dice-que-ley-de-incentivos-genera-creciente-inversion-en-hidrocarburos>.

44. See *id.*

45. See Diego Ponce, *Bolivia y consorcio Repsol suscriben ampliación de operaciones en Caipipendi por 15 años* [Bolivia and Repsol Consortium Sign Expansion of Operations in Caipipendi for 15 Years], CAMBIO (Oct. 26, 2016), <http://cambio.bo/?qNºde/15735>.

46. See *Bolivia y Brasil pactan por \$us 1.200 millones en energía* [Bolivia and Brazil pact US \$ 1.2 billion in energy], DELTA FINANCIERO (Nov. 8, 2016), <http://deltafinanciero.com/797-Bolivia-y-Brasil-pactan-por-us-1-200-millones-en-energia>.

47. See Resolução Normativa No. 482 de 17 de Abril de 2012, AGÊNCIA NACIONAL DE ENERGIA ELÉCTRICA [ANEEL] de 17.4.2012 (Braz.).

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energy companies to carry out investments aimed at expanding the Brazilian Net Metering Program (*Sistema de Compensação de Energia*).<sup>49</sup>

In view of RN 687, Brazil has experienced growth in this sector.<sup>50</sup> ANEEL announced that by September 2016, 5,525 micro-mini generation connections were registered compared to 1,155 connections registered with ANEEL in September 2015.<sup>51</sup>

Changes introduced to the Net Metering Program under RN 687 include:

- (1) Consumers that generate up to 5 MW, up from 1 MW of installed capacity, may offset their electricity bills with credits from the energy they deliver to the grid.<sup>52</sup>
- (2) Consumers can distribute credits earned through the Net Metering Program among multiple electric service accounts: for example, on a multi-tenant commercial property.<sup>53</sup>
- (3) Several customers may share the benefits of a solar power generating facility as a single consumer (known as “community solar”) if (a) the same electric energy distribution company services all the costumers, and (b) the single consumer is formed as a cooperative (for individuals) or consortium (for companies).<sup>54</sup>
- (4) Consumers with unused net-metering credits may use those credits to offset any excess energy usage at other sites (known as “virtual net metering”) if (a) the same electric energy distribution company services both sites; and (b) ownership of both sites is the same.<sup>55</sup>
- (5) Consumers’ credits under the Net Metering Program expire after sixty months, an increase from thirty-six months.<sup>56</sup>

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48. See Resolução Normativa No. 687 de 24 de Novembro de 2015, AGÊNCIA NACIONAL DE ENERGIA ELÉCTRICA [ANEEL] de 24.11.2012 (Braz.).

49. In general, net metering allows consumers to install energy generators from different sources—solar, wind, hydro and cogeneration—and inject the energy generated into the distribution system. By doing this, (i) the consumer/generator earns credits that may be used to set off in his/her electric bills from the distribution company, and (ii) energy generated under the generation distribution closer to the consumers decrease losses due to transmission and distribution, allowing the Brazilian electric matrix to be less risky and dependent on hydro plants.

50. See *Registro de Micro e Mini Geradores Distribuídos [Registration of Micro and Mini Distributed Generators]*, AGÊNCIA NACIONAL DE ENERGIA ELÉTRIC (Feb. 6, 2017), <http://www2.aneel.gov.br/scg/gd/gd.asp>.

51. For more information on the increase of distributed generation in Brazil, see *Brasil ultrapassa 5 mil conexões de micro e minigeração [Brazil Exceeds 5,000 Micro and Minigeration Connections]*, AGÊNCIA NACIONAL DE ENERGIA ELÉTRIC (Sept. 26, 2016), [http://www.aneel.gov.br/sala-de-imprensa-exibicao-2/-/asset\\_publisher/zXQREz8EVIZ6/content/brasil-ultra-passa-5-mil-conexoes-de-micro-e-minigeracao/656877](http://www.aneel.gov.br/sala-de-imprensa-exibicao-2/-/asset_publisher/zXQREz8EVIZ6/content/brasil-ultra-passa-5-mil-conexoes-de-micro-e-minigeracao/656877).

52. See Resolução Normativa No. 482 de 24 de Novembro de 2015, art. 2 § III.

53. See *id.* at § VI.

54. See *id.* at § VII.

55. See *id.* at § VIII.

56. See *id.* at art. 6 para. 1, art. 7 § XII.

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- (6) Distribution companies are required to connect a distributed generation system within fifteen or thirty days of a request if there is no need for improvements to the network.<sup>57</sup>

Other initiatives that prompted the increase of distributed generation and net metering in Brazil relate to tax incentives granted by the government. In 2015, Brazil's National Council for Financial Policy agreed to authorize the states in Brazil to grant a value added tax exemption on all distributed generation from net-metering systems (the *Convênio ICMS 16/2015*).<sup>58</sup> Acre, Alagoas, Minas Gerais, Rio de Janeiro, Rio Grande do Sul,<sup>59</sup> Roraima,<sup>60</sup> and Pará are among the states that have recently agreed to adhere to the *Convênio ICMS 16/2015*.<sup>61</sup>

## V. Cameroon

### A. ELECTRICITY

Cameroon is currently unbundling its electric power sector. On October 8, 2015, two presidential decrees approved the articles of association creating the National Electricity Transport Company (SONATREL).<sup>62</sup> Set up as a state-owned enterprise with the Government as the sole shareholder, SONATREL's main objective is to transmit electric power and manage the transmission network on the State's behalf.<sup>63</sup> The parties have yet to conclude concession agreement(s) between the State and SONATREL that entrust these duties to SONATREL. Once signed, the agreement(s) with SONATREL will end the existing concession agreement for electric power transmission between the State and ENEO Cameroun S.A.<sup>64</sup>

The ten members of SONATREL's management team, including Basile Atangana Kouna, the Minister for Water and Energy, were nominated by

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57. See § 3.7 *Procedimentos de Distribuição de Energia Elétrica no Sistema Elétrico Nacional – PRODIST [Procedures for the Distribution of Electric Power in the National Electrical System – PRODIST]*, AGÊNCIA NACIONAL DE ENERGIA ELÉTRICA [ANEEL] de 3.3.2016 (Braz.).

58. See *Convênio ICMS 16 [ICMS Agreement 16]*, O CONSELHO NACIONAL DE POLÍTICA FAZENDÁRIA [CONFAZ] de 22 de Abril de 2015 (Braz.).

59. See *Convênio ICMS 157 [ICMS Agreement 157]*, O CONSELHO NACIONAL DE POLÍTICA FAZENDÁRIA [CONFAZ] de 18 de Dezembro de 2015 (Braz.).

60. See *Convênio ICMS 39 [ICMS Agreement 39]*, O CONSELHO NACIONAL DE POLÍTICA FAZENDÁRIA [CONFAZ] de 3 de Maio de 2016 (Braz.).

61. See *Convênio ICMS 81 [ICMS Agreement 81]*, O CONSELHO NACIONAL DE POLÍTICA FAZENDÁRIA [CONFAZ] de 22 de Agosto de 2016 (Braz.).

62. Décret 2015/454 du 8 Octobre 2015 créer Société nationale de Transport de l'électricité (SONATREL) [Decree 2015/454 of Oct. 8, 2015 creating the National Electric Transportation Society] (Cam.); Décret 2015/455 du 8 Octobre 2015 créer Société nationale de Transport de l'électricité (SONATREL) [Decree 2015/455 of Oct. 8, 2015 creating the National Electric Transportation Society] (Cam.).

63. Decree 2015/454 of Oct. 8, 2015, art. 3. (Cam.).

64. Formerly AES Sonel until 2014.

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presidential decree on February 4, 2016,<sup>65</sup> for three-year terms, which are renewable once. The Board held its first meeting on February 9, 2016.

**B. SOCIAL AND ENVIRONMENTAL IMPACT**

Two ministerial orders issued on February 8, 2016, “set out procedures for screening” large-scale<sup>66</sup> and “smaller-scale investments for potential adverse environmental and social impacts.”<sup>67</sup> The order covering large scale investments requires in-depth and detailed prior analysis before the following projects can be launched: (1) construction of high voltage lines, thermal power plants over 10MW, hydropower plants over 50 MW, and nuclear power plants, among others things; and (2) industrial exploitation of quarries, minerals or hydrocarbons.<sup>68</sup>

**VI. Ecuador**

**A. ADJUSTMENT OF MODEL INVOICE FOR PUBLIC ELECTRIC SERVICE**

A regulation approved in December 2015 established a new model invoice for public electricity service that sets out consumer information and the amount due, including itemized charges and subsidies as applicable.<sup>69</sup> The deadline to implement the model was January 2016.<sup>70</sup> The regulation applies to distribution companies that provide the following public services: distribution, commercialization of electricity, and public illumination.<sup>71</sup> This measure supersedes Regulation No. CONELEC-004/14, approved by the Board of CONELEC, by Resolution No. 059/14, of July 15, 2014.<sup>72</sup>

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65. Décret 2016/068 du 4 Février 2016 Nomination d'un conseil d'administration du Société nationale de Transport de l'électricité [Decree 2015/454 of Feb. 4, 2016 appointing the board of directors of the National Electric Transportation Society] (Cam.);

66. *Rehabilitation De La Route Mora-Dabangkousseri (205 Km)*, MINISTÈRE DES TRAVAUX PUBLICS (Décembre 2016), <http://documents.worldbank.org/curated/en/531271485234854544/pdf/SFG2882-V2-EA-FRENCH-P079736-Box402874B-PUBLIC-Disclosed-1-23-2017.pdf>.

67. *Cameroon - Electricity Transmission and Reform Project: Environmental and Social Monitoring Framework - executive summary*, WORLD BANK GROUP (Aug. 3, 2016), <http://documents.worldbank.org/curated/en/152831470680325611/Cameroon-Electricity-Transmission-and-Reform-Project-environmental-and-social-monitoring-framework-executive-summary>.

68. See Order 00001/MINEPED dated Feb. 8, 2016, art. 4.

69. Regulación No. ARCONEL - 005/15 de 17 Marzo 2016 de Modelo de factura para el pago de los servicios público de energía eléctrica y alumbrado público general [Regulation No. ARCONEL - 005/15 of Mar. 17, 2016 of Model Invoice for Payment of Public Utilities for Electric Power and General Public Lighting], REGISTRO OFICIAL [R.O.] [OFFICIAL GAZETTE OF ECUADOR] Mar. 17, 2016, art. 1 (Ecuador).

70. *Id.*

71. See *id.* at § 2.

72. See *id.* at § 6.

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**B. INSTRUCTIONS FOR PREPARING TECHNICAL REPORTS AND  
PRESENTING CERTIFICATIONS**

The Hydrocarbons Regulation and Control Agency issued a series of resolutions that provide instructions for the submission of technical reports or certifications required to obtain authorization and registration of certain hydrocarbon related activity,<sup>73</sup> including authorization and registration of infrastructure for marketing petroleum products (including LPG).<sup>74</sup> The instructions apply to foreign and domestic individuals or corporations, private, public, or mixed, requiring operation authorization and registration to perform the applicable activities.<sup>75</sup>

**C. MINING LAW REFORM: PAYMENT OF ROYALTIES**

The Organic Law for the Balancing of Public Finance amended, among other legislation, Article 92 of the Mining Law.<sup>76</sup> A new paragraph covering the commercialization of metallic minerals specifies that mining concessionaires must pay two percent of the total value of each transaction as a royalty to the State.<sup>77</sup> Payments will be made semi-annually, proof of which will be a qualifying document for foreign trade operations.<sup>78</sup> Additionally, dealers must also pay royalties for secondary minerals.<sup>79</sup>

**VII. Mali**

**A. HYDROCARBONS**

Following Law no. 2015-035 regulating hydrocarbon exploration, exploitation, and transportation activities, enacted on July 16, 2015,<sup>80</sup> the Malian government adopted an implementing decree on April 29, 2016.<sup>81</sup> The law, among other things, limits hydrocarbon prospecting, extraction and treatment to Malian companies, requiring foreign companies to act

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73. Regulacions Nos. ARCH - 250/15 – 257/15 de 13 Enero 2016 de Modelo de factura para el pago de los servicios público de energía eléctrica y alumbrado público general [Regulations No. ARCH – 250/15 of Jan. 13, 2016 of Model Invoice for Payment of Public Utilities for Electric Power and General Public Lighting], REGISTRO OFICIAL [R.O.] [OFFICIAL GAZETTE OF ECUADOR] Jan. 17, 2016 (Ecuador).

74. Regulation No. ARCH – 257/15 of Jan. 13, 2016, art. 1 (Ecuador).

75. See, e.g., *id.* at art. 2.

76. Expídese la Ley Orgánica para el Equilibrio de las Finanzas Públicas [Organic Law for the Balancing of Public Finance] of April 26, 2016, REGISTRO OFICIAL [R.O.] [OFFICIAL GAZETTE OF ECUADOR] April 29, 2016, art. 8 (Ecuador).

77. See *id.*

78. See *id.*

79. See *id.*

80. Loi No. 2015-035 portant organisation de la recherche, de l'exploitation et du transport des hydrocarbures [governing hydrocarbons exploration, exploitation and transportation], of July 16, 2015, *Officiel de la République du Mali*, June 3, 2016.

81. Décret No. 2016-0272/P-RM of April 29, 2016, *Journal Officiel de la République du Mali*, June 3, 2016, No. 23, p. 882.



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through Malian subsidiaries in order to engage in these activities.<sup>82</sup> The 2016 decree contains 253 articles and covers a wide range of subjects. It sets out the conditions for the State to acquire an interest in production authorisations that it grants;<sup>83</sup> requirements for oil prospecting and extraction<sup>84</sup> (including environmental requirements);<sup>85</sup> formalities to be completed for an application for authorisation to prospect for, extract, or transport hydrocarbons; and criteria for granting, renewing, assigning, and rejecting such authorisations.

**B. ELECTRICITY**

On October 19, 2016, the Council of Ministers adopted a bill regarding public-private partnerships that, in part, also governs concession agreements.<sup>86</sup> The production, distribution, transmission, and supply of electricity are public services in Mali that the State can entrust to private operators via a concession agreement (*concession de service public*).<sup>87</sup> This type of agreement is subject to public procurement rules. The independent authority in charge of electricity and water, the Commission de Régulation de l'Eau et de l'Électricité (“CREE”), issued a directive in August 2015 governing the tender procedure for awarding concession agreements in the electric power and water sectors.<sup>88</sup> But a decree followed in September 2015<sup>89</sup> that sets out a new legal framework for procurement contracts, including concession agreements, in all sectors. This legal framework may change again given the October 19, 2016 bill.

**VIII. Morocco**

**A. RENEWABLE ENERGIES**

At the Conference of Parties (COP) in Paris in 2015, Morocco announced its aim to have fifty-two percent of its electric power provided by renewable

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82. See Loi No. 2015-035 of July 16, 2015, art. 5.

83. See Décret No. 2016-02727/P-RM, art. 10 *et seq.*

84. *Id.*, at art. 50 *et seq.*

85. *Id.*, at art. 79 *et seq.*

86. *Mali: Adoption of a “PPP Law”*, BIRD & BIRD & AFRICA, (2017), <https://www.twobirds.com/en/news/articles/2017/global/africa-newsletter-feb/new-legal-framework-for-foreign-investment-in-algeria>.

87. Ordonnance No. 00-019/P-RM *portant organisation du secteur de l'électricité [governing the electricity sector]*, of Mar. 15, 2000, *Journal Officiel de la République du Mali*, June 7, 2011, Special Issue No. 4, 02.

88. Directive 15-001/C-CREE of Aug. 17, 2015, *Journal Officiel de la République du Mali*, Aug. 21, 2015, No. 37, 1468.

89. Décret No. 2015-0604/P-RM of Sept. 25, 2015, *Journal Officiel de la République du Mali*, Oct. 2, 2015, No. 43, 1686.

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sources by 2030.<sup>90</sup> Subsequently, Morocco hosted the twenty-second session of the COP (COP22) in November 2016.

Morocco enacted Law 13-09 on renewable energies in 2010.<sup>91</sup> In January 2016, Law 58-15 amended Law 13-09.<sup>92</sup> The amendment enables renewable energy producers to have access to the low-voltage grid. In addition, the amendment increases the threshold for hydroelectric installed capacities from 12MW to 30MW. Finally, the amendment authorizes renewable energy producers that sell power directly to consumers to sell their surplus<sup>93</sup> to the Office National de l'Eau et de l'Électricité (ONEE), or the grid system operator.

In May 2016, Law 48-15 established an independent regulator for the power sector—the Autorité Nationale de Régulation de l'Électricité (ANRE).<sup>94</sup> ANRE, among other things, ensures the satisfactory operation of the power market and makes or approves the rules on grid access by self-producers, interconnection access, and network codes.

Public entities involved in the renewable energy sector have been reorganised by several laws passed at the end of August 2016. Historically the entity in charge of electricity and water, ONEE will no longer be in charge of renewable energy. Its remit is limited to electric power production from other sources pursuant to Law 38-16.<sup>95</sup> After a five-year transitional period, the renewable power plants owned by ONEE and related facilities and personnel must be transferred to the Moroccan Agency for Solar Energy (MASEN).<sup>96</sup> Legislation amending the entity's name to the "Moroccan Agency for Sustainable Development" has confirmed this extended scope for MASEN.<sup>97</sup>

Pursuant to Law 39-16, the National Agency for Renewable Energies and Energy Efficiency (Agence Nationale des Energies Renouvelables et de l'Efficacité Énergétique or "ADEREE") has changed its name to the "Moroccan Agency for Energy Efficiency" and is now responsible for developing energy efficiency programs in Morocco.<sup>98</sup>

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90. LeAnne Graves, *Morocco sets target for 50 per cent renewable energy by 2030*, THE NATIONAL, (Dec. 7, 2015), available at <http://www.thenational.ae/business/energy/morocco-sets-target-for-50-per-cent-renewable-energy-by-2030>.

91. Dahir no.1-10-16 of Feb. 11, 2010, *Bulletin officiel*, Mar. 18, 2010, no.5822 (Morocco).

92. Loi 58-15, *Bulletin officiel*, Feb. 4, 2016, no.6436 (Morocco).

93. Up to 20% of annual production.

94. Loi 48-15 of Jan. 12, 2016 [on regulation of the electric power sector and creation of the Autorité Nationale de Régulation de l'Électricité], *Bulletin officiel*, June 2, 2016, no. 6472.

95. Dahir no.1-16-133 of Aug. 25, 2016 *Bulletin officiel* Sept. 22, 2016, no.6502.

96. See Dahir no.1-16-133, art. 2 *et seq.*

97. Dahir no.1-16-133, art. 2 *et seq.*

98. Law no. 39-16 amending and completing Law 16-09 on the Agence Nationale des Energies Renouvelables et de l'Efficacité Énergétique (ADEREE), *Bulletin officiel* no.6502 dated Sept. 22, 2016.

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**B. MINING**

In July 2015, Law 33-13 implemented a new mining code, replacing the code that had been in effect since 1951.<sup>99</sup> The first implementation decree issued on April 20, 2016, sets out the applicable requirements for an authorisation to prospect; a research permit and/or an exploitation license; and the criteria for granting, renewing, assigning, or rejecting such authorisations, permits, and/or licenses.<sup>100</sup>

**IX. Peru**

**A. MECHANISM FOR RESIDENTIAL ELECTRICITY RATE  
COMPENSATION**

The purpose of Law No. 30468, enacted on June 21, 2016, is to subsidize residential electricity rates in the provinces to make them competitive with rates in the capital.<sup>101</sup> Law No. 30468 subsidizes residential electricity rates in electric systems that have a higher energy charge<sup>102</sup> than a referential weighted energy charge, as determined by a formula approved by the Energy and Mining Investment Supervisory Body.<sup>103</sup> Otherwise, normal electricity rates for an electric system apply.<sup>104</sup> Available balances from the Social Inclusion Energy Fund (FISE)<sup>105</sup> finance the subsidy for the residential electricity tariff.<sup>106</sup>

**B. MINING GRID SYSTEM: WGS84 UTM COORDINATES**

Law No. 30428, enacted in April 2016, adopts the WGS84 coordinate system for use in Peru's mining grid system.<sup>107</sup> This norm will simplify processes and provide better services to state organizations and other users of Peru's geological and mining cadaster generated by the Geological, Mining and Metallurgical Institute (INGEMMET).<sup>108</sup> The admission of

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99. Loi no. 33-13, *Bulletin officiel*, Aug. 6, 2015, no.6384.

100. Decree 2-15-807 of April 20, 2016, *Bulletin officiel*, July 21, 2016, no.6484.

101. Ley N° 30468, Que Crea El Mecanismo De Compensación De La Tarifa Eléctrica Residencial [Creating the Compensation Mechanism for Residential Electricity Rates], D.O. No. 590173, June 21, 2016, art. 1, (Peru).

102. Electricity tariffs are comprised of a fixed service charge and a consumption energy charge. *See id.* at art. 5.1.

103. *See id.* at art. 5.3-5.4.

104. *See id.*

105. *See id.* at art. 4.1.

106. FISE was created to address energy access in vulnerable populations. *See* Law No. 29852, Que Crea el Sistema de Seguridad Energética en Hidrocarburos y el Fondo de Inclusión Social Energético [Creating the Energy Security System in Hydrocarbons and the Social Inclusion Energy Fund], D.O. No. 464005, April 13, 2012, art. 3 (Peru).

107. Ley N° 30428, Ley Que Oficializa El Sistema De Cuadrículas Mineras En Coordenadas UTM WGS84 [Institutionalizing Mining Grid System: WGS84 UTM Coordinates], D.O. No. 585890, April 30, 2016, art. 1, (Peru).

108. *Id.* at art. 2.

mining petitions was suspended for two months from the Law's date of publication.<sup>109</sup>

## **X. Portugal**

Decree-Law No. 31/2006 of February 15, 2006, set forth the general organizational and operational framework for the National Petroleum System and the framework for downstream activities.<sup>110</sup> The Portuguese government enacted Decree-Law No. 244/2015 of October 19, 2015, which amended Decree-Law No. 31/2006, and came into force in January 2016.<sup>111</sup> Decree-Law No. 31/2006 as amended established rules applicable to storage, transport, distribution, refining, and marketing of crude oil and petroleum products.<sup>112</sup> The Decree-Law also gives an extended supervisory and monitoring role over downstream oil sector activity to the National Entity for the Fuel Market.<sup>113</sup>

Additionally, the government enacted Decree-Law 13/2016 of March 9, 2016, which transposes into national law Directive 2013/30/EU of the European Parliament and of the Council, of June 12, 2013, on the safety of offshore oil and gas operations.<sup>114</sup> Decree-Law 13/2016 establishes minimum requirements for measures to prevent major accidents and to limit the impact deriving therefrom.<sup>115</sup> The Decree-Law also establishes an entity (comprised of the General Directorate of Natural Resources and the National Entity for the Fuel Market) that, among other things, evaluates risk reports and supervises compliance with the Decree-Law<sup>116</sup> Moreover, Decree-Law No. 69/2016 of November 3, 2016 amended legislation on biofuels and bio-liquids for the second time.<sup>117</sup>

## **XI. Republic of Congo**

The President of the Republic of Congo promulgated the new Hydrocarbons Code of the Republic of Congo—Law 28/2016, of October 12, 2016.<sup>118</sup> The Hydrocarbons Code states the legal, tax, customs, and foreign exchange regimes applicable to upstream operations; details the rights and obligations of industry participants; and sets forth health, safety,

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109. *See id.* at Cuarta disposición [Fourth disposition].

110. *See* Decreto-Lei no. 31/2006, Diário da República, Série I, no. 33, Feb. 15, 2009 (Port.).

111. Decreto-Lei no. 244/2015, Diário da República, Oct. 19, 2015 Série I, no. 204, Arts. 1, 8, (Port.).

112. Decreto-Lei no. 31/2006, Attachment.

113. Decreto-Lei no. 244/2015, Arts. 24, 25, 27, 32.

114. Decreto-Lei no. 13/2016, Diário da República, Série I, no. 48, Art. 1, Mar. 9, 2016 (Port.).

115. *Id.*

116. *Id.* at Art. 3.

117. Decreto-Lei no. 69/2016, Diário da República, Nov. 3, 2016, Série I, no. 211, Arts. 1, 2, (Port.).

118. Loi 28-2016 du Oct. 12, 2016, art. 1, [http://media.wix.com/ugd/f80303\\_673780bb351a461dafc0dcd4470d6d52.pdf](http://media.wix.com/ugd/f80303_673780bb351a461dafc0dcd4470d6d52.pdf).

environmental and local content rules and policies.<sup>119</sup> The new statute<sup>120</sup> governs the 2016 licensing round,<sup>121</sup> in which thirteen blocks are available in the offshore Coastal and onshore Cuvette Basins.<sup>122</sup>

## **XII. United States**

### **A. FOSSIL FUELS**

Low crude oil prices caused by a continuing worldwide oversupply drove events in the petroleum sector in 2016.<sup>123</sup> After sinking to \$26.21 a barrel in New York in February 2016,<sup>124</sup> crude oil prices rebounded to over \$45.00 a barrel,<sup>125</sup> but remained significantly lower than the shale boom prices of 2014, which surpassed \$100.00 a barrel.<sup>126</sup> Consumers benefitted from lower gas prices,<sup>127</sup> but oil recovery was uneconomical for producers,<sup>128</sup> resulting in numerous bankruptcies.<sup>129</sup> Against this backdrop, Congress repealed the forty-year ban on oil exports at the end of 2015,<sup>130</sup> and United States producers began shipping oil overseas.<sup>131</sup> Ongoing challenges beset the coal industry, with the largest U.S. coal mining company filing for bankruptcy in April 2016.<sup>132</sup>

Native Americans' right to consultation about infrastructure projects affecting their sovereignty became the focus in the Dakota Access oil

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119. *Id.*

120. Bid Documents, <http://www.congolr2016.com/coastal-basin-bid-documents> (last visited Nov. 8, 2016).

121. The closing date for submission of bids is scheduled for January 31, 2017 and the evaluation of bids and announcement of results for the end of March 2017. *Timetable*, <http://www.congolr2016.com/timetable> (last visited Nov. 8, 2016).

122. *The Blocks*, <http://www.congolr2016.com/the-blocks>.

123. Clifford Krauss & Stanley Reed, *Gloomy Days in the Oil Patch, but Some See a Glimmer of Light*, N.Y. TIMES (July 29, 2016), <http://nyti.ms/2anftEv>.

124. Clifford Krauss, *Oil Prices: What to Make of the Volatility*, N.Y. TIMES (Mar. 10, 2017), <http://www.nytimes.com/interactive/2016/business/energy-environment/oil-prices.html>.

125. *See id.*

126. *Id.*

127. *See id.*

128. Asjlynn Loder & Erik Schatzker, *Oil at \$45 a Barrel Proving No Savior as Bankruptcies Pile Up*, BLOOMBERG (May 12, 2016), <https://www.bloomberg.com/news/articles/2016-05-12/oil-at-45-a-barrel-proving-no-savior-as-bankruptcies-add-up>.

129. *See* HAYNES & BOONE, LLP, *Complete List of North American Bankruptcies 2015-2016, 2016 Bankruptcies, January-April*, OIL PATCH BANKRUPTCY MONITOR (Oct. 19, 2016), 7–8, [http://www.haynesboone.com/~media/files/attorney%20publications/2016/energy\\_bankruptcy\\_monitor/oil\\_patch\\_bankruptcy\\_20160106.ashx](http://www.haynesboone.com/~media/files/attorney%20publications/2016/energy_bankruptcy_monitor/oil_patch_bankruptcy_20160106.ashx).

130. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2987-2988, § 101 (enacted Dec. 18, 2015).

131. Matt Egan, *U.S. Oil Exports Rise 7-Fold in First 3 Months*, CNNMONEY (JUNE 6, 2016), <http://money.cnn.com/2016/06/06/investing/us-oil-exports-increase/>.

132. *See Voluntary Petition for Peabody Energy Corporation Filing for Bankruptcy*, No. 16-42529, (E. D. MO, April 13, 2016), <http://www.kccllc.net/peabody/document/list/4234>.

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pipeline dispute.<sup>133</sup> After losing a suit for injunctive relief against the Army Corps of Engineers,<sup>134</sup> the Standing Rock Sioux Tribe received an unusual reprieve. The United States Department of Justice, the Army, and the Department of the Interior temporarily banned construction of the pipeline until the Army reviewed its previous decisions,<sup>135</sup> and later announced the launch of discussions on changes to the tribal consultation process nationwide.<sup>136</sup>

**B. RENEWABLE ENERGY**

Congress extended the production tax credit for electricity produced by wind-powered facilities provided construction has begun before January 1, 2020.<sup>137</sup> The credit, however, declines twenty percent per year for projects commencing construction after December 31, 2016, and terminates for projects commencing construction after December 31, 2019.<sup>138</sup> Congress also extended the investment tax credit for investors in commercial<sup>139</sup> and residential<sup>140</sup> solar energy property, provided construction has commenced before January 1, 2022. This credit also declines over time.<sup>141</sup>

The Environmental Protection Agency (EPA) previously published its final Clean Power Plan Emission Guidelines (CPP) designed to reduce greenhouse gas emissions from power plants.<sup>142</sup> Twenty-seven states along with utilities, coal companies, and business groups filed suit to have the CPP set aside.<sup>143</sup> The district court denied the petitioners' request for a stay in the implementation of the CPP pending the outcome of the litigation,<sup>144</sup> but the U.S. Supreme Court granted the stay on appeal.<sup>145</sup> The petitioners' case

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133. See Jack Healy & John Schwartz, *U.S. Suspends Construction on Part of North Dakota Pipeline*, N.Y. TIMES (Sept. 9, 2016), <http://nyti.ms/2crr3mi>.

134. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534 (JEB), 2016 U.S. Dist. LEXIS 121997 (D.D.C. Sept. 9, 2016).

135. DEP'T OF JUSTICE, *Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

136. DEP'T OF JUSTICE, *Joint Statement from Department of Justice, Department of the Army and Department of the Interior Regarding D.C. Circuit Court of Appeals Decision in Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Oct. 10, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-dc>.

137. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 3038, § 301 (enacted Dec. 18, 2015).

138. *Id.*

139. *Id.* at 3039, § 303.

140. *Id.* at 3039-3040, § 304.

141. *Id.* at §§ 303, 304.

142. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

143. *West Virginia v. E.P.A.*, 136 S. Ct. 1000 (2016).

144. *Id.*

145. *Chamber of Commerce v. EPA*, 136 S.Ct. 999 (Feb. 9, 2016) (order in pending case).

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is proceeding,<sup>146</sup> but the stay has affected key CPP deadlines, which the EPA cannot currently enforce.<sup>147</sup>

A key United States Supreme Court decision reinforced the federal government's ability to regulate wholesale interstate electricity markets even when there are repercussions in retail markets traditionally regulated by the states.<sup>148</sup> *Federal Energy Regulatory Commission v. Electric Power Supply Association* concerned electricity demand response management and a Federal Energy Regulatory Commission (FERC) rule requiring wholesale market operators to pay the same price for electricity conservation and production.<sup>149</sup> But the holding could have important implications for federal efforts to encourage recalcitrant states to develop clean energy.<sup>150</sup> *Hughes v. Talon Energy Marketing*, another United States Supreme Court decision, also upheld the federal government's role in regulating wholesale electricity markets, even when a state's objective was to expand clean energy generation, but only because the state's incentive mechanism invaded federal territory by setting the wholesale rate for the new producer.<sup>151</sup>

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146. Oral arguments were held on September 27, 2016, in the U.S. Court of Appeals for the District of Columbia.

147. September 6, 2016, was the deadline for submission of both state emissions reduction plans and notification of intent to participate in the optional Clean Energy Incentive Program. 80 Fed. Reg. at 64669.

148. *See* Fed. Energy Reg. Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016).

149. *See id.*

150. Matthew R. Christiansen, *FERC v. EPSA: Functionalism and the Electricity Industry of the Future*, 68 STAN. L. REV. ONLINE 100 (Apr. 2016).

151. *Hughes v. Talon Energy Mktg.*, 136 S. Ct. 1288 (2016).

## **International Transportation Law**

ANDREW M. DANAS, JASON WILSON DROUYOR, AND JANE HONG\*

International transportation encompasses a variety of modes of transport and industries, including passenger and cargo transportation by air, ocean, motor, and rail transportation. This report highlights some of the 2016 legal developments that will affect global trends in international transportation in coming years. More specifically, the ocean shipping industry experienced significant disruption through the adoption of a global weight verification system plus the bankruptcy of Hanjin lines. Both the ocean and air industries adopted new restrictions on environmental pollution, while the ocean and automobile industries experienced record penalties and settlements for the deliberate violation of anti-pollution regulations. Automation of transportation services was also the subject of regulatory and judicial developments, with new regulations and guidelines for drones, self-driving vehicles, and ride-sharing services.

### **I. Ocean Shipping**

#### **A. SOLAS OPERATIONAL SAFETY THROUGH CONTAINER WEIGHT VERIFICATION (VGM)**

On July 1, 2016, the International Maritime Organization's (IMO) new regulations to the Safety of Life at Sea (SOLAS) convention went into effect.<sup>1</sup> Originally adopted on November 21, 2014, these regulations require that the weight of a container be verified by the shipper.<sup>2</sup> The rationale for these requirements was to ensure safe handling of containers in international maritime trade. Their 2016 worldwide implementation had a direct effect on shippers, port authorities, and international carriers.

One method to determine the verified gross mass (VGM) stated in the amendment to the SOLAS convention requires that the packed container be

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\* This chapter was compiled by Andrew M. Danas. Andrew M. Danas is a Partner with Grove, Jaskiewicz and Cobert LLP in Washington, D.C., and is Co-Chair of the American Bar Association Section of International Law International Transportation Committee (ITC). Jason Wilson Drouyor is a JD Candidate at Georgia State University College of Law and contributed the ocean shipping and NHTSA Cybersecurity sections. Jane Hong is Manager & Counsel at International Advisers, the Netherlands, and contributed the section on drones. All other sections were contributed by Mr. Danas. The ITC thanks Ana Luisa Castro Cunha Derenusson, co-chair of the ITC, and Roberta Fagundes Leal Andreoli of the Sao Paulo, Brazil law firm of De Luca, Derenusson, Schuttoff e Azevedo for their assistance.

1. Maritime Safety Committee Res. 94/21, annex 1, Amendment to the International Convention for the Safety of Life at Sea (SOLAS), 1974, As Amended, at 1 (Nov. 21, 2014).

2. *Id.* at 2.



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weighed with calibrated and certified equipment.<sup>3</sup> The second method allows the weight of all contents in the container, including pallets, to be added to the tare weight of the individual shipping container.<sup>4</sup> But the method must be approved by the country where the container was packed. Confirmation of method two was a point of contention in many countries and was not clarified as the July 1, 2016 implementation date arrived. In the United States, confirmation was given on April 28, 2016, when the United States Coast Guard released a statement stating that the existing United States regulations in the Code of Federal Regulations, 29 CFR § 1918.85(b), satisfies the SOLAS convention.<sup>5</sup> Shippers were then left to figure out how to comply with these codes and how to submit VGM to the ocean carriers.

Adding to the global confusion about the implementation of the new SOLAS regulation was the fact that each ocean carrier adopted their own methods and protocols for VGM submission, which created confusion for many shippers, especially those that utilized more than one ocean carrier. Carriers, like Maersk, tried to cut through the confusion by explaining the VGM requirement, why it was needed, and their individual procedures for submission.<sup>6</sup>

Further confusion occurred due to the lack of standardization between port operations. While the regulations do not require VGM submission until loading of the container, some United States ports stated that containers that have not already submitted VGM would not be allowed to enter the port.<sup>7</sup> Other ports agreed to provide weighing services and electronically submit them to a carrier that has established such a connection.<sup>8</sup> As shipping continues into 2017, it is expected that adoption of industry and government procedures implementing the SOLAS VGM regulations will be clarified.

#### B. HANJIN SHIPPING BANKRUPTCY

The most disruptive legal event in the international maritime industry in 2016 was the surprise August 31, 2016 bankruptcy filing in a South Korean court by Hanjin Shipping. The bankruptcy was not a complete surprise because the ocean carrier had already been undergoing voluntary

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3. *Id.* at 2.1.

4. *Id.* at 2.2.

5. U.S. COAST GUARD, COMMANDANT, MSIB Bull. No. 009/16, U.S. DECLARES AN EQUIVALENCY TO REGULATION VI/2 OF THE INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS) (2016).

6. *What is Verified Gross Mass?*, MAERSK LINE, <http://www.maerskline.com/en-us/shipping-services/verified-gross-mass> (last visited Nov. 5, 2016).

7. Bill Mongelluzzo, *California terminals open door to potentially weighing containers*, JOC (June 2, 2016, 7:39 PM), [http://www.joc.com/regulation-policy/transportation-regulations/international-transportation-regulations/la-long-beach-oakland-terminals-open-door-potentially-weighing-containers\\_20160602.html](http://www.joc.com/regulation-policy/transportation-regulations/international-transportation-regulations/la-long-beach-oakland-terminals-open-door-potentially-weighing-containers_20160602.html).

8. *Id.*

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restructuring with its creditors since May 2016.<sup>9</sup> Hanjin's operations halted when it filed for bankruptcy after failing to secure support from its largest creditor, Korea Development Bank.<sup>10</sup> Within days of Hanjin's filing of bankruptcy, Hanjin vessels were being arrested and denied berthing by port authorities throughout the world.<sup>11</sup> While creditors and port operators were immediately working to prevent their losses, Hanjin began to file for bankruptcy protection throughout the world.<sup>12</sup>

As a major carrier in the Transpacific trade, Hanjin sought Chapter 15 bankruptcy protection to seek recognition of the South Korean bankruptcy proceedings. In the United States, Hanjin filed for Chapter 15 bankruptcy protection in the United States Bankruptcy Court for the District of New Jersey. Hanjin sought and obtained a judicial stay to protect its ships from arrest and to facilitate the discharge of its customers' cargo from Hanjin ships. Provisional protection was granted by the New Jersey bankruptcy court on September 6, 2016, with a continued hearing scheduled for September 9, 2016.<sup>13</sup> Although Hanjin was granted temporary protection, no Hanjin vessel entered United States territorial waters to discharge cargo, and it was reported that one vessel began its return to Korea.<sup>14</sup> After hearing claims by multiple parties looking to enforce their liens against ships chartered by Hanjin, the court upheld Chapter 15 protection on September 20, 2016.<sup>15</sup> The result of this judgment required claimants to seek relief in Korea where Hanjin originally filed for bankruptcy.

The United States Bankruptcy Court's order also authorized cargo interests and third parties to enter into commercially negotiated agreements to allow the unloading of Hanjin vessels. In other countries, where the equivalent of Chapter 15 bankruptcy procedures and protections do not exist, Hanjin ships were the subject of arrest. Cargo remained detained, and in some cases, unloaded and undelivered.

**C. ASSERTION OF MARITIME LIENS TO SUBSTITUTED PROPERTY**

On October 17, 2016, the United States Supreme Court denied certiorari of the decision of the United States Court of Appeals for the Third Circuit in *World Imports v. OEC Group*, which held that a Non-Vessel-Operating

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9. Xiaolin Zeng, *Creditors OK Hanjin debt restructuring*, JOC (May 4, 2016, 3:25 PM), [http://www.joc.com/maritime-news/container-lines/hanjin-shipping/creditors-ok-hanjin-debt-restructuring\\_20160504.html](http://www.joc.com/maritime-news/container-lines/hanjin-shipping/creditors-ok-hanjin-debt-restructuring_20160504.html).

10. *Hanjin Shipping to Seek Receivership After Losing Banks' Support*, FORTUNE (Aug. 31, 2016), <http://fortune.com/2016/08/31/hanjin-shipping-receivership/>.

11. Andreas Illmer, *Hanjin Ships, cargo and sailors stranded at sea*, BBC (Sep. 1, 2016), <http://www.bbc.com/news/business-37241727>.

12. *Bankrupt Hanjin Seeks court protection for its ships*, BBC (Sep. 5, 2016), <http://www.bbc.com/news/37273067>.

13. *In re Hanjin Shipping Co., Ltd.*, No. BR 16-27041, 2016 WL 6681169 (D.N.J. Sept. 16, 2016).

14. *Id.* ¶ 8.

15. *Id.* ¶ 9.

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Common Carrier's (NVOCC) maritime lien remained valid despite delivery of the goods to which the lien originally applied.<sup>16</sup>

The case hinged upon whether waiver of the lien was given by OEC when delivery of the cargo was made to World Imports. The Third Circuit reversed a ruling by the lower court holding that such a waiver had occurred, and instead ruled that the trial court erred by characterizing OEC delivery of the cargo as unconditional and thus effecting waiver of a maritime lien.<sup>17</sup> The Third Circuit cited various documents stating that OEC intended for its maritime lien to survive delivery.<sup>18</sup> These documents included the credit agreement between the two companies and the bill of lading for the various shipments.<sup>19</sup>

The Third Circuit also rejected the main argument made by World Imports that contractual provisions stating OEC's intent to retain its lien were unenforceable. The Third Circuit noted that maritime liens do have the ability to attach to substituted property, and that the freedom to contract allows parties to agree or curtail such an occurrence.<sup>20</sup> It placed significant importance on the documentation that appeared to show World Imports' consent to the maritime liens surviving delivery. With this new ruling, carriers may have a contractual framework to impose liens and withhold a shipment if payment for previous shipments remains outstanding.

## II. Aviation

The year of 2016 has been a defining year for Unmanned Aircraft System (UAS), also known as drones. In the U.S., in particular, new regulations of the Federal Aviation Administration governing UAS came into effect on August 2016. The new regulations, set forth in 14 CFR Part 107,<sup>21</sup> apply to commercial use of small UAS (sUAS) weighing less than 55 pounds (25kg), including payload.<sup>22</sup> In essence, Part 107 permits the commercial operation of sUAS in the National Airspace System (NSA) without a Section 333 Exemption. This means that commercial operators of sUAS do not need to acquire FAA airworthiness certification.<sup>23</sup>

Part 107 also creates the Remote Pilot Certificate system, which sets out operational requirements and limitations, in addition to a Certificate of

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16. *In re World Imports Ltd.*, 820 F.3d 576, 592 (3d Cir. 2016), *cert. denied*, *World Imports, Ltd. v. OEC Group New York*, 137 S. Ct. 340 (2016).

17. *Id.* at 584-85.

18. *Id.* at 585.

19. *Id.* at 579-80.

20. *Id.* at 588.

21. Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 42,064 (June 28, 2016) (codified at 14 C.F.R. pts. 21, 43, 61, 91, 101, 107, 119, 133, and 183).

22. Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331(6), 126 Stat. 11.

23. Before Part 107, commercial operators of SUAS had to acquire a Section 333 Exemption. See Pub. L. No. 112-95, § 333.

Waiver process.<sup>24</sup> In particular, an operator of sUAS must obtain a Remote Pilot Certificate.<sup>25</sup> Also, a Remote Pilot in Command must maintain visual-line-of-sight of the vehicle, fly the vehicle during daytime or civil twilight with appropriate anti-collision lighting, and not operate the vehicle over non-participants.<sup>26</sup>

The new regulations also provide that a single sUAS operator cannot operate multiple sUAS, and that a maximum groundspeed of 100 mph and maximum altitude of 400 feet above ground level must be observed.<sup>27</sup> To note, a foreign-registered sUAS is allowed to operate in NSA if the requirements of 14 CFR Part 375 are met, although foreign-certified UAS pilots should obtain a Remote Pilot Certificate issued by the FAA.<sup>28</sup>

### III. International Transportation Environmental Developments

The regulation of environmental pollution by transportation companies saw several key developments in 2016, both in the development of regulations and standards aimed at curbing pollution, and in the enforcement of criminal fines for the violation of existing regulations.

#### A. NEW AIR AND OCEAN EMISSIONS STANDARDS

In the area of reducing environmental pollution, both the international air and ocean transportation industry saw the adoption of new regulatory guidelines in 2016. Both of these developments were in response to the adoption of the 2015 Paris Climate Accord, which specifically carved out the air and maritime areas from its global environmental provisions.

In the aviation industry, on October 6, 2016, the 191 States of the United Nations International Civil Aviation Organization (ICAO) 39th Assembly adopted ICAO Assembly Resolution A39-3, which agreed to control CO<sub>2</sub> emissions from international aviation through a new global market-based measure (GMBM).<sup>29</sup> While details need to be worked out prior to implementation, the resolution reflects an effort to create a global carbon market whereby airlines will be obliged to offset their CO<sub>2</sub> emissions to effect carbon-neutral growth.

Rules for the GMBM will be developed over the next two years. The pilot phase of the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) will be implemented from 2021 through

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24. 14 C.F.R. § 107.53, *supra* note 21.

25. *Id.* § 107.12(2)(b).

26. *Id.* § 107.29(b), § 107.31(a).

27. *Id.* § 107.51(a)-(b).

28. *Id.* § 107.12(2)(c).

29. *Historic agreement reached to mitigate international aviation emissions*, ICAO (Oct. 6, 2016), <http://www.icao.int/Newsroom/Pages/Historic-agreement-reached-to-mitigate-international-aviation-emissions.aspx>.

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2023.<sup>30</sup> The first phase will commence from 2024 through 2026. Both the pilot and first phases of CORSIA are voluntary. With certain exemptions, implementation in the phase from 2027 to 2035 would require all States on board.<sup>31</sup>

With respect to ocean shipping, in October 2016 the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) agreed at its 70th session to implement a global sulfur cap of 0.50% m/m (mass/mass) in 2020.<sup>32</sup> The current limit of 3.50% m/m has been in effect since 2012. The regulations governing sulfur oxide emissions from ships are set forth in the International Convention for the Prevention of Pollution from ships (MARPOL Convention), Annex VI. This Annex sets standards for controlling emissions from ships, including sulfur oxides (SO<sub>x</sub>), through a set of progressively stricter regulations.<sup>33</sup>

Under the standards adopted for 2020, ships will be required to use fuel on board with the lower 0.50% m/m sulfur content.<sup>34</sup> The new requirements can be met through using low-sulphur compliant fuel oil; alternative low emissions fuels, such as gas and methane; or Flag-State approved equivalent methods, such as exhaust gas cleaning systems or “scrubbers.”

The 0.10% m/m limit for the IMO SO<sub>x</sub> Emissions Control Areas (ECAs) will remain unaffected by the new standards. Established under MARPOL Annex VI and in effect since January 1, 2015, the ECAs consist of the Baltic Sea area; the North Sea area; the North American area (covering designated areas off the coasts of Canada and the United States); and areas around the U.S. Virgin Islands and Puerto Rico.<sup>35</sup>

**B. TRANSPORTATION INDUSTRY ENVIRONMENTAL FINES AND PENALTIES**

Record fines and penalties for violations of environmental regulations were also seen in the transportation industry in 2016. Two cases involved record fines and settlements.

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30. U.N. Int'l Civil Aviation Org. [ICAO], Assembly Res. A39-3 (2016), *in* Assembly Resolutions in Force, at I-82, ICAO Doc. 10075 (2016).

31. *Id.*

32. Press Briefing, IMO, IMO sets 2020 date for ships to comply with low Sulphur fuel oil requirement (Oct. 28, 2016) (*available at* <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/MEPC-70-2020sulphur.aspx>).

33. *Marpol Annex VI*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/enforcement/marpol-annex-vi> (last visited Apr. 11, 2017); *Prevention of Air Pollution from Ships*, IMO, <http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Air-Pollution.aspx> (last visited Apr. 11, 2017).

34. Marine Environment Protection Committee Res. 70/18, annex 6, Effective Date of Implementation of the Fuel Oil Standard in Regulation 14.1.3 of MARPOL Annex VI (Oct. 28, 2016). *See* Press Briefing, *supra* note 32.

35. *See* IMO sets 2020 date for ships to comply with low Sulphur fuel oil requirement, *supra* note 32.

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1. *Volkswagen Emissions Scandal*

In June, 2016, Volkswagen agreed to spend up to a record USD \$14.7 billion to settle allegations that it had cheated on emissions tests in violation of United States environmental laws and that it had deceived customers on its 2.0-liter diesel vehicles.<sup>36</sup> In January 2016, the United States Environmental Protection Agency (EPA) filed a civil complaint against Volkswagen, Audi, and Porsche alleging intentional violations of the United States Clean Air Act. Volkswagen was alleged to have equipped certain of its diesel vehicles with illegal software which only turned on its full emissions controls during testing for vehicle compliance with United States or California emissions standards. The use of this “defeat device” allegedly resulted in the vehicles meeting emissions standards during lab testings, but not in real world driving situations. Volkswagen was alleged to have improperly certified that these vehicles complied with the emissions requirements of the Clean Air Act.

In March of 2016 the Federal Trade Commission (FTC) also sued Volkswagen for allegedly using deceptive advertising campaigns promoting “clean diesel” Volkswagens and Audi cars. On June 28, 2016, Volkswagen entered into two related settlements with the State of California and the U.S. Government to settle some of the civil complaints against it.<sup>37</sup>

In its settlements, Volkswagen agreed to spend up to USD \$14.7 billion to resolve some of the civil complaints. It agreed that it would offer a buyback and lease termination for approximately 500,000 2.0-liter diesel vehicles sold or leased in the U.S. It further agreed to spend up to \$10.03 billion as compensation to consumers who participated in the buyback program, plus \$4.7 billion to mitigate pollution from the vehicles.<sup>38</sup>

The settlements did not fully resolve all of the civil or criminal violations pending against the companies for the alleged intentional violations of the federal and state environmental laws. On September 9, 2016, a Volkswagen engineer pled guilty for his role in the nearly 10-year conspiracy to defraud United States regulators and United States Volkswagen customers. The engineer had a significant role in developing the software to cheat United States emissions devices and subsequent misrepresentations to government

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36. Partial Consent Decree at 1, In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation, No. 2672 CRB (JSC) (N.D. Cal. July 26, 2016); Press Release, U.S. Dept. of Justice, Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles (June 28, 2016) (*available at* <https://www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving>).

37. Partial Consent Decree, *supra* note 36 at 1-2; U.S. Dept. of Justice, Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles, *supra* note 36.

38. U.S. Dept. of Justice, Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles, *supra* note 36.

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officials and consumers that the Volkswagen vehicles met United States emissions standards and were environmentally-friendly.<sup>39</sup>

2. *United States v. Princess Cruise Lines, Ltd.*

On December 1, 2016, Princess Cruise Lines Ltd. (“Princess”) agreed to plead guilty to seven felony charges and to pay the largest-ever criminal penalty—USD \$40 million—for violation of U.S. environmental laws.<sup>40</sup> In its plea agreement, Princess admitted that it had deliberately polluted the seas when one of its cruise ships used a “magic pipe” to illegally dump oil-contaminated waste into the sea. Princess also admitted that the use of the magic pipe had commenced in 2005 and it had engaged in intentional acts to conceal and cover up the vessel pollution. The long-term intentional violation of environmental laws was discovered when a newly hired engineer reported the use of the magic pipe to the British Maritime and Coastguard Agency (MCA) when there was an illegal waste discharge off the coast of England. The MCA then notified the United States Coast Guard, which conducted its own investigation, during the course of which it was discovered that other Princess cruise ships had also been intentionally engaged in these illegal practices.<sup>41</sup>

Princess Cruise Lines, Ltd., is a subsidiary of Carnival Corporation, the world’s largest cruise company. As part of the criminal plea agreement with Princess, it was agreed that eight Carnival cruise ships from several Carnival Corporation cruise line companies will be under a court supervised Environmental Compliance Program (ECP) for five years. Under the terms of the ECP, there will be a court-appointed monitor and independent audits by an outside entity.

#### IV. Regulating Technology Developments: Autonomous Vehicles

The development and use of autonomous vehicles made significant advancements in 2016. The first death of a driver in a self-driving vehicle (a Tesla),<sup>42</sup> the testing of self-driving Uber “ride sharing” services in

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39. Rule 11 Plea Agreement at 5-6, U.S. v. D-1 Liang, No. 16-cr-20394 (E.D. Michigan) (Sept 9, 2016); Press Release, U.S. Dept. of Justice, Volkswagen Engineer Pleads Guilty for His Role in Conspiracy to Cheat U.S. Emissions Tests (Sept. 9, 2016) (*available at* <https://www.justice.gov/opa/pr/volkswagen-engineer-pleads-guilty-his-role-conspiracy-cheat-us-emissions-tests>).

40. Plea Agreement, U.S. v Princess Cruise Lines, Ltd., No. 16-20897-CR-Seitz, (S.D. Fla.) (Dec. 1, 2016); Press Release, U.S. Dept. of Justice, Princess Cruise Lines to Pay Largest-Ever Criminal Penalty for Deliberate Vessel Pollution (Dec. 1, 2016) (*available at* <https://www.justice.gov/opa/pr/princess-cruise-lines-pay-largest-ever-criminal-penalty-deliberate-vessel-pollution>).

41. Plea Agreement, *supra* note 40, at 2-3.

42. Brian Solomon, *Tesla Autopilot Enthusiast Killed In First Self-Driving Car Death*, FORBES (June 30, 2016, 5:08 PM), <https://www.forbes.com/sites/briansolomon/2016/06/30/the-first-self-driving-car-death-launches-tesla-investigation/#3d44fb87762e>.

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Pittsburgh,<sup>43</sup> and the first commercial delivery in the United States using a self-driving tractor-trailer combination (a delivery of Budweiser beer in Colorado)<sup>44</sup> all pointed to both the fact that autonomous or self-driving vehicles will increasingly be on the road and the fact that uniform regulations regarding the design and use of such vehicles on roads may need to be developed, as will liability and insurance standards.

In the United States, the 2016 regulatory approach to autonomous vehicles remained piecemeal at the state and local level. But the federal government issued several sets of guidelines in 2016 which established the foundation for future federal regulation and best standards practices.

A. FEDERAL AUTOMATED VEHICLES POLICY

In September 2016, the U.S. Department of Transportation issued the United States government's federal policy for the safe testing and deployment of automated vehicles.<sup>45</sup> The policy established Vehicle Performance Guidance for Automated Vehicles for manufacturers, developers, and other entities which included a fifteen point "Safety Assessment" for the safe design, development, testing and deployment of automated vehicles. It further identified areas of federal and state responsibilities for regulation with suggested recommended policy areas for states to consider as well as potential new regulatory tools and statutory authorities that may aid the deployment of such technologies.

B. NHTSA BEST PRACTICES FOR VEHICLE CYBERSECURITY

In October 2016, the National Highway Traffic Safety Administration (NHTSA) released a best practices guide for vehicle cybersecurity. Although these guidelines are voluntary, the NHTSA signaled to the industry the need for cybersecurity to become a priority. The guidelines even mentioned the need for a "high-level corporate officer" with the sole task of addressing cybersecurity concerns.<sup>46</sup> The NHTSA release sets a serious tone for cybersecurity, and presents a comprehensive security approach.

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43. Signe Brewster, *Uber starts self-driving car pickups in Pittsburgh*, TECHCRUNCH (Sept. 14, 2016), <https://techcrunch.com/2016/09/14/1386711/>.

44. Mike Isaac, *Self-Driving Truck's First Mission: A 120-Mile Beer Run*, N.Y. TIMES (Oct. 25, 2016), [https://www.nytimes.com/2016/10/26/technology/self-driving-trucks-first-mission-a-beer-run.html?\\_r=0](https://www.nytimes.com/2016/10/26/technology/self-driving-trucks-first-mission-a-beer-run.html?_r=0).

45. U.S. Department of Transportation, Federal Automated Vehicles Policy, <https://www.transportation.gov/av>; National Highway Traffic Safety Administration (NHTSA), Docket No. NHTSA-2016-0090, *Request for Comment on "Federal Automated Vehicles Policy"*, 81 Fed. Reg. 65703 (Sept. 23, 2016).

46. U.S. DEPT. OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 812 333, *Cybersecurity Best Practices for Modern Vehicles at 13* (2016), *available at* [https://acquia-dev-nhtsa.dot.gov/sites/nhtsa.dot.gov/files/documents/812333\\_cybersecurityformodernvehicles.pdf](https://acquia-dev-nhtsa.dot.gov/sites/nhtsa.dot.gov/files/documents/812333_cybersecurityformodernvehicles.pdf).



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One considerable area of concern identified by NHTSA is the security of the electronic control unit (ECU). The ECU acts as the vehicle's computer and controls much of the vehicle's systems. The NHTSA guidance worked to balance the need for security with the need for accessibility. Notwithstanding a strong push for security by eliminating access to the ECU, the NHTSA acknowledged that a complete elimination of access may not be possible due to the need for developers and serviceability by third-parties.<sup>47</sup> Aftermarket consumer products, like insurance driving history dongles, may also need access.<sup>48</sup> NHTSA thus advocated a "layered approach" to create a framework with multiple levels of access to prevent full compromises in security.

The NHTSA guidance also focused on cybersecurity throughout a product's development and life cycle by specifically citing the need to provide security for the vehicle's "conception, design, manufacture, sale, use, maintenance, resale, and decommissioning."<sup>49</sup> NHTSA recommended using risk assessments, vulnerability testing, and threat response protocols as ways to increase security.<sup>50</sup> Sharing this information within the industry was also highly stressed. NHTSA also stated that it had a goal for full industry participation in Auto ISAC, which was setup in 2015 to help facilitate the sharing of information.<sup>51</sup> Vulnerability and disclosure policies were also seen by NHTSA as being pivotal to ensure collaboration between manufacturing and independent testers.<sup>52</sup>

Lastly, NHTSA promoted the need for strong self-auditing and review of the entire cybersecurity framework that is implemented. This includes periodic threat simulation testing to ensure proper implementation of all aspects of the strategy.<sup>53</sup> It advised that retention of these documents and revision of protocols is also important to ensure that the framework stays current with the latest research and information.<sup>54</sup>

Encompassing many areas of vehicle security, the NHTSA's release of Cybersecurity Best Practices for Modern Vehicles represents what NHTSA believes is a "solid foundation" on which to build a cybersecurity framework. Although it is up to individual companies to voluntarily implement and improve upon these practices, it remains to be seen as to whether these practices will be used to develop mandatory regulations or are adopted by the courts in litigation to establish a minimum standard requirement.

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47. *Id.* at 17, 21.

48. *Id.* at 20.

49. *Id.* at 13.

50. *Id.* at 14-16.

51. *Id.* at 8.

52. U.S. DEPT. OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 812 333, Cybersecurity Best Practices for Modern Vehicles at 14 (2016), *available at* [https://acquisition-nhtsa.dot.gov/sites/nhtsa.dot.gov/files/documents/812333\\_cybersecurityformodernvehicles.pdf](https://acquisition-nhtsa.dot.gov/sites/nhtsa.dot.gov/files/documents/812333_cybersecurityformodernvehicles.pdf).

53. *Id.* at 15.

54. *Id.*

## **V. Transportation Network Companies**

Legal issues surrounding “ride sharing” companies such as Uber and Lyft continued to be the subject of litigation and regulatory disputes in a variety of areas and jurisdictions during 2016. These companies, also known as Transportation Network Companies (TNCs) and Transportation Network Providers (TNPs) generally use a smartphone or computer app to pair drivers and their vehicles with passengers. The companies claim that they are basically software companies that help self-employed drivers and individual customers to use the companies ride-sharing apps to provide and obtain transportation services. Competitors of these companies, largely traditional taxi companies, claim that they are basically taxi companies and should be regulated as such.

Some of the legal developments around the world involving TNCs in 2016 included whether they should be regulated the same as taxi companies, including licensing and background checks; whether regulating such companies differently than traditional taxi companies violated competition and other laws insofar as they deprive taxi companies of the benefits of their investment in their licenses; and whether drivers for such companies are employees or independent contractors.

In the United States, Uber, Lyft, and other TNCs were engaged in multiple lawsuits and legislative initiatives involving these controversies, including state and local efforts to mandate certain types of driver background checks and litigation over the proper classification of drivers. There was no consistent or uniform trend in determining how such companies should be regulated. Two 2016 decisions, one in the United States and one in the United Kingdom, illustrate the different conclusions that courts and regulators are reaching over how to classify and regulate ride-sharing services such as Uber.

One approach was represented by an October 7, 2016 decision by the United States Court of Appeals for the Seventh Circuit, which dismissed arguments by taxi companies that different and less strict regulatory standards for ride sharing companies is anticompetitive and an unconstitutional taking of the property of the taxi companies, in violation of the U.S. Constitution’s guarantee of equal protection.<sup>55</sup> Writing for the Court, Judge Richard Posner found that taxi and ride sharing companies were not the same:

The plaintiffs argue that the City has discriminated against them by failing to subject Uber and the other TNPs to the same rules about licensing and fares (remember that taxi fares are set by the City) that the taxi ordinance subjects the plaintiffs to. That is an anticompetitive argument. Its premise is that every new entrant into a market should be forced to comply with every regulation applicable to incumbents in the market with whom the new entrant will be competing.

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55. *Illinois Transp. Trade Ass’n v. City of Chicago*, 839 F.3d 594, 598 (7th Cir. 2016).

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Here's an analogy: Most cities and towns require dogs but not cats to be licensed. There are differences between the animals. . . . Dog owners, other than those who own cats as well, would like cats to have to be licensed, but do not argue that the failure of government to require that the "competing" animal be licensed deprives the dog owners of a constitutionally protected property right, or alternatively that it subjects them to unconstitutional discrimination. The plaintiffs in the present case have no stronger argument for requiring that Uber and the other TNPs be subjected to the same licensure scheme as the taxi owners. Just as some people prefer cats to dogs, some people prefer Uber to Yellow Cab, Flash Cab, Checker Cab, et al. They prefer one business model to another. The City wants to encourage this competition, rather than stifle it as urged by the plaintiffs, who are taxi owners.<sup>56</sup>

\* \* \*

There are enough differences between taxi service and TNP service to justify different regulatory schemes, and the existence of such justification dissolves the plaintiffs' equal protection claim. Different products or services do not as a matter of constitutional law, and indeed of common sense, always require identical regulatory rules. The fallacy in the district judge's equal protection analysis is her equating her personal belief that there are no significant differences between taxi and TNP service with the perception of many consumers that there are such differences—a perception based on commonplace concerns with convenience, rather than on discriminatory or otherwise invidious hostility to taxicabs or their drivers. If all consumers thought the services were identical and that there was therefore no advantage to having a choice between them, TNPs could never have gotten established in Chicago.<sup>57</sup>

The seemingly opposite conclusion that Uber is essentially no different than a taxi company was reached the same month by a United Kingdom Employment Tribunal.<sup>58</sup> In a decision examining the same business model examined by the Seventh Circuit, the UK Employment Tribunal ruled that Uber is essentially a taxi company and Uber drivers are workers for purposes of the law. Arguably, the Seventh Circuit's decision addressed the question of whether Uber's services were sufficiently different from a taxi company to permit it being regulated differently than a taxi company, while the Tribunal's decision was focused on whether it was providing a transportation service. Nonetheless the Tribunal's reasoning at paragraphs 86 through 89 of its decision underscores the different conclusions that are being reached about the fundamental legal status of ride-sharing services. It is worth quoting in detail:

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<sup>56.</sup> *Id.* at 597-98.

<sup>57.</sup> *Id.* at 598-99.

<sup>58.</sup> Reasons for the Reserved Judgment on Preliminary Hearing Sent to the Parties on 28 October 2016 at ¶ 89, *Aslam, et al v. Uber B.V., et al*, Nos. 2202550/2015 & Others, (U.K.).

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86 . . . We have reached the conclusion that any driver who (a) has the App switched on, (b) is within the territory in which he is authorised to work, and (c) is able and willing to accept assignments, is, for so long as those conditions are satisfied, working for Uber under a ‘worker’ contract and a contract within each of the extended definitions. Our reasons merge and/or overlap in places, but we will endeavour to keep the main strands separate.

87 In the first place, we have been struck by the remarkable lengths to which Uber has gone in order to compel agreement with its (perhaps we should say its lawyers’) description of itself and with its analysis of the legal relationships between the two companies, the drivers and the passengers. Any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, as a matter of contract, that it does not provide transportation services (through UBV or ULL), and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism. Reflecting on the

Respondents’ general case, and on the grimly loyal evidence of Ms Bertram in particular, we cannot help being reminded of Queen Gertrude’s most celebrated line:

The lady doth protest too much, methinks.

88 Second, our scepticism is not diminished when we are reminded of the many things said and written in the name of Uber in unguarded moments, which reinforce the Claimants’ simple case that the organisation runs a transportation business and employs the drivers to that end. We have given some examples in our primary findings above. We are not at all persuaded by Ms Bertram’s ambitious attempts to dismiss these as mere sloppiness of language.

89 Third, it is, in our opinion, unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary. The observations under our first point above are repeated. Moreover, the Respondents’ case here is, we think, incompatible with the agreed fact that Uber markets a ‘product range.’<sup>41</sup> One might ask: Whose product range is it if not Uber’s? The ‘products’ speak for themselves: they are a variety of driving services. Mr Aslam does not offer such a range. Nor does Mr Farrar, or any other solo driver. The marketing self-evidently is not done for the benefit of any individual driver. Equally self-evidently, it is done to promote Uber’s name and ‘sell’ its transportation services. In recent proceedings under the title of Douglas O’Connor-v-Uber Technologies Inc. the North California District Court resoundingly rejected the

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company's assertion that it was a technology company and not in the business of providing transportation services. The judgment included this:

Uber does not simply sell software; it sells rides. Uber is no more a “technology company” than Yellow Cab is a “technology company” because it uses CB radios to dispatch taxi cabs.

We respectfully agree.<sup>59</sup>

The one conclusion that can be reached between the multitude of court and regulatory decisions around the world grappling with how to classify and regulate TNCs is that the contrasting approaches of the Seventh Circuit and the UK Employment Tribunal decisions will not be the final word on the subject.

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<sup>59</sup> *Id.* ¶ 86-89 (citing *Douglas O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015) (other footnotes and citations omitted).

## **Women’s Interest Network: 2016 in Review**

CAN TALEZ AND TAMARI J. LAGVILAVA\*

### **I. Gender Equality in International Arbitration**

Characterized only half in jest as “PMS” (i.e., pale (white), male, and stale (aged)), the ranks of international arbitrators have long been criticized for their lack of diversity.<sup>1</sup> May 18, 2016, however, marked a turning point for gender equality in the international arbitration community. Led by co-chairs Sylvia Noury and Wendy Miles QC, the Equal Representation in Arbitration (ERA) Steering Committee officially launched and opened for signature the “ERA Pledge,” designed to remedy the under-representation of women on international arbitration tribunals.<sup>2</sup> As the word “pledge” suggests, this is not a wish or hope, but “a binding promise or agreement to do.”<sup>3</sup>

The ERA Pledge has two general objectives: (1) raising the profile and increasing the representation of women in arbitration; and (2) appointing women as arbitrators on an equal opportunity basis.<sup>4</sup> To achieve these objectives, the ERA Pledge sets forth a number of specific practical commitments, including ensuring: (a) that “committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;” (b) that “lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;” (c) that “states, arbitral institutions and national committees include a fair representation of female candidates

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\* The Committee Editor is Dionne Marie Flynn, Faculty Support Assistant at Southwestern Law School. Can Talaz, Counsel to the Honorable Delissa A. Ridgway, Judge at the U.S. Court of International Trade, contributed Section I on gender equality in international arbitration. Tamari J. Lagvilava, Law Clerk to Judge Ridgway, contributed Section II on gender equality in the practice of law in the United States. The views expressed in this article are offered in the authors’ personal capacities and do not reflect the views of the U.S. Court of International Trade or any of the judges on the Court.

1. See Michael D. Goldhaber, *Madame La Présidente – A Woman Who Sits As President of a Major Arbitral Tribunal Is a Rare Creature. Why?*, TRANSNAT’L DISP. MGMT., July 2004, at 1–2, <https://www.transnational-dispute-management.com/article.asp?key=158>.

2. See Mirèze Philippe, *Equal Representation in Arbitration (ERA) Pledge: A Turning Point in Arbitration History for Gender Equality*, KLUWER ARB. BLOG (June 2, 2016), <http://kluwarbitrationblog.com/2016/06/02/equal-representation-in-arbitration-era-pledge-a-turning-point-in-the-arbitration-history-for-gender-equality/>.

3. See *Pledge Definition*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/pledge> (last visited Dec. 14, 2016).

4. See EQUAL REPRESENTATION IN ARB., <http://arbitrationpledge.com/> (last visited Dec. 14, 2016).

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on rosters and lists of potential arbitrator appointees, where maintained by them;” (d) that, “where they have the power to do so, counsel, arbitrators, representatives of corporations, states and arbitral institutions appoint a fair representation of female arbitrators;” (e) that “gender statistics for appointments (split by party and other appointment) are collated and made publicly available;” and (f) that “senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.”<sup>5</sup>

Since its launch, the ERA Pledge has found significant support among international arbitrators and arbitration practitioners, academics, law firms, corporations, states, and international arbitration institutions around the world.<sup>6</sup> As of December 14, 2016, there are 1,568 signatories, including the International Chamber of Commerce International Court of Arbitration (ICC Court) and the London Court of International Arbitration (LCIA).<sup>7</sup>

The ICC’s and LCIA’s commitment to the ERA Pledge reflect growing trends of transparency and diversity in the international arbitration world. For the first time in the history of the institution, the ICC in 2016 disclosed statistics on gender balance on ICC arbitral tribunals, reporting that women arbitrators represented just over 10 percent of all appointments and confirmations in 2015.<sup>8</sup> For the same year, the LCIA reported that 15.8 percent of all arbitrators appointed were women.<sup>9</sup> In another landmark move, the ICC in 2016 began publishing on its website the names and nationalities of the arbitrators sitting in ICC cases, in addition to information concerning whether each appointment was made by the parties or by the institution, and which arbitrator is the chair of the tribunal.<sup>10</sup> This practice will shed further light on gender balance on ICC tribunals, and will raise the profiles of the women serving on those tribunals.

When the dismal statistics on gender diversity on arbitral tribunals have been raised in the past, the frequent refrain has been that “there aren’t enough qualified women” to serve as international arbitrators. One key feature of the ERA Pledge website is a search function that is designed to help refute that claim. Specifically, when a requester provides relevant details about a particular arbitral proceeding (e.g., pertinent areas of expertise, the applicable law, the language and place of arbitration, etc.), the

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5. *See id.*

6. *See id.*

7. The complete list of signatories can be found on the Pledge website. *See id.*

8. *See ICC Arbitration Posts Strong Growth in 2015*, INT’L CHAMBER OF COM. (May 11, 2016), <http://www.iccwbo.org/News/Articles/2016/ICC-Arbitration-posts-strong-growth-in-2015/>.

9. *See* LCIA REGISTRAR, LCIA REGISTRAR’S REPORT 2015, at 4, <http://www.lcia.org/media/download.aspx?MediaId=500>.

10. *See* ICC Arbitral Tribunals (Chart Listing Arbitrators Appointed in ICC Arbitration Cases), INT’L CHAMBER OF COM., <http://iccwbo.org/Products-and-Services/Arbitration-and-ADR/ICC-Arbitral-Tribunals/> (last visited Dec. 14, 2016); *see also* *ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency*, INT’L CHAMBER OF COM. (Jan. 5, 2016), <http://www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>.

search service provides the requester with the names and contact information of potential female arbitrators on a confidential basis.<sup>11</sup> This search function fills a previously unmet need in the international arbitration community and demonstrates the depth of the Pledge Steering Committee's commitment to gender parity on international arbitral tribunals.

## II. Gender Equality in the Practice of Law in the United States

New research published in 2016 shows that significant gender inequality continues in the legal profession, even in the United States. The research, however, highlights a few positive trends as well.

According to 2016 data, women comprise only 21.5 percent of partners in private practice and 24 percent of the general counsels of Fortune 500 companies.<sup>12</sup> Similarly, only 27.1 percent of all federal and state judges are women.<sup>13</sup> A different survey of top New York law firms suggests that, although women have made some progress in securing law firm leadership positions, 25 percent of the largest firms in New York City do not have a woman on their management committees and one in eight does not have a woman leading a practice group.<sup>14</sup> For those women who make it into the partnership ranks at major firms, a significant pay gap between male and female partners persists.<sup>15</sup> Another 2016 survey found that at large American law firms, female partners are paid 44 percent less than their male colleagues (although only two years ago that figure was 47 percent).<sup>16</sup>

Some research seems to support a conclusion that women are disadvantaged from the very start—even before they enter law school. A study by Ohio State University's Moritz College of Law (Moritz Study) identified a "leaky pipeline" in the law school admission process.<sup>17</sup> First, fewer women than men apply to law school; second, those women who do apply are less likely to be admitted, relative to men; and, third, women who are admitted are more likely than men to attend lower-tier schools that are less successful placing their graduates.<sup>18</sup>

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11. See EQUAL REPRESENTATION IN ARB., <http://arbitrationpledge.com/> (last visited Dec. 14, 2016).

12. See *A Current Glance at Women in the Law May 2016*, ABA COMMISSION ON WOMEN IN THE PROFESSION, at 2–3, [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_may2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_may2016.authcheckdam.pdf).

13. See *id.* at 5.

14. See Elizabeth Olson, *Leading New York Law Firms Lag in Including Women and Minorities*, N.Y. TIMES (Oct. 16, 2016), <http://www.nytimes.com/2016/10/17/business/dealbook/leading-new-york-law-firms-lag-women-and-minorities-diversity.html>.

15. See Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, N.Y. TIMES (Oct. 12, 2016), <http://www.nytimes.com/2016/10/13/business/dealbook/female-law-partners-earn-44-less-than-the-men-survey-shows.html>.

16. See *id.*

17. See Deborah Jones Merritt & Kyle McEntee, *The Leaky Pipeline for Women Entering the Legal Profession*, Nov. 2016 Research Summary, [http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary\\_Nov-2016.pdf](http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary_Nov-2016.pdf) (last visited Dec. 14, 2016).

18. See *id.*



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Thus, although today there are as many women in law schools as men, research indicates that there are more female students attending lower-ranked schools, while a greater percentage of men are enrolled in more prestigious law schools.<sup>19</sup> Across the country, 49.4 percent of law students are women; but, in the top fifty highest-ranked law schools, only 46 percent of the students are women.<sup>20</sup> As a possible explanation for this disparity, the Moritz Study pointed to the fact that the top fifty schools place greater emphasis on LSAT scores, which disadvantages women who on average score lower than men.<sup>21</sup> Because higher-ranked schools tend to have higher job placement rates than lower-ranked schools do, the distribution of women in these schools makes a difference in the types of jobs female lawyers obtain post-graduation.

As these recent studies show, there are still miles to go before male and female lawyers will have equal opportunities to advance in the workplace. Even in the U.S., the proverbial “old boys club” is still alive and well.

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19. See Elizabeth Olson, *More Law Degrees for Women, but Fewer Good Jobs*, N.Y. TIMES, (Nov. 30, 2016), <http://www.nytimes.com/2016/11/30/business/dealbook/more-law-degrees-for-women-but-fewer-good-jobs.html?ribbon-ad-idx=9&rref=business/dealbook&module=Ribbon&version=context&region=Header&action=click&contentCollection=DealBook&pgtype=article>.

20. See Deborah Jones Merritt & Kyle McEntee, *The Leaky Pipeline for Women Entering the Legal Profession*, November 2016 Research Summary, [http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary\\_Nov-2016.pdf](http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary_Nov-2016.pdf) (last visited Dec. 14, 2016).

21. See *id.*

## **Cross-Border Real Estate**

TIMUR BONDARYEV, BOHDAN SHMORHUN, FELIPE ISA CASTILLO,  
ANDERS FORKMAN, AND BRUCE D. GREENBERG\*

This article surveys significant legal developments in cross-border real estate, focusing on recent developments in the Ukraine, Dominican Republic, Sweden, and Mexico.

### **I. Ukraine<sup>1</sup>**

Legal developments in Ukraine during the year 2016 were primarily focused on the sphere of e-government services. But there were also some significant changes that affect the area of real estate law. In particular:

#### **A. RECENT CHANGES IN THE OWNERSHIP RIGHTS TO IMMOVABLE PROPERTY REGISTRATION<sup>2</sup>**

City councils, accredited persons, and notaries,<sup>3</sup> i.e. state registrars, from the beginning of 2016, are entitled to register ownership rights to real estate and real property. Such registration shall be performed by making respective records in the State Register of Ownership Rights to Immovable Property.<sup>4</sup> Thus, the practice of issuing ownership certificates is no longer to be applied in Ukraine. Moreover, the improved digital communication and registration system provides for public access to such registers as the State Land Cadastre, the Unified State Register of Court Decisions, the Unified State Register of Private Entrepreneurs, Legal Entities and Civil Organizations, and the Unified Register of Permissive Documents for Construction.

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\* Editor of the submission: Wojciech Baginski, LL.M (University of Virginia), EMBA Expected '17 (Kellogg-WHU), Managing Partner at Baginski.Pro. He is an Attorney at Law admitted to practice in New York, England and Wales and Poland.

1. Timur Bondaryev, Bohdan Shmorhun are the authors of the section on Ukraine. Timur Bondaryev is an Attorney, Managing Partner, and Head of the Real Estate and Construction, Antitrust and Competition practices at Arzinger. Bohdan Shmorhun is a Junior Associate of the Real Estate and Construction practice at Arzinger.

2. Amendments to On State Registration of Rights to Real Estate and Their Encumbrances (Law No. 834-VIII) (Ukr.), art. 1, para. 1, cl. 1, *available at* <http://zakon5.rada.gov.ua/laws/show/834-19>.

3. On State Registration of Rights to Real Estate and Their Encumbrances (Law No. 1952-IV) (Ukr.), art. 10, para. 1, *available at* <http://zakon3.rada.gov.ua/laws/show/1952-15>.

4. *Id.* art. 10, para. 3, cl. 5.

As of October 2016, the Registration Law<sup>5</sup> was amended to ensure even better protection of the property titles from violations by third parties, especially from illegal shares takeover. These amendments,<sup>6</sup> *inter alia*, enable: (1) owner notification in the event of any application for the registration of any ownership right; (2) obligation of the State Registrar to verify the information on the real estate object in certain state registers prior to committing any registration; (3) automatic registration of the rights and encumbrances according to the court decision received from the State Court Administration; and (4) notarial certification of the Head's and Secretary's signatures on the minutes of participants' general meeting of legal entity.<sup>7</sup>

**B. THE NEW COURT PRACTICE RELATED TO THE MORTGAGED PROPERTY RETROFIT**

Courts have recently adopted decisions stating that retrofit of the mortgaged objects causes the creation of the new (unmortgaged) ones.<sup>8</sup> Recent judicial practice<sup>9</sup> invented a new principle according to which the mortgaged object retrofit does not lead to creation of a new property.<sup>10</sup> Thus, the risk of evading the obligations under the mortgage agreement should be mitigated.

**II. Dominican Republic<sup>11</sup>: Purchasing Dominican Real Estate from Government**

On September 27, 2016, the Dominican Republic ("DR") Executive Branch issued Decree No. 268-16<sup>12</sup> creating the Evaluation Commission of Lands Registered as Owned by the Sugar Mills belonging to the Dominican State Sugar Council or Consejo Estatal del Azucar ("CEA").<sup>13</sup> The Decree recognizes the DR's economic transformation which has made it so that

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5. *Id.*

6. On Amendments to Improvement of State Registration of Rights to Immovable Property and Property Rights (Law No. 1666-VIII) (Ukr.), *available at* <http://zakon5.rada.gov.ua/laws/show/1666-19>.

7. *Id.* art. I para 12.

8. *See, e.g.,* Megabank PJSC v. Malvy-Market LLC, 914/4006/13 (2016) (Ukr.), *available at* <http://www.reyestr.court.gov.ua/Review/56250418>.

9. Finansy & Credit PJSC v. PERSON\_6, 6-1213??16 (2016) (Ukr.), *available at* <http://www.reyestr.court.gov.ua/Review/58986639>.

10. "The disputable apartment should not be considered as a newly created object of immovable property, as it was created on the basis of existing pledged property using its functional elements, so the previous court decisions that the apartment is not subject to the mortgage but the other property is anticipatory." *Id.*

11. Felipe Isa Castillo is the author of the section on Dominican Republic. Dr. Castillo is an Attorney, Managing Partner, and Head of the Real Estate and Tourism and Foreign Investment Law Practice at Arthur & Castillo (AC Law).

12. *Creating the Evaluation Commission of Lands Registered as Owned by the Sugar Mills of the Dominican State Sugar Council (CEA)*, Presidential Decree No.268-16 (2016) (Dom. Rep.).

13. *Dominican State Sugar Council (CEA)*, Law No. 7 (1966) (Dom. Rep.).

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Government lands originally dedicated to sugar production, farming, or agriculture have been converted into urban, commercial, and tourism properties. Since this transformation, autonomous and local institutions often compete for the benefits of using and selling property that may belong to them based on different interests.

According to Land Registration Law 108-05,<sup>14</sup> the Dominican Government is the original owner of all real estate properties that constitute the Dominican Republic, and real estate properties registrable under the Dominican government's name are those over which no one can prove a right. But there is no title or deed issued to every piece of government real estate property as a national survey and inventory of all government-owned real estate assets is pending.<sup>15</sup>

The purpose of Decree 268-16 is (a) to make an inventory of government-owned land; (b) to audit real estate transactions affecting government lands; (c) to determine the best use of real estate owned or presumed owned by the government in accordance with their nature and characteristics; (d) to make efficient surveys, amendments, and updates of plots of land that allow for the cleansing of lands and their ownership; and (e) to decide about their use by other government institutions.

The Decree, as part of public policy, also seeks to protect government property rights and grant public access to titled real estate property through "trustworthy and quick" legal means. As such, the Decree recognizes the lack of a clear and efficient property purchase and titling process, which is often discovered by investors who purchase property from government institutions or from private sellers who purchased real estate originally owned by the government.

Challenges exist in confidently buying Dominican real estate from government institutions or private parties who originally purchased from the Dominican Government. How can you verify title if there is no title? Is there an explicit process across all government institutions for purchasing real estate? The answer to these questions depends on each particular case. While it is true that one can buy property from the government through an entity whose representative is empowered to sell by power of attorney from the Executive Branch<sup>16</sup> and the sales contract is then approved by the Dominican Congress,<sup>17</sup> getting title to real estate property through

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14. Land Registration Law 108-05 enacted on March 23, 2005. Principle III states the following: "The Dominican State is the original owner of all the lands that conform the territory of the Dominican Republic. They are registered on behalf of the Dominican State all the lands over which no one may prove any right of property."

15. *Commission for Titling Government Lands*, Presidential Decree 624-12 (2012) (Dom. Rep.).

16. *Representation of the State in Juridical Acts*, Law 5148 (1938) (requires a power of attorney by the President to a Government representative for executing real property sale contracts over Government property) (Dom. Rep.).

17. Constitución de la República Dominicana [Constitution of the Dominican Republic] Jan. 26, 2010, art. 93(k) (grants the Dominican Republic Congress the power to approve or disapprove Contracts for the sale of Government assets submitted by the Executive Branch) (Dom. Rep.).

trustworthy and quick legal means will require a completed government property survey and titling as well as clear contract validation and closing requirements enabling an easy real estate property transfer process.

### III. Sweden<sup>18</sup>

#### A. CO-OPERATIVE ECONOMIC ASSOCIATIONS (CONDOMINIUMS)

In an effort to modernize certain aspects of co-operative associations, the Swedish government proposed amendments to the Co-operative Economic Association Act<sup>19</sup> in October 2015.<sup>20</sup> The proposal was adopted and went into effect on July 1, 2016.<sup>21</sup> Its importance in relation to real property lies in the fact that it applies to condominiums as they are a form of a co-operative economic association.<sup>22</sup>

The new legislation includes amendments relating first to the notice required for convocation of a general assembly. It allows for notice to be sent to members by email rather than ordinary mail and states that the notice of convocation shall as a general rule be sent between four and six weeks before an annual meeting and two to four weeks before an extraordinary meeting. The new legislation also sets out that particular documentation should be provided at the annual general assembly. This documentation includes the annual report and the auditor's statement, which must be provided at least two weeks prior to the meeting, instead of one week. Finally, the association membership registries are now required to record additional information such as the time of membership and the point in time when membership was terminated.

#### B. PLANNING AND ZONING REGULATIONS

Several amendments enacted during 2016 apply to the Planning and Building Act.<sup>23</sup> Among the more important change is the requirement that municipal decisions relating to the adoption or amendment of zoning plans may now be appealed directly to the Land and Environmental Court,<sup>24</sup>

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18. Anders Forkman, partner at Advokatfirman Vinge, Malmoe, Sweden, authored the section on Sweden.

19. *Om Ekonomiska Föreningar* [Economic Association] (Lagen 2002:149) (Swed.).

20. Proposition [Prop.] 2015/16:4 [government bill] (Swed.), available at <http://www.regeringen.se/contentassets/0fd35d7d9c0548c8b4d565b4d6a32c08/modernisering-av-lagen-om-ekonomiska-foreningar-prop.-2015164>.

21. LAG OM ÄNDRING I LAGEN OM EKONOMISKA FÖRENINGAR (Svensk Författningssamling [SFS] 2016:108) [Law Amending the Law on Economic Compounds, Swedish Codes of Statutes] (Swed.), available at <http://rinfo.beta.lagrummet.se//publ/sfs/2016:108/pdf,sv>.

22. *Bostadsrättsförening* [Tenant] (Swed.).

23. Prop. 210:900 Plan- och bygglagen [government bill] (Swed.), available at [https://riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/plan-och-bygglag-2010900\\_sfs-2010-900](https://riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/plan-och-bygglag-2010900_sfs-2010-900).

24. *Mark- och miljödomstolen* [Land and Environment Court] (Swed.).

rather than the County Administrative Board.<sup>25</sup> In effect, this change reduces the number of appellate bodies from three to two (the decision of the court may be appealed to the Land and Environmental Court at the Court of Appeal<sup>26</sup>) and is intended to shorten the planning procedure.

### C. TAXATION

On October 27, 2016, the Finance Department submitted a notice to parliament that it intends to propose amendments relating to taxation of transfer of real property from individuals to limited liability companies.<sup>27</sup> Current legislation allows an individual to transfer real property to a limited liability company, typically owned by the individual himself, without triggering any capital gains tax provided that the consideration is less than the taxation value of the property (in theory the taxation value shall correspond to 75 percent of the market value). The shares in the company can then be sold to a third party without incurring any capital gains tax (popularly known as a “cat’s tail transaction”). This tax structure resulted in a considerably lower overall tax than if the individual were to sell the property at market value to a third party. In order to avoid this, the government’s future proposal will introduce thresholds where a transfer from an individual to a company will be considered to constitute a taxable transaction. The purpose of the notice is to allow the future legislation to take effect retroactively on October 28, 2016, on the condition that it is passed by parliament.

## **IV. Mexico: Improving Mexico’s Reputation in the Global Financial Markets Through the Implementation of New Valuation Standards<sup>28</sup>**

The federal government of Mexico has recognized that the Valuation and Review Standards and Code of Ethics must change in order to attract global investors. The Instituto de Administración y Avalúos de Bienes Nacionales (“INDAABIN”), Mexico’s federal government organization that administers nearly 100,000 federal assets in the Republic of Mexico, determined that a higher level of public confidence in the valuation profession was necessary. It therefore decided to standardize requirements for both external hired appraisers and internal reviewers within the Institute, and as a result, adopted a set of standards and a code of ethics, which conformed to International Valuation Standards (“IVS”) and placed personal responsibility on the valuation professionals in the sector. The new standards and code of

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25. *Länsstyrelsen* [Country Board] (Swed.).

26. See *Mark- och miljödomstolen*, *supra* note 23.

27. Regeringens skrivelse 2016/17:38 [government report series] (Swed.), available at <http://www.regeringen.se/rattsdokument/skrivelse/2016/10/skr.-20161738/>.

28. Bruce D Greenberg, FRICS, MAI, ASA, SRA, Managing Director/Country Leader of Duff & Phelps Mexico, authored the section of Mexico.

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ethics will require valuation professionals and reviewers in Mexico to communicate their analysis and opinions in a manner that is not misleading. Further, their obligations must be performed with objectivity, integrity, independence, and professionalism.<sup>29</sup>

Some of the initial administrative reform undertaken by INDAABIN include:

- Perform a detailed analysis of the existing administrative and working documents of INDAABIN, which included processes, regulatory procedures, and the language of its documents to conform to IVS;
- Classify and score the University programs within Mexico that provide valuation curriculums;
- Classify and score the professionals who work within INDAABIN as valuation reviewers, and develop review guidelines for their internal professionals which conform to IVS; and
- Classify and score the professional appraisers, who are registered with the federal government to perform valuations for INDAABIN, and develop guidelines to perform external appraisals which conform to IVS.<sup>30</sup>

The first round of norms, which included the Valuation Standards and Code of Ethics for all valuation disciplines, were adopted into Mexico Federal Law on December 3, 2015, in Mexico City by the Secretary of Public Administration (“SFP”), Minister Virgilio Andrade of Mexico. Among the critical components of the Valuation Standards and Code of Ethics that were adopted into law by the Secretary of Public Administration are:

- Ethics: A valuation professional must promote and preserve the public trust inherent in the appraisal practice by observing the highest standards of professional ethics;
- Record Keeping: A valuation professional must prepare a work file for each appraisal or appraisal review assignment. A work file must be in existence prior to the issuance of any report; and
- Competence: A valuation professional must be competent to perform the assignment. If the valuation professional is not competent, [they] must decline or withdraw from the assignment

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29. Asistencia Técnica en la Alineación de los Procesos de la Dirección General de Avalúos y Obras del Instituto de Administración y Avalúos de Bienes Nacionales (Mex.), *available at* <http://www.duffandphelps.com/assets/pdfs/news/valuation-services/code-of-ethics-and-valuation-and-review-standards-1.pdf>.

30. Bruce Greenberg, *Improving Mexico's reputation in global financial markets through the implementation of new valuation standards*, IMMOBILIARE (Oct. 5, 2016), <http://www.inmobiliare.com/improving-mexicos-reputation-in-global-financial-markets-through-the-implementation-of-new-valuation-standards/>.

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before accepting the assignment, and further have the adequate education and tools to perform the assignment.<sup>31</sup>

On July 25, 2016, these Code of Ethics, and International Standards of Valuation were published in the Federal Registry of Mexico.<sup>32</sup>

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31. *Id.*

32. Valuation Standards and Code of Ethics, Diario Oficial de la Federación [DOF] 3-12-2015 (Mex.), *available at* [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5445623&fecha=25/07/2016](http://www.dof.gob.mx/nota_detalle.php?codigo=5445623&fecha=25/07/2016).



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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

## Immigration and Naturalization

EDITED BY KEVIN J. FANDL;\* CONTRIBUTIONS BY SABRINA DAMAST,  
MAYRA C. ARTILES, POORVI CHOTHANI AND CLIODHNA MURPHY\*\*

### I. Introduction

The Immigration and Naturalization Committee's contribution to the 2016 *Year in Review* provides critical updates on key issues in immigration law in the United States, Puerto Rico, India, and the European Union. It would be remiss, however, to ignore the potential changes surrounding U.S. immigration law and policy in the aftermath of the presidential election. If rhetoric translates into action, immigrants and practitioners in this field will likely face significant changes. Refugee admissions, particularly those with Syrian beneficiaries, may decline precipitously. Immigration registration databases—first created under the George W. Bush Administration but dormant under the Obama Administration—may return. Protections for immigrant children provided by the Deferred Action for Childhood Arrivals program may dissipate. Normalization of relations with Cuba, which has led to a surge in immigrants from Cuba, may reverse course.<sup>1</sup> Individually, each change would dramatically affect a particular target group, such as child immigrants, Cubans, or Syrian refugees. Taken together, these proposals suggest a broad shift in public policy toward protectionism and nationalism, contrary to America's historical commitment to promoting diversity and providing refuge. Time will tell if the administration acts upon its campaign rhetoric.

### II. “Crimmigration” Update: *Mathis v. United States*<sup>2</sup>

The United States Supreme Court has made significant changes to “crimmigration” case law, defined as cases analyzing the immigration consequences of criminal convictions. The shifts occurred because the analyses employed in this area of the law—known as the categorical and modified categorical approaches—are derived from federal criminal sentencing law. When the Court interpreted the categorical approach in the

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\* Assistant Professor, Fox School of Business, Temple University. Former Counsel to the Assistant Secretary, United States Immigration and Customs Enforcement.

\*\* Authors of each section are noted accordingly.

1. See Kevin J. Fandl, *Cuban Migration to the United States in a Post-Normalized Relations World*, 26 MINN. J. INT'L L. (forthcoming 2017); see also, Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, AM. BUS. L. J. (forthcoming 2017).

2. Sabrina Damast is the founding attorney of the Law Office of Sabrina Damast in Los Angeles, CA.

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sentencing context, it had a direct impact on the parallel crimmigration analysis. Most recently, the Supreme Court again redrew the crimmigration map in its decision in *Mathis v. United States*.<sup>3</sup>

To understand the impact of the decision in *Mathis*, an understanding of the historical development of the categorical and modified categorical approaches is necessary. The Supreme Court introduced the categorical approach in *Taylor v. United States*,<sup>4</sup> a case addressing the sentencing implications of a prior conviction for burglary in Missouri. The Court determined whether the Missouri conviction met the federal generic definition of burglary. The Court took this step to ensure that, when the statutes criminalize the same conduct, convictions for this crime in one state are treated identically, for sentencing purposes, to convictions for burglary in another state.<sup>5</sup> In conducting this analysis, the court focused solely on the elements of the state statute.<sup>6</sup> If all the conduct criminalized by the state statute fell within the generic federal definition, the state statute is a categorical match to the federal generic definition.

This categorical analysis functions the same in the immigration context as in the criminal sentencing context. The controversy surrounded which sentencing enhancements (or immigration consequences) arise if only *some* of the conduct criminalized by the state statute falls within the generic federal definition. Under these circumstances, a court may consult the charging paper or jury instructions to determine if a jury was required to find all of the elements of the generic offense.<sup>7</sup> This additional analysis is known as the modified categorical approach. In 2013, the Supreme Court explained that the modified categorical approach is *only* applicable to “divisible” statutes, so named because the alternative elements of the statute (some matching the generic definition of the offense and some not) “divide” the statute into multiple, discrete crimes.<sup>8</sup>

In *Mathis*, the Court had to determine what qualifies as a divisible statute, and accordingly, when to apply the modified categorical approach.<sup>9</sup> Previously, courts defined a divisible statute as one containing alternative elements, some of which matched the generic definition of the offense that would lead to an immigration consequence.<sup>10</sup> The issue remained open as to whether the presence of the word “or” between two alternatives necessarily makes them alternative elements. The Court granted certiorari in *Mathis* to resolve a Circuit Court split concerning whether a jury must unanimously agree on an alternative enumerated in the statute in order for it to qualify as an element. The Court recognized that disjunctively phrased statutes might

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3. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

4. 495 U.S. 575 (1990).

5. *Id.* at 592.

6. *Id.* at 601.

7. *Id.*

8. *Descamps v. United States*, 133 S. Ct. 2276 (2013).

9. *Mathis v. United States*, 136 S. Ct. 2243 (2016).

10. *Descamps*, 133 S. Ct. at 2276.

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enumerate alternative elements or might enumerate “various factual means of committing a single element.”<sup>11</sup> The Court then suggested several ways that a lower court should ascertain whether an alternative is an element or merely a means of committing an element. First, a court should review state case law interpreting the statute at issue. If a jury need not agree on which alternative was violated, then the alternative is a factual mean, not an element of the offense.<sup>12</sup> Second, a court should look at the punishment accorded to the alternatives. If one alternative carries a different punishment than the other, it is an element of the offense.<sup>13</sup> Third, the statute may also “identify which things must be charged (and so are elements) and which need not be (and so are means).”<sup>14</sup> Finally, if the statute and state law interpretations do not resolve the issue conclusively, a court may also “peek” at the record of conviction for the sole purpose of determining whether alternatives are elements or means.<sup>15</sup> For example, if the alternatives are charged disjunctively in the charging document, that is “as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.”<sup>16</sup> Jury instructions that list all of the potential alternatives are also indicative of alternative means, not alternative elements.<sup>17</sup>

The Attorney General and the Board of Immigration Appeals (“Board”) have conceded that the decision in *Mathis* applies to administrative immigration proceedings.<sup>18</sup> Therefore, immigration practitioners need to consult state case law interpretations of statutes, jury instructions, and any other resource that will help them identify whether the word “or” in a statute truly separates alternative elements (*i.e.*, things a jury must unanimously agree upon to convict). If so, the presence of “or” triggers the use of the modified categorical approach to analyze the immigration consequences of a conviction. It is important to note that the Board has identified at least one issue regarding the implementation of the categorical approach, which remains the subject of the Circuit Court split, and as such, the Board will apply the law of the Circuit in which each case arises.<sup>19</sup> Thus, practitioners are advised to continue to follow the developments in immigration law in their Circuit, as this area of the law is constantly

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11. *Mathis*, 136 S. Ct. at 2249.

12. *Id.* at 2256.

13. *Id.*

14. *Id.*

15. *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016).

16. *Id.* at 2257.

17. *Id.*

18. *Matter of Chairez-Castrejon & Sama*, 26 I&N Dec. 796 (AG 2016) (lifting the stay on cases involving the question of what constitutes a divisible statute in light of the decision in *Mathis*); *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

19. *Silva-Trevino*, 26 I&N Dec. at 831 (acknowledging a circuit split on the use of the “realistic probability” test in the categorical approach).

changing. Indeed, the Supreme Court has granted certiorari in another crimmigration case for the upcoming term.<sup>20</sup>

### III. Indian Immigration Updates 2016<sup>21</sup>

The Government of India continues to increase its vigilance on immigration matters by either introducing new measures, modernizing systems, or strengthening enforcement. Some of the recent measures affecting foreign nationals working, living, or investing in India are set out below.

#### A. OPERATING ENTITY AT THE HYDERABAD FRRO - REQUIRED FOR EMPLOYMENT VISA SPONSORSHIP

As of September 2016, the Foreigners Regional Registration Office (“FRRO”) at Hyderabad requires evidence of a visa sponsor’s business operations in Hyderabad. Companies must provide evidence that the business is a registered entity when it wishes to sponsor a foreign national on an employment visa in India. This evidence may be a registration certificate issued by the Registrar of Companies, which reflects the registered address of the sponsoring entity. Problems may occur, however, when the registered address of the sponsoring entity is a location other than Hyderabad. When the visa sponsor will employ the foreign national in Hyderabad, the company must provide additional government-issued evidence that it is an operating entity in that jurisdiction. Such proof may include “registration under the Shops and Establishment Act of Telangana State (which is a mandatory requirement for most entities) or any other relevant Telangana State Government body.”<sup>22</sup> This evidence will be required at the time of registration with the FRRO or when extending the employment visa.<sup>23</sup>

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20. *Lynch v. Dimaya*, 2016 WL 3232911 (U.S. Sept. 29, 2016) (addressing whether the definition of a crime of violence under 18 U.S.C. § 16(b) is unconstitutionally vague).

21. Poorvi Chothani, Esq., is the founder and managing partner of LawQuest, a global immigration law firm headquartered in Mumbai, India, and with offices in Bengaluru and New York. She is admitted to the New York State Bar with an LL.M from the University of Pennsylvania, USA, and is registered as a Solicitor in England and Wales. Poorvi has been practicing law in India since 1984, and is admitted to the Bar Council of Maharashtra and Goa. She can be reached at [poorvi@lawquestinternational.com](mailto:poorvi@lawquestinternational.com).

22. *Australia, Canada, China, Czech Republic, EU, India, Italy, Switzerland, Turkey*, PEARL LAW GROUP, <https://www.immigrationlaw.com/oct-18-2016/> (last visited Apr. 12, 2017).

23. Poorvi Chothani, *India: Operating Entity at the Hyderabad FRRO – Required for Employment Visa Sponsorship*, MONDAQ (Oct. 24, 2016), <http://www.mondaq.com/india/x/537958/work+visas/Operating+Entity+At+The+Hyderabad+FRRO+Required+For+Employment+Visa+Sponsorship>.

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**B. LANDLORDS IN INDIA MUST REPORT THE STAY OF FOREIGN  
NATIONALS ON THEIR PREMISES**

The government is increasingly enforcing a long-standing regulation that tracks the stay of foreign nationals in India. The regulations state that: “Any Hotel/ Guest House/ *Dharmashala* (charitable housing)/ Individual House/ University/ Hospital/ Institute/ Others etc. who provide accommodation to [foreign nationals] must submit the details of the residing [foreign national] in Form C to the Registration authorities within 24 hours of the arrival of the [foreign national] at their premises.”<sup>24</sup> Until recently, only hotels, guest houses, hospitals, and hostels were routinely filing Form C for foreign nationals living on their premises. However, now even individual or private home owners (including landlords) are required to file Form C for each foreign national living on their premises.

Form C is designed for collecting prerequisite information on any foreign national who is residing in a: hotel, guest house, *Dharmashala* (charitable house), individual house, university, hospital, institute, or other abode. This information is mandatory from a security point of view. One copy of this Form C must be submitted at the FRRO within 24 hours of the foreign national’s arrival in India. Filing this form helps in proving legal arrival of the foreign national in India.

**C. INDIA’S E-TOURIST VISA AND VISA ON ARRIVAL TO UNDERGO  
CHANGE**

In 2015, to encourage tourism and business travel to India, the government introduced a “[t]ourist visa on arrival (TVoA) scheme”<sup>25</sup> as an “e-tourist visa” (eTV) scheme.<sup>26</sup> This is a misnomer, as it can be used for several reasons, including short business travel, for visits with family, and religious pilgrimages.<sup>27</sup> Applicants must apply for an eTV online a minimum of four days prior to the date of travel. A TVoA-ETA can be obtained at the port of entry into India. Both visas are valid for thirty days from the date of entry into India.

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24. *Form C*, INDIA: BUREAU OF IMMIGR., <http://boi.gov.in/content/form-c> (last visited Mar. 29, 2017).

25. “*TOURIST VISA ON ARRIVAL*” SCHEME, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA, <http://mha1.nic.in/pdfs/ForeigD-TourVISA-Schm.pdf> (last visited Apr. 11, 2017); *Tourist Visa On Arrival Scheme*, INDIA.GOV, <https://india.gov.in/spotlight/encouraging-inbound-tourism-tourist-visa-arrival-tvoa-scheme> (last visited Apr. 11, 2017).

26. *e-Tourist Visa Scheme - Fly to India trouble-free*, NATIONAL PORTAL OF INDIA, <https://india.gov.in/spotlight/e-tourist-visa-scheme-fly-india-trouble-free#tab=tab-1> (last visited Mar. 29, 2017).

27. *Id.*

1. *Mandatory Bio-metric Collection for Seven Indian Visa Categories When Applying in London*

In a Press Release dated August 5, 2016, the High Commission of India in London announced the use of biometrics enrollment for visa applicants in certain visa categories, with biometric collection in effect as of August 19, 2016.<sup>28</sup> Individuals applying for certain visas at the Indian Visa Application Centers in the United Kingdom will now be required to appear in person and submit biometrics (fingerprint data and facial photographs). But applicants under the age of twelve or over the age of seventy are exempt from the new biometric enrollment requirement.<sup>29</sup> Mandatory biometric collection applies to employment visas, journalist visas, research visas.

D. TOURIST VISA FOR YOGA AFICIONADOS AND INDIAN MEDICINE SYSTEMS ENTHUSIASTS

Foreigners interested in learning to practice yoga or study Indian medicine in India will need to apply for an E-Tourist visa. With an eye to making Indian yoga and its age-old medicine system accessible to all nationals, the Government of India has decided to add “attending a short-term yoga programme” to its existing list of permissible activities under Tourist and E-Tourist visa categories.<sup>30</sup> The Government has also included “short duration medical treatment under Indian systems of medicine,” thus expanding the list of permissible activities for foreigners on an E-Tourist visa.<sup>31</sup>

E. MANDATORY REPATRIATION PROCESS

For many years, the Indian government has required foreign nationals to register with the FRRO/FRO when they will work in India for an extended period. The entity that sponsors the visa must give an undertaking to the FRRO/FRO on behalf of the foreign national, “to ensure good conduct of the [foreign national] during his/her stay in India.”<sup>32</sup> An “undertaking” is a guarantee given in writing by the visa sponsor to take on the responsibility for the actions of the foreign national during his or her stay in India.

Until recently, the government did not require formal notification regarding repatriation to de-register the foreign national employees when

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28. Press Release, High Commission of India: London, Introduction of Mandatory Biometric Enrolment for Seven Visa Categories With Effect From August 19, 2016, (Aug. 5, 2016), available at <http://www.vfsglobal.com/india/uk/pdf/Introduction-of-Mandatory-Biometric-Enrolment.pdf>

29. *Id.*

30. *Activities permitted under Tourist Visa and e-Tourist Visa*, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA (June 2, 2016), available at [http://mha1.nic.in/pdfs/MaterialTV\\_02062016\\_01.pdf](http://mha1.nic.in/pdfs/MaterialTV_02062016_01.pdf).

31. *Id.*

32. *Regulations applicable to foreigners in India*, INDIA: BUREAU OF IMMIGR., available at <http://boi.gov.in/sites/default/files/Regulations.pdf> (last visited Apr. 10, 2017).

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they ended their employment or left the country permanently. The procedure has changed. The Ministry of Home Affairs published a notification making it mandatory for employers to report the termination or departure of all foreign nationals working with them in India.<sup>33</sup>

**F. GRANT OF CITIZENSHIP MADE EASIER FOR CERTAIN PAKISTAN NATIONALS**

In an effort to allow certain minorities from Pakistan to continue to live and work in India, the Modi-led government put forth a proposal to simplify the process for obtaining Indian citizenship for such individuals. Under the proposal, certain Pakistani nationals staying in India on a Long-Term Visa will be permitted to: open bank accounts with prior RBI approval, subject to certain conditions, to buy property; obtain a Permanent Account Number (PAN) and Aadhaar Number (a twelve-digit unique identification number issued by the Indian government to the residents of India); and become self-employed.<sup>34</sup>

**G. PIO CONVERSION TO OCI EXTENDED UNTIL JUNE, 2017**

The deadline for the conversion of the Person of Indian Origin (PIO) card to an Overseas Citizen of India (OCI) card has been extended until June 30, 2017.<sup>35</sup>

**IV. Island Life Might Serve as the Best Entry of Foreign Investment to the United States: Puerto Rico as Tax Haven for Attracting Foreign Investment to the United States<sup>36</sup>**

United States immigration laws take into consideration the country's need for job creation and influx of foreign capital to further economic growth. The laws establish requirements for investors to ensure the creation of jobs for U.S. residents. Of course, some states, territories, and cities might need that job creation or capital influx more than others. To account for this, most immigrant visas incentivize the creation of jobs in rural areas and places in need of economic development.

Puerto Rico is a U.S. commonwealth that qualifies as part of the United States for investment visa purposes. But it is considered a "foreign country" for U.S. federal income tax purposes.<sup>37</sup> At the same time, due to its political,

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33. *Id.*

34. *Grant of various facilities to persons belonging to minority communities in Afghanistan, Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians, staying in India on Long Term Visa (LTV)*, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA (Aug. 19, 2016), available at [http://mha1.nic.in/pdfs/LTVFacilities\\_230816.pdf](http://mha1.nic.in/pdfs/LTVFacilities_230816.pdf).

35. *Person of Indian Origin (PIO) Card*, EMBASSY OF INDIA, <https://indianembassy.org/pages.php?id=21> (last visited Apr. 10, 2017).

36. Mayra C. Artiles, Esq. is the Business Immigration Practice Director of Estrella LLC.

37. 26 U.S. Code § 933 (2017).



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geographic, and economic climate, nearly the entire island qualifies as a “targeted employment area.” The island’s current fiscal crisis, which has led to significant unemployment, has made it even more attractive in this regard. The crisis has increased the need for significant capital investment, thereby making Puerto Rico the perfect entry point for foreign investors interested in doing business in the United States and obtaining the immigration benefits such investment provides.

**A. PUERTO RICO’S UNIQUE TAX INCENTIVES**

Due to Puerto Rico’s fiscal crisis, its government enacted various tax incentive packages to attract foreign investors and companies. As a foreign jurisdiction for United States tax purposes, the island offers unique incentives unavailable elsewhere within the United States. These incentives allow individuals and companies to claim significant tax exemptions that are considerably more attractive than many United States jurisdictions.

**1. Act 73/2008 (*Industrial Incentives*)<sup>38</sup>**

Act 73 was enacted to promote industrial development in Puerto Rico. It followed a long line of Puerto Rican legislation aimed at incentivizing foreign companies to establish themselves on the island, including but not limited to, industries in the pharmaceutical, biotechnology, aerospace, and telecommunications sectors.<sup>39</sup> The program provides significant tax incentives to eligible businesses as it provides for a fixed income tax rate of 4-8% and 12% withholding on royalty payments. Pioneer industries<sup>40</sup> are subject to a 1% income tax, and to a 0% rate when the intangible property was developed or created in Puerto Rico.

At the same time, Act 73 grants business entities tax credits<sup>41</sup> for some income tax, such as returns for job creation (\$1,000, \$2,500, or \$5,000, depending on the area), research and development expenses (50%), investment in machinery and equipment for renewable energy usage (up to 50%), purchase of locally manufactured products (25%), and reduction of energy costs for exempt industrial industries (up to 10%). It also offers municipal and property incentives by granting a 90% exemption from personal and property tax, 60% exemption from municipal license tax (75% for qualifying small and medium enterprises), and 100% exemption from state and local sales tax on the purchase of raw materials.

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38. P.R. Laws Ann. tit. 13, § 10641 (2017).

39. *Id.*

40. Pioneer industries are defined as those conducting economic activity not being produced nor done in Puerto Rico in the previous 12 months. P.R. Laws Ann. tit. 13, § 10643(a)(3) (2017).

41. There is a minimum combined tax for these credits of 3% if at least 50% of exempt shareholders are residents of PR and 1% for small and medium enterprises (SME).

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2. *Act 20/2012 (Services Exportation Incentives)*<sup>42</sup>

Act 20 was enacted to attract investors to move or create companies in Puerto Rico. It establishes financial incentives to create jobs on the island. Through this law, qualifying companies can obtain a tax decree that grants them benefits such as a fixed 4% corporate tax or fixed income tax rate; 100% tax exemption on qualifying dividends or benefits for shareholders; 60% exemption on municipal tax; and, a 100% exemption on property tax for the first five years of operation and 90% thereafter. Act 20 stipulates that to maintain the tax decree the company must create at least five jobs within the first two years of operation, and open a local bank account. To benefit from Act 20's incentives, the company must render services from within Puerto Rico and export its services to foreign jurisdictions. Defined most favorably for the investor, foreign jurisdictions include other United States jurisdictions.

3. *Act 22/2012 (Individual Investors)*<sup>43</sup>

Act 22, on the other hand, was enacted to attract individual investors. These investors might be owners of Act 20 companies, creating a very beneficial type of tax incentive synergy. Act 22 investors must establish themselves in Puerto Rico and become *bona fide* residents of the island. To qualify, they must not have been residents of Puerto Rico in the six years prior to January 2012. Moreover, they must purchase real property on the island during the first two years of residence and open a local bank account. Once the investment is made, these investors enjoy a 100% tax exemption on Puerto Rico-sourced interest and dividends, 100% tax exemption on income taxes (short term), and on long term capital gains accrued (once established).

4. *Act 273/2012 (International Financial Intermediaries)*<sup>44</sup>

Under the same line of exporting services, Act 273 was enacted to deal directly with international financial entities (IFE) managing foreign investment in Puerto Rico. The IFE may participate in and accept deposits from foreign persons; accept collateralized deposits; borrow duly secured money; engage in foreign currency exchange; invest in securities, stock, notes, and bonds of the PR government; negotiate or refinance letters of credit in transactions for the financing of exports; and trade securities outside of Puerto Rico on behalf of foreign persons, among others. The IFE is, however, prohibited from engaging in transactions with domestic persons or from issuing loans or letters of credit to be used in Puerto Rico.

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42. P.R. Laws Ann. tit. 13, § 10831 (2017).

43. P.R. Laws Ann. tit. 13, § 10851 (2017).

44. P.R. Laws Ann. tit. 7, § 3081 (2017).

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There are very specific requirements and processes to follow in order to obtain the license and tax decree,<sup>45</sup> including significant investment and local job creation. However, once approved and established, the IFE benefits from various tax exemptions. Among these, it will only be subject to a 4% fixed income tax rate; a 6% rate for income tax on dividends for shareholders or partners of the IFE that are residents of PR; a 100% exemption on payments of municipal license taxes; a 100% tax exemption on all real and personal property belonging to the IFE; and, a 100% exclusion from interest, financing charges or participation in partnership benefits.

5. *Act 185/2014 (Private Equity Funds)*<sup>46</sup>

As the last example of investment incentives in Puerto Rico, Act 185 was enacted to grant special tax treatment to private equity (PE) funds. The law is aimed at allowing private investors tax benefits as if they were providing a direct investment.<sup>47</sup> The qualifying PE funds must be engaged in buying and selling securities that are not offered on public stock exchange markets, either in the United States or another country. Act 185 also requires the private equity fund to 1) have a local office in Puerto Rico; 2) invest a minimum of 80% of the paid-in capital in securities issued by entities that are not available in the public stock exchange market when acquired; 3) invest the remaining paid-in capital in direct United States or Puerto Rico—or United States or Puerto Rico guaranteed—short term obligations; 4) only admit accredited investors; 5) use a registered investment adviser with a business in Puerto Rico; 6) operate a diversified investment fund; 7) have a minimum capitalization of \$10 million; 8) appoint at least one of the investors or limited partners to an advisory board; and 9) in the case of a foreign partnership or foreign LLC, it must derive at least 80% of gross income from Puerto Rico or sources connected to Puerto Rico. Once eligible, the funds will pay a 10% fixed income tax, receive a tax exemption for capital gains, and a 5% fixed income tax for sale of property interest for investors, among other benefits. The funds are also exempt from state and municipal property tax and income taxes.

As noted above, most of these tax incentives have been available for some time. Nevertheless, due to the current economic crisis, the government is promoting them on a greater scale than ever before. This, in turn, has led to an increase in foreign investment entering the island. Promotion has also caused the creation of new visas to accommodate foreign investors.

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45. Some of these include: submitting a business plan, capital investment evidence, shareholders' information, and a non-refundable application fee. The IFE must first be approved before it can incorporate in the P.R. State Department.

46. P.R. Laws Ann. tit. 7, § 3111 (2017).

47. P.R. Laws Ann. tit. 7, § 3111, Preamble (2014).

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**B. FOREIGN INVESTOR VISAS FOR INVESTING IN PUERTO RICO**

As a United States territory, any foreign investor that enters Puerto Rico must have a valid United States visa for investment purposes. Below is an explanation of the available foreign investment visas.

1. *Foreign Investor Visas*

a. E-2 Visa

Citizens of countries that have commerce treaties with the United States may invest and immigrate to the United States by means of an E-2 visa.<sup>48</sup> The foreign national must make a significant investment in a *bona fide* business enterprise and seek to enter the United States to direct and develop that enterprise. Under this visa, the investor will be granted an initial two-year stay, which may be extended for another two years. It should be noted that the investment required by this program should be sufficient for the maintenance of the business in question. Puerto Rico provides sufficient economic incentives to enable investors with limited means to add more value to their investments.

b. EB-5 Visa

EB-5 was created to stimulate the United States economy and generate jobs. The program allows foreign investors to inject capital in the United States to establish commercial enterprises, in either a new business or an existing troubled business.<sup>49</sup> Normally the investment must be of at least \$1 million.<sup>50</sup> However, if the new commercial enterprise is in a “targeted employment area,”<sup>51</sup> such as Puerto Rico, the required investment amount is a reduced to \$500,000.<sup>52</sup> This is a significant point a potential investor must consider when deciding where to settle. Many Puerto Rican businesses have suffered economically because of the island’s current fiscal situation. Additionally, the island’s unemployment rate is very high due to the ongoing economic recession. According to the Bureau of Labor Statistics, the unemployment rate on the island is 12.1%.<sup>53</sup>

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48. 8 C.F.R. § 214.2(e)(12) (2016).

49. 8 C.F.R. §§ 204.6 and 216.6 (LEXIS through the March 27, 2017 issue of the Fed. Reg.); USCIS, POLICY MEMORANDUM, PM-602-0083, EB-5 ADJUDICATIONS POLICY (2013).

50. 8 U.S.C.S. § 1153(b)(5)(C)(i) (LEXIS through Pub. L. No. 115-14).

51. A targeted employment area is an area that, “at the time of the investment, [is] a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)” and rural area as “any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).” 8 U.S.C.S. § 1153(b)(5)(B)(ii),(iii); *see also* 8 C.F.R. § 204.6(e) (LEXIS through the March 27, 2017 issue of the Fed. Reg.).

52. 8 U.S.C.S. § 1153(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2).

53. *Puerto Rico*, U.S. BUREAU OF LABOR STATISTICS, [http://www.bls.gov/regions/new-york-new-jersey/puerto\\_rico.htm#eag\\_pr.f.2](http://www.bls.gov/regions/new-york-new-jersey/puerto_rico.htm#eag_pr.f.2) (last visited April 10, 2017) (Data from October 2016); The data published on November 9, 2016, showed the U.S. unemployment rate at 4.6%. Press

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These conditions have been accompanied by a trend of increasing unemployment over the last several months. When broken down into municipalities, all rural areas, and most urban areas, qualify as “targeted employment areas.” This means that a potential investor can establish a new business or help a troubled one almost anywhere on the island, and enjoy the immigration benefits and tax incentives discussed above. The new business must create at least ten full-time jobs within two years.<sup>54</sup> Note that this threshold is higher than that required by any of the tax incentives in Puerto Rico. Therefore, the local job requirement criteria would be met for visa purposes. Puerto Rico has regional centers that can assist with meeting the job creation requirements.<sup>55</sup>

c. International Entrepreneur Rule

The enactment of a rule concerning international entrepreneurship is a significant recent change in United States immigration law.<sup>56</sup> On August 29, 2016, United States Citizenship and Immigration Services proposed an amendment to its discretionary parole that favors international entrepreneurs.<sup>57</sup> The rule would allow entrepreneurs entry to the United States to create start-up entities providing “significant public benefits,” evaluated on a case-by-case basis. The applicants must show significant ownership interest in a startup formed in the last three years, and demonstrate rapid business growth and job creation. The latter is shown by significant investments of capital or evidence of substantial potential to do so. Once granted, the entrepreneurs will be allowed to stay in the United States to develop and grow their entities. Qualifying entrepreneurs will be granted an initial two-year stay, with a possible extension of three additional years.

When the proposed rule was released, it appeared to target potential Silicon Valley beneficiaries.<sup>58</sup> However, Puerto Rico tax incentives might be more appealing to some entrepreneurs. If adopted, it might offer an easier,

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Release, THE EMPLOYMENT SITUATION — FEBRUARY 2017, U.S. Bureau of Labor Statistics Tbl.A-1 (Mar. 10, 2017), available at <http://www.bls.gov/news.release/pdf/empisit.pdf>.

54. Note that P.R. labor and employment laws require employers to offer additional employee benefits and protections that are not required in other U.S. jurisdictions.

55. *Immigrant Investor Regional Centers*, USCIS (Apr. 10, 2017), <https://www.uscis.gov/work-ing-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers>.

56. 8 CFR §§ 103, 212 and 274a; See *Obama Administration Announces New Steps to Welcome International Entrepreneurs*, U.S. DEPARTMENT OF HOMELAND SECURITY (Aug. 26, 2016), <https://www.dhs.gov/blog/2016/08/26/obama-administration-announces-new-steps-welcome-international-entrepreneurs>.

57. Press Release, USCIS Proposes Rule to Welcome International Entrepreneurs, USCIS (Aug. 26, 2016), <https://www.uscis.gov/news/news-releases/uscis-proposes-rule-to-welcome-international-entrepreneurs>.

58. Stacey Cowley, *U.S. Immigration Option Could Aid Entrepreneurs*, THE N.Y. TIMES B2 (Aug. 27, 2016), available at <http://www.nytimes.com/2016/08/27/business/entrepreneur-immigration.html>.

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and more beneficial, economic pathway for the development of the companies in question and for the investor to meet the required level of job creation. The proposed rule is still pending final publication before its entry into force.

2. *Foreign Company Investment Visas*

a. L Visas

Companies wishing to open a new branch, subsidiary, or affiliate—in sum a “qualifying organization”—can do so by means of an L-1 visa for its employees, for intracompany business transfers.<sup>59</sup> These companies can take advantage of Puerto Rican economic incentives to establish their business on the island. Of course, there is a need for job creation for the local population. However, the companies can ensure their staff can enter the United States to establish the business and train new employees to get the enterprise up and running.<sup>60</sup> By meeting the Puerto Rican requirements for tax incentives, they will most likely be meeting the same for the new business establishment. Additionally, these visas allow the foreign worker to bring their family along.<sup>61</sup>

C. TAKING ADVANTAGE OF INVESTMENT OPPORTUNITIES IN  
PUERTO RICO

Puerto Rico’s economic situation and its many economic incentives create the perfect climate for attracting foreign investors seeking to enter the U.S. market. Although many of these incentives have been available for some time, the current economic climate has led many foreign investors to look toward the island as an alternative for relocating to the United States. At the same time, with the current exodus of residents from the island, the opportunities to invest in job creation, in businesses in peril, and in real estate at reduced prices, have increased significantly in the last year. As discussed above, its economic climate facilitates the investment opportunities as it can ensure a better revenue for investors.

Puerto Rico is also a distinct U.S. jurisdiction to invest in, as its cultural and geographical characteristics give it a unique advantage. Puerto Rico is a Spanish speaking—though also English speaking<sup>62</sup>—Latin American country in the middle of the Caribbean. As such, it provides the perfect gateway for penetrating Latin American markets. Its people will not have any significant cultural or language barriers when conducting business in Latin America. Therefore, it provides the ideal conditions for creating businesses in the

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59. 8 C.F.R. § 214.2(l)(3)(v) (2016); *see also L-1A Intracompany Transferee Executive or Manager*, USCIS (June 17, 2016), <https://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager>.

60. 8 C.F.R. § 214.2(l)(1)(ii).

61. *Id.*

62. Given its historical and political characteristics, Spanish and English are both official languages on the island.

United States that intend to negotiate with markets in Latin America, while also providing the bilingual and culturally adapted employees to do so.

### **V. Refugees in Europe and the EU-Turkey Statement: Problems and Prospects<sup>63</sup>**

The current border crisis in Europe poses a challenge for European States serious about responding to the inflow of refugees and migrants in a compassionate and humane manner. The Syrian civil war, unrest across the Middle East, and instability and repression in African countries such as Mali and Eritrea triggered the arrival of 280,000 people at Europe's shores in 2014, and over one million individuals in 2015.<sup>64</sup> The asylum reception and determination systems of Greece and Italy have been cracking under the number of people arriving spontaneously from Turkey and Northern Africa. In 2015, a photograph of Alan Kurdi, a Syrian toddler who drowned while trying to reach Europe from Turkey in a dinghy, sparked a wave of seeming compassion across Europe. Citizens took to the streets to declare "Refugees Welcome," and demanded that governments do more to help refugees.<sup>65</sup> Less than a year later, however, popular opinion appeared to turn. In the United Kingdom, immigration formed a central part of the "leave" campaign's message to Brexit voters.<sup>66</sup> The people of Hungary voted on a referendum proposing the rejection of the European Union's ("EU") system of migrant quotas.<sup>67</sup> Throughout Europe, far-right anti-immigration politicians enjoyed a surge in popularity.<sup>68</sup>

Against this backdrop, in March 2016, the EU negotiated an agreement with Turkey whereby "irregular migrants" arriving in Greece from Turkey will be returned to Turkey. The EU-Turkey Statement raises serious questions of refugee and human rights law because of deficiencies in the Greek and Turkish asylum systems, and question concerning whether Turkey is a "safe country" for asylum seekers and refugees.<sup>69</sup>

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63. Cliodhna Murphy, Lecturer, Department of Law, Maynooth University; Former postdoctoral fellow, University College Cork; PhD (2012), MLitt (2006), LLB (2004), Trinity College Dublin.

64. *Global Trends: Forced Displacement in 2015*, UNHCR 13-17 (June 20, 2016), available at <http://www.unhcr.org/statistics>.

65. Mukul Devichand, *Alan Kurdi: Has One Picture Shifted Our View of Refugees?* BBC (Sept. 3, 2015), <http://www.bbc.com/news/blogs-trending-34142804>.

66. Alan Travis, *Fear of immigration drove the leave victory – not immigration itself*, THE GUARDIAN (June 24, 2016, 12:23 BST), <https://www.theguardian.com/politics/2016/jun/24/voting-details-show-immigration-fears-were-paradoxical-but-decisive>.

67. May Bulman, *Hungary referendum against EU migrant quotas fails due to low turnout*, THE INDEPENDENT (Oct. 2, 2016 20:37 BST), <http://www.independent.co.uk/news/world/europe/hungary-referendum-eu-migrant-quotas-fails-low-turnout-a7342071.html>.

68. See e.g., *Europe's Rising Far Right: A Guide to the Most Prominent Parties*, N.Y. TIMES (Nov. 17 2016), [http://www.nytimes.com/interactive/2016/world/europe/europe-far-right-political-parties-listy.html?\\_r=0](http://www.nytimes.com/interactive/2016/world/europe/europe-far-right-political-parties-listy.html?_r=0).

69. There have been many useful blog contributions to this debate. James Hathaway, *Three legal requirements for the EU-Turkey deal: An interview with JAMES HATHAWAY*,

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A. WHAT IS THE EU-TURKEY STATEMENT?

The EU-Turkey Statement, agreed to by representatives of the European Council and Turkey, was announced on March 18, 2016.<sup>70</sup> The status of the Statement is somewhat ambiguous; it is not a treaty, and is therefore not subject to challenge or approval in the same manner as a treaty.<sup>71</sup> The centerpiece of the Statement is the commitment that, “[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.”<sup>72</sup> In an effort to render this remarkable sweeping statement compatible with human rights and refugee law, it is immediately clarified that “[t]his will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion.”<sup>73</sup>

Second, for every Syrian returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU.<sup>74</sup> Furthermore, when the numbers of those arriving have reduced significantly, the EU will establish a Voluntary Humanitarian Admission Scheme.<sup>75</sup> The EU also agrees to pursue visa liberalization for Turkish citizens,<sup>76</sup> to re-energize the Turkish accession process,<sup>77</sup> and to provide funds for the reception of refugees in Turkey.<sup>78</sup> In addition, the EU and Turkey agree to work towards developing a safe zone in Syria, and Turkey undertakes to try to prevent the opening of new smuggling routes.<sup>79</sup>

The part of the deal causing the most controversy is the approach to asylum claims.<sup>80</sup> Anyone who arrives in Greece may apply for asylum, with the accompanying procedural guarantees, including: individual interviews, individual assessments, and rights of appeal. Applications can be rejected, and the individual returned to Turkey, if the application is deemed to be

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VERFASSUNGSBLOG (Mar. 9, 2016), <http://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>; Daniel Thym, *Why the EU-Turkey Deal is Legal and a Step in the Right Direction*, VERFASSUNGSBLOG (Mar. 9, 2016), <http://verfassungsblog.de/why-the-eu-turkey-deal-is-legal-and-a-step-in-the-right-direction/>; Kay Hailbronner, *Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway*, VERFASSUNGSBLOG (Mar. 11, 2016), <http://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/>.

70. European Council Press Release 144/16, Foreign Affairs and Int’l Rel., EU-Turkey statement 1, 1 (Mar. 18, 2016).

71. Maarten den Heijer & Thomas Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty?*, EU LAW ANALYSIS BLOG (Apr. 7, 2016), <http://eulawanalysis.blogspot.ie/2016/04/is-eu-turkey-refugee-and-migration-deal.html?m=1>.

72. EU-Turkey statement, *supra* note 68, at 2(1).

73. *Id.*

74. EU-Turkey statement, *supra* note 68, at 2(2).

75. European Council Press Release 144/16, Foreign Affairs and Int’l Rel., EU-Turkey statement 1, 2(4) (Mar. 18, 2016).

76. *Id.* at 2(5).

77. *Id.* at 3(7).

78. *Id.* at 2(6).

79. *Id.* at 2(3).

80. See European Commission MEMO/16/963, EU-Turkey Statement: Questions and Answers (Mar. 19, 2016).



unfounded on the merits or the applicant is found to be inadmissible (*i.e.*, the application is rejected after a fast-track procedure without examination of the substance). Applicants could be deemed inadmissible because Turkey was a first country of asylum, or it is a “safe third country.” The EU’s endorsement of Turkey as a safe third country is most problematic. Turkey refused to adopt the 1967 Protocol to the 1951 Refugee Convention, meaning that it is not legally bound by the 1951 Convention for non-European refugees.

**B. HUMAN RIGHTS AND REFUGEE LAW CONCERNS: IS THE DEAL  
LEGAL?**

The key legal criticism of the EU-Turkey Statement is that returning “all” irregular migrants to Turkey, potentially without a full individualized assessment of asylum and human rights claims for protection, could violate the European Convention on Human Rights’ (“ECHR”) prohibition on collective expulsions (Art. 4 of Protocol 4). In its seminal decisions in *Hirsi Jamaa v Italy*<sup>81</sup> and *Kblaiifa v Italy*,<sup>82</sup> the European Court of Human Rights confirmed that collective procedures for expulsion not including the opportunity for individual assessment are contrary to the ECHR. These concerns inspired the reassurances in the first paragraph of the Statement that there will not be “any kind of collective expulsion.” Thus far, it appears that most people arriving in Greece have had an effective opportunity to make an asylum claim and have their case considered on the merits.

The conditions faced by asylum seekers and refugees in both Greece and Turkey also raise serious human rights issues, and may be incompatible with the ECHR and the EU Charter of Fundamental Rights (“CFR”). In *MSS v Belgium and Greece*,<sup>83</sup> the European Court of Human Rights found that the Greek reception and determination system was systemically deficient, leading to inhuman and degrading treatment in contravention of Article 3 of the ECHR. In November 2016, the EU Fundamental Rights Agency’s observation team reported that in Kos, new arrivals are without any shelter. The team also found that, on some of the smaller islands, no reception facilities exist, and people sleep outside or in private rental accommodation.<sup>84</sup> In addition, a report produced for the Council of Europe noted that the Greek asylum system lacks the capacity to effectively process these asylum applications, raising procedural concerns (including those relating to legal representation through the asylum process) and the possibility of errors.<sup>85</sup> With respect to Turkey, non-governmental

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81. *Jamaa v. Italy*, App. No. 27765/09 14,19 (2012).

82. *Khlaifia v. Italy*, App. No. 16483/12 (2015).

83. *M.S.S. v. Belgium*, App. No. 30696/09 75-6 (2011).

84. EU Fundamental Rights Agency, Weekly data collection on the situation of persons in need of international protection, Update 8, 26 (2015), *available at* [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2015-weekly-compilation-8\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-weekly-compilation-8_en.pdf).

85. Eur. Consult. Ass., *The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016*, 2d Part Session (18-22 April 2016), Doc. No. 14028 (2016), *available at* <http://>

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organizations report on refugees' fear of being returned to Turkey, and document instances of violence by Turkish police and border guards.<sup>86</sup> If an individual can demonstrate a real risk of suffering torture, or inhuman or degrading treatment or punishment in Turkey, return would be contrary to the ECHR and the CFR.

Finally, the arrangements made by the deal may conflict with other EU law measures. Under the Dublin Regulation, asylum seekers with valid and verified family connections in another Member State must be transferred to the appropriate EU Member State to complete asylum procedures, rather than be returned to Turkey.<sup>87</sup> UNHCR reports that many current arrivals are seeking to join family members in Europe; therefore, this could form a fruitful avenue of challenge in the appropriate case.

C. CONCLUDING REMARKS: THE QUESTIONABLE ETHICS OF EU  
ASYLUM POLICY

The legality of the EU-Turkey deal is questionable from several angles, and will certainly be tested. Cases relating to aspects of the deal are pending at the Court of Justice of the EU<sup>88</sup> and in Ireland.<sup>89</sup> At the level of principle, the Statement itself appears to stay (just) within the confines of international and EU law, meaning that much depends on its implementation in practice. The outcomes of individual challenges will most likely depend on the facts of those cases. As mentioned above, decision-makers in Greece seem to have, thus far, tried to adhere to EU and international standards. The number of people returned has been quite low to date and mainly include those who have not made an asylum claim.

Quite aside from the legal challenges, the EU-Turkey Statement is undoubtedly a further step in the politics of *non-entrée* already pursued in Europe through the imposition of strict visa requirements, carrier sanctions,

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assembly.coe.int/nw/Home-EN.asp (click "search"; then "official documents" and search for Doc. No. 14028).

86. See, e.g., *Greece: Refugees detained in dire conditions amid rush to implement EU-Turkey deal*, AMNESTY INTERNATIONAL (Apr. 7, 2016), <https://www.amnesty.org/en/latest/news/2016/04/greece-refugees-detained-in-dire-conditions-amid-rush-to-implement-eu-turkey-deal/>.

87. Commission Regulation 604/2013, of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 2013 O.J. (L 180) 31,32 (EU).

88. Case T-192/16, *NF v. Council*, 2017 E.C.R.; Case T-193/16, *NG v. Council*, 2017 E.C.R.; Case T-257/16, *NM v. Council*, 2017 E.C.R.; INFORMATION NOTE: Cases before the General Court of the European Union, 2016 O.J. C 9897/16, available at <http://www.statewatch.org/news/2016/jun/eu-council-turkey-agreement-challenges-9897-16.pdf>.

89. Mary Carolan, *Syrian families held in Greece sue Ireland, EU over rights breaches*, IRISH TIMES (Nov. 7, 2016), <http://www.irishtimes.com/news/crime-and-law/courts/high-court/syrian-families-held-in-greece-sue-ireland-eu-over-rights-breaches-1.2857833>.

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and the closure of the land border between Greece and Turkey.<sup>90</sup> Above all, the deal is clearly intended to be a message that “Europe is closed.” This approach is especially disappointing when one views the numbers in global context. Europe hosts 6% of the world’s refugees, “compared with 39% in the Middle East and North Africa, and 29% in the rest of Africa.”<sup>91</sup> In addition, the ‘one-for-one’ swap of so-called irregular migrants for resettled refugees sits uneasily with the value of human dignity and a real commitment to international protection. Moreover, the general state of human rights in Turkey (for example, in relation to freedom of expression), while not directly legally relevant to the question of whether Turkey is safe for refugees, is of concern to observers in Europe. Conditions in Turkey raise the issue of whether the re-energizing of the Turkish accession process would be legitimate or appropriate.

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90. See generally Kelly M. Greenhill, *Open Arms behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis*, 22 EUR. L.J. 317, 317–332 (2016) (For academic commentary).

91. *Correcting media myths about refugees and migrants*, UNESCO (Jan. 7, 2016), available at [http://www.unesco.org/new/en/media-services/single-view/news/correcting\\_media\\_myths\\_about\\_refugees\\_and\\_migrants/](http://www.unesco.org/new/en/media-services/single-view/news/correcting_media_myths_about_refugees_and_migrants/).

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## **International Taxes**

CO-EDITORS: SUNITA DOOBAY, CHRISTIE GALINSKI, AND ELINORE RICHARDSON; AUTHORS: SUNITA DOOBAY, DANIEL GOTTFRIED, GAGAN KUMAR, JORGE LOPEZ, ELINORE RICHARDSON, EUGENIO ROMITA, AND GUILLERMO VILLASEÑOR\*

### **I. Introduction - The Debt vs. Equity Conundrum Continues**

The question of what constitutes debt and what qualifies as equity for tax purposes has long been a source of debate in the international tax community.<sup>1</sup> Issuers will generally decide on whether to raise capital through the issue of debt or of equity, based primarily on business considerations. To the extent that tax factors into the decision, if debt affords an issuer a deduction for interest without any further withholding tax cost assessed by the source jurisdiction to the recipient, it may prove extremely attractive to both an issuer and an investor.<sup>2</sup> Tax professionals and their clients have worked in the international arena with varying national notions of debt and equity in structuring financial instruments with combined debt and equity features, in order to satisfy investor requirements, while also maximizing their tax efficiency. The purpose of this tax planning has, most often, been the very real commercial or business requirement that most issuers face in securing and accessing capital from arm's length lenders in foreign markets at attractive and economically viable costs.

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\* The co-editors and the authors are all members of the International Taxes Committee of the ABA Section of International Law. Sunita Doobay is a tax partner with Tax Chambers LLP based in Toronto, Canada. Christie Galinski is a tax associate with Chapman and Cutler LLP in Chicago, Illinois. Daniel Gottfried is a tax partner at Hinckley Allen in Hartford, Connecticut (USA). Gagan Kumar is a tax partner with Krishnomics Legal in New Delhi, India. Jorge Lopez is a tax attorney with Sánchez Devanny in Mexico City, Mexico. Elinore Richardson is an international consultant with EMKDM Global Consultants Inc. based in Toronto, Canada. Eugenio Romita is a tax partner with Gattai, Minoli, Agostinelli & Partners in Milan, Italy. Guillermo Villaseñor is a senior partner with Sánchez Devanny in Mexico City, Mexico.

1. See, e.g., Shipra Padhi & Shreya Rao, *The Debt-Equity Conundrum*, 7 INT'L TAXATION 468, 468 (2012); Tim Edgar, *The Income Tax Treatment of Financial Instruments: Theory and Practice*, CANADIAN TAX FOUNDATION (2000); Mark P. Gergen, *Making Do in a Mongrel Accrual-Realization Regime*, 50 CANADIAN TAX J. 212, 214 (2002).

2. As the deduction afforded by many jurisdictions for interest on debt is highly sensitive—especially when the parties involved in the transactions are related, affiliated, or otherwise connected—jurisdictions have put limits on interest deductions to ensure that they are able to tax what they consider to be their fair share of revenues of multinational groups. The varied approaches to these limitations have also been the subject of study, and have been addressed in one of the Action Items of the BEPS project. See OECD, LIMITING BASE EROSION INVOLVING INTEREST DEDUCTIONS AND OTHER FINANCIAL PAYMENTS, 18 (2015).

This process has also resulted, however, in the evolution of “hybrid” financial instruments, designed deliberately with equity or debt features to take advantage or “arbitrage” the differences in domestic laws of relevant jurisdictions as they impact the characterization of debt and equity. For example, a hybrid may be treated as debt in a jurisdiction of source, and related payments would then, if they met local domestic law tests in that source jurisdiction, be deductible in computing the income of the issuer. In the jurisdiction of the investor’s residence, however, if the same instrument is treated as equity, the receipt may be exempted from tax for the recipient through some type of participation exemption or dividend-received deduction under relevant domestic law. This hybrid mismatch has been the subject of much scrutiny among tax administrations internationally, particularly in recent years, and has now been addressed in one of the Action Items of the G20/OECD Base Erosion and Profit Shifting (BEPS) project, as well as in numerous other research studies and published works.<sup>3</sup>

Derivatives (such as options, futures, forwards, interest rates, currency swaps, and more recently collateralized and synthetic obligations, such as mortgage-backed securities and total return swaps) do not fit neatly into traditional categories of debt or equity, and are treated in some jurisdictions separately for tax purposes as financial claims or obligations (e.g., notional principal contracts). Derivatives and synthetics add a further stress to tax regimes that distinguish between debt and equity but provide no flexibility for addressing these more complex instruments.

## II. Canada

The character of a financial instrument for Canadian tax purposes, as debt or equity, is determined under common law principles. These common law principles suggest that, for an obligation to be “debt,” it must contain the essential elements of debt as judicially determined under commercial law.<sup>4</sup> There is authority in Canada for the proposition that to have debt, it is necessary to have an obligation of a fixed or liquidated character.<sup>5</sup> Canadian courts have, in the past, been asked to characterize financial instruments as either debt or equity. As a result, there is Canadian jurisprudence that provides guidance as to how a duality of features in a financial instrument has been reconciled by the Canadian courts.<sup>6</sup>

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3. See, e.g., OECD, NEUTRALISING THE EFFECTS OF HYBRID MISMATCH ARRANGEMENTS, 15 (2015) (setting out recommendations for domestic rules designed to neutralize mismatches in tax outcomes that arise in respect of payments under a hybrid mismatch arrangement); see also Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, 2015 (EC).

4. See *Backman v. Canada*, [2001] 1 S.C.R. 17 (Can.); *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915 (Can.).

5. See *Diewold v. Diewold*, [1941] S.C.R. 35, 39 (Can.); *Noble v. Lashbrook*, [1918] 40 D.L.R. 93, 94 (Can. Ont. C.A.).

6. See, e.g., *Canada Deposit Insurance v. Canadian Commercial Bank*, [1992] 3 SCR 558 (Can.). The Canadian courts have been asked, in tax and non-tax contexts, to make

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In *Barejo Holdings ULC v. The Queen*,<sup>7</sup> the Canada Revenue Agency (CRA) characterized as debt two “hybrid” derivative contracts, which on their face were styled as Notes (the “Notes”) and were valued at \$996 million (USD). Justice Boyle of the Tax Court of Canada upheld the position of the CRA.

The two Notes were held by St. Lawrence Trading Inc. (SLT), a BVI-controlled foreign affiliate subsidiary of Barejo Holdings ULC (Barejo Holdings). The Notes were a result of the reorganization of the predecessor of SLT, where certain hedge fund assets (Assets) of the predecessor of SLT were sold to the Bank of Nova Scotia and the Toronto-Dominion Bank (Vendors). SLT used the proceeds to acquire the Notes in affiliates of the Vendors (Issuers) under a Note Purchase Agreement. The value of the Notes was derived from the performance of the Assets (or replacement assets), which were managed by the same management team.

The Term Sheet specified that no interest was payable except for default interest and that the Notes ranked *pari passu* with all unsecured obligations of the Issuers. The Notes did not refer to a principal amount but instead to an issuance amount. The Term Sheet also did not provide for a stated or fixed amount to be payable on the Notes upon maturity or upon an earlier termination event. Instead, each Issuer was obliged, at maturity, to settle the Notes for cash, either by payment of an amount, if any, equal to the net value of the Assets, or by payment of an amount, if any, realized in connection with their actual liquidation. There was also a provision for the calculation and communication of the net value of the Assets on an aggregate and per investment weekly basis, throughout the term of the Notes.<sup>8</sup>

The Canadian *Income Tax Act* (“Act”)<sup>9</sup> does not provide a specific statutory definition of debt. The tax court’s response to the reference question, therefore, took the reader through a treatise on the common law character of debt.<sup>10</sup> It then continued with a statutory review of all possibly relevant

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determinations as to the character of financial instruments having features of both debt and equity. The courts have found that the determination is to be made on the basis of which features carry the most weight and are the most persuasive. There is no suggestion in the jurisprudence that there could be a further category of obligations that do not fit neatly, even with the benefit of the established guidance, into either of the traditional categories. This jurisprudence, however, was addressing more conventional instruments, such as convertible debt or preferred shares for the purpose of determining creditor versus shareholder rights and preferences.

7. 2015 TCC 274 (Can. Tax Ct.). The reference question in this case was put to the tax court under Rule 58, Tax Court Rules (General Procedure). This Rule allows the parties, pre-hearing of the substantive issues, to put one or more questions before the court.

8. This value was presumably used during the holding period for determining the managers’ fees, bank fees, monitoring compliance with investment restrictions, and potential events of default.

9. R.S.C. 1985, c. 1 (5th Supp.), as amended (Can.).

10. Barejo, 2015 TCC at para. 65 (Can.) (concluding rather surprisingly that “there is not a single all purpose, all encompassing, and all limiting or circumscribing legal definition of debt in Canada.”).

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terminology in the *Act*, which it concluded supported the characterization of the Notes as debt.

The Court, however, cautioned that its conclusions will not necessarily apply in all cases. In the hearing of any other particular case, the Court may give a somewhat different or more nuanced meaning to the term debt depending upon: (1) the text and context of a particular provision or regime in the *Act*, (2) specific provincial or other applicable laws that are relevant to the interpretation of a contract or the re-characterization of a relationship, or (3) the possible relevance of purpose, objective or intention the application of the provision or the interpretation or characterization of the contract or relationship, among other things.<sup>11</sup>

Justice Boyle believed that his only option was to determine whether the Notes were debt or equity for tax purposes. He identified the debt features of the Notes, such as a stipulated interest rate (which he found to be nil). He also recognized the equity characteristic of the Notes: “[d]istinct from credit or performance risk, the value of the Notes at any time clearly derives from the value of the underlying . . . Assets.” Justice Boyle concluded that “the core essentials of debt generally for purposes of the *Act*” are:

- (i) an amount or credit is advanced by one party to another party;
- (ii) an amount is to be paid or repaid by that other party upon demand or at some point in the future set out in the agreement in satisfaction of the other party’s obligation in respect of the advance;
- (iii) the amount described in (ii) is fixed or determinable or will be ascertainable when payment is due; and
- (iv) there is an implicit, stipulated, or calculable interest rate (which can include zero).<sup>12</sup>

Justice Boyle clarified that all of the core essentials mentioned need not be “perfectly” met. Moreover, other evidence, such as *supportive or contradictory wording or intention*, would be a part of the overall weighing process of any debt-equity characterization. “A provision in respect of interest, the use of the term principal or principal amount, and/or security rankings relative to other debt liabilities will generally be indicative of debt.”<sup>13</sup>

The Notes, Justice Boyle determined, were debt for purposes of the *Act*. As he describes them,

“[t]hey are entitled Notes. . . . They have a maturity. . . . Upon maturity there is a payment obligation that relates clearly . . . to the amount for which the Notes were issued. . . . [T]he Notes describe the amount for

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11. *Id.* at para. 13.

12. *Id.* at para. 129.

13. *Id.* at para. 131. Based on the decision of the tax court, it would appear that the amount to be repaid may be considered as fixed or determinable and as a debt feature so long as it is or *will be* ascertainable when payment is due, and there will be an implicit, stipulated, or calculable interest rate (which can include zero) where there is a mere mention of interest, even to say simply that none would be paid. The references need not be in the primary instrument to be given weight; they could be included in a prior circular or term sheet or other transactional document.

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which they are issued as a Principal Amount . . . At maturity . . . the amount payable . . . is readily ascertainable . . . . The interest rate is stipulated . . . as . . . zero . . . . The Notes evidence that the parties' intention was that this be treated like any other debt of the issuers. . . . [T]he Guarantors would be liable as if they were the primary debtors. . . ."<sup>14</sup>

While it is difficult to disagree with the core essentials of debt noted by Justice Boyle in *Barejo*, his application of those core essentials to the Notes and the qualifications he introduced to reach his conclusions are somewhat disconcerting. The Notes that the Issuers issued to SLT were financial contracts, which gave SLT, for consideration, the right potentially to future claims against the Issuers and the Banks. Simply put, these financial contracts did not give SLT rights comparable to either a holder of a portfolio of stock or a holder of traditional debt in the Issuer or in any other entity. SLT was an unsecured creditor, which is not unusual in derivative arrangements. The Notes paid no interest; indeed, they did not mention interest at all, and they did not mention a principal amount. Their focus was on the amount paid by SLT to acquire a claim against the Issuers, which would crystallize and be determinable only on maturity, default, or early termination. These events were not likely to occur unless the market or the financial, tax, or regulatory landscape changed dramatically for fifteen years. At that point, the Issuers would be required to settle the contracts and might possibly, depending on the facts, pay a sum of money. The fact that the financial contracts were styled Notes and that the financial claims were ranked and guaranteed did not change the nature of the rights of the parties under the contracts themselves. The Notes were not "fixed return" instruments, but high risk contractual gambles, both economically and financially. SLT's return was dependent, it is true, on the credit of the Issuer and the Banks, but primarily its exposure was to the financial market or an investment risk.

The definitions of debt in the Canadian jurisprudence are arguably imprecise. If one considers the tax court decision carefully, it would seem to suggest that a financial instrument cannot be one thing at one point in time and another at an earlier or a later point in time. The concept of commercial debt can be, and has been, construed to require that there be an agreement to repay a "fixed amount" determinable at the time of issue and throughout the term of the instrument or arrangement, in order for the obligation to be considered debt at the outset. The agreed amount need not be the same amount as is advanced, but general wisdom would suggest that it should be *some* amount. It remains to be determined if zero or nil, as suggested by Justice Boyle, is an amount for Canadian tax purposes. If so, the potential that no portion of funds advanced will be repayable on maturity and that no interest will be payable on a financial claim should, in the future, still leaves open a debt characterization.

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14. *Id.* at para. 133 (emphasis added).



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An argument can be made that the decision also supports the proposition that what the parties call a financial instrument and how they reflect its terms and conditions in words (e.g., its form) may be given more weight in an analysis by the Canadian courts than its economics, financial equivalents, or substance.

The tax court decision has been appealed to the Federal Court of Appeal. It should be noted that the standard of review to successfully overturn any findings of fact by the trial judge is that of a palpable and overriding error.<sup>15</sup> It is, nonetheless, to be hoped that the appellate court will use this opportunity to provide some clarity on the core essentials of debt and exercise some levity in addressing Justice Boyle's unusual interpretation and application of those core essentials in this case.

### III. India

The famous Indian jurist Mr. Nani Palkhiwala observed that both tax evasion and arbitrary or excessive taxation are reprehensible. He further observed that tax evasion aggravates arbitrary taxation, and arbitrary taxation aggravates tax evasion. To break the vicious cycle, while there must be every attempt to check evasion, there must equally be every attempt to stop whimsical taxation. While these words were said more than three decades ago, the battle continues today in India. In order to minimize tax costs, taxpayers continue to develop ingenious ways to reduce their tax costs while working within the four corners of tax provisions.

A common issue in India relates to capitalizing a company and repatriating its profits in a manner that does not entail significant tax cost. While dividends paid by a company to a shareholder can attract significant tax cost at two levels, the same may not be true for interest payments on borrowed capital.

In India, dividends are not a deductible expense. The amount of a dividend comes from profits which have already been taxed at the corporate level. When the dividend is declared, the company must pay an additional Dividend Distribution Tax (DDT) of 17.304 percent.<sup>16</sup> The dividend is then exempt in the hands of recipient shareholders.<sup>17</sup> Beginning April 1, 2016, however, India added a further tax of 10 percent against any shareholder receiving dividends of Rs.10 lacs<sup>18</sup> or more. Except for certain instances where a holding company and a subsidiary company declare a dividend, there is no credit available for DDT. It, therefore, becomes a net tax cost to the ultimate shareholder, which may increase to as high as 50 percent.

Compare this with a scenario where an investor holds debt. Under the existing provisions of the Indian Act, there would be a withholding tax of 10 percent. The issuer, however, would be eligible to claim a deduction of the

15. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (Can.).

16. Income-Tax Act, No. 43 of 1961, INDIA CODE, <http://indiacode.nic.in>.

17. *Id.* § 10(34).

18. Rs.10 lacs is INR 1 million; The Finance Bill, 2016, Acts of Parliament, 2016 (India).

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interest that could possibly produce a corporate tax savings of up to 34.61 percent.

No issue should arise as long as the financial instrument is clearly identifiable as either debt or equity. However, this may not be the case, where an investor acquires debt, but the terms of the debt include features of equity as well. If the debt is recharacterized, the deductibility of interest paid on it will be in jeopardy.

Although thin capitalization rules are not applicable in India and the General Anti Avoidance Rules (Indian GAAR) have yet to take effect, there are instances where Specific Anti Avoidance Rules (SAAR) and Judicial Anti Avoidance Rules (JAAR) may have an impact on this re-characterization.

The Indian Act contains an SAAR that treats loans by a closely-held company to its shareholders that hold more than 10 percent of its shares as a “deemed dividend” to the shareholder.<sup>19</sup> However, the deemed dividend does not attract DDT, but is rather taxed in the hands of the shareholder. Hence, there are two levels of tax—one at the corporate and the other at the shareholder level.

The Indian accounting rules will have a bearing on the characterization of a financial instrument as debt or equity. IND AS-32 addresses the accounting for financial instruments either as a financial liability or an equity instrument.<sup>20</sup> In simple terms, the accounting standard requires that if an instrument qualifies as a financial liability, its fair market value must be ascertained at the beginning of the year, and a necessary provision should be made, after taking into the fair market value of the amount which is to be paid at its maturity.

The Indian Companies Act requires that Indian companies may only issue preference shares that are redeemable (RPS).<sup>21</sup> If the principles stipulated in IND AS-32 are applied, these preference shares may be recognized as a financial liability.<sup>22</sup> As a natural corollary to this characterization, the dividend payable on RPS will be recognized as a charge to profits.<sup>23</sup>

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19. Income-Tax Act § 2(22)(e).

20. MINISTRY OF CORPORATE AFFAIRS, INDIAN ACCOUNTING STANDARD (IND AS) 32 (2015). IND AS-32 is the Indian Accounting Standard-32 (“IND AS-32”) issued by the Ministry of Corporate Affairs, which establishes principles for presenting financial instruments as liabilities or equity and for offsetting financial assets and financial liabilities. It applies to the classification of financial instruments from the perspective of the issuer into financial assets, financial liabilities, and equity instruments; the classification of related interest, dividends, losses and gains; and the circumstances in which financial assets and financial liabilities should be offset.

21. The Companies Act, No. 18 of 2013, INDIA CODE (2013).

22. MINISTRY OF CORPORATE AFFAIRS, *supra* note 20, ¶ 11, at 959 (Where a contractual obligation to deliver cash exists for the repayment of principal, the outflow of cash is unavoidable and hence ought to be treated as financial liability.).

23. *Id.* ¶ 35, at 972 (Interest, dividends, losses, and gains relating to a financial instrument or a component that is a financial liability will be recognized as income or expense in profit or loss.).

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Under the Indian Act, there is a provision to pay minimum alternate tax (MAT)<sup>24</sup> on the book profit of a company, as disclosed in its financials. Thus, a dichotomy could arise where a dividend will not be permitted under the normal provisions of the Indian Act, even for purposes of the determination of book profit, as only the ascertained liability is deductible. Nonetheless, it is arguable that the provision for fair market value of the future dividends payable may be regarded as a provision for an ascertained liability, and hence, that amount may be deductible from the book profits for the purposes of MAT. Although this approach may be consistent with the regulatory laws when only fully and mandatorily convertible instruments are not regarded as debt instruments,<sup>25</sup> it is clearly inconsistent with the normal provisions dealing with the deduction of interest on a debt instrument when payments, even on RPS, are regarded as dividends only.

An amendment to the Indian tax laws is clearly required to bring them into conformity with the accounting principles adopted for recognition for financial instruments. In the absence of clear provisions, there is a possibility that the proposed GAAR provision, when effective, will be relied on to recharacterize payments of dividends on RPS. Since, it is the express intention of the Indian government to ensure that India has certainty in its tax laws, inconsistencies such as this should be avoided at all cost.

#### **IV. Italy**

Distinctions between debt and equity also exist for Italian tax purposes. When the funding of an Italian corporate entity with debt or with equity is considered, the tax treatment of interest expense (Interest Barrier Rule) and the deduction for notional interest (NID), as well as a quick comparison between the two, may provide some guidance.

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24. Income-tax Act § 115JB. MAT is applicable to a company where the income tax payable by that company on its total income as computed under the Indian Act is less than 18.5 percent of its book profit. The company would be required to pay income tax at the rate of 18.5 percent as increased by an applicable surcharge on its book profit ("Book profit" is the net profit as shown in the profit and loss account for a relevant previous year subject to certain adjustments.). The amount of a dividend paid or proposed must be added back in when computing book profit.

25. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, Gazette of India, pt. II sec. 3 (May 8, 2000). "Capital" means equity shares, preference shares, and convertible debentures. The equity shares issued in accordance with provisions of the Companies Act, as applicable, shall include equity shares that have been partly paid. Preference shares and convertible debentures shall be required to be fully paid, mandatorily and fully convertible. "FDI" means direct investment by a non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 – ¶ 2.1.12 of Consolidated FDI Policy Circular dated 7-6-2016.

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For debt, the Italian interest barrier rule,<sup>26</sup> since 2008, follows the “interest-to-profit approach,”<sup>27</sup> and provides that interest expense is deductible up to an amount equal to the interest income. The balance of any interest expense is deductible up to 30 percent of the gross operating income (Adjusted EBITDA).<sup>28</sup> Any excess of interest expense over the 30 percent of Adjusted EBITDA can be carried forward with no time limit, and can be deducted in future fiscal years to the extent that the net interest expense (in other words, exceeding interest income) of future years is lower than the corresponding threshold. Also, any unused Adjusted EBITDA can be carried forward with no limit and may increase the threshold in future fiscal years.

For equity, the NID, introduced in 2011,<sup>29</sup> mitigates the difference, in terms of tax treatment, between companies funded with debt and companies funded with equity. Under the NID, Italian companies (and Italian-permanent establishments) may benefit from a deduction of a notional yield on the qualifying equity increase accumulated after 2010, computed by applying a defined rate (4.75 percent for 2016, 2.3 percent for 2017, and 2.7 percent for 2018) to that increase. The qualifying equity increase consists of cash contributions from the shareholders, waivers of financial receivables from the shareholders, and retained distributable profits.

In comparing the effect of these rules to decide how to fund an Italian company, the following features should be kept in mind:

- NID is not subject to the Interest Barrier Rule, so it applies to companies with no interest-deduction capacity under that rule;
- both excess interest expense and excess NID may be impaired on a merger with other companies or on the transfer of the controlling stake in the corporate taxpayer; and
- for funding from abroad, interest payments may only be subject to withholding tax, while NID is neutral in this respect.

In 2016, there were two developments that may affect the funding of Italian companies. First, the Italian tax authorities issued important

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26. Decreto Presidente della Repubblica. 22 dicembre 1986, n.917, G.U. Dec. 31, 1986, n.302 (It.).

27. For an overview of the different approaches to the matter, see Chloe Burnett, *Intra-Group Debt at the Crossroads: Stand-Alone Versus Worldwide Approach*, 6 *WORLD TAX J.* 1 (2014); STUART WEBBER, *THIN CAPITALIZATION AND INTEREST DEDUCTION RULES: A WORLDWIDE SURVEY*, 60 *TAX NOTES INT’L* 683 (Nov. 29, 2010).

28. Decreto Legislativo 14 settembre 2015, n.147, in G.U. Sept. 22, 2015, n.220 (It.). This adjustment is equal to the difference between ordinary revenues and ordinary costs (excluding depreciation, amortization, and financial leasing instalments). In 2016, it also includes dividends from non-resident subsidiaries in which the Italian company holds more than 50 percent of the voting rights at a shareholders’ meeting.

29. Decreto Legge 6 dicembre 2011, n.284, in G.U. Dec. 22, 2011, n.214 (It.). The Italian acronym for NID is *Ace* (*Aiuto alla crescita economica*).

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interpretations on interest expense arising on merger-leveraged-buyout (MLBO) transactions,<sup>30</sup> concerning:

- the legitimacy of the deduction, in the hands of the Italian acquisition vehicle, of any interest expense incurred in the context of a leveraged acquisition;<sup>31</sup>
- the issue of advance tax rulings on the possibility of repealing the exposure to tax loss carry-forward limitations and to interest expense (in excess of the yearly threshold) deduction limitations in case of a merger in the context of MLBO transactions;<sup>32</sup>
- the so-called IBLOR-fronting structures used to grant syndicated loans to Italian acquisition vehicles where a foreign credit support provider grants a loan to an Italian fronting bank that in turn grants a mirror loan to an Italian acquisition vehicle;<sup>33</sup>
- shareholders' loan granted to an Italian acquisition vehicle by a EU company that in turn is back-to-back financed by foreign third party lenders;<sup>34</sup> and
- the re-characterization as equity of a shareholder's loan granted to an Italian acquisition vehicle by a foreign investor whereby, in exceptional circumstances and following the reasoning of the OECD Transfer Pricing Guidelines, the investment should have taken place in the form of equity instead of a loan.<sup>35</sup>

Second, in 2016, Italy became compliant with EU law.<sup>36</sup> As of 2016, a 95 percent exemption from taxable income for investors applies to payments on financial instruments that are linked to the economic results of an issuer (or of other group companies), provided that they are not deductible from the

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30. ITALIAN REVENUE AGENCY, CIRCULAR LETTER NO. 6/E (2016), *available at* <http://www.agenziaentrate.gov.it/wps/file/nsilib/nsi/documentazione/provvedimenti+circolari+risoluzioni/circolari/archivio+circolari/circolari+2016/marzo+2016/circolare+6e+del+30+marzo+2016/CIRCOLARE+N.+6+--+E+DEL+30+MARZO+2016.pdf>.

31. *Id.* This interpretation is quite relevant, as the Italian tax inspectors have often challenged the deduction of interest related to an acquisition loan.

32. *Id.* The relevant ruling requests now become acceptable by definition.

33. *Id.* The fronting bank is now disregarded for withholding tax purposes; in other words, the interest payments to the fronting bank are subject to the Italian withholding tax applicable—or not applicable, as the case may be—as if the relevant interest were paid directly to each foreign credit support provider.

34. *Id.* The EU shareholder's eligibility to the benefits of the EU Interest/Royalties Directive, Directive 2003/49/CE, dated 3 June 2003 will be denied due to its lack of beneficial ownership with respect to the interest income; therefore, the Italian withholding tax becomes applicable—or not applicable, as the case may be—as if the interest were paid directly to each foreign third party lender.

35. *Id.* This recharacterization results in the denial of any deduction for interest accrued on the shareholder's loan, the recognition in principle of the NID on the loan principal amount recharacterized as equity and of the dividend tax treatment on the interest paid to the foreign shareholder. This interpretation has been opposed by Italian scholars based on several arguments.

36. Legge 7 luglio 2016, n.122, G.U. July 8, 2016, n.158 (It.).

income of the issuer.<sup>37</sup> In order to benefit from the exemption on payments from a foreign issuer, an Italian holder or investor must have held at least 10 percent of the share capital of the issuer uninterrupted for at least one year, and the issuer must have one of the legal forms listed in Annex I of the Directive,<sup>38</sup> must be a EU resident for tax purposes, and must be subject to one of the taxes listed in Annex I of the Directive, without the possibility of benefitting from any exemption regime. With this modification to the existing domestic law, there is full symmetry between the tax position of the issuer and the investor, equivalent to that already existing for dividends. This modification also addresses the concerns of the OECD on hybrid instrument mismatches.<sup>39</sup>

## V. Mexico

Mexican tax legislation distinguishes between debt and equity. In general, financing a business through debt provides a relative advantage because the loan can be registered in a foreign currency, avoiding a potential exchange loss, and the interest expense may be deductible to the issuer in computing its income. If equity is issued, there is the risk of an exchange loss and no deduction for dividends. The capital of the issuer company is, however, adjusted for inflation, providing a present value of the investment when there is a future redemption and reimbursement to the shareholder.

Whether the decision is made to use debt or equity to raise funds by a Mexican company will depend only partly on Mexican law. The tax treatment of a foreign investor under the domestic laws of its jurisdiction of residence will also be relevant. Mexican income tax law<sup>40</sup> contains provisions that are intended to neutralize differences in the tax treatment to investors of debt and equity.

Before 2014, dividend distributions of after-tax profits from companies were not taxable by Mexico, regardless of the recipient's residence the year in which the revenues were earned or the distribution occurred. However, as of 2014, an additional 10 percent withholding tax is levied on dividends or profits distributed by entities in Mexico or by permanent establishments of non-residents, to either a Mexican resident individual or foreign resident (individual or legal entity) shareholders. This withholding tax also applies where a permanent establishment remits profits to a home office or to another permanent establishment located abroad.<sup>41</sup> Payment of the tax is affected through withholding by the distributing entity.

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37. D.P.R. n.917/1986 (It.).

38. Council Directive 2011/96, 2011 O.J. (L 345) 8, 12 (EU).

39. OECD, *supra* note 3, at 45.

40. Ley del Impuesto Sobre la Renta [ISR], Diario Oficial de la Federación [DOF] 11-12-2013, últimas reformas DOF 30-11-2016 (Mex.).

41. *Id.* art 140, 164.

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Interest paid to non-resident creditors is also subject to a withholding tax<sup>42</sup> ranging from 4.9 percent to 35 percent, depending on the nature of the loan, the status of the lender, and, in some cases, the use of the funds. The withholding tax rate of 4.9 percent is applicable when the payment is made to banks, investment banks, and non-bank banks that reside in a tax treaty country. The same preferential rate applies when the payment is made by a Mexican financial institution (in other words, a bank or a special purpose financing entity (SOFOM)). Withholding tax rates are as follows: (1) the 15 percent rate applies to payments to reinsurance companies; (2) the 21 percent rate applies when the debt is used by a Mexican taxpayer for the acquisition of fixed assets and the lender is the supplying party; and (3) the 35 percent rate applies in cases not expressly regulated.<sup>43</sup>

In Mexico, corporate taxpayers are required to calculate and recognize the effect that inflation has on their debts and credits on an annual basis.<sup>44</sup> In general, if the average debts during the year is higher than the average credits, the taxpayer will be required to recognize and accrue the inflationary effect of the excess debts. If the average credits during the year is higher than the average debts, the taxpayer will be entitled to a deduction of the inflationary effect for the excess credits. Debt to which the thin capitalization rules apply is excluded from the inflationary calculation.

The Mexican thin capitalization rules address interest paid by a Mexican resident to non-resident related parties, and prevent its deduction to the extent that an issuer's debt to equity ratio exceeds 3:1.<sup>45</sup> In calculating the 3:1 threshold, a Mexican taxpayer must consider all debt that generates interest, regardless of whether the debt was contracted with a non-resident related party. The 3:1 debt to equity ratio can be exceeded in an advance pricing agreement with Mexican tax administration. The thin capitalization rules are not applicable to financial institutions or to financings between related parties for activities related to the construction, operation, and maintenance of infrastructure in national-strategic areas, such as hydrocarbons, oil and gas, and generation of electricity.<sup>46</sup>

There is much debate in Mexico as to whether the non-discrimination clause included in several Mexican tax treaties limits Mexico's right to apply its thin capitalization rules to treaty residents. As an example, article 25, paragraph 4 of the Mexico-USA Tax Treaty provides that interest, royalties, and other disbursements paid by a resident of a Contracting State to a resident of the other Contracting State shall, for the purposes of determining the taxable profits of the first-mentioned resident, be deductible under the same conditions as if they had been paid to a resident of the first-

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42. *Id.* art 166.

43. *Id.*

44. *Id.* art 44, 46.

45. DELOITTE, *Taxation and Investment Mexico 2016*, <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-mexicoguide-2016.pdf> (last visited Apr. 17, 2017).

46. *Id.*

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mentioned State.<sup>47</sup> Thus, the scope of the indirect non-discrimination clause may be to prevent the source Contracting State from denying any deduction of interest paid by its resident to a resident of the other Contracting State, if the interest payment would be deductible if paid to a resident of the source Contracting State. Because thin capitalization rules deny the deduction of interest arising on debt owed to non-resident related parties when that debt exceeds the 3:1 ratio, these rules arguably breach the non-discrimination clause as the same interest paid to a related Mexican resident might be deductible. There are not yet any judicial precedents on the subject.

## VI. United States

Historically, the question of whether a financial instrument constitutes debt or equity for U.S. tax purposes has been determined by reference to a multifactor test established by the U.S. courts.<sup>48</sup> The courts have recognized that although “classic debt is an unqualified obligation to pay a sum certain at a reasonably close fixed maturity date along with a fixed percentage in interest payable regardless of the debtor’s income,” there are some variations; “[t]oo great a variation,” however, will preclude classification as debt.<sup>49</sup>

Detrimental tax consequences may result from a reclassification, including the loss of interest deductions for the issuer, recharacterization of interest and principal payments as dividends, incurrence of higher tax rates on dividends, and the possible disruption of ownership thresholds under the Code,<sup>50</sup> including Section 382 (net operating loss limitations), Subpart F (controlled foreign corporations), and Section 1504 (consolidated return rules).

When evaluating whether an investment takes the form of debt or equity, the courts have focused on a number of factors including the following: (1) whether there is a written, unconditional promise to pay a fixed amount; (2) whether repayment must be made on a specified date (or on demand); (3) the priority of the obligation in relation to borrower’s other indebtedness; (4) the capitalization of the borrower and its ability to repay; (5) the availability of third party credit on similar terms; and (5) whether the borrower and lender are related parties.<sup>51</sup>

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47. United States – Mexico Income Tax Convention, Mex.-U.S., Sept. 18, 1992, *available at* <https://www.irs.gov/pub/irs-trty/mexico.pdf>.

48. *See* Gilbert v. Comm’r, 248 F.2d 399, 406 (2d Cir. 1957); *Am. Metallurgical Co v. Comm’r*, 112 T.C.M. (CCH), 23 (T.C. 2016).

49. *Gilbert*, 248 F.2d at 637–38 (internal citations omitted).

50. Unless otherwise indicated, all section references are to the United States Internal Revenue Code of 1986, as amended (hereinafter the “Code”) and to Treasury Regulations promulgated thereunder.

51. *See* Estate of Mixon v. U.S., 464 F.2d 394, 402-10 (5th Cir. 1972).



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This multifactor test has been referred to as “an amorphous and highly unsatisfactory ‘smell test.’”<sup>52</sup> It fosters uncertainty as taxpayers, and their advisors attempt to predict the results that could emanate from the patchwork of existing case law.<sup>53</sup> Nevertheless, this test has stopped neither taxpayers from adopting their preferred classifications nor the IRS from challenging those classifications.<sup>54</sup>

Section 385 was first enacted in 1969, authorizing the Treasury Department to promulgate regulations “as may be necessary or appropriate to determine whether an interest in a corporation is to be treated . . . as stock or indebtedness.”<sup>55</sup> Initial attempts at creating regulations were highly controversial, and the Treasury Department finally gave up in 1983, leaving Section 385 with little impact until 2016.<sup>56</sup>

On April 8, 2016, the Treasury Department’s efforts against “corporate inversions”<sup>57</sup> in the context of the larger backdrop of global coordination on BEPS resulted in the Treasury Department publishing proposed regulations under Section 385.<sup>58</sup> After public comments, the regulations were revised and published as final regulations on October 21, 2016.<sup>59</sup>

The new regulations were promoted as a tool to discourage corporate inversions. Specifically, the Treasury Department believed that, by eliminating earnings-stripping strategies, it would reduce the appeal for a U.S. multinational to undertake an inversion. In reality, however, these new regulations are not limited to situations involving an inversion; they are general anti-earnings-stripping measures that target related party loans between a U.S. borrower and a foreign lender.<sup>60</sup> Furthermore, the targeted loans may arise in the ordinary course of business,<sup>61</sup> or as a result of reorganizations or other structuring.

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52. STEPHEN A. LIND ET AL., FUNDAMENTALS OF CORPORATE TAXATION 140 (7th ed. 2008).

53. See James S. Eustice & Thomas Brantley, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 4.05 (2017).

54. *American Metallurgical*, 112 T.C.M. (CCH) (T.C. 2016).

55. Tax Reform Act of 1969, Pub. L. No. 91-172, § 415(a), 83 Stat. 487, 613 (1969).

56. See T.D. 7920, 1983-2 C.B. 69 (1983); *Full Service Beverage Co. v. Comm’r*, T.C.M. 1995-126 (1995) (explaining the history of the Section 385 regulations).

57. Corporate inversions are transactions undertaken by U.S.-based multinationals that result in redomestication of the parent company outside of the U.S. Although there can be non-tax reasons for an inversion, significant tax benefits can often be achieved.

58. Treatment of Certain Interests in Corporations as Stock or Indebtedness, 81 Fed. Reg. 20912 (proposed Apr. 8, 2016). See also U.S. DEP’T OF TREASURY, *Fact Sheet: Treasury Issues Inversion Regulations and Proposed Earnings Stripping Regulations* (Apr. 4, 2016), available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0404.aspx>.

59. Treatment of Certain Interests in Corporations as Stock or Indebtedness, 26 C.F.R. pt. 1 (2016). See also U.S. DEP’T OF TREASURY, *Treasury’s Issues Final Earnings Stripping Regulations to Narrowly Target Corporate Transactions That Erode U.S. Tax Base* (Oct. 13, 2016), available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0580.aspx>.

60. The US already has earnings-stripping rules under Section 163(j).

61. The Treasury Department included exceptions to help reduce the effect on some ordinary course transactions, such as short-term cash pooling arrangements.

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As an opening principle, the regulations reinforce the existing multifactor test by providing that, in general, “whether an interest in a corporation is treated for purposes of the . . . Code as stock or indebtedness . . . is determined based on common law, including the factors prescribed under such common law.”<sup>62</sup> The regulations provide two sets of rules under which an instrument that is classified as debt under the multifactor test will nevertheless be treated as equity for federal income tax purposes.

For interests issued on or after January 1, 2018, the parties are required to have appropriate documentation in place before the due date for the U.S. tax return (including extensions).<sup>63</sup> This includes copies of all documents evidencing material rights and obligations of the borrower and lender.<sup>64</sup> Documentation of the kind that the taxpayer uses with unrelated third parties in similar transactions (e.g., evidence of trade payables) will generally suffice, as will documentation that is required by regulators for certain financial and insurance companies.

The regulations require that specific factors be documented.<sup>65</sup> Those factors include: (1) the unconditional, legally binding obligation to pay a sum certain; (2) the holder’s rights as a creditor to enforce the obligation; (3) the holder’s reasonable expectation of repayment; and (4) an analysis of collateral value, particularly with respect to non-recourse debt.

These rules only apply to expanded groups, which include a public company having total assets in excess of \$100 million or having total revenue in excess of \$50 million.<sup>66</sup> There are limited exceptions for noncompliance: (1) that is de minimis; (2) when the taxpayer has reasonable cause; or (3) that is ministerial in nature, if remedied by the taxpayer before discovered by the IRS.<sup>67</sup>

If an instrument is considered debt under the multifactor test and otherwise complies with the documentation rules, it will nevertheless be considered equity if the distribution rules apply. Broadly speaking, the distribution rules seek to recharacterize instruments that are issued to a related party in a situation that does not result in any new investment in the operations of the issuer. In general, these rules apply to debt issued after April 4, 2016, by a U.S. domestic corporation to a related party, if the issuer is not an excepted financial or insurance company.<sup>68</sup>

Under these rules, the covered debt is reclassified as stock to the extent issued in connection with a distribution, in exchange for stock of a group member, or in exchange for property in certain asset reorganizations.<sup>69</sup> There is also a “funding rule” that attempts to reclassify debt issued to a

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62. Treas. Reg., 26 C.F.R. § 1.385-1(b) (2016).

63. 26 C.F.R. § 1.385-2.

64. 26 C.F.R. § 1.385-2(c)(1).

65. 26 C.F.R. § 1.385-2(c)(2).

66. 26 C.F.R. § 1.385-2(a)(3)(ii).

67. 26 C.F.R. § 1.385-2(b)(2)(i)-(iii).

68. See 26 C.F.R. § 1.385-3(g)(3) (covered debt instrument).

69. 26 C.F.R. § 1.385-3(b)(2) (general rule).

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related party in exchange for property, if treated as funding an acquisition or distribution during a six year “per se” period.<sup>70</sup> These rules do not apply if the aggregate adjusted issue price of all covered debt instruments is less than \$50 million.<sup>71</sup> There are also exceptions for compensatory stock acquisitions, transfer pricing adjustments, and acquisitions in the ordinary course of business by a dealer in securities.<sup>72</sup>

The future of debt/equity determinations in the United States is in a state of flux. Affected businesses are expected to expend considerable effort and funds in compliance costs and restructuring. Furthermore, members of the U.S. Congress and various commentators have questioned the validity of the regulations.<sup>73</sup> It is expected that businesses will spend several years updating their compliance protocols, while the courts determine the lasting effects of these new regulations.

## **VII. Conclusion**

If they illustrate anything at all, the recent developments in regard to debt and equity in the countries included in this report suggest that the debate over what constitutes debt and equity and what tax treatment applies to those interests, as well as to issuers and holders of the much more complex derivatives and other financial products in global markets, is far from finished.

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70. 26 C.F.R. § 1.385-3(b)(3) (funding rule); 26 C.F.R. § 1.385-3(b)(3)(iii)(A) (per se period).

71. 26 C.F.R. § 1.385-3(c)(4).

72. 26 C.F.R. § 1.385-3(c) (exceptions).

73. See, e.g., House of Representatives, Committee on Ways and Means, Letter to Treasury Secretary Jacob Lew (June 28, 2016), *available at* [http://waysandmeans.house.gov/wp-content/uploads/2016/06/20160628\\_WM-Reps\\_Lew\\_385-Regs.pdf](http://waysandmeans.house.gov/wp-content/uploads/2016/06/20160628_WM-Reps_Lew_385-Regs.pdf) (expressing “surprise” and stating that the proposed regulations are beyond Congressional intent for Section 385).

## **Labor and Employment Law**

CO-EDITORS: ROSELYN SANDS AND NICHOLAS ETCHEPARRE;  
AUTHORS: TREVOR LAWSON, SEAN PORTER, ROSELYN SANDS,  
DEIRDRE LYNCH, BYRNE WALLACE, DENNIS G. VELDHIJZEN,  
JONATHAN BURNS, AMGAD T. HUSEIN, AND RICHARD HARVEY\*

This Article summarizes important developments in 2016 in labor and employment law in Canada, France, Ireland, the Netherlands, Saudi Arabia, and the United Kingdom.

### **I. Canada**

In *Wilson v. Atomic Energy of Canada Limited*,<sup>1</sup> the Supreme Court of Canada determined that the Canada Labor Code does not permit federally regulated employers to dismiss employees without just cause (with the legislated exceptions of employees with less than one year's service, managerial employees, and dismissals due to lack of work or elimination of a position). In light of this decision, federally-regulated employers must ensure that appropriate internal procedures and performance management programs are in place to properly document employee performance issues, as employers will not be able to simply proceed "without cause" to dismiss poorly performing employees. Similarly, when employees are being dismissed as a result of an internal reorganization or reduction in force, employers should now properly document such terminations as resulting from "lack of work" or "elimination of a position;" in the past employers may have proceeded with such terminations as being "without cause."

In *Paquette v. TeraGo Networks Inc.*,<sup>2</sup> the Court of Appeal for Ontario found that a bonus plan which required an employee to be "actively" employed at the time of payment was insufficiently clear to deprive an employee who was dismissed without cause and without "reasonable" notice of termination of a claim for the bonus as part of his or her claim for wrongful dismissal damages. This determination is a significant decision for employers whose Canadian employees participate in bonus, incentive compensation, and/or equity plans which stipulate that participation ceases

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\* Editors: Roselyn Sands and Nicholas Etcheparre. Authors: Trevor Lawson, McCarthy Tétrault LLP, and Sean Porter, McCarthy Tétrault LLP (Canada); Roselyn Sands, EY Société d'Avocats (France); Deirdre Lynch, Byrne Wallace (Ireland); Dennis G. Veldhuizen, CLINT Lawyers & Mediators (The Netherlands); Jonathan Burns, Dentons, and Amgad T. Husein, Dentons (Saudi Arabia); and Richard Harvey, GQ Employment Law LLP (United Kingdom).

1. *Wilson v. Atomic Energy of Canada Limited*, [2016] S.C.C. 29 (Can.).

2. *Paquette v. TeraGo Networks, Inc.*, [2016] O.N.C.A. 618 (Can.).

upon termination of employment or which require “active” employment as a condition of continued participation. Language of this kind, without more, is likely to be found insufficiently clear. Concise language that explicitly limits an employee’s entitlements during any period following the actual termination date that does not constitute “deemed employment” under provincial employment standards legislation will be required in order to mitigate the risk of such damage awards.

In *Omarali v. Just Energy*,<sup>3</sup> the Ontario Superior Court of Justice certified a class action filed by commissioned “sales agents” who alleged that Just Energy had misclassified them as independent contractors (rather than employees) and had thereby breached the Employment Standards Act 2000, by failing to provide them with minimum wage, overtime, and other benefits provided for employees. Although certification does not mean that Just Energy will not be able to successfully defend this claim on its merits, this certification is itself significant to employers because the courts have previously refused to deal with worker misclassification cases by way of class action on the basis that individualized assessments of fact were required with respect to each individual worker.

## II. France<sup>4</sup>

One of the most significant changes in French legislation in 2016 is the final adoption of the draft law (the “El Khomri” law) relating to “labor, improvement of social dialogue and safeguard of professional careers.”<sup>5</sup>

The law contains provisions that aim at clarifying the general principles of French employment law, strengthening collective bargaining in France, increasing flexibility by modifying rules on working time and leave, and clarifying rules on economic redundancies.

### A. REWRITING THE FRENCH LABOR CODE AND ITS GENERAL PRINCIPLES

The new law profoundly reworks the general principles of the French Labor Code and modifies its general architecture. Indeed, under the new law, company-level collective bargaining may result in greater flexibility for employers regarding working time and for other matters in the future. This is a considerable philosophical change in French labor and employment law where the historical hierarchy of norms principle ensured that company-

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3. *Omarali v. Just Energy*, [2016] O.N.S.C. 4094 (Can.).

4. This section builds on a post by co-editor Roselyn Sands posted on The International Employment Lawyer, which is a quarterly newsletter published by the International Employment Law Committee under the American Bar Association, Section of International Law. Roselyn Sands, *France – Recent Legal Developments*, THE INTERNATIONAL EMPLOYMENT LAWYER (Sept. 27, 2016), [http://intemploy.blogspot.com/2016\\_09\\_01\\_archive.html](http://intemploy.blogspot.com/2016_09_01_archive.html).

5. Loi 2016-1088 du 8 août 2016 [Law 2016-1088 of August 8, 2016], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 2016.

level CBAs could further enhance employee rights but could not provide less protection.

#### B. FLEXIBILITY THROUGH COLLECTIVE BARGAINING

The law strengthens the legally binding effect of company-level CBAs, and enables companies to achieve flexibility through collective bargaining.

Whereas the detailed application of this architecture will take a couple of years to fine tune, this architecture is immediately applicable for issues relating to working time and employee leave. Under the new law, the validity of company-level CBAs on other matters will depend on a “two-tier” system, starting September 1, 2019. Company-level CBAs will be valid if the majority unions, *i.e.* those that have gathered more than 50% of the employee votes during the most recent election, sign or if the signatories have gathered more than 30% of the employee votes during the most recent election, and the agreement has been approved by the employees through referendum.

#### C. WORKING TIME

The new law includes a series of measures impacting working time and aiming to increase employer flexibility and freedom in organizing the company.<sup>6</sup> Working time related issues such as the number of hours to be worked to trigger night work compensation, the maximum weekly time duration, or the weekly and daily minimum rest period can now be set through collective bargaining. As mentioned above, the ability for the employer to provide for rules through collective bargaining that are less favorable to employees is a considerable change.

The new law also reinforces certain employee rights, in particular rights related to health and safety issues. Employees are now afforded a right “to be disconnected, in particular from electronic devices, after working hours.”<sup>7</sup> This measure aims to ensure a proper balance between workload and private life with the regulation of the use of digital tools. The specific modalities of this right new right will be discussed, on a company by company basis, with union representatives on a yearly basis.

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6. Loi 2016-1088 du 8 août 2016 [Law 2016-1088 of August 8, 2016], art. 8, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 2016.

7. CODE DU TRAVAIL (LABOR CODE) [C. TRAV.] art. L. 2242-8 (Fr.).

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**D. GREATER FLEXIBILITY IN THE JUSTIFICATION FOR COLLECTIVE REDUNDANCIES**

The law provides for new rules regarding collective redundancies.<sup>8</sup> These rules clarify some of the reasons that can be used to justify a collective redundancies caused by economic difficulties. Indeed, the law provides that in addition to the already existing reasons (i.e., the company's closure, or the safeguard of the company's competitiveness, or considerable technological changes) two new reasons could be used: a drop in the company's turnover for a period of time depending on the size of the company (e.g. four consecutive quarters for companies with more than 300 employees). Together with the procedural changes from 2013, the combination of these modifications facilitates and creates certainty as to the time required to complete the collective redundancy process in France.

**E. CONCLUSION**

France labor and employment law continues its path to creating a more employer-friendly environment in order to fuel foreign investment into France.

**III. IRELAND**

Several significant changes to Ireland's employment law landscape were introduced in 2016. Legislation protecting workers who whistle-blow on wrongdoing in the workplace was introduced in 2014.<sup>9</sup> A code of practice published in 2015 sets out guidance for employers, workers, and their representatives in regard to the disclosure of information regarding wrongdoing in the workplace and how to deal with the disclosure of such information. It also provides for potential compensation of up to five years' gross remuneration as "compensation for unfair dismissal on grounds of making a protected disclosure."<sup>10</sup> The protection afforded to those who make a disclosure in the workplace will continue to be a very relevant consideration for employers for the foreseeable future.

Equality legislation continues to allow employers to set compulsory retirement ages but only if such retirement ages are "objectively and reasonably justified by a legitimate aim, and [ ] the means of achieving that

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8. Loi 2016-1088 du 8 août 2016 [Law 2016-1088 of August 8, 2016], art. 22, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 9, 2016.

9. Protected Disclosures Act of 2014 (Act No. 14/2014) (Ir.), <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html>.

10. Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014) (Declaration) Order 2015, (SI 464/2015) (Ir.), <http://www.irishstatutebook.ie/eli/2015/si/464/made/en/print>.

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aim are appropriate and necessary.”<sup>11</sup> This brings the law in Ireland into line with European case law. There is also a legislative right to two weeks’ paternity leave.<sup>12</sup> An employer is not required to pay an employee during this period; however, the employee may be eligible for social welfare payments.

Individuals who work with children and vulnerable adults must be vetted by the Irish Police’s National Vetting Bureau before commencing employment.<sup>13</sup>

Certain criminal convictions may now be regarded as spent. Where a conviction is regarded as a spent conviction, an individual is not required to disclose the conviction itself or the circumstances ancillary to it when seeking employment or entering employment, except in limited cases specified in the legislation.

#### **IV. The Netherlands<sup>14</sup>**

##### **A. DBA ACT**

On 1 May 2016 the Act on Deregulation Assessment Labor Relationships (in Dutch the “Wet deregulerend beoordeling arbeidsrelaties,” the “DBA Act”) came into force.<sup>15</sup> This also meant the end of the VAR declaration. The VAR declaration (which was issued by the Dutch Tax Authorities) indemnified companies that hired self-employed freelancers from any potential claims by the Dutch Tax Authorities for wages and social security premiums, should it (later) appear the relationship factually qualified as employment agreement.<sup>16</sup>

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11. Equality (Miscellaneous Provisions Act) 2015 (Act No. 43/2015) (Ir.), <http://www.irishstatutebook.ie/eli/2015/act/43/enacted/en/print.html>.

12. Paternity Leave and Benefit Act 2016 (Act No. 11/2016) (Ir.), <http://www.irishstatutebook.ie/eli/2016/act/11/enacted/en/print.html>.

13. National Vetting Bureau (Children and Vulnerable Persons) Act 2012 Revised (Act No. 47/2012) (Ir.), <http://revisedacts.lawreform.ie/eli/2012/act/47/revised/en/html>.

14. This section builds on a post by author Dennis G. Veldhuizen posted on The International Employment Lawyer, which is a quarterly newsletter published by the International Employment Law Committee under the American Bar Association, Section of International Law. Dennis G. Veldhuizen, *Netherlands – Independent Contractor Status*, THE INTERNATIONAL EMPLOYMENT LAWYER (Feb. 10, 2017), <http://intemploy.blogspot.com/2017/02/netherlands-independent-contractor.html>.

15. Eerste Kamer, *Wet deregulerend beoordeling arbeidsrelaties* [Review of deregulation of labor relationships law], Eerste Kamer der Staten-Generaal, [www.eerstekamer.nl/wetsvoorstel/34036\\_wet\\_deregulerend\\_beeoordeling](http://www.eerstekamer.nl/wetsvoorstel/34036_wet_deregulerend_beeoordeling); Wet deregulerend beoordeling arbeidsrelaties [Act on Deregulation Assessment Labor Relationships] 3 februari 2016, Stb. 2016, 45 (Neth.).

16. Wet inkomstenbelasting [Income Tax Act] 30 mei 2000, Stb. 2001 (Neth.); Wet expansion VAR legal [Law Extending Legal VAR] 29 december 2004, 2005 (Neth.).



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**B. INDEPENDENT CONTRACTOR?**

Whether the relationship between the company and the freelancer qualifies as employment agreement depends mainly on whether the following three factors are present: (1) labor, (2) wages, and, (3) authority:

- An employee should personally perform activities and substitution is only possible with the permission of the employer, whereas the freelancer does not have to personally perform labor;
- Employees receives wages for the activities performed, whereas the freelancer receives a (management) fee;
- The contact with a freelancer is aimed at bringing about a result and the contractor bears the responsibility in this respect;
- A relationship of authority exists between the employee and employer, whereas a client has a limited right to give instructions to the freelancer, only to the extent it regards the execution of the freelancer's assignment.<sup>17</sup>

**C. DBA ACT IN PRACTICE**

The purpose of the DBA Act is to minimize the chances of a 'pseudo' independent contractor and as such to provide a better protection to the self-employed. The DBA Act would also increase the legal security, as the differences between employees and independent contractors are now much more defined.

Clients and freelancers have to make use of three types of so-called "model contracts" prior to engagement. These have been drawn up and issued by the Dutch Tax Authorities:

- A general model contract: this model contract covers most business relationship where employment is not involved;
- A sector or profession specific model contract: meant for everyone working according to certain sectoral or professional standards or conditions;
- An individual model contract: a specific model contract that can be used by everyone working in the same sector or profession for which that model contract was drawn up specifically.<sup>18</sup>

Once the model contract is approved by the Dutch Tax Authorities, both parties are assured that there is no requirement to withhold taxes by the client. However, if a Dutch Tax Authorities judge at a later stage that the relation is one of employment rather than independent contracting, both client and contractor will be held liable to withhold payroll taxes and social security contributions with retroactive effect.

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17. Wet deregulering beoordeling arbeidsrelaties [Act on Deregulation Assessment Labor Relationships] 3 februari 2016, Stb. 2016, 45 (Neth.).

18. Dutch Tax Authorities, *The DBA Law: How Does it Work?*, BELASTINGDIENST.NL, <https://www.belastingdienst.nl/wps/wcm/connect/nl/modelovereenkomsten/modelovereenkomsten> (last visited Apr. 15, 2017 5:22 PM).

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The Dutch senate introduced a transitional period of one year, until 1 May 2017. During the transitional period, the Dutch Tax Authorities will not actively enforce the DBA Act, but will mainly focus on providing information.<sup>19</sup>

**D. INSECURITY**

Already before its entry date, the DBA Act led to insecurity to both self-employed contractors and their clients. Many self-employers became reluctant to take on new engagements and some of them are even considering to cease their activities because of the insecurity with which the DBA Act has provided them. The same applies to clients: they are also reluctant to hire a self-employer because of the risk of corrective tax assessments.

**E. WILL THE DBA ACT SURVIVE?**

On the recommendation of a special committee (the Boot Committee), which performed a study the consequences of the DBA Act, the Dutch State Secretary of Finance, Mr. Wiebes, decided on 18 November 2016 to postpone the implementation of the DBA Act until 1 January 2018.<sup>20</sup>

This means that in principle, the Dutch Tax Authorities will not enforce the DBA Act during the extended implementation period, provided that the client or its principal in question is deemed to be ‘well-intentioned’. A party is deemed to be well-intentioned if it is familiar with the DBA Act and in any event attempts to operate in accordance with the model contracts issued by the Dutch Tax Authorities.

The situation is different for ‘ill-intentioned parties’. As from 1 May 2017, the original end date of the implementation period of the DBA Act, the Dutch Tax Authorities will take enforcement measures against such parties.

The Dutch government itself obviously still has a great deal of work to do in the coming period. It is expected that the system of model contracts will be simplified or even cancelled.

**F. PRACTICE**

So while the pressure is off the self-employment sector to some extent, it remains unclear how the DBA Act will ultimately be applied as of 2018. For principals, it is important to continue to use (approved) model contracts in

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19. Dutch Tax Authorities, *Letter to former VAR holders postponing DBA law enforcement*, BELASTINGDIENST.NL (Jan. 31, 2017), <https://www.belastingdienst.nl/wps/wcm/connect/nl/modelovereenkomsten/content/brief-voor-oud-var-houders-over-uitstel-handhaving-wet-dba>.

20. Anneke Meulenveld, *Enforcement DBA Act postponed: what does that mean?*, BOONTJE: ADVOCATEN ARBEIDSRECHT BLOG (Jan. 12, 2016), <http://www.boontjeadvocaten.nl/enforcement-dba-act-postponed-what-does-that-mean-2/>.

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practice. A wait-and-see approach is definitely not an option. The VAR declaration has been abolished and will not be reintroduced.

## **V. Saudi Arabia**

### **A. LABOR LAW 2016 IMPLEMENTING REGULATIONS**

The Saudi Arabian Labor and Workmen's Law (the Labor Law)<sup>21</sup> and its Implementing Regulations (IRs) comprehensively govern Saudi Arabia's labor and employment law regime. IRs are issued from time to time and have the effect of both explaining existing provisions of the Labor Law, as well as creating new statutory rights and duties.<sup>22</sup> On 22 April 2016, a new set of Labor Law IRs came into effect (the 2016 IRs), which superseded and abrogated all previous Labor Law IRs, as well as any other inconsistent law or regulation.<sup>23</sup>

Following is a brief overview of significant changes to the Saudi Arabian labor and employment law regime effected by the 2016 IRs:

### **B. STANDARD FORM OF WORK RULES**

The 2016 IRs adopted a new standard form of internal work rules, which are not significantly different than the previous standard form. However, the new form lays out "a much more specific and detailed scheme for employee discipline specifying the type of penalty that may be applied for 49 specific acts depending on whether the act was committed for the first, second, third, or fourth time."<sup>24</sup> Additionally, whereas the previous guidelines provided that an employee was "entitled to a bonus in the event that his yearly performance is classified as "Good" on a scale of 1) Excellent; 2) Very Good; 3) Good; 4) Satisfactory; and 5) Poor," the new Guidelines require that an employee with merely "Satisfactory" performance must also receive a bonus.<sup>25</sup>

All companies in Saudi Arabia are required to have internal work rules, which do not have to follow verbatim the new form, but may not be inconsistent with it.

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21. See Labor and Workmen's Law, enacted by Royal Decree No. M/51, 23/8/1426H (Sept. 27, 2005).

22. See Labor and Workmen's Law Amendment, enacted by Royal Decree No. M/46, 05/06/1436H (Apr. 24, 2015).

23. See Ministerial Resolution No. 693/1 of 29/2/1428H; Ministerial Decision No 1/1/1998; Amgad T. Husein & Jonathan Burns, *Saudi Arabia: Assessing the Impact of the 2016 Implementing Regulations to the Labour Law*, DENTONS.COM (Aug. 24, 2016), <http://www.dentons.com/en/insights/alerts/2016/august/24/saudi-arabia-assessing-the-impact-of-the-2016-implementing-regulations-to-the-labour-law>.

24. Husein & Burns, *supra* note 23.

25. *Id.*

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C. STANDARD FORM OF EMPLOYMENT CONTRACT

The 2016 IRs also adopted, for the first time, a standard employment contract form with obligatory terms must be incorporated (in substance only—i.e., such terms need not be copied verbatim) and optional terms depending on individual circumstances. Any additional terms included in an employment contract are enforceable only to the extent that they are not inconsistent with the Labor Law and its IRs.

The provisions of the standard form contract are not significantly noteworthy, and it appears it was adopted and formatted in a way in order to simplify the contracting process so as to encourage employers and employees to reduce the terms of their employment relationship to writing—likely as a remedial measure to reduce the burden on the labor courts, since many labor claims arise out of a basic misunderstanding between the parties due to lack of a clear written agreement.

However, one noteworthy provision is an obligatory term that all fixed term contracts shall automatically renew for similar periods at the expiration of the contract unless either party notifies the other party in writing otherwise at least thirty days prior. This requirement has not existed previously in Saudi Arabian labor and employment law. Thus, employers who plan to let go an employee on a fixed term contract at the end of the term by simply not renewing the contract should be mindful of the new thirty days' notice requirement.

D. MISCELLANEOUS UPDATES

Saudi Arabian employers are notorious for holding the passports of their expatriate employees, which has drawn criticism from advocacy groups and the international community. Some employers claim that they hold their employees' passports voluntarily and for safekeeping. However, critics claim that employers only do so as a means of maintaining control and leverage over their employees because an employee cannot escape the country without his or her passport. Historically, the Ministry of Labor (MOL) and its labor regulations have not been very forceful as to the impermissibility of this practice. However, the 2016 IRs expressly state that an employer may not retain the passport of his non-Saudi Arabian employee without execution of an acknowledgment form by the employee in both Arabic and the employee's language.

The 2016 IRs listed eighteen jobs that may not be filled by non-Saudi Arabians, including, among others, titles as Human Resources Director, Hotel Reception Clerk, Treasurer, or Private Security Guard. In addition, non-Saudi Arabians who are less than eighteen years of age or more than sixty years of age may not be employed—unless the employee is an expert, doctor, or another exempt profession as determined by the MOL. Presumably, existing employment visas will not be renewed, and new employment visas will not be issued, for expatriates falling into these restricted categories.

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Finally, the 2016 IRs expressly limit an employee's yearly overtime to no more than 720 hours, unless otherwise permitted by the MOL.

## **VI. The United Kingdom**

In the United Kingdom (UK), the main development across the legal world has been the vote on 23 June 2016 to leave the European Union (EU). For employment law, Brexit's impact is still far from clear and the UK government has ruled out major changes. However, several commentators anticipate at least some modifications once Brexit occurs, most likely in the following areas: introducing a financial cap on damages in discrimination claims; increasing the ability for employers to harmonize terms and conditions after a Transfer of Undertaking (Protection of Employment) (TUPE) transfer or Acquired Rights Directive (ARD) transfer; the EU bankers' bonus cap; and limiting holiday pay claims. Many international employers will be closely watching the outcome of UK/EU negotiations on the freedom of workers, and particularly on whether the rights of EU citizens currently in the UK will be curtailed. As of yet, there is little clarity on these points as the UK government continues to keep its cards close to its chest.

A recent Employment Tribunal decision granting "worker" status to Uber drivers has also gained a lot of attention.<sup>26</sup> Although falling short of full "employee" status, the decision grants the drivers the right to minimum wage, paid holiday, rest breaks, and other rights. An appeal is possible, and claims from other similar groups of atypical workers (e.g. couriers) are following. More litigation in this area is expected in 2017.

Other developments that should be on international employers' radars include a new obligation for larger companies to report on their efforts to ensure their supply chains are free of modern slavery (already in force);<sup>27</sup> an obligation to report on differentials in pay also for larger employers (expected to come into force in 2017);<sup>28</sup> and continuing developments in the long-running holiday pay cases regarding how employers should calculate pay while employees are away from the workplace.<sup>29</sup>

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26. *Mr. Y Aslam, Mr. J Farrar & Others v. Uber B.V., Uber London Ltd., Uber Britannia Ltd.*, Case Nos: 2202550/2015 & Others, Employment Tribunals (Oct. 28, 2016), 2016 WL 06397421 (Eng.).

27. Modern Slavery Act 2015, § 54 (UK).

28. Equality Act 2010, § 78 (UK).

29. *Case C-539/12, Z.J.R. Lock v. British Gas Trading Ltd.*, CELEX 612CJ0539 (May 22, 2014); *UKEAT/0189/15/BA, British Gas Trading Ltd. v. Lock and another*, 2 C.M.L.R. 40.

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## **Anti-Corruption**

LESLIE A. BENTON, SEVERIN WIRZ, MIKHAIL REIDER-GORDON,  
LADAWN BURNETT, AND AMANDA GALBO\*

### **I. United States Developments**

There was a significant uptick in the number of cases brought under the Foreign Corrupt Practices Act (“FCPA”) this year. The Department of Justice (“DOJ”) also issued new policy guidelines meant to encourage companies to voluntarily self-disclose wrongdoing and cooperate in corruption-related investigations.

#### **A. SIGNIFICANT POLICY DEVELOPMENTS**

##### **1. *FCPA Pilot Program***

On April 5, 2016, the Chief of the DOJ Fraud Section issued a memorandum announcing the launch of a new, one-year FCPA enforcement pilot program.<sup>1</sup> Companies who voluntarily self-disclose FCPA-related misconduct and cooperate during investigations will get credit for their good behavior. Five companies received declinations in 2016 as part of the new program.<sup>2</sup>

#### **B. RELEVANT LITIGATION**

##### **1. *United States v. Harder***

On March 2, a pre-trial ruling by the U.S. District Court for the Eastern District of Pennsylvania confirmed that employees of public international organizations constitute “foreign officials” under the FCPA and that the Travel Act can apply to criminal activity that occurs outside of the United

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\* Leslie A. Benton (Part IV and Committee Editor) is Vice President, Advocacy and Stakeholder Engagement, at the Center for Responsible Enterprise And Trade; Severin Wirz (Part I) is the founder of Practical Ethics Solutions; Mikhail Reider-Gordon (Part II) is Director, Disputes & Investigations, at Navigant Consulting, Inc.; LaDawn Burnett (Part III) is an Associate at Bryan Cave LLP; and Amanda Galbo (Part IV) is an intern at the Center for Responsible Enterprise And Trade.

1. Memorandum from Andrew Weissmann, Chief (Fraud Section), Crim. Div., U.S. DEP’T OF JUSTICE, *The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), available at <https://www.justice.gov/criminal-fraud/file/838416/download>.

2. See *U.S. DOJ FCPA Pilot Program Declinations*, U.S. DEP’T OF JUSTICE (last updated Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/pilot-program/declinations>.

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States so long as some “relevant conduct” territorially connects the defendant and his bribery scheme to the United States.<sup>3</sup>

2. *McDonnell v. United States*

On June 27, 2016, the United States Supreme Court unanimously vacated the conviction of former Virginia governor Bob McDonnell under the Hobbs Act and the honest-services fraud statute related to his taking \$175,000 in loans, gifts, and other benefits gifts from a Virginia businessman while in office.<sup>4</sup> The Court found that McDonnell’s activity did not sufficiently constitute “official act[s]” under the statutes.<sup>5</sup>

3. *SEC v. Straub*

On September 30, 2016, the Southern District Court of New York ruled in favor of the Securities and Exchange Commission (SEC) on a motion for summary judgment to dismiss FCPA charges against three former executives of Magyar Telekom, Plc.<sup>6</sup> The defendants, who are accused of bribing Macedonian government officials, argued that the SEC could not prove that they had “ma[d]e use of the mails or any means or instrumentality of interstate commerce” in “furtherance of” the alleged bribery scheme.<sup>7</sup> The court ruled that despite residing in Hungary, the defendants’ false written representations to accountants which were then used “in the preparation of falsified SEC filings” were sufficient to establish jurisdiction under the FCPA.<sup>8</sup>

C. CORPORATE ENFORCEMENT ACTIONS

1. *SAP SE*

On February 1, 2016, German-based company SAP SE agreed to a SEC order to pay U.S. \$3.9 million in disgorgement and prejudgment interest related to allegations that the company paid \$145,000 in bribes to a senior Panamanian government official.<sup>9</sup> The bribes were allegedly orchestrated by Vincente Eduardo Garcia, SAP’s Vice-President of Global and Strategic Accounts, who arranged large, illegitimate discounts to one of SAP’s corporate partners in order to generate a slush fund to bribe officials.<sup>10</sup>

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3. *Id.* at 15.

4. *McDonnell v. United States*, 136 S. Ct. 2355, 2357 (2016).

5. *Id.* at 2375.

6. Opinion and Order at 26, *SEC v. Straub, et al.*, No. 11-cv-09645 (S.D.N.Y. 2016), ECF No. 261.

7. *Id.* at 13.

8. *Id.* at 16.

9. In the Matter of Sap Se, Respondent., Exchange Act Release No. 34-77005, 113 SEC Docket 8 (Feb. 1, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-77005.pdf>.

10. *Id.* ¶ 14.

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2. *SciClone Pharmaceuticals*

On February 4, 2016, California-based SciClone Pharmaceuticals, Inc. agreed to pay the SEC over U.S. \$12 million to settle charges that it violated the FCPA.<sup>11</sup> Managers at the parent company were allegedly told that VIP healthcare professionals were provided trips, meals, and entertainment.<sup>12</sup> Further, travel companies were allegedly hired to provide services in connection with what were ostensibly legitimate conferences, when in actuality there was no legitimate educational purpose.<sup>13</sup>

3. *PTC Inc.*

On February 16, 2016, Massachusetts-based PTC, Inc. entered into separate settlement agreements with both the DOJ and SEC regarding allegations that two PTC China-based subsidiaries provided improper travel, gifts, and entertainment, disguised as commissions, totaling nearly \$1.5 million to Chinese government officials who were employed by state-owned entities that were PTC customers.<sup>14</sup> PTC agreed to pay U.S. \$11.8 million in disgorgement and U.S. \$ 1.7 million in prejudgment interest to settle the SEC's charges, and its Chinese subsidiary, PTC China, entered into a non-prosecution agreement (NPA) with the DOJ, agreeing to a U.S. \$14.5 million penalty.<sup>15</sup>

4. *VimpelCom Ltd.*

On February 18, 2016, Dutch company VimpelCom Ltd. agreed to a deferred prosecution agreement (DPA) with the DOJ and a consent agreement with the SEC pertaining to VimpelCom's business in Uzbekistan.<sup>16</sup> According to the SEC, VimpelCom paid more than U.S. \$114 million in bribes—disguised as sham contracts and charitable donations—to a government official in Uzbekistan to benefit VimpelCom's business there.<sup>17</sup> VimpelCom agreed to pay U.S. \$230.3 million in criminal penalties to the DOJ and U.S. \$167.5 million to the SEC, and U.S. \$397.5 million to the Dutch Public Prosecution Service, bringing the total global resolution amount to more than U.S. \$835 million.<sup>18</sup>

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11. In the Matter of SciClone Pharmaceuticals, Inc., Securities Exchange Act Release No. 34-77058, 113 SEC Docket 8 (Feb. 4, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-77058.pdf>.

12. *Id.* ¶ 5.

13. *Id.* ¶ 11.

14. See Press Release, Tech Company Bribed Chinese Officials, SEC. & EXCH. COMM., 2016-29 (Feb. 16, 2016), <https://www.sec.gov/news/pressrelease/2016-29.html>.

15. *Id.*

16. Press Release, Vimpelcom to Pay \$795 Million in Global Settlement for FCPA Violations, SEC. & EXCH. COMM., 2016-34 (Feb. 18, 2016), <https://www.sec.gov/news/pressrelease/2016-34.html>.

17. See *id.*

18. *Id.*



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5. *Qualcomm*

In September 2010, a whistleblower informed the SEC of allegations of wrongdoing by California-based Qualcomm, Inc. Qualcomm settled with the SEC on March 1, 2016, and agreed to pay a U.S. \$7.5 million penalty for violations of the FCPA.<sup>19</sup> Qualcomm allegedly offered and provided full-time employment and paid internships to foreign officials' family members in order to obtain business in China.<sup>20</sup> Last November, the DOJ informed Qualcomm that it had terminated its investigation and would not pursue any charges against the company.

6. *Olympus Latin America Inc.*

On March 1, 2016, Olympus Corp. of the Americas and its Miami-based subsidiary, Olympus Latin America, Inc., agreed to pay U.S. \$646 million in total penalties for the illegal payments to doctors and hospitals both in the United States and in Latin America.<sup>21</sup> The company was charged under the Anti-Kickback Statute for winning new business in the United States by giving doctors and hospitals kickbacks.<sup>22</sup> The company's subsidiary was charged with violating the FCPA by establishing strategic "training centers" as well as a "Miles Program" through which it made improper payments and gifts to health care professionals in Latin America.<sup>23</sup>

7. *Nordion Inc.*

Violations of the FCPA's books and records and accounting provisions were the basis of the SEC's March 3, 2016, order instituting a settled administrative proceeding against Nordion (Canada), Inc.<sup>24</sup> According to the SEC, Nordion used a third-party agent to help distribute the company's cancer treatment even though the agent was chosen with virtually no due diligence and lacked experience.<sup>25</sup> In a separate action, Nordion employee, Mikhail Gourevitch, also entered into a cease-and-desist order with the

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19. See Press Release, SEC: Qualcomm Hired Relatives of Chinese Officials to Obtain Business, SEC. & EXCH. COMM., 2016-36 (Mar. 1, 2016), <https://www.sec.gov/news/press-release/2016-36.html>.

20. *Id.*

21. Press Release, Medical Equipment Company Will Pay \$646 Million for Making Illegal Payments to Doctors and Hospitals in United States and Latin America, U.S. DEPT OF JUSTICE, 16-234 (Mar. 1, 2016), <https://www.justice.gov/opa/pr/medical-equipment-company-will-pay-646-million-making-illegal-payments-doctors-and-hospitals>.

22. See Complaint ¶¶ 7-10, United States v. Olympus Corp. of the Ams., No. 16-3524 (MF) (D.N.J. 2016), available at <https://www.justice.gov/usao-nj/file/829696/download>.

23. *Id.* ¶ 3.

24. In the Matter of Nordion (Canada), Inc., Securities Exchange Act Release No. 34-77289, 113 SEC Docket 12 (Mar. 3, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-77290.pdf>.

25. *Id.* ¶ 7.

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SEC, agreeing to pay close to U.S. \$180,000 in disgorgement, prejudgment interest, and a civil penalty.<sup>26</sup>

8. *Novartis AG*

On March 23, 2016, Swiss-based company Novartis AG agreed to pay U.S. \$25 million to settle with the SEC due to violations of the FCPA books and records and accounting provisions.<sup>27</sup> Certain employees and agents of Novartis subsidiaries conducting business in China provided gifts, travel, entertainment, and other improper favors to health care professionals in China from 2009 to 2013.<sup>28</sup> These payments were improperly recorded on the company's general ledger as legitimate expenses.<sup>29</sup>

9. *Las Vegas Sands Corp.*

On April 7, 2016, Las Vegas Sands Corp. consented to the entry of a SEC cease-and-desist order to settle charges that it violated the books and records and internal control provisions of the FCPA by failing to properly authorize or document U.S. \$62 million in payments to a consultant who was facilitating business activities in China and Macao.<sup>30</sup> The company agreed to a U.S. \$9 million civil monetary penalty and to retain an independent compliance consultant for a period of two years.<sup>31</sup>

10. *Akamai Technologies*

On June 7, 2016, Massachusetts-based company Akamai Technologies entered into a NPA with the SEC regarding allegations that the company's Chinese subsidiary arranged approximately U.S. \$40,000 in payments and improper gifts to induce Chinese government-owned entities to purchase more in services from the company than they actually needed.<sup>32</sup> The DOJ notified the company that the agency had closed its investigations against the company, noting Akamai's prompt voluntary self-disclosure and cooperation as the basis for its decision not to prosecute.<sup>33</sup>

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26. In the Matter of Mikhail Gourevitch, Securities Exchange Act Release No. 34-77288, 113 SEC Docket 12 (Mar. 3, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-77288.pdf>.

27. See In the Matter of Novartis AG, Securities Exchange Act Release No. 34-77431, 113 SEC Docket 15 (Mar. 23, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-77431.pdf>.

28. *Id.* ¶¶ 8, 14.

29. *Id.*

30. See Press Release, Las Vegas Sands Paying Penalty for FCPA Violations, SEC. & EXCH. COMM., 2016-64 (Apr. 7, 2016), <https://www.sec.gov/news/pressrelease/2016-64.html>.

31. *Id.*

32. Non-Prosecution Agreement, In re Akamai Tech., Inc., SEC No. 2016-109 (SEC June 7, 2016), *available at* <https://www.sec.gov/news/press/2016/2016-109-npa-akamai.pdf>.

33. Letter from Daniel Kahn, U.S. Dep't of Justice, to Josh Levy, Akamai Technologies, Inc. 1 (June 6, 2016), <https://www.justice.gov/criminal-fraud/file/865411/download>.

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11. *Nortek Inc.*

On June 7, 2016, the SEC announced a NPA with Rhode Island-based manufacturer, Nortek, Inc. Nortek's indirect, wholly-owned Chinese subsidiary made more than four hundred improper payments during a five-year period to local officials from multiple different governmental departments.<sup>34</sup> The payments were inaccurately recorded in the subsidiary's books, records, and accounts, which were consolidated into the books and records of Nortek.<sup>35</sup> The SEC noted that Nortek's self-reporting, extensive cooperation with the Commission's investigation, prompt tightening of its internal controls, and remedial measures to eliminate the problems resulted in the NPA.<sup>36</sup>

12. *Analogic Corporation*

On June 21, Massachusetts-based company Analogic Corporation and its wholly-owned Danish subsidiary, BK Medical ApS, entered into an order with the SEC, agreeing to pay nearly fifteen million USD to resolve charges that it failed to keep accurate books and records and maintain adequate internal accounting controls.<sup>37</sup> The company allegedly engaged in a ten-year scheme involving hundreds of sham transactions with distributors that funneled approximately twenty million USD to third parties in Russia and elsewhere.<sup>38</sup> It agreed to a \$3.4 million USD penalty in a separate NPA with the DOJ.<sup>39</sup>

13. *Johnson Controls, Inc.*

On July 11, Wisconsin-based Johnson Controls, Inc. agreed to pay more than fourteen million USD to the SEC regarding charges that it violated the FCPA's books and records and accounting provisions.<sup>40</sup> Employees of Johnson Controls' Chinese subsidiary made payments amounting to U.S.

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34. See Non-Prosecution Agreement, Exhibit A – Statement of Facts at ¶¶ 3-5, *In re Nortek Inc.*, SEC No. 2016-109 (SEC June 7, 2016), available at <https://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf>.

35. *Id.* ¶¶ 7-8.

36. Press Release, SEC Announces Two Non-Prosecution Agreements in FCPA Cases, SEC. & EXCH. COMM., 2016-109, (June 7, 2016), available at <https://www.sec.gov/news/pressrelease/2016-109.html>.

37. Press Release, SEC Charges Medical Device Manufacturer with FCPA Violations, SEC. & EXCH. COMM., 2016-126, (June 21, 2016), available at <https://www.sec.gov/news/pressrelease/2016-126.html>.

38. *Id.*

39. Press Release, Analogic Subsidiary Agrees to Pay More than \$14 Million to Resolve Foreign Bribery Charges, U.S. DEP'T OF JUSTICE, 16-716 (June 21, 2016), available at <https://www.justice.gov/opa/pr/analogic-subsidiary-agrees-pay-more-14-million-resolve-foreign-bribery-charges>.

40. In the Matter of Johnson Controls, Inc., Securities Exchange Act Release No. 34-78287, 114 SEC Docket 11 (July 11, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78287.pdf>.

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\$4.9 million to employees of Chinese government owned shipyards, ship-owners, and others to win business. Employees at the Chinese subsidiary circumvented previously implemented controls by utilizing third-party vendors who were deemed low risk, who would then pass on the payments to government officials.<sup>41</sup> On June 21, 2016, the DOJ issued a letter of declination to the company, citing its voluntary disclosure, thorough investigation, full cooperation, remediation, and additional enhancements to its internal controls.<sup>42</sup>

14. *LATAM Airlines*

On July 25, 2016, LATAM Airlines Group S.A. settled an administrative proceeding with the SEC regarding charges that its predecessor, LAN Airlines, failed to keep accurate books and records and maintain adequate accounting controls.<sup>43</sup> The SEC alleged that LAN entered into a fictitious \$1.15 million USD consulting agreement with a third party, knowing that the money would be used to funnel bribes to labor union officials with whom LAN Airlines had an existing dispute.<sup>44</sup> LATAM also entered into a DPA with the DOJ regarding the same matter, agreeing to pay a U.S. \$12.75 million criminal penalty.<sup>45</sup>

15. *Key Energy Services, Inc.*

On August 11, 2016, Houston-based Key Energy Services, Inc. entered into a cease-and-desist order with the SEC to settle charges that it violated the internal controls and books and records provisions of the FCPA, relative to its Mexican subsidiary's use of a third-party consulting firm to make improper payments to Mexican officials.<sup>46</sup> The company agreed to disgorge five million USD. The SEC order further notes that Key Energy voluntarily disclosed the matter in May 2014, and had subsequently undertaken significant remedial efforts.<sup>47</sup> In April 2016, the company disclosed that the

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41. *Id.* ¶¶ 6-11.

42. Letter from Daniel Kahn, U.S. Dep't of Justice, to Jay Holtmeier, Johnson Controls, Inc. 1 (June 21, 2016), <https://www.justice.gov/criminal-fraud/file/874566/download>.

43. In the Matter of LAN Airlines S.A., Securities Exchange Act Release No. 34-78402, 114 SEC Docket 13, 1 (July 25, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-78402.pdf>.

44. *Id.* at 2.

45. Deferred Prosecution Agreement at 8, United States v. LATAM Airlines Grp. S.A., No. 0:16-CR-60195 (S.D. Fla. 2016), *available at* <https://www.justice.gov/opa/file/878806/download>.

46. In the Matter of Key Energy Services, Inc., Securities Exchange Act Release No. 34-78558, 114 SEC Docket 15, 1-2 (Aug. 11, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-78558.pdf>.

47. *Id.* at 8.

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DOJ had closed its investigation against the company and would not pursue charges.<sup>48</sup>

16. *AstraZeneca PLC*

On August 30, 2016, U.K.-based company AstraZeneca PLC agreed to a settlement with the SEC, agreeing to pay more than five million USD to settle charges that it violated the books and records and internal controls provisions of the FCPA.<sup>49</sup> Between 2005 and 2010, AstraZeneca's wholly-owned subsidiaries in China and Russia were involved in multiple schemes allowing for improper payments to be made to foreign officials.<sup>50</sup> The SEC remarked that the company's existing controls were insufficient. The company did not provide adequate FCPA training to its sales and marketing employees in China and Russia nor did it employ reasonable due diligence and monitoring of third-party contractors.<sup>51</sup>

17. *Nu Skin Enterprises*

On September 20, 2016, Utah-based Nu Skin Enterprises settled charges with the SEC that it violated the FCPA's books and records and internal controls provisions. In 2013, Nu Skin's Chinese subsidiary allegedly made a U.S. \$154,000 payment to a local charity in order to influence an investigation by China's Administration of Industry and Commerce.<sup>52</sup> The company had also promised to secure college recommendation letters for the child of a government official.<sup>53</sup> Under the settlement, Nu Skin agreed to pay disgorgement, prejudgment interest, and a civil penalty totaling U.S. \$765,688.<sup>54</sup>

18. *Anheuser-Busch InBev*

On September 28, Belgian brewer Anheuser-Busch InBev agreed to pay a US \$6 million penalty to the SEC related to FCPA and whistleblower violations. The company allegedly made improper payments to sales distributors to be passed on to government officials in India, and then recorded the payments inaccurately on the company's books. The company

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48. Key Energy Services, Inc., April 28, 2016 Form 8-K, *available at* <https://www.sec.gov/Archives/edgar/data/318996/000119312516564285/d188921d8k.htm>, (accessed Nov. 22, 2016).

49. In the Matter of AstraZeneca PLC, Securities Exchange Act Release No. 34-48730, 114 SEC Docket 18, 6 (Aug. 30, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-78730.pdf>.

50. In the Matter of AstraZeneca PLC, Securities Exchange Act Release No. 34-48730, 114 SEC Docket 18, 4 (Aug. 30, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-78730.pdf>.

51. *Id.* at 5.

52. In the Matter of Nu Skin Enterprises, Inc., Securities Exchange Act Release No. 34-78884, 115 SEC Docket 1, 2 (Sept. 20, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-78884.pdf>.

53. *Id.* at 3.

54. *Id.* at 5.

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also attempted to chill a whistleblower who reported the misconduct by including language in a separation agreement restricting the employee's communications with the SEC.<sup>55</sup>

19. *Och-Ziff Capital Management Group LLC*

On September 29, 2016, New York-based hedge fund Och-Ziff Capital Management, along with its wholly-owned subsidiary, entered into a cease-and-desist order with the SEC and a DPA with the DOJ for violating the FCPA's anti-bribery, books and records, and internal control provisions.<sup>56</sup> Och-Ziff agreed to pay more than U.S. \$213 million in a criminal fine as well as approximately U.S. \$199 million in disgorgement and prejudgment interest.<sup>57</sup> Och-Ziff made payments to well-connected third parties who paid bribes to various African government officials in Libya, Niger, Chad, and other nations in exchange for investment opportunities.<sup>58</sup> Separately, Och-Ziff's CEO and CFO entered into agreements with the SEC to settle charges related to their involvement in the schemes.<sup>59</sup>

20. *HMT LLC*

On September 29, 2016, the DOJ wrote a letter of declination to HMT LLC, a Texas-based manufacturer, concerning an investigation into the company's activities in China and Venezuela.<sup>60</sup> The DOJ noted the Department's FCPA pilot program and HMT's timely and voluntary self-disclosure, full cooperation, and remediation, as well as the fact that the company agreed to disgorge over U.S. \$2.7 million in profit from the illegally obtained sales in Venezuela and China.<sup>61</sup>

21. *NCH Corp.*

On September 29, 2016, the DOJ issued a public letter of declination to Texas-based NCH Corp., closing a FCPA investigation into the company for

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55. Press Release, SEC Charges Anheuser-Busch InBev With Violating FCPA and Whistleblower Protection Laws, SEC. & EXCH. COMM., 2016-196, (Sep. 28, 2016), *available at* <https://www.sec.gov/news/pressrelease/2016-196.html>.

56. Press Release, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine, U.S. DEP'T OF JUSTICE, 16-1130 (Sept. 29, 2016), <https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213>.

57. *Id.*

58. *See generally id.*

59. Press Release, Och-Ziff Hedge Fund Settles FCPA Charges, SEC. & EXCH. COMM., 2016-203 (Sept. 29, 2016), <https://www.sec.gov/news/pressrelease/2016-203.html>.

60. Letter from Lorinda Laryea & Daniel Kahn, U.S. Dep't of Justice, to Steven A. Tyrrell, HMT LLC 1 (Sept. 29, 2016), <https://www.justice.gov/criminal-fraud/file/899116/download>.

61. *Id.* at 2.

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making improper payments to Chinese government officials.<sup>62</sup> The DOJ noted the FCPA Pilot Program and NCH Corp.'s timely and voluntary self-disclosure, full cooperation, and remediation, as well as its full disgorgement of profits.<sup>63</sup>

22. *GlaxoSmithKline*

On September 30, 2016, UK-based pharmaceutical company GlaxoSmithKline PLC agreed to pay a twenty million USD civil penalty to the SEC to settle charges that it violated the FCPA's internal controls and recordkeeping provisions.<sup>64</sup> GSK used third parties that ostensibly provided legitimate travel services in order to hide payments to Chinese foreign officials.<sup>65</sup> The payments were recorded in GSK's books and records as legitimate expenses.<sup>66</sup>

23. *Embraer*

On October 24, 2016, Brazilian aircraft manufacturer Embraer S.A. entered into a DPA with the DOJ and settlement with the SEC concerning four transactions in Saudi Arabia, India, Mozambique, and the Dominican Republic.<sup>67</sup> Embraer paid bribes to officials in these countries through the use of a mixture of third-party agents, acquaintances of the government officials, false invoices, and shell companies.<sup>68</sup> Embraer agreed to pay a U.S. \$107 million penalty to the DOJ and more than U.S. \$98 million in disgorgement and interest to the SEC.<sup>69</sup>

24. *J.P. Morgan Chase*

On November 17, J.P. Morgan Chase and its Hong Kong-based subsidiary entered into a NPA with the DOJ and agreed to a cease-and-

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62. Letter from Laura N. Perkins, Rohan A. Virginkar & Daniel Kahn, U.S. Dep't of Justice, to Paul E. Coggins, NCH Corp. 2 (Sept. 29, 2016) <https://www.justice.gov/criminal-fraud/file/899121/download>.

63. *Id.* at 2.

64. In the Matter of GlaxoSmithKline plc, Securities Exchange Act Release No. 34-79005, 115 SEC Docket 2, 3 (Sept. 30, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-79005.pdf>.

65. *Id.*

66. *Id.*

67. See Press Release, Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges, U.S. DEP'T OF JUSTICE, 16-1240 (Oct. 24, 2016), <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>.

68. Deferred Prosecution Agreement at A-4, United States v. Embraer S.A., No. 0:16-cr-60294-JIC (S.D. Fla. 2016), *available at* <https://www.justice.gov/criminal-fraud/file/904636/download>.

69. Press Release, Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges, U.S. DEP'T OF JUSTICE, 16-1240 (Oct. 24, 2016), <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>.

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desist administrative order by the SEC regarding violations of the anti-bribery, books and records, and internal controls provisions of the FCPA.<sup>70</sup> J.P. Morgan created a special hiring program in 2006 that gave preferential treatment to candidates referred by clients, prospective clients, or Chinese government officials in return for over U.S. \$100 million in business.<sup>71</sup> J.P. Morgan agreed to pay more than U.S. \$264 million to settle the charges, including U.S. \$72 million to the DOJ, U.S. \$130 million to the SEC, and nearly U.S. \$62 million to the Federal Reserve Board of Governors.<sup>72</sup>

25. *Odebrecht S.A. and Braskem S.A.*

On December 21, Brazilian-based construction company Odebrecht S.A. and its affiliate Braskem S.A. agreed to a US \$3.5 billion global settlement with authorities in the U.S., Switzerland and Brazil related to bribes paid to government officials spanning three continents.<sup>73</sup> In the US, both Odebrecht and Braskem entered into plea agreements with the DOJ, and Braskem, whose stock is traded on the U.S. markets, entered into a separate agreement with the SEC. The total amount to be paid by both companies to US authorities will be decided at a sentencing hearing in April 2017.

26. *Teva Pharmaceuticals Industries Ltd.*

On December 22, Israeli-based Teva Pharmaceuticals agreed to settle parallel investigations with the DOJ and SEC and pay over US \$519 million in penalties and fines related to bribes made to government officials in Mexico, Russia and Ukraine.<sup>74</sup> The bribes, many of which were concealed a legitimate payments to distributors, were used to increase market share, obtain regulatory and formulary approvals as well as favorable drug purchase and prescription decisions.<sup>75</sup>

27. *General Cable Corporation*

On December 29, General Cable Corp. – Kentucky-based maker of copper, aluminum, and fiber optic wires and cables – agreed to pay US \$75.75 million in penalties and disgorgement to the DOJ and SEC for

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70. See Press Release, JPMorgan's Investment Bank in Hong Kong Agrees to Pay \$72 Million Penalty for Corrupt Hiring Scheme in China, U.S. DEP'T OF JUSTICE, 16-1343 (Nov. 17, 2016), <https://www.justice.gov/opa/pr/jpmorgan-s-investment-bank-hong-kong-agrees-pay-72-million-penalty-corrupt-hiring-scheme>.

71. *Id.*

72. *Id.*

73. See Press Release, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, U.S. DEP'T OF JUSTICE, 16-1515, (Dec. 21, 2016), *available at* <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

74. Press Release, Teva Pharmaceutical Paying \$519 Million to Settle FCPA Charges, SEC. & EXCH. COMM., 2016-277, (Dec. 22, 2016), *available at* <https://www.sec.gov/news/pressrelease/2016-277.html>.

75. *Id.*



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violating the FCPA in Angola, Bangladesh, China, Egypt, Indonesia, and Thailand.<sup>76</sup> The DOJ noted the company's voluntary self-disclosure and full cooperation during the investigation in offering the company a NPA and 50-percent reduction in penalties.<sup>77</sup>

## II. Enforcement Actions Abroad

### A. CASES

#### 1. *Algeria*

On February 2, 2016, German company Contel Funkwerk was banned from bidding for Algerian state contracts for five years<sup>78</sup> for its role in bribing several government employees of state energy firm Sonatrach.<sup>79</sup> The Algerian court also sentenced six employees to jail terms and fined two local companies.<sup>80</sup>

#### 2. *Brazil*

On March 8, 2016, Marcelo Odebrecht, CEO of Grupo Odebrecht SA, was found guilty of corruption and other crimes for his role in paying bribes to Brazilian state company Petrobras officials.<sup>81</sup> He was sentenced to nineteen years in prison.<sup>82</sup>

#### 3. *Czech Republic*

On February 2, 2016,<sup>83</sup> Marek Dalík, a lobbyist and an ex-aide to a former Czech prime minister, was sentenced to five years in prison<sup>84</sup> for his role in a

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76. See Press Release, General Cable Corporation Agrees to Pay \$20 Million Penalty for Foreign Bribery Schemes in Asia and Africa, U.S. DEP'T OF JUSTICE, 16-1536, (Dec. 29, 2016), available at <https://www.justice.gov/opa/pr/general-cable-corporation-agrees-pay-20-million-penalty-foreign-bribery-schemes-asia-and>.

77. *Id.*

78. See Hamid Ould Ahmed, *Algerian Court Jails Six in Oil Firm Corruption Case*, REUTERS (Feb. 2, 2016), <http://www.reuters.com/article/us-algeria-corruption-idUSKCN0VB27W>.

79. *Id.*

80. *Id.*

81. See Pedro Fonseca & Reese Ewing, *Brazil's Marcelo Odebrecht Gets 19-yr Sentence in Corruption Scandal*, REUTERS (Mar. 8, 2016), <http://www.reuters.com/article/brazil-corruption-odebrecht-idUSE6N13S03W>.

82. See Daniel Bland, *Odebrecht to sell off US\$3bn in assets in wake of Lavo Jato*, BNAMERICAS (Apr. 4, 2016), <http://www.bnamericas.com/en/news/infrastructure/odebrecht-to-sell-off-us3bn-in-assets-in-wake-of-lava-jato>.

83. See Eliška Hradilková Bártová, *Suma sumárum, aneb jak Marek Dalík nakupoval a prodával*, PRAVÝ PROSTOR (Mar. 12, 2016), <http://pravyprostor.cz/suma-sumarum-aneb-jak-marek-dalik-nakupoval-a-prodaval/>.

84. See Ruth Franková, *Lobbyist Marek Dalík sentenced to five years in prison over corruption case*, Czech Radio 7, RADIO PRAGUE (Feb. 2, 2016), <http://www.radio.cz/en/article/470211>.

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corruption case involving Austrian company Steyr. Dalik's sentence was later reduced on appeal to four years.<sup>85</sup>

4. *France*

On February 26, 2016, a French appeals court<sup>86</sup> found France-based extraction industry company Total SA guilty of bribing Iraqi officials and fined the company ₪750,000.<sup>87</sup>

5. *Germany*

In April 2016, Chung Eui-sung, a former South Korean naval officer, and a former head of sales at MTU Friedrichshafen's,<sup>88</sup> was given a ten-month suspended jail sentence, and fined ₪30,000.<sup>89</sup> MTU, an arm of Tognum, now largely owned by Rolls-Royce, continues to be under investigation by German authorities,<sup>90</sup> who have already seized ₪12 million in profits MTU earned from South Korean sales obtained through bribery.<sup>91</sup>

6. *Israel*

On May 2, 2016, the Justice Ministry of Israel announced a settlement with Siemens AG.<sup>92</sup> Siemens agreed to pay NIS 160 million (approximately forty-three million USD)<sup>93</sup> and accept a monitor for its operations in the country.<sup>94</sup> Siemens paid bribes to Israel Electric Corporation (IEC) over a six-year period,<sup>95</sup> including to former District Court Judge Dan Cohen,<sup>96</sup> who served on IEC's board.

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85. See *Close Ally of Former Czech Leader Convicted of Fraud*, DAILY MAIL (May 31, 2016), available at <http://www.dailymail.co.uk/wires/ap/article-3618085/Close-ally-former-Czech-leader-convicted-fraud.html>.

86. See Gaspard Sebag, *Total, Vitol fined in Iraq Oil-for-Food Case by French Court*, BLOOMBERG (Feb. 26, 2016), <http://www.bloomberg.com/news/articles/2016-02-26/total-vitol-fined-in-iraq-oil-for-food-case-by-french-court-il3hkh41>.

87. *Id.*

88. See Jung Hwan-bong, *Arrest Warrant on Corruption Charges Sought for Big-name Defense Mogul*, HANKYOREH (July 2, 2015), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/698587.html](http://english.hani.co.kr/arti/english_edition/e_national/698587.html).

89. See Karin Mattusek, *Rolls Royce Unit Mired in German Bribery Probe Over Asian Sales*, BLOOMBERG, (July 29, 2016), <http://www.bloomberg.com/news/articles/2016-07-29/rolls-royce-unit-mired-in-german-bribery-probe-over-asian-sales>.

90. *Id.*

91. *Id.*

92. See Tamar Pileggi, *Ex-power company execs charged in massive Siemens bribery case*, TIMES OF ISRAEL (May 3, 2016), <http://www.timesofisrael.com/ex-power-company-exec-charged-in-massive-siemens-bribery-case/>.

93. *Id.*

94. *Id.*

95. See Soon Weilun, *Israel Electric Corporation accepts S\$33.1m settlement from Siemens*, BUSINESS TIMES (Nov. 16, 2016), <http://www.businesstimes.com.sg/companies-markets/israel-electric-corporation-accepts-s331m-settlement-from-siemens>.

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On November 14, 2016, Nikuv International Projects Global Ltd. became the first company to be indicted<sup>97</sup> under Israel's Bribery of Foreign Public Officials law.<sup>98</sup> NIP settled with the Tel Aviv District Attorney, agreeing to pay a NIS 4.5 million forfeiture and fine, as well as additional penalties for paying in excess of \$500,000 in bribes to officials in Lesotho.<sup>99</sup>

7. *Italy*

On April 7, 2016, an Italian appellate court sentenced former Finmeccanica CEO Giuseppe Orsi to four and one-half years in jail for false accounting and corruption,<sup>100</sup> reversing a 2014 lower court decision acquitting him.<sup>101</sup> Orsi had appealed against the conviction,<sup>102</sup> but the prosecution appealed against the acquittal on the corruption charge.<sup>103</sup> Both charges related to Orsi's role in bribes paid to Indian government officials.<sup>104</sup> Bruno Spagnolini, former CEO of Finmeccanica's helicopter subsidiary AgustaWestland, was also found guilty of both charges and sentenced to four years in prison.<sup>105</sup>

8. *Norway*

On January 7, 2016, Norway's Sovereign Wealth Fund announced the no end-date conduct-based exclusion of Zhongxing Telecommunications Equipment Corporation (ZTE) from the Fund's investment portfolio for "gross corruption."<sup>106</sup>

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96. DC (TA) 4004/09 State of Israel v. Dan Cohen, (2016) (Isr.), *available at* [http://www.isa.gov.il/Download/IsaFile\\_5990.pdf](http://www.isa.gov.il/Download/IsaFile_5990.pdf).

97. See Ela Levy-Weinrib, NIP Global Ltd. has been charged with bribing an official in Lesotho, *GLOBES* (Nov. 14, 2016), <http://www.globes.co.il/en/article-first-israeli-co-prosecuted-for-bribery-overseas-1001161089>.

98. Penal Law 5737-1977, LSI (1978) Special Volume 291A (Isr.) *available at* <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43289694.pdf>.

99. See Levy-Weinrib, *supra* note 91.

100. See Eds., *Finmeccanica's ex-boss jailed for corruption*, *LOCAL.IT* (Apr. 8, 2016), <http://www.thelocal.it/20160408/finmeccanicas-ex-boss-sentenced-to-jail-for-corruption>.

101. See PTI, *Finmeccanica's ex-boss Giuseppe Orsi jailed for graft in Indian chopper deal*, *THE ECONOMIC TIMES* (Apr. 8, 2016) <http://economictimes.indiatimes.com/news/defence/finmeccanicas-ex-boss-giuseppe-orisi-jailed-for-graft-in-indian-chopper-deal/articleshow/51735773.cms>.

102. *Id.*

103. *Id.*

104. See *id.*

105. *Id.*

106. *Observation and Exclusion of Companies*, *NORGES BANK INVESTMENT MANAGEMENT* (last updated Mar. 7, 2017), <https://www.nbim.no/en/responsibility/exclusion-of-companies/>.

9. *South Korea*

On December 13, 2016, Jin Kyung-joon, a former vice-ministerial-level federal prosecutor, who was arrested whilst in office in July 2016<sup>107</sup>, was sentenced to 4 years in prison for his role in a procurement fraud<sup>108</sup>. Jin was convicted of organizing Korean Air to pay in direct over \$12 million in corporate contracts to his brother-in-law<sup>109</sup>. The Korean Air official, Suh Yong-won involved retained his job, but was given a two-year suspended sentence<sup>110</sup>.

10. *United Kingdom*

On February 19, 2016, Sweett Group PLC was sentenced and ordered to pay £1.4m in fine, £851,152.23 in confiscation, and an additional, £95,031.97 in costs<sup>111</sup> as a result of a conviction arising from its activities in the United Arab Emirates.

On May 11, 2016, Peter Chapman, a former manager with Securrency PTY Ltd., was convicted of four counts of making corrupt payments to a Nigerian official to secure business.<sup>112</sup> Chapman was sentenced to 30 months on each count, to be served concurrently.<sup>113</sup>

On July 8, 2016, an unnamed small to medium sized enterprise<sup>114</sup> was granted a DPA<sup>115</sup>, the second approved by the Serious Fraud Office (SFO),<sup>116</sup> relating to the company's employees and agents' involvement in the systematic offering and payment of bribes to foreign officials. As a result of the DPA, the company will pay £6,201,085 disgorgement of gross profits and a £352,000 financial penalty.<sup>117</sup> The company also agreed to provide reports to the SFO every twelve months for the duration of the DPA.

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107. See *Top South Korean Prosecutor Arrested on Charges He Accepted Bribes*, New York Times (July 17, 2016), [https://www.nytimes.com/2016/07/18/world/asia/top-south-korean-prosecutor-arrested-on-charges-that-he-accepted-bribes.html?\\_r=0](https://www.nytimes.com/2016/07/18/world/asia/top-south-korean-prosecutor-arrested-on-charges-that-he-accepted-bribes.html?_r=0)

108. See *Former South Korean Prosecutor Gets 4 Years for Corruption*, The Associated Press (Dec 12, 2016), <http://www.asahi.com/ajw/articles/AJ201612130062.html>

109. *Id.*

110. *Id.*

111. Press Release, *Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction*, SERIOUS FRAUD OFFICE (Feb. 19, 2016), <https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>.

112. Press Release, *Former Securrency Manager Convicted of Corruption*, SERIOUS FRAUD OFFICE (May 11, 2016), <https://www.sfo.gov.uk/2016/05/11/former-securrency-manager-convicted-corruption/>.

113. Press Release, *Former Securrency Manager Convicted of Corruption*, SERIOUS FRAUD OFFICE (May 12, 2016), <https://www.sfo.gov.uk/2016/05/12/former-securrency-manager-sentenced-corruption/>.

114. *Serious Fraud Office v. XYZ Ltd.* [2016] Lloyd's Rep. FC Plus 371 (QB) (UK), *available at* <https://www.sfo.gov.uk/download/xyz-preliminary-redacted/?wpdmdl=13249>.

115. Press Release, *SFO Secures Second DPA*, SERIOUS FRAUD OFFICE (July 8, 2016), <https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>.

116. *Id.*

117. *Id.*

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B. ANTI-CORRUPTION LEGISLATION AND INITIATIVES

1. *Colombia*

On February 2, 2016, Colombia passed Law 1778,<sup>118</sup> enacting an anti-bribery law that includes a broad definition of public officials,<sup>119</sup> creates corporate liability for Colombian companies and their foreign subsidiaries,<sup>120</sup> sets forth strict penalties,<sup>121</sup> and provides for potential reductions in penalties for evidencing a compliance program,<sup>122</sup> diligence,<sup>123</sup> and for cooperation.<sup>124</sup>

2. *France*

On November 8, 2016, France adopted Sapin II,<sup>125</sup> new anti-corruption legislation.<sup>126</sup> It bans influence trafficking;<sup>127</sup> creates a registry of lobbyists; forms a new enforcement department, the National Agency to Combat Corruption, tasked with the detection and prevention of corruption;<sup>128</sup> and makes corruptly influencing a foreign public official a criminal offence.<sup>129</sup> The bill also sets forth obligations for certain companies to implement corruption prevention plans,<sup>130</sup> expands extraterritorial reach, raises maximum fines for violations,<sup>131</sup> and creates a new system whereby Deferred Prosecution Agreements (DPAs) will be allowed.<sup>132</sup>

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118. L. 1778, febrero 2, 2016, DIARIO OFICIAL [D.O.] (Colom.), available at [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_1778\\_2016.html](http://www.secretariassenado.gov.co/senado/basedoc/ley_1778_2016.html), translated in <https://www.global-regulation.com/translation/colombia/6405379/by-establishing-rules-on-liability-of-legal-persons-they-are-dictated-by-acts-of-transnational-corruption-and-other-provisions-in-the-fight-against-co.html?q=bribery>.

119. *Id.* at ch.1, art. 2, ¶ 1.

120. *Id.* ch. 1, art. 2, ¶ 2.

121. Up to twenty years sanction, prohibiting them from doing business with the State. *See id.* at ch. 2, art. 5, ¶ 2.

122. *Id.* at ch. 2, art. 7, ¶ 7-8.

123. *Id.* at ch. 2, art. 7, ¶ 9.

124. *Id.* at ch. 2, art. 7, ¶ 6, 10.

125. The requirement of companies to implement an anti-corruption compliance and training program will go into effect June 1, 2017. Loi 2016-1691 du 10 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of December 10, 2016 on Transparency, the Fight Against Corruption, and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016, available at [https://www.legifrance.gouv.fr/jo\\_pdf.do?id=JORFTEXT000033558528](https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000033558528).

126. The requirement of companies to implement an anti-corruption compliance and training program will go into effect May 2017.

127. *Id.* at art. 18 § I.

128. *Id.* at art. 1.

129. *Id.* at art. 25, § I.

130. *Id.* at art. 17, § II, ¶ 1.

131. *Id.* at art. 22.

132. *Id.*

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3. *Germany*

On June 4, 2016, Germany affected a new law<sup>133</sup> aimed at combating bribery and corruption in the healthcare sector, broadly defining “healthcare provider,” and making it a criminal offence<sup>134</sup> to give or receive bribes in the healthcare sector.

4. *Greenland*

On June 6, Greenland passed Parliament Act No. Fifteen on Sport and Exercise.<sup>135</sup> The new Act includes provisions requiring sports organizations and sports clubs to ensure that they and their athletes do not engage in match-fixing or other similar types of manipulations of outcomes<sup>136</sup> and prohibiting bribery by anyone involved in or carrying out missions associated with any nationwide or international competitions.<sup>137</sup>

5. *India*

The Supreme Court of India made two important rulings<sup>138</sup> related to the prosecution of Indian civil servants involved in the taking of bribes.<sup>139</sup> The Court considered whether public servants continue to have protection from prosecution<sup>140</sup> if they remain public servants but have left the office under which they took a bribe. The court affirmed that protection is lost, and also upheld the requirement<sup>141</sup> that further investigation and prosecution of public servants necessitates advance approval<sup>142</sup> from the court.

6. *Mexico*

On July 18, 2016, the President of Mexico signed into law a sweeping set of new laws and amendments to its constitution under the banner of the

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133. Gesetz zur Bekämpfung von Korruption im Gesundheitswesen [KorrBekGG] [Law on Combatting Corruption in Healthcare] May 13, 2016, BUNDESGESETZBLATT, Teil I [BGBL I] at 1254 (Ger.), available at [http://www.bundesrat.de/SharedDocs/drucksachen/2016/0101-0200/181-16\(B\).pdf?\\_\\_blob=publicationFile&v=1](http://www.bundesrat.de/SharedDocs/drucksachen/2016/0101-0200/181-16(B).pdf?__blob=publicationFile&v=1).

134. *Id.* at ¶ 2.

135. Inatsisartutlov nr. 15 af 6. juni 2016 om idræt og motion [Parliament Act No. 15 of 6 June 2016 on Sport and Exercise] June 6, 2016 (Green.), available at [http://lovgivning.gl/lov?rid{96DE056F-619E-4865-A341-41D5A80E5556}](http://lovgivning.gl/lov?rid{96DE056F-619E-4865-A341-41D5A80E5556}, translated in https://www.global-regulation.com/translation/greenland/5961242/parliament-act-no.-15-of-6-june-2016-on-sport-and-exercise.html?q=bribery), translated in <https://www.global-regulation.com/translation/greenland/5961242/parliament-act-no.-15-of-6-june-2016-on-sport-and-exercise.html?q=bribery>.

136. *Id.* at ch. 2, § 5.

137. *Id.* at ch. 2, § 6, ¶ 1-2.

138. L Narayana Swamy v. State of Karnataka, (2016) 2016(8) SCALE 560 (India), available at <https://indiankanoon.org/doc/187807399/>.

139. Prevention of Corruption Act, No. 49 of 1988, INDIA CODE (1988), vol. 4, available at <https://indiankanoon.org/doc/1331755/>.

140. *Id.* at § 19(1).

141. Code of Criminal Procedure, No. 2 of 1974, CODE CRIM. PROC. (1974), at para. 173(2) (India); L Narayana Swamy v. State of Karnataka, (2016) 2016(8) SCALE 560, at ¶ 25 (India).

142. *Id.* at ¶ 157(1).

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National Anti-Corruption System (SNA).<sup>143</sup> The newest set of rules<sup>144</sup> establishes an enforcement scheme;<sup>145</sup> creates a means to impose sanctions upon public servants, as well as individuals and companies who violate anti-bribery laws;<sup>146</sup> creates a national public registry of all parties and public officials banned from participating in government contracting processes;<sup>147</sup> requires public officials to disclose (a) existing assets, (b) potential conflicts of interest, and (c) tax returns;<sup>148</sup> and creates defense options for companies under adequate procedures, self-reporting, and cooperation.<sup>149</sup>

7. *South Korea*

On September 28, 2016, South Korea's Improper Solicitation and Graft Act<sup>150</sup> went into effect. In addition to increased penalties,<sup>151</sup> the Act broadly defines "public institutions" and "public officials" (which includes teachers<sup>152</sup> and their spouses<sup>153</sup> as well as journalists<sup>154</sup>) and imposes severe value restrictions on the receipt of "advantages,"<sup>155</sup> including the gifts and meals they may receive.<sup>156</sup>

8. *Slovakia*

In alignment with the EU public procurement rules,<sup>157</sup> and as part of the country's anti-corruption efforts under a law passed April 15, 2016,<sup>158</sup> on

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143. Ley General del Sistema Nacional Anticorrupción de México [SNA], Diario Oficial de la Federación [DOF] 18-7-2016 (Mex.), *available at* [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5445048&fecha=18/07/2016](http://www.dof.gob.mx/nota_detalle.php?codigo=5445048&fecha=18/07/2016).

144. *Id.*

145. *Id.* at tit. 2.

146. *Id.* at tit. 1, ch. I, art. 2(III).

147. *Id.* at tit. 4, art. 53.

148. *Id.* at tit. 3, ch. 1, art. 49.

149. Broadly defined throughout the legislation. *See, e.g., id.* at tit.2, ch. 1, art. 21.

150. Improper Solicitation and Graft Act, Act No. 13278, Mar. 27, 2015 (S. Kor.), *available at* <http://law.go.kr/engLsSc.do?menuId=0&subMenu=5&query=%EB%B6%80%EC%A0%95%EC%B2%AD%ED%83%81#liBgcolor0>.

151. *Id.* at ch. 5, art. 22-23.

152. *Id.* at ch. 1, art. 2, ¶ 2(c).

153. *Id.* at ch. 3, art. 8, ¶ 3.

154. *Id.* at ch. 1, art. 2, ¶ 2(d).

155. *Id.* at ch. 1, art. 2, ¶ 3(a-c).

156. KRW 30,000 (± USD 27) for each meal; KRW 50,000 for gifts; KRW 100,000 cash gifts. *Id.* at ch. 3, art. 8, ¶ 1.

157. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the Award of Concession Contracts, 2014 O.J. (L94) 1; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, 2014 O.J. (L 94) 65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on Procurement by Entities Operating in the Water, Energy, Transport, and Postal Services Sectors and Repealing Directive 2004/17/EC, 2014 O.J. (L 94) 243.

158. *See Law Against Shell Companies is Empty*, THE SLOVAK SPECTATOR (Apr. 15, 2015), <http://spectator.sme.sk/c/20056920/dennik-n-law-against-shell-companies-is-empty.html>.

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October 26, 2016, Slovakia announced that it had begun banning companies with undisclosed ownership from bidding on projects or conducting business with the state.<sup>159</sup>

9. *Switzerland*

On September 15, 2016, Swiss authorities announced the launch of a new web-based platform [www.fightingcorruption.ch](http://www.fightingcorruption.ch) that will enable anyone with information on possible acts of corruption to report their suspicions anonymously to Swiss law enforcement.<sup>160</sup>

10. *Thailand*

On October 4, 2016, Thailand announced the establishment of its first anti-corruption court.<sup>161</sup> The Thai Legislative Assembly unanimously approved the formation of the court June 17, 2016.<sup>162</sup>

### III. Treaties and International Organizations

#### A. TREATIES

##### 1. *Council of Europe's Criminal Law Convention on Corruption*

###### a. New Members

In August, San Marino ratified the Criminal Law Convention on Corruption and its Additional Protocol.<sup>163</sup>

###### b. Reports & Announcements

In June 2016, the Group of States Against Corruption (GRECO) issued its Sixteenth General Activity Report<sup>164</sup> concerning eliminating corruption among parliamentarians, judges, and prosecutors, which included “an

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159. See Tatiana Jancarikova, *Slovakia Steps Up Anti-Corruption Drive*, REUTERS (Oct. 26, 2016), available at <http://www.reuters.com/article/us-slovakia-corruption-idUSKCN12Q2BI>.

160. *New Anti-Corruption Reporting Platform*, FED. OFFICE OF POLICE (Sept. 15, 2016), <https://www.fedpol.admin.ch/fedpol/en/home/aktuell/news/2015/2015-09-15.html>.

161. Establishment of Criminal Court of Corruption and Malfeasance Cases 2559, GOV'T GAZETTE 133 71 A (Aug. 16, 2016) (Thai.), available at [http://acoc.ops.moc.go.th/ewt\\_dl\\_link.php?nid=106&filename=index](http://acoc.ops.moc.go.th/ewt_dl_link.php?nid=106&filename=index).

162. See Thai PBS, *NLA Approves Bill to Create Criminal Court to Deal Exclusively with Corruption Cases*, PATTAYA MAIL (June 17, 2016), <http://www.pattayamail.com/thailandnews/nla-approves-bill-create-criminal-court-deal-exclusively-corruption-cases-139656>.

163. San Marino ratified the Criminal Law Convention on Corruption (ETS No. 173), and the Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191), COUNCIL OF EUROPE (Aug. 30, 2016), <http://www.coe.int/en/web/human-rights-rule-of-law/-/san-marino-ratified-the-criminal-law-convention-on-corruption-ets-no-173-and-the-additional-protocol-to-the-criminal-law-convention-on-corruption-ets->.

164. GROUP OF STATES AGAINST CORRUPTION (GRECO), 16TH GENERAL ACTIVITY REPORT (2015), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cb949>.



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overview of the impact of its recommendations concerning the legislation, practices[,] and institutional framework in the states it evaluated in 2015.”<sup>165</sup>

GRECO also announced that the theme of its Fifth Evaluation Round would be “the prevention of corruption and the promotion of integrity in central governments . . . and law enforcement agencies.”<sup>166</sup>

2. *Organization for Economic Co-Operation and Development (OECD)*  
*Anti-Bribery Convention*

a. Reports & Announcements

In October 2016, the OECD announced a collaborative effort with the African Development Bank (“AfDB”).<sup>167</sup> The OECD-AfDB Joint Initiative to Support Business Integrity and Anti-Bribery Efforts in Africa developed the “Anti-Bribery Policy and Compliance Guidance for African Companies,” which aims to provide “practical, concise” guidance on bribery prevention to African companies.<sup>168</sup>

In November 2016, the OECD Working Group on Bribery published its report<sup>169</sup> on enforcement data spanning 1999 to December 2015.<sup>170</sup> The findings revealed that since 1999, “397 individuals and 133 entities have been sanctioned in criminal proceedings for foreign bribery in [seventeen] Parties.”<sup>171</sup> Of the individuals, at least 115 were sentenced to prison.<sup>172</sup>

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165. *GRECO’s Annual Report: Progress Needed in Preventing Corruption in Respect of MP’s, Judges, and Prosecutors*, COUNCIL OF EUROPE (June 1, 2016), <https://www.coe.int/en/web/human-rights-rule-of-law/-/greco-s-annual-report-progress-needed-in-preventing-corruption-in-respect-of-mp-s-judges-and-prosecutors>.

166. *Council of Europe’s Anti-Corruption Body GRECO to Monitor Prevention of Corruption in Respect of Top Government Officials and Law Enforcement*, COUNCIL OF EUROPE (Oct. 24, 2016), <https://www.coe.int/en/web/human-rights-rule-of-law/-/prevention-of-corruption-in-respect-of-top-government-officials-and-law-enforcement>.

167. *OECD and AfDB Launch Powerful Tool to Help African Companies Prevent Bribery*, OECD (Oct. 28, 2016), <http://www.oecd.org/corruption/oecd-and-afdb-launch-powerful-tool-to-help-african-companies-prevent-bribery.htm>.

168. *Id.*

169. *OECD WORKING GROUP ON BRIBERY, 2015 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION* (2016), <http://www.oecd.org/daf/anti-bribery/WGB-Enforcement-Data-2015.pdf>.

170. *Data on Enforcement of the Anti-Bribery Convention*, OECD (Nov. 22, 2016), <http://www.oecd.org/corruption/anti-bribery/data-on-enforcement-of-the-anti-bribery-convention.htm>.

171. *Id.*

172. *Id.*

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3. *United Nations Convention Against Corruption (UNCAC)*

a. New Members

In September 2016, Bhutan ratified the Convention and the Holy See acceded to it, bringing the number of State Parties to 180.<sup>173</sup>

b. Reports & Announcements

In July 2016, the UNCAC Implementation Review Group issued its report on the Seventh session, held in Vienna on June 20-24, 2016.<sup>174</sup> The reviews' outcomes include (1) that challenges were most often related to the (a) "prosecution, adjudication, and sanctioning of corruption-related offenses"; (b) "freezing, seizure, and confiscation of assets"; and (c) "bribery of national public officials";<sup>175</sup> (2) the ongoing need for skill-development and training for judges, the legal profession, and law enforcement;<sup>176</sup> and (3) the critical role of capacity-building with respect to international cooperation and asset recovery.<sup>177</sup>

B. INTERNATIONAL ORGANIZATIONS

1. *African Development Bank (AfDB)*

In November, the AfDB announced the establishment of the Africa Integrity Fund (AIF), a Fund that will provide grant funding to public entities such as law enforcement agencies, public audit institutions, and tax authorities, as well as civil society organizations and educational institutions.<sup>178</sup>

The Fund is financed with penalties collected from the settlement of investigations conducted by the Bank's Integrity and Anti-Corruption Department (IACD).<sup>179</sup>

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173. *United Nations Convention Against Corruption Signature and Ratification Status as of 12 December 2016*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (Dec. 12, 2016), <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

174. CONFERENCE OF THE STATES PARTIES TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: IMPLEMENTATION REVIEW GROUP, REPORT OF THE IMPLEMENTATION REVIEW GROUP ON ITS SEVENTH SESSION, HELD IN VIENNA FROM 20 TO 24 JUNE 2016 (2016), <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/20-24June2016/V1604450e.pdf>.

175. *Id.* at ¶ 47.

176. *Id.* at ¶ 50.

177. *Id.* at ¶ 57.

178. *AfDB Establishes Africa Integrity Fund*, AFRICAN DEV. BANK GROUP (Nov. 10, 2016), <http://www.afdb.org/en/news-and-events/article/afdb-establishes-africa-integrity-fund-16359/>.

179. *Id.*

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2. *Asian Development Bank (ADB)*

The 2015 Annual Report<sup>180</sup> released by the ADB's Office of Anticorruption and Integrity (OAI) in March revealed that it sanctioned ninety entities for integrity violations and cross-debarred 106 entities.<sup>181</sup>

In July, the ADB announced plans to update its Anticorruption Policy in an effort to address "tax integrity issues" that have arisen as a consequence of recent global developments.<sup>182</sup>

3. *World Bank Group*

According to the Annual Update for FY 2016 issued by the independent Integrity Vice Presidency (INT), the World Bank Group's investigations included forty-three substantiated projects, involving 124 contracts amounting to \$633 million.<sup>183</sup> In addition to sanctioning fifty-eight entities and entering eighteen Negotiated Resolution Agreements, the World Bank Group saw an uptick in compliance efforts through the lifting of debarment for a record twenty companies.<sup>184</sup>

#### IV. Civil Society Efforts

A. TRANSPARENCY INTERNATIONAL (TI)

In January, TI released its annual Corruption Perceptions Index (CPI).<sup>185</sup> The CPI is compiled on the basis of global expert opinions of perceived levels of corruption in the public sector in one hundred sixty-eight countries.<sup>186</sup> No country assessed achieved a perfect score on TI's zero (very corrupt) to 100 (highly clean) scale.<sup>187</sup> Findings indicate that over six billion people worldwide live in a nation with a serious corruption problem.<sup>188</sup> Denmark ranked at the top of the Index for the fourth year running,

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180. OAI INTEGRITY 2015 ANNUAL REPORT, ASIAN DEV. BANK: OFFICE OF ANTI-CORRUPTION AND INTEGRITY (2016), <https://www.adb.org/sites/default/files/institutional-document/181639/oai-annual-rpt-2015.pdf>.

181. *ADB Sanctioned 90 Entities for Integrity Violations in 2015*, ASIAN DEV. BANK (Mar. 16, 2016), <https://www.adb.org/news/adb-sanctioned-90-entities-integrity-violations-2015-oai>.

182. *ADB Updates Policy in Wake of Global Tax Developments*, ASIAN DEV. BANK (July 7, 2016), <https://www.adb.org/news/adb-updates-policy-wake-global-tax-developments>.

183. ANNUAL UPDATE FISCAL YEAR 2016, WORLD BANK GROUP: INTEGRITY VICE PRESIDENCY 4 (2016), <http://pubdocs.worldbank.org/en/118471475857477799/INT-FY16-Annual-Update-web.pdf>.

184. *Id.* at 4–5.

185. 2015 CORRUPTION PERCEPTIONS INDEX, TRANSPARENCY INT'L (2015), [https://issuu.com/transparencyinternational/docs/2015\\_corruptionperceptionsindex\\_rep?e=2496456/33011041](https://issuu.com/transparencyinternational/docs/2015_corruptionperceptionsindex_rep?e=2496456/33011041).

186. *Id.* at 3.

187. *Id.*

188. *Id.*

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followed by Finland.<sup>189</sup> North Korea and Somalia were ranked at the bottom.<sup>190</sup>

The TI Transparency in Corporate Reporting: Assessing Emerging Market Multinationals<sup>191</sup> analyzed the disclosure practices of 100 major emerging market multinational companies.<sup>192</sup> Entities evaluated were headquartered in fifteen and active in nearly 200 countries.<sup>193</sup> The report found that those reviewed were not meeting the corporate transparency standards expected of companies operating internationally.<sup>194</sup> Country-by-country reporting remains an area of weakness.<sup>195</sup> Tax disclosure is also a deficiency.<sup>196</sup> Seventy-two percent of emerging market companies evaluated failed to disclose to citizens any information about tax payments in foreign countries.<sup>197</sup>

**B. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI)**

As of 2016, fifty-one countries have implemented the EITI standard, promoting transparency in the governance of oil, gas, and mineral resources.<sup>198</sup> Participating countries disclose information on taxes, licenses, contracts, and other payments.<sup>199</sup>

The EITI standard was revised in 2016 in three significant ways.<sup>200</sup> The 2016 standard requires beneficial ownership reporting,<sup>201</sup> encourages mainstreamed reporting,<sup>202</sup> and introduces quality assurance by way of EITI's new Validation system.<sup>203</sup>

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189. *Id.* at 4.

190. *Id.* at 5.

191. TRANSPARENCY IN CORPORATE REPORTING: ASSESSING EMERGING MARKET MULTINATIONALS, TRANSPARENCY INT'L (2016), [https://issuu.com/transparencyinternational/docs/2016\\_transparencyincorporatereporti?e=2496456/37122985](https://issuu.com/transparencyinternational/docs/2016_transparencyincorporatereporti?e=2496456/37122985).

192. *Id.* at 6.

193. *Id.*

194. *Id.* at 7-8.

195. *Id.* at 8.

196. *Id.* at 5.

197. *Id.*

198. EITI FACT SHEET 2016, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (EITI) (Oct. 31, 2016), [https://eiti.org/sites/default/files/documents/eiti\\_factsheet\\_en.pdf](https://eiti.org/sites/default/files/documents/eiti_factsheet_en.pdf).

199. *Id.*

200. Jonas Moburg, *The EITI 2016 Standard is Different – the EITI In a Minute and Recent Focus*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE (EITI) (Nov. 11, 2016), [https://eiti.org/node/8135?utm\\_source=EITI+Newsletter&utm\\_campaign=a261ffebe0-EITI\\_Newsletter\\_November\\_2016&utm\\_medium=email&utm\\_term=0\\_6aa20b6ee3-a261ffebe0-65321285](https://eiti.org/node/8135?utm_source=EITI+Newsletter&utm_campaign=a261ffebe0-EITI_Newsletter_November_2016&utm_medium=email&utm_term=0_6aa20b6ee3-a261ffebe0-65321285).

201. *Id.*

202. *Id.*

203. *Id.*

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According to the 2016 EITI Fact Sheet, thirty-one total countries are currently compliant with the EITI requirements.<sup>204</sup> Twenty “candidate” countries also have pledged to adhere to the EITI standard.<sup>205</sup>

C. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO)

In October, ISO published ISO 37001 anti-bribery management systems standard, the first such global standard.<sup>206</sup> The requirements standard is designed to help organizations design, implement, and improve an anti-bribery management system.<sup>207</sup>

Fifty-six countries and seven liaison organizations participated in drafting the standard.<sup>208</sup>

Organizations will be able to seek third party certification.<sup>209</sup> Auditor competency is governed by ISO 37001-specific standards.<sup>210</sup>

D. WORLD JUSTICE PROJECT

The World Justice Project (WJP) released its sixth annual Rule of Law Index.<sup>211</sup> The 2016 Index ranks the rule of law in 113 countries, based on more than 110,000 resident and legal expert surveys.<sup>212</sup> Each country is scored and ranked regionally and globally, using forty-seven indicators across nine categories.<sup>213</sup>

This year, Denmark, Norway, and Finland achieved the top rankings.<sup>214</sup> The lowest three rankings were occupied by Afghanistan, Cambodia, and Venezuela.<sup>215</sup>

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204. *Id.*

205. *Id.*

206. Samuel Rubinfeld, *Anti-Bribery Compliance Gets Global Standard*, WALL STREET J. (Oct. 21, 2016), <http://blogs.wsj.com/riskandcompliance/2016/10/21/anti-bribery-compliance-gets-global-standard/>.

207. *ISO 37001 – Anti-Bribery Management Systems*, INT’L ORGANIZATION FOR STANDARDIZATION (ISO) (Oct. 31, 2016), <http://www.iso.org/iso/home/standards/management-standards/iso37001.htm>.

208. THE CENTER FOR RESPONSIBLE ENTERPRISE AND TRADE (CREATE), TOP 10 TAKEAWAYS OF THE NEW ISO 37001 ANTI-BRIBERY MANAGEMENT SYSTEMS STANDARD 8 (2016) (ebook), *available at* <https://create.org/resource/top-10-takeaways-new-iso-37001-anti-bribery-management-systems-standard/>.

209. *Id.* at 14.

210. *Id.*

211. WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT: RULE OF LAW INDEX 2016, [http://worldjusticeproject.org/sites/default/files/media/wjp\\_rule\\_of\\_law\\_index\\_2016.pdf](http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf).

212. *Id.* at 4.

213. *Id.* at 10–13.

214. *Id.* at 5.

215. *Id.*

## **Anti-Money Laundering and Counter-Terrorist Finance**

POUYAN BOHLOUL, GABRIELA CHAMBI, SANDRA FADEL, NICOLE S. HEALY, EUNJUNG PARK, AND CHRISTINA ROBERTSON\*

### **I. Introduction**

This past year, anti-money laundering (AML) and counter-terrorist financing (CTF) regimes have been challenged to keep pace with technology and increasingly sophisticated global money laundering networks. Virtual currencies (VC) continue to evolve and authorities worldwide struggle with how to regulate and police these payment technologies. Efforts at VC legislation generally focus on protecting the integrity of the financial system, but regulators are also increasingly sensitive to the potential social benefits of the underlying technology.

#### **A. RECENT DEVELOPMENTS IN VIRTUAL CURRENCY**

##### **1. *Virtual Currency Overview***

“Virtual currency (VC) is a digital representation of value” that can be traded online and functions as a medium of exchange, a unit of account, or a means to store value.<sup>1</sup> VC is global and operates outside traditional financial systems. VC “is not issued or guaranteed by any jurisdiction” but rather derives value from community members.

VC is a general term that represents a broad array of quickly evolving technologies that vary in degree of sophistication. Bitcoin is the most popular VC and represents a subclass of VC, cryptocurrency. There are currently over 700 different cryptocurrencies in operation; the market cap of

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\* Pouyan Bohloul, Esq., is a regular contributor to The World Bank Group’s Doing Business Project. He received his J.D. from Florida State University College of Law and is licensed to practice law in Iran. Gabriela Chambi, JD candidate 2017, and Sandra Fadel, JD candidate 2017, attend American University Washington College of Law. Nicole S. Healy is a partner at Ropers Majeski Kohn & Bentley, P.C., in Redwood City, California, where her practice focuses on litigation including business disputes, securities violations, and shareholder litigation. Eunjung Park is an Associate in Anti Money Laundering Compliance at Societe Generale. Ms. Park received her law degree from American University, Washington College of Law in 2009, and previously worked for the African Development Bank Christina Robertson is a compliance attorney in Kansas City, Missouri.

1. See FIN. ACTION TASK FORCE, VIRTUAL CURRENCIES: KEY DEFINITIONS AND POTENTIAL AML/CFT RISKS 4 (2014), <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf>.

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the twenty-five largest cryptocurrencies exceeds twelve billion dollars.<sup>2</sup> Though cryptocurrencies have struggled to gain widespread acceptance as a daily payment method to purchase goods or services, adoption rates continue to rise.<sup>3</sup>

Cryptocurrencies allow anyone with computer access to efficiently obtain funding or make payments worldwide. The VCs pose considerable risk as potential vehicles for money laundering and terrorist financing because they are anonymous or pseudo-anonymous and mostly unregulated.

A flurry of ransomware attacks this year brought attention to Bitcoin as a means to facilitate and mask criminal activity.<sup>4</sup> In a typical ransomware attack, an individual or organization's computer or software is compromised by cybercriminals who then encrypt and hold that encrypted data hostage. Bitcoin is the preferred method of payment for ransomware attacks because funds can be sent or received from anywhere and are challenging to trace.<sup>5</sup>

The risk to AML and CTF efforts posed by VCs will continue to grow as the technology matures. The current blockchain technology that supports Bitcoin makes tracing a transaction challenging but not impossible.<sup>6</sup> But Zero-proof is a next generation technology that removes all identifying information from a payment, and thus renders the transaction untraceable.<sup>7</sup> Zcash, the first cryptocurrency to utilize this technology, promotes on its website "total payment confidentiality."<sup>8</sup>

## 2. *Criminal Prosecution*

Three U.S. cases from 2016 highlight the challenges of prosecuting AML cases that involve VC. The first case demonstrates that AML regulation of VC requires complex and multi-jurisdictional cooperation; seventeen countries and numerous domestic and foreign agencies and intelligence units

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2. See *CryptoCurrency Market Capitalizations*, COINMARKETCAP, <https://coinmarketcap.com> (last updated Mar. 12, 2017, 6:20 PM).

3. See DONG HE ET AL., *VIRTUAL CURRENCIES AND BEYOND: INITIAL CONSIDERATIONS 17* (2016), <https://www.imf.org/external/pubs/ft/sdn/2016/sdn1603.pdf>; see also RYAN FARELL, *AN ANALYSIS OF THE CRYPTOCURRENCY INDUSTRY 14* (Univ. of Pa. ScholarlyCommons, 2015), [http://repository.upenn.edu/wharton\\_research\\_scholars/130](http://repository.upenn.edu/wharton_research_scholars/130).

4. See Robert McMillan, *In the Bitcoin Era, Ransomware Attacks Surge*, WALL ST. J., <https://www.wsj.com/articles/in-the-bitcoin-era-ransomware-attacks-surge-1471616632?mg=id-wsj> (last updated Aug. 19, 2016, 11:59 PM).

5. *Id.*

6. See Steven Norton, *CIO Explainer: What is Blockchain?*, WALL ST. J. (Feb. 2, 2016, 12:49 AM), <http://blogs.wsj.com/cio/2016/02/02/cio-explainer-what-is-blockchain/>.

7. See Joseph Mari, *When Blockchain, Cryptocurrencies, and AML Meet*, BANKING EXCHANGE (Nov. 7, 2016, 17:36), <http://www.bankingexchange.com/news-feed/item/6547-when-blockchain-cryptocurrencies-and-aml-meet?Itemid=637>.

8. See Press Release, Maureen Walsh, Zcash Launches at the First Open, Permissionless Fin. Sys. Employing Zero-Knowledge Sec. (Oct. 28, 2016), <https://z.cash/support/zcash-sprout-launch.html>.

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contributed to the *Liberty Reserve* investigation.<sup>9</sup> *State v. Espinoza and Coin.mx* illustrate the importance of modernizing AML statutes to include technology-based money laundering tools and the need for a coordinated approach to VC regulation.<sup>10</sup>

In May 2016, the U.S. District Court for the Southern District of New York sentenced Arthur Budovsky, the founder of Liberty Reserve, a digital currency company, to twenty years in prison for running an extensive VC-based money laundering operation.<sup>11</sup> Budovsky pled guilty to one count of conspiring to commit money laundering in January 2016.<sup>12</sup> Liberty Reserve laundered more than \$250 million since its inception by converting criminal proceeds into its branded VC, Liberty Dollars (LR), processing the transactions, and then converting the VC into cash.<sup>13</sup> The Liberty Dollar was a predecessor to Bitcoin. Liberty Reserve employed insufficient and ineffective AML controls and failed to validate user identities.<sup>14</sup> Customers would make deposits and withdrawals through third-party currency exchangers located in various third-party countries, including Malaysia, Nigeria, and Russia.<sup>15</sup> As a result, account holders exchanged LR in nearly untraceable transactions. Assistant Attorney General Leslie R. Caldwell stated that Budovsky's twenty-year sentence demonstrates that "money laundering through the use of virtual currencies is still money laundering, and that online crime is still crime."<sup>16</sup>

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9. See *Founder of Liberty Reserve Pleads Guilty to Laundering More Than \$250 Million through His Digital Currency Business*, THE UNITED STATES DEPARTMENT OF JUSTICE (Jan. 29, 2016), <https://www.justice.gov/opa/pr/founder-liberty-reserve-pleads-guilty-laundering-more-250-million-through-his-digital>.

10. Jeffrey K. Berns, *Recent VC Ruling Emphasizes Why Congress Needs to Act Promptly to Pass VC Legislation*, BERSWEISS LLP (Sept. 21, 2016, 2:13 PM), <https://www.law111.com/recent-vc-ruling-emphasizes-why-congress-needs-to-act-promptly-to-pass-vc-legislation>.

11. See *id.*; *Liberty Reserve Founder Arthur Budovsky Sentenced in Manhattan Federal Court to 20 Years for Laundering Hundreds of Millions of Dollars Through His Global Digital Currency Business*, U.S. DEPARTMENT OF JUST. (May 6, 2016), <https://www.justice.gov/usao-sdny/pr/liberty-reserve-founder-arthur-budovsky-sentenced-manhattan-federal-court-20-years>.

12. See *Founder of Liberty Reserve Pleads Guilty to Laundering More Than \$250 Million Through His Digital Currency Business*, *supra* note 9; see also *Liberty Reserve Founder Arthur Budovsky Sentenced in Manhattan Federal Court to 20 Years for Laundering Hundreds of Millions of Dollars Through His Global Digital Currency Business*, *supra* note 11.

13. See *Founder of Liberty Reserve Pleads Guilty to Laundering More Than \$250 Million Through His Digital Currency Business*, *supra* note 9; see also *Liberty Reserve Founder Arthur Budovsky Sentenced in Manhattan Federal Court to 20 Years for Laundering Hundreds of Millions of Dollars Through His Global Digital Currency Business*, *supra* note 11.

14. *Liberty Reserve Founder Arthur Budovsky Sentenced in Manhattan Federal Court to 20 Years for Laundering Hundreds of Millions of Dollars Through His Global Digital Currency Business*, *supra* note 11.

15. Alan Brill & Lonnie Keene, *Cryptocurrencies: The Next Generation of Terrorist Financing?*, 6 DEF. AGAINST TERRORISM REV. 7, 7-30 (2014).

16. *Liberty Reserve Founder Arthur Budovsky Sentenced in Manhattan Federal Court to 20 Years for Laundering Hundreds of Millions of Dollars Through His Global Digital Currency Business*, *supra* note 11.



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On the other hand, in *State v. Espinoza*, Miami-Dade County Circuit Court Judge Teresa Pooler dismissed felony anti-money laundering charges against a website developer stating that Bitcoins are not a “monetary instrument” or “payment instrument” as defined by statute and that “money transmission” does not include the sale of Bitcoin.<sup>17</sup> The judge further noted that “virtual currency” is not included as a category within the statutory definition of “monetary instrument” and that Bitcoin does not fall within any of the existing categories.<sup>18</sup>

The defendant sold Bitcoins to an undercover agent who claimed that he would use the bitcoins to buy stolen credit cards.<sup>19</sup> Judge Pooler stated that “[n]othing in our frame of reference allows us to accurately define or describe Bitcoin.”<sup>20</sup> In her analysis, Judge Pooler referenced the Internal Revenue’s classification of virtual currency as property before concluding that “Bitcoin has a long way to go before it is the equivalent of money.”<sup>21</sup>

Shortly thereafter, a federal judge in New York ruled in *Coin.mx* that Bitcoins “function as pecuniary resources and . . . means of payment.”<sup>22</sup> In July 2015, Anthony Murgio was arrested for operating an illegal online Bitcoin exchange called *Coin.mx* and charged with violating federal anti-money laundering laws.<sup>23</sup> Investigators believe Murgio knowingly facilitated payments for victims of the ransomware attacks, and thus, enabled the attacks. Murgio sought to dismiss charges against him by arguing that Bitcoins are not “funds” under the federal law prohibiting the operation of an unlicensed money transmitting business. In September 2016, Judge Alison Nathan of the U.S. District Court for the Southern District of New York rejected Murgio’s argument ruling that “Bitcoins are funds within the plain meaning of that term.”<sup>24</sup>

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17. See David Ovalle, *Bitcoin Not Money, Miami Judge Rules in Dismissing Laundering Charges*, MIAMI HERALD (July 25, 2016, 10:22 AM), <http://www.miamiherald.com/news/local/crime/article91682102.html>; see also *State v. Espinoza*, No. F14-2923, slip op. (Fla. 11th Cir. 2016).

18. See *Espinoza*, No. F14-2923 at 6-7. .

19. See Ovalle, *supra* note 13 at 2; see also Patricia Hurtado & Susannah Nesmith, *Florida State Judge Rules Bitcoin Doesn’t Qualify as Money*, BLOOMBERG TECH. (July 25, 2016, 8:11 PM), <https://www.bloomberg.com/news/articles/2016-07-25/florida-state-judge-rules-bitcoin-doesn-t-qualify-as-money>.

20. *Id.*

21. *Id.* at 6.

22. Jonathan Stempel, *Bitcoin Is Money, U.S. Judge Says in Case Tied to JPMorgan Hack*, REUTERS (Sept. 19, 2016, 8:08 PM), <http://www.reuters.com/article/us-jpmorgan-cyber-bitcoin-idUSKCN11P2DE>.

23. See *id.*

24. *Id.*

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3. *Regulatory Response*

a. Japan

Japan enacted a law in May 2016 to regulate VC.<sup>25</sup> The new law defines VC as “asset-like values” and will go into effect one year from its adoption. The law requires that exchanges register with the Financial Services Agency (FSA).<sup>26</sup> Exchanges will also be subject to AML and know your customer (KYC) obligations.<sup>27</sup> The FSA will conduct on-site inspections and issue administrative orders as needed to ensure compliance.<sup>28</sup>

b. China

Since 2013, The People’s Bank of China has prohibited financial institutions and employees from dealing in Bitcoin.<sup>29</sup> The Cyberspace Administration of China acknowledged in October 2015 the innovation potential of Bitcoin’s underlying technology, and in January 2016 the People’s Bank of China hinted at plans to develop its own VC.<sup>30</sup>

c. Russia

In 2014, the Russian Ministry of Finance issued legislation that banned the use, creation, and distribution of VC. In August 2016, the Ministry proposed an amendment to the VC ban that would treat VC as “foreign currency” to be used by Russians outside of Russia.<sup>31</sup>

d. United Kingdom

Jersey, a self-governing dependency of the United Kingdom, recently amended its AML legislation to include virtual currency exchange services.<sup>32</sup> The Proceeds of Crime Regulations went into effect in September and requires that VC exchanges register with, and are supervised by, the Jersey

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25. See *Diet Oks Bill to Regulate Virtual Currency Exchanges*, THE JAPAN TIMES, <http://www.japantimes.co.jp/news/2016/05/25/business/diet-oks-bill-regulate-virtual-currency-exchanges/#.WMYgE7G-Ixe> (last visited Mar. 13, 2017).

26. David Meyer, *Burned by Bitcoin Scandal, Japan is Introducing Controls*, FORTUNE (May 26, 2016), <http://fortune.com/2016/05/26/japan-bitcoin-exchanges/>.

27. Naoya Ariyoshi, Susumu Tanizawa, & Hideki Katagiri, *Japan: the Essential Points of the Amendments to the Regulation on Virtual Currency Exchange Services*, MONDAQ (Jan. 21, 2017), <http://www.mondaq.com/x/554128/Financial+Services/The+Essential+Points+Of+The+Amendments+To+The+Regulation+On+Virtual+Currency+Exchange+Services>.

28. See *Diet Oks Bill to Regulate Virtual Currency Exchanges*, *supra* note 25.

29. See Valentin Schmid, *What Is Going On with China and Bitcoins?*, EPOCH TIMES (June 1, 2016, 2:48 PM), <http://www.theepochtimes.com/n3/2080774-what-is-going-on-with-china-and-bitcoin/>.

30. See *id.*; Sophia Yan, *China Wants to Launch Its Own Digital Currency*, CNN (Jan. 22, 2016, 1:02 AM), <http://money.cnn.com/2016/01/21/technology/china-digital-currency/>.

31. *Russia to Allow Foreign Trading of Virtual Currency*, BITLEGAL (Aug. 11, 2016), <http://bitlegal.io/2016/08/11/russia-to-allow-foreign-trading-of-virtual-currency/>.

32. *Id.*

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Financial Services Commission.<sup>33</sup> Jersey intends to establish itself as an international center for digital industries, and to this end, the regulation provides an exception for smaller exchanges, which are intended to create a “regulatory sandbox” to encourage innovation.<sup>34</sup>

**B. RECENT DEVELOPMENTS IN ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM**

1. *Financing*

The Panama Papers incident in May revealed how effectively assets can be transferred and hidden offshore.<sup>35</sup> Though the creation of offshore legal entities is not evidence of illegal activity *per se*, the system is susceptible to abuse by tax evaders, terrorists, and money launderers.<sup>36</sup> Of note in the Panama Papers data leak, and of interest to AML and CTF professionals, is the sophisticated and robust global network of entities and intermediaries that mask the identity of beneficial owners, disguise transactions, and hide funds.<sup>37</sup> In response, AML and CTF programs are bolstering customer due diligence requirements in an effort to better expose and monitor beneficial ownership, and thus preserve the integrity of established financial systems.

2. *Regulatory Response in the United States*

In May 2016, the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) issued final rules under the Bank Secrecy Act (BSA) to clarify and enhance customer due diligence (CDD) requirements and focus on beneficial owner identification.<sup>38</sup> The new rules are effective July 1, 2016, but covered entities have until May 11, 2018, to

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33. Proceeds of Crime (Supervisory Bodies) (Virtual Currency Exchange Business) (Exemption) (Jersey) Order 2016, available at <https://www.jerseylaw.je/laws/enacted/Pages/RO-101-2016.aspx>.

34. Sara Jones, *Virtual Currency Regulation in Jersey Takes Effect*, OGIER (Apr. 10, 2016), <https://www.ogier.com/publications/virtual-currency-regulation-in-jersey-takes-effect>; see also *Digital Jersey Welcomes Innovative Regulation for Virtual Currency*, DIGITAL JERSEY (Sept. 26, 2016), <https://www.digital.je/news/regulation-for-virtual-currency>.

35. The Panama Papers references a data leak of 11.5 million files from Mossack Fonseca, a Panama-based law firm in 2016. The leaked records disclosed the attorney-client records of more than 200,000 offshore entities. See Frederik Obermaier et al., *About the Panama Papers*, SÜDDEUTSCHE ZEITUNG, <http://panamapapers.sueddeutsche.de/articles/56febff0a1bb8d3c3495adf4/> (last visited Mar. 13, 2016); *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html>.

36. Obermaier et al., *supra* note 35.

37. *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*, *supra* note 35.

38. See Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016) (to be codified at 31 C.F.R. pts. 1010, 1020, 1023, et al.), <https://www.federalregister.gov/documents/2016/05/11/2016-10567/customer-due-diligence-requirements-for-financial-institutions>.

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comply. Covered entities include the following: “[b]anks; brokers or dealers in securities; mutual funds; and futures commission merchants and . . . brokers in commodities.”<sup>39</sup> The BSA is the primary AML law in the United States and, as amended by the USA Patriot Act, incorporates CTF requirements as well.

The new rules outline the four core elements of an effective CDD program: customer identification and verification; beneficial ownership identification and verification; risk profiling based on an understanding of customer relationships; and ongoing transaction and risk-based customer monitoring.<sup>40</sup>

Beneficial ownership of all legal entities must be identified and verified at account opening.<sup>41</sup> FinCEN provides a form that provides the required beneficial ownership information. In the absence of any knowledge that would reasonably call into question the reliability of the information, covered entities may rely on ownership information provided by the customer.<sup>42</sup> FinCEN considers beneficial ownership to include not just those individuals with an equity interest in the legal entity but also those who exercise control over the entity. FinCEN believes if covered entities know the identity of the individuals that own or control their legal entity customers and comply with AML and CTF regulations, criminals will be denied access to the United States financial system. In addition, this insight into beneficial ownership will assist law enforcement in investigations, prevent financial sanction evasion, and advance U.S. compliance with international AML standards and commitments.<sup>43</sup>

### *3. Enforcement Challenges in the United States*

FinCEN’s suspicious activity reporting requirement informs the enforcement arm of the U.S. AML/CTF regulatory scheme. This year the United States faced a challenge to the application of AML enforcement measures that function to protect the U.S. financial system from exposure to high-risk activity. Section 311 of the USA PATRIOT Act authorizes the FinCEN to “impose a variety of special measures against institutions that it finds to be of primary money-laundering concern . . . .” The first four of these five special measures may be authorized by agency order; FinCEN “may impose the fifth special measure . . . only by rulemaking.”<sup>44</sup> A list of the jurisdictions and institutions subject to these special measures, as well as links to FinCEN’s findings and the special measures imposed on various

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 29,298.

43. *Id.* at 29,431.

44. *See id.*; *see also* 31 U.S.C. § 5318A(a)(2)(B)-(C) (stating the first through fourth special measures may be imposed by “regulation, order, or otherwise as permitted by law,” however, the fifth special measure may only be imposed by regulation, after providing for notice and comment).

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institutions, is available at the agency's website.<sup>45</sup> FinCEN has only imposed such a final rule seven times since 2004. Financial institutions have sought judicial review of FinCEN's Section 311 designations even more rarely.<sup>46</sup>

In a recent case challenging a Section 311 designation, FBME Bank Ltd. (FBME), a Tanzanian bank, obtained a preliminary injunction barring implementation of FinCEN's final rule and fifth special measure, which would have frozen FBME out of the U.S. financial markets.<sup>47</sup> While the court would "not . . . second guess FinCEN's exercise of its broad discretion in finding that FBME poses a primary money laundering concern," it found that FinCEN had not complied with the notice provisions of the Administrative Procedures Act (APA) because it had failed to supply FBME with the unclassified and otherwise unprotected evidence on which it based its decision to bar the bank's access to the United States financial system and further failed to address adequately whether it had considered alternatives to barring the bank from the United States financial system.<sup>48</sup> The court found that FinCEN's failure to disclose non-classified and unprotected information during the final rule's notice and comment period was a procedural error that deprived FBME of an opportunity to review and comment on those materials.<sup>49</sup> Further, FinCEN had not adequately described whether it had considered alternatives to the Section 311 designation, such as imposing conditions on opening or maintaining correspondent accounts, rather than entirely prohibiting such accounts.<sup>50</sup>

Rather than appeal the ruling, FinCEN asked the district court to remand the matter to the agency so that it could have what the court termed a "do-over." That is, FinCEN requested "an opportunity to correct any mistakes it might have made the first time around and to promulgate—following proper procedures—the same rule, a new rule altogether, or perhaps even no rule at all."<sup>51</sup> The court agreed, stayed its ruling, and remanding the case to FinCEN.<sup>52</sup> In its order, the court noted that voluntary remand is favored where the agency has decided to re-consider its decisions and re-start the

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45. See *311 Special Measures*, FINCEN, <https://www.fincen.gov/resources/statutes-and-regulations/311-special-measures> (last visited Mar. 13, 2017).

46. See *FBME Bank Ltd.*, 2016 WL 5108018, at \*4 (citing Section 311—Special Measures, FINCEN, [https://www.fincen.gov/statutes\\_regs/patriot/section311.html](https://www.fincen.gov/statutes_regs/patriot/section311.html)).

47. See *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109 (D.D.C. 2015) (mem. op.) (giving opinion granting preliminary injunction); see also § 5318A(b)(5) (stating certain payable-through or correspondent accounts may be prohibited).

48. See *FBME Bank Ltd.*, 125 F. Supp. at 114. FinCEN had claimed that "FBME openly advertises the bank to its potential customer base as willing to facilitate the evasion of AML regulations. In addition, FBME solicits and is widely recognized by its high-risk customers for ease of use." *FinCEN Takes Action to Protect U.S. Financial System*, FINCEN (July 17, 2014), <https://www.fincen.gov/news/news-releases/fincen-takes-action-protect-us-financial-system>.

49. See *FBME Bank Ltd.*, 125 F. Supp. at 118.

50. See *id.*

51. *Id.*

52. *Id.*

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rulemaking process.<sup>53</sup> Moreover, the court found that the remand would not unduly prejudice FBME.<sup>54</sup>

Thereafter, on March 31, 2016, FinCEN published a final rule under Section 311, designating FBME as a “financial institution of primary money laundering concern.”<sup>55</sup> The order would have gone into effect 120 days from publication, but FBME again challenged it.<sup>56</sup> On September 20, 2016, FBME won a second injunction against FinCEN’s designation, including on the grounds that FinCEN’s disclosures to FBME were insufficient.<sup>57</sup> While the FBME case is limited to its facts, it may encourage other financial institutions to challenge FinCEN’s Section 311 rulemaking process.

The FBME case highlights the tension between FinCEN’s use of data drawn from SARs, which have not been disclosed to the financial institution but from which the agency has drawn conclusions regarding purportedly suspicious transactions and the institution’s AML controls and the imposition of sanctions on the institution.<sup>58</sup> In *FBME Bank Ltd. v. Lew*, the court concluded that the use of aggregate SAR information put the bank on

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53. *Id.* at 73.

54. *Id.*

55. See Imposition of Special Measure Against FBME Bank Ltd., Formerly Known as the Federal Bank of the Middle East Ltd., as a Financial Institution of Primary Money Laundering Concern, 81 Fed. Reg. 18480 (Mar. 31, 2016) (to be codified at 31 C.F.R. pt. 1010), [https://www.fincen.gov/sites/default/files/shared/FBME\\_FR\\_20160325.pdf](https://www.fincen.gov/sites/default/files/shared/FBME_FR_20160325.pdf); *FinCEN Issues Final Rule Imposing a Prohibition on the Opening or Maintaining of Correspondent Accounts for, or on Behalf of, FBME Bank Ltd.*, FINCEN, <https://www.fincen.gov/sites/default/files/shared/20160325.pdf> (last visited Mar. 13, 2017).

56. See *FinCEN Issues Final Rule Imposing a Prohibition on the Opening or Maintaining of Correspondent Accounts for, or on Behalf of, FBME Bank Ltd.*, *supra* note 55.

57. See *FBME Bank Ltd. v. Lew*, No. 15-CV-01270 (CRC), 2016 WL 5108018, at \*30 (D.D.C. Sept. 20, 2016) (mem. op.); see also Ben DiPietro, *FBME Bank Wins Second Injunction Against FinCEN Rule*, WALL ST. J. (Sept. 21, 2016, 4:33 PM), <http://blogs.wsj.com/riskandcompliance/2016/09/21/fbme-bank-wins-second-injunction-against-fincen-rule/>.

Analyzing FinCEN’s Section 311 final rulemaking pursuant to the APA, in particular, FBME’s challenge to the final rule under 5 U.S.C. § 706(2) on the basis that FinCEN’s rulemaking was arbitrary and capricious, the district court found that FinCEN failed to fully comply with two notice provisions but that the errors were harmless. See *FBME Bank Ltd.*, 2016 WL 5108018, at \*5. More significantly, the court found that FinCEN had not adequately responded to certain comments from FBME. See *id.* at \*30. On that basis, the court again stayed implementation of the final rule. See *id.*

58. See *FBME Bank Ltd.*, 2016 WL 5108018, at \*7 (citing Notice of Finding That FBME Bank Ltd., Formerly Known as Federal Bank of the Middle East, Ltd., Is a Financial Institution of Primary Money Laundering Concern, 79 Fed. Reg. 42,639, 42,640 (July 22, 2014), [https://www.fincen.gov/sites/default/files/special\\_measure/FBME\\_NOF.pdf](https://www.fincen.gov/sites/default/files/special_measure/FBME_NOF.pdf)). The court noted that, in its proposed final rule, FinCEN stated that between April 2013 and April 2014, “FBME conducted at least \$387 million in wire transfers through the U.S. financial system that exhibited indicators of high-risk money laundering typologies, including widespread shell company activity, short-term ‘surge’ wire activity, structuring, and high-risk business customers” and that “FBME was involved in at least 4,500 suspicious wire transfers through U.S. correspondent accounts that totaled at least \$875 million between November 2006 and March 2013.” *FBME Bank Ltd.*, 2016 WL 5108018, at \*7.

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notice of FinCEN's concerns, and access to individual SARs would not have assisted the bank's efforts to push back against the Section 311 designation where FinCEN had discussed its concerns regarding AML controls at length with the bank.<sup>59</sup> These facts are unique to this case, however, and financial institutions' concerns regarding due process in like situations are not frivolous.

In another recent case, FinCEN first issued and then withdrew its Section 311 findings and notice of proposed rulemaking in which it designated Banca Privada d'Andorra (BPA) an institution of special money-laundering concern.<sup>60</sup>

FinCEN explained its decision by stating that "BPA no longer operates in a manner that poses a threat to the U.S. financial system."<sup>61</sup> That determination followed the bank's takeover by the Andorran banking authorities in which the Andorran government assumed control of the bank's "management and operations, arrested the chief executive officer on money laundering charges, and are in the final stages of implementing a resolution plan that is isolating the assets, liabilities, and clients of BPA that raise money laundering concerns."<sup>62</sup> As a result of the takeover, BPA's assets were placed into a new entity, Vall Bank, which was later sold.<sup>63</sup>

In both of these cases, the banks resisted FinCEN's Section 311 designation and sought more information regarding the basis for the agency's determination. Because each Section 311 determination is based on the specific facts and circumstances presented, however, and because so few Section 311 final rules have been sought or challenged, it is difficult to draw any general conclusions regarding the circumstances under which courts will affirm FinCEN's designations. It seems likely, however, that the more

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59. *See id.*, at \*8.

60. *See FinCEN Names Banca Privada d'Andorra a Foreign Financial Institution of Primary Money Laundering Concern*, FINCEN (Mar. 10, 2015), <https://www.fincen.gov/news/news-releases/fincen-names-banca-privada-dandorra-foreign-financial-institution-primary-money>; *Notice Regarding the Withdrawals of Findings and Proposed Rulemakings Under Section 311*, FINCEN (Feb. 19, 2016), <https://www.fincen.gov/news/news-releases/notice-regarding-withdrawals-findings-and-proposed-rulemakings-under-section-311>. In October 2015, the Cierco family, the majority shareholders of Banca Privada d'Andorra, filed suit in Washington, D.C., asking the court to rescind the Section 311 designation. *See Ramon and Higinio Cierco File Lawsuit Against the U.S. Treasury and the Financial Crimes Enforcement Network, Claiming the Agency's Actions Against Banca Privada d'Andorra Are Wholly Unjustified and Unconstitutional*, PR NEWSWIRE (Oct. 17, 2015, 13:12), <http://www.prnewswire.com/news-releases/ramon-and-higinio-cierco-file-lawsuit-against-the-us-treasury-and-the-financial-crimes-enforcement-network-claiming-the-agencys-actions-against-banca-privada-dandorra-are-wholly-unjustified-and-unconstitutional-300155903.html>.

61. *Notice Regarding the Withdrawals of Findings and Proposed Rulemakings under Section 311*, *supra* note 60.

62. *See id.*

63. The Ciercos sued the Treasury Department over the Section 311 findings. The court dismissed the case as moot where the shareholders obtained the relief requested when FinCEN withdrew its findings. *See Cierco v. Lew*, 190 F. Supp. 3d 16, 18–19, 21 (D.D.C. 2016) (mem. op.) (dismissing complaint under Fed. R. Civ. P. 12(b)(1) for mootness).

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generalized APA analysis followed by the court in *FBME* will provide guidance for future judicial review of Section 311 rulemaking.

4. *Regulatory Response in the European Union*

In May 2015, the European Union (EU) adopted the Fourth Anti-Money Laundering Directive (4AMLD) to improve the effectiveness of the EU's efforts to detect and prevent money laundering and terrorist financing.<sup>64</sup> On July 5, 2016, the European Commission approved a proposal (Proposal) to amend the 4AMLD.<sup>65</sup> The Proposal introduces new requirements, modifies current requirements, and promotes increased collaboration among Member States.

Each EU Member State must transpose, or adopt laws to implement, the directive. The Proposal accelerates the 4AMLD transposition deadline of June 26, 2017; all EU Member States must now transpose and enter 4AMLD into force by January 1, 2017.<sup>66</sup>

The issues addressed by the Proposal include: terrorist financing risks posed by virtual currencies, risks linked to anonymous pre-paid instruments, the limited information powers of EU Financial Intelligence Units (FIUs), enhanced due diligence for high risk countries, and access to beneficial ownership information.

Obligated entities are defined by and subject to the requirements of the 4AMLD.<sup>67</sup> The Proposal broadens the scope of obligated entities to include VC platforms offering exchange services between virtual and fiat currencies and custodian wallet providers.<sup>68</sup>

Public authorities within the EU do not currently monitor VC transfers; no specific rules exist at the Union or Member State level that would establish a monitoring framework.<sup>69</sup> Recognizing that this gap in enforcement may be exploited by those engaged in money-laundering or terrorist financing, the Proposal requires that exchanges and virtual currency custodians implement preventive AML measures and report suspicious

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64. 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 Purposes of Money Laundering or Terrorist Financing, amending Regulation 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) 1 [hereinafter 4AMLD].

65. *Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing and Amending Directive 2009/101/EC*, COM (2016) 450 final (July 5, 2016) [hereinafter *Proposal*].

66. See *id.* at 4.

67. See 4AMLD, *supra* note 64 at art. 2.

68. See *Proposal*, *supra* note 65 at 12.

69. See *id.*



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transactions.<sup>70</sup> As obliged entities, they are also subject to online financial data and data privacy obligations.<sup>71</sup>

Acknowledging both the terrorist financing risks and legitimate social utility of pre-paid cards, 4AMLD Article 12 authorizes Member States to waive certain CDD requirements for obliged entities when the transaction falls below a certain threshold.<sup>72</sup> The Proposal lowers the CDD transaction threshold of 4AMLD from  $\_250$  to  $\_150$ .<sup>73</sup> Additionally, the Proposal requires that Member States enact controls to ensure that anonymous prepaid cards used within the Union but issued outside the Union are subject to issuing requirements equivalent to those of the EU.<sup>74</sup>

The Proposal clarifies that closed loop cards are low risk for money laundering and terrorist financing and are therefore outside the scope of 4AMLD. Closed loop cards are prepaid cards that can only be used within a limited network or to acquire a limited range of goods and services.<sup>75</sup>

FIUs are public authorities within a Member State that collect, identify, and analyze information about suspicious transactions. FIUs in certain Member States can only request information from an obliged entity once a suspicious activity report (SAR) has been filed. As a result, these FIUs are prevented from gaining timely access to information held by those obliged entities on payment accounts and account holder identities. To accelerate the detection of terrorist financing and money laundering, and improve the cooperation across borders, FIUs must be able to obtain information from obliged entities and have timely access to relevant financial, administrative, and law enforcement information in the absence of an SAR.<sup>76</sup> The Proposal authorizes FIUs to request information from any obliged entity regardless of whether an SAR has been filed. The Proposal delegates to the Member States the task of defining the conditions under which FIUs can request information.<sup>77</sup> FIUs must still respect security and confidentiality requirements governing information access, handling, and dissemination.<sup>78</sup>

Currently there is no obligation at the EU level to implement banking registries or electronic data retrieval systems, which would provide FIUs with access to bank account information. The 4AMLD encourages but does not require these information systems; as a result, not all Member States have these systems in place.<sup>79</sup> Therefore, FIUs are challenged to detect criminal and terrorist financial movements at the national level. The

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70. See *id.*

71. See *id.* at 13.

72. See 4AMLD, *supra* note 64 at art. 12. .

73. See *Proposal*, *supra* note 65 at 13.

74. The Proposal Directive specifies that “[t]he rule should be enacted in full compliance with Union obligations in respect of international trade, especially the provisions of the General Agreement on Trade in Services.” *Id.* at 23.

75. *Id.*

76. See *id.* at 13 – 14.

77. *Proposal*, *supra* note 53, at 14.

78. *Id.*

79. See 4AMLD, *supra* note 52, at 57.

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Proposal modifies 4AMLD to require Member States to set up automated centralized databases that enable FIUs to quickly identify bank account and payment information. These systems would allow FIUs and other AML authorities to identify all bank and payment accounts belonging to an individual through a centralized automated search query.<sup>80</sup> Access to these registries should be limited to a need-to-know basis and subject to maximum retention periods for personal data.<sup>81</sup>

Under 4AMLD Article 18, obliged entities are required to apply enhanced CDD to manage and mitigate risks when dealing with individuals or entities in countries identified by the EU as high risk.<sup>82</sup> Currently, each Member State independently determines the enhanced CDD measures that are appropriate for high-risk jurisdictions. This inconsistent and uncoordinated approach by Member States creates vulnerability in monitoring these high-risk countries. Accordingly, the Proposal harmonizes the monitoring of high-risk countries by requiring Member States to adopt a minimum standard of enhanced CDD measures that are compliant with FATF recommendations.<sup>83</sup>

Currently, companies, trusts, and other legal entities are required to maintain accurate information on their beneficial ownership.<sup>84</sup> Articles 30 and 31 of the 4AMLD provide guidance on the collection, storing, and access to ultimate beneficial ownership information.<sup>85</sup> The Proposal seeks to synchronize these requirements across entities and Member States.

Stressing the importance of public access to information, the Proposal amends Directive 2009/101/EC to require that Member States make beneficial ownership of for-profit firms and legal entities publically available.<sup>86</sup> The Proposal asserts that public access to this information results in enhanced scrutiny by society, provides additional guarantees to potential business partners, and contributes to the integrity of business

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80. *Id.*

81. *Id.* at 15

82. Article 9 of 4AMLD authorizes the Commission to identify high-risk third countries that have deficient anti-money laundering and counter terrorist financing controls. See 4AMLD, *supra* note 52 at arts. 9, 18. The list of high-risk third countries was adopted in July 2016. See *Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 Supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by Identifying High-Risk Third Countries with Strategic Deficiencies*, COM (2016) (July. 14, 2016).

83. The minimum enhanced due diligence standards should require checks on the customer, identifying the purpose and nature of the business relationship as well as the source of funds, and transaction monitoring. The enhanced due diligence measures should be fully compliant with lists drafted by the Financial Action Task Force (FATF). In addition, the list of countermeasures set out by FATF should be adequately reflected in the EU legislation. See *Proposal, supra* note 53 at 15. The FATF is an intergovernmental body that sets standards and promotes measures to combat money laundering, terrorist financing, and other threats to the financial system. See *Who We Are*, FIN ACTION TASK FORCE, <http://www.fatf-gafi.org/about/> (last visited Mar. 15, 2017).

84. *Proposal, supra* note 53, at 15.

85. *Id.*

86. *Id.* at 26.

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transactions and the financial system.<sup>87</sup> The Proposal provides that trusts engaged in commercial or business-like activity should also make beneficial ownership information publically available.<sup>88</sup> But the privacy concerns of trusts created for charitable purposes or to hold family assets require that beneficial ownership information be shared only with those who have a legitimate interest.<sup>89</sup>

Finally, a beneficial owner according to Article 3(6)(a) of the 4AMLD is a legal person owning twenty-five percent plus one share or an ownership interest of more than twenty-five percent in a corporate entity.<sup>90</sup> The Proposal recommends lowering this threshold to ten percent for passive non-financial entities.<sup>91</sup> Passive non-financial entities do not create income on their own, but function primarily as an intermediary to channel income from other sources.<sup>92</sup> These entities may exist only to distance beneficial owners from their assets, and accordingly present a high risk for money laundering and tax evasion.<sup>93</sup>

*5. Iran's First Counter-Terrorism Finance Law*

On March 17, 2016, the Islamic Republic of Iran (Iran) enacted its first CTF law, known as The Law on Combating Terrorism Finance.<sup>94</sup> The brief law defines terrorist financing, outlines reporting obligations for banks and financial agencies, and permits international cooperation.<sup>95</sup> The Iranian Parliament approved the law on February 2, 2016, and the Guardian Council confirmed it on March 3, 2016.<sup>96</sup>

The promulgation of this law is an effort by the Iranian regime to adopt international banking and AML standards and thereby modernize its banking legislation in response to the Joint Comprehensive Plan of Action (JCPOA).<sup>97</sup> The JCPOA was signed between Iran and the five permanent members of the United Nations Security Council (China, France, Russia,

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87. *Id.* at 16.

88. *Id.*

89. *See id.* at 17. “The legitimate interest with respect to money laundering, terrorist financing and the associated predicate offences should be justified by readily available means, such as statutes or mission statement of non-governmental organisations, or on the basis of demonstrated previous activities relevant to the fight against money laundering and terrorist financing or associated predicate offences, or a proven track record of surveys or actions in that field.” *Id.* at 28.

90. *Proposal, supra* note 53, at 17.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* The Law on Combating Terrorism Finance (Iran), [www.tejaratbank.ir/file\\_manager/1659577/download/1/CFT-law.html](http://www.tejaratbank.ir/file_manager/1659577/download/1/CFT-law.html).

95. *Id.*

96. *See Ratification of the Law of Combating the Financing of Terrorism (CFT)*, CENTRAL BANK OF THE ISLAMIC REPUBLIC OF IRAN (Mar. 8, 2016), <http://www.cbi.ir/showitem/14423.aspx>.

97. Iranian officials have responded to these speculations by publishing a scanned picture of the 2009 proposed bill of the previous administration. *See, The Picture of the Bill of the Law on*

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Germany, United States, and the United Kingdom) in July 2015 and provides Iran with a multiyear plan for phased economic sanctions relief upon the verification of Iran's implementation of certain nuclear commitments.<sup>98</sup> On January 16, 2016, the International Atomic Energy Agency (IAEA) verified that Iran had implemented the key nuclear-related measures required by the JCPOA.<sup>99</sup>

Iran's counter-terrorism finance law requires that authorities and law enforcement personnel under the direction of a judicial authority identify and block funds and assets procured and collected for terrorist activities.<sup>100</sup> Individuals and entities subject to the law are required to maintain records of suspicious transactions and customers for no less than five years.<sup>101</sup> Any suspicious activity must be reported to the High Commission of Anti-Money Laundering for further action.<sup>102</sup> Knowingly or intentionally failing to report suspicious activity can result in criminal liability.<sup>103</sup> If the failure to report suspicious activity is due to negligence, then some lesser punishment may be imposed.

## II. Conclusion

VC regulation continues to challenge regulators, legislators, and law enforcement. The anonymity and global reach of VC ensures that the threat it poses to successful AML and CTF initiatives is unlikely to diminish. Though there is little consensus on how to define, much less regulate VCs, the initial wave of regulation is directed at intermediaries like VC exchanges and virtual wallet providers.

Regulators focused this year on strengthening CDD programs and implementing controls to capture beneficial ownership information. This signals a distinct trend towards proactive information-driven monitoring as a tool to combat money laundering and terrorist financing. Authorities acknowledge that the global nature of the threat posed by money laundering and terrorism requires cooperation among financial partners and across

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*Combating Terrorism Finance in Abmadi Nejbadi's Administration*, EGHTEHAD ONLINE, (Sep. 5 2016).

98. See *Joint Comprehensive Plan of Action*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/e/eb/tfs/spi/iran/jcpoa/> (last visited Mar. 15, 2017) (containing full text of the Joint Comprehensive Plan of Action and its annexes) [hereinafter *JCPOA*]; see also U.S. DEPARTMENT OF THE TREASURY, FREQUENTLY ASKED QUESTIONS RELATING TO THE LIFTING OF CERTAIN U.S. SANCTIONS UNDER THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) ON IMPLEMENTATION DAY (2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa\\_faqs.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf).

99. See *JCPOA Implementation*, U.S. DEPARTMENT OF THE TREASURY (Jan. 16, 2016), [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa\\_implementation.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/jcpoa_implementation.aspx).

100. See *The Law on Combating Terrorism Finance*, *supra* note 94 at art. 5.

101. *Id.* at art. 13.

102. *Id.* at art. 14.

103. *Id.* at Note 1.

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jurisdictions. Criminals and terrorists engaged in financial crimes will continue to attempt to exploit opportunities that result from uncoordinated or incompatible regulatory schemes.

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

## **International Animal Law**

EMILY BERGERON, DAINA BRAY, MAYRA CAVAZOS CALVILLO,  
JUDITH CHIARITO EVANS, JEFFREY FLOCKEN, TIM FRANKLIN,  
NATHAN HERSCHLER, LINDA M. LOWSON, LAURA SCHIERHOFF,  
AND MARCY STRAS\*

This Article reviews significant legal developments during 2016 in the field of international animal law. This year's contributions discuss important developments in marine conservation, wildlife protection, and the dog meat industry in selected countries, as well as at the Seventeenth Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Tenth North American Leaders Summit.

### **I. Developments at the Seventeenth Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora**

#### **A. PROGRESS FOR ENDANGERED WILDLIFE<sup>1</sup>**

On October 4, 2016, the last day of the Seventeenth Conference of the Parties (CoP) for the Convention on International Trade in Wild Species of Flora and Fauna (CITES), the CITES Secretary General described the meeting as “a game changer that will be remembered as a point in history when the tide turned in favor of ensuring the survival of our most vulnerable wildlife.”<sup>2</sup> Indeed, the following morning, the Washington Post declared that “[t]he world just agreed to the strongest protections ever for endangered animals.”<sup>3</sup>

Whether these statements are hyperbolic wishful thinking, or an accurate reflection of a sea change in the way countries protect imperiled species

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\* Edited by Mayra Cavazos Calvillo and Tim Franklin. Contributions by Judith Chiarito Evans, Emily Bergeron, Jeffrey Flocken, Nathan Herschler, Daina Bray, Linda M. Lowson, Laura Schierhoff, Marcy Stras and Mayra Cavazos Calvillo. Authors from each section are noted accordingly.

1. This section authored by Jeffrey Flocken, Nathan Herschler and Daina Bray of the International Fund for Animal Welfare.

2. Press Release, CITES, Largest Ever World Wildlife Conference Hailed as a “Game Changer” (Oct. 4, 2016), [https://cites.org/eng/news/pr/Largest\\_ever\\_World\\_Wildlife\\_Conference\\_CoP17\\_hailed\\_as\\_a\\_game\\_changer\\_04102016](https://cites.org/eng/news/pr/Largest_ever_World_Wildlife_Conference_CoP17_hailed_as_a_game_changer_04102016).

3. Darryl Fears, *The World Just Agreed to the Strongest Protections Ever for Endangered Animals*, WASH. POST (Oct. 5, 2016), <https://www.washingtonpost.com/news/animalia/wp/2016/10/05/the-world-just-agreed-to-the-strongest-protections-ever-for-endangered-animals/>.

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from unsustainable commercial exploitation, is yet to be determined. What is clear, however, is that many species, both iconic and obscure, emerged with new protections. These new protections reflect a global will, if not to outright save imperiled species, then at least not to play an active role in their demise.

CITES entered into force in 1975, with eighty participating countries, referred to as “Parties” or “Members.”<sup>4</sup> Today, it has 183 Parties<sup>5</sup> and aims to protect over 35,000 species of plants and animals.<sup>6</sup>

For consideration at this CoP, CITES Parties had submitted sixty-two species proposals to amend CITES Appendices I and II,<sup>7</sup> potentially impacting nearly 500 different species<sup>8</sup> including mammals (16 proposals), birds (4), reptiles (16), amphibians (5), fishes (6), snail (1), nautilus (1), and plants (13).<sup>9</sup> Fourteen proposals involved an attempt to weaken existing protections,<sup>10</sup> while forty-two aimed to increase protections.<sup>11</sup> Of those proposals seeking to lessen protections, ten passed and four failed.<sup>12</sup> Of those seeking stronger protections, all but one succeeded to some degree.<sup>13</sup>

Potentially the biggest “winners” from this CoP were the eight pangolin species that were transferred from Appendix II to Appendix I, thereby providing them the strongest global protections from commercial trade.<sup>14</sup> Pangolins—a taxonomically unique species with no close relatives in the animal kingdom<sup>15</sup>—have the unfortunate distinction of being the most

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4. *What Is CITES*, CITES, <https://cites.org/eng/disc/what.php> (last visited Oct. 30, 2016).

5. *Member Countries*, CITES, <https://cites.org/eng/disc/parties/index.php> (last visited Oct. 30, 2016).

6. *FAQ (Frequently Asked Questions)*, CITES, <https://cites.org/eng/resources/faq.php> (last visited April 9, 2017).

7. CITES Appendices I, II and III are lists of species afforded different levels of protection. Commercial trade in the more than 800 Appendix I species, which are designated as being in immediate danger of extinction, is largely banned. While some commercial trade of the endangered but less protected CITES Appendix II species is allowed, international trade in such species requires special permits. *CITES Appendices*, CITES, <https://www.cites.org/eng/app/index.php> (last visited Oct. 29, 2016).

8. Press Release, CITES Secretariat, CITES Secretariat Presents its Recommendations on Proposals to Amend the CITES Appendices – CITES #CoP17 (Aug. 23, 2016), [https://cites.org/eng/news/pr/CITES\\_Secretariat\\_presents\\_its\\_recommendations\\_on\\_proposals\\_to\\_amend\\_the\\_CITES\\_Appendices\\_23082016](https://cites.org/eng/news/pr/CITES_Secretariat_presents_its_recommendations_on_proposals_to_amend_the_CITES_Appendices_23082016).

9. *Table of Proposals and the CoP17 Outcomes*, CITES, [https://cites.org/sites/default/files/eng/cop/17/CITES\\_CoP17\\_DECISIONS.pdf](https://cites.org/sites/default/files/eng/cop/17/CITES_CoP17_DECISIONS.pdf) (last visited Oct. 30, 2016). Six proposals were withdrawn after the start of the CoP. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *CITES Appendices*, CITES, <https://www.cites.org/eng/app/index.php> (last visited Oct. 29, 2016).

15. RONALD NOWAK, *WALKER’S MAMMALS OF THE WORLD*, 1239 (6th ed. 1999).

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trafficked mammal in the world,<sup>16</sup> with over one million thought to have been poached from the wild and traded in the last decade.<sup>17</sup>

Other lesser known species that received new or greater protections included Barbary macaques and African grey parrots (both of which are threatened by the pet trade), Nautilids, and a number of reptiles, amphibians, and fish (including devil rays, thresher sharks, and silky sharks).<sup>18</sup> The shark and ray protections continued a marine winning streak from the Sixteenth CoP in Bangkok, Thailand, where oceanic whitetips, porbeagle sharks, three hammerhead shark species, and manta rays had received new protections.<sup>19</sup>

Within the plant category, rosewood trees from the genus *Dalbergia*, which includes over 300 species found in tropical regions of Africa, South and Central America, Madagascar, and southern Asia, received new protections.<sup>20</sup> These trees have been aggressively harvested for timber to be used in luxury furniture sold in China, the EU, and the United States.<sup>21</sup>

The results for more iconic species like elephants, lions, and rhinos were mixed. Proposals from Namibia and Zimbabwe that would have allowed for new commercial trade in ivory were defeated,<sup>22</sup> but so was a proposal from thirteen elephant range states to move all African elephant populations to the highest level protections of Appendix I.<sup>23</sup> If successful, the Appendix I listing would have changed the status of elephant populations in Botswana, Namibia, South Africa, and Zimbabwe, where they are currently listed on Appendix II.<sup>24</sup> A proposal by Swaziland, that would have opened up the prospect of legal rhino horn trade, was one of the most discussed and anticipated proposals in light of the current rhino poaching crisis that has claimed thousands of wild rhinos in Africa over the past five years.<sup>25</sup> It was defeated in a secret ballot with twenty-six votes in favor and 100 against.<sup>26</sup>

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16. Jackie Northam, *The World's Most Trafficked Mammal Is One You May Never Have Heard Of*, NPR (Aug. 18, 2015), <http://www.npr.org/sections/parallels/2015/08/18/432568915/the-worlds-most-trafficked-mammal-is-one-you-may-never-have-heard-of>.

17. IUCN SSC PANGOLIN SPECIALIST GROUP, <http://www.pangolinsg.org/> (last visited Oct. 30, 2016).

18. *Table of Proposals and the CoP17 Outcomes*, CITES, [https://cites.org/sites/default/files/eng/cop/17/CITES\\_CoP17\\_DECISIONS.pdf](https://cites.org/sites/default/files/eng/cop/17/CITES_CoP17_DECISIONS.pdf) (last visited Oct. 30, 2016).

19. *Which Sharks and Rays Were Listed at CoP16?*, CITES, <https://cites.org/eng/prog/shark/sharks.php> (last visited Oct. 30, 2016).

20. *Table of Proposals and the CoP17 Outcomes*, *supra* note 18.

21. Damian Carrington, *Furniture that Destroys Forests: Crackdown on "Rampant" Trade in Rosewood*, GUARDIAN (Sept. 29, 2016), <https://www.theguardian.com/environment/2016/sep/29/wildlife-summit-cracks-down-on-illegal-rosewood-trade>.

22. *Table of Proposals and the CoP17 Outcomes*, *supra* note 18.

23. *Id.*

24. *African Elephant*, CITES, [https://cites.org/eng/gallery/species/mammal/african\\_elephant.html](https://cites.org/eng/gallery/species/mammal/african_elephant.html) (last visited Oct. 30, 2016).

25. David Shukman, *Rhino Poaching: Another Year, Another Grim Record*, BBC (Mar. 9, 2016), <http://www.bbc.com/news/science-environment-35769413>.

26. *Table of Proposals and the CoP17 Outcomes*, CITES 1, [https://cites.org/sites/default/files/eng/cop/17/CITES\\_CoP17\\_DECISIONS.pdf](https://cites.org/sites/default/files/eng/cop/17/CITES_CoP17_DECISIONS.pdf) (last visited Oct. 30, 2016).



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Meanwhile, a proposal from nine range states to move African lions to Appendix I met with resistance from the EU and from a number of range states, resulting in a compromise that called for ending trade in wild lion bones but did not take any meaningful steps to end the growing trade in captive-bred lion bones.<sup>27</sup> With lion populations facing significant declines and potentially as few as 20,000 lions left in the wild,<sup>28</sup> there is fear that an emerging legal bone trade could provide cover for trade in wild lion bones.<sup>29</sup>

Beyond the species-listing proposals discussed above, a suite of other conservation issues was debated and resolved at the CoP. With regards to elephants, the Fourteenth CoP in 2007 had agreed to a compromise that permitted a one-off sale of legal ivory stockpiles from Namibia, Botswana, Zimbabwe, and South Africa.<sup>30</sup> This one-off sale was in exchange for a nine-year moratorium on proposals to allow trade in elephant ivory from Appendix II populations of elephants, as well as agreement that all future proposals would flow through a “decision-making mechanism for a process of trade in ivory.”<sup>31</sup> Dueling proposals at this CoP would have either: a) declined to extend the mandate for a decision-making mechanism,<sup>32</sup> resulting in a ban; or b) adopted a proposed decision-making mechanism,<sup>33</sup> resulting in a likely resumption of trade. Both proposals were voted down, resulting in the maintenance of a ban in trade from Appendix II elephant populations at the expiration of the nine-year moratorium period in November 2017.<sup>34</sup>

The Parties also agreed to revise prior resolutions related to wildlife confiscated from the illegal trade, including recommendations to develop plans for humane care of live specimens and to pass related costs to the traffickers.<sup>35</sup> Given the increasing use of the Internet to facilitate illegal

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27. *Id.*; *Draft Decisions on the African Lion*, CITES, [https://cites.org/sites/default/files/eng/cop/17/Com\\_I/E-CoP17-Com-I-29.pdf](https://cites.org/sites/default/files/eng/cop/17/Com_I/E-CoP17-Com-I-29.pdf) (last visited Oct. 30, 2016).

28. *Panthera Leo*, IUCN RED LIST OF THREATENED SPECIES, <http://www.iucnredlist.org/details/15951/0> (last visited Oct. 30, 2016).

29. *E.g., id.*

30. *Summary Record of the 15th Session of Committee 1 (CoP14 Com. I Rep. 15 (Rev. 1))*, CITES, <https://cites.org/sites/default/files/eng/cop/14/rep/E14-Com-I-Rep-15.pdf> (last visited Oct. 31, 2016).

31. *Id.*; *Decision-Making Mechanism for a Process of Trade in Ivory (CoP17 Doc. 84.2)*, CITES, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-02.pdf> (last visited Oct. 31, 2016).

32. *Decision-Making Mechanism for a Process of Trade in Ivory (CoP17 Doc. 84.2)*, *supra* note 31.

33. *Decision-Making Mechanism for a Process of Trade in Ivory*, CITES (CoP17 Doc. 84.3), <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-84-03.pdf> (last visited Oct. 31, 2016).

34. Rachael Bale, *A Big Day at CITES: No Ivory or Rhino Horn Trade*, NAT'L GEOGRAPHIC (Oct. 3, 2016), <http://voices.nationalgeographic.com/2016/10/03/184016/>.

35. *Draft Resolution: Disposal of Illegally Traded and Confiscated Specimens of CITES Listed Species (CoP 17 Com II 12)*, CITES, [https://cites.org/sites/default/files/eng/cop/17/Com\\_II/E-CoP17-Com-II-12.pdf](https://cites.org/sites/default/files/eng/cop/17/Com_II/E-CoP17-Com-II-12.pdf) (last visited Oct. 30, 2016).

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trafficking of wildlife,<sup>36</sup> the Parties agreed to support the continued engagement of CITES with INTERPOL to combat wildlife trafficking online.<sup>37</sup>

While much good work was done in terms of both new protections for species and commitments to address pressing risks to wildlife, the threat posed by illicit trafficking seems to be growing. On-the-ground enforcement efforts in source countries, as well as demand reduction efforts in end-user countries, must be ramped up to meet this increased threat. It will take a network of states, NGOs, and dedicated people on-the-ground to solve and defeat the network of increasingly organized criminal networks trafficking in wild animals.<sup>38</sup> While this CoP may have been “a game changer” for wildlife conservation, it will have to be a significant and sustained game changer in order to fight the escalating illegal wildlife trade.

**B. ANTI-CORRUPTION RESOLUTION<sup>39</sup>**

For the first time, the Parties to CITES have adopted a resolution addressing corruption.<sup>40</sup> The European Union (EU) and Senegal introduced the resolution at the seventeenth annual CITES Conference of the Parties (CoP17) in September 2016.<sup>41</sup> The document acknowledges the presence of corruption at every point in the trade chain,<sup>42</sup> and notes that CITES offers a “sector-specific” approach to addressing corruption.<sup>43</sup>

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36. E.g., *Wanted – Dead or Alive: Exposing Online Wildlife Trade*, INTERNATIONAL FUND FOR ANIMAL WELFARE (Nov. 25, 2014), <http://www.ifaw.org/sites/default/files/IFAW-Wanted-Dead-or-Alive-Exposing-Online-Wildlife-Trade-2014.pdf>.

37. *Draft Decisions on Combating Wildlife Cybercrime (CoP 12 Com II 36)*, CITES, [https://cites.org/sites/default/files/eng/cop/17/Com\\_II/E-CoP17-Com-II-36.pdf](https://cites.org/sites/default/files/eng/cop/17/Com_II/E-CoP17-Com-II-36.pdf) (last visited Oct. 30, 2016).

38. E.g., Willy Woody, Chief, Office of Law Enforcement, USFWS, Dep’t of Interior, *Stopping the Money Flow: The War on Terror Finance: Before the H. Comm. on Foreign Affairs, Subcomm. on Terrorism, Nonproliferation, and Trade, and H. Comm. on Armed Services, Subcomm. on Emerging Threats and Capabilities* (June 9, 2016), <https://www.fws.gov/laws//Testimony/displaytestimony.cfm?ID=270> (“Wildlife trafficking once was predominantly a crime of opportunity committed by individuals or small groups. Today, it is the purview of international criminal cartels that are well structured, highly organized, and capable of illegally moving large commercial volumes of wildlife and wildlife products. What was once a local or regional problem has become a global crisis, as increasingly sophisticated, violent, and ruthless criminal organizations have branched into wildlife trafficking. Organized criminal enterprises are a growing threat to wildlife, the world’s economy, and global security.”).

39. This section authored by Judith Chiarito Evans of the University of New Hampshire School of Law.

40. Wildlife Conservation Society, *WCS Cheers Adoption of CITES CoP17 Corruption Resolution*, NAT’L GEOGRAPHIC (Sept. 28, 2016), <http://voices.nationalgeographic.com/2016/09/28/wcs-cheers-adoption-of-cites-cop17-corruption-resolution/>.

41. *Prohibiting, Preventing and Countering Corruption Facilitating Activities Conducted in Violation of the Convention (CoP 17 Doc. 28)*, CITES ¶ 1, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-28.pdf> (last visited Oct. 31, 2016).

42. *Id.* ¶ 3.

43. *Id.* ¶ 5.

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The draft resolution builds upon previous United Nations resolutions and conventions that address corruption, bribery, and wildlife trafficking.<sup>44</sup> The document states that the United Nations General Assembly, for example, has passed resolutions that address the influence of corruption on wildlife trafficking.<sup>45</sup> It notes that Resolution 69/80 reaffirms The United Nations Convention against Corruption (UNCAC),<sup>46</sup> and encourages Member States to address corruption that facilitates illegal wildlife trafficking.<sup>47</sup> It also mentions Resolution 70/1—the outcome document of the United Nations Sustainability Summit—which outlines targets for ending poaching and wildlife trafficking and reducing bribery and corruption.<sup>48</sup>

The resolution notes that UNCAC and the United Nations Convention on Transnational Organized Crime (UNTOC)<sup>49</sup> require criminalization of bribery and similar offenses.<sup>50</sup> For example, UNCAC Article 5 requires Parties to adopt anti-corruption policies,<sup>51</sup> and Article 13 notes the importance of participation by private individuals and groups in combating corruption and promoting public awareness.<sup>52</sup>

The Cop17 draft resolution recognizes that implementation of CITES can be compromised by corruption of implementation authorities and other government officials.<sup>53</sup> Stating that “failure to prohibit, prevent, detect and counter corruption which relates to the implementation or enforcement of CITES greatly undermines the effectiveness of the Convention,”<sup>54</sup> the resolution urges Parties to adopt measures to make corruption “associated with the administration, regulation, implementation or enforcement of CITES”<sup>55</sup> a criminal offense.<sup>56</sup> Acknowledging the need to prevent corruption in CITES implementation, enforcement, and administration, the resolution encourages Member States to properly train, equip, and pay these authorities and professionals.<sup>57</sup>

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44. *Id.* at 4.

45. *Id.*

46. United Nations Convention Against Corruption art. 5, Dec. 9, 2003, 2349 U.N.T.S. 41.

47. Tackling Illicit Trafficking in Wildlife, GA Res. 69/L.80, at 2-3, U.N. Doc. A/RES/69/314 (July 15, 2015).

48. Transforming our world: the 2030 Agenda for Sustainable Development, GA Res. 70/1, ¶ 15.7, A/RES/70/1 (Oct. 21, 2015).

49. United Nations Convention Against Transnational Organized Crime art. 8, Dec. 12, 2000, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003).

50. *Prohibiting, Preventing and Countering Corruption Facilitating Activities Conducted in Violation of the Convention (CoP 17 Doc. 28)*, CITES 4, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-28.pdf> (last visited Oct. 31, 2016).

51. United Nations Convention Against Corruption, *supra* note 46, at art 5.

52. *Id.* art. 13.

53. *Prohibiting, Preventing and Countering Corruption Facilitating Activities Conducted in Violation of the Convention (CoP 17 Doc. 28)*, CITES 5 ¶ 1, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-28.pdf> (last visited Oct. 31, 2016).

54. *Id.* ¶ 1.

55. *Id.* ¶ 2.

56. *Id.*

57. *Id.* ¶ 5.

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The resolution contains measures to prevent corruption in CITES permit and certificate procedures at every stage of the trade chain, including endorsement, inspection, and clearance of authorized shipments.<sup>58</sup> Parties are encouraged to implement deterrence and detection of corrupt practices.<sup>59</sup> Acknowledging the role that corporate gifting can play in corruption, paragraph 8 urges Parties to “adopt zero tolerance policies”<sup>60</sup> toward acceptance of “CITES-listed species or products made from them.”<sup>61</sup>

The resolution encourages CITES Member States to use training and guidance materials prepared by INTERPOL, the UN Commission on Drugs and Crime, the World Bank, and similar organizations to prevent corruption among CITES personnel.<sup>62</sup> Paragraph 4 states that CITES Implementation Authorities should seek expertise from existing law enforcement agencies, anti-corruption commissions, and other organizations.<sup>63</sup> Donor communities, intergovernmental and international organizations, and non-governmental organizations should, in turn, provide funds and expertise upon request to enable anti-corruption and CITES enforcement measures.<sup>64</sup> The resolution recommends continued anti-corruption efforts by the International Consortium on Combating Wildlife Crime (ICWC),<sup>65</sup> and adoption of anti-corruption plans by regional and sub-regional Wildlife Enforcement Networks.<sup>66</sup>

The resolution further encourages regular reports on corruption-related matters.<sup>67</sup> For example, CITES Article VIII, Paragraph 7(b) requires Parties to submit “a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the present Convention.”<sup>68</sup> The anti-corruption resolution asks Parties to help prevent CITES-related corruption by reporting instances of corruption and anti-corruption activities in these implementation reports.<sup>69</sup> Paragraph 13 of the resolution requests that the Secretariat issue reports on allegations of corruption to relevant national authorities and at every Standing Committee meeting and

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58. *Id.* ¶¶ 6, 7.

59. *Prohibiting, Preventing and Countering Corruption Facilitating Activities Conducted in Violation of the Convention (CoP 17 Doc. 28)*, CITES 5 ¶ 7, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-28.pdf> (last visited Oct. 31, 2016).

60. *Id.* ¶ 8.

61. *Id.*

62. *Id.* ¶ 6.

63. *Id.* ¶ 4.

64. *Id.* ¶ 9.

65. *Prohibiting, Preventing and Countering Corruption Facilitating Activities Conducted in Violation of the Convention (CoP 17 Doc. 28)*, CITES 5 ¶ 10, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-28.pdf> (last visited Oct. 31, 2016).

66. *Id.* ¶ 11.

67. *Id.* ¶ 12.

68. United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora art. 7(b), Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

69. *Prohibiting, Preventing and Countering Corruption Facilitating Activities Conducted in Violation of the Convention (CoP 17 Doc. 28)*, CITES 5 ¶ 10, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-28.pdf> (last visited Oct. 31, 2016).

Conference of the Parties.<sup>70</sup> The Standing Committee is asked to “take note of instances of corruption affecting the implementation or enforcement of the Convention,”<sup>71</sup> and to issue recommendations to relevant Parties and Conference of the Parties, as well as consider measures under the Conference of the Parties Compliance Procedures.<sup>72</sup>

The CoP17 *Enforcement Matters* document states that the involvement of organized crime in wildlife trafficking “makes the officers responsible for regulating trade in specimens of these species particularly vulnerable to corruption.”<sup>73</sup> *Enforcement Matters* recommends that Parties adopt measures such as “vetting of staff”<sup>74</sup> and “recognizing and rewarding those who become aware of corrupt practices, refuse to engage in [them], and expose [them],”<sup>75</sup> and take “prompt and strict actions”<sup>76</sup> against officials who take part in corrupt practices.<sup>77</sup>

## II. Developments on Marine Conservation<sup>78</sup>

### A. THE ROSS SEA REGION MARINE PROTECTED ZONE: THE PUSH TO PROTECT ANTARCTICA’S “LAST OCEAN”

On October 28, 2016, representatives from twenty-four nations and the European Union reached an agreement to establish the 598,000 square mile Ross Sea Marine Protected Zone in Antarctica as the world’s largest marine reserve. The Ross Sea reserve encompasses the Ross Sea shelf and slope, the Balleny Islands, and the ocean around two seamounts.<sup>79</sup> It is home to thousands of species, including approximately 38 percent of the world’s Adelie penguins, 30 percent of Antarctic petrels, and 6 percent of the population of Antarctic minke whales.<sup>80</sup> According to the U.S. Secretary of State John Kerry, it is intended as “a natural laboratory for valuable scientific research to increase our understanding of the impact of climate change and fishing on the ocean and its resources” and its protection will improve collaborative marine research.<sup>81</sup>

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70. *Id.* at 6, ¶ 13.

71. *Id.* ¶ 14.

72. CITES Conf. Res. 14.3 (2013), available at <https://cites.org/eng/res/14/14-03C15.php>.

73. *Enforcement Matters (CoP 17 Doc. 25)*, CITES ¶ 17, <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-28.pdf> (last visited Oct. 31, 2016).

74. *Id.* ¶ 23.

75. *Id.*

76. *Id.* ¶ 21.

77. *Id.*

78. This section authored by Emily Bergeron of the University of Kentucky.

79. *Conservation Measure 91-05*, CCAMLR, [https://www.ccamlr.org/sites/drupal.ccamlr.org/files/91-05\\_4.pdf](https://www.ccamlr.org/sites/drupal.ccamlr.org/files/91-05_4.pdf) (last visited Nov. 30 2016).

80. Matt McGrath, *Nations push to protect Antarctica’s ‘last ocean’*, BBC (Oct. 27, 2016), <http://www.bbc.com/news/science-environment-3777257>.

81. Press Release, Secretary of State John Kerry, Department of State, On the New Marine Protected Area in Antarctica’s Ross Sea (October 27, 2016), <https://www.state.gov/secretary/remarks/2016/10/263763.htm>.

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Human activity in the Antarctic is regulated by treaties and international organizations, some specific to the Antarctic, such as the Antarctic Treaty.<sup>82</sup> This treaty was enhanced by the Protocol on Environmental Protection,<sup>83</sup> which previously designated Antarctica as a “natural reserve, devoted to peace and science” and mandated that protection of this environment be considered paramount when planning and carrying out activities there. Additionally, the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)<sup>84</sup> was adopted, in part, as an international response to concerns that unregulated increases in krill catches in the Southern Ocean would damage Antarctic marine ecosystems, impacting species reliant on krill for food (i.e., seabirds, seals, whales, and fish).<sup>85</sup> The CCAMLR, which oversees the waters surrounding Antarctica, created the Ross Sea reserve by a unanimous decision of Member Nations.<sup>86</sup> In addition to the reserve, the commission renewed a measure limiting krill fishing in the South Atlantic for an additional five years.

The majority of the reserve has been designated a “no-take” zone, prohibiting the removal of marine life or minerals. Although the agreement bans commercial fishing in the entire area, it does designate 28 percent of the reserve as research zones where scientists may take limited quantities of fish and krill. The total tonnage of fish that may be harvested from the Ross Sea has not been reduced; however, fishing vessels have been restricted to areas further out to sea away from ecologically significant sites such as breeding and feeding grounds for whales, large fish, penguins, and other sea birds.<sup>87</sup> Protection will begin on December 1, 2017, and continue for thirty-five years.

**B. MARINE CONSERVATION IN THE UNITED STATES AND RUSSIA**

Numerous other advances in ocean conservation and the protection of marine habitats were made in 2016 with marine reserves created and

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82. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794.

83. Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 ILM 1455.

84. Convention on the Conservation of Antarctic Marine Living Resources, Aug 1, 1980, 33 U.S.T 3476; 1329 U.N.T.S 48; 19 ILM 841.

85. Numerous other laws and organizations governing global maritime activities impact the Antarctic seas. See, e.g., *Agreed Measures for the Conservation of Antarctic Flora and Fauna*, June 2-13, 1964, 17 U.S.T. 996, T.L.A.S. No. 6058 (prohibiting the taking of species without a permit and the introduction of non-native species, and designate specially protected species); *Convention for the Conservation of Antarctic Seals (CCAS)*, Feb. 11, 1972, 1080 U.N.T.S. 175, 29 U.S.T. 441 (establishing measures designed to conserve Antarctic seal populations, including permitting for the killing of seals); *History and Purpose*, INT’L WHALING COMM’N, <https://iwc.int/history-and-purpose> (last visited Nov. 11, 2016) (governing of Antarctica’s whales); *Introduction to IMO*, INT’L MARITIME ORG., <http://www.imo.org/en/About/Pages/Default.aspx> (last visited Nov. 11, 2016) (creates rules governing shipping).

86. *Conservation Measure 91-05*, CCAMLR, [https://www.ccamlr.org/sites/drupal.ccamlr.org/files/91-05\\_4.pdf](https://www.ccamlr.org/sites/drupal.ccamlr.org/files/91-05_4.pdf) (last modified Nov. 30 2016).

87. *Id.*

expanded by various countries seeking to protect these environments from the effects of climate change, pollution, and overfishing.<sup>88</sup> On August 26, 2016, President Obama, using his authority under the Antiquities Act, issued a Proclamation expanding the Papahānaumokuākea Marine National Monument off the coast of Hawaii to include more than 582,000 square miles of remote Pacific waters known for exceptional marine life and of importance to native Hawaiian culture.<sup>89</sup> In addition to expanding the monument's boundary, the proclamation prohibited commercial fishing out to the 200-mile limit of the exclusive economic zone. Papahānaumokuākea is a sanctuary for endangered species, including blue whales, short-tailed albatrosses, sea turtles, and Hawaiian monk seals and contains some of the world's northernmost, healthiest coral reefs. On the same day, Russia expanded the Russkaya Arktika (Russian Arctic) National Park to include Franz Josef Land, the world's northernmost chain of islands, providing further protection of the habitat of Atlantic walrus, bowhead whale, polar bear, narwhal, and white gulls, making the park the country's largest specially protected natural territory.<sup>90</sup>

### **III. Developments at the Tenth North American Leaders Summit<sup>91</sup>**

#### **A. THE NORTH AMERICAN CLIMATE, CLEAN ENERGY, AND ENVIRONMENT PARTNERSHIP AND ACTION PLAN**

On June 29, 2016, Prime Minister Justin Trudeau, President Barack Obama, and President Enrique Peña Nieto held the Tenth North American Leaders Summit in Ottawa, Canada. In this meeting, the three governments announced the North American Climate, Clean Energy and Environment Partnership and Action Plan, an ambitious agreement that includes the protection of ecosystems and endangered species that live or transit through Mexico, the United States, and Canada.

Sustainable biodiversity conservation is one of the top priorities of this Partnership.<sup>92</sup> It created new commitments and confirmed a set of long-

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88. For a more comprehensive list of commitments made by various countries to protect marine resources, see the proceedings of the Our Oceans conference held in September 2016 in Washington, DC. *Commitments, OUR OCEAN*, <http://ourocean2016.org/commitments/#commitments-main> (last visited Apr. 11, 2017).

89. Proclamation 9478, 81 Fed. Reg. 60226 (August 26, 2016), available at <https://www.federalregister.gov/documents/2016/08/31/2016-21138/papahamacnaumokuamacrkea-marine-national-monument-expansion>.

90. *Russia Expands National Park to Protect Franz Josef Land Archipelago*, NAT'L. GEOGRAPHIC (Aug. 29, 2016), <http://nationalgeographic.org/newsroom/russia-expands-national-park-to-protect-franz-josef-land-archipelago>.

91. This section authored by Mayra Cavazos Calvillo of the Law Office of Bernard Grimm.

92. Office of the Press Secretary, *Leaders' Statement on a North American Climate, Clean Energy, and Environment Partnership*, WHITE HOUSE (June 29, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/29/leaders-statement-north-american-climate-clean-energy-and-environment>.

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term goals. One of the old long-term commitments of the three governments is the protection of the natural habitat of the Monarch butterfly. The countries reaffirmed their continuous cooperation to achieve the “2020 Eastern Monarch population target represented by its occupation of six hectares of overwintering habitat in Mexico.”<sup>93</sup>

A second long-term commitment outlined in this Partnership is the flyway conservation of North American migratory bird species. More than 800 species are covered under the Migratory Birds Treaty Act of 1918 (MBTA),<sup>94</sup> which implemented Conventions between the United States, Canada, and Mexico in 1916 and 1936, respectively.<sup>95</sup> The Partnership Action Plan also encompasses the “conservation of key species and combat of wildlife trafficking”<sup>96</sup> through their established channels of dialogue, namely, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Last, the North American Partnership Action Plan provides that the three governments will “enhance cooperation among respective Marine Protected Areas”<sup>97</sup> and “foster complementary research on oceans, including the impacts of climate change on oceans and marine ecosystems.”<sup>98</sup>

#### **IV. Developments on the International Dog Meat Trade Industry<sup>99</sup>**

##### **A. UNITED STATES**

On May 25, 2016, House Resolution 752 was introduced by Rep. Alcee L. Hastings (D-FL-20), and referred to the House Committee on Foreign Affairs.<sup>100</sup> The Resolution had 142 Co-Sponsors, with broad bipartisan support. The Resolution condemns the Dog Meat Festival in Yulin, China, because it (1) is a spectacle of extreme animal cruelty, (2) is a commercial activity not grounded in Chinese history, (3) is opposed by a majority of the Chinese people, and (4) threatens global public health. The Resolution

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93. Office of the Press Secretary, *North American Climate, Clean Energy, and Environment Partnership Action Plan*, WHITE HOUSE (June 29, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/29/north-american-climate-clean-energy-and-environment-partnership-action>.

94. *Migratory Bird Treaty Act*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php> (last visited Nov 19, 2016).

95. *Id.*

96. *North American Climate, Clean Energy, and Environment Partnership Action Plan*, *supra* note 93.

97. *Id.*

98. *Id.*

99. This section authored by Linda M. Lowson of the Global ESG Regulatory Academy.

100. *See*, H.R. Res. 752, 114th Cong. (2015), *available at* <https://www.congress.gov/bill/114th-congress/house-resolution/752/all-info>; 789 Cong. Rec. Extension of Remarks (daily ed. May 25, 2016) (statement of Hon. Hastings) (plans to introduce additional legislation urging all nations to end the dog meat trade and its inhumane practices).



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urges the government of China and the Yulin authorities to ban the killing and eating of dogs as part of Yulin's festival, and to enforce China's food safety laws regulating the processing and sale of animal products and the 2011 Agriculture Ministry of China Regulation on the Quarantine of Dogs at the Place of Origin requiring one certificate for one dog on trans-provincial transport trucks. It further urges the National People's Congress of China to enact an animal anticruelty law that bans the dog meat trade. Lastly, the Resolution affirms the commitment of the United States to the protection of animals and to the progress of animal protection. On September 7, 2016, the Bill was referred to the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific.<sup>101</sup>

**B. UNITED KINGDOM**

Following a House of Commons Resolution passed on November 5, 2015,<sup>102</sup> a House of Commons Debate on the South Korean illegal dog meat trade was held on September 12, 2016. The attending MPs unanimously called for an end to South Korea's atrocious factory farming of dogs for human consumption, and pressed the U.K. government to engage in a dialogue with the South Korean government now on this issue.<sup>103</sup>

**C. SOUTHEAST ASIA**

Investigation and exposing of the horrific and expanding illegal dog meat trade in Southeast Asia continued in 2016 with strong vigor and determination by numerous prominent NGOs (most notably Humane Society International), calling for a complete ban on the dog meat trade, governmental enforcement of existing laws, and enactment of amendments to animal protection laws.<sup>104</sup>

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101. *Id.*

102. 601 Parl Deb HC (6th series) (2015) col. 1226-1227 (UK), *available at* <https://hansard.parliament.uk/Commons/2015-11-05/debates/15110531000003/DogMeatTrade>.

103. *See, E-Petition 120702*, PARLIAMENT LIVE.TV, (Sep. 12, 2016), <http://www.parliamentlive.tv/Event/Index/e5c0e472-edfa-421d-ad27-5b04760cdd5e> (the Petition urged U.K. government action now as the 2018 Winter Olympics will be held in South Korea in 18 months); *Nagaland, India dog meat media footage*, HUMANE SOC'Y, <http://newsroom.humaneociety.org/video/video.php?bctid=5030678792001> (last visited Nov. 21, 2016).

104. There are an estimated 30 million dogs brutally and illegally killed every year for human consumption in Southeast Asia, with the dog meat trade most prevalent in China, South Korea, Vietnam, the Philippines, Thailand, Laos, Cambodia, and India's State of Nagaland. The dogs are kidnapped from homes, caught on the streets, and raised on thousands of illegal dog farms scattered around the country, ranging from small backyard enterprises to large-scale industrialized farms with more than 1,000 dogs. This illegal trade represents a US\$2 billion industry in South Korea alone. *See The Dog Meat Trade*, ANIMAL WELFARE INST, <https://awionline.org/dogmeat> (last visited Nov. 21, 2016); *Dog Meat Trade*, HUMANE SOC'Y INT'L, [http://www.hsi.org/issues/dog\\_meat/](http://www.hsi.org/issues/dog_meat/) (last visited Nov. 21, 2016); *India's brutal dog meat trade exposed as Humane Society International launches campaign to end "Nagaland Nightmare"*, HUMANE SOC'Y INT'L (July 13, 2016), [http://www.hsi.org/news/press\\_releases/2016/07/nagaland-india-](http://www.hsi.org/news/press_releases/2016/07/nagaland-india-)

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D. CHINA

In China, where more than 18 million dogs are killed each year for their meat or fur, a ground-breaking legislative proposal was introduced to the National People's Congress in March 2016 by a deputy to the Congress, Zheng Xiaohu. The proposal calls for a ban on the transport, trade, slaughter, manufacture, and sale of dogs and cats for the purpose of eating, including for use in food processing materials, as "a clear violation of the purpose and mission of China's Food Safety Law and Animal Epidemic Prevention Law." In an online voting poll, 8.6 million Chinese people backed the proposal.<sup>105</sup>

**V. China's 2016 Revised Wildlife Protection Law: A Law of Economic Benefit Not Conservation**<sup>106</sup>

A. INTRODUCTION

The Wildlife Protection Law (WPL) of the People's Republic of China is the primary law in China that relates to the protection of wildlife. The legislation was originally enacted in 1989<sup>107</sup> and has long been criticized for the lack of protections given to wild animals. The 1989 WPL characterized wildlife as a resource for human use, promoting utilization for human gain rather than protection. On July 2, 2016, the Standing Committee of the National People's Congress in China passed new amendments to the WPL.<sup>108</sup>

The revised WPL of 2016 states that the purpose of the law is to protect rare and endangered wildlife, preserve biodiversity and ecological balance,

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dog-meat-trade.html; *Nagaland, India dog meat media footage*, *supra* note 103; Peter Shadbolt, *Smugglers drive Thailand's grim trade in dog meat*, CNN (June 3, 2013), <http://edition.cnn.com/2013/06/02/world/asia/thailand-dogs/index.html>. Animal welfare acts in Hong Kong, Taiwan, and the Philippines have banned the slaughtering and the sale of dogs for human consumption, but these laws are not being enforced, despite the significant public health risks (including rabies transmission), which are well documented. See, Merritt Clifton, *More medical warnings link dog meat to rabies*, ANIMALS 24-7 (Mar. 18, 2015), <http://www.animals24-7.org/2015/03/18/more-medical-warnings-link-dog-meat-to-rabies/>; *Introduction and Purpose of Report*, SIRIUS.ORG, <http://www.siriusgao.org/submission/Submission%20-%20International%20Ban%20on%20Dog%20Meat%20Products%204.pdf> (last visited Nov. 21, 2016) (a 2007 Sirius NGO Report to World Health Organization calling for an international ban on dog meat products).  
105. See *SPECIAL REPORT: Almost 9 million Chinese back bill to end cat and dog meat eating*, ANIMALS ASIA (Mar. 23, 2016), <https://www.animalsasia.org/us/media/news/news-archive/special-report-almost-9-million-chinese-back-bill-to-end-cat-and-dog-meat-eating.html>.

106. This section was authored by Laura Schierhoff and Marcy Stras of Cozen O'Connor, and Linda M. Lowson of the Global ESG Regulatory Academy.

107. Law of the People's Republic of China on the Protection of Wildlife (promulgated by the Standing Comm. Nat'l Cong., Nov. 8, 1988), rev'd Aug. 28, 2004) chap. 1, art. 2 (2004) (China).

108. Adopted at the Twenty-First Meeting of the Standing Committee of the Twelfth People's Congress.

and promote the construction of an ecological civilization.<sup>109</sup> But the new law carves out exemptions that maintain the status quo. For instance, captive breeding for commercial purposes under the revised WPL is still allowed, as long as a license is obtained from the government. Unfortunately, the revisions make it clear that wildlife in China is still considered a resource, and there can be little doubt that these animals will continue to be exploited instead of protected.

## B. THE WILDLIFE PROTECTION LAW REVISED

The revised law will take effect on January 1, 2017 and while the new WPL contains language and provisions promoting the protection of wildlife, it advances the use of wild animals as a resource into regulation. The revised WPL came after years of review, public input, and consultation. Many scientists, conservation and animal welfare NGOs weighed in on the process and encouraged a shift from the WPL's original paradigm—of breeding, domesticating, and utilizing wildlife—to conservation. And while it may appear that China took conservation into consideration, as the revised WPL does contain updated language on conservation, in reality many significant changes that had been advocated for are absent.

### 1. *Authority*

The departments of forestry and fisheries under the State Council continue to authorize the protection of both terrestrial and aquatic animals respectively.<sup>110</sup> The law also continues to identify wildlife as a “resource” belonging to the state.<sup>111</sup> The revised WPL gives significant authority to provincial governments who will oversee many of the protection plans and measures, which could mean less oversight at the Central level of government.

### 2. *Wildlife Habitats*

The revised WPL directs the state to protect wildlife and their habitats.<sup>112</sup> Human activity in protected wildlife habitats will be restricted, which includes construction projects such as airports, railways, and roads.<sup>113</sup> Further, the law states that if construction projects cannot be avoided on nature reserves or wildlife migration routes, the projects should build wildlife passages or take other measures to allow for wildlife migration and to avoid an adverse impact on wildlife.<sup>114</sup>

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109. Law of the People's Republic of China on the Protection of Wildlife (promulgated by the Standing Comm. Nat'l Cong., Jul. 2, 2016) chap. 1, art. 1 (2016) (China).

110. *Id.* art. 7.

111. *Id.* art. 3.

112. *Id.* art. 5.

113. *Id.* chap. 2, art. 13.

114. *Id.*

### 3. *Breeding Wildlife*

The revised WPL does not encourage the domestication and breeding of wildlife like the old WPL.<sup>115</sup> But the 2016 WPL does encourage breeding programs that support relevant scientific research institutions in conducting captive breeding of wildlife under special state protection.<sup>116</sup> Anyone involved with captive breeding of wildlife for reasons other than scientific research, may do so after receiving a permit.<sup>117</sup> The only stipulation for captive breeding is that it may not damage wildlife populations.<sup>118</sup>

### 4. *Hunting*

The revised WPL prohibits certain hunting methods, including hunting with poisons, explosives, electric devices, snares, and leg-hold traps.<sup>119</sup> Night-time hunting with lights, guerrilla-style hunting, destroying nests or dens, using fire, smoke or nets are also prohibited.<sup>120</sup> An exception is made for net or electric hunting if necessary for scientific research.<sup>121</sup> Hunting permits and licenses are required, as well as a gun license if hunting with a gun.<sup>122</sup>

### 5. *Trade in Wildlife*

The revised WPL generally prohibits the sale, purchase, and use of endangered wildlife species.<sup>123</sup> But it carves out large exemptions, including where the sale is necessary for: (1) scientific research, (2) captive breeding, (3) public exhibition or performances, and (4) heritage conservation or other special purposes.<sup>124</sup> Under these exemptions, an approval must be obtained from the provincial-level government.<sup>125</sup> Utilizing wildlife and wildlife products for medicine is also allowed, the only rule is that one shall abide by relevant laws and regulations relating to the administration of medicines.<sup>126</sup>

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115. Law of the People's Republic of China on the Protection of Wildlife (promulgated by the Standing Comm. Nat'l Cong., Nov. 8, 1988) chap. 1, art. 2 (1988) (China).

116. Law of the People's Republic of China on the Protection of Wildlife (promulgated by the Standing Comm. Nat'l Cong., Jul. 2, 2016) chap. 1, art. 1 (2016) (China).

117. *Id.*

118. *Id.* chap. 3, art. 25.

119. *Id.* art. 24.

120. *Id.*

121. *Id.*

122. *Id.* art. 23

123. *Id.* art. 27.

124. *Id.*

125. Law of the People's Republic of China on the Protection of Wildlife (promulgated by the Standing Comm. Nat'l Cong., Jul. 2, 2016) chap. 1, art. 1 (2016) (China).

126. *Id.* art. 29.

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C. CAUSE FOR CONCERN

While the revised WPL is an improvement over the old law that defined wildlife as species “which are beneficial or of important economic or scientific value,”<sup>127</sup> it still does little for the humane treatment of wildlife and conservation. The stated purpose in the 2016 revision may be to protect and conserve wildlife, however it essentially carries over the worst elements of the old law by regulating captive breeding of wild animals and the trade in commercial wildlife for scientific purposes and other exceptions.

One of the most significant causes for concern is the breeding of wildlife species. The revised WPL mandates that the breeding of wildlife must be carried out for the purpose of protecting the species.<sup>128</sup> While the language focuses more on the ecological value of wildlife and cuts out much of the utilitarian approach, there are still huge loopholes that allow for the exploitation of wildlife to continue for scientific research and other exceptions and through obtaining a permit.

Another huge concern is that the revised WPL fails to ban the commercial exploitation of wildlife. The law generally prohibits the sale, purchase, or use of endangered wild animals and their products; however the exemptions ultimately cancel out those prohibitions in practice. Again, one must only obtain approval from the government to fall under one of the exempted categories.<sup>129</sup> Legalizing trade in wildlife will only fuel demand, and will lead not only to more captive breeding, but will also drive up poaching for the scarce wildlife populations that still exist.

The revised WPL also failed to ban farmed wild animal products—like tiger bone or bear bile—and includes language that sets the legal basis for allowing commercial breeding and trade in endangered species. One need only obtain a captive/artificial breeding permit in order to continue the practice.

A potential positive change is the revised WPL states that captive bred wildlife should have the necessary living space and conditions for movement, as well as hygienic and adequate facilities, which would be a vast improvement over where these animals are kept now.<sup>130</sup> The law also states that wildlife should not be abused.<sup>131</sup> The tigers and bears that are kept on “farms” today are kept in deplorable and appalling conditions and would benefit from this revision. But there are thought to be hundreds of tiger and bear farms with thousands of animals and it is hard to imagine all these farms converting their facilities to meet this requirement. Further, the law still

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127. Law of the People’s Republic of China on the Protection of Wildlife (promulgated by the Standing Comm. Nat’l Cong., Nov. 8, 1988) chap. 1, art. 2 (1988) (China).

128. Law of the People’s Republic of China on the Protection of Wildlife (promulgated by the Standing Comm. Nat’l Cong., Jul. 2, 2016) chap. 1, art. 1 (2016) (China).

129. *Id.* at 27.

130. *Id.* at 26.

131. *Id.*

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enshrines use of captive wildlife for economic gain and banning the farms outright would be the only way to ensure that these animals are not abused.

While the revised WPL took years to complete and there were high hopes for a shift in the way China handles conservation and views wildlife, the changes have fallen far from the stated goal of protecting wildlife. Not only will the commercial exploitation of wildlife continue under the new WPL, the exploitation is now regulated and sanctioned. This is a major step back for the humane treatment of animals and conservation in China.

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## **International Art and Cultural Heritage Law**

PATTY GERSTENBLITH, JACQUELINE CHEZAR, DAVID BRIGHT,  
AND KEVIN RAY\*

This article summarizes important legal developments in 2016 in international art and cultural heritage law.

### **I. The Protect and Preserve International Cultural Property Act**

The United States implements its obligations under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>1</sup> through the Convention on Cultural Property Implementation Act (CPIA).<sup>2</sup> Under the CPIA, a State Party can request assistance under Article 9 of the Convention when its cultural patrimony is in jeopardy due to the pillage of archaeological or ethnological materials.<sup>3</sup> A request is submitted through diplomatic channels with supporting documentation relating to the four statutory determinations that are prerequisites to such an agreement. The United States can then impose import restrictions on designated categories of archaeological and ethnological materials pursuant to a bilateral agreement. Another mechanism also exists for imposing import restrictions in “emergency” circumstances.<sup>4</sup> But the term “emergency” is at best a misnomer and is frequently misleading because this provision is not applicable unless the requesting State first asks for a bilateral agreement.<sup>5</sup> This process is therefore not opportune in cases of true emergency situations, as demonstrated by the recent examples of Iraq and Syria.

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\* Patty Gerstenblith is Distinguished Research Professor, DePaul University College of Law, and a Senior Advisor to the ABA’s Art & Cultural Heritage Law Committee (Part I). All opinions expressed in these materials are those of the author and not necessarily those of the U.S. Department of State or of the U.S. government. Jacqueline Chezar is Executive Director and Assistant General Counsel at The Depository Trust & Clearing Corporation and a Senior Advisor to the ABA’s Art & Cultural Heritage Law Committee (Part II). David Bright is an Attorney, Simmons Perrine Moyer Bergman PLC, and Co-Chair of the International Art & Cultural Heritage Law Committee (Part III). Kevin Ray is Of Counsel, Greenberg Traurig, LLP, and Immediate Past Co-Chair of the ABA’s Art & Cultural Heritage Law Committee (Editor) (Part IV).

1. 823 U.N.T.S. 231 (1970).

2. 19 U.S.C.A. §§ 2601-13 (West 2007).

3. 19 U.S.C.A. § 2602 (West 2007).

4. 19 U.S.C.A. § 2602 (West 2007) (describing the process for imposing import restrictions pursuant to an emergency action and the definition of emergency condition).

5. 19 U.S.C.A. § 2603 (c)(1) (West 2007).



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In the case of Iraq, as is well known, the Iraq National Museum in Baghdad was looted during the United States-led invasion in March and April of 2003. For the next several years, archaeological sites, particularly in the southern part of Iraq, were looted on a massive scale.<sup>6</sup> In May of 2003, the United Nations Security Council adopted Resolution 1483, calling on all Member States to “take appropriate steps to facilitate the safe return to Iraqi institutions of [illegally removed] Iraqi cultural property . . . including by establishing a prohibition on trade in or transfer of such items . . . .”<sup>7</sup> It was not possible for Iraq to engage in the CPIA process to request import restrictions. To fulfill U.S. obligations, Congress enacted special legislation, the Emergency Protection for Iraqi Cultural Antiquities Act, in late 2004,<sup>8</sup> and import restrictions were later imposed.<sup>9</sup>

The cultural heritage of Syria has suffered considerable damage, destruction, and looting since the beginning of the civil war in March 2011. While some of the looted archaeological sites, such as Ebla and Apamea, are located in western Syria, several major sites, including Dura-Europos, Mari and Raqqa, are located within territory controlled by the so-called Islamic State of Iraq and the Levant (ISIL).<sup>10</sup> Satellite imagery shows that these sites were looted on an industrial scale after falling under ISIL control in 2014. Both on-the-ground reports and evidence gathered in a raid carried out by special operations forces in May 2015 indicate that ISIL is reaping monetary benefit from the looting of archaeological sites.<sup>11</sup>

In February 2015, the UN Security Council adopted Resolution 2199, which, mirroring the resolution concerning Iraq, called on all UN member states to prohibit the import of cultural materials illegally removed from

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6. See Elizabeth Stone, *Patterns of Looting in Southern Iraq*, 82 *ANTIQUITY* 125 (2008); Elizabeth C. Stone, *An Update on the Looting of Archaeological Sites in Iraq*, 78 *NEAR EASTERN ARCHAEOLOGY* 178, 179-80 (2015).

7. S.C. Res. 1483 ¶ 7 (May 22, 2003).

8. H.R. Res. 1047, 108th Cong. (2004) (enacted) (This legislation removed the limitations of 19 U.S.C. § 2603(c) and made the import restrictions applicable to a broader category of cultural materials than those covered by the CPIA); see also Treas. Reg. § 575.533(b)(5) (2004) (prohibiting “trade in or transfer of such [cultural] items”).

9. Iraq 2008 Designated List Notice, 73 Fed. Reg. 84 (Apr. 30, 2008).

10. Susan Wolfinbarger, et al., *Ancient History, Modern Destruction: Assessing the Status of Syria’s Tentative World Heritage Sites Using High-Resolution Satellite Imagery*, AAAS GEOSPATIAL TECHNOLOGIES PROJECT, SCIENTIFIC RESPONSIBILITY, HUMAN RIGHTS AND LAW PROGRAM (2014), <https://www.aaas.org/page/ancient-history-modern-destruction-assessing-status-syria-s-tentative-world-heritage-sites-7>; See also Jesse Casana, *Satellite Imagery-Based Analysis of Archaeological Looting in Syria*, *NEAR EASTERN ARCHAEOLOGY* (vol. 78, no. 3) (2015), <https://www.jstor.org/stable/pdf/10.5615/neareastarch.78.3.0142.pdf>. Less well-known sites have not received the same degree of scrutiny but likely have also suffered from looting. *Id.*

11. U.S. Dep’t of State, Bureau of Educational and Cultural Affairs, *ISIL Leader’s Loot*, (May 15, 2015), <https://eca.state.gov/cultural-heritage-center/iraq-cultural-heritage-initiative/isil-leaders-loot>; Andrew Keller, Deputy Assistant Sec’y Remarks at the U.S. Dep’t. of State, *Documenting ISIL’s Atiquities Trafficking*, (Sept. 29, 2015), (on file with author), [https://eca.state.gov/files/bureau/final\\_presentation\\_to\\_met\\_on\\_isil\\_antiquities\\_trafficking\\_for\\_das\\_keller\\_9.29.2015\\_.pdf](https://eca.state.gov/files/bureau/final_presentation_to_met_on_isil_antiquities_trafficking_for_das_keller_9.29.2015_.pdf).

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Syria after March 2011.<sup>12</sup> Even before adoption of the Resolution, the European Union had acted to prohibit import of cultural materials from Syria,<sup>13</sup> as did Switzerland,<sup>14</sup> while the U.K. adopted criminal sanctions.<sup>15</sup> In the spring of 2016, after an earlier unsuccessful attempt, Congress enacted and the President signed into law, the Protect and Preserve International Cultural Property Act (PPICPA), H.R. 1493.<sup>16</sup> Import restrictions were then imposed on cultural materials illegally removed from Syria after March 2011.<sup>17</sup>

As with the Iraq legislation, several aspects of the CPIA were modified to make the import restrictions appropriate to the current situation in Syria. These include eliminating the requirement for a request for a bilateral agreement and a redefinition of the term “archaeological or ethnological material of Syria” to mean “cultural property” as it is defined in the CPIA.<sup>18</sup> But the Syria legislation differs in two ways. One is a fairly complex sunset provision that will terminate the emergency import restrictions when it is possible for Syria to bring a request for a bilateral agreement under the normal CPIA process, and the President determines that it would not be against the national interest of the United States to enter into such an agreement.<sup>19</sup>

A second difference is the addition of a “safe harbor” provision. The President may waive the import restrictions if the “owner or lawful custodian” of the object requests that it be temporarily located in the United States for protection purposes and there is “no credible evidence that granting a waiver . . . will contribute to illegal trafficking . . . or financing of criminal or terrorist activities.”<sup>20</sup> The material must be returned to the

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12. S.C. Res. 2199, ¶ 17 (Feb. 12, 2015) (reaffirming the earlier Security Council Resolution 1483, paragraph 7, with respect to Iraq). As with the Iraq Resolution, this Resolution was adopted under Chapter VII of the United Nations Charter, which makes it mandatory on all U.N. member states to act in accordance with the resolution. *Id.*

13. Council Regulation 1332/2013 of Dec. 13, 2013, Amending Regulation 36/2012 concerning restrictive measures in view of the situation in Syria, O.J. (L 335), art. 3b, art. 11c (EU).

14. Schweizerisches Strafgesetzbuch [StGB] [Criminal Code] June 8, 2012, SR 946.231.172.7 (2012), *as amended by* Der Schweizerische Bundesrat, Mar. 10, 2017, art.9A, para. 1 (Switz).

15. The Export Control (Syria Sanctions) (Amendment) Order 2014, No. 1896, para. 2, art. 12A (UK).

16. Protect and Preserve International Cultural Property Act, Pub. L. 114-151, Stat. 1493.

17. Import Restrictions Imposed on Archaeological and Ethnological Material of Syria, 81 FR 53916, 19 CFR 12 (Aug. 15, 2016); Media Note, United States Imposes Emergency Import Restrictions To Protect the Cultural Heritage of Syria, Aug. 17, 2016, *available at* <http://www.state.gov/r/pa/prs/ps/2016/08/261099.htm> [accessed 1 December 2016]; <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements/syria> [accessed 1 December 2016].

18. 19 U.S.C. § 2601(6) (2007). This definition tracks that of cultural property in Article 1 of the 1970 UNESCO Convention. *Id.*

19. Protect and Preserve International Cultural Property Act, P.L. 114-151, § 3(b), 130 STAT. 369 (2016).

20. *Id.* at § 3(c)(2).

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owner or lawful custodian upon request. Materials for which a waiver has been granted may be placed in the temporary custody of the United States Government or of a cultural or educational institution “for the purpose of protection, restoration, conservation, study, or exhibition, without profit.”<sup>21</sup>

In addition to the import restrictions, the PPICPA states the sense of Congress that the President should establish an interagency committee “to coordinate the efforts of the executive branch to protect and preserve international cultural property at risk from political instability, armed conflict, or natural or other disasters.”<sup>22</sup> This committee is to be chaired by an Assistant Secretary in the Department of State and includes representatives of the Smithsonian Institution and relevant Federal agencies. It should consult with governmental and nongovernmental organizations, including the United States Committee of the Blue Shield, museums, and educational and research institutions. The law also requires an annual report from the President on the activities of the inter-agency committee, implementation of the Iraq and Syria import restrictions, and actions taken to fulfill obligations under international agreements, including the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>23</sup>

While Congress enacted special legislation in the cases of Iraq and Syria, it is not feasible to expect Congress to proceed on a reactive, country-by-country basis, each time a crisis creates the conditions for large-scale looting of archaeological sites and cultural repositories. Under the existing structure of the CPIA, the United States is clearly unable to respond effectively to emergency situations in which cultural heritage is destroyed and looted objects may fund terrorism and armed conflict, as seems now to be the case in Libya.<sup>24</sup> One might conclude that, under these circumstances, a more general corrective legislation is needed to remedy this inability to act in a timely and realistic manner to protect cultural heritage from the threats of looting and theft of cultural remains.

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21. *Id.* at § 3(c)(3). These safe harbor provisions could be viewed as an indirect codification of the First Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. The Association of Art Museum Directors adopted guidelines concerning safe harbors; these would be applicable in the circumstance of such a waiver and possibly in other situations. AAMD Protocols for Safe Havens for Works of Cultural Significance from Countries in Crisis (Oct. 1, 2015), <https://aamd.org/document/aamd-protocols-for-safe-havens-for-works-of-cultural-significance-from-countries-in-crisis>.

22. *Id.* at § 2.

23. *Id.* at § 4.

24. See Susan Kane, *Archaeology and Cultural Heritage in Post-Revolution Libya*, 204 THE AMERICAN SCHOOLS OF ORIENTAL RESEARCH (2015); see also Tim Cornwell, *Looters exploit the political chaos in Libya*, THE ART NEWSPAPER (Oct. 20, 2016), <http://theartnewspaper.com/news/news/looters-exploit-the-political-chaos-in-libya/>.

## **II. Amendment to Germany's Cultural Property Protection Law - Kulturgutschutzgesetz**

On July 8, 2016, German Parliament, the *Bundesrat*, adopted revisions to Germany's Cultural Property Protection Law ("*Kulturgutschutzgesetz*" or KGSG) in an effort to take further action toward prohibiting illegal trafficking of cultural objects, protecting cultural objects of national significance from export, and facilitating the return of cultural objects that were exported illegally from their country of origin.<sup>25</sup> The new law addresses matters that were previously found in various regulations and is an attempt to create one coherent, uniform, legal framework to address, among other matters, the trading in, and import and export of, cultural objects in Germany.

The *Bundesrat* is the legislative body that represents Germany's sixteen federal states (*Länder*) at the national level. While preservation of cultural objects is generally considered a matter to be regulated by the German *Länder*, the federal government has responsibility over protection of *nationally valuable cultural property*, and over the protection of cultural property of foreign states that may have been illegally imported into Germany.<sup>26</sup> Each of the sixteen *Länder* will have an important role in enforcing the new law.

Among the new provisions, the KGSG requires a license for the export of artwork to any foreign nation, including other European Union countries.<sup>27</sup> The requirement applies only to artwork 70 years or older and valued at 300,000.<sup>28</sup> Works of living artists are exempt from this requirement, minimizing the impact of the regulation on the contemporary art market.<sup>29</sup> Despite this limited exemption, the requirement is viewed as significantly expanding the existing export license requirements under European Union law and some fear will have a negative impact on the German art market.<sup>30</sup> Under existing EU regulations, each EU country must require an export license for the export of artwork outside of the EU, but a license is not required for movement of artwork between EU countries.<sup>31</sup>

Each of the sixteen *Länder* is responsible for issuing these export licenses, and is also tasked with creating a register of works that are considered

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25. Gesetz zum Schutz von Kulturgut [KGSG] [Act for the Protection of Cultural Property] July 31, 2016, BUNDESGESETZBLATT, Teil I [BGBl I] at p. 1914.

26. Interview with Monika Grütters, Minister of State for Culture and Media, Die Bundesregierung, (2016).

27. Gesetz zum Schutz von Kulturgut [KGSG] [Act for the Protection of Cultural Property] July 31, 2016, BUNDESGESETZBLATT, Teil I [BGBl I] at § 21.

28. *Id.* at § 24.

29. *Id.*

30. Conrad De Aenlle, *Cultural Property Protection Law Comes Under Fire in Germany*, NY TIMES, Sept. 29, 2016, [https://www.nytimes.com/2016/09/29/arts/international/cultural-property-protection-law-comes-under-fire-in-germany.html?\\_r=0](https://www.nytimes.com/2016/09/29/arts/international/cultural-property-protection-law-comes-under-fire-in-germany.html?_r=0).

31. Council Regulation No. 116/2009 of Dec. 18, 2008 on the export of cultural goods, O.J. (L 39/1), art. 2 (EC).

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“cultural property of unique national importance.”<sup>32</sup> Designated works are considered Germany’s national heritage and, as such, are prohibited from export and may not be granted an export license.<sup>33</sup> An object could be designated for this register if it is deemed to be particularly important for German cultural heritage and export of the object would constitute such a loss to German cultural heritage that prohibition of export is in the public interest.<sup>34</sup> There is no requirement that such objects be created in Germany or by German citizens, but if the creator of the work is still living, that person’s consent must be obtained to place the work on this register.<sup>35</sup>

The KGSG also requires any antiquity imported into or sold in Germany to be accompanied by an appropriate export permit from its country of origin and adequate evidence that it had been legally removed from that country.<sup>36</sup> Additionally, domestic sales of cultural objects must be accompanied by detailed due diligence, including documentation of prior ownership and location, and whether movements were accompanied by appropriate export permits.<sup>37</sup> Antiquities are to be considered illicit unless proven otherwise, and many collectors and antiquities dealers have expressed concern about the effect this requirement will have on the antiquities market. Because objects that are subject to this requirement are likely to have crossed many borders since removal from their country of origin, few will have such documentation.

Finally, among the more significant provisions within the KGSG is a simplification of the procedures required for foreign countries to request the return of cultural objects that were illegally exported.<sup>38</sup> Such requests must include a (1) description of the item; (2) statement confirming the item is considered national cultural heritage under the legislation or administrative procedures of the requesting state; and (3) statement confirming that the cultural heritage has been transferred from its territory illegally.<sup>39</sup> Privately owned items that are the subject of such a request will be required to be surrendered and the owner will be compensated the original purchase price if the owner is able to prove due diligence was exercised in the purchase.<sup>40</sup>

The stated goal of the revised KGSG is to implement European Union Directive 2014/60/EU, on the return of cultural objects unlawfully removed from a Member State,<sup>41</sup> and to improve German implementation of the 1970

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32. Gesetz zum Schutz von Kulturgut [KGSG] [Act for the Protection of Cultural Property] July 31, 2016, BUNDESGESETZBLATT, Teil I [BGBl I] at p. 1914.

33. *Id.* at § 21.

34. *Id.*

35. *Id.* at § 7.

36. *Id.* at § 30.

37. *Id.* at §§ 40–48.

38. *Id.* at §§ 49–57.

39. *Id.*

40. *Id.*

41. Directive 2014/60/ of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation No. 1024/2012, 2014 O.J. (L 159/1), 1.

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UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).<sup>42</sup> Thus, the revised law is intended to bring German law into line with international standards. Similar laws exist in other EU states, notably Italy and Greece. The legislation is also viewed as a response to trafficking of cultural objects from areas of conflict.<sup>43</sup>

Despite its worthy goals, the revised KGSG met outspoken public criticism when it was proposed in 2015.<sup>44</sup> Critics included many German art and antiquities collectors, dealers, and museum directors, as well as prominent artists including Georg Baselitz and Gerhard Richter, most of whom raised concerns regarding the revised export license requirement.<sup>45</sup> While the adopted version of the regulation was updated to address some of the criticism, many remain concerned about the effect the law may have on the Germany's art market.

### III. Fletcher v. Doig

Peter Doig (Doig) is a Scottish artist who has enjoyed considerable commercial and critical success. At auction, his paintings have sold for as much as \$USD 25.9 million.<sup>46</sup> His works appear in the collections of the Art Institute of Chicago, British Museum, Los Angeles County Museum of Art, Museum of Modern Art, and Tate Gallery.<sup>47</sup>

On April 30, 2013, a former corrections officer from Canada named Robert Fletcher (Fletcher), and Bartlow Gallery, Ltd., a Chicago art gallery (Bartlow; collectively, the Plaintiffs), filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division.<sup>48</sup> The lawsuit was originally filed against Doig, Gordon VeneKlasen, Matthew S. Dontzin, and The Dontzin Law Firm, LLP, (Defendants), but the Court dismissed the claims against VeneKlasen and Dontzin, and the Dontzin Law Firm, LLP for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2).<sup>49</sup>

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42. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Austl.-U.S., May 9, 1972, 823 U.N.T.S. 231.

43. Interview with Monika Grütters, Minister of State for Culture and Media, Die Bundesregierung, (2016).

44. De Aenle, *supra* note 30.

45. *Trotz heftiger Proteste Bundestag verabschiedet Kulturgutschutzgesetz*, DER SPIEGEL, June 23, 2016, <http://www.spiegel.de/kultur/gesellschaft/bundestag-verabschiedet-kulturgutschutzgesetz-a-1099319.html>.

46. Peter Doig, *Swamped* (1990), Christie's, *available at* <http://www.christies.com/lotfinder/Lot/peter-doig-b-1959-swamped-5895959-details.aspx> (last visited Dec. 1, 2016).

47. Biography of Artist, *Peter Doig*, ARTNET, <http://www.artnet.com/artists/peter-doig/biography> (last visited Dec. 1, 2016).

48. Verified Complaint for Declaratory and Other Relief, *Fletcher v. Doig*, No. 1:13-cv-03270 (N.D. Ill. Apr. 30, 2013).

49. Fed. R. Civ. P. 12(b)(2).

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The Plaintiffs claimed that Fletcher owned an artwork created by Doig in 1976 (the Painting).<sup>50</sup> The Plaintiffs also claimed that Fletcher had entered into a series of agreements with Bartlow to market and sell the Painting.<sup>51</sup> The Plaintiffs further claimed that Leslie Hindman Associates, Inc. (Hindman), a Chicago auction house, had intended to sell the Painting, until actions by the Defendants caused Hindman to decide to withdraw the Painting from the auction.<sup>52</sup>

The Plaintiffs alleged that in the mid- to late-1970s, Fletcher was employed at Thunder Bay Correctional Center in Thunder Bay, Ontario, Canada (the Correctional Center).<sup>53</sup> The Plaintiffs stated that in 1975, Fletcher enrolled at Lakehead University in Thunder Bay where he claimed to have met Doig, who he alleged also attended Lakehead University at that time.<sup>54</sup> The Plaintiffs further claimed that Doig stopped attending classes at Lakehead University shortly thereafter, and was remanded to the Correctional Center.<sup>55</sup>

The Plaintiffs alleged that Fletcher and Doig recognized one another from their concurrent time at Lakehead University.<sup>56</sup> The Plaintiffs also alleged that Doig was incarcerated for possession of LSD.<sup>57</sup> The Plaintiffs claimed that Doig was a participant in the Correctional Center's fine and recreational arts programs.<sup>58</sup> The Plaintiffs further claimed that Fletcher observed the Painting at various stages of completion, at the Correctional Center.<sup>59</sup>

The Plaintiffs alleged that Fletcher assisted Doig with applying for and obtaining parole, and became his parole officer.<sup>60</sup> The Plaintiffs further alleged that Fletcher purchased the Painting from Doig in 1976 for \$100.00, and has owned it since that time.<sup>61</sup> The Plaintiffs claimed that a friend of Fletcher's observed the Painting many years later, and believed it to be a work by Doig.<sup>62</sup> The Plaintiffs further claimed that Doig's age, background, employment history, and drug use supported their claims that it was he who painted the Painting.<sup>63</sup>

The Plaintiffs stated that in 2011 they had contacted Doig and VeneKlasen, a New York art dealer who professionally represented Doig, by

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50. Verified Complaint for Declaratory and Other Relief, *supra* note 48, at 1.

51. *Id.* at p. 3.

52. *Id.*

53. *Id.* at 5.

54. *Id.*

55. *Id.*

56. Verified Complaint for Declaratory and Other Relief, *supra* note 48, at 5.

57. *Id.* at 6.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Verified Complaint for Declaratory and Other Relief, *supra* note 48, at 7.

63. *Id.*

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e-mail about the Painting and the possibility that it was authored by Doig.<sup>64</sup> VeneKlasen responded by email, denying that the Painting was a work of Doig, that Doig knew Fletcher and that Doig had ever been to Thunder Bay.<sup>65</sup> Bartlow replied by e-mail that if Doig provided them with information and evidence of his whereabouts between 1976 and 1978 that disproved his authorship of the Painting, the Plaintiffs would conclude their inquiries.<sup>66</sup> Through counsel, Doig and VeneKlasen sent a cease and desist letter to Bartlow.<sup>67</sup> Also through counsel, Doig and VeneKlasen advised Hindman that they denied Doig's authorship of the Painting, and threatened legal action if it were sold as a work of Doig.<sup>68</sup>

The Plaintiffs' claims for relief were two-fold. First, the Plaintiffs claimed that the actions of the Defendants constituted interference with prospective economic advantage.<sup>69</sup> Second, the Plaintiffs sought declaratory relief establishing their right to attribute the Painting to Doig.<sup>70</sup>

As the sole defendant after the Court's dismissal of VeneKlasen and Dontzin, and The Dontzin Law Firm, LLP, Doig answered the Plaintiffs' petition on October 21, 2014.<sup>71</sup> While admitting to some of the factual aspects of the Plaintiffs' petition, Doig denied the substance of the claims alleged by the Plaintiffs and asserted affirmative defenses of justification and failure to state a claim.<sup>72</sup>

Doig presented evidence before, and at trial, that the Painting, which was signed "Pete Doige," was actually the work of a man named Peter Doige.<sup>73</sup> Marilyn Doige Brovard (Ms. Brovard) stated in a declaration that she was the sister of Peter Edward Doige (Mr. Doige), who attended Lakehead University in the 1970s, served a sentence at the Correctional Center, and told her that he took painting and music classes while incarcerated there.<sup>74</sup> Brovard also stated that she has paintings made by her brother of desert scenes, similar to the Painting, and that she believes Doige painted the Painting.<sup>75</sup>

A seven-day bench trial was held in August 2016 before District Court Judge Gary Feinerman, who issued an oral decision in favor of Doig on

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64. *Id.* at 8.

65. *Id.*

66. *Id.*

67. *Id.* at 9.

68. Verified Complaint for Declaratory and Other Relief, *supra* note 48, at 9.

69. *Id.* at 12.

70. *Id.*

71. Defendant's Answer and Affirmative Defenses, *Fletcher v. Doig*, No. 1:13-cv-03270 (N.D. Ill. Oct. 21, 2014).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 2-3.



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August 23, 2016.<sup>76</sup> The Judge stated “Peter Doig could not have been the author of this work.”<sup>77</sup> Despite that decision, the Painting remains available through Bartlow, which states on its website that “[t]he owner of the painting, Bob Fletcher, bought the painting from Peter Doig in 1977, but Doig denies that he was the artist or that he knew Bob Fletcher.”<sup>78</sup>

**IV. The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01-/12-01/15**

In June and July, 2012, the Islamist groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) engaged in widespread ideologically-driven destruction of mosques, monuments, and manuscripts in Timbuktu, Mali, as part of a non-international armed conflict between Malian Government forces and groups including Ansar Dine and AQIM. For Ansar Dine and AQIM, the destruction of the monuments themselves was not enough. After the monuments were destroyed, the perpetrators “carried the clay obtained from the monuments outside the city . . . to prevent them from being rebuilt with the same clay in the future.”<sup>79</sup> The government of Mali referred the situation in Mali to the International Criminal Court (ICC), and the ICC’s Prosecutor opened an investigation in January 2013.

The ICC issued a warrant for the arrest of Ahmad Al Faqi Al Mahdi on September 18, 2015, and on December 17, 2015, the Office of the Prosecutor charged Al Mahdi with responsibility for the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Rome Statute of the International Criminal Court (ICC Statute), which proscribes “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”<sup>80</sup> Al Mahdi was the leader of the Ansar Dine/AQIM morality brigade called the Hesbah, which was “entrusted with regulating the morality of the people of Timbuktu, and . . . preventing, suppressing and repressing anything perceived. . . to constitute a visible vice.”<sup>81</sup>

Specifically, Al Mahdi was charged with directing (and participating in) attacks against ten buildings of a religious or historical character: (1) the mausoleum Sidi Mahamoud Ben Omar Mohamed Aquit; (2) the mausoleum

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76. Graham Bowley and Lori Rotenberk, *The Artist Peter Doig Wins a Case Involving a Painting’s Attribution*, NY TIMES, Aug. 23, 2016, [https://www.nytimes.com/2016/08/24/us/the-artist-peter-doig-wins-case-involving-a-paintings-attribution.html?\\_r=0](https://www.nytimes.com/2016/08/24/us/the-artist-peter-doig-wins-case-involving-a-paintings-attribution.html?_r=0).

77. *Id.*

78. *Piece Detail: Doig Using Stencils*, PETER BARTLOW GALLERY, [http://www.bartlowgallery.com/artists\\_detail.php?ID=209](http://www.bartlowgallery.com/artists_detail.php?ID=209) (last visited Dec 1, 2016).

79. Federico Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in ENFORCING INTERNATIONAL CULTURAL HERITAGE 60 (Francesco Francioni & James Gordley eds., 2013).

80. Rome Statute of the International Criminal Court, art. 8(2)(e)(iv), July 17, 1998, GAOR.

81. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01-/12-01/15, Judgment and Sentence, ¶ 16 (Sept. 27, 2016), <https://www.icc-cpi.int/pages/item.aspx?name=pr1242>.

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Sheikh Mohamed Mahmoud Al Arawani; (3) the mausoleum Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabir; (4) the mausoleum Alpha Moya; (5) the mausoleum Sheikh Sidi Ahmed Ben Amar Arragadi; (6) the mausoleum Sheikh Muhammad El Mikki; (7) the mausoleum Sheikh Abdoul Kassim Attouaty; (8) the mausoleum Ahmed Fulane; (9) the mausoleum Bahaber Babadié; and (10) Sidi Yahia mosque. All of the attacked sites were dedicated to religion and historic monuments. None were military targets. With the exception of the mausoleum Sheikh Mohamed Mahmoud Al Arawani, all were designated as UNESCO World Heritage sites.<sup>82</sup>

The trial in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* was held on August 22–24, 2016, at which Al Mahdi admitted guilt as to the charges. This case marked not only the first time the Court had applied Article 8(2)(e)(iv), but also the first time the Court had applied Article 65, which allows a defendant to make an admission of guilt at the start of a trial. The Article 65 procedure combines elements of the common law ‘guilty plea’ (authorizing discussions similar to plea agreements) and civil law (requiring the Court to independently evaluate whether the admission is supported by the facts of the case). After the admission of guilt is made, the trial proceeds, evidence is introduced, and witness testimony is taken.

Evidence at trial established that Al Mahdi initially opposed the decision to destroy the sites, noting that “all Islamic jurists agree on the prohibition of any construction over a tomb,” but recommending “not destroying the mausoleums so as to maintain relations between the population and the occupying groups.”<sup>83</sup> Despite his initial opposition, Al Mahdi agreed to attack the sites, personally determining the sequence in which the sites would be attacked, personally supervising certain attacks, and participating in others.<sup>84</sup>

The Court took particular note of a statement that Al Mahdi made to journalists during the destruction of the Sidi Yahia Mosque, which provides a summary of the groups’ ideological and culturally-specific reasoning for the attacks. “What you see here,” Al Mahdi told the journalists:

Is one of the ways of eradicating superstition, heresy and all things or subterfuge which can lead to idolatry. We heard about a door in the ancient mosque of Sidi Yahya. If it is opened, the Day of Resurrection will begin. Following an investigation, we discovered that it was a condemned door in the courtyard of an old mosque. The door was condemned and bricked up. Over time, a myth took hold, claiming that the Day of Resurrection would begin if the door were opened. We fear that these myths will invade the beliefs of people and the ignorant who,

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82. *Id.*

83. *Id.* at 19.

84. *Id.* at 20-21.

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because of their ignorance and their distance from religion, will think that this is the truth. So we decided to open it.<sup>85</sup>

On September 27, 2016, the Court issued its judgment and sentence in the case, unanimously finding Al Mahdi guilty of intentionally attacking protected cultural sites.<sup>86</sup> The Prosecution recommended that Al Mahdi be sentenced to between nine and eleven years imprisonment. But after considering mitigating circumstances (Al Mahdi's admission of guilt, his cooperation with the Prosecutor, his expression of remorse for the victims of his acts, his initial reluctance to commit the acts, and his behavior during his detention), the Court sentenced Al Mahdi to nine years imprisonment, with the time he had already spent in detention being deducted from that sentence, as authorized by Article 78(2) of the ICC Statute.<sup>87</sup>

International law protects cultural heritage from destruction and plunder during armed conflict (both international and domestic) through a variety of instruments. But most of these instruments impose liability on states, not individuals. These instruments include Convention (IV) Respecting the Laws and Customs of War on Land of 1907,<sup>88</sup> the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (which imposes not only obligations to safeguard cultural heritage during international/crossborder conflicts, but also, importantly, during internal conflicts),<sup>89</sup> the two 1977 Protocols to the Geneva Conventions on

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85. *Id.* at 22.

86. *Id.*

87. *Id.* at 48.

88. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 27, Oct. 18, 1907, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788>. The Regulations annexed to the Convention state: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand." *Id.*

89. Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, Andorra-Uru., 249 U.N.T.S. 240. Article (4)(1) states: "The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property." *Id.* Article 19(1) imposes a corresponding obligation to safeguard cultural heritage in internal (not international or cross-border) conflicts: "In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property." *Id.*

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Humanitarian Law of 1949,<sup>90</sup> the Second Protocol to the Hague Convention,<sup>91</sup> and the 2003 UNESCO Declaration on the Intentional Destruction of Cultural Heritage.<sup>92</sup> While individual criminal liability for the destruction of cultural heritage was slower to develop, it is embodied in the statutes of the International Criminal Tribunal for the Former Yugoslavia and, most importantly, the ICC.

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90. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 5 (Article 53 provides: “Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals.”); *see also*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609 (Article 16 provides: “it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.”).

91. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999, 2253 U.N.T.S. 172.

92. UNESCO Declaration on the Intentional Destruction of Cultural Heritage adopted by the General Conference of UNESCO at its 33rd session, Paris, 19 Oct. 2005, reprinted in Standard Setting in UNESCO, vol. II (2007) 733. Article VII, in proclaiming the principle of individual criminal responsibility for acts of destruction of cultural heritage, affirms: “States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization.”). *Id.*

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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

## International Human Rights

WHITNEY DAVIS, MARK DU, SAMUEL J. GOWIN, JENNY POON, AND  
LUKE WILSON\*

This article describes international human rights law developments in 2016, including foreign domestic workers' rights in Asia, the refugee crisis in Europe—as well as related refugee resettlement issues in the United States—and authoritarian challenges to free speech rights around the world.

### I. Human Rights of Foreign Domestic Workers in Asia<sup>1</sup>

Incremental progress was made in protecting the human rights of foreign domestic workers from Indonesia and the Philippines working in Hong Kong and Taiwan this past year. An increase in civil society advocacy has succeeded in amending existing labor protections in Taiwan to cover foreign domestic workers. In the case of Hong Kong, awareness of the plight of foreign domestic workers generated in 2015 by the case of Erwiana Sulistyaningsih has led to renewed efforts by civil society organizations to organize marches. Sulistyaningsih was named by TIME magazine as one of the world's most influential persons in 2014 for speaking out against the regular abuses experienced by foreign domestic workers around the world after suffering what was deemed “torture” by her employers for months without being paid.<sup>2</sup> This section summarizes the progress made in the improvement of human rights for Indonesian and Filipina foreign domestic workers employed in Hong Kong and Taiwan, and also identifies the challenges that remain.

Hong Kong hosts some 173,726 domestic workers from the Philippines and approximately 150,000 from Indonesia.<sup>3</sup> Taiwan hosts approximately 210,000 domestic worker or caregivers, eighty percent of them from Indonesia.<sup>4</sup> Most domestic workers hail from the countryside of Indonesia

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\* Edited by Cindy G. Buys, Professor of Law and Director of International Law Programs at Southern Illinois University School of Law.

1. Mark Du, Administrative Hearings Officer/Judge of the City of New York.

2. Somaly Mam, *Erwiana Sulistyaningsih: The Migrant Worker Who Fought Back*, TIME (Apr. 23, 2014), <http://time.com/70820/erwiana-sulistyaningsih-2014-time-100/>.

3. Daisy C.L. Mandap, *Number of Filipino Domestic Workers in HK at All-Time High*, RAPPLER (Apr. 17, 2015), <http://www.rappler.com/move-ph/balikbayan/90186-filipino-domestic-workers-hk>.

4. *Indonesia to Seek Higher Pay for its Domestic Workers in Taiwan*, THE CHINA POST (Feb. 1, 2017), <http://www.chinapost.com.tw/taiwan/intl-community/2017/02/01/490555/Indonesia-to.htm>; *Indonesia to Raise Wages for Domestic Workers in Taiwan*, TAIPEI TIMES (July 27, 2015), <http://www.taipetimes.com/News/taiwan/archives/2015/07/27/2003623999>.

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and the Philippines where they have received little more than a high school education. Their journey often begins by meeting a broker from an employment agency operating with little to no governmental oversight. The brokers offer women placement with a family in a foreign country, in exchange for an exorbitant “broker’s fee” that may require years to pay off.<sup>5</sup> Women could be charged up to \$2,700 for placement, which represents five times the monthly minimum wage in Hong Kong.<sup>6</sup> Assorted fees for a placement to Taiwan could reach \$2,000,<sup>7</sup> though once there they are not entitled to the monthly minimum wage of \$626.<sup>8</sup> Most domestic helpers in Taiwan report earning far less than that amount. Hong Kong laws require payment of a Minimum Allowable Wage under the Employment Ordinance, but recourse is time consuming and all but impossible.<sup>9</sup> Other costs not explained in the employment contract are frequently passed onto the foreign domestic worker and deducted directly without explanation.<sup>10</sup>

Domestic workers go deep into debt to pay hefty broker’s fees and sign employment contracts they do not understand with terms that ultimately make it very difficult for them to cease employment. Along the process, they are ripe for exploitation as the agency, nominally required to protect the rights of the domestic workers, seeks instead to maximize profits and turn a blind eye to any reports of abuse.

Once an Indonesian and Filipina arrive to Hong Kong or Taiwan (assuming the agents were truthful about the destination), they are invariably faced with working around the clock as a live-in helper.<sup>11</sup> Their wages could be fully deducted for up to a year and occasionally longer to pay off “assorted fees.”<sup>12</sup> Host families have been known to confiscate passports, identification, ATM cards, and even cell phones of the domestic workers under the guise that it will prevent them from leaving the place of

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5. Per Liljas, *Beaten and Exploited, Indonesian Maids Are Hong Kong’s ‘Modern-Day Slaves’*, TIME (Jan. 15, 2014), <http://world.time.com/2014/01/15/beaten-and-exploited-indonesian-maids-are-hong-kongs-modern-day-slaves/?iid=gs-main-mostpop1>; *Migrant Workers Brokers Fees “Exorbitant”*: Indonesia, TAIPEI TIMES (Mar. 1, 2015), <http://www.taipetimes.com/News/taiwan/archives/2015/03/01/2003612509>.

6. *Id.*

7. Staff Writer with CNA, *Migrant Workers Brokers’ Fees “Exorbitant”*: Indonesia, TAIPEI TIMES (Mar. 1, 2015) <http://www.taipetimes.com/News/taiwan/archives/2015/03/01/2003612509>.

8. *Indonesia to Raise Wages for Domestic Workers in Taiwan*, TAIPEI TIMES (July 27, 2015), <http://www.taipetimes.com/News/taiwan/archives/2015/07/27/2003623999>.

9. U.S. Dep’t of State, Bureau of Democracy Human Rights and Labor Country Rep. on Human Rights Practices, *China (Includes Tibet, Hong Kong, and Macau) 2015 Human Rights Report*, <https://www.state.gov/documents/organization/252971.pdf>.

10. *Id.* at 125.

11. Pinay, *Indonesian Workers in Taiwan Call for Days Off, Higher Salaries*, GMA NEWS ONLINE (Feb. 10, 2014), <http://www.gmanetwork.com/news/story/347761/news/pinoyabroad/pinay-indonesian-workers-in-taiwan-call-for-days-off-higher-salaries>.

12. David Dickinson, *Recruitment Costs Brief: Taiwan*, RESEARCH REPORT (Apr. 2016), <http://twc2.org/wp-content/uploads/2016/06/Recruitment-Costs-Taiwan2.pdf>.

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employment.<sup>13</sup> In Taiwan, employers have been known to pay the wages to the employment agency first and the agency will deduct for a variety of fees and loans taken out at predatory rates for “training,” and finally, the “balance” reaches the worker.<sup>14</sup>

The domestic worker, unable to speak the language and cut off from access to friends and families, remains highly vulnerable to further abuse. Reportedly, eighteen percent of domestic workers have been physically abused in Hong Kong.<sup>15</sup> Just under ten percent report sexual exploitation by employers.<sup>16</sup> If fortunate, some will be granted one or two days off each month.<sup>17</sup>

A. CHANGES IN LAW

This year, Taiwan’s Legislative Yuan took a major step towards improving the bargaining position for domestic workers relative to their employers when it passed an amendment to the Employment Service Act.<sup>18</sup> Previously, domestic workers and all laborers were required to leave Taiwan for at least one day every three years, which effectively put them at the mercy of their brokers and employment agencies every three years and causing them to incur dubious agency fees.<sup>19</sup> This legislation complements the Ministry of Labor’s initiative to allow “direct hiring” by employers through a government-run website allowing families in need of domestic helpers to hire directly from the country of origin. This initiative would allow government oversight in the hiring process and also greatly reduces chances of exploitation by shady employment agencies.<sup>20</sup>

A variety of NGO and civil society organizations have emerged to advocate on behalf of domestic helpers in Taiwan. Inspired by the example of HK Helpers Campaign and Bethune House in pursuing legal recourse for Erwiana Suliyastiningsih, Taiwanese domestic workers advocacy

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13. *Editorial: Migrant Workers Treated Shamefully*, TAIPEI TIMES (Mar. 10, 2015), <http://www.taipetimes.com/News/editorials/archives/2015/03/10/2003613179>.

14. Joe Henley, *Domestic Slavery, Maid in Taiwan*, TAIPEI TIMES (Feb. 17, 2015), <http://www.taipetimes.com/News/feat/archives/2015/02/17/2003611746/5>.

15. Randa Leung, *Social Justice: Summer Internship Report in* MIGRANTS REVIEW: RESEARCHES AND ESSAYS ON MIGRANT DOMESTIC WORKERS IN HONG KONG 47, 57 (Dec. 2012), <http://www.migrants.net/wp-content/uploads/Migrant-Review-2012-FINAL.pdf>; Chenyu Liang, *Maid in Hong Kong: Protecting Foreign Domestic Workers*, MIGRATION POLICY INSTITUTE (Oct. 20, 2016), <http://www.migrationpolicy.org/article/maid-hong-kong-protecting-foreign-domestic-workers>.

16. Chenyu Liang, *Maid in Hong Kong: Protecting Foreign Domestic Workers*, MIGRATION POLICY INSTITUTE (Oct. 2016).

17. *Pinay, Indonesian Workers in Taiwan Call for Days Off, Higher Salaries*, GMA NEWS ONLINE (Feb. 10, 2014), <http://www.gmanetwork.com/news/story/347761/news/pinoyabroad/pinay-indonesian-workers-in-taiwan-call-for-days-off-higher-salaries>.

18. Abraham Gerber, *Exit Rules Lifted for Blue-Collar Workers*, TAIPEI TIMES (Oct. 22, 2016), <http://www.taipetimes.com/News/front/print/2016/10/22/2003657664>.

19. *Id.*

20. *Id.*



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organizations have stepped up to more aggressively encourage domestic workers and their allies to utilize channels of legal recourse to seek justice from exploitation.<sup>21</sup>

This advocacy has on occasion made a difference for vulnerable domestic workers in finding the courage to seek justice through a foreign legal system. A YouTube video clip, dated July 30, 2016, of the sexual assault of a thirty-one-year-old Indonesian domestic worker by her fifty-eight-year-old employer, “Hsieh,” in Taichung, Taiwan, was sent to the police, resulting in the employer’s arrest in September.<sup>22</sup> Reportedly, the victim had been sexually assaulted several times prior to the recording, but did not report those incidents until a local NGO, the Global Workers Organization, began an informational campaign to encourage domestic workers to secretly record incidents of abuse on their phones.<sup>23</sup> Horrendously, an employee “allowed” herself to be raped on a video recording and then uploaded her assault to the Internet before the police responded. The employer’s prosecution, however, has raised awareness of the plight that could be sufficient to deter future exploitation. The consequent public outrage led legislators to consider amendments to the Employee Services Act to prohibit employers with a criminal history from hiring domestic workers.<sup>24</sup>

While some cases signify progress towards fairer and more equitable employment for domestic helpers, others illustrate workers’ vulnerability to exploitation and government disregard for their dire circumstances. The saga of Mary Jane Veloso is highly instructive. The thirty-one-year-old Filipina single mother of two with only a limited education was, like many in her situation, forced to find work abroad as a domestic helper. An initial stint to Dubai in 2009 lasted only seven months out of a two-year contract for employment because her employer constantly tried to rape her. Shortly after her return, and deeply in debt, a friend in her village who claimed she could find her work as a domestic helper in Malaysia approached Mary Jane. With no other options, Mary Jane traveled with this friend to Malaysia, but the employer that her friend had promised was allegedly out of town. Mary Jane became financially dependent on her friend and her friend’s employer, so that when they asked her to travel to Yogyakarta in Indonesia with a suitcase to bring to a friend, she agreed. She was arrested at the airport when the suitcase was found to contain two kilograms of heroin. Mary Jane, unable to speak English or Indonesian and denied access to a lawyer, was set to be executed under Indonesia’s draconian drug trafficking laws in April 2015. At that time, newly discovered evidence and a new witness, along with intervention from then-President Benigno Aquino of the Philippines,

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21. HK Helpers Campaign, *Helper Charities & NGOs*, HK HELPERS CAMPAIGN (2017), <http://hkhelpercampaign.com/en/organisations/>.

22. Stacy Hsu, *Assault on Foreign Carer Prompts Call for Stricter Laws*, TAIPEI TIMES (Sept. 16, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/09/16/2003655250>.

23. *Foreign Workers Urged to Record Work Life*, TAIPEI TIMES (Sept. 13, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/09/13/2003655066>.

24. Hsu, *supra* note 22.

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allowed the case to be re-opened.<sup>25</sup> Mary Jane's case has remained in legal limbo since, but in 2016, newly elected President Rodrigo Duterte reportedly raised the issue in a visit with Indonesian President Joko Widodo—who only expressed his indifference to Mary Jane's execution.<sup>26</sup>

**B. REMAINING CHALLENGES**

In Taiwan, domestic workers are not covered by the Labor Standards Act<sup>27</sup> and domestic workers' labors remain largely unregulated. The system is not problematic; it simply does not exist. Proving abuse in a private home is extremely difficult as the inspectors will notify employers of their inspection date and even knock on the door before arriving. Compounding the matter is the fact that the Ministry of Labor in Taiwan does not have jurisdiction over domestic workers; instead, issues of domestic workers fall under the National Immigration Agency.<sup>28</sup>

Forced departure rules in both Hong Kong and Taiwan also greatly diminish bargaining power of the domestic workers, and advocates in both territories recognize these rules as the next challenge. Current laws in Hong Kong require domestic workers to depart from the territory within two weeks upon separation from employment, thereby making it nearly impossible to seek recourse through the legal process or to file grievances.<sup>29</sup> The statute of limitations for claims under the Employment Ordinance is six months.<sup>30</sup> Interestingly, this two-week rule does not apply to other foreign workers in Hong Kong. Repealing the forced departure rule in Hong Kong would be a critical step in protecting domestic workers. Taiwan's forced departure rule has been repealed, but other matters remain unresolved—even though domestic helpers are no longer required to leave on three-year intervals, they remain at the mercy of unscrupulous agents upon whom they depend to re-negotiate new employment contracts. To remedy this situation, the Legislative Yuan in Taiwan now needs to promote the direct hiring of domestic workers through the Ministry of Labor,<sup>31</sup> as pledged, and ban the hiring of domestic workers by employers with a criminal record,

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25. Lila Ramos Shahani, *Whatever Happened to Mary Jane Veloso*, PHILSTAR GLOBAL (June 27, 2016), <http://www.philstar.com/opinion/2016/06/27/1596981/whatever-happened-mary-jane-veloso>.

26. Oliver Holmes, *Indonesia Says Duterte has Given it Permission to Execute Mary Jane Veloso*, THE GUARDIAN (Sept 12, 2016), <https://www.theguardian.com/world/2016/sep/12/indonesia-permission-philippines-execute-drug-mule-rodrigo-duterte-mary-jane-veloso>.

27. U.S. Dep't of State, Bureau of Democracy Human Rights and Labor Country Rep. on Human Rights Practices, *Taiwan 2015 Human Rights Report* 21 (2015), <https://www.state.gov/documents/organization/253013.pdf>.

28. *Id.*

29. U.S. Dep't of State, Bureau of Democracy Human Rights and Labor Country Rep. on Human Rights Practices, *supra* note 9, at 123.

30. Hong Kong Labour Dep't, *Statutory Time Limits Concerning Employment Claims* (May 2015), [http://www.labour.gov.hk/eng/public/pdf/lrd/Eng\\_statutory\\_time\\_limits\\_claims.pdf](http://www.labour.gov.hk/eng/public/pdf/lrd/Eng_statutory_time_limits_claims.pdf).

31. U.S. Dep't of State, Bureau of Democracy Human Rights and Labor Country Rep. on Human Rights Practices, *supra* note 27, at 22.

which is still being deliberated. Additionally, civil society organizations continue to advocate for mandatory days off.<sup>32</sup>

The outlook appears optimistic, as allies have emerged to take on these challenges. In Taiwan, two young professionals established the One Forty Foundation, an NGO dedicated to offering free education to domestic helpers. The name was inspired by the statistic that one in forty workers in Taiwan is from a foreign country.<sup>33</sup> In Hong Kong, the Bethune House, a Catholic charity that took up Erwiana's cause in 2015, continues to organize on behalf of the vulnerable. Lastly, the governments of the Philippines and Indonesia have proposed outright bans in sending foreign workers abroad as a means to negotiate more favorable treatment to these vulnerable persons.

## II. European Migrant Crisis<sup>34</sup>

### A. RESPONSES BY THE EUROPEAN UNION (EU)

#### 1. *The EU-Turkey Deal*

The recent EU-Turkey Deal (the "Deal") reveals the importance of adhering to the principle of *non-refoulement* and the necessity of States to ensure adequate safeguards are accorded to asylum claimants and refugees.<sup>35</sup> The Deal effectively returns asylum claimants who travel from Turkey to Greece back to Turkey as of March 20, 2016, and for every asylum claimant returned to Turkey, the EU promises to take back one refugee from Syria.<sup>36</sup> Essentially, the Deal swaps one human being for another, treating them as commodities, and promotes violation of *non-refoulement* due to the deficient asylum system in Turkey and the likelihood of subsequent rejected applications.<sup>37</sup>

The purpose of the Deal is to tackle the issue of irregular migrants and secondary movements such as smuggling, as well as address the migration crisis.<sup>38</sup> The EU and Turkey agreed to a joint action plan on March 7, 2016, in which Turkey agreed to "accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters."<sup>39</sup> The two main components of the Deal are: "1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to

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32. *Id.* at 23.

33. Yeh Kuan-Yu & Jonathan Chin, *Foundation Focuses on 'Guest Workers'*, *TAIPEI TIMES* (Mar. 8, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/03/08/2003641099>.

34. Jenny Poon, Barrister & Solicitor, Ontario, Canada.

35. *See* Convention Relating to the Status of Refugees art. 33, Apr. 22, 1954, 189 U.N.T.S. 137, <http://www.refworld.org/docid/3be01b964.html>.

36. Press Release, The European Council, EU-Turkey Statement (Mar. 18, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement>.

37. *See* Bridget Anderson, *Why the EU-Turkey Migrant Deal is a Moral Disaster*, *FORTUNE* (Mar. 16, 2016), <http://fortune.com/2016/03/17/eu-turkey-migrant-crisis-deal-disaster>.

38. *See* Press Release, The European Council, *supra* note 36.

39. *Id.*

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Turkey,” and “2) for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria.”<sup>40</sup>

According to the EU-Turkey Statement, “migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the [Asylum Procedures Directive] will be returned to Turkey,” and priority will be given to those Syrian migrants “who have not previously entered or tried to enter the EU irregularly” to be resettled from Turkey to the EU.<sup>41</sup>

The EU has worked on a Common European Asylum System (CEAS) since the entry into force of the Treaty of Amsterdam in May of 1999 to harmonize Member States’ legal frameworks with respect to asylum.<sup>42</sup> Although the main purpose of the Dublin System within the CEAS is to allocate state responsibility for the processing of asylum claims among EU member states, much like the Deal, one of the CEAS’s main goals is to tackle secondary movements, or the movements of irregular migrants, such as smuggling.<sup>43</sup>

Despite this promising aim, the Syrian armed conflict has been ongoing for over five years, yet the failures of the Dublin System in handling the massive influx have been apparent and emphasized by the UNHCR since 2008.<sup>44</sup> The EU’s response to the failures of the Dublin System has been slow. The Dublin System has been in place since the inception of the Dublin Convention of 1990; however, the proposal to improve the system did not take place until the Dublin II Regulation of 2003, and the subsequent Dublin III Regulation, ten years later, in 2013.<sup>45</sup> Based on these reasons, the EU response to the refugee crisis has been anything but adequate and timely.

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40. *Id.*

41. *Id.*

42. See *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, at 2, COM (2008) 360 final (June 17, 2008), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>.

43. See *id.* at 3-4, 10-11.

44. See United Nations High Commissioner for Refugees, *The Dublin Regulation: Asylum in Europe*, <http://www.unhcr.org/4a9d13d59.pdf>.

45. See Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, Aug. 19, 1997, 1997 O.J. (C 254) 1; Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 050) 1; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), 2013 O.J. (L 180) 31.

2. *EU Commission Proposals—Dublin IV Proposal (2016)*

The key instruments of the Common European Asylum System (CEAS) include: the Dublin Convention (1990), the Dublin II Regulation (2003), and the Dublin III Regulation (2013).<sup>46</sup> Together, these three pieces of legislation are known as the Dublin System. The EU Commission came up with a proposal to revise the Dublin III Regulation on May 4, 2016, in order to enhance the Dublin System's capacity to determine the member state responsible for processing asylum claims, to prevent secondary movements such as smuggling, as well as to establish fair sharing of responsibilities between member states through the establishment of a reference key.<sup>47</sup>

"The Dublin IV proposal aims to reform the Dublin III Regulation by improving the system's capacity to determine, in an efficient and effective manner, the member state responsible for processing an asylum claim; to ensure fair sharing of responsibilities between member states through the establishment of" a reference key to determine allocation; "and to discourage abuses and prevent secondary movements, such as smuggling, of applicants within the EU."<sup>48</sup>

The current proposal bestows a lot of discretion upon EU member states to implement the provisions related to asylum claims processing. For instance, Chapter II, titled: "General Principles and Safeguards," includes clauses which enable member states a certain level of discretion. These clauses at times leave too much room for interpretation, leading to a potential violation of international law where that interpretation is based on state-interested agendas as opposed to safeguarding of asylum claimants' rights.<sup>49</sup>

B. RESPONSE BY THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

One response of the United Nations High Commissioner for Refugees (UNHCR) is to attempt to resolve the difficulty of processing massive numbers of asylum applications through Guidelines on International

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46. *Id.*

47. See *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)*, at 2, COM (2016) 270 final (Apr. 5, 2016), available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin\\_reform\\_proposal\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf).

48. *Id.*; see also Jenny Poon, *The EU Commission on 'Dublin IV': Sufficient Safeguards for Asylum Claimants?*, 5 EUROPEAN SOC'Y OF INT'L L. 1, 3 (2016), available at <http://www.esil-sedi.eu/node/1466>.

49. See Jenny Poon, *Emerging Voices: Is the Margin of Appreciation Accorded to European Union Member States Too Wide, Permitting Violations of International Law?*, OPINIO JURIS (Aug. 16, 2016), <http://opiniojuris.org/2016/08/16/emerging-voices-is-the-margin-of-appreciation-accorded-to-european-union-member-states-too-wide-permitting-violation-of-international-law>.

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Protection No. 11 (the “Guidelines”) on the “Prima Facie Recognition of Refugee Status.”<sup>50</sup> The prima facie recognition of refugees allows States to grant refugee status to a collective group of asylum claimants rather than granting refugee status based on individual assessments of a “well-founded fear of persecution.”<sup>51</sup> The inherent problem with a system that permits group recognition of refugee status rather than the processing of asylum applications on a case-by-case basis is that it increases the likelihood of abuse of process by claimants. For instance, when claimants do not have individualized assessments of their claims, the burden to prove a “well-founded fear of persecution” is significantly lowered, leading to the potential for granting refugee status to those undeserving of that status, such as those specified under Article 1F.<sup>52</sup> Further, group recognition of refugees such as the recognition of those fleeing from the Syrian civil war, arguably, undermines the original object and purpose of the Refugee Convention.

According to the Guidelines, prima facie recognition of refugees, or a prima facie approach, means “the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum-seekers, their country of former habitual residence.”<sup>53</sup> A prima facie approach may be applied to individual refugee status determination circumstances, but is most often used for groups, where “individual status determination is impractical, impossible or unnecessary in large-scale situations.”<sup>54</sup>

Situations involving massive influx of asylum claimants continue to be on the rise, as the Syrian armed conflict progresses. The prima facie recognition of refugees as proposed by the UNHCR seems to contravene the object and purpose of the Refugee Convention, given that the overall humanitarian object and purpose of the Refugee Convention is to “ensure the protection of specific rights of refugees, to encourage international cooperation in that regard, including through UNHCR, and to prevent the refugee problem from becoming a cause of tensions between states.”<sup>55</sup> Because group-based recognition takes away the asylum claimant’s ability to make an individual case to the asylum official, it is submitted that prima facie recognition of refugee status contravenes the object and purpose of the Refugee Convention.

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50. See United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status*, at 2 (2015), <http://www.unhcr.org/558a62299.html>.

51. *Id.* at 3, 6.

52. See Convention Relating to the Status of Refugees, *supra* note 35, at art. 1F.

53. See United Nations High Commissioner for Refugees, *supra* note 50, at 2.

54. *Id.* at 2.

55. See United Nations High Commissioner for Refugees, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, at 1 (Apr. 2001), available at <http://www.refworld.org/pdfid/3b20a3914.pdf>.

### **III. Recent Litigation on the Refugee Act of 1980 and the Possibility of Zeroing Out the Refugee Ceiling in the United States<sup>56</sup>**

The settlement of Syrian refugees has led to substantial activity concerning the United States Refugee Act of 1980 (the Act). In fact, there was more litigation as to interpretation of the Act in 2016 than in any year since the early years of its enactment. Also relating to the Act, United States President Donald Trump has famously promised to halt immigration of Muslims.<sup>57</sup> Much of his early support came from citizens motivated to curtail immigration of any kind, including refugee resettlement.

The United States Resettlement Program (USRP) is the biggest managed resettlement program in the world. Accordingly, 2.6 million refugees have been resettled in the U.S since 1975, with annual admissions ranging from a high of 207,000 in 1980 to a low of 27,110 in 2002.<sup>58</sup> The United States currently resettles around 80,000 new refugees a year. The Immigration and Nationality Act (INA), as amended by the Refugee Act of 1980, gives great, if not absolute, discretion to the president in setting this number.<sup>59</sup>

For fiscal year 2016, President Obama proposed a refugee ceiling of 85,000.<sup>60</sup> His 2017 proposal asks for 110,000 refugees, a twenty-nine percent increase based on special humanitarian concerns.<sup>61</sup> The resettlement of Syrian refugees has caused the greatest concern among state lawmakers.

Alabama brought an action against the United States concerning the refugee resettlement program,<sup>62</sup> specifically the placement of Syrian refugees in the state. The Alabama governor issued an executive order directing “all departments, budget units, agencies, offices, entities, and officers of the executive branch of the State of Alabama . . . to utilize all lawful means to prevent the resettlement of Syrian refugees in the State of Alabama until this

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56. Samuel J. Gowin, Attorney with the Law Offices of Samuel J. Gowin, and Whitney Davis, Researcher and Legal Assistant with the Law Offices of Samuel J. Gowin.

57. Donald J. Trump, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

58. ANDORRA BRUNO, CONGRESSIONAL RESEARCH SERVICE, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY (2016), <http://www.fas.org/sgp/crs/misc/RL31269.pdf>; *U.S. Refugee Admissions Program*, U.S. DEP'T OF STATE, <http://www.state.gov/j/prm/ra/admissions/>; *History of the U.S. Refugee Resettlement Program*, REFUGEE COUNCIL USA, <http://www.rcusa.org/history>.

59. Andorra Bruno, *Refugee Admissions and Resettlement Policy*, CONGRESSIONAL RESEARCH SERVICE (2016), <http://www.fas.org/sgp/crs/misc/RL31269.pdf>.

60. EXEC. OFFICE OF THE PRESIDENT, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2016, at iii (2015), <http://www.state.gov/j/prm/releases/docsforcongress/247770.htm>.

61. Sam Stockard, *Refugee Lawsuit Proceeds in Spite of Obstacles*, THE DAILY NEWS (Dec. 1, 2016), available at <https://www.memphisdailynews.com/news/2016/dec/1/refugee-lawsuit-proceeds-in-spite-of-obstacles>.

62. *Alabama v. United States*, 198 F. Supp. 3d 1263 (N.D. Ala. 2016) (memorandum opinion).

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order is rescinded . . .”<sup>63</sup> The state of Alabama also complained by letter to the Obama administration that it was not receiving reports from the state’s resettlement agency about how refugees resettled in the state were vetted.<sup>64</sup> Alabama’s governor further wrote the federal Director of Refugee Admissions for the Bureau of Population, Refugees, and Migration requesting a report on refugees resettled in the state.<sup>65</sup> Not getting a satisfactory response, the State of Alabama, along with state agencies, filed suit against the United States and various federal agencies seeking declaratory and injunctive relief as to the defendants’ “alleged failure to fulfill their consultation obligations under the Refugee Act.”<sup>66</sup>

The plaintiffs offered three theories to impose such procedural requirements on the federal government: the Refugee Act itself, the Administrative Procedures Act (“APA”), and a writ of mandamus. The district court granted the defendants’ motion to dismiss, rejecting all three theories. The court held that the Refugee Act provided no right of action that would give the plaintiff the right to sue. Second, the court held that the APA did not apply as the consultation language of the Refugee Act was not an agency action. Finally, the court held that the mandamus action failed because the plaintiffs did not have “a clear right to relief” because plaintiffs were not entitled to the particular information they sought from the various refugee agencies.<sup>67</sup>

The State of Indiana also sought to prevent the resettlement of Syrian refugees in the state but used a different theory. In *Exodus Refugee Immigration, Inc. v. Pence*, the district court granted Exodus’s motion for a preliminary injunction.<sup>68</sup> The former Governor of Indiana, Vice President Michael Pence, directed all state agencies to “not pay federal grant funds to local refugee resettlement agencies, such as Exodus [the plaintiff], for social services these agencies provide to the Syrian refugees they help resettle in Indiana.” The idea was that the governor’s action would discourage resettlement of Syrians in the state. The district court found this conduct clearly discriminated against refugees based on national origin.<sup>69</sup> The Seventh Circuit Court of Appeals affirmed the district court in a scathing order written by Judge Richard Posner.<sup>70</sup>

[The governor] argues that his policy of excluding Syrian refugees is based not on nationality and thus is not discriminatory, but is based solely on the threat he thinks they pose to the safety of residents of Indiana. But that’s the equivalent of his saying (not that he does say) that he wants to forbid black people to settle in Indiana not because

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63. *Id.* at 1266.

64. *Id.* at 1266-67.

65. *Id.* at 1267.

66. *Id.*

67. *Id.*

68. *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 719 (S.D. Ind. 2016).

69. *Id.* at 723.

70. *Exodus Refugee Immigration, Inc. v. Pence*, 838 F. 3d 902, 904-05 (7th Cir. 2016).



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they're black but because he's afraid of them, and since race is therefore not his motive he isn't discriminating. But that of course would be racial discrimination, just as his targeting Syrian refugees is discrimination on the basis of nationality.<sup>71</sup>

In the same litigation, but dealing with a separate issue, a third-party resettlement service sought an order against the State of Indiana requiring it to repay \$11,000.00 in attorney's fees expended in providing subpoenaed information. The resettlement service argued that the state "requested documents that were unduly burdensome to provide and confidential, including documents that were available from Plaintiff or in the State's own records." The district court denied the petition, holding that the petitioner had voluntarily provided the documents.<sup>72</sup>

The Alabama and Indiana holdings do not seem to have discouraged other states from trying to take similar action against the resettlement of Syrian refugees. For example, the Tennessee legislature previously passed legislation directing the state's attorney general to sue the federal government to prohibit refugee resettlement under the Tenth Amendment in the United States Constitution.<sup>73</sup> The state's attorney general refused to file suit against the United States government on constitutional grounds. The sponsor of the law stated: "It's the General Assembly's will that we defend our 10th Amendment rights and state sovereignty, so I'm going to march ahead until I'm told otherwise." The state legislature decided to move forward with suit and selected the Thomas More Law Center of Ann Arbor, Michigan, to represent them.<sup>74</sup> On the other hand, legislation in South Carolina that required registration and tracking of all refugees in the state stalled in the state house.<sup>75</sup>

The courts have consistently upheld the Refugee Act to prohibit states from restricting resettlement. Yet the Act itself gives the president nearly total authority to admit refugees for resettlement.

During his campaign, President Trump promised to ban all Syrian refugees to the United States. He was also quoted saying that "we have no idea who these people are, we are the worst when it comes to paperwork. This could be one of the great Trojan horses."<sup>76</sup>

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71. *Id.* at 904-05.

72. *Exodus Refugee Immigration, Inc. v. Pence*, No. 1:15-cv-1858-TWP-DKL, 2016 WL 3917094, at \*1, \*2 (S.D. Ind. July 20, 2016).

73. S.J. Res. 467, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); *see also* Joel Ebert, *Haslam Allows Tennessee to Sue Feds Over Refugees*, THE TENNESSEAN (May 20, 2016), <http://www.tennessean.com/story/news/politics/2016/05/20/haslam-opts-allow-tennessee-sue-federal-government-over-refugee-resettlement/84457538>.

74. Stockard, *supra* note 61.

75. Gavin Jackson, *Syrian Refugees Resettle in South Carolina, More Planned*, THE POST AND COURIER (July 13, 2016), [http://www.postandcourier.com/politics/syrian-refugees-resettle-in-south-carolina-more-planned/article\\_92dadf0d-b6f8-596c-8ec1-edb6950724b7.html](http://www.postandcourier.com/politics/syrian-refugees-resettle-in-south-carolina-more-planned/article_92dadf0d-b6f8-596c-8ec1-edb6950724b7.html).

76. Tal Kopan, *Donald Trump: Syrian Refugees a 'Trojan Horse'*, CNN (Nov. 16, 2015), <http://www.cnn.com/2015/11/16/politics/donald-trump-syrian-refugees>.

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The authorizing language of the Refugee Act provides that the number of refugees admitted is determined by the President.

[T]he number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.<sup>77</sup>

As to process, the president prepares and sends to Congress a proposal for the maximum number of refugees to be admitted into the U.S. for the upcoming fiscal year. This maximum number is known as the “refugee ceiling.” The refugee ceiling traditionally becomes the target of annual lobbying by those wanting to raise the number, and those wanting to lower the number.

While the Act requires “appropriate consultation,” that means little in practice. As the Act states:

“[A]ppropriate consultation” means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with [certain information].<sup>78</sup>

The information to be provided includes descriptions of the current situation, and how many refugees can be absorbed.<sup>79</sup> Generally, the refugee ceiling is accepted without much debate. Although the refugee ceiling has not dropped below 40,000 souls since 1980, there is no reason an administration could not do so, even down to zero.

The refugee resettlement process is a political process as opposed to a legal one. Although crimes committed by refugees are generally no different from those committed by the general population,<sup>80</sup> they often make the news

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77. Immigration and Nationality Act, 8 U.S.C. § 1157(a)(2)-(3).

78. Immigration and Nationality Act, 8 U.S.C. § 1157(e).

79. *Id.* at § 1157(e)(1)-(2).

80. E.g., Brian Bell et al., *Crime and Immigration: Evidence from Large Immigrant Waves*, 95 THE REVIEW OF ECON. AND STATISTICS 1278, 1282 (2010), available at [http://eprints.lse.ac.uk/59323/1/CEP\\_Bell\\_Fasani\\_Machin\\_Crime-and-immigration\\_2013.pdf](http://eprints.lse.ac.uk/59323/1/CEP_Bell_Fasani_Machin_Crime-and-immigration_2013.pdf).

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cycle. The recent knife attacker in Ohio was a Somali refugee.<sup>81</sup> A highly publicized juvenile sexual assault in Twin Falls, Idaho, involved refugee children.<sup>82</sup> These instances lead to a vocal constituency for restricting resettlement.

There are practical and economic factors involved with significantly reducing the refugee ceiling. Significant infrastructure developed as a result of the resettlement of 80,000 or 90,000 people per year for several decades. United States resettlement is handled by non-governmental agencies known as VOLAGs (voluntary agencies) who contract with the government to handle services for resettled people. These services end after ninety days, at which time other local charities and service organizations sometimes step in and provide assistance—and sometimes do not. Technically, a refugee is on her own after the ninety-day period.<sup>83</sup>

Zeroing out refugee resettlement for four or eight years would leave all these agencies with nothing to do. There are nine United States refugee resettlement agencies operating in the United States, with dozens of local sites and affiliates that help refugees get settled. Each of these organizations uses multiple employees and volunteers.<sup>84</sup> Although there may be no work to do, there are appropriations made as to the overhead of these VOLAGs. Under § 2601 of the Resettlement Act, as much as \$100 million is set aside for emergency funding for refugees, including the overhead for agencies.<sup>85</sup>

These appropriations, and the significant infrastructure of the resettlement agencies, push against zero resettlement. Also, although Muslim refugees may be in the spotlight, Christians and other persecuted groups have significant allies in the United States. Presidents-elect often renege on some of their tougher lines, and hostility to refugee resettlement may be one of them.

#### **IV. Dueling Sanctity: Free Expression Versus Kings and Leaders<sup>86</sup>**

Patriotism and free speech are not competing ideas. In many ways, freedom of speech provides one of the rare avenues for underrepresented,

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81. Pete Williams et al, *Suspect Identified in Ohio State Attack as Abdul Razak Ali Artan*, NBC NEWS (Nov. 28, 2016), <http://www.nbcnews.com/news/us-news/suspect-dead-after-ohio-state-university-car-knife-attack-n689076>.

82. Peter Holley & Sarah Larimer, *I'm Looking at Drudge: "Syrian Refugees Rape Little Girl at Knife Point in Idaho" – All False*, THE WASHINGTON POST (June 23, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/06/23/an-alleged-sexual-assault-fuels-rumors-that-turn-an-idaho-town-against-muslim-refugees/?utm\\_term=.22f46f03f7](https://www.washingtonpost.com/news/morning-mix/wp/2016/06/23/an-alleged-sexual-assault-fuels-rumors-that-turn-an-idaho-town-against-muslim-refugees/?utm_term=.22f46f03f7).

83. *History of the U.S. Refugee Resettlement Program*, REFUGEE COUNCIL USA, <http://www.rcusa.org/history> (2017).

84. *Id.*

85. 22 U.S.C. § 2601 (2002).

86. Luke Wilson is the Deputy Director of the Center for Water Security and Cooperation and a Professorial Lecturer in Law, The George Washington University. All opinions are the author's own and do not reflect the opinions of either the CWSC or GWU.

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underserved, and vulnerable populations to express dissatisfaction with government actions. Recent developments have begun to blur the lines as governments seek to limit dissent, with a particular focus on protecting leaders from satirical or insulting works. A few cases this past year illustrate some of the developments in this area.

Thailand continued to enforce its strict *lèse-majesté* laws with vigor. A prosecution was initiated in late 2015 against a man accused of insulting the king's dog,<sup>87</sup> and a preliminary investigation was started against a United States diplomat who criticized the *lèse-majesté* laws as violative of the right of free speech.<sup>88</sup> With the death of the King in October 2016, the military junta government signaled an increasing desire to project the force of the *lèse-majesté* laws outside of their territory. In addition to calling on internet providers and citizens to report instances of insults to the monarchy and setting up a monitoring team inside the Ministry of Justice,<sup>89</sup> the junta government signaled that it would ask countries around the world to extradite persons who have broken these laws.<sup>90</sup> In Thailand, internet providers have been asked to block material that insults the monarchy and mobs have reportedly been attacking those who have not worn attire mourning the King's death.<sup>91</sup>

The Human Rights Council, in its Universal Periodic Review of Thailand in 2016, also repeatedly highlighted *lèse-majesté* laws in its recommendations, with the United States, Spain, Norway, and Latvia, calling for changes ranging from abolition of the laws and mandatory sentencing to increased transparency and alignment of the process with human rights norms.<sup>92</sup>

Despite the calls from the Human Rights Council, the future of the *lèse-majesté* laws remains uncertain. The Junta government has granted itself broad powers under Section 44 of the 2014 Interim Constitution, which allows the leader of the National Council for Peace and Order—in this case, the Prime Minister, Gen. Prayuth Chan-ocha—to pass and enforce laws

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87. Paul Armstrong, *Internet Post Insulting Thai King's Dog May Land Man in Jail*, CNN (Dec. 17, 2015), <http://edition.cnn.com/2015/12/17/asia/thailand-lese-majeste-king-dog>.

88. Euan McKirdy, *U.S. Envoy Glyn Davies Faces Probe Over Thailand's Royal Defamation Law*, CNN (Dec. 15, 2015), <http://edition.cnn.com/2015/12/09/asia/thailand-us-ambassador-glyn-davies-lese-majeste-laws>.

89. *Thai Junta Cracks Down on Royal Insults After King's Death*, BLOOMBERG NEWS (Oct. 18, 2016), <https://www.bloomberg.com/news/articles/2016-10-18/thai-junta-cracks-down-on-royal-insults-after-king-s-death>.

90. *Thai Junta to Request Extradition of Royal Insult Suspects*, REUTERS (Oct. 18, 2016), <http://www.reuters.com/article/us-thailand-king-insults-idUSKCN1210MH>.

91. Feliz Solomon, *Thailand's Junta Wants to Extradite People Accused of Offending the Nation's Monarchy*, TIME (Oct. 19, 2016), <http://time.com/4536238/thailand-junta-monarchy-bhumibol-vajiralongkorn-extradition-lese-majeste/>.

92. Rep. of the Working Grp. on Universal Periodic Review: Thailand, Human Rights Council, 33d Sess., July 15, 2016, U.N. Doc. A/HRC/33/16, at 25, 27-28, <http://www.refworld.org/docid/57cd6be64.html>.

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regardless of human rights consequences.<sup>93</sup> While it is unclear if the junta has begun to prosecute more people for violations of lèse-majesté, the accession of the new king, Rama X, slated for late 2016, may lead to a renewed focus on preventing monarchical affronts.<sup>94</sup>

In Turkey, a high-profile conflict broke out between President Recep Tayyip Erdogan and multiple countries after a spate of insult-laden and offensive poems and songs about the Turkish leader. In Germany, laws designed to prevent the insult of foreign leaders were brought to the fore after an insulting poem was read on television by a German comedian. The poem, which made explicit comments about Erdogan and commented, in part, on treatment of the Kurdish minority, followed the publication of a song that also contained offenses to the long-time Turkish leader. German laws, as well as laws in many other European countries,<sup>95</sup> prohibit the insult or slander of foreign leaders, and President Erdogan called on Germany to enforce its laws in this instance. In Germany, the government must affirmatively consent to investigations under the law.<sup>96</sup> The German Chancellor, Angela Merkel, allowed the case against the comedian to continue after consultations with government and her political coalition in Parliament.<sup>97</sup> But, this decision led to rallies and criticism that the investigation was designed to mollify Turkey, an important player in managing the flow of Syrian refugees into Europe.<sup>98</sup>

The case was ultimately dropped in October 2016 after prosecutors determined that the poem was designed to comment on the limits of free speech in Germany and not to insult Erdogan.<sup>99</sup> Lawyers for the Turkish leader appealed the termination of the criminal case,<sup>100</sup> but have also pressed

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93. *Thailand: Junta Leader Seeks Sweeping Powers Would Invoke Constitutional Provision With Limitless Scope*, HUMAN RIGHTS WATCH (Mar. 31, 2015), <https://www.hrw.org/news/2015/03/31/thailand-junta-leader-seeks-sweeping-powers>.

94. *Thai Crown Prince Maha Vajiralongkorn Proclaimed King*, BBC (Dec. 1, 2016), <http://www.bbc.com/news/world-asia-38168912>.

95. In England, instead of prosecutions, the Spectator held a competition for the most offensive poem about Erdogan. The now-Foreign Minister, Boris Johnson, won the contest. Douglas Murray, *Boris Johnson Wins the Spectator's President Erdogan Offensive Poetry Competition*, THE SPECTATOR (May 18, 2016), <http://blogs.spectator.co.uk/2016/05/boris-johnson-wins-the-spectators-president-erdogan-offensive-poetry-competition>.

96. Alison Smale, *Angela Merkel Draws Criticism for Allowing Turkey's Case Against Comic*, N.Y. TIMES (Apr. 15, 2016), <http://www.nytimes.com/2016/04/16/world/europe/germany-turkey-recep-tayyip-erdogan-jan-bohmermann.html>.

97. Merrit Kennedy, *At Turkey's Request, Germany Allows Criminal Investigation Of Comedian*, NPR (Apr. 15, 2016), <http://www.npr.org/sections/thetwo-way/2016/04/15/474360749/at-turkeys-request-germany-allows-criminal-investigation-of-comedian>.

98. *Id.*

99. Merrit Kennedy, *Germany Drops Investigation of Comic Whose Poem Insulted Turkey's Leader*, NPR (Oct. 5, 2016), <http://www.npr.org/sections/thetwo-way/2016/10/05/496738689/germany-drops-investigation-against-comic-whose-poem-insulted-turkeys-leader>.

100. *Erdogan Fights for Inquiry into German TV Comic to be Reopened*, THE GUARDIAN (Oct. 10, 2016), <https://www.theguardian.com/world/2016/oct/10/erdogan-fights-probe-german-tv-comic-reopened-turkish-president-jan-bohmermann>.

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a civil case in German courts and a permanent injunction against the reading of the poem.<sup>101</sup> A previous attempt to prevent a German publishing CEO from reciting the poem failed.<sup>102</sup> As a response to the controversy, Merkel has pledged to repeal the section of the German Criminal Code that formed the basis for the prosecution by 2018.<sup>103</sup>

Other instances of laws that weigh free speech against national pride have also been of interest. A Dutch court sentenced a man to thirty days in prison for insults against the Dutch King.<sup>104</sup> The Indian Supreme Court ruled that all movie theaters must play the Indian National Anthem, show an image of the Indian flag while the anthem plays, and shut theater exits during the anthem.<sup>105</sup> In addition, the Court ordered that everyone must stand when the anthem is played.<sup>106</sup> These nationalist invocations appear to be on the rise, creating less space for free speech to exist.

Under the International Covenant on Civil and Political Rights (ICCPR), which is binding international law in Thailand, Turkey, Germany, India, and the Netherlands, the right to free expression can only be limited if the restrictions are for the respect of the rights or reputations of others, and for the protection of either national security, public order, public health, or morals.<sup>107</sup> But, these allowances are not broad or blanket authority. As noted in General Comment thirty-four by the Human Rights Committee, which oversees application of the ICCPR:

When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.<sup>108</sup>

In its 2011 Comment, the Human Rights Committee specifically noted that public figures in the “political domain and public institutions” should be

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101. *German Court Hears Erdogan’s New Challenge Against TV Comic*, THE CITIZEN (Nov. 2, 2016), available at <http://citizen.co.za/news/news-world/1333510/german-court-hears-erdogans-new-challenge-tv-comic>.

102. *German court rejects Erdogan’s challenge against Springer boss*, HURRIYET DAILY NEWS (May 10, 2016), available at <http://www.hurriyetaidailynews.com/german-court-rejects-erdogans-challenge-against-springer-boss.aspx?pageID=238&nID=98978&NewsCatID=338>.

103. *German Court Hears Erdogan’s New Challenge Against TV Comic*, *supra* note 101.

104. J. Weston Phippen, *Lèse-Majesté in the Netherlands: A Dutch Man was Sentenced to 30 Days for Calling King Willem-Alexander a Murderer, Rapist, and a Thief*, THE ATLANTIC (July 15, 2016), <http://www.theatlantic.com/news/archive/2016/07/dutch-king-insult/491498>.

105. Ellen Barry, *Indian Cinemas Must Play the National Anthem, Supreme Court Rules*, N.Y. TIMES (Nov. 30, 2016), <http://nyti.ms/2gJmYIG>.

106. *Id.*

107. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16 1966).

108. Human Rights Comm., General Comment No. 34, 102d Sess., ¶ 35, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

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treated differently as “the value placed by the Covenant upon uninhibited expression [in public debate] is particularly high.”<sup>109</sup> While the Human Rights Committee did not go so far as to suggest that all *lèse-majesté* contravene the strictures of the Covenant, it did state that “all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition . . . States parties should not prohibit criticism of institutions, such as the army or the administration.”<sup>110</sup> The Committee also stated that “laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.”<sup>111</sup> The Committee strikes a balance: While limitations are acceptable to protect an individual’s reputation and to ensure public order, those limitations must be lessened when expression concerns public figures and penalties should not be driven by the identity of the defamed party.<sup>112</sup> When it comes to institutions, like monarchies or even States as a whole, the Committee’s words seem clear: Laws should not prohibit criticism.

Free expression allows under-protected and underrepresented persons around the world to call for changes to leaders, institutions, and systems. Certain laws that criminalize these expressions threaten the ability of these persons to express their discontent or dissatisfaction with the systems that may bind them. This past year, the struggle has become more palpable and the laws have been more and more utilized. This is a critical area of importance in human rights, and the right to free expression to critique public figures and leaders must be preserved.

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109. Human Rights Comm., General Comment No. 34, 102d Sess., ¶ 38, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

110. *Id.*

111. *Id.*

112. *Id.*

## National Security Law

JAMES D. CARLSON, GEOFFREY M. GOODALE, GUY C. QUINLAN,  
SERGIO L. SUAREZ, JONATHAN MICHAEL MEYER, ROBERT MCHUGH  
III, KEITH A. PETTY, AND BONNIE H. WEINSTEIN\*

This Article surveys 2016 international legal developments relevant to National Security Law.<sup>1</sup>

### I. Surveillance & Privacy

#### A. UNITED STATES

Following the February 2015 San Bernardino shootings, the Federal Bureau of Investigation (FBI) and Apple began a lengthy court battle that propelled the conversation between modern technology and national security surveillance. The FBI sought to gain entry into the phone without triggering the mechanism that would wipe the phone after ten unsuccessful attempts to enter the correct password.<sup>2</sup> Although the FBI was eventually able to gain access to the phone using a third-party contractor, Apple's challenge initiated intense public debate and was seen as a flashpoint between privacy and national security.

The fight between the Federal government and tech companies within the United States escalated following the United States Supreme Court's approval of changes to a key provision in the Federal Rule of Criminal Procedure 41—Searches and Seizures.<sup>3</sup> The adjustments to the rule give law enforcement officials the ability to go before a magistrate judge and obtain a

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\* The committee co-editors of this Article were Captain James D. Carlson, U.S. Coast Guard (ret.) and Professor Joseph D. Prestia. Captain Sergio L. Suarez, U.S. Army, contributed "Surveillance and Privacy," Geoffrey M. Goodale, Partner, FisherBroyles, LLP, and Jonathan Michael Meyer, Attorney-at-Law, contributed "Cybersecurity Developments." Major Keith A. Petty, Judge Advocate, U.S. Army, contributed "Tension between the United States and Russia," Robert McHugh III, Attorney at law, contributed "Hostilities in Syria," Guy C. Quinlan, President, Lawyers Committee on Nuclear Policy, contributed "Nuclear Arms Control," and James Carlson contributed "International Reaction to Democratic People's Republic of North Korea (DPRK) Weapon Development." Bonnie H. Weinstein, Attorney-at-Law, contributed the "Developments in the South China Sea."

1. For developments during 2015, see James D. Carlson et al., *National Security Law*, 50 ABA/SIL YIR (N.S.) 499 (2016).

2. Elizabeth Weise, *Apple v. FBI: 43 Days That Rocked Tech*, USA TODAY (Mar. 15, 2016, 6:26 PM), <http://www.usatoday.com/story/tech/news/2016/03/15/apple-v-fbi-timeline/81827400/>.

3. Joe Uchill, *DOJ Defends New Warrant Rule For Computer Searches*, THE HILL (Nov. 21, 2016, 12:04 PM), <http://thehill.com/policy/cybersecurity/307038-doj-blog-without-new-evidence-rules-computer-investigations-nonsensical>.



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warrant allowing remote access while searching electronic storage devices and electronically stored information located within or outside the jurisdiction of the court.<sup>4</sup> The rule applies if the district where the information is located has been concealed through the use of technology or if the computer in question is involved in fraud and located within five or more districts.<sup>5</sup> Critics of the amended rule argue it will significantly expand the government's ability to conduct remote access searches to further their investigation by removing jurisdictional requirements.<sup>6</sup> With no Congressional intervention, the amended Rule 41 took effect December 1, 2016.<sup>7</sup>

**B. CANADA**

A recent Canadian federal court decision could have an impact on the interpretation of surveillance statutes around the world, particularly in the Five Eyes intelligence-sharing network, comprised of Canada, the United Kingdom, Australia, New Zealand, and the United States.<sup>8</sup> In October 2016, a Canadian federal judge ruled the Canadian Security Intelligence Service illegally retained data collected during investigations. The decision interpreted Sections 12(1), 2 and 21 of the Canadian Security Intelligence Service Act regarding the collection and retention of information collected through the operation of certain warrants used to retain associated data obtained from service providers.<sup>9</sup> In doing so, the ruling narrowly construed the statute and determined the mandate is limited and does not permit the retention of such data.<sup>10</sup> The decision further specifies that information collected by investigators, accidentally or as a "spin-off," cannot be retained if it is not found to be related to a threat to the security of Canada.<sup>11</sup> The

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4. FED. R. CRIM. P. 41 (amended Dec. 1, 2016).

5. *Id.*

6. *E.g.*, I2 COALITION, *Rule 41 Expands Government Hacking Authority* (Nov. 26, 2016), <https://www.i2coalition.com/rule-41-expands-government-hacking-authority/>.

7. Leslie R. Caldwell, *Rule 41 Changes Ensure a Judge May Consider Warrants for Certain Remote Searches*, U.S. DEP'T OF JUSTICE: JUSTICE BLOGS (June 20, 2016), <https://www.justice.gov/opa/blog/rule-41-changes-ensure-judge-may-consider-warrants-certain-remote-searches>.

8. *Canadian Judge Blasts Spy Agency for Illegally Hoarding Private Data*, THE GUARDIAN (Nov. 3, 2016), <https://www.theguardian.com/world/2016/nov/04/canadian-judge-blasts-spy-agency-for-illegally-hoarding-private-data>.

9. In the Matter of an Application by (redacted) for Warrants Pursuant to Section 12 and 21 of the Canadian Security Intelligence Act, R.S.C. 1985, C. C-23 and in the Presence of the Attorney General and Amici and in the Matter of (redacted), (2016) F.C. 1105 (Can.), <https://assets.documentcloud.org/documents/3213887/DES-Warrant-Nov-3-2016-Public-Judgment-FINAL.pdf>.

10. *Canadian Judge Blasts Spy Agency for Illegally Hoarding Private Data*, THE GUARDIAN (Nov. 3, 2016), <https://www.theguardian.com/world/2016/nov/04/canadian-judge-blasts-spy-agency-for-illegally-hoarding-private-data>.

11. In the Matter of an Application by (redacted) for Warrants Pursuant to Section 12 and 21 of the Canadian Security Intelligence Act, R.S.C. 1985, C. C-23 and in the Presence of the Attorney General and Amici and in the Matter of (redacted), (2016) F.C. 1105, 98, para. 196

decision follows a trend in which the oversight and parameters of security agencies are being scrutinized following an outcry of civil liberties concerns.

## II. Cybersecurity Developments

Several important cybersecurity developments occurred during 2016. As discussed below, these developments included: (a) major cyber-hacking of various organizations and individuals in or associated with the Democratic Party that is widely viewed as having been perpetrated by Russian entities; (b) a massive distributed denial of service (DDoS) attack targeting the Domain Name System (DNS) service of the Dyn company that disrupted internet access to major websites for millions of Americans on a short-term basis; (c) the issuance of various kinds of cybersecurity guidelines by several U.S. Government (USG) agencies; and (d) the release of an important report with numerous cybersecurity recommendations by the Commission on Enhancing National Cybersecurity.

In June 2016, it was alleged that Russian hackers had penetrated the computer network of the Democratic National Committee (DNC) for nearly a year before being thwarted, and that, during that time, the hackers had been able to read all of the DNC's e-mail and chat traffic.<sup>12</sup> Subsequently, many of the DNC's emails were leaked shortly before the Democratic National Convention was held in Philadelphia in July 2017, which resulted in the resignations of several high-ranking DNC members. Based on extensive analysis of the hacking of the DNC's computer network, numerous experts concluded that the hacking had been perpetrated by two Russian entities commonly referred to as "Fancy Bear" and "Cozy Bear," which are widely believed to be operatives of the Russian Government.<sup>13</sup>

Major breaches of the email accounts of other entities and people affiliated with the Democratic Party also occurred in 2016. In July 2016, the Democratic Congressional Campaign Committee's (DCCC) computer network was reported to have been hacked. The FBI subsequently launched an investigation relating to the incident and concluded that the Russian Government likely perpetrated the attack.<sup>14</sup> In October 2016, it was discovered that the e-mail account of John Podesta, campaign manager for

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(Can.), <https://assets.documentcloud.org/documents/3213887/DES-Warrant-Nov-3-2016-Public-Judgment-FINAL.pdf>.

12. See, e.g., David E. Sanger & Nick Corasaniti, *D.N.C. Says Russian Hackers Penetrated Its Files, Including Dossier on Donald Trump*, N.Y. TIMES (June 14, 2016), [http://www.nytimes.com/2016/06/15/us/politics/russian-hackers-dnc-trump.html?\\_r=0](http://www.nytimes.com/2016/06/15/us/politics/russian-hackers-dnc-trump.html?_r=0).

13. See, e.g., Ellen Nakashima, *Cyber researchers confirm Russian government hack of Democratic National Committee*, WASHINGTON POST (June 20, 2016), [https://www.washingtonpost.com/world/national-security/cyber-researchers-confirm-russian-government-hack-of-democratic-national-committee/2016/06/20/e7375bc0-3719-11e6-9ccd-d6005beac8b3\\_story.html?utm\\_term=.cefea6d2d31c](https://www.washingtonpost.com/world/national-security/cyber-researchers-confirm-russian-government-hack-of-democratic-national-committee/2016/06/20/e7375bc0-3719-11e6-9ccd-d6005beac8b3_story.html?utm_term=.cefea6d2d31c).

14. See, e.g., Chris Strohm & Billy House, *FBI Said to Have High Confidence Russia Hacked Democrats*, BLOOMBERG POLITICS (Aug. 11, 2016), <http://www.bloomberg.com/politics/articles/2016-08-11/fbi-said-to-have-high-confidence-russia-behind-democratic-hacks>.

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Hilary Clinton's presidential campaign, had been hacked. Based on its investigation into the matter, the FBI again expressed its view that the Russian Government likely perpetrated the hacking of Podesta's e-mail account.<sup>15</sup>

Other entities also engaged in cyber-attacks on United States companies in 2016. On October 21, 2016, a massive DDoS attack targeted the DNS service of Dyn, which caused an extended Internet outage that resulted in millions of Internet users being unable to access at least 80 websites, including those of Twitter, PayPal, Amazon, and Netflix.<sup>16</sup> Sources at Dyn stated tens of millions of IP addresses were used to overwhelm the company's servers, a large portion of which came from internet-connected devices that had been co-opted by a type of malware, called Mirai.<sup>17</sup>

Even before the attack against Dyn, the USG had become concerned about possible large scale cyber-attacks that could be launched by massively infecting Internet of Things (IoT) devices (e.g., routers, and webcams). Given this concern, and in light of the attack against Dyn, on October 26, 2016, the FBI issued a Private Industry Notification that provided a list of precautionary measures that stakeholders should take to mitigate a range of potential DDoS threats.<sup>18</sup> Subsequently, on November 15, 2016, the U.S. Department of Homeland Security (DHS) issued non-binding guidance on principles that should be followed when developing IoT security measures,<sup>19</sup> and on that same date, the National Institute of Standards and Technology (NIST) published guidelines on systems engineering processes that should be utilized when designing security to be integrated into IoT devices.<sup>20</sup>

The United States Government issued additional general cybersecurity guidance in 2016. On July 26, 2016, the Obama Administration issued a Presidential Policy Directive on United States Cyber Incident Coordination ("PPD-41"), which sets forth the principles that federal agencies should use

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15. See, e.g., Devlin Barrett & Damian Paletta, *FBI Suspects Russia in Hack of John Podesta Emails*, WALL STREET J. (Oct. 11, 2016), <http://www.wsj.com/articles/top-russian-officials-shift-away-from-denying-dnc-hack-1476295233>.

16. See, e.g., Nicole Perlroth, *Hackers Used New Weapons to Disrupt Major Websites Across U.S.*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/business/internet-problems-attack.html>.

17. See *id.*

18. FED. BUREAU OF INVESTIGATION, PRIVATE INDUSTRY NOTIFICATION – DISTRIBUTED DENIAL OF SERVICE ATTACK AGAINST DOMAIN NAME SERVICE HOST HIGHLIGHTS VULNERABILITY OF "INTERNET OF THINGS" DEVICES (Oct. 26, 2016), <https://info.publicintelligence.net/FBI-IoT-DDoS.pdf>.

19. U.S. DEP'T OF HOMELAND SECURITY, STRATEGIC PRINCIPLES FOR SECURING THE INTERNET OF THINGS (IoT), VERSION 1.0 (Nov. 15, 2016), [https://www.dhs.gov/sites/default/files/publications/Strategic\\_Principles\\_for\\_Securing\\_the\\_Internet\\_of\\_Things-2016-1115-FINAL...pdf](https://www.dhs.gov/sites/default/files/publications/Strategic_Principles_for_Securing_the_Internet_of_Things-2016-1115-FINAL...pdf).

20. NIST, SYSTEMS SECURITY ENGINEERING – CONSIDERATIONS FOR A MULTIDISCIPLINARY APPROACH IN THE ENGINEERING OF TRUSTWORTHY SECURE SYSTEMS (PUB. NO. 800-160), (Nov. 15, 2016), <http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-160.pdf>.

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in responding to any cyber incident that is brought to their attention.<sup>21</sup> Under PPD-41, federal agencies are required to undertake the following three concurrent lines of effort: (1) threat response coordinated by the FBI; (2) asset response coordinated by the U.S. Department of Homeland Security (DHS); and (3) intelligence support and related activities coordinated by the Office of the Director of National Intelligence (ODNI).<sup>22</sup>

In 2016, President Obama also established the Commission on Enhancing National Cybersecurity pursuant to Executive Order 13718 of February 9, 2016.<sup>23</sup> In accordance with its mandate, on December 1, 2016, the Commission submitted a report to President Obama in which it made numerous short-term and long-term cybersecurity recommendations, many of which emphasized the need for joint public-private action.<sup>24</sup>

### III. Tensions Between the United States and Russia

Tension between the United States and Russia increased significantly during much of 2016. Areas of ongoing concern include: (1) Russian involvement in Syria, (2) interference with the U.S. election, and (3) security measures in Europe.

Tensions over the five-year Syrian civil war reached an all-time high this year. At one point, diplomatic negotiations stopped due to Russian and Syrian airstrikes on Aleppo,<sup>25</sup> and a United States' acknowledgement that it bombed Syrian soldiers.<sup>26</sup> President Putin cited tensions in Syria and United States aggression for Russia's withdrawal from a long-standing bilateral agreement on the disposition of plutonium used in nuclear weapons.<sup>27</sup>

Purported Russian efforts to interfere with the United States' 2016 presidential election – described as both espionage and information

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21. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESIDENTIAL POLICY DIRECTIVE NO. 41, UNITED STATES CYBERSECURITY INCIDENT COORDINATION (2016), <https://www.whitehouse.gov/the-press-office/2016/07/26/presidential-policy-directive-united-states-cyber-incident>.

22. *Id.*

23. Exec. Order No. 13718, 81 Fed. Reg. 7441 (Feb. 12, 2016).

24. COMM'N ON ENHANCING NAT'L SECURITY, REPORT ON SECURING AND GROWING THE DIGITAL ECONOMY (2016), [https://obamawhitehouse.archives.gov/sites/default/files/docs/cybersecurity\\_report](https://obamawhitehouse.archives.gov/sites/default/files/docs/cybersecurity_report).

25. Michael R. Gordon & Andrew E. Kramer, *Tension with Russia Rises as U.S. Halts Syria Negotiations*, N.Y. TIMES (Oct. 3, 2016), [http://www.nytimes.com/2016/10/04/world/middleeast/us-suspends-talks-with-russia-on-syria.html?\\_r=0](http://www.nytimes.com/2016/10/04/world/middleeast/us-suspends-talks-with-russia-on-syria.html?_r=0).

26. Anne Barnard & Mark Mazzetti, *U.S. Admits Airstrike in Syria, Meant to Hit ISIS, Killed Syrian Troops*, N.Y. TIMES (Sept. 17, 2016), <http://www.nytimes.com/2016/09/18/world/middleeast/us-airstrike-syrian-troops-isis-russia.html>.

27. Andrew E. Kramer, *Vladimir Putin Exits Nuclear Security Pact, Citing "Hostile Actions" by U.S.*, N.Y. TIMES (Oct. 3, 2016), <http://www.nytimes.com/2016/10/04/world/europe/russia-plutonium-nuclear-treaty.html>.

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operations—raised significant legal and political concerns.<sup>28</sup> Intelligence and Homeland Security officials accused Russia, in cooperation with the websites WikiLeaks, DCLeaks, and Guccifer 2.0, of stealing and disclosing emails from the Democratic National Committee and other institutions and individuals, and stated that these actions were “intended to interfere with the United States election process.”<sup>29</sup> Similarly, Admiral Michael S. Rogers, Director of the National Security Agency, stated: “This was a conscious effort by a nation-state to attempt to achieve a specific effect.”<sup>30</sup>

In an effort to deter Russian aggression in Eastern Europe, the United States announced several thousand troops would be deployed to Poland, Lithuania, Latvia, and Estonia in coordination with other NATO forces.<sup>31</sup> This action was likely in response to Russian military incursions in the territory of Estonia, Lithuania, and Poland, and multiple “close calls,” including the use of Russian jets in April to buzz the U.S. missile destroyer U.S.S. DONALD COOK on the Baltic Sea.<sup>32</sup>

Additionally, the United States imposed new sanctions against Russian targets in reaction to the invasion of Ukraine in 2014.<sup>33</sup> John Smith, Acting Director of the Treasury’s Office of Foreign Assets Control stated: “Treasury stands with our partners in condemning Russia’s violation of international law, and we will continue to sanction those who threaten Ukraine’s peace, security and sovereignty.”<sup>34</sup>

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28. Robert Chesney, *State-Sponsored Doxing and Manipulation of the U.S. Election: How Should the U.S. Government Respond?*, LAWFARE BLOG (Oct. 21, 2016), <https://lawfareblog.com/state-sponsored-doxing-and-manipulation-us-election-how-should-us-government-respond>. See also Section II, *supra*.

29. David E. Sanger & Charlie Savage, *U.S. Says Russia Directed Hacks to Influence Elections*, N.Y. TIMES (Oct. 7, 2016), [http://www.nytimes.com/2016/10/08/us/politics/us-formally-accuses-russia-of-stealing-dnc-emails.html?\\_r=0](http://www.nytimes.com/2016/10/08/us/politics/us-formally-accuses-russia-of-stealing-dnc-emails.html?_r=0).

30. Joon Ian Wong, *A “Nation-State” Used Wikileaks to Influence the US Election, The Head of the NSA Says*, QUARTZ (Nov. 15, 2016), <http://qz.com/838615/nsa-chief-on-wikileaks-and-the-hacks-affecting-the-us-election-a-conscious-effort-by-a-nation-state/>.

31. Carol E. Lee, *U.S. to Move Troops to Poland, Raising Russia Tensions*, WALL ST. J. (July 8, 2016), <http://www.wsj.com/articles/obama-nato-leaders-gather-as-europe-frays-and-russia-blusters-1467955429>.

32. THE MCCAIN INSTITUTE FOR INTERNATIONAL LEADERSHIP, ARIZONA STATE UNIVERSITY, *RUSSIAN ACTIONS IN THE NORDIC-BALTICS: 2015-2016* (Oct. 26, 2016), <https://www.mccaininstitute.org/russian-actions-nordic-baltics-2015-2016/> [HEREINAFTER MCCAIN INSTITUTE].

33. U.S. DEP’T OF THE TREASURY, *PRESS RELEASE, RUSSIA/UKRAINE-RELATED DESIGNATIONS AND IDENTIFICATIONS; PUBLICATION OF RUSSIA/UKRAINE-RELATED GENERAL LICENSE* (2016), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20160901.aspx>. See also David Francis, *U.S. Treasury Hits Russia With More Sanctions Over Ukraine*, FOREIGN POLICY (Sept. 1, 2016), <http://foreignpolicy.com/2016/09/01/u-s-treasury-hits-russia-with-more-sanctions-over-ukraine/>.

34. Jack Stubbs & Yeganeh Torbati, *U.S. Imposes Sanctions on “Putin’s Bridge” to Crimea*, REUTERS (Sept. 1, 2016), <http://www.reuters.com/article/us-ukraine-crisis-russia-usa-sanctions-idUSKCN1175E0>.

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Russia views these moves, along with NATO control of missile defense systems in Turkey and missile interceptors in Romania, as provocative and a threat to Russia's nuclear deterrent.<sup>35</sup> In response, Russia continued massing troops on the border with Ukraine,<sup>36</sup> started militarizing the Crimean peninsula,<sup>37</sup> announced an increase in troop exercises,<sup>38</sup> and issued threats to neighboring states.<sup>39</sup>

In a move that will further polarize the United Nations Security Council, Russia is strengthening ties with China. The two signed the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law.<sup>40</sup> The Joint Declaration describes in broad terms shared approaches to (1) principles of international law, (2) state sovereignty, (3) use of force, (4) non-intervention, (5) dispute resolution, (6) economic sanctions, (7) terrorism, (8) immunity for state officials, (9) United Nations Convention on the Law of the Sea, and (10) jointly promoting international law.<sup>41</sup>

Russia also unsigned the Rome Statute of the International Criminal Court, similar to actions taken by the United States in 2002. Russia's unsigned is a symbolic act of protest regarding the Court's investigations in Georgia, Crimea, and, possibly, Syria.<sup>42</sup>

#### IV. Hostilities in Syria

As co-chairs of the International Syria Support Group, the United States and Russia adopted the Terms for a Cessation of Hostilities in Syria (CoH) on February 22, 2016.<sup>43</sup> This measure was in support of U.N. Security

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35. *Id.*

36. Mark Galeotti, *Russia is Massing Thousands of Troops on Ukraine's Border. Here's Why We Shouldn't Panic*, VOX (Sept. 1, 2016), <http://www.vox.com/2016/9/1/12729426/russia-troops-ukraine-border>.

37. *In Crimea, Russia Signals Military Resolve With New and Revamped Bases*, REUTERS (Nov. 1, 2016), <http://www.reuters.com/investigates/special-report/russia-crimea/>.

38. MCCAIN INSTITUTE, (Oct. 26, 2016), <https://www.mccaininstitute.org/russian-actions-nordic-baltics-2015-2016/>.

39. *Id.*

40. Kenneth Anderson, *Text of Russia-China Joint Declaration on Promotion and Principles of International Law*, LAWFARE BLOG (Jul. 7, 2016), <https://www.lawfareblog.com/text-russia-china-joint-declaration-promotion-and-principles-international-law>.

41. *Id.* See also Ingrid Wuerth, *China, Russia, and International Law*, LAWFARE BLOG (Jul. 11, 2016), <https://www.lawfareblog.com/china-russia-and-international-law>.

42. Shaun Walker & Owen Bowcott, *Russia Withdraws Signature from International Criminal Court Statute*, THE GUARDIAN (Nov. 16, 2016), <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>.

43. U.S. DEP'T OF STATE, MEDIA NOTE, JOINT STATEMENT OF THE UNITED STATES AND THE RUSSIAN FEDERATION, AS CO-CHAIRS OF THE ISSG, ON THE CESSATION OF HOSTILITIES IN SYRIA (2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/02/253115.htm> [hereinafter JOINT STATEMENT].

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Council Resolution 2254<sup>44</sup> and was designed to achieve a peaceful settlement to the Syrian conflict and to establish conditions for a Syrian-led political transition process.<sup>45</sup>

The CoH requires, *inter alia*, organizations engaged in military or paramilitary hostilities in Syria—other than ISIS, Jabhat al-Nusra, or any UN-designated terrorist organizations—to indicate to the United States or Russia their commitments to and acceptance of the CoH, implementation of UN Security Council Resolution 2254, including the readiness to participate in the UN-facilitated political negotiation process, the cessation of attacks against the Armed Forces of the Syrian Arab Republic and any associated forces, and allowing humanitarian agencies safe access where necessary to reach people in need of assistance.<sup>46</sup> The UN Security Council endorsed the CoH and demanded that all parties to whom the CoH applied fulfill their commitments under it.<sup>47</sup> By May 2016, the CoH resulted in progress in the areas of North Latakia and East Ghouta,<sup>48</sup> but it largely unraveled throughout the remainder of 2016.<sup>49</sup> The United States-led coalition, Russia, and Syria are permitted under the CoH to continue military actions against ISIS, Jabhat al Nusra, and other UN-designated terrorist organizations.

Since entering the conflict in September 2015, Russia has conducted military operations against ISIS and anti-Assad opposition groups, in cooperation with President Bashar al-Assad’s Syrian government.<sup>50</sup> The

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44. Security Council Resolution 2254, *inter alia*, reconfirmed the UN endorsement of the June 30, 2012 Geneva Communiqué and endorsed the “Vienna Statements” on the implementation of the Geneva Communiqué as the basis for a Syrian-led and Syrian-owned political transition to the conflict. In addition, Resolution 2254 supported a nationwide ceasefire, establishment of a Syrian-led process of non-sectarian governance with the assistance of the UN, and setting of a schedule and process for drafting a new constitution. S.C. Res. 2254, ¶1-4. U.N. Doc. S/RES/2254, at 2 (Dec. 8, 2015). *See also* Meetings Coverage, Security Council, *Security Council Unanimously Adopts Resolution 2254 (2015), Endorsing Road Map for Peace Process in Syria, Setting Timetable for Talks*, U.N. Meetings Coverage, U.N. Doc. SC/12171 (Dec. 18, 2015), <http://www.un.org/press/en/2015/sc12171.doc.htm>.

45. JOINT STATEMENT, *supra* note 43.

46. *Id.*

47. S.C. Res. 2268, ¶1, 3, U.N. Doc. S/RES/2268, at 1 (Feb. 26, 2016).

48. U.S. DEP’T OF STATE, MEDIA NOTE, JOINT STATEMENT OF THE RUSSIAN FEDERATION AND THE UNITED STATES ON SYRIA (2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/05/256998.htm>.

49. *Syria ceasefire: ‘No deaths on first day’*, BBC NEWS (Sept. 13, 2016), <http://www.bbc.com/news/world-middle-east-37346656>.

50. Helene Cooper, Michael R. Gordon, & Neil MacFarquhar, *Russians Strike Targets in Syria, but Not ISIS Areas*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/world/europe/russia-airstrikes-syria.html>; *see also* Matthew Rosenberg, *U.S. Tell Russia of ‘Strong Concerns’ About Strikes on Syrian Rebels*, N.Y. TIMES (June 18, 2016), <http://www.nytimes.com/2016/06/19/world/middleeast/us-tells-russia-of-strong-concerns-about-strikes-on-syrian-rebels.html>.

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United States has waged parallel but separate military operations against ISIS, while backing certain groups opposed to the Assad government.<sup>51</sup>

In March 2016, Russian airstrikes aided Syrian forces in overtaking ISIS-controlled Palmyra.<sup>52</sup> In August 2016, Russia began staging missions from Hamad in northwest Iran targeting ISIS and other groups fighting in the city of Aleppo.<sup>53</sup> The airstrikes in Aleppo resulted in heavy civilian casualties, leading to strained United States-Russia relations, and the United States suspending bilateral CoH discussions. However, in September 2016, another cease fire was agreed,<sup>54</sup> which unraveled within days after the United States mistakenly bombed a Syrian army base.<sup>55</sup> Moreover, the United States condemned Russia for violating its obligations under international humanitarian law and UN Security Council Resolution 2254.<sup>56</sup> Although Russia halted its airstrikes on October 20, 2016,<sup>57</sup> Russia and Syria commenced a new offensive in eastern Aleppo on November 15, 2016.<sup>58</sup>

The Organization for the Prohibition of Chemical Weapons<sup>59</sup> (OPCW) released an Executive Council Decision on November 11, 2016, adopting the conclusions of the OPCW-United Nations Joint Investigative Mechanism that Syria used chemical weapons on three occasions: in Talmenes on April 21, 2014; in Qmenas on March 16, 2015; and in Sarmin

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51. Andrew E. Kramer & Anne Barnard, *Russia Asserts Its Military Might in Syria*, N.Y. TIMES (Aug. 19, 2016), <http://www.nytimes.com/2016/08/20/world/middleeast/russia-syria-mediterranean-missiles.html>.

52. Liz Sly, *In Syria and Iraq, The Islamic State is in Retreat on Multiple Fronts*, THE WASHINGTON POST (Mar. 24, 2016), [https://www.washingtonpost.com/world/middle\\_east/in-syria-and-iraq-the-islamic-state-is-in-retreat-on-multiple-fronts/2016/03/24/a0e33774-f101-11e5-a2a3-d4e9697917d1\\_story.html](https://www.washingtonpost.com/world/middle_east/in-syria-and-iraq-the-islamic-state-is-in-retreat-on-multiple-fronts/2016/03/24/a0e33774-f101-11e5-a2a3-d4e9697917d1_story.html).

53. Neil MacFarquhar & David E. Sanger, *Russia Sends Bombers to Syria Using Base in Iran*, N.Y. TIMES (Aug. 16, 2016), <http://www.nytimes.com/2016/08/17/world/middleeast/russia-iran-base-syria.html>.

54. *Syria's Civil War: US and Russia Clinch Ceasefire Deal*, AL JAZEERA (Sept. 11, 2016), <http://www.aljazeera.com/news/2016/09/syria-civil-war-russia-clinch-syria-deal-160910031517683.html>.

55. Anne Bernard & Mark Mazzetti, *U.S. Admits to Airstrike in Syria, Meant to Hit ISIS, Killed Syrian Troops*, N.Y. TIMES (Sept. 17, 2016), [http://www.nytimes.com/2016/09/18/world/middleeast/us-airstrike-syrian-troops-isis-russia.html?\\_r=0](http://www.nytimes.com/2016/09/18/world/middleeast/us-airstrike-syrian-troops-isis-russia.html?_r=0).

56. Michael R. Gordon & Andrew E. Kramer, *Tension With Russia Rises as U.S. Halts Syria Negotiations*, N.Y. TIMES (Oct. 4, 2016), <http://www.nytimes.com/2016/10/04/world/middleeast/us-suspends-talks-with-russia-on-syria.html>.

57. Ivan Nechepurenko, *Russia Extends Aleppo Cease-Fire and Urges Rebels to Leave*, N.Y. TIMES (Nov. 3, 2016), <http://www.nytimes.com/2016/11/03/world/middleeast/russia-syria-aleppo-ceasefire.html>.

58. Emma Graham-Harrison, *Aleppo Airstrikes Restart as Russia Announces Major Syria Offensive*, THE GUARDIAN (Nov. 15, 2016), <https://www.theguardian.com/world/2016/nov/15/aleppo-airstrikes-resume-as-russia-announces-major-syria-offensive>.

59. The United Nations recognized the OPCW as responsible for activities related to the prohibition of chemical weapons in accordance with the Chemical Weapons Convention. U.N. Secretary-General, *Agreement Concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons*, U.N. Doc. A/55/988 (2001).



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on March 16, 2015.<sup>60</sup> In addition, the Decision concluded that ISIS used mustard gas in Marea on August 21, 2015. The OPCW raised concerns on September 7, 2016, about alleged use of chemical weapons in the northern area of Aleppo earlier that month.<sup>61</sup> The Syrian National Coalition, the main anti-Assad opposition group, and Russia accused each other of using chlorine explosives in these attacks.<sup>62</sup>

## V. Nuclear Arms Control

On October 27, 2016, the First Committee of the United Nations General Assembly<sup>63</sup> voted 123 to 38 with 16 abstentions “to convene in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.”<sup>64</sup> The conference, which is scheduled for March, June, and July 2017 in New York, will be open to all member states.

Russia, the United States, and most members of NATO voted against the resolution. The United States criticized the resolution as an unwise departure from a gradual process of negotiating “pragmatic steps to reduce the role and number of nuclear weapons.”<sup>65</sup>

The First Committee also voted 174 to 4 with 4 abstentions<sup>66</sup> for “decreasing the operational readiness of nuclear weapons systems” to reduce the risk of accidental nuclear war through mistaken, unintentional, or

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60. Org. for the Prohibition of Chemical Weapons, *Decision: OPCW-United Nations Joint Investigative Mechanism Reports on Chemical Weapons Use in the Syrian Arab Republic*, at 2, Doc. No. EC-83/DEC.5 (Nov. 11, 2016), [https://www.opcw.org/fileadmin/OPCW/EC/83/en/ec83dec05\\_e\\_.pdf](https://www.opcw.org/fileadmin/OPCW/EC/83/en/ec83dec05_e_.pdf).

61. Org. for the Prohibition of Chemical Weapons, *Statement from the OPCW Director-General on Recent Allegations on Toxic Chemicals Use in Aleppo*, (Sept. 7, 2016), <https://www.opcw.org/news/article/statement-from-the-opcw-director-general-on-recent-allegations-of-toxic-chemical-use-in-aleppo/>.

62. Vladimir Isachenkov, *Russia, Syria's Rebels Clash on Chemical Weapons Use Claims*, ASSOCIATED PRESS (Nov. 11, 2016), <http://www.bigstory.ap.org/article/35e2d5fe9fd14455a9d51ef0b1a633dd/russia-says-militants-used-chemical-weapons-syria>.

63. *Disarmament and International Security*, <http://www.un.org/en/ga/first>. First Committee resolutions are normally adopted as a matter of course by the General Assembly when it meets in plenary session. (The First Committee, consisting of all United Nation member states, “considers all disarmament and national security matters within the scope of the [UN] Charter.”).

64. U.N. First Committee, 71st Sess., *Taking forward nuclear disarmament negotiations* ¶8, Doc. No. A/C.1/71/L.41, <http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com16/resolutions/L41.pdf>.

65. U.N. General Assembly First Committee, *General Debate Statement of Assistant Secretary of State Frank A. Rose* (Oct. 13, 2016).

66. UN General Assembly First Committee, *First Committee Sends 22 Texts to General Assembly, Echoing Call for Expanding Nuclear-Weapon-Free Zones into Middle East, Bolstering Disarmament Efforts*, Doc. No. GA/DIS/3563 (Oct. 27, 2016), <http://www.un.org/press/en/2016/gadis3563.doc.htm>.

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unauthorized launch.<sup>67</sup> The United States, Russia, United Kingdom, and France cast the only votes against the resolution.

The United States State Department has asserted that Russia has been violating the Intermediate Nuclear Forces (INF) Treaty since 2014. This treaty prohibits the development, testing, or possession of ground-launched cruise missiles (GLCMs) with a range capability of 500 km to 5,500 km, or launchers for such missiles.<sup>68</sup> The United States asserts Russia is progressing toward deployment of a prohibited GLCM.<sup>69</sup> Washington called for a meeting of the Special Verification Commission under Article VIII of the INF Treaty to examine the issue. The State Department subsequently confirmed that such a meeting took place on November 15-16, 2016.<sup>70</sup>

For its part, Russia has countercharged that certain elements of the U.S. missile defense and armed drone programs violate the INF. The United States has denied those assertions.

Citing United States' "hostile actions," including economic sanctions, the Russian government announced its withdrawal from the Plutonium Management and Disposition Agreement (PMDA)<sup>71</sup> in October 2016.<sup>72</sup> The Agreement's purpose is to render surplus plutonium unusable for nuclear weapons.

Russia also announced its withdrawal from an agreement between the Russian State Nuclear Energy Corporation (Rosatom) and the U.S. Department of Energy (DOE) for research on measures to convert research reactors from weapons-usable high-enriched uranium (HEU) to low-enriched uranium (LEU). Moscow stated that Russia would continue its conversion program "independently" without U.S. aid. DOE announced

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67. United Nations First Committee, 71st Sess., *Decreasing the operational readiness of nuclear weapons systems*, Doc. No. A/C.1/71/L.33 (Oct. 14, 2016), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/C.1/71/L.33](http://www.un.org/ga/search/view_doc.asp?symbol=A/C.1/71/L.33).

68. Treaty between the U.S. and the Union of Soviet Socialist Republic on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (Dec. 8, 1987), [www.state.gov/t/avc/trty/102360.htm](http://www.state.gov/t/avc/trty/102360.htm).

69. Michael R. Gordon, *Russia is Moving Ahead with Missile Program That Violates Treaty*, *U.S. Officials Say*, N.Y. TIMES (Oct. 19, 2016), <http://www.nytimes.com/2016/10/20/world/europe/russia-missiles-inf-treaty.html>; U.S. DEP'T OF STATE, 2016 REPORT ON ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS (2016), <http://www.state.gov/t/avc/rls/rpt/2016/255651.htm#INF%20TREATY>.

70. U.S. DEP'T OF STATE, MEDIA NOTICE, OFFICE OF THE SPOKESPERSON (2016), <http://www.state.gov/r/pa/prs/ps/2016/11/264375.htm>.

71. Agreement concerning the management and disposition of plutonium designated as no longer required for defense purposes and related cooperation, with annexes and joint statement, as amended by 2006 Protocol and 2010 Protocol, signed at Moscow and Washington Aug. 29 and Sept. 1, 2000, [www.state.gov/documents/organization/213493.pdf](http://www.state.gov/documents/organization/213493.pdf).

72. Andrew E. Kramer, *Vladimir Putin Exits Nuclear Security Pact, Citing 'Hostile Actions' by U.S.*, N.Y. TIMES (Oct. 3, 2016), [http://www.nytimes.com/2016/10/04/world/europe/russia-plutonium-nuclear-treaty.html?\\_r=0](http://www.nytimes.com/2016/10/04/world/europe/russia-plutonium-nuclear-treaty.html?_r=0).

that the Russian withdrawal would have “no practical effect” on U.S. international efforts to convert reactors from HEU to LEU.<sup>73</sup>

On October 5, the International Court of Justice (ICJ) held that it lacked jurisdiction to hear a claim by the Republic of the Marshall Islands (RMI) against India, Pakistan, and the United Kingdom.<sup>74</sup> The claim asserted that those nations were violating customary international law (and, in the case of the UK, treaty obligations under Article VI of the Non-Proliferation Treaty (NPT)) by failing to negotiate in good faith for nuclear disarmament. The ICJ held that there was not sufficient evidence of a justiciable dispute by a vote of 9-7 as to India and Pakistan, and 8-8 with the President’s casting vote as to the UK. The ICJ recited its unanimous 1996 finding that there is a legal obligation to pursue and to conclude negotiations leading to nuclear disarmament.<sup>75</sup>

All nine nations openly possessing nuclear weapons<sup>76</sup> continued to modernize and upgrade their nuclear arsenals in 2016, in some cases adding new capabilities.<sup>77</sup> The quantitative nuclear arms race between India and Pakistan continued, with Pakistan continuing to deploy short-range nuclear missiles, despite United States’ expressions of concern that this could lower the threshold for actual use of nuclear weapons.<sup>78</sup> North Korea conducted its fifth nuclear weapon test.

## **VI. International Reaction to Democratic People’s Republic of North Korea (DPRK) Weapon Development**

Tensions continued to mount through 2016 between the international community and the DPRK, stemming from the DPRK’s evolving weapons program and human rights abuses.

The DPRK conducted nuclear detonations in February and September 2016, eleven medium- or intermediate-range ballistic missile test launches, four submarine ballistic missile test launches, a short-range ballistic missile

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73. Michael Allen, *U.S. Unfazed by Russia Ending Reactor Cooperation*, PHYSICSWORLD.COM (Oct. 25, 2016), <http://physicsworld.com/cws/article/news/2016/oct/25/us-unfazed-by-russia-ending-reactor-co-operation>.

74. India, Pakistan, and the United Kingdom were the only nuclear weapon states that had accepted the compulsory jurisdiction of the ICJ. RMI had asked the other nuclear weapon states to appear voluntarily in the ICJ case, but none did so.

75. Full text of all opinions available through [www.icj-cij.org/homepage/](http://www.icj-cij.org/homepage/).

76. United States, Russia, China, United Kingdom, France, India, Pakistan, Israel, and North Korea.

77. Hans Kristensen & Robert Norris, *Nuclear Arsenals: Current Developments, Trends and Capabilities*, 97 INT’L REV. OF THE RED CROSS 563, 564 (2015).

78. Hans Kristensen & Robert Norris, *Pakistani Nuclear Forces 2016*, BULLETIN OF THE ATOMIC SCIENTISTS (Nov. 1, 2016), available at <http://thebulletin.org/2016/november/pakistani-nuclear-forces-201610118>.

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test launch, two new rocket engine tests, and a space launch.<sup>79</sup> Additionally, in June 2016 the IAEA reported North Korea appeared to have reopened the Yongbyon nuclear facilities to produce plutonium from spent fuel, which the DPRK confirmed to Japan's Kyodo news agency.<sup>80</sup> This aggressive weapons development program triggered sanctions, condemnation, and widespread concern regarding stability on the Korean peninsula.<sup>81</sup>

In response, the UN Security Council passed Resolution 2270,<sup>82</sup> which "condemned in the strongest terms the DPRK's previous nuclear test conducted in January."<sup>83</sup> The resolution, *inter alia*:

- Requires states to expel DPRK diplomats or nationals working on behalf of a designated person to violate sanctions;<sup>84</sup>
- Calls on states to conduct inspections of cargo that has originated in or is destined for the DPRK;<sup>85</sup>
- Prohibits DPRK's sale of coal, iron, iron ore,<sup>86</sup> gold, titanium ore, rare earth minerals;<sup>87</sup>

The resolution seeks to ensure that Pyongyang's latest provocations are met by efforts to shrink the number of overseas locations from which North Koreans can facilitate illicit activity, and increase the cost of doing business in those countries. . .North Korea's official foreign presences have traditionally been essential nodes in the country's illicit trade networks . . . UNSCR 2270 takes aim at those 'safe spaces.'<sup>88</sup>

In late November, in response to the DPRK's September nuclear detonation, the United Nations Security Council passed Resolution 2321:<sup>89</sup>

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79. For a graphical display of the launches, see James D. Carlson, *Graphical View of DPRK Missile Launches*, LEX INTUITUS BLOG (Nov. 22, 2016), <https://lex-intuitus.blogspot.com/2016/11/graphical-view-of-dprk-missile-launches.html>.

80. Elaine Lies & David Brunnstrom, *North Korea Says it has Resumed Plutonium Production: Report*, REUTERS (Aug. 17, 2016), <http://www.reuters.com/article/us-northkorea-nuclear-idUSKCN10S0XU>.

81. China, Russia, France, and the EU among others, issued condemnations at various times this year. See, e.g., *International Leaders Condemn North Korea's latest nuclear Test*, EURONEWS (Sep. 9, 2016), <http://www.euronews.com/2016/09/09/international-leaders-condemn-north-korea-s-latest-nuclear-test>.

82. S.C. Res. 2270 (Mar. 2, 2016).

83. Int'l Atomic Energy Agency [IAEA], *Statement by IAEA Director General Yukiya Amano on DPRK* (Sept. 9, 2016), <https://www.iaea.org/newscenter/statements/statement-by-iaea-director-general-yukiya-amano-0>.

84. S.C. Res. 2270, *supra* note 82, ¶13.

85. S.C. Res. 2270, *supra* note 82, ¶18.

86. S.C. Res. 2270, *supra* note 82, ¶29.

87. S.C. Res. 2270, *supra* note 82, ¶30.

88. Andrea Berger, *The New UNSC Sanctions Resolution on North Korea: A Deep Dive Assessment*, 38 NORTH BLOG (Mar. 2, 2016), <http://38north.org/2016/03/aberger030216/>; Annex I to S.C. Res. 2270, *supra* note 82, adds 16 persons, including trade representatives in Iran, Syria, and Viet Nam, while Annex II adds 12 entities.

89. S.C. Res. 2321 (Nov. 30, 2016), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2321\(2016\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2321(2016)).

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[T]o slash North Korea's biggest export, coal, by about 60 percent . . . . The resolution also bans copper, nickel, silver and zinc exports . . . . China, believed to be the only country that buys North Korean coal, would slash its imports by some \$700 million compared with 2015 sales under the new sanctions . . . . Banning North Korean exports of copper, nickel, silver and zinc would slash about \$100 million in revenue . . . .<sup>90</sup>

The United States took its own actions in response to the DPRK's weapons development. It passed the North Korean Sanctions and Policy Enforcement Act of 2016,<sup>91</sup> with President Obama signing Executive Order 13722 to effectuate this law.<sup>92</sup>

The new sanctions extend a ban on exporting goods to North Korea to cover all items set out in Section 6(j) of the *Export Administration Act [of] 1979* (50 U.S.C. § 4605) and broaden the scope of asset blocking rules to include entities controlled by or acting on behalf of a blocked person. Previously, the rules only applied to entities owned 50% or more by a blocked person.<sup>93</sup>

The United States took actions to further block DPRK's access to financial institutions, issuing a notice of finding<sup>94</sup> that the Democratic People's Republic of Korea is a Jurisdiction of Primary Money Laundering Concern pursuant to section 311 of the USA PATRIOT Act,<sup>95</sup> and an implementing rule<sup>96</sup> that "would require U.S. financial institutions to implement additional due diligence measures in order to prevent North Korean banking institutions from gaining improper indirect access to U.S. correspondent accounts . . . [and] prohibit the use of third-country banks' U.S. correspondent accounts to process transactions for North Korean financial institutions."<sup>97</sup> Lastly, in July the United States and Republic of

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90. Michelle Nichols, *U.N. Security Council Imposes New Sanctions on North Korea*, REUTERS (Nov. 30, 2016), <http://www.reuters.com/article/us-northkorea-nuclear-un-idUSKBN13P1TF>. As of this writing, the resolution text is not posted to the U.N. Security Council website.

91. North Korea Sanctions and Policy Enhancement Act of 2016, Pub. L. No. 114-122 (Feb. 8, 2016), <https://www.congress.gov/114/plaws/publ122/PLAW-114publ122.pdf>.

92. Exec. Order No. 13722, 81 Fed. Reg. 53 (2016), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/nk\\_eo\\_20160316.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/nk_eo_20160316.pdf).

93. Maya Lester QC, *U.S. Introduces New Sanctions on North Korea*, EUROPEAN SANCTIONS BLOG (Feb. 19, 2016), <https://europeansanctions.com/2016/02/19/us-introduces-new-sanctions-against-north-korea/>.

94. Notice of Finding, 81 Fed. Reg. 35,441 (June 2, 2016), [https://www.fincen.gov/sites/default/files/shared/2016-13038\(DPRK\\_Finding\).pdf](https://www.fincen.gov/sites/default/files/shared/2016-13038(DPRK_Finding).pdf).

95. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) § 311, 31 U.S.C. 5318A (2001).

96. Final Rule, 81 Fed. Reg. 78715 (Nov. 9, 2016), <https://www.fincen.gov/sites/default/files/shared/2016-27049.pdf>.

97. Press Release, Dep't of the Treasury, Treasury Takes Actions To Further Restrict North Korea's Access to The U.S. Financial System, <https://www.treasury.gov/press-center/press-releases/Pages/jl0471.aspx>, June 1, 2016.

Korea (i.e., South Korea) agreed on the United States deploying a Terminal High Altitude Area Defense battery over Chinese objections.<sup>98,99</sup>

## VII. Developments in the South China Sea

Control of the South China Sea continued to capture headlines through 2016 due to on-going disputes involving overlapping and competing island and maritime claims among several states in the region, including China, Taiwan, Vietnam, the Philippines, Malaysia, Brunei, and Japan.<sup>100</sup> Tensions in the West are generally viewed as being driven by China's stance in its assertion of sovereign rights to the waterways and tiny island chains of the Spratly and Paracel Islands, as well as Scarborough Shoal.<sup>101</sup> Vietnam, Malaysia, the Philippines, and Taiwan have all expanded islands in the Spratlys, but at nowhere near the same scale as China.<sup>102</sup>

The South China Sea occupies a strategic position on the world stage. Over half the world's annual merchant fleet tonnage passes through its various choke points, and approximately US\$5.3 trillion, or 30 percent of the annual world trade, passes through the South China Sea.<sup>103</sup> Due in part to the

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98. Jack Kim & Ju-min Park, *South Korea Chooses Site of THAAD U.S. Missile System Amid Protests*, REUTERS (July 13, 2016, 8:32 AM), <http://www.reuters.com/article/us-northkorea-southkorea-thaad-idUSKCN0ZT03F>.

99. The United States also offered its own shows of force, launching two Minuteman III ICBMs within a week in February. David Alexander, *U.S. Test-fires ICBMs to Stress its Power to Russia, North Korea*, REUTERS (Feb. 26, 2016), <http://www.reuters.com/article/us-usa-defense-nuclear-idUSKCN0VZ02R>. Additionally, two overflights of South Korea by U.S. and South Korean Air Force were conducted after the January and September North Korean nuclear detonations, with the flyovers after the September DPRK nuclear detonation conducted by B-1B bombers.

100. See, e.g., R.B. Cribb, *Territorial Claims in the South China Sea*, THE SOUTH CHINA SEA ONLINE RESOURCE, <http://www.southchinasea.org/files/2011/08/Territorial-Claims-in-the-South-China-Sea-R.B.Cribb.jpg> (click on the "Territorial Claims in the south China Sea – R.B. Cribb" link); Gregory B. Poling, *The South China Sea in Focus: Clarifying the Limits of the Maritime Dispute*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (July 17, 2013), [https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/130717\\_Poling\\_SouthChinaSea\\_Web.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130717_Poling_SouthChinaSea_Web.pdf).

101. Conn Hallinan, *China and the U.S. are Approaching Dangerous Seas*, FOREIGN POLICY IN FOCUS (Aug. 17, 2016), <http://fpif.org/china-u-s-approaching-dangerous-seas/>; Helene Cooper, *Patrolling Disputed Waters, U.S. and China Jockey for Dominance*, N.Y. TIMES (Mar. 30, 2016), <http://www.nytimes.com/2016/03/31/world/asia/south-china-sea-us-navy.html>; Seema Mody and Ted Kemp, *China Says Its Ready if U.S. Stirs Up Any Conflict*, CNBC (May 19, 2016), <http://www.cnbc.com/2016/05/19/china-says-its-ready-if-us-stirs-up-any-conflict-in-south-china-sea.html>; Bonnie S. Glaser, *Armed Clash in the South China Seas*, COUNCIL ON FOREIGN RELATIONS, Contingency Planning Memorandum No. 14 (Apr. 2015), <http://www.cfr.org/asia-and-pacific/armed-clash-south-china-sea/p27883> [hereinafter CSIS Memo 14].

102. Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Oct. 27, 2015), <http://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html>.

103. CSIS Memo 14, *supra* note 102. There are also varying estimates for oil and gas reserves, but this prospect may be a mere proxy for sovereign rights over the sea. Ralph Jennings, *Oil Becoming Code for Sovereignty in Contested South China Sea*, VOICE OF AMERICA (Nov. 23, 2016),

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strategic importance of these waters, the United States, while claiming neutrality, has maintained a territorial presence through significant naval and air patrols, termed “freedom of navigation operations,” as has China, resulting in a build-up of tensions between the two powers.<sup>104</sup>

Capping off an intense construction program ongoing since 2013,<sup>105</sup> this year China conducted a test flight of a civilian airliner to a newly-built airstrip on Fiery Cross Reef in the Spratly Islands<sup>106</sup> and apparently deployed a ground to air missile battery on Woody Island in the Paracel Islands.<sup>107</sup> China also stated it would start a reclamation project in Scarborough Shoals in late 2016.<sup>108</sup>

There are also reports that, amid the tensions, Vietnam extended its airstrip on its outpost at Spratly Island<sup>109</sup> and deployed mobile rocket launchers capable of striking Chinese installations in the South China Sea.<sup>110</sup>

In July 2016, the Permanent Court of Arbitration in The Hague granted a decisive victory to the Philippines when it ruled against China’s maritime claims in *Philippines v. China*.<sup>111</sup> The panel ruled overwhelmingly in favor of

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<http://www.voanews.com/a/oil-becoming-code-for-sovereignty-in-contested-south-china-sea/3608195.html>.

104. Julian G. Ku, M. Taylor Fravel, & Malcolm Cook, *Freedom of Navigation Operations in the South China Sea Aren't Enough*, FOREIGN POLICY (May 16, 2016), <http://foreignpolicy.com/2016/05/16/freedom-of-navigation-operations-in-the-south-china-sea-arent-enough-unclos-fonop-philippines-tribunal/>.

105. See, e.g., Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Oct. 27, 2015), <http://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html>; Julian Borger and Tom Phillips, *How Chinese Artificial Islands Led the Tensions in the South China Sea*, THE GUARDIAN (Oct. 27, 2015), <https://www.theguardian.com/world/2015/oct/27/tensions-and-territorial-claims-in-the-south-china-sea-the-guardian-briefing>; Shannon Tiezzi, *Why Is China Building Islands in the South China Sea?*, THE DIPLOMAT (Sept. 10, 2014), <http://thediplomat.com/2014/09/why-is-china-building-islands-in-the-south-china-sea/>.

106. Katie Hunt and Kevin Wang, *China Defends Test Flight in South China Sea After Vietnam Objects*, CNN (Jan. 4, 2016), <http://www.cnn.com/2016/01/03/asia/china-vietnam-south-china-sea/index.html>.

107. Michael Forsythe, *China Deployed Missiles on Disputed Island, U.S. Says*, N.Y. TIMES (Feb. 16, 2016), [http://www.nytimes.com/2016/02/17/world/asia/china-is-arming-south-china-sea-island-us-says.html?\\_r=0](http://www.nytimes.com/2016/02/17/world/asia/china-is-arming-south-china-sea-island-us-says.html?_r=0).

108. Minnie Chan, *China to Build Up Atoll in Contested South China Sea, source says*, SOUTH CHINA MORNING POST, (Apr. 25, 2016), <http://www.cnbc.com/2016/04/25/china-to-build-up-atoll-in-contested-south-china-sea-source-says.html>. As of this writing, there is no evidence any reclamation has occurred on Scarborough Shoal.

109. Center for Strategic and International Studies [CSIS], Asia Maritime Transparency Initiative, *Updated: Viet Nam Responds with Spratley Air Upgrades* (Nov. 15, 2016), <https://amti.csis.org/vietnam-responds/>.

110. Greg Torode, *Exclusive: Vietnam Moves New Rocket Launchers into Disputed South China Sea—sources*, REUTERS (Aug. 10, 2016, 3:23 PM), <http://www.reuters.com/article/us-southchinasea-vietnam-idUSKCN10K2NE>.

111. The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China), Award, § V(F)(d)(278), 17 (Perm. Ct. Arb. 2016), <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>.

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the Philippines, which had argued that its maritime territory had been illegally seized by China.<sup>112</sup> The court, *inter alia*, ruled that China did not have a legal basis to claim historic rights to resources that China claimed were within its sovereign rights. The tribunal further held that some of the waters at issue are within the exclusive economic zone of the Philippines and are not overlapped by any possible entitlement of China. The tribunal stated that China had violated the Philippines' sovereign rights in those waters through the construction of artificial islands and its interference with Philippine fishing and petroleum exploration.<sup>113</sup> Although the verdict is binding and final, the court lacks enforcement mechanisms.<sup>114</sup> China, which refused to participate in the proceedings and does not acknowledge the tribunal, dismissed the ruling as "null and void."<sup>115</sup>

Subsequently, as China's aggressive activities continued, China's President Xi Jinping and Philippine President Rodrigo Duterte agreed to undertake bilateral negotiations in an attempt to reach an accommodation.<sup>116</sup> An informal deal was apparently reached in November, with reports that China had begun to allow Philippine fishermen to operate in Scarborough Shoal, waters contested by China and the Philippines.<sup>117</sup> It has been suggested that the arrangement gives both parties what they seek, while sidestepping the more contentious sovereignty issue over Scarborough Shoal.<sup>118</sup>

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112. *See id.*; *see also* Max Fisher, *The South China Seas, Explaining the Dispute*, N.Y. TIMES (July 14, 2016), <http://www.nytimes.com/2016/07/15/world/asia/south-china-sea-dispute-arbitration-explained.html>; Oliver Holmes & Tom Phillips, *South China Sea Dispute, What You Need to Know about the Hague Court Ruling*, THE GUARDIAN (July 12, 2016), <https://www.theguardian.com/news/2016/jul/12/south-china-sea-dispute-what-you-need-to-know-about-the-hague-court-ruling>; Matikas Santos, *Philippines Wins Arbitration Case vs China over South China Sea*, PHILIPPINE DAILY INQUIRER (July 12, 2016), <http://globalnation.inquirer.net/140358/philippines-arbitration-decision-maritime-dispute-south-china-sea-arbitral-tribunal-unclos-itlos>.

113. *Id.*

114. *Id.*

115. *See, e.g.*, Gillian Wong & Gerry Shih, *China Rejects Ruling on South China Seas as 'null and void'*, ASSOCIATED PRESS (July 12, 2016), <http://bigstory.ap.org/article/d6d1fe0ff98341aba8440b32b1c35ef6/china-rejects-ruling-south-china-sea-null-and-void>.

116. *See, e.g.*, Jane Perlez, *Rodrigo Duterte and Xi Jinping Agree to Reopen South China Sea Talks*, N.Y. TIMES (Oct. 20, 2016), <http://www.nytimes.com/2016/10/21/world/asia/rodrigo-duterte-philippines-china-xi-jinping.html>; Ben Blanchard, *Duterte Aligns Philippines with China, Says U.S. has Lost*, REUTERS (Oct. 20, 2016), <http://www.reuters.com/article/us-china-philippines-idUSKCN12K0AS>.

117. *Id.*

118. *Id.*



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## **United Nations and International Organizations**

ELIZABETH TURCHI, RENEE DOPPLICK, SHRUTI CHOPRA, DANA NAZAROVA, JOSEPH BONGIORNO, RICHARD BAINTER, RONCEVERT GANAN ALMOND, KAREN VAN ESSEN, ADAM MAUNTAH, AND TAARIKA SRIDHAR\*

This article reviews select developments occurring in 2016 in the United Nations (UN) and other international organizations. It focuses on the UN Security Council, the UN General Assembly, the International Court of Justice, the Permanent Court of Arbitration, the International Law Commission, and the UN Commission on International Trade Law.

### **I. United Nations Security Council Resolutions**

Pursuant to its purpose under the UN Charter to maintain international peace and security,<sup>1</sup> the Security Council passed sixty-five resolutions in 2016, largely focusing on region-specific resolutions to maintain peace in conflict zones, to prevent and eliminate conflicts, and to implement new strategies to eliminate or reduce current conflicts.<sup>2</sup>

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\* Elizabeth Turchi is a Legal Officer with the United Nations Secretariat and served as committee co-editor of this Article. Renee Dopplick, committee co-chair and co-editor, is an international attorney in Washington D.C. and the Director of Public Policy for ACM. Shruti Chopra is an attorney licensed in New York and India, focusing on intellectual property, technology, and transactions. She is the contributing co-author of Section I on the United Nations Security Council together with Dana Nazarova. Ms. Nazarova is an international attorney, focusing on white collar defense in Texas. Joseph Bongiorno, JD, LL.M, PhD, the main author of Section II on the United Nations General Assembly, is an Associate Professor of History at St. John's University in New York. Roncevert Ganan Almond, author of Section III on the International Court of Justice, is Partner and Vice-President at The Wicks Group. Taarika Sridhar, author of Section IV on the Work of the International Law Commission, is a student at Northeastern University School of Law. Karen Van Essen, author of Section V on Human Rights Treaty Bodies, is an associate at Arent Fox LL.P. in California. Adam Mauntah, author of Section VI on World Bank and Financial Institutions, is Counsel at the Department of Justice Canada. Richard Bainter, author of Section VII on UNCITRAL, is an international attorney focusing on international organizations. The views expressed are attributed to the authors individually and do not represent the views of their respective organizations or workplaces.

1. See U.N. Charter art. 24, para. 1.

2. See *Security Council Resolutions*, UNITED NATIONS SEC. COUNCIL, <http://www.un.org/en/sc/documents/resolutions/2016.shtml> (last visited Nov. 30, 2016). This article reviews sixty-five resolutions adopted by the UN Security Council and one resolution that was vetoed by the Russian Federation at the time of writing this article.

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A. MAJOR ISSUES OF 2016

This year's resolutions covered peacekeeping operations, sexual exploitation and abuse by peacekeeping personnel, nuclear non-proliferation and disarmament regime, international migration and human trafficking, aviation security, the protection of civilians in post-conflict environments, and the necessity of protecting human rights. The Security Council also continued to address issues prevalent in 2015, such as the conflicts in Syria, Liberia, Middle East, Sudan, South Sudan, Burundi, Central African Republic, Libya, Somalia, Congo, and North Korea. It also looked to implement new strategies and courses of actions regarding the persistent issues in Cyprus, Iraq, Haiti, Mali, Western Sahara, and Yemen.

1. *Peacekeeping*

The Security Council stressed the UN's zero-tolerance policy for sexual exploitation and abuse and endorsed several measures aimed at protection against and prevention of sexual exploitation and abuse by peacekeeping contingent troops and peacekeeping personnel.<sup>3</sup> The Security Council stressed that proper conduct and discipline are crucial to the effectiveness of peacekeeping operations. Noting the report by the High-Level Independent Panel on Peace Operations,<sup>4</sup> two reports by the Secretary-General, and an external panel report on sexual exploitation and abuse in the Central African Republic submitted to the Secretary-General, Resolution 2272 endorsed: (1) the repatriation of entire military or formed police units when there is credible evidence of widespread or systemic sexual exploitation and abuse by that unit; (2) the practice to replace repatriated units only with units from troop contributing Member States that have upheld standards of conduct and discipline; (3) stronger pre-deployment training about sexual exploitation and abuse; and (4) vetting of all personnel to prevent the deployment of troops for whom there are pending sexual exploitation and abuse allegations. The Resolution also called for the Secretary-General to assess whether Member States are investigating allegations of sexual exploitation and abuse and holding their nationals criminally accountable.

2. *Non-Proliferation of Nuclear Weapons*

The Security Council emphasized the importance of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and urged all outstanding states to sign the Comprehensive Nuclear-Test-Ban Treaty (CTBT).<sup>5</sup> It also recognized the establishment of the International Monitoring System and

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3. See S.C. Res. 2272 (Mar. 11, 2016).

4. See U.N. Secretary-General, Letter dated June 17, 2015 from the Secretary General addressed to the President of the Security Council, U.N. Doc. S/2015/446 (June 17, 2015); U.N. Secretary-General, *The Future of United Nations Peace Operations: Implementation of the Recommendations of the High-level Independent Panel on Peace Operations*, U.N. Doc. A/70/357-S/2015/682 (Sept. 2, 2015).

5. See S.C. Res. 2310 (Sept. 23, 2016).

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the International Data Centre to ensure treaty compliance and urged Member States to end nuclear testing.

3. *Human Trafficking and Migrant Smuggling*

With regard to its efforts under the UN Convention against Transnational Organized Crime and the Protocol Against Smuggling Migrants Across Land Air and Sea, the Security Council addressed the migrant smuggling crisis in the Mediterranean Sea.<sup>6</sup> It called upon Member States to implement border security policies to protect migrants' human rights. The Security Council urged coordination with Libyan authorities to deter migrant smuggling and human trafficking. Also, it called upon Member States to exercise due diligence, punish smugglers, and assist victims.

4. *Aviation Security*

The Security Council, reaffirming its commitment to air space sovereignty, expressed concern that terrorist groups are seeking to defeat or circumvent aviation security.<sup>7</sup> It affirmed the role of the International Civil Aviation Organization (ICAO) as the UN Organization for developing international aviation security standards and monitoring Member States' compliance. The Security Council encouraged cooperation between ICAO and the UN Counter Terrorism Executive Directorate and called upon Member States to adhere to Annex 17 of the Chicago Convention. More so, it called upon Member States to engage in dialogue on aviation security and exchange information about threats, risks, and vulnerabilities.

5. *Civilians in Armed Conflict*

Focusing on the protection of civilians and medical and humanitarian personnel in conflict zones, the Security Council condemned attacks against the infirmed, medical and humanitarian personnel and their transportation and equipment, hospitals, and medical facilities.<sup>8</sup> It urged the prosecution of perpetrators of war crimes and violations of international law. It also called for compliance with international law and with the Geneva Conventions to prevent acts of violence against such protected non-combatants.

6. *Peacebuilding in Post-Conflict Zones*

The Security Council, with respect to the 2030 Agenda for Sustainable Development, emphasized the importance of a comprehensive approach to sustaining peace, particularly through the prevention of conflict and addressing its root causes, strengthening the rule of law at the international and national levels, and promoting sustained and sustainable economic

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6. See S.C. Res. 2312 (Oct. 6, 2016).

7. See S.C. Res. 2309 (Sept. 22, 2016).

8. See S.C. Res. 2286 (May 3, 2016).

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growth and social development.<sup>9</sup> It stressed that civil society, women, and youth are vital to peace. It also welcomed the work of the Peacebuilding Fund and the importance of strategic partnerships for funding from private sector sources. The Security Council encouraged the Peacebuilding Commission to: (a) diversify its working methods; (b) consider regional and crosscutting issues relevant to sustaining peace; (c) enhance synergies with the Peacebuilding Fund; and (d) integrate a gender perspective into its work. It also requested the Secretary-General to strengthen the UN and World Bank partnership to foster economic growth, marshal resources, create and provide funding platforms, and enhance exchanges on peacebuilding. It also noted the importance of women's leadership and participation in conflict prevention, resolution, and peacebuilding and the need to increase representation of women at all decision-making levels. Further, it encouraged the promotion of gender dimensions and the participation of youth and the private sector in peacebuilding activities.

**B. COUNTRY-SPECIFIC RESOLUTIONS**

The Security Council, due to the efforts at peace and stability in the region, decreased the UNOCI's military component in Cote d'Ivoire.<sup>10</sup>

In light of the peace process in the Republic of Columbia, the Security Council established a political mission in Columbia to oversee the tripartite mechanism monitoring the bilateral ceasefire.<sup>11</sup>

The Government of Cyprus extended the stay of the UN Interim Forces in Cyprus (UNFICYP) beyond January 31, 2016.<sup>12</sup> The Security Council appreciated the continued progress on the Joint Declaration adopted by the Greek and Turkish Cypriot leaders in 2014 and urged both sides to permit the removal of mines within the buffer zone and to continue demining operations outside the buffer zone.

In Yemen, the Security Council urged all parties to resolve political, security, economic, and humanitarian disputes and to cease violence and provocation.<sup>13</sup> The Security Council continued to support the work of the Special Envoy. It stressed the necessity of the measures prescribed in Resolution 2253<sup>14</sup> to combat terrorist activity and emphasized effective implementation of the sanctions pursuant to Resolution 2140<sup>15</sup> and Resolution 2216.<sup>16</sup>

With respect to peacekeeping operations in Guinea-Bissau, the Security Council extended the mandate for the UN Integrated Peacebuilding Office

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9. See S.C. Res. 2282 (Apr. 27, 2016).

10. See S.C. Res. 2260 (Jan. 20, 2016); S.C. Res. 2283 (Apr. 27, 2016); S.C. Res. 2284 (Apr. 27, 2016).

11. See S.C. Res. 2261 (Jan. 25, 2016); S.C. Res. 2307 (Sept. 13, 2016).

12. See S.C. Res. 2263 (Jan. 28, 2016), S.C. Res. 2300 (July 26, 2016).

13. See S.C. Res. 2266 (Feb. 24, 2016).

14. See S.C. Res. 2266 (Feb. 24, 2016); S.C. Res. 2253 (Dec. 17, 2015).

15. See S.C. Res. 2266 (Feb. 24, 2016); S.C. Res. 2140 (Feb. 26, 2014).

16. See S.C. Res. 2266 (Feb. 24, 2016); S.C. Res. 2216 (Apr. 14, 2015).

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and stressed that peace and stability was dependent upon strengthened democratic institutions, human rights protections, law enforcement, and socio-economic development.<sup>17</sup> The Security Council called upon the political leaders to work together with the military and civil society to address the root causes of instability.

The Security Council reiterated that chemical weapons usage in Syria is a serious violation of international law and that perpetrators must be held accountable.<sup>18</sup> It also renewed the original mandate of the Joint Investigative Mechanism, and established an International Syria Support Group (ISSG) humanitarian task force and an ISSG ceasefire task force. It continued to endorse the terms for the cessation of hostilities in Syria, which was set to commence February 27, 2016. Further, it called on parties to immediately allow humanitarian agencies rapid, safe, and unhindered access throughout Syria to render humanitarian assistance. The Security Council expressed its support for the Syrian-led political process and requested the Secretary-General and the Special Envoy for Syria to continue formal negotiations between the representatives of the Syrian government and the opposition. The Security Council also asked Member States to use their influence to advance the peace process and the release of detained persons.

With regard to the role of the government in facilitating peace in Liberia, the Security Council indicated that stability requires the Liberian Government to maintain well-functioning and accountable national institutions able to provide rule of law and national reconciliation.<sup>19</sup> It noted, however, that the Liberian Government had not demonstrated sufficient progress in these areas. Further, the Security Council noted that the conflict over Liberia's natural resources and land disputes must be addressed in order to achieve stable and effective government institutions. The Security Council urged Liberia to facilitate inclusive, free, fair, and transparent elections in 2017 and called for the extended mandate of the UN Mission in Liberia (UNMIL) through December 31, 2016.

Regarding North Korea (the Democratic Republic of Korea), the Security Council adopted three resolutions reemphasizing the threat of nuclear, chemical, and biological weapons to international peace and security. In Resolution 2270, the Security Council condemned North Korea's continued nuclear testing and ballistic missile related programs that violate Security Council resolutions and international norms.<sup>20</sup> In Resolution 2276, the Security Council continued to monitor the effects of the sanctions; emphasized the importance of independent assessment, analysis, and recommendations; and extended the mandate of the Panel of Experts until April 24, 2017.<sup>21</sup> In its unanimous Resolution 2321, the Security Council

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17. See S.C. Res. 2267 (Feb. 26, 2016).

18. See S.C. Res. 2268 (Feb. 26, 2016); S.C. Res. 2314 (Oct. 31, 2016).

19. See S.C. Res. 2308 (Sept. 14, 2016); S.C. Res. 2288 (May 25, 2016).

20. See S.C. Res. 2270 (Mar. 2, 2016).

21. See S.C. Res. 2276 (Mar. 24, 2016).

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strengthened and expanded sectoral sanctions on North Korea's international trade, financial transactions, and weapon related programs.<sup>22</sup>

The Security Council adopted several resolutions related to the situation of insecurity in Sudan and South Sudan.<sup>23</sup> The Security Council called upon all parties to engage in the peace efforts mediated by the African Union High-Level Implementation Panel (AUHIP)<sup>24</sup> and reiterated its support for the Doha Document for Peace in Darfur (DDPD) as a framework for the peace process in Darfur.<sup>25</sup> The Security Council stressed the responsibility of the Government of Sudan to protect civilians within its territory, including protection from crimes against humanity and war crimes,<sup>26</sup> and re-emphasized the need for all armed actors to cease violence against civilians, including against children.<sup>27</sup>

Burundi continued to see violence in the region, ongoing political impasse, and serious humanitarian consequences. The Security Council continued to urge the government to protect its population based on respect for rule of law and international law.<sup>28</sup> It also called for addressing the increased cases of forced disappearance, kidnapping, and acts of torture. Highlighting issues with the implementation of the Arusha Peace and Reconciliation Agreement, the Security Council pointed out that the coordinating efforts between the African Union, the East African Community, the International Conference of the Great Lakes Region, the European Union, and the United Nations, including the Special Adviser, as necessary for conflict prevention.<sup>29</sup> The Security Council requested the Secretary-General, in consultation with the African Union and the Government of Burundi, to establish a UN police component to monitor the security situation, promote response for human rights, and advance the rule of law.

The Security Council continued to help secure a permanent ceasefire in Lebanon and the Middle East,<sup>30</sup> which has had limited progress since Resolution 1701 (2006). It asked all other parties involved to strengthen their efforts and to determine special solutions with the Special Coordinator of the Secretary-General and the UNIFIL Force Commander to fully implement Resolution 1701.<sup>31</sup> The Security Council reemphasized the

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22. See S.C. Res. 2321 (Nov. 30, 2016).

23. See S.C. Res. 2318 (Nov. 15, 2016); S.C. Res. 2304 (Aug. 12, 2016); S.C. Res. 2302 (July 29, 2016); S.C. Res. 2296 (June 29, 2016); S.C. Res. 2290 (May 31, 2016); S.C. Res. 2287 (May 12, 2016); S.C. Res. 2280 (Apr. 7, 2016); S.C. Res. 2271 (Mar. 2, 2016); S.C. Res. 2265 (Feb. 10, 2016).

24. See S.C. Res. 2318 (Nov. 15, 2016).

25. See S.C. Res. 2296 (June 29, 2016).

26. See *id.*

27. See S.C. Res. 2318 (Nov. 15, 2016).

28. See S.C. Res. 2279 (Apr. 1, 2016).

29. See S.C. Res. 2303 (July 29, 2016).

30. See S.C. Res. 2314 (Oct. 31, 2016); S.C. Res. 2305 (Aug. 30, 2016); S.C. Res. 2294 (June 29, 2016).

31. See S.C. Res. 2305 (Aug. 30, 2016).

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necessity to comply with the prohibition on the sale and supply of arms and related material.<sup>32</sup> In addition to expressing strong support for the Lebanese Armed Forces to provide security for Lebanon, where the situation continues to be a threat to international peace and security, the Security Council extended the mandate of UNIFIL until August 31, 2017.<sup>33</sup> It urged the continued collaboration between UNIFIL and the Lebanese Armed Forces.<sup>34</sup> Further, the Security Council reaffirmed its call on all parties to accept and respect the cessation of hostilities, and prevent any violation of the Blue Line, while cooperating with the United Nations and UNIFIL.<sup>35</sup> The Security Council asked the Government of Israel to expedite the withdrawal of its army from northern Ghajar, while continuing to support and respect establishment of an area free of any armed personnel, assets, and weapons between the Blue Line and the Litani River.<sup>36</sup>

With respect to the Central African Republic (CAR), the Security Council noted the acts of violence and criminality in Bangui, the kidnapping of CAR police by armed groups, and the attacks and abductions by the Lord's Resistance Army in the southeast.<sup>37</sup> It stressed the urgent need to end impunity for the violations of humanitarian law and the need to bolster accountability, such as through the Special Criminal Court and the Independent Expert on human rights. In addition, it emphasized that the current situation in the CAR may prove fertile to transnational criminal activity and as a breeding ground for radical networks.

### C. VETOED RESOLUTIONS

Russia vetoed a proposal by France and Spain that demanded an immediate halt to all aerial bombardment and military flights over the city of Aleppo, as well as immediate, safe, and unhindered humanitarian access throughout Syria.<sup>38</sup> Russia stated that it was not Security Council practice to address a permanent Member State's conduct and policy by vote without prior consent.<sup>39</sup>

## II. United Nations General Assembly

The UN General Assembly's agenda in 2016 included the 2030 Agenda for Sustainable Development, a treaty on climate change, a framework

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32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

37. *See* S.C. Res. 2301 (July 26, 2016); S.C. Res. 2281 (Apr. 26, 2016); S.C. Res. 2264 (Feb. 9, 2016); S.C. Res. 2262 (Jan. 27, 2016).

38. *See* S.C. Res. 2846 (Oct. 8, 2016).

39. *See* Press Release, U.N., Sec. Council Fails to Adopt Two Draft Resolutions on Syria, Despite Appeals for Action Preventing Impending Humanitarian Catastrophe in Aleppo (Oct. 8, 2016).



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document to address large movements of refugees and migrants, transnational crime, and increased cooperation among the UN and international economic development organizations. The UN General Assembly also adopted resolutions related to Afghanistan and the United States' longstanding embargo against Cuba.

Upon recommendation of the Security Council, the General Assembly appointed, by acclamation, António Guterres of Portugal as the new Secretary-General to succeed Ban Ki Moon, effective January 1, 2017.<sup>40</sup> Guterres served as the UN High Commissioner for Refugees from 2005 to 2010. As part of an effort to make the selection and appointment process more transparent, the UN held public forums with candidates and increased public outreach for civil society participation.

A. MAJOR ISSUES OF 2016

1. *2030 Agenda for Sustainable Development*

The international community began action to implement the 2030 Agenda for Sustainable Development, which UN Members States adopted in 2015.<sup>41</sup> The seventeen Sustainable Development Goals (SDGs) and their targets reflect global consensus on international development priorities as consistent with sustainable economic growth, social inclusion, and environmental protection. The new goals call for public and private action to address inequalities, discrimination, violence against women, human trafficking, corruption, water and energy insecurity, and climate change. The goals also cover ensuring equal access to justice, strengthening rule of law, protecting human rights, and promoting good governance through effective, accountable, and transparent institutions at all levels. In support of multilateral implementation of the 2030 Agenda and the Sustainable Development Goals, the General Assembly adopted resolutions this year to encourage and facilitate increased cooperation by the UN with various regional organizations such as the Commonwealth of Independent States, the League of Arab States, the Collective Treaty Organization, and the Council of Europe.<sup>42</sup>

2. *Climate Change*

The Paris Agreement on Climate Change, a landmark agreement aimed at reducing greenhouse gas emissions, entered into force on November 4,

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40. See G.A. Res. 71/4 (Oct. 13, 2016).

41. See G.A. Res. 70/1 (Oct. 21, 2015) (adopted Sept. 25, 2015). See generally U.N. Dep't Econ. & Soc. Affairs, Sustainable Development Goals, <http://www.un.org/sustainabledevelopment/development-agenda/> (last visited Dec. 12, 2016).

42. See G.A. Res. 71/10 (Oct. 21, 2015); G.A. Res. 71/11 (Nov. 21, 2016); G.A. Res. 71/12 (Nov. 21, 2016); G.A. Res. 71/17 (Nov. 21, 2016); Press Release, U.N., Gen. Assembly Adopts 10 Resolutions Encouraging Stronger Ties Between Regional Org, United Nations to Address Global Challenges (Nov. 21, 2016).

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2016.<sup>43</sup> Adopted in December 2015,<sup>44</sup> it opened for signatures on Earth Day, April 22, with the United States and China issuing a joint statement of support. The Agreement aims to reduce the risks of climate disruption by keeping the global average temperature well below 2 degrees Celsius above pre-industrial levels and ideally below 1.5 degrees Celsius. The Agreement requires parties to report their nationally determined contributions every five years to the Secretariat of the United Nations Framework Convention on Climate Change (UNFCCC). Implementation of the Paris Agreement supports Sustainable Development Goal 13, which calls for urgent action to combat climate change and its impact.

3. *Large Movements of Refugees and Migrants*

The UN General Assembly held its first ever high-level plenary meeting on large movements of refugees and migrants, spurred in part by the situations in the Middle East, Africa, and Europe.<sup>45</sup> The resulting New York Declaration on Refugees and Migrants, signed by 193 Member States, provides the blueprint for global cooperation regarding the displacement of large populations due to war, political upheaval, or economic conditions.<sup>46</sup> The Declaration consists of a set of agreements and commitments that recognize the role of the international community to address such large movements of refugees and migrants. Member States agreed to international cooperation while recognizing the individual capacities of different states. The Declaration's two annexes outline a global compact for safe, orderly, and regular migration, as well as a comprehensive refugee response framework. The meeting was attended by all Member States, as well as Observer States and international organizations involved directly or indirectly with international migration.<sup>47</sup>

4. *Transnational Crime*

The General Assembly adopted a resolution to promote greater cooperation between the UN and the International Criminal Police Organization (INTERPOL) and to foster a more consistent approach toward transnational crime and its international networks.<sup>48</sup>

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43. See generally U.N. Framework Convention on Climate Change, The Paris Agreement, [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) (last visited Nov. 30, 2016).

44. See U.N. Framework Convention on Climate Change, Report of the Conference of the Parties on its Twenty-First Session, held in Paris from 30 November to 13 December 2015, U.N. Doc. FCCC/CP/2015/10/Add. 1 (Jan. 29, 2016).

45. See Addressing Large Movements of Refugees and Migrants, Summit for Refugees and Migrants—19 September 2016 (Sept. 19, 2016) <http://refugeesmigrants.un.org/summit>.

46. See U.N. GAOR, 71st Sess., 3rd plen. mtg., U.N. Doc. A/71/PV.3 (Sept. 13, 2016).

47. See G.A. Res. 71/1 (Sept. 19, 2016).

48. See G.A. Res. 71/19 (Nov. 21, 2016).

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5. *Inter-Organizational Cooperation*

The General Assembly passed numerous resolutions in the area of cooperation with international organizations to coordinate on sustainable development, combat terrorism, and promote economic integration.<sup>49</sup> The resolutions call upon the UN Secretariat and UN entities to accelerate inter-organizational cooperation in order to construct a more consistent and comprehensive framework for development.

B. COUNTRY-SPECIFIC RESOLUTIONS

Among the country-specific resolutions, the General Assembly adopted resolutions regarding Afghanistan and the United States' longstanding embargo against Cuba.

1. *Afghanistan*

In a resolution adopted by consensus, the General Assembly called for comprehensive peace negotiations and resumption of peace talks between the Afghan government and the Taliban.<sup>50</sup> The resolution noted the successes of several fundraising initiatives for Afghanistan within the international community, such as the Brussels Conference on Afghanistan.

2. *Cuba Embargo*

The General Assembly adopted a resolution calling upon the United States to end its economic, commercial, and financial embargo against Cuba.<sup>51</sup> The resolution was supported with a vote of 191-0-2, with, for the first time, the United States abstaining rather than rejecting.<sup>52</sup> Israel also abstained.

**II. International Courts**

A. INTERNATIONAL COURT OF JUSTICE

In 2016, States submitted three new legal contentious cases before the International Court of Justice (ICJ), the UN's principal judicial organ for disputes between states.

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49. See G.A. Res. 71/15 (Nov. 21, 2016); G.A. Res. 71/16 (Nov. 21, 2016); G.A. Res. 71/18 (Nov. 21, 2016).

50. See G.A. Res. 71/9 (Nov. 17, 2016).

51. See G.A. Res. 71/5 (Oct. 26, 2016).

52. See *US Abstains from UN Vote Against Cuba Embargo*, BBC NEWS (Oct. 27, 2016), <http://www.bbc.com/news/world-us-canada-37784136>.

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In *Chile v. Bolivia*,<sup>53</sup> Chile instituted proceedings against Bolivia over the status and use of the waters of the Silala River. Chile requested that the ICJ confirm Chile's entitlement to its current use of the waters and Bolivia's obligation to prevent and control pollution and other form of harm to Chile resulting from its activities near the Silala River, as well as to cooperate with Chile on planned measures impacting the river.<sup>54</sup> The ICJ set July 3, 2017, and July 3, 2018, as the respective time limits for the filing of a Memorial by Chile and a Counter-Memorial by Bolivia.<sup>55</sup>

In *Equatorial Guinea v. France*, Equatorial Guinea argued that France breached its obligation to respect the principles of sovereign equality and non-interference in the internal affairs of another State by permitting French courts to initiate criminal legal proceedings against Teodoro Nguema Obiang Mangue, Equatorial Guinea's Second Vice President in charge of defense and state security, and by allowing the seizure of the building which houses Equatorial Guinea's Embassy in France, which was formerly owned by Mr. Mangue.<sup>56</sup> Equatorial Guinea has alleged that France's actions are in violation of the UN Convention against Transnational Organized Crime, the Vienna Convention on Diplomatic Relations, and general international law.<sup>57</sup> After two rounds of oral observations, the ICJ began its deliberation.<sup>58</sup>

In *Islamic Republic of Iran v. United States of America*,<sup>59</sup> Iran submitted its dispute against the United States alleging the latter's designation of Iran as a State sponsoring terrorism and its adoption of legislative and executive acts, pursuant to which assets and interest of Iran and Iranian entities were subjected to enforcement proceedings in the United States, are in violation of international law and of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States.<sup>60</sup> The Court fixed February 1, 2017, and September 1, 2017, as the respective time limits for

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53. See Dispute over the Status and Use of the Waters of the Silala (*Chile v. Bolivia*), Application Instituting Proceedings (June 6, 2016), <http://www.icj-cij.org/docket/files/162/19020.pdf>.

54. See *id.* ¶ 50.

55. Press Release, Int'l Court of Justice, Dispute over the Status and Use of Waters of Silala (*Chile v. Bol.*); Fixing of Time-Limits for the Filing of the Initial Pleadings No. 2016/22 (July 14, 2016).

56. See Immunities and Criminal Proceedings (*Equatorial Guinea v. France*), Application for Initiation of Proceeding (June 13, 2016), <http://www.icj-cij.org/docket/files/163/19036.pdf>.

57. See *id.* ¶ 3.

58. See Press Release, Int'l Court of Justice, Immunities and Criminal Proceedings (*Equatorial Guinea v. Fr.*); Conclusion of the Public Hearing on the Request for the Indication of Provisional Measures Made by Equatorial Guinea; The Court to Begin its Deliberation No. 2016/33 (Oct. 19, 2016).

59. See Certain Iranian Assets (*Islamic Republic of Iran v. U.S.*), Application for Initiation of Proceeding (June 14, 2016), <http://www.icj-cij.org/docket/files/164/19038.pdf>.

60. See Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, U.S.-Iran, Aug. 15, 1955, 284 U.N.T.S. 93.

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the filing of a Memorial by the Iran and a Counter-Memorial by the United States.<sup>61</sup>

**B. PERMANENT COURT OF ARBITRATION**

On July 12, 2016, the Permanent Court of Arbitration (PCA) issued a landmark arbitral award in *The Republic of Philippines v. The People's Republic of China*.<sup>62</sup> The PCA rejected China's "nine-dash line" claim, finding that the United Nations Law of the Sea Convention (UNCLOS) was controlling for the purposes of determining maritime entitlements. The PCA further concluded that Chinese-claimed maritime features in the Spratly Islands were not capable of generating extended maritime zones. On this basis, the PCA also determined that China's actions, such as constructing artificial islands and denying access to Manila, were unlawful and unduly infringed on the Philippines' rights within its exclusive economic zone.

**IV. The Work of the International Law Commission (ILC)**

The International Law Commission (ILC) held its 68th session at the UN Office in Geneva from May through August of 2016.<sup>63</sup> The highlights of the session include the following:

1. The ILC adopted a set of 16 draft conclusions from the fourth report on Identification of Customary International Law, which the ILC will transmit to governments for comments;
2. The ILC considered the second report on Crimes Against Humanity, and provisionally adopted articles 5 through 10 that cover issues including criminalization under national law and establishment of national jurisdiction;
3. The ILC also considered the third report on the Protection of the Atmosphere, and proposed five draft obligations states must undertake;
4. The ILC has requested further information from states on their national legislation and practices regarding immunity of state officials from foreign criminal jurisdiction;
5. The ILC has established a Planning Group to manage its programme and procedures; and
6. The ILC will consider the following future topics: the "settlement of international disputes to which international organizations are parties," and the succession of states in respect of state responsibility."

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61. See *Certain Iranian Assets (Iran v. U.S.)*, Order (July 1, 2016), <http://www.icj-cij.org/docket/files/164/19060.pdf>.

62. See *In the Matter of the South China Sea Arbitration (Phil. V. P.R.C.)*, PCA Case No. 2013-19 (July 12, 2016), <http://www.pcacases.com/pcadocs/PH-CN - 20160712 - Award.pdf>.

63. See Int'l Law Comm'n, Report on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10 (2016).

## V. Human Rights Treaty Bodies

The UN's ten human rights treaty bodies, comprised of independent expert committees monitoring State Parties' implementation of international human rights treaties,<sup>64</sup> celebrated milestone anniversaries for major international human rights treaties and recognized the continued need to address various challenges to protecting human rights.

The Human Rights Committee (HRC) and Committee on Economic, Social and Cultural Rights (CESCR) celebrated the fiftieth anniversary of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>65</sup> This year also marked the tenth anniversary of the International Convention for the Protection of all Person from Enforced Disappearances.<sup>66</sup>

The Committee against Torture (CAT) recognized the importance of the survivors' efforts in obtaining the conviction of former President of Chad Hissène Habré for crimes against humanity, summary executions, torture, and rape.<sup>67</sup> The Committee also assisted by supporting the principle of universal jurisdiction that kept Hissène Habré in Senegal for prosecution.

Among the emerging challenges, Committees expressed concern about rising racist and xenophobic rhetoric and violence amid significant refugee and migrant movement,<sup>68</sup> and State responses to terrorism.<sup>69</sup>

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64. See U.N. Human Rights Office of the High Comm'r, Human Rights Bodies, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.

65. Comm. on Econ., Soc., and Cultural Rights, Opening Statement (Feb. 22, 2016), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fSTA%2f57%2f24474&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fSTA%2f57%2f24474&Lang=en).

66. See Comm. on Enforced Disappearances, Tenth Session Opening Address by Simon Walker, Chief Civil, Political, Economic, Social and Cultural Rights Section Human Rights Treaties Division (Mar. 7, 2016), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCED%2fSTA%2f10%2f24501&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCED%2fSTA%2f10%2f24501&Lang=en).

67. See Committed Against Torture, 58th Session Statement by Mr. Simon Walker, Chief, Civil, Political, Economic, Social and Cultural Rights Section Human Rights Council and Treaty Mechanisms Division Office of the High Commissioner for Human Rights (July 25, 2016) [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fOCR%2f58%2f24979&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fOCR%2f58%2f24979&Lang=en).

68. See Comm. on the Elimination of Racial Discrimination, 89th Session Opening Address by Ibrahim Salama, Director of Human Rights Treaties Division (Apr. 25, 2016), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fOCR%2f89%2f24658&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fOCR%2f89%2f24658&Lang=en); See also Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families, Twenty-Fourth Session Statement by Mr. Simon Walker Chief, Civil, Political, Economic, Social and Cultural Rights Section Human Rights Treaties Division Office of the High Commissioner for Human Rights (Apr. 11, 2016), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCMW%2fOCR%2f24%2f24639&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCMW%2fOCR%2f24%2f24639&Lang=en).

69. *Security Council Resolutions*, *supra* note 2.

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The Committee on Elimination of Racial Discrimination (CERD) noted intersecting forms of discrimination against women and girls.<sup>70</sup> Women's lack of access to justice and violence against women continued to be important issues.<sup>71</sup> Committees also focused on children and armed conflict<sup>72</sup> and protecting children from sexual exploitation.<sup>73</sup>

## **VI. World Bank and Financial Institutions**

On October 9, 2016, the World Bank, regional Multilateral Development Banks (MDBs), and other organizations issued a statement expressing their commitment to work toward the Sustainable Development Goals (SDGs) set out in the 2030 Agenda.<sup>74</sup> MDBs recognize that meeting the SDGs will require a coordination of efforts. The World Bank and the European Commission developed a framework for collaboration in situations affected by fragility, conflict, and violence.<sup>75</sup> MDBs will continue to explore how to work individually and in partnership with each other and with the international community to realize the implementation of the SDGs.

## **VII. UN Commission on International Trade Law (UNCITRAL)**

The UN Commission on International Trade Law (UNCITRAL) adopted three major texts in 2016.

The Model Law on Secured Transactions deals with security interests in all tangible and intangible movable property. It provides a transparent and comprehensive legal framework of secured financing. It is expected to impact the availability and cost of credit, which will help to support small- and medium-size enterprises in developing countries and to alleviate poverty.<sup>76</sup>

The Technical Notes on Online Dispute Resolution (ODR) assists parties in dispute resolution in a flexible and secure manner by obviating the need

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70. See Orest Nowosad, Chief, Groups in Focus, Human Rights Council and Treaty Mechanisms Div., Opening Address of the Committee on the Elimination of Racial Discrimination 90th Session (Aug. 2, 2016).

71. See Yoko Hayashi, Chairperson, Comm. on the Elimination of Discrimination Against Women, Statement on Activities Undertaken Between the 64th and 65th Sessions of the Comm. on the Elimination of Discrimination Against Women (Oct. 24, 2016).

72. See *id.*

73. See Ibrahim Salama, Chief, Human Rights Treaties Branch, Representative of the Secretary-General, Opening Address at the Committee on the Rights of the Child 72nd Session (May 17, 2016).

74. See G.A. Res. 70/1 (Oct. 21, 2015).

75. Press Release, The World Bank, Joint Declaration on a Framework for European Commission-World Bank Group Collaboration in Situation Affected by Fragility, Conflict and Violence (June 14, 2016), <http://www.worldbank.org/en/news/press-release/2016/06/14/joint-declaration-framework-european-commission-world-bank-group-collaboration-in-situations-affected-by-fragility-conflict-violence> (June 4, 2016).

76. See UNCITRAL Model Law on Secured Transactions (2016), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/security/2016Model\\_secured.html](http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html).

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for physical appearance at meetings or hearings. The Technical Notes are nonbinding and were drafted for universal application. They are designed to promote the availability of ODR systems to buyers and sellers in both developed and developing countries and are expected to contribute significantly to the promotion of online settlement of cross-border disputes.<sup>77</sup>

The Notes on Organizing Arbitral Proceedings, 2nd Edition updates the original version from 1996, which have become an important resource for participants and practitioners in international arbitration. They address common issues that arise in the organization of an arbitral proceeding. The notes are intended to apply regardless of whether the arbitration is administered on an ad hoc basis or by an arbitral institution.<sup>78</sup>

The Commission also endorsed a guidance note about the importance of assisting States with the implementation of sound commercial law reforms.<sup>79</sup> The guidance note is relevant to all UN departments, offices, funds, agencies, and programs, as well as other donors. It highlights the importance of international commercial law for the achievement of UN objectives in the context of development, conflict-prevention, post-conflict-reconstruction, and other fields.

During its fiftieth anniversary event next year, the Commission will explore new directions in cross-border commerce to support innovation and sustainable development.<sup>80</sup>

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77. See UNCITRAL, Tech. Notes on Online Dispute Resolution (2016), [http://www.uncitral.org/uncitral/uncitral\\_texts/odr/2016Technical\\_notes.html](http://www.uncitral.org/uncitral/uncitral_texts/odr/2016Technical_notes.html).

78. See UNCITRAL Notes on Organizing Arbitral Proceedings (2016), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2016Notes\\_proceedings.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html).

79. See UNCITRAL, Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms (2016); [http://www.uncitral.org/pdf/english/TAC/GuidanceNoteTAC/EnglishGuidance\\_Note.pdf](http://www.uncitral.org/pdf/english/TAC/GuidanceNoteTAC/EnglishGuidance_Note.pdf).

80. See UNCITRAL, Modernizing International Trade Law to Support Innovation and Sustainable Development (2016), <http://www.uncitral.org/uncitral/en/commission/colloquia/50th-anniversary.html>.



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## **International Legal Education and Specialist Certification**

MARISSA MORAN, DIANE PENNEYS EDELMAN, AND RICHARD PELTZ-STEELE\*

The American Bar Association (ABA) promulgates rules and regulations that apply to all United States law schools with ABA-accreditation and approval. Those rules apply specifically to schools offering programs leading to a J.D. degree. In August 2016, the ABA Council approved certain changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*, which became effective on August 9, 2016.<sup>1</sup> The changes affected not only J.D. programs, but also study abroad programs offered by ABA member schools.

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\* Marissa J. Moran is the International Legal Education Committee's editor for this review of developments during 2016. Marissa is a Professor in the Department of Law & Paralegal Studies, New York City College of Technology, CUNY, where she currently teaches Legal Technology, Forensics and the Legal Process, and Legal Document Preparation. In addition, she has taught business law courses as an adjunct professor at New York University, Stern School of Business. Professor Moran has served as a judge for ABA sponsored law school division mock trial national competitions and the Cardozo Law School International Moot Court Honor Society–Oxford Competition, and served as a national and local judge for the “*We the People*” constitutional law competition. Diane Penneys Edelman is Professor of Law and Director of International Programs at Villanova University Charles Widger School of Law, where she teaches Legal Research, Analysis, Writing & Oral Communication (LRAWC) I and an “International Advocacy” version of LRAWC II. In addition, she has taught International Art & Cultural Heritage Law in the Villanova Law–University of St. Thomas Law Summer Program in Rome. She has directed Villanova’s summer programs in Montréal and Rome, as well as the Law School’s J.D./L.L.M. International Studies program. She is the Co-Chair of the International Law Committee of the Philadelphia Bar Association and Co-Chair of the International Legal Education Committee of the ABA International Section. Richard J. Peltz-Steele is a professor at the University of Massachusetts Law School, where he teaches comparative media law, including defamation, privacy, copyright, transparency, free expression in international social and economic development, in sport, and mass communication. He has spoken in the United States, Chile, and Spain on comparative data protection, including for the UIA in Spain. He serves as a vice chair for the ABA-TIPS International Committee and for the ABA-International Section Privacy, E-Commerce, and Data Security Committee. His current research examines the intersection of communication, sport, human rights, and sustainable development.

1. See generally, *The Law School Accreditation Process*, AMERICAN BAR ASSOC. SECTION ON LEGAL ED. AND ADMISSION TO THE BAR, Sept. 2016, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2016\\_accreditation\\_brochure\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2016_accreditation_brochure_final.authcheckdam.pdf). The United States Department of Education recognizes the Council and Accreditation Committee of this Section as the parties responsible for accrediting J.D. programs.

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## **I. Amendments to American Bar Association Criteria Relating to Foreign Programs<sup>2</sup>**

Although regulatory authorities outside the United States may regulate programs within their boundaries, the ABA's Section on Legal Education and Admission to the Bar promulgates criteria regulating the types of international programs offered by United States law schools. Different sets of regulations, or criteria, may apply to different types of programs.<sup>3</sup> For example, there are different criteria for Foreign Summer and Intersession Programs,<sup>4</sup> and for Foreign Semester and Year-Long Study Abroad Programs.<sup>5</sup> Yet another set of criteria govern study abroad for United States law students that do not fit into the above categories—the Criteria for Accepting Credit for Student Study at a Foreign Institution.<sup>6</sup>

Law schools seeking to add summer, intersession, semester, or year-long programs must timely complete and submit to the Section on Legal Education a detailed questionnaire.<sup>7</sup> Part VII of that questionnaire, entitled “Foreign Programs of the Annual Questionnaire,” requires schools to report about various aspects of these programs (as well as student study at a foreign institution).<sup>8</sup> In addition, both summer and intersession programs and semester and year-long programs may be subject to ABA site visits. As discussed below, however, regulation of programs may differ depending upon whether those programs are open to students of one United States law school or open to students from other schools as well.

### **A. SUMMER AND INTERSESSION PROGRAMS**

In the summer of 2016, the ABA amended the rules and procedures governing the award of academic credit at ABA-approved United States law schools for student work performed outside of the country, whether in an

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2. This Section was contributed by Richard Peltz-Steele and Diane Penneys Edelman. The Introduction was contributed by Professor Edelman.

3. *See id.*

4. *See Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States*, THE A.B.A. STANDARDS AND RULES OF PROC. FOR THE APPROVAL OF L. SCH. (2017), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_criteria\\_foreign\\_summer\\_intersession\\_programs.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_criteria_foreign_summer_intersession_programs.authcheckdam.pdf).

5. *See Criteria for Approval of Foreign Semester and Year-Long Study Abroad Programs Established by ABA-Approved Law Schools*, THE A.B.A. STANDARDS AND RULES OF PROC. FOR THE APPROVAL OF L. SCH. (2017), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_criteria\\_foreign\\_semester\\_yearlong\\_study\\_abroad.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_criteria_foreign_semester_yearlong_study_abroad.authcheckdam.pdf).

6. *See Criteria for Accepting Credit for Student Study at a Foreign Institution*, THE A.B.A. STANDARDS AND RULES OF PROC. FOR THE APPROVAL OF L. SCH. (2017), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_criteria\\_accepting\\_credit\\_student\\_study\\_foreign\\_institution.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_criteria_accepting_credit_student_study_foreign_institution.authcheckdam.pdf).

7. *See generally A.B.A. Questionnaires*, A.B.A.: SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., [http://www.americanbar.org/groups/legal\\_education/resources/questionnaire.html](http://www.americanbar.org/groups/legal_education/resources/questionnaire.html).

8. *See id.*

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ABA school's foreign program or in the program of a foreign school. Effective August 9, 2016, the ABA's "Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States"<sup>9</sup> replaced the ABA's "Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools."<sup>10</sup> The revision created a new distinction between foreign-study programs: "closed" programs and "open" programs.

Closed programs enroll only students from the sponsoring law school itself. On the other hand, open programs enroll students from other ABA-approved law schools or those co-sponsored by more than one ABA-approved law school. Under the revised criteria, closed programs are relieved of many of the administrative burdens of operating a foreign program. Closed programs are no longer compelled to pay an annual fee to the ABA, and no longer must run the gauntlet of a special approval process.<sup>11</sup> Instead, these programs are reviewed as part and parcel of the school's program of legal education in the ordinary course of annual and sabbatical review.<sup>12</sup> Open programs, however, remain subject to a special approval process. Open programs require prior approval, payment of a \$1,900 annual fee to the ABA, and a site visit during the second year of operation.<sup>13</sup>

Open programs, but not closed programs, must have a full-time faculty member and program director (which may be the same person) on site for the duration of the program.<sup>14</sup> Additional terms pertain to faculty qualifications and student access to faculty.<sup>15</sup> In an open program, the criteria require that the program substantially relate to the socio-legal environment of the host country, or that the program have has an

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9. *Criteria for Foreign Summer and Intersession Programs Offered by ABA-Approved Law Schools in a Location Outside the United States*, A.B.A. STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCH. (2017), at 89–96, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_criteria\\_foreign\\_summer\\_intersession\\_programs.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_criteria_foreign_summer_intersession_programs.pdf) (hereinafter referred to as "Revised Criteria").

10. *Criteria for Approval of Foreign Summer and Intersession Programs Established by ABA-Approved Law Schools*, A.B.A. STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCH. (2016), at 145–52, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2015\\_2016\\_foreign\\_summer\\_intersession\\_programs.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_foreign_summer_intersession_programs.pdf) [hereinafter "Original Criteria"].

11. See Revised Criteria, *supra* note 9, at 89–92.

12. See *id.* at 93–94.

13. *Id.* at 92–95; Memorandum from Barry A. Currier, ABA Managing Director of Accreditation and Legal Education, to Interested Persons and Entities 8 (Aug. 31, 2016), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20160831\\_no\\_tice\\_revisions\\_standards\\_foreign\\_study\\_criteria.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20160831_no_tice_revisions_standards_foreign_study_criteria.pdf) [hereinafter "Currier Memorandum"].

14. See Revised Criteria, *supra* note 9, at 92.

15. *Id.* at 93.

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international or comparative focus.<sup>16</sup> Open programs trigger the full range of approval procedures spelled out in the criteria.<sup>17</sup>

Relaxed oversight of closed programs is a function of the growth and success of foreign study. The ABA explained that the earliest foreign-study programs, a quarter century ago, required careful oversight to ensure quality while they pioneered in the field.<sup>18</sup> But a present abundance of program offerings means that there are successful models and deep experience on which new programs can draw, diminishing the need for close scrutiny.<sup>19</sup> Moreover, the ABA's recent focus on law school accountability in outcomes and assessments means that schools' full curricular programs, foreign study courses included, are subject to more rigorous analysis upon routine annual and sabbatical reviews.<sup>20</sup> The ABA noted that the annual questionnaire was recently revised to consolidate and update questions on foreign programs.<sup>21</sup> Both annual and site evaluation questionnaires will be upgraded to ensure review of a law school's foreign offerings to its own students, as well as its open programs.<sup>22</sup>

Although the same rationales for relaxed oversight might apply when a law school opens its programs to students from other schools, whether through open application or organized co-sponsorship, the ABA concluded that more careful oversight for open programs remains warranted.<sup>23</sup> ABA approval and specialized review provide quality assurance for law schools that award degree credit for a student's work in another law school's approved program.<sup>24</sup>

Both open and closed programs continue to be subject to the usual standards that pertain to a law school's curricular offerings, including the following: faculty must approve the courses, administrative and faculty staffing must be adequate, class preparation time must be adequate, and student evaluations must be collected and maintained.<sup>25</sup> In addition, no more than one and one-half (1.5) semester credit hours may be awarded for each week of the program, foreign-language instruction with consecutive rather than simultaneous English translation must be time-discounted by fifty percent, programs must incorporate at least two visits related to the socio-legal environment of the host country, and physical facilities must be adequate, with library resources made available if course materials are not self-contained.<sup>26</sup> In its commentary, the ABA emphasized that all foreign-study programs must continue to disclose details of their workings, including

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16. *Id.*

17. *See id.* at 94–96.

18. Currier Memorandum, *supra* note 13, at 8.

19. *Id.*

20. *Id.*

21. *Id.* at 9.

22. *Id.*

23. *Id.*

24. Currier Memorandum, *supra* note 13, at 9.

25. Revised Criteria, *supra* note 9, at 89–92, 94.

26. *Id.* at 90–91.

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program cost and content, methods of student evaluation, faculty biographical information, housing cost and availability, refund and cancelation policies, and travel advisories.<sup>27</sup>

**B. STUDENT STUDY AT A FOREIGN INSTITUTION**

The revised ABA “Criteria for Accepting Credit for Student Study at a Foreign Institution” also came into effect August 9, 2016.<sup>28</sup> The revisions were technical in nature, bringing the criteria into accord with changes to the 2016–2017 *ABA Standards and Rules of Procedure for Approval of Law Schools*.<sup>29</sup> One revision deleted an outdated reference to the minutes-of-instruction calculation in Standard 304.<sup>30</sup> Another revision accommodated the move of field placements from Standard 305 to the experiential-focused Standard 304.<sup>31</sup>

Most important, the remaining portion of Part I(C)(2) of these criteria states that “[a] law school shall award credit consistent with the requirements of Standard 310 regarding the determination of credit hours for coursework, and should make reasonable efforts to determine appropriate comparability between the foreign course and the regular law school curriculum.”

In May 2016, the ABA modified Standard 310, “Determination of Credit Hours for Coursework,” and provided a guidance memo from the Managing Director on the topic.<sup>32</sup> This modification changed the method that sponsoring schools must use to award credits. Specifically, the Managing Director has explained:

In combination with new Standard 311, new Standard 310: (a) changes the requirement for determining the work required to earn a credit from minutes to hours; (b) restates the amount of time to include time for a final examination; and (c) adds the requirement that out-of-class work, in addition to in-class instruction time, be included in the calculation and determination of the work needed for a credit. Standard 311 mandates that schools require “not fewer than 83 credits [sic] hours” for graduation, with at least 64 credit hours earned in courses requiring attendance in regularly scheduled classroom sessions or direct

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27. Currier Memorandum, *supra* note 13, at 9; Revised Criteria, *supra* note 9, at 91–92.

28. *Criteria for Accepting Credit for Student Study at a Foreign Institution*, A.B.A. STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCH. (2017), at 105–08, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_criteria\\_accepting\\_credit\\_student\\_study\\_foreign\\_institution.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_criteria_accepting_credit_student_study_foreign_institution.pdf).

29. See generally *A.B.A. Standards*, A.B.A.: SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B., [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html).

30. Currier Memorandum, *supra* note 13, at 8.

31. *Id.*

32. See *Managing Director’s Guidance Memo: Standard 310, May 2016*, A.B.A.: SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B. (May 2016), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2016\\_standard\\_310\\_guidance\\_memorandum.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_standard_310_guidance_memorandum.authcheckdam.pdf).

faculty instruction. Standard 310 governs how schools determine the credit hours awarded for courses and other work undertaken by students. Standard 310 does two basic things: (1) it requires that schools “adopt, publish, and adhere to written policies and procedures for determining the credit hours that it awards for coursework,” and (2) it establishes the amount of student work (in class and out of class) schools must require in awarding academic credit.<sup>33</sup>

Law schools must also “adopt, publish, and adhere to written policies and procedures for determining the credit hours that it awards for coursework” and must consider student work both inside and outside of class when determining how to award academic credit.<sup>34</sup> Thus, law schools should evaluate their policies for granting credit earned abroad to comply with the revised criteria.

## **II. First-Year Courses That Focus on International or Comparative Law<sup>35</sup>**

Once offered only to upper-level law students, courses that focus entirely or partially on international and/or comparative law are increasingly being offered to first-year law students, either as electives or required courses. As of November 2016, nineteen United States law schools reported that they typically offer international or comparative law-oriented courses to first-year students.<sup>36</sup> Reporting schools named a combined twenty-four course offerings, seventeen of which are doctrinal courses and the remainder of which are legal skills-oriented.<sup>37</sup> The legal skills-oriented courses are sometimes required (e.g., in the Louisiana law schools,<sup>38</sup> and University of Detroit-Mercy’s joint degree program with the University of Windsor), and sometimes electives.<sup>39</sup> Although most courses are offered to first-year students in the spring, a few are fall term courses. The specific offerings include the following:

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33. *Id.*

34. *Id.*

35. This section was contributed by Diane Penneys Edelman.

36. This information is based on emails on file with contributing author, sent to members of the Legal Writing listserv (LRWPROF-L).

37. Typical doctrinal offerings are International (or Public International) Law or Comparative Law. Other offerings include International Business Transactions, Immigration Law, and Law and Society in Japan. This Article does not address offerings specifically designed for international students or students for whom English is a second language, many of which are listed on the website of the Legal Writing Institute’s resources for Teaching International Students. See generally *Teaching International Students*, LEGAL WRITING INST. (2017), [http://lwionline.org/teaching\\_international\\_students.html](http://lwionline.org/teaching_international_students.html).

38. Schools located in dual-jurisdiction Louisiana reported offerings of Western Legal Traditions: Louisiana Impact (Louisiana State), Civil Law Obligations (Louisiana State and Southern) and Civil Law Property (Louisiana State and Southern). These Louisiana law school courses are required parts of the first-year curriculum.

39. *E.g.*, University of Baltimore, Brooklyn, University of the Pacific, and Villanova.

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Institution	Course(s)	Type of 1L Course
American University	International Law	Spring elective
Arizona, University of	Intl Business Transactions	Spring elective
Arizona, University of	Immigration Law	Spring elective
Baltimore, University of	Comparative Law	Spring elective
Brooklyn	Legal Writing II	Legal Writing option—Spring
Detroit Mercy	Comparative Legal Research & Writing	Required first-year course for students enrolled in joint program with University of Windsor
Detroit Mercy	All 1L courses in Detroit-Mercy/Windsor dual degree program include comparative US/Canadian law components	Required first-year course for students enrolled in joint program with University of Windsor
<i>Drexel</i> (Thomas R. Kline School of Law)	International Law (offered occasionally)	Spring elective
Drexel (Thomas R. Kline School of Law)	International Human Rights Law (offered occasionally)	Spring elective
Louisiana State	Western Legal Traditions: Louisiana Impact (fall)	Required
<i>Louisiana State</i>	Civil Law Obligations (spring)	Required
Louisiana State	Civil Law Property (spring)	Required
Louisville	Lawyering Skills	Includes some British law in lawyering skills classes
Loyola – Los Angeles	Introduction to International Law	Spring elective
Minnesota, U. of	International Law	Spring elective
Nebraska College of Law	International Perspectives in the U.S. Legal System: Practicing Law in a Global Legal Environment	Required—spring term
Pacific, University of (McGeorge)	Global Lawyering Skills	Year-long research, writing, and skills; spring term course includes unit on international/comparative law

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Institution	Course(s)	Type of 1L Course
Pennsylvania, University of	Public International Law (frequently offered)	Spring elective
Pennsylvania, University of	Law and Society in Japan (frequently offered)	Spring elective
Penn State University – Dickinson Law	Practicing Law in a Global World: Contexts and Competencies	Required—Spring term
Southern	Civil Law Property	Required
Southern	Civil Law Obligations	Required
Southwestern	Public International Law	Spring elective
Stetson University College of Law	Research and Writing II - International Law	Persuasive legal writing—Spring
Villanova	International Advocacy	Legal Writing option—Spring
Villanova	Public International Law	Spring elective
Wisconsin, University of	International Law	Spring elective

The International Legal Education Committee plans to collect course syllabi during the coming year. Those interested in research in this area may also wish to review the numerous scholarly resources about “internationalizing” first-year law school courses.<sup>40</sup>

40. See, e.g., Diane Penneys Edelman, *A Global Approach to Legal Writing and Legal Research: An Evolutionary Process*, 5 DREXEL L. REV. 497 (2013); DeJarnatt & Rahdert, *Preparing for Globalized Law Practice: The Need to Include International and Comparative Law in the Legal Writing Curriculum*, 17 LEGAL WRITING 3 (2011); Sebok, *Using Comparative Torts Materials to Teach First-Year Torts*, 57 J. LEGAL ED. 562 (2007); Grossman, *Integrating International Law into the First-Year Curriculum*, 24 PENN STATE INT’L L. REV. 835 (2006); Madden, *Integrating Comparative Law Concepts into the First Year Curriculum: Torts*, 56 J. LEGAL ED. 560 (2006); Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, 54 J. LEGAL ED. 183 (2004); Schnably, *Integrating International Law into the First-Year Property Course*, 93 AM. SOC’Y INT’L L. PROC. 359 (1999).

## Transnational Legal Practice

LAUREL TERRY\*

### I. Introduction

This Article provides the year-in-review summary for both the Transnational Legal Practice (TLP) Committee and the Transnational Practice Management (TPM) Committee of the ABA Section of International Law (ABA SIL). The 2016-17 TPM Committee represents a merger of the 2015-16 ABA SIL Transnational Legal Practice (TLP) Committee and the 2015-16 ABA SIL International Law Practice Management Committee; the merger of these committees took effect in August 2016.<sup>1</sup> This article will review developments related to the topic of transnational legal practice.<sup>2</sup>

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\* Laurel Terry is a Professor of Law and the H. Laddie Montague Jr. Chair in Law at the Pennsylvania State University - Dickinson Law, which is one of two ABA-accredited Penn State law schools. She can be reached at LTerry@psu.edu. Professor Terry would like to thank Carole Silver and Kristi Gaines for their assistance with this article. This article was completed on November 30, 2016 and all urls in this article were accurate as of that date. To access the current webpages of an item that has a “perma.cc” citation, select the button at the top of the perma.cc webpage that states “View the live page.”

1. Compare A.B.A., *Sec. of Int’l Law: Transnational Practice Management Committee*, 2016-2017 Committee Business Plan, <https://apps.americanbar.org/dch/committee.cfm?com=IC866000> (pdf document link available on main page) (also on file with journal) *with* A.B.A., *Sec. of Int’l L. Transnational Legal Practice Committee*, 2015-2016 Committee Business Plan (on file with journal). The most recent Year-in-Review article for the International Law Practice Management Committee is Robert C. Bata, Laurel S. Terry, Jordan Furlong, Martin Desautels, David Doran And Kevin Nudd, Robert D. Lewis, Robert Millard, Horacio Bernardes Neto, Sally Hutton, & Christo Els, *International Law Practice Management*, 49 ABA/SIL YIR (n.s.) 397 (2015).

2. This Article will use a structure similar to that found in 2015 Transnational Legal Practice article. See Laurel S. Terry, *Transnational Legal Practice [2015]*, in 50 ABA/SIL YIR (n.s.) 531 (2016) [hereinafter TLP 2015]. Developments related to TLP have also been memorialized in the inaugural newsletters of the 2015-16 Transnational Legal Practice Committee and the 2016-17 Transnational Management Practice Committee. See A.B.A. Sec. of Int’l L., *Transnational Legal Practice Committee Quarterly Newsletter (June 2016)*, [http://apps.americanbar.org/webupload/commupload/IC866000/newsletterpubs/ABA\\_TLP\\_Committee\\_Newsletter\\_June2016.pdf](http://apps.americanbar.org/webupload/commupload/IC866000/newsletterpubs/ABA_TLP_Committee_Newsletter_June2016.pdf) (included items about the sessions held during the Spring 2016 SIL meeting, access to the legal services market in China, and legal services in Latin America); A.B.A. Sec. of Int’l L., *Transnational Management Practice Committee Quarterly Newsletter (Fall 2016)*, [http://apps.americanbar.org/webupload/commupload/IC866000/newsletterpubs/ABA\\_TMP\\_Committee\\_Newsletter\\_Fall2016.pdf](http://apps.americanbar.org/webupload/commupload/IC866000/newsletterpubs/ABA_TMP_Committee_Newsletter_Fall2016.pdf). (includes short articles about market access for foreign lawyers in Japan and the impact of Brexit on foreign law firms in London).

## II. TLP International Trade-Related Developments

During 2016, the United States was involved in four sets of trade negotiations that included legal services within their coverage. In February 2016, the participants in the Trans-Pacific Partnership (TPP) announced that they had concluded their negotiations and signed the TPP agreement.<sup>3</sup> In light of the results of the 2016 U.S. elections and the fact that the TPP requires Congressional approval, the U.S. is unlikely to be a participant in TPP in the future.<sup>4</sup>

In addition to the TPP, during 2016, the United States was involved in three additional sets of trade negotiations that included legal services: (A) the World Trade Organization's GATS negotiations; (B) the Trade in Services Agreement (TISA) negotiations; and (C) the Transatlantic Trade and Investment Partnership (T-TIP) negotiations.<sup>5</sup>

As was true in 2015, from a legal services perspective, most of the 2016 trade activity concerned the T-TIP trade negotiations between the United States and the EU. The T-TIP negotiations were the subject of a panel session at the 2016 Spring Meeting that was co-sponsored by the TLP Committee; this panel session included representatives from the Council of Bars and Law Societies of Europe (CCBE), the Conference of Chief Justices (CCJ), and United States lawyers, among others.<sup>6</sup>

The conversations at the Section's 2016 Spring Meeting were a continuation of conversations that have been ongoing in other venues. The T-TIP negotiations led the CCBE to adopt a recommendation to the European Commission regarding what should be offered to United States

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3. See Office of the U.S. Trade Rep., Press Release, Trans-Pacific Partnership Ministers' Statement (Feb. 4, 2016), <https://perma.cc/7Y CZ-WK2G>. The TPP requires Congressional approval, however, in order to take effect. Given the results in the 2016 U.S. elections, it appears unlikely that such approval will be forthcoming.

4. See *Trump Says US to Quit TPP on First Day in Office*, BBC NEWS (Nov. 22, 2016), <http://www.bbc.com/news/world-us-canada-38059623>.

5. See generally WTO Doha Negotiations, Services Negotiations, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/wto-multilateral-affairs/wto-doha-negotiations/services-negotiations> [<https://perma.cc/X8NC-9DKK>] (last visited Nov. 29, 2016); Trade Agreements, Other Initiatives, Office of the U.S. Trade Representative, <https://ustr.gov/trade-agreements/other-initiatives> [<https://perma.cc/D9UL-E3WN>] (last visited Nov. 29, 2016); Free Trade Agreements, Transatlantic Trade and Investment Partnership, Office of the U.S. Trade Representative, <https://ustr.gov/ttip> [<https://perma.cc/JJ8E-ADWZ>] (last visited Nov. 29, 2016).

6. See A.B.A. SEC. OF INT'L LAW, ONSITE MEETING PROGRAM, Spring 2016, at 10 (New York City) (Apr. 12-16, 2016), <https://shop.americanbar.org/PersonifyImages/ProductFiles/188482042/2016SpringOnsiteBrochure.pdf> (listing includes a session entitled "[t]he Transatlantic Trade and Investment Partnership (TTIP)—Free Mobility of Lawyers, the Issues of Reciprocity of Access to the Legal Profession and the Reciprocity of Foreign Legal Consultant Status Offered to U.S. Attorneys in the European Legal Market").

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lawyers “inbound” to the EU.<sup>7</sup> During 2016, the CCJ continued to sponsor quarterly conference calls whose participants included representatives from the CCBE and from the Office of the U.S. Trade Representative; these conversations typically included discussions about the status of the TTIP negotiations.<sup>8</sup>

The CCJ-led conversations provide the impetus to update the map and charts that are available online and that show the status of United States state adoption of inbound foreign lawyer rules.<sup>9</sup> As these documents show, compared to the April 2015 version of the map and chart cited in the prior year-in-review, there has been one new rule regarding temporary practice by inbound foreign lawyers, two new rules about foreign pro hac vice practice, and eight new rules allowing foreign in-house counsel.<sup>10</sup> New York is among the jurisdictions that adopted new rules; it has joined the jurisdictions that have explicit rules regarding all five of the “foreign lawyer cluster” of rules.<sup>11</sup>

One explanation for the various conversations and activity related to international trade negotiations is the fact that international trade in legal services is significant. For example, a 2016 U.S. government document shows that in 2015, as in 2014, the United States exported more than nine billion dollars in legal services.<sup>12</sup> This document also shows that the U.S. imported more than two billion dollars, with a gain of fifty million dollars

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7. See *Transatlantic Trade and Investment Partnership*, 49 CCBE 1, 3 (Feb. 2016), [http://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/Newsletter/CCBEINFO49/EN\\_newsletter\\_49.pdf](http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Newsletter/CCBEINFO49/EN_newsletter_49.pdf).

8. See *id.*; see also e.g., TLP 2015, *supra* note 2, at 535. The Author has personal knowledge of the 2016 conference calls.

9. See Laurel Terry, *Summary of State Foreign Lawyer Practice Rules* (Oct. 14, 2016), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_8\\_9\\_status\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf) [<https://perma.cc/G9Z9-UQ93>]

10. Compare Terry, *infra* note 20, with TLP 2015, *supra* note 2, at 534, nn.21 and 36 (compare the April 29, 2015 version of the map and chart to the October 2016 map and chart, showing that one more state—New York—had adopted a temporary practice rule; two new states—North Dakota and New Jersey—had adopted foreign pro hac vice rules; and eight new states—Illinois, Iowa, Massachusetts, Montana, New Hampshire, New Jersey, New York, and North Dakota—had adopted rules that allow foreign in-house counsel).

11. See, e.g., N.Y. Ct. of Appeals, Notice to the Bar: Temporary Practice of Law in New York (Part 523) and Registration of Foreign Lawyers as In-house Counsel (Part 522) (Dec. 15, 2015), <https://www.nycourts.gov/ctapps/news/nottobar/nottobar121515.pdf>.

12. See Table 2.2. U.S. Trade in Services, by Type of Service and by Country or Affiliation, U.S. Dep’t of Commerce, Bur. Econ. Affairs (Oct. 24, 2016), available at [http://www.bea.gov/international/bp\\_web/tb\\_download\\_type\\_modern.cfm?list=41&RowID=170](http://www.bea.gov/international/bp_web/tb_download_type_modern.cfm?list=41&RowID=170) (listing in millions the 2015 legal services exports as 9,047 dollars. This was a slight decrease from the 2014 exports but an increase over the 2013 exports). The 2016 *Recent Trends in U.S. Services Trade* report did not contain data about legal services. See U.S. International Trade Commission, *Recent Trends in U.S. Services Trade: 2016 Annual Report*, Inv. No. 332-345, USITC Pub. 4643 (2016). As footnote 1 to that report explains, “[b]eginning with its publication in 2013, *Recent Trends* covers three industries each year, rotating on a four-year basis between professional services . . . ; electronic services . . . ; distribution services . . . ; and financial services . . .” *Id.* at 15, n.4.

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over the prior year.<sup>13</sup> A May 2016 report issued by the District of Columbia Bar Association showed the international nature of that organization and its members.<sup>14</sup>

Data such as this suggests that transnational commerce and transnational legal practice are a fundamental part of the global economy and are likely will continue in the future, even though the United States has terminated its involvement in trade negotiations that were underway in 2016<sup>15</sup> and even though the United States may withdraw from trade agreements that it previously signed.<sup>16</sup>

### III. Additional United States Developments

There were a number of United States developments in 2016 that are related to transnational legal practice or that facilitated the TLP-Nets

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13. See Table 2.2, *supra* note 12 (showing imports, in millions, of 2,167 dollars).

14. See DISTRICT OF COLUMBIA BAR GLOBAL LEGAL PRACTICE TASK FORCE, INTERIM REPORT TO THE BOARD OF GOVERNORS OF THE DISTRICT OF COLUMBIA BAR (May 10, 2016), <https://www.dcb.org/about-the-bar/reports/upload/GLPTF-Final-Report-with-exhibits-May-2016.pdf>. The findings included the following:

- 54 percent of domestic survey respondents were very or somewhat interested in expanding their international practices within the next five years, with 57 percent of them indicating that they do expect to expand their practices during that time.
- 64 percent of domestic survey respondents age 44 and under younger were very or somewhat interested in expanding their international practices within the next five years. Two-thirds expect to expand their practice during that time. Both groups of survey respondents and focus group members cited the same group of core challenges in international law practice: conflicting rules about attorney/client privilege (a challenge for over 50 percent of the domestic survey respondents and 61 percent of the abroad survey respondents); conflicting rules about legal ethics (a challenge for just under 50 percent of domestic respondents and 50 percent of the abroad respondents); and conflicting rules about discovery (a challenge for over 40 percent of domestic respondents and 44 percent of abroad respondents).
- Nearly 36 percent of the domestic survey respondents wanted more access to education and resources about the overall globalization of legal practice.
- Asked to rate prospective services the Bar could offer to members on a scale of one to five, with one being “least valuable” and five being “most valuable,” 58 percent of the domestic survey respondents rated “educational programs on globalization of legal practice” at a three or higher and 63 percent of the abroad survey respondents rated it as a three or higher.

*Id.* at 13–14. This Report noted that “substantial portions of the domestic survey respondents were doing business in a handful of countries: the United Kingdom (35 percent); China (23 percent); France (23 percent), and Germany (17 percent). *Id.* at 15.

15. See Trump, *supra*, note 4; see also Jonathan Goldsmith, *TTIP, Globalisation and Lawyers*, LAW SOC. GAZETTE (Sept. 13, 2016), [https://www.lawgazette.co.uk/analysis/comment-and-opinion/ttip-globalisation-and-lawyers/5057593.article?utm\\_source=dispatch&utm\\_medium=email&utm\\_campaign=GAZ13092016](https://www.lawgazette.co.uk/analysis/comment-and-opinion/ttip-globalisation-and-lawyers/5057593.article?utm_source=dispatch&utm_medium=email&utm_campaign=GAZ13092016).

16. The U.S. has signed approximately fifteen trade agreements that apply to legal services. See generally Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875 (2010) (agreements include the WTO GATS agreement, NAFTA, and a number of bilateral trade agreements).

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discussed in the 2014 Year-in-Review.<sup>17</sup> This section briefly highlights in chronological order a number of the United States-related 2016 TLP developments.

In February 2016, the ABA House of Delegates adopted a resolution that amended the foreign in-house counsel provisions of ABA Model Rule of Professional Conduct 5.5.<sup>18</sup> The new language in Rule 5.5 gives each state's highest court the discretion to admit a foreign in-house lawyer who is lawfully practicing as in-house counsel under the laws of his or her jurisdiction.<sup>19</sup> The House also adopted, in February 2016, a resolution that endorsed ABA Model Regulatory Objectives for the Provision of Legal Services and encouraged states to develop their own regulatory objectives.<sup>20</sup> This resolution was inspired, at least in part, by developments outside the

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17. Laurel S. Terry & Carole Silver, *Transnational Legal Practice*, in 49 ABA/SIL YIR (n.s.) 413 (2015) [hereinafter TLP 2014], available at [http://www.americanbar.org/content/dam/aba/uncategorized/international\\_law/inl\\_yir\\_2015\\_cpy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/international_law/inl_yir_2015_cpy.authcheckdam.pdf) (as corrected). The online version of this article was the authorized version of the article that replaced the print version of the article and all electronic versions that did not contain a single asterisk footnote noting the substitution. The 2014 TLP Year-in-Review provided a departure from the Year-in-Review's typical method of presentation by identifying two categories of what that article called "TLP-Nets." One group of TLP-Nets is nationally based and the other is inherently transnational. The 2014 article identified examples of TLP-Nets and highlighted the meeting points and relationships that facilitate border-crossing for the variety of actors involved in TLP policy-making and practice.

18. MODEL CODE OF PROF'L CONDUCT R. 5.5, RES. 103 (Feb. 8, 2016), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2016\\_hod\\_midyear\\_rr\\_103\\_adopded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016_hod_midyear_rr_103_adopded.authcheckdam.pdf).

19. *Id.* at R. 5.5(e). The Report that accompanied Resolution 103 and this model rule change explained the rationale for this change. See A.B.A., THE REGULATION OF FOREIGN LAWYERS, AND IN PARTICULAR FOREIGN IN-HOUSE COUNSEL, IN THE U.S.: PROPOSALS FOR A BETTER AND MORE COMPREHENSIVE FRAMEWORK, Draft Report, at p. 6, available at [http://www.americanbar.org/content/dam/aba/uncategorized/international\\_law/report\\_with\\_recommendation.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/international_law/report_with_recommendation.authcheckdam.pdf) ("[t]he foreign lawyer or foreign in-house counsel must be subject to effective regulation and discipline by a duly constituted professional body or a public authority, or, in its discretion, be otherwise authorized by [this highest court of appellate jurisdiction] to practice in this jurisdiction as an in-house counsel");

The ABA policies dealing with foreign in-house counsel de facto exclude over 70 percent of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. For example, a lawyer admitted to the practice of law in France, upon going in-house, has to surrender her bar admission status, and consequently, does not fall under the current ABA definition of foreign lawyer.

*Id.* at, p. 1.

20. A.B.A. MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES, RES. 105 (Feb. 8, 2016) (adopted as revised and amended), available at [http://www.americanbar.org/content/dam/aba/directories/policy/2016\\_hod\\_midyear\\_105.docx](http://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_105.docx) [hereinafter ABA Res. 105]. For additional information about regulatory objectives, see Laurel S. Terry, *Why Your Jurisdiction Should Consider Jumping on the Regulatory Objectives Bandwagon*, 22(1) PROF. L. 28 (Dec. 2013).

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United States.<sup>21</sup> In April 2016, Colorado became one of the first states to adopt regulatory objectives when it added them as a preamble to the Colorado Supreme Court's rules regarding lawyer regulation.<sup>22</sup>

During the summer of 2016, there were several different developments related to proactive lawyer regulation and entity regulation. In June 2016 in Philadelphia and in September 2016 in Washington, D.C., a number of United States regulators and other stakeholders met for the second and third time with their Canadian counterparts in order to discuss these topics.<sup>23</sup> Canadian and U.S. regulators also met for a networking breakfast that was held in June 2016 in conjunction with the ABA's annual ethics conference.<sup>24</sup> There were additional opportunities for discussions in July 2016 when regulators and academics from around the world met at Fordham Law School for the seventh International Legal Ethics Conference (ILEC 2016).<sup>25</sup> The attendees included academics from approximately seventy

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21. See A.B.A. Res. 105, *supra* note 20, at 8 (“[n]early two dozen jurisdictions outside the U.S. have adopted them in the past decade or have proposals pending. Australia, Denmark, England, India, Ireland, New Zealand, Scotland, Wales, and several Canadian provinces are examples”). For more information about the work that led to the adoption of this resolution, see generally A.B.A., *Comm’n on the Future of Legal Services*, <https://perma.cc/4UMA-3F73> (last visited Apr. 5, 2017).

22. In April 2016, the Colorado Supreme Court added a Preamble to Chapters 18 to 20, which is the location of the rules governing the practice of law. State of Colo. Judicial Dep’t, *Rule Change: Rules Governing the Practice of Law* (Apr. 6, 2016), [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/2016/2016\(06\)%20clean.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2016/2016(06)%20clean.pdf) [<https://perma.cc/E6QB-ZMU4>] (Colorado Supreme Court approves regulatory objectives) [hereinafter Colorado Regulatory Objectives Preamble]. Among other things, this Preamble explains that “in regulating the practice of law in Colorado in the public interest, the Court’s objectives include [nine objectives].” *Id.* at 1. Colorado’s regulatory objectives differ from the objectives found in A.B.A. Resolution 105, *supra* note 20. See *id.*

23. The minutes from the June 2016 and July 2016 meetings are available on the Colorado PMBR webpage. See Office of Att’y Regul. Counsel, Proactive Management-Based Regulation Materials, Colo. Sup. Ct., (Nov. 6, 2016) <https://perma.cc/EK25-7KZ2>. For additional information on proactive regulation, see Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717 (2016); see also Entity Regulation Frequently Asked Questions, Nat’l Org. Bar Counsel, [http://www.nobc.org/docs/Global%20Resources/Entity%20Regulation/Entity.Regulation.Committee.FAQs.FINAL.07142015.\(00000003\).pdf](http://www.nobc.org/docs/Global%20Resources/Entity%20Regulation/Entity.Regulation.Committee.FAQs.FINAL.07142015.(00000003).pdf) [<https://perma.cc/D4Q6-N25N>]. This FAQ document (and updated versions) can be accessed from the NOBC’s “Global Resources” webpages. See Nat’l Org. Bar Counsel, Global Resources, <https://perma.cc/M23V-XKNT>.

24. See A.B.A., 42nd Nat’l Conf. Professional Responsibility, Program (Philadelphia) (June 1-3, 2016), [http://www.americanbar.org/content/dam/aba/events/professional\\_responsibility/2016%20Meetings/Conference/2016\\_conf\\_schedule.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2016%20Meetings/Conference/2016_conf_schedule.authcheckdam.pdf) (listing the U.S./Canadian Regulators’ Roundtable). The author has personal knowledge that this was the second networking breakfast and that the NOBC used the Can-Am regulator listserv to invite regulators to attend this networking breakfast.

25. See generally ILEC 2016, *Int’l Legal Ethics Conference VII*, FORDHAM LAW SCHOOL (2016), [https://www.fordham.edu/info/23510/ilec\\_2016](https://www.fordham.edu/info/23510/ilec_2016). The author, for example, participated in meetings regarding proactive regulation and FATF, as well as attending a number of ILEC sessions.

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United States law schools, along with individuals from more than sixty countries.<sup>26</sup>

There were a number of TLP-related events that occurred during the ABA's 2016 Annual Meeting in San Francisco. For example, during this meeting, the ABA changed its Bylaws so that the Task Force on International Trade in Legal Services became a Standing Committee.<sup>27</sup> During the ABA Annual Meeting, the Standing Committee sponsored a roundtable session on the topic of "association," which involves the relationships between foreign and domestic lawyers, rather than the practice rights of foreign lawyers.<sup>28</sup>

During the 2016 ABA Annual Meeting, the ABA Commission on the Future of Legal Services unveiled its final report and announced the creation of a new ABA Center for Innovation, which was a key recommendation contained in the report.<sup>29</sup> The ABA Journal noted that, among other things, "the center will track the innovation efforts of the domestic and international legal services community."<sup>30</sup> There has been interest outside the United States in this Commission's work regarding innovation, access to justice, and regulation of legal services.<sup>31</sup>

The topics of access to justice, innovation, and regulation were among the topics discussed one month later, in September 2016, when the DC Office of Disciplinary Counsel sponsored the 5th International Conference of Legal Regulators.<sup>32</sup> There were a number of United States regulators in

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26. See ILEC 2016, *Participants by Country*, FORDHAM LAW SCHOOL (2016), [https://www.fordham.edu/info/23510/ilec\\_2016/8329/participants\\_by\\_country](https://www.fordham.edu/info/23510/ilec_2016/8329/participants_by_country).

27. See Resolution and Report 11-7, Amends § 31.7 of the Bylaws to create a Standing Committee on International Trade in Legal Services (Aug. 7-8, 2016), [https://www.americanbar.org/content/dam/aba/directories/policy/2016\\_hod\\_annual\\_11-7.docx](https://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_annual_11-7.docx).

28. See A.B.A. Task Force on Int'l Trade in Legal Servs., *Roundtable Announcement: Going Global: Association between Local and Foreign Lawyers and Law Firms* (San Francisco) (Aug. 6, 2016), [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/promoting\\_international\\_rule\\_law/internationaltradedf.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/internationaltradedf.html) (program announcement and materials available as links).

29. See A.B.A. COMM'N FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (Aug. 2016), <http://abafuturesreport.com/2016-fls-report-web.pdf> [<https://perma.cc/ZWP3-HLZK>]; see also Victor Li, *Go for Launch: The ABA's new Center for Innovation will drive efforts to develop new methods of delivering legal services*, A.B.A. J. 66 (Nov. 2016) (reporting on the unveiling of the report and the announcement about the new Center); see also LAW SOC. ENGL. & WALES, THE FUTURE OF LEGAL SERVICES (Jan. 2016), <http://www.lawsociety.org.uk/news/documents/Future-of-legal-services-pdf/>.

30. Li, *supra* note 29, at 66.

31. See, e.g., Jonathan Goldsmith, *A UK Center for legal innovation?*, LAW GAZETTE (Aug. 8, 2016), available at <https://www.lawgazette.co.uk/comment-and-opinion/a-uk-centre-for-legal-innovation/5057036.article>.

32. See, e.g., International Conference of Legal Regulators 2016 (Sept. 2016), <https://perma.cc/SZ9C-L3YU>. The International Conference of Legal Regulators (ICLR) is an organization that was launched in 2012. For more information about the ICLR, see Laurel S. Terry, *Transnational Legal Practice* (International) [2010-2012], 47 INT'L LAW 485, 493-94 (2013); see also Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, 82(2) BAR EXAM'R 18 (June 2013).



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attendance; an ICLR webpage hosted by the UK Solicitors Regulation Authority was launched in conjunction with this conference.<sup>33</sup>

At the Section's Fall Meeting in October 2016, which was held in Tokyo, the TPM Committee sponsored several sessions that addressed topics related to innovation and regulation.<sup>34</sup> Another important event that took place in October 2016 was the plenary session of the Financial Action Task Force which received the FATF's 4th Mutual Evaluation Report of the United States.<sup>35</sup> On December 1, 2016, following the required quality and consistency review,<sup>36</sup> the FATF issued the final version its 4th Mutual Evaluation Report of the United States.<sup>37</sup> Given the timing of the release of this report, a full analysis is beyond the scope of this article, but this report is likely to lead to additional conversations between the U.S. government and the legal profession.<sup>38</sup>

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33. See International Conference of Legal Regulators, <https://iclr.net/>.

34. See N.Y. Ct. of Appeals, *supra* note 11.

35. See Fin. Action Task Force (FATF), *Outcomes of the Plenary meeting of the FATF*, Paris (Oct. 19-21, 2016), <http://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-plenary-october-2016.html#mer> [<https://perma.cc/UN2V-A5RN>]. The FATF webpage reported the following regarding the October 2016 Plenary Session:

Discussion of the mutual evaluation reports of Switzerland and the United States

The Plenary discussed the mutual evaluation reports of Switzerland and the United States which set out the level of effectiveness of their AML/CFT systems and their level of compliance with the FATF Recommendations. The reports were prepared on the basis of the FATF Methodology for assessments, which requires countries to take into account the effectiveness with which AML/CFT measures are implemented, as well as technical compliance for each of the FATF Recommendations. The mutual evaluation of the United States was conducted jointly with the Asia/Pacific Group on Money Laundering, of which the country is also a member. The Plenary discussed the assessment team's key findings, priority actions, and recommendations regarding each country's AML/CFT regime. The FATF will finalise the mutual evaluation reports for publication after the quality and consistency review, in accordance with its procedures.

36. See generally FATF, *Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations* (Oct. 2013), <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF-4th-Round-Procedures.pdf>.

37. See FATF, *Anti-money laundering and counter-terrorist financing measures – United States, Mutual Evaluation Report* (Paris) (Dec. 1, 2016), <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-united-states-2016.html>.

38. The "Priority Actions" listed in the report include the following: "[a]pply appropriate AML/CFT obligations as follows: . . . (b) On the basis of a specific vulnerability analysis, to lawyers, accountants, trust and company service providers (other than trust companies which are already covered)." *Id.* at 11. In the technical compliance section, the U.S. was rated partially compliant or non-compliant with respect to some of the FATF Recommendations that applied to lawyers. *Id.* at 218-22. For additional information about the FATF mutual evaluation process and potential impact on the United States, see Laurel S. Terry, *U.S. Legal Profession Efforts to Combat Money Laundering & Terrorist Financing*, 59 N.Y.L. SCH. L. REV. 487 (2014-15).

#### **IV. Developments Outside of the United States**

During 2016, there were a number of developments outside the U.S. that have transnational legal practice implications. The most noteworthy event was the June 2016 United Kingdom “Brexit” vote in favor of a referendum to have the UK leave the European Union.<sup>39</sup> The Brexit vote has caused great uncertainty and there is likely to be significant changes ahead for lawyers and clients who work in the UK. In a column in the TPM Committee’s newsletter, Stephen Denyer, who is the Director of Strategic Relationships for the Law Society of England and Wales, wrote the following:

The Law Society has put together a list of priorities for the UK government when it starts negotiations to leave the EU. This includes maintaining practice and establishment rights for our members in the EU, as well as ongoing cooperation in civil and criminal matters. We also want arrangements to remain in place that allow EU, and non-EU, lawyers and law firms continuing access to the English and Welsh legal services market and the solicitor qualification.

England and Wales is, and will remain, a leading global centre for legal services. The strength and stability of English and Welsh law, our independent courts and the excellence of our legal services providers have resulted in us being the global governing law for contracts and the jurisdiction of choice for dispute resolution.<sup>40</sup>

One result of the “Brexit” vote is that there has been an influx of lawyers applying to become licensed in Ireland.<sup>41</sup>

Although there were discussions in 2016 about whether and how to amend the 2007 UK Legal Services Act,<sup>42</sup> it seems unlikely that action will be taken on this in the near future given the activity required by Brexit. In other developments, during 2016, the UK competition authority released its interim report on the legal profession (deciding not to open an

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39. See generally UK Dep’t for Exiting the European Union, <https://www.gov.uk/government/organisations/department-for-exiting-the-european-union> [<https://perma.cc/3DCM-AVMS>].

40. See TMPC Fall 2016 Newsletter, *supra* note 2, at 9.

41. See Max Walters, *Brexit: Applications to Practise Law in Ireland Keep Rising*, LAW SOCIETY GAZETTE (Sept. 13, 2016), <https://www.lawgazette.co.uk/law/brexit-applications-to-practise-law-in-ireland-keep-rising/> 5057570.article?utm\_source=dispatch&utm\_medium=email&utm\_campaign=GAZ13092016.

42. See, e.g., Legal Services Board, News and Publications, *Delivering Better Outcomes for Consumers and Citizens: LSB Outlines Options for Legislative Reform* (Sept. 12, 2016), [http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_news/PDF/2016/20160909\\_Delivering\\_Better\\_Outcomes\\_For\\_Consumers\\_And\\_Citizens.html](http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160909_Delivering_Better_Outcomes_For_Consumers_And_Citizens.html).

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investigation)<sup>43</sup>, and the Bar Standards Board of England and Wales received approval to regulate alternative business structures or ABS firms.<sup>44</sup>

Another noteworthy event of 2016 was the April release of the so-called “Panama Papers.” This EU Parliament document provides a brief summary of what occurred:

On April 3rd 2016, the International Consortium for Investigative Journalism (ICIJ) uncovered 11.5 million documents from Mossack Fonseca, a global law firm based in Panama, also known as the “Panama Papers” scandal. Although thorough analysis of the documents is still needed, these records apparently show that Mossack Fonseca created more than 214,000 offshore entities in 21 jurisdictions considered as tax havens connected to people in more than 200 countries and territories.<sup>45</sup>

United States law firms were among the law firms whose names were revealed in the Panama Papers leak.<sup>46</sup> This event, along with the Global Witness undercover operation, portions of which were publicized on the United States television show “60 Minutes,” have focused attention on the issue of the degree to which the legal profession is or is not involved in activities related to money laundering.<sup>47</sup>

One of the positive developments of 2016 was the IBA’s issuance of its Directory of Regulators.<sup>48</sup> This Directory, which was an initiative of the

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43. See UK COMPETITION & MARKETS AUTHORITY (CMA), LEGAL SERVICES MARKET STUDY, Interim Report (July 8, 2016), <https://assets.publishing.service.gov.uk/media/577f76daed915d622c0000ef/legal-services-market-study-interim-report.pdf>.

44. See, e.g., Bar Standards Board, *Press Release: Alternative Business Structures And Opportunities For The Bar And The Wider Legal Profession* (Nov. 29, 2016), <https://www.barstandardsboard.org.uk/regulatory-requirements/regulatory-update-2016/bsb-regulatory-update-august-2016/alternative-business-structures-and-opportunities-for-the-bar-and-the-wider-legal-profession/>; see also Bar Standards Board, *Entities, including Alternative Business Structures*, <https://www.barstandardsboard.org.uk/regulatory-requirements/entities,-including-alternative-business-structures/>.

45. See Law Society of England and Wales, Brussels Agenda, European Parliament Inquiry into Panama Papers (Aug.-Sept. 2016); *Request for the setting up of a Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering and tax avoidance and tax evasion*, EUR. PARL. DOC. PE 583.232/CPG (May 24, 2016), <http://www.europarl.europa.eu/resources/library/media/20160602RES30047/20160602RES30047.pdf>.

46. Brian Baxter, *Dozens of Big Firms to Appear in New ‘Panama Papers’ Database*, AM LAW DAILY (May 8, 2016), <http://www.americanlawyer.com/printerfriendly/id=1202757101004>.

47. See, e.g., Louise Story, *Report Describes Lawyers’ Advice on Moving Suspect Funds into U.S.*, N.Y. TIMES, A12 (Feb. 1, 2016), available at [https://www.nytimes.com/2016/02/01/us/report-describes-lawyers-advice-on-moving-suspect-funds-into-us.html?\\_r=0](https://www.nytimes.com/2016/02/01/us/report-describes-lawyers-advice-on-moving-suspect-funds-into-us.html?_r=0) [<https://perma.cc/8EGC-VRQZ>]; see also Michael D. Goldhaber, *When a Kleptocrat Comes Calling*, AM. LAW. 18 (Mar. 2016).

48. See Int’l Bar Ass’n, Directory of Regulators of the Legal Profession (2016). The report is available in a pdf format or webpage format as links from the Int’l B. Ass’n, Bar Issues Commission, [http://www.ibanet.org/barassociations/bar\\_associations\\_home.aspx](http://www.ibanet.org/barassociations/bar_associations_home.aspx) [<https://perma.cc/MRN4-PQ3G>]. The 2014 IBA Global Legal Services Report has been shared with

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Regulation Committee of the IBA Bar Issues Commissions, was prepared by Alison Hook and was issued in June 2016.<sup>49</sup> It included a directory that listed the admissions regulators, conduct regulators, and discipline regulators for legal professionals located in WTO Member States.<sup>50</sup> It is available online in both webpage and pdf formats and also includes a section that analyzes the data.<sup>51</sup> This IBA Directory supplements the useful 2014 IBA Global Legal Services Report (which continued to be cited in 2016 in trade discussions and elsewhere).<sup>52</sup> Another IBA initiative during 2016 was a two-day capacity-building workshop conducted in Zimbabwe for approximately seventy lawyers and regulators.<sup>53</sup> Finally, during 2016, the IBA released its somewhat controversial report on the independence of the profession<sup>54</sup> and a “Practical Guide” on business and human rights for business lawyers that supplements its practice guide for bar associations.<sup>55</sup>

There were a number of important transnational legal practice developments in Canada during 2016. For example, a number of Canadian jurisdictions launched or continued initiatives related to entity regulation and proactive regulation.<sup>56</sup> Nova Scotia, which is the furthest along in this process, launched a pilot self-assessment project that has been influenced by

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international trade negotiators and used in trade discussions. See TLP 2015, *supra* note 2, at 538; see also TLP 2014, *supra* note 17, at 428.

49. See Int’l Bar Ass’n Directory, *supra* note 48.

50. *Id.*

51. *Id.*

52. INT’L BAR ASS’N, IBA GLOBAL REGULATION AND TRADE IN LEGAL SERVICES REPORT 2014 (Oct. 2014), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2530064](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530064). For additional information, see TLP 2014, *supra* note 17, at 428-29.

53. The trip consisted of a workshop for approximately seventy lawyers which took place in Nyanga, Zimbabwe on November 3-4, 2016. The IBA volunteers, who joined Zimbabwe lawyers and regulators, included lawyers from Africa, Europe, and North and South America. See Email from Alison Hook to IBA ITILS Members (Nov. 8, 2016) (on file with author).

54. See, e.g., INT’L B. ASS’N, THE INDEPENDENCE OF THE LEGAL PROFESSION: THREATS TO THE BASTION OF A FREE AND DEMOCRATIC SOCIETY (Sept. 23, 2016), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=6E688709-2CC3-4F2B-8C8B-3F341705E438>; see also Letter from Legal Services Board Chief Executive Neil Buckley to IBA President David Rivkin (Sept. 23, 2016), <https://perma.cc/LP38-KG56> (identifying perceived errors about the LSB in the IBA’s draft report on the Independence of the Legal Profession); see also Jonathan Goldsmith, *Separation of powers, US-style*, LAW GAZETTE (Sept. 26, 2016), [https://www.lawgazette.co.uk/analysis/comment-and-opinion/separation-of-powers-us-style/5057912.article?utm\\_source=dispatch&utm\\_medium=email&utm\\_campaign=GAZ26092016](https://www.lawgazette.co.uk/analysis/comment-and-opinion/separation-of-powers-us-style/5057912.article?utm_source=dispatch&utm_medium=email&utm_campaign=GAZ26092016) (citing the IBA draft report when commenting on the U.S. Supreme Court’s N. Carolina Dental Board case).

55. See INT’L B. ASS’N, IBA PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR BUSINESS LAWYERS (Adopted May 28, 2016), <https://perma.cc/DN2J-GQXH>; see also INT’L B. ASS’N, IBA PRACTICAL GUIDE ON BUSINESS AND HUMAN RIGHTS FOR BAR ASSOCIATIONS (Adopted Oct. 8, 2015), <https://perma.cc/U5RV-NUUD>.

56. See Terry, *supra* note 23, at 729-50 (discussing developments in Nova Scotia, Ontario, British Columbia and the “Prairie” Provinces of Alberta, Manitoba, and Saskatchewan).

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prior developments in Australia.<sup>57</sup> Other 2016 developments included several important lawyer-regulation cases,<sup>58</sup> including cases on solicitor-client privilege,<sup>59</sup> which may be increasingly important in light of the FATF's 4th Mutual Evaluation Report for Canada which was issued in 2016 and called for changes in aspects of its lawyer regulation.<sup>60</sup>

Transnational legal practice developments were not limited to the English-speaking common-law world. For example, in February 2016, Korea revised its Foreign Legal Consultant Act.<sup>61</sup> In April 2016, in

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57. See *MSELP Self-Assessment Pilot Project*, N.S. BARRISTERS' SOC'Y (Nov. 30, 2016), <https://perma.cc/574D-TBYB>; see also *Framework For Legal Services Regulation*, N.S. BARRISTERS' SOC'Y, <http://nsbs.org/framework-legal-services-regulation> (last visited April 4, 2017); see also Terry, *supra* note 23, at 749-51.

58. Compare *Trinity Western University v. The Law Society of British Columbia*, [2016] CCA 423 (Can.) (finding unreasonable the Law Society of British Columbia's denial of accreditation to a religiously-affiliated law school) with *Trinity Western University v. The Law Society of Upper Canada*, [2016] ONCA 518 (Can.) (upholding the Law Society's denial of accreditation to a religiously-affiliated law school, finding reasonable the Law Society's conclusion that public interest in ensuring equal access to the profession justified a degree of interference with the appellants' religious freedoms).

59. *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] SCC 53 (Can.); *Canada (National Revenue) v. Thompson*, [2016] SCC 21 (Can.); *Canada (Attorney General) v. Chambre des notaires du Québec*, [2016] SCC 20 (Can.); see also *Canada (Attorney General) v. Fed'n of Law Soc'ys of Can.*, [2015] 1 S.C.R. 401 (Can.) (striking portions of Canada's Proceeds of Crime (Money Laundering) and Terrorist Financing Act).

60. See FATF, *Canada's Measures To Combat Money Laundering And Terrorist Financing*, Mutual Evaluation Report (Sept. 15, 2016), <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-canada-2016.html> (includes links to the full report and to the Executive Summary). The report states,

Canada faces important money laundering and, to a lesser extent, terrorist financing risks. The authorities have a good understanding of these risks and have put a number of mitigating measures in place. The AML/CFT regime covers all high-risk areas, except legal counsels, legal firms and Quebec notaries; the Supreme Court declared AML/CFT measures inoperative in their respect. The lack of coverage of these professions is a significant loophole in Canada's AML/CFT framework and raises serious concerns. Legal persons and arrangements are at high risk of misuse for money laundering or terrorist financing purposes, and that risk is not satisfactorily mitigated.

*Id.* at 1.

61. See Office of U.S. Trade Rep., *The 2016 National Trade Estimate Report*, at 279-80 (2016), <https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf> [<https://perma.cc/3XWU-WQQT>] (this annual government report is statutorily required). See also Office of U.S. Trade Rep., *2016 National Trade Estimate Report*, <https://perma.cc/VV6W-5F96> (webpage cites the statutory requirement of §181 of the Trade Act of 1974, as amended several times). This report explains the United States position as follows regarding the February 2016 Korean amendments:

On August 4, 2015, the Ministry of Justice submitted a bill to amend the Foreign Legal Consultants Act that would allow joint ventures in Korea with law firms from the United States and other countries with similar provisions in their free trade agreements with Korea. However, the United States expressed concern that the bill contains many requirements, unique to Korea that would discourage U.S.

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connection with the rulemaking process implementing this Act, the ABA and others submitted comments objecting to certain aspects of the law.<sup>62</sup> The ABA's letter expressed its concern that under Korea's new law, "the nearly two dozen U.S. law firms that have already established offices in Seoul would find it difficult or even impossible to exercise their choice to be engaged in the practice of local law as negotiated and embodied in KORUS."<sup>63</sup> The letter identified three provisions that the ABA believed would "create serious impediments to the successful implementation of the final stage of the legal services provisions of KORUS."<sup>64</sup> To date, however, Korea has not adopted any further amendments to its Foreign Legal Consultant Act.<sup>65</sup>

In addition to Korea, United States lawyers and law firms have been interested in market access in a number of other countries, including India.<sup>66</sup> Although there were several 2016 initiatives to provide greater market access for foreign lawyers or law firms in India, no definitive action had been taken.<sup>67</sup>

In addition to the TLP activities in Asia, there were a number of TLP developments in Europe. For example, the Council of Bars and Law Societies of Europe (CCBE) was active with respect to issues related to the surveillance of lawyers<sup>68</sup> and the EU's efforts to develop its 4th money

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companies from starting joint ventures. The bill would limit a foreign law firm's ownership of the joint venture to 49 percent, require the firms comprising the joint venture to have been in operation for three years, and exclude joint ventures from working on litigation, notarization, labor affairs, intellectual property rights, business involving the Korean government, and cases on family relations or inheritance. While the bill would allow foreign law firms to operate joint ventures in Korea for the first time, these provisions would undermine the legislation's purpose of facilitating trade in legal services between the two countries. On February 4, 2016, the bill was passed by the National Assembly. The U.S. Government will continue to urge Korea to review its overall approach to opening the legal services market and to ensure Korea complies with its international obligations.

*Id.*

62. See, e.g., Letter from Thomas Susman, Director, A.B.A. Governmental Affairs Office, to the Ministry of Justice of the Republic of Korea (Apr. 11, 2016), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016apr11\\_korea\\_l.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016apr11_korea_l.authcheckdam.pdf).

63. *Id.*

64. *Id.*

65. See Email from Kristi Gaines, A.B.A. Staff Counsel to the Standing Committee on International Trade in Legal Services, to author (Dec. 1, 2016) (on file with author).

66. See, e.g., Transnational Legal Practice (International) [2010-12], *supra* note 32, at 491-92.

67. See, e.g., *Standing Committee on International Trade in Legal Services*, A.B.A. (Oct. 2016), [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/promoting\\_international\\_rule\\_law/internationaltradetf.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/internationaltradetf.html) (contains numerous stories about developments in India including an October 3, 2016 Hindustan Times story entitled "Plan for liberal legal sector hits Bar Council hurdle").

68. See Council Bars Law Soc. Europe, *CCBE Press Release: CCBE Publishes Recommendations on the Protection of Client Confidentiality within the Context of Surveillance Activities* (May 23, 2016),

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laundering directive.<sup>69</sup> The CCBE was also among the bar associations that denounced the mass dismissals of judges in Turkey.<sup>70</sup>

During 2016, a number of law firms opened offices in other countries, a few closed offices, and there were some cross-border law firm mergers.<sup>71</sup> Another noteworthy set of developments included the increasing pace of announcements related to the use of artificial intelligence in the provision of legal services.<sup>72</sup>

## V. Conclusion

The developments highlighted in this article have shown that transnational legal practice is an important phenomenon, and that it continued to grow in 2016.

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<https://perma.cc/22ER-6YNV> [http://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/Pressreleases/2016/EN\\_SVL\\_PR\\_0516.pdf](http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/Pressreleases/2016/EN_SVL_PR_0516.pdf).

69. See, e.g., CCBE, *supra* note 7, at 4.

70. See, e.g., CCBE, *CCBE PRESS RELEASE: The CCBE Denounces Recent Mass Dismissals Of Judges In Turkey* (July 20, 2016), [http://www.ccbe.eu/NTCdocument/EN\\_pr\\_0816pdf1\\_1469027614.pdf](http://www.ccbe.eu/NTCdocument/EN_pr_0816pdf1_1469027614.pdf); see also Int'l Bar Ass'n, *News Release: IBAHRI Condemns Mass Removal Of Judges Following Attempted Coup In Turkey* (July 20, 2016), <http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4c12eee3-bf1d-47cc-9080-9e4464d4bb85>; see also Statement of Paulette Brown, President, American Bar Association Re: Recent incidents in Turkey (July 19, 2016), [https://www.americanbar.org/news/abanews/aba-news-archives/2016/07/statement\\_of\\_paulett.html](https://www.americanbar.org/news/abanews/aba-news-archives/2016/07/statement_of_paulett.html).

71. See generally IBA Global Legal Services, Discussion Forum, <http://www.ibanet.org/Forum/Detail.aspx?ForumUid=03E2F023-6378-42AE-B3D6-051B6DDB2AEA> [<https://perma.cc/H53P-WDXZ>].

72. See, e.g., Susan Beck, *Inside ROSS: What Artificial Intelligence Means for Your Firm*, LAW.COM (Sept. 28, 2016), <http://www.law.com/sites/almstaff/2016/09/28/inside-ross-what-artificial-intelligence-means-for-your-firm/>.

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## **Africa**

ENGLEBERT AKONG, SUSAN BISHAI, ANNE BODLEY, MICHELA COCCHI, D. PORPOISE EVANS, PAMELA FAPOHUNDA, KATHERINE FLANNERY, SARA FRAZÃO, REBECCA GEROME, DAVID HOFISI, TYLER HOLMES, JENNIFER ISMAT, ALEXANDRA KERR MEISE, LINDA LOWSON, ANIS MAHFUD, ADESHOLA MOS-SHOGBAMIMU, JOHN MUKUM MBAKU, KELLY NEWSOME, IVAN ALLAN OJAKOL, KINGSLEY OSEI, DANIELLE ROWLAND LINDAHL, RICARDO ALVES SILVA, MATTHEW SNYDER, ANNA TOUBIANA, AND JOÃO LUÍS TRAÇA.\*

This article details important legal developments in Africa in 2016.

### **I. North Africa**

#### **A. ALGERIA**

##### *1. Constitutional Amendments*

Algeria experienced continued political uncertainty under ailing President Bouteflika.<sup>1</sup> In February 2016, parliament passed constitutional reforms increasing defendant rights in the criminal justice process, setting two-term presidential limits, and controversially, limiting presidential candidacies to

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\* Committee Editor (A Bodley); Algeria (S Bishai); Angola (S Frazão, R Silva); Benin (Ed.); Botswana (L Lowson, P Evans); Burkina Faso (Ed.); Burundi (K Flannery, D Rowland Lindahl); Cameroon (E Akong, S Frazão, R Silva); Cape Verde (S Frazão, R Silva); CAR (Ed.); Chad (J Mbaku); Comoros (Ed.); DRC (S Frazão, R Silva); Congo (S Frazão, R Silva); Côte d'Ivoire (K Newsome); Djibouti (Ed.); Egypt (K Flannery); Equatorial Guinea (J Traça, S Frazão, R Silva); Eritrea (K Flannery); Ethiopia (Ed.); Gabon (Ed.); Gambia (Ed.); Ghana (K Osei); Guinea (K Newsome); Guinea-Bissau (M Snyder); Kenya (Ed.); Lesotho (Ed.); Liberia (Ed.); Libya (Ed.); Madagascar (Ed.); Malawi (T Holmes); Mali (Ed.); Mauritania (Ed.); Mauritius (Ed.); Morocco (A Mahfoud); Mozambique (S Frazão, R Silva); Namibia (T Holmes); Niger (Ed.); Nigeria (P Fapohunda, A Mos-Shogbamimu, Ed.); Rwanda (Ed.); São Tomé and Príncipe (J Traça, S Frazão, R Silva); Senegal (Ed.); Seychelles (Ed.); Sierra Leone (Ed.); Somalia (Ed.); South Africa (P Evans, L Lowson); South Sudan (K Flannery); Sudan (J Ismat); Swaziland (Ed.); Tanzania (D Rowland Lindahl); Togo (Ed.); Tunisia (S Bishai); Uganda (I Ojakol, D Rowland Lindahl); Western Sahara (R Gerome); Zambia (Ed.); Zimbabwe (D Hofisi); AU (J Mbaku); ECOWAS (A Mos-Shogbamimu); EAC (I Ojakol); AfDB (A Toubiana, A Kerr Meise); Afreximbank (Ed.); SADC (T Holmes); COMESA (Ed.); ECCAS (Ed.); UMA (Ed.); OHADA (M Cocchi); UNMICT (Ed.); author biographies at <http://www.abanet.org/dch/committee.cfm?com=IC805000>.

1. Robert S. Ford, *Challenges Ahead for Algeria in 2016*, MIDDLE EAST INST. (Jan. 5, 2016), <http://www.mei.edu/content/article/challenges-ahead-algeria-2016>.



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those holding solely Algerian citizenship, disqualifying dual Algerian-French nationals and others.<sup>2</sup>

2. *Investment Code*

In July 2016, the country passed an investment code to diversify Algeria's oil-centric economy in the wake of falling oil prices.<sup>3</sup> These laws give incentives to invest in non-oil industries such as communication, technology, and tourism, and reinforce a rule requiring Algerian residents to hold the majority stake in companies or projects.<sup>4</sup>

B. EGYPT

1. *Anti-FGM Amendment*

In August 2016, Egypt criminalized female genital mutilation (FGM), providing up to seven years' imprisonment for its commission or up to fifteen years if causing death or permanent deformity.<sup>5</sup> The law also provides for a maximum of three years' imprisonment for those accompanying the victims.<sup>6</sup>

C. LIBYA

1. *New Draft Constitution*

In February 2016, Libya's Constitution Drafting Assembly, elected in 2014, produced a revision of its October 2015 draft.<sup>7</sup> If accepted by two-thirds of a public referendum, it will become "Libya's first permanent constitution since Gaddafi's coup in 1969."<sup>8</sup> The draft, built on the doctrine

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2. Robert Looney, *Does Algeria Still Have Time to Turn it Around?*, FOREIGN POL'Y (Sept. 23, 2016, 10:39 AM), <http://foreignpolicy.com/2016/09/23/does-algeria-still-have-time-to-turn-it-around-bouteflika/>.

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4. *Algeria Approves New Investment Law to Spur Economic Growth*, AFR. NEWS (July 18, 2016, 2:05 PM), <http://www.africanews.com/2016/07/18/algeria-approves-new-investment-law-to-spur-economic-growth/>.

5. George Sadek, *Egypt: New Law Enhancing the Penalties for FGM Approved by Parliament*, LIBR. OF CONGRESS (Sept. 14, 2016), <http://www.loc.gov/law/foreign-news/article/egypt-new-law-enhancing-the-penalties-for-fgm-approved-by-parliament/>.

6. *New Bill Increases Jail Terms as FGM Becomes a Felony in Egypt*, AHAM ONLINE (Aug. 28, 2016), <http://english.ahram.org.eg/News/241850.aspx>.

7. Suliman Ibrahim, *Libya's Long Awaited Constitution: Will It Finally See the Light of the Day?*, CONST. NET (Mar. 22, 2016), <http://www.constitutionnet.org/news/libyas-long-awaited-constitution-will-it-finally-see-light-day>.

8. *Id.*

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of separation of powers with the country a unitary state, makes Arabic the official language and Islam its sole religion.<sup>9</sup>

D. TUNISIA

1. *Criminal Justice Reform*

In June 2016, lawmakers amended the Criminal Procedure Code in order to provide some rights to the accused.<sup>10</sup> The amendments grant suspects the right to an attorney during initial investigations and in detention, reduce the time officials can hold suspects during interrogation, and invalidate court proceedings where police have breached the new procedural rules.<sup>11</sup>

2. *Economic Reforms*

Building on its 2015 economic reform laws, in September 2016 lawmakers approved a law to encourage foreign investment.<sup>12</sup> The economic environment worsened after the Arab Spring revolts, leaving millions of youth unemployed.<sup>13</sup>

E. MOROCCO

1. *Regulation Reform*

In 2016, reforms were introduced including an update of the insurance act requiring mandatory insurance for building activities and against catastrophic events, implementation of the Casablanca Stock Exchange's new regulations, and implementation of a new regulation governing commercial lease relationships.<sup>14</sup>

F. WESTERN SAHARA

1. *UN Evacuated, Ceasefire Breach Claim*

In March 2016, Morocco gave the UN Mission for the Referendum in Western Sahara (MINURSO) seventy-two hours to evacuate eighty-four

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9. Chris Stephen, *Libya's Draft Constitution – Overview*, LIBYA HERALD (July 21, 2016), <https://www.libyaherald.com/2016/07/21/libyas-draft-constitution-overview/>.

10. Mohamed Afif Jaidi, *Criminal Justice in Tunisia: A Revolutionary Reform?*, LEGAL AGENDA (Aug. 26, 2016), <http://legal-agenda.com/en/article.php?id=789&folder=articles&lang=en>.

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13. See Jihen Laghari & Caroline Alexander, *Back to Square One in Tunisia as Protests Spread, Promise Fades*, BLOOMBERG (Oct. 11, 2016, 12:00 AM), <https://www.bloomberg.com/news/articles/2016-10-11/back-to-square-one-in-tunisia-as-protests-spread-promise-fades>.

14. See generally, *Secrétariat Générale du Gouvernement*, MOROCCO, [www.sgg.gov.ma](http://www.sgg.gov.ma) (last updated Mar. 30, 2017).

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staff after the UN Secretary General described the Western Sahara situation as an “occupation.”<sup>15</sup> The UN Security Council extended MINURSO’s mandate in April 2016 calling for a return to its “full functionality.”<sup>16</sup> After Morocco sent armed personnel to the Guergarat buffer zone in August 2016, the Polisario Front claimed Morocco had violated the 1991 ceasefire.<sup>17</sup>

2. *EU/Morocco Trade Agreement*

In December 2015, the EU Court of Justice (ECJ) suspended application of an EU-Morocco trade agreement as the EU had not considered protection of the Saharawis’ rights in concluding the agreement.<sup>18</sup>

In September 2016, ECJ Advocate General Melchior Wathelet held that Western Sahara is not Moroccan territory and therefore the agreement is inapplicable to it.<sup>19</sup>

**II. West Africa**

A. BENIN

1. *New President to Reduce Presidential Terms*

Benin held non-violent, free elections in March, 2016.<sup>20</sup> Newly elected President Patrice Talon, who replaced two-term President Thomas Boni Yayi, announced he plans to reduce presidential mandates to a single five-year term.<sup>21</sup>

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15. Rick Gladstone, *Morocco Orders U.N. to Cut Staff in Disputed Western Sahara Territory*, N.Y. TIMES (Mar. 17, 2016), [https://www.nytimes.com/2016/03/18/world/africa/morocco-orders-un-to-cut-staff-in-disputed-western-sahara-territory.html?\\_r=1](https://www.nytimes.com/2016/03/18/world/africa/morocco-orders-un-to-cut-staff-in-disputed-western-sahara-territory.html?_r=1).

16. Press Release, Security Council, Security Council Extends Mandate of United Nations Mission for Referendum in Western Sahara by 10 Votes in Favour, 2 Against, with 2 Abstentions, U.N. Press Release SC/12346 (Apr. 29, 2016).

17. Barrett Bilali, *Armed Polisario Fighters Confront Moroccan Security Forces in Guergarate*, MOROCCO WORLD NEWS (Aug. 28, 2016, 11:55 PM), <https://www.moroccoworldnews.com/2016/08/195390/armed-polisario-fighters-confront-moroccan-security-forces-guarguarat/>.

18. Case T-512/12, *Front Polisario v. Council*, 2015 E.C.R. III-953, ¶ 227.

19. Court of Justice of the European Union Press Release No 94/16, According to Advocate General Wathelet, Neither the EU-Morocco Association Agreement nor the EU-Morocco Agreement on the Liberalisation of Trade in Agricultural and Fishery Products Apply to Western Sahara (Sept. 13, 2016).

20. *Benin 2016 Investment Climate Statements*, U.S. DEP’T OF STATE (July 5, 2016), <https://www.state.gov/e/eb/rls/othr/ics/2016/af/254167.htm>.

21. Samuel Elijah et al., *Newly-elected Benin President Aims to Reduce Presidential Terms*, REUTERS (Mar. 26, 2016), <http://www.reuters.com/article/us-benin-election-idUSKCN0WS08X>.

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B. BURKINA FASO

1. *Foreign Terrorist Fighters Law*

Burkina Faso adopted an updated counter-terrorism law in May 2016 to curb the threat of foreign terrorist fighters.<sup>22</sup> Over 25,000 children have left their homes in recent years to fight for terrorist and militant groups operating in the North Africa and Middle East regions.<sup>23</sup>

C. CAPE VERDE

1. *Aviation*

Aiming to transform air transportation into one of the country's main economic drivers, Resolution 13/2016 of February 22, 2016, approved a plan to improve air traffic, restructure national airline TACV, and strengthen the air transport liberalization policy.<sup>24</sup>

2. *AML Strengthened*

Cape Verde's anti-money laundering framework was strengthened with Law 120/VIII/2016 of March 24, 2016, reinforcing duties of diligence and collaboration, and widening the powers of public authorities to combat money laundering.<sup>25</sup>

D. CÔTE D'IVOIRE

1. *Gbagbo Trials*

In January 2016, former Ivorian President Laurent Gbagbo went on trial at the International Criminal Court (ICC) for crimes against humanity arising out of the 2010 presidential elections.<sup>26</sup> Gbagbo, the first former president to reach trial at the ICC, pleaded not guilty.<sup>27</sup> The ICC also issued an arrest warrant for former first lady, Simone Gbagbo, but the

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22. *Burkina Faso Adopts Law Against Foreign Terrorist Fighters*, U.N. OFF. ON DRUGS & CRIME (Mar. 17, 2016), <https://www.unodc.org/unodc/en/frontpage/2016/May/burkina-faso-adopts-law-against-foreign-terrorist-fighters.html>.

23. *Id.*

24. *Cape Verde – Legal News*, MIRANDA LAW FIRM (Dec. 2015 – Feb. 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161005\\_a6465b.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161005_a6465b.pdf).

25. *Cape Verde – Legal News*, MIRANDA LAW FIRM (Mar. – July, 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161005\\_8ebd92.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161005_8ebd92.pdf).

26. Saskia de Rothschild, *Trial of Ivory Coast's Laurent Gbagbo Will Test International Criminal Court*, N.Y. TIMES (Jan. 27, 2016), [https://www.nytimes.com/2016/01/28/world/africa/ivory-coast-laurent-gbagbo-hague-trial.html?\\_r=0](https://www.nytimes.com/2016/01/28/world/africa/ivory-coast-laurent-gbagbo-hague-trial.html?_r=0).

27. Jason Burke, *Former Ivory Coast President on Trial for 'Unspeakable' Crimes*, THE GUARDIAN (Jan. 28, 2016, 11:48 AM), <https://www.theguardian.com/world/2016/jan/28/former-ivory-coast-president-on-trial-for-unspeakable-crimes>.

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country did not transfer her to the ICC.<sup>28</sup> In May 2016, the former first lady went on trial in Abidjan on charges also related to 2010–2011 post-election violence.<sup>29</sup> She is currently serving a twenty year sentence for crimes against humanity.

## 2. *Constitutional Changes*

On November 1, 2016, over 93% of Côte d'Ivoire voters approved a new constitution.<sup>30</sup> The new constitution, *inter alia*, requires that only one parent of a presidential candidate be a natural-born Ivorian.<sup>31</sup> It also establishes a Senate, one-third of which will be appointed by the President, and creates the post of Vice President.<sup>32</sup>

## E. GAMBIA

### 1. *ICC Withdrawals*

In November 2016, Gambia became the third African country to announce its withdrawal from the ICC, following Burundi and South Africa.<sup>33</sup> The decision appeared related to the long-standing contention by African leaders that the court was biased, with most ICC investigations involving African nations.<sup>34</sup> Kenya, Namibia, and Uganda are also thought likely to withdraw.<sup>35</sup>

### 2. *Jammeh Defeat*

In a surprise victory in December 2016, twenty-two-year incumbent Yahya Jammeh conceded defeat in the presidential election to real estate developer Adama Barrow.<sup>36</sup>

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28. *Simone Gbagbo Will Not be Handed Over to the ICC – Ivorian PM*, AFR. NEWS (May 18, 2016), <http://www.africanews.com/2016/05/18/simone-gbagbo-will-not-be-handed-over-to-the-icc-ivorian-pm/>.

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30. Stephen Feller, *Ivory Coast Voters Approve New Constitution*, UNITED PRESS INT'L (Nov. 1, 2016, 9:08 PM), [http://www.upi.com/Top\\_News/World-News/2016/11/01/Ivory-Coast-voters-approve-new-constitution/4681478041962/](http://www.upi.com/Top_News/World-News/2016/11/01/Ivory-Coast-voters-approve-new-constitution/4681478041962/).

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32. *Id.*

33. See Kevin Sieff, *Gambia is the Latest African Country Deciding to Pull Out of International Criminal Court*, WASH. POST (Oct. 26, 2016), [https://www.washingtonpost.com/world/gambia-latest-african-country-deciding-to-pull-out-of-international-criminal-court/2016/10/26/7f54d068-c4ca-440f-848f-e211ba29dc34\\_story.html?utm\\_term=.7ddaecae868b](https://www.washingtonpost.com/world/gambia-latest-african-country-deciding-to-pull-out-of-international-criminal-court/2016/10/26/7f54d068-c4ca-440f-848f-e211ba29dc34_story.html?utm_term=.7ddaecae868b).

34. *Id.*

35. *Id.*

36. *Gambia's Jammeh Loses to Adama Barrow in Shock Election Result*, BBC NEWS (Dec. 2, 2016), <http://www.bbc.com/news/world-africa-38183906>.

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F. GHANA

1. *Petroleum Bill Passed*

The Ghana Petroleum (Exploration and Production) Bill, 2016 passed into law on August 5, 2016.<sup>37</sup> Under the law, the selection of companies in down, mid, and upstream transactions must be done exclusively “through an open, transparent, and competitive” public tender process.<sup>38</sup>

G. GUINEA

1. *New Cabinet Makes Key Female Appointments*

In January 2016, following the inauguration of Alpha Condé for a second five-year presidential term, Prime Minister Mamady Youla appointed sixteen new cabinet ministers.<sup>39</sup> Several key appointments were women, including the new Minister of Economy and Finance, forty-four-year-old Malado Kaba, who has spent the majority of her career at the European Commission (EC) and will be responsible for making Guinea an emerging economy.<sup>40</sup>

H. GUINEA-BISSAU

1. *Agreement Reached to End Crisis*

In September 2016, rivals in Guinea-Bissau agreed to a roadmap for a new government.<sup>41</sup> The agreement aims to end the year-long political crisis that began with President Vaz’s dismissal of Prime Minister Domingos Simoes Pereira in August 2015,<sup>42</sup> and provides a plan to form a consensus government that will revise the constitution and reform the defense sector.

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37. Edward Abambire Bawa, *Petroleum Exploration and Production Bill, 2016 Passed Into Law*, MOD. GHANA (Aug. 5, 2016), <https://www.modernghana.com/news/709539/petroleum-exploration-and-production-bill-2016-passed-into.html>.

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42. *Guinea-Bissau’s ‘Unconstitutional’ PM Baciro Dja Resigns*, BBC (Sept. 9, 2015), <http://www.bbc.com/news/world-africa-34203240>.

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I. LIBERIA

1. *Liberia Resumes Control Over Security*

On June 30, 2016, the UN Mission in Liberia (UNMIL) handed responsibility for security back to Liberia after taking control thirteen years ago. The peacekeeping mission assumed control in 2003 following civil wars that left hundreds of thousands dead and displaced more.<sup>43</sup> The UN Secretary General's Special Representative relayed that UNMIL would continue to support Liberia in a reduced capacity.<sup>44</sup>

J. MAURITANIA

1. *Calls to Reject Law Restricting Freedom of Association*

In June 2016, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, called on Mauritania to reject a proposed law finding that the law restricted the right to freedom of assembly and association.<sup>45</sup> If passed, state authorization would remain necessary to establish an association in Mauritania.<sup>46</sup>

2. *Anti-Slavery Activists Appeal Conviction*

In August 2016, a Nouakchott tribunal found thirteen members of the Resurgence of the Abolitionist Movement "guilty of charges including being part of an unauthorized organization and inciting attacks against authority."<sup>47</sup> Slavery was criminalized in Mauritania in 2007, but concerns continue about abolition of the practice.<sup>48</sup>

K. MALI

1. *Truth Commission Starts Work*

Established in 2014, Mali's Truth, Justice and Reconciliation Commission continued work in 2016.<sup>49</sup> The Commission's work has been complicated by

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43. Chrispin Mwakideu, *UNMIL Returns Security Control to Liberia*, DEUTSCHE WELLE (June 30, 2016), <http://www.dw.com/en/unmil-returns-security-control-to-liberia/a-19368732>.

44. *Id.*

45. Press Release, U.N. Special Rapporteur, Mauritania: UN Rights Expert Urges parliament to Repeal NGO Bill that Threatens Civil Society (Aug. 10, 2015).

46. *Id.*

47. Salem Solomon, *Mauritania Anti-Slavery Activists Appeal Conviction*, VOA NEWS (Aug. 27, 2016, 3:39 PM), <http://www.voanews.com/a/mauritanian-anti-slavery-activists-appeal-conviction/3483314.html>.

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49. *Mali's Truth, Justice and Reconciliation Commission: Opening the Way Towards Sustainable Peace?*, INT'L CTR. FOR TRANSITIONAL JUST. (Apr. 7, 2016), <https://www.ictj.org/news/mali-truth-justice-reconciliation-commission-peace>.

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ongoing violence due to the unresolved 2012 conflict, combined with international terrorism within Mali.<sup>50</sup>

2. *ICC Conviction*

In September 2016, the ICC convicted Ahmad Al Faqi Al-Mahdi, a senior member of the Ansar Eddine armed group, and sentenced him to nine years imprisonment for his role in Mali's 2012 conflict.<sup>51</sup>

L. NIGER

1. *UNODC Strengthens Investigative Capacity*

In May 2016, as part of the UN Regional Integrated Strategy for the Sahel (2013-2017), the UN Office of Drugs and Crime (UNODC), in collaboration with the government of Niger, provided training to judges and others to reinforce the country's ability to investigate terrorism cases.<sup>52</sup> Landlocked between Libya, Mali, and Nigeria, Niger faces terrorist threats that range from kidnapping to human trafficking.<sup>53</sup>

M. NIGERIA

1. *Climate Change Agreement Signed*

In September 2016, President Muhammadu Buhari signed the Paris Agreement, part of the UN Framework Convention on Climate Change (UNFCCC).<sup>54</sup> The Agreement aims to fight climate change by keeping a global temperature rise below two degrees Celsius, more than pre-industrial levels this century.<sup>55</sup>

2. *Gender Equality Bill Opposed*

In September 2016, the Nigerian Senate approved the text of the controversial Gender and Equal Opportunities Bill at a second reading, but

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50. *Id.*

51. *Landmark ICC Verdict Against Al-Mahdi Must be First Step to Broader Justice in Mali Conflict*, AMNESTY INT'L (Sept. 27, 2016), <https://www.amnesty.org/en/latest/news/2016/09/landmark-icc-verdict-against-almahdi-must-be-first-step-to-broader-justice-in-mali-conflict/>.

52. *UNODC Enhances Investigative Capacity on Terrorism in Niger*, U.N. OFF. ON DRUGS & CRIME <https://www.unodc.org/westandcentralafrica/en/2016-05-24-workshop-investigative-terrorism-niger.html> (last visited Mar. 21, 2017).

53. *UNODC Strengthens Niger's Investigation and Prosecution Capacity of Terrorism-Related Cases*, U.N. OFF. ON DRUGS & CRIME <https://www.unodc.org/westandcentralafrica/en/niger--terrorism-investigation-and-prosecution-capacity-strengthened.html> (last visited Mar. 17, 2017).

54. Isaac Anyaogu, *Buhari Signs Paris Agreement on Climate Change*, BUS. DAY (Dec. 22, 2016), <http://www.businessdayonline.com/buhari-signs-paris-agreement-on-climate-change/>.

55. *The Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) (last visited Mar. 21, 2017).



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it has thus far failed to pass into law.<sup>56</sup> Muslim clerics in Nigeria oppose its passage as incompatible with Islam after it already failed to pass in March on the same grounds.<sup>57</sup> The Bill aims to give legal redress for discrimination on the grounds of gender.

N. SÃO TOMÉ AND PRÍNCIPE

1. *Data Protection Law*

In May 2016, São Tomé and Príncipe enacted a legal framework for data protection matters (Law No. 03/2016).<sup>58</sup> The Data Protection Law takes direction from the European Data Protection Directive and Portuguese Data Protection Law and establishes a national agency to implement the law.<sup>59</sup>

O. SENEGAL

1. *Shortened Terms Inapplicable to Current President*

Senegalese President Macky Sall put constitutional changes, including a reduction of presidential terms from seven to five years, to a referendum in March 2016.<sup>60</sup> Following a Constitutional Council opinion, Sall nonetheless declared the reduction in term lengths inapplicable to his tenure and that, contrary to a promise made when he was elected, he would stay in office until 2019.<sup>61</sup>

2. *Former Chad Ruler Convicted*

In May 2016, the hybrid *Chambres Africaines Extraordinaires* convicted former Chadian ruler Hissène Habré of crimes against humanity and sentenced him to life in prison for rape, sexual slavery, and ordering killings during his eight-year rule.<sup>62</sup> Habré, who had challenged the tribunal's legitimacy and had to have court-appointed lawyers for his defence, was given fifteen days to appeal.<sup>63</sup>

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56. Ludovica Iaccino, *Muslim Clerics in Nigeria to Oppose Gender Equality Bill as Inheritance Rights Still 'Incompatible' with Islam*, INT'L BUS. TIMES, (Oct. 11, 2016, 5:50 PM), <http://www.ibtimes.co.uk/muslim-clerics-nigeria-oppose-gender-equality-bill-inheritance-rights-still-incompatible-islam-1585853>.

57. *Id.*

58. *São Tomé and Príncipe – Legal News*, MIRANDA LAW FIRM (May, 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161006\\_f84941.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161006_f84941.pdf).

59. *Id.*

60. Eric Pichon, *Constitutional Referendum in Senegal – Shorter Presidential Term: A Half-Kept Promise*, EUR. PARLIAMENTARY RES. SERV. BLOG (Mar. 17, 2016), <https://epthinktank.eu/2016/03/17/constitutional-referendum-in-senegal-shorter-presidential-term-a-half-kept-promise/>.

61. *Id.*

62. *Hissene Habre: Chad's Ex-Ruler Convicted of Crimes Against Humanity*, BBC (May 30, 2016), <http://www.bbc.com/news/world-africa-36411466>.

63. *Id.*

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P. SIERRA LEONE

1. *Constitutional Overhaul Proposed*

In March 2016, Sierra Leone's Constitution Review Committee published a revision of its draft report, following a three-year review.<sup>64</sup> The report proposes a radical overhaul of the 1991 Constitution strengthening multi-party democracy and creating an open and transparent society.<sup>65</sup> The recommendations now go to a national referendum.

Q. TOGO

1. *FOI Law*

On March 10, 2016, the Togo National Assembly approved a freedom of information law.<sup>66</sup> The new law guarantees the right to information with exemptions, including for personal information of others without consent, and for disclosure that could damage international relations.<sup>67</sup>

**III. Central Africa**

A. CAMEROON

1. *New Commercial Legal Framework*

A revised legal framework on commercial activities in Cameroon was approved in late 2015 covering, *inter alia*, the distribution and sale of products and price formation, product warranties, and after-sales services.<sup>68</sup>

2. *Common Law Lawyers' Strike*

Cameroon's common law lawyers went on strike October 11, 2016, protesting what they term the government's disregard for the common law.<sup>69</sup> Lawyers' association leaders call on President Biya to hold an emergency session of the Higher Judicial Council and to redeploy all Civil Law magistrates from the Common Law North West and South West Regions.<sup>70</sup>

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64. Abdul Rashid Thomas, *Big Changes to the Constitution of Sierra Leone Announced*, SIERRA LEONE TELEGRAPH (Feb. 17, 2016), <http://www.thesierraleonetelegraph.com/?p=11715>.

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66. *Togo Approves FOI Law; 108th Internationally*, FREEDOM INFO (Apr. 6, 2016), <http://www.freedominfo.org/2016/04/togo-approves-foi-law-106th-internationally/>.

67. *Id.*

68. *Cameroon - Legal News*, MIRANDA LAW FIRM (Jan. - Mar. 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161006\\_27633e.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161006_27633e.pdf).

69. Ndi Eugene Ndi, *No End to Cameroon Lawyers' Strike*, AFR. REV. (Oct. 16, 2016, 2:33 PM), <http://www.africareview.com/news/No-end-to-Cameroon-lawyers-strike/979180-3418646-format-xhtml-jbihnm/index.html>.

70. Mbom Sixtus, *Anglophone Lawyers to President Paul Biya: Heed Our Needs Else we Begin Strike on Tuesday*, BLASTING NEWS (Oct. 9, 2016), <http://us.blastingnews.com/world/2016/10/>

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**B. CENTRAL AFRICAN REPUBLIC**

1. *Peaceful Elections*

On February 14, 2016, the Central African Republic elected Faustin Archange Touadera as president in elections some hoped would strengthen the country's fragile peace.<sup>71</sup> Touadera served as Prime Minister for President François Bozize who was toppled in 2013 by the largely Muslim Seleka rebels.

2. *Head of Armed Forces Assassinated*

In October 2016, the head of the Central African Republic's armed forces, Marcel Mombeka, was shot dead and his son wounded in an attack in a predominantly Muslim neighbourhood in Bangui.<sup>72</sup> Concerns remain that there could again be widespread violence in the country.

**C. CHAD**

1. *Chad Assumes AU Presidency*

Idriss Déby Itno, President of Chad, was elected to chair the African Union in January 2016, succeeding the one year term of Zimbabwean President Robert Mugabe.<sup>73</sup>

**D. CONGO (DEMOCRATIC REPUBLIC)**

1. *Criminal Law Harmonized*

During 2016, DRC criminal law was harmonized with international commitments, notably the International Criminal Court's statute. The new law introduces the crimes of genocide, crimes against humanity, and war crimes.<sup>74</sup>

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anglophone-lawyers-to-president-paul-biya-heed-our-needs-else-we-begin-strike-on-tuesday-001172133.html.

71. *Central African Republic: Touadera Wins Election*, AL JAZEERA, (Feb. 20, 2016), <http://www.aljazeera.com/news/2016/02/central-african-republic-touadera-wins-election-160221044730048.html>.

72. Associated Press in Bangui, *Head of Central African Republic Armed Forces Assassinated*, THE GUARDIAN (Oct. 4, 2016, 2:13 PM), <https://www.theguardian.com/world/2016/oct/04/central-african-republic-armed-forces-assassinated>.

73. Press Release, African Union, President Idriss Déby Itno of Chad has Been Elected New Chairperson of the African Union, (Jan. 30, 2016).

74. *Democratic Republic of the Congo – Legal News*, MIRANDA LAW FIRM (Feb. – Apr. 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161006\\_3e93a7.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161006_3e93a7.pdf).

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2. *Insurance*

Under Decree 16/001 of January 16, 2016, a new insurance regulatory authority, safeguarding the rights of insured parties and beneficiaries, and ensuring sector solvency, was created.<sup>75</sup>

E. CONGO (REPUBLIC)

1. *Afreximbank Accession*

In March 2016, Congo authorized accession to the 1993 African Export-Import Bank agreement.<sup>76</sup> Afreximbank's objectives are to promote African trade and act as an intermediary to funding Africa with non-African exporters and importers.

2. *PM's Powers Enacted*

Following adoption of the Congolese Constitution by referendum in 2015, that, *inter alia*, created the Office of Prime Minister, Congo's Prime Minister enacted Decree 2016-175 of May 30, 2016, outlining his office's competencies, staff positions, organization, and missions.<sup>77</sup>

F. EQUATORIAL GUINEA

1. *New Data Protection Law Enacted*

With Law 1/2016 of July 22, Equatorial Guinea enacted a new data protection regime.<sup>78</sup> The regime is framed by principles set out in the European Data Protection Directive guaranteeing that personal data is not transferred without adequate consent or that processing of personal data does not take place for an unauthorised purpose.

2. *State Administration*

In 2016, the government enacted measures aimed at improving equal access to opportunities for women, tackling youth unemployment, and reducing crime.<sup>79</sup>

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75. *Id.*

76. *Republic of the Congo – Legal News*, MIRANDA LAW FIRM (May 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161007\\_905862.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161007_905862.pdf).

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78. *Equatorial Guinea – Legal News*, MIRANDA LAW FIRM (Nov. 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161129\\_c853d7.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161129_c853d7.pdf).

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G. GABON

1. *Gabon Re-joins OPEC*

After a twenty-one year absence, Gabon re-joined the Organization of the Petroleum Exporting Countries (OPEC) in July, looking to boost its declining oil production and alleviate pressure from a decline in oil prices.<sup>80</sup> Gabon originally joined OPEC in 1975 as its smallest member by oil production, but left in 1995 due to OPEC's high membership fees and the country's comparatively low oil production.

IV. East Africa

A. BURUNDI

1. *UN Security Council Approves Police Presence*

In March 2016, the UN Security Council resolved to deploy UN police to Burundi to monitor the security and human rights situation despite Burundi's objections claiming its forces were in control of the situation.<sup>81</sup> The African Union had abandoned a plan to send 5,000 peacekeepers after the Burundian government objected; 200 AU observers are expected to deploy instead.<sup>82</sup>

B. DJIBOUTI

1. *UMP Leader Wins Fourth Presidential Term*

In April 2016, the leading UMP party leader Ismail Omar Guelleh won a fourth consecutive five year term as president of Djibouti.<sup>83</sup> Guelleh had won the 2011 election after the country's parliament altered the constitution to allow him to extend his rule.<sup>84</sup>

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80. Timothy Han, *Former member Gabon Re-joins OPEC Following a 21 Year Absence*, NORTON ROSE FULBRIGHT INSIDE AFR. (Oct. 26, 2016), <http://www.insideafricalaw.com/blog/former-member-gabon-re-joins-opec-following-a-21-year-absence>.

81. *UN Security Council Approves Police Presence in Burundi*, AL JAZEERA (Apr. 2, 2016), <http://www.aljazeera.com/news/2016/04/security-council-approves-police-presence-burundi-160402050321283.html>.

82. *Id.*

83. *Ismail Guelleh Wins Fourth Term as Djibouti President*, AL JAZEERA (Apr. 9, 2016), <http://www.aljazeera.com/news/2016/04/ismail-guelleh-wins-fourth-term-djibouti-president-160409042824002.html>.

84. *Id.*

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C. ERITREA

1. *Human Rights Report*

In June 2016, the UN Commission of Inquiry (COI) on Human Rights in Eritrea issued a second report.<sup>85</sup> The report concluded that crimes against humanity including enslavement, forced disappearances, torture, and rape have been committed in a “widespread and systematic manner” in Eritrea over 25 years.<sup>86</sup> The COI, *inter alia*, recommends referral to the International Criminal Court.<sup>87</sup>

D. ETHIOPIA

1. *State of Emergency*

On October 8, 2016, Prime Minister Hailemariam Desalegn declared a six month state of emergency following widespread anti-government unrest.<sup>88</sup> Measures include curfews, restrictions on the opposition, and curbs on diplomats following attacks on foreign-owned businesses and demonstrations over land and political rights.<sup>89</sup> On October 20, 2016, authorities detained 1,645 suspects.<sup>90</sup>

E. KENYA

1. *Kenyan Police Charged with Kimani Murder*

In July 2016, four police officers were charged with the murder of lawyer Willie Kimani, his client Josephat Mwenda, and their driver Joseph Muiruri.<sup>91</sup> The bodies of the three men were discovered a week after Kimani filed a case against a police officer on behalf of Mwenda.<sup>92</sup> The killings sparked outrage, as police have been blamed for past extrajudicial killings inside Kenya; the government denies the existence of police death

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85. *Commission of Inquiry on Human Rights in Eritrea*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/HRC/CoIEritrea/Pages/commissioninquiryonhrinEritrea.aspx> (last visited October 7, 2016).

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87. *Id.*

88. Matina Stevis, *Ethiopia Investors Warily Eye Ethiopia Crackdown*, WALL STREET J. (Oct. 10, 2016, 9:57 AM), <http://www.wsj.com/articles/ethiopia-investors-warily-eye-ethiopia-crackdown-1476107838>.

89. Aaron Maasho & Andrew Heavens, *Ethiopia Arrests 1,645 ‘Ringleaders and Bandits’ in Crackdown on Violence*, REUTERS (Oct. 20, 2016, 10:58 AM), <http://www.reuters.com/article/us-ethiopia-protests-idUSKCN12K1X7>.

90. *Id.*

91. *Willie Kimani: Kenyan Police Charged with Murder*, BBC (July 18, 2016), <http://www.bbc.co.uk/news/world-africa-36824522>.

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squads, stating that killings were the work of “rogue officers.”<sup>93</sup> In September 2016, a fifth suspect was charged.<sup>94</sup>

F. RWANDA

1. *President to Seek Third Term*

Following changes to the constitution permitting him to seek a third term, Rwandan President Paul Kagame announced in January that he would again run for office in 2017.<sup>95</sup> Kagame disclaims wanting to be president for life.<sup>96</sup>

G. SEYCHELLES

1. *Seychelles Ranks High on ILAG Index*

In 2016, Seychelles rose to fourth position, behind Mauritius, Botswana, and Cape Verde, on the Ibrahim Index of African Governance which looks to safety and the rule of law, participation and human rights, human development, and sustainable economic opportunity.<sup>97</sup>

H. SOMALIA

1. *Somali Elections Postponed*

The postponed Somali elections gave rise to a complex system viewed as ‘the least objectionable compromise’ in the words of the UN special envoy to Somalia.<sup>98</sup> The process will take over a month and involves clan elders selecting delegates to 275 electoral colleges.<sup>99</sup>

Those colleges will then vote for a lower house of parliament distributed between the four majority and minority clans. In October 2016 Somalia’s new federal states selected 54 members of the upper house with a president and speakers of each house to be elected by November 30, 2016.<sup>100</sup>

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93. *Id.*

94. Cyrus Ombati, *Fifth Suspect in Lawyer Willie Kimani’s Murder Arrested*, STANDARD MEDIA (Sept. 15, 2016), <http://www.standardmedia.co.ke/article/2000216059/fifth-suspect-in-lawyer-willie-kimani-s-murder-arrested>.

95. Paul Richardson, *Kagame Says Will Run for Third Term in 2017 After Rwanda Law Change, But Doesn’t Want to Be President for Life*, MAIL & GUARDIAN (Jan. 1, 2016), <http://mgafrika.com/article/2016-01-01-kagame-says-will-run-for-third-term-in-2017-after-rwanda-law-change-but-doesnt-want-to-be-president-for-life>.

96. *Id.*

97. *Seychelles Climbs in ILAG Rankings*, SEYCHELLES NATION (Oct. 6, 2016), <http://www.nation.sc/article.html?id=251314>.

98. Mary Harper, *Somalia’s Rocky Road to Democracy*, BBC (Oct. 19, 2016), <http://www.bbc.co.uk/news/world-africa-37482832>.

99. *Id.*

100. *Id.*

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I. SOUTH SUDAN

1. *NGO Bill*

In February 2016, the South Sudanese president signed a law imposing new restrictions on non-governmental organizations operating in the country.<sup>101</sup> Provisions included the disclosure of funding sources, consent to monitoring and evaluation by the government, and requiring a minimum 80% of all employees of the NGO to hold South Sudanese citizenship.<sup>102</sup>

J. SUDAN (REPUBLIC)

1. *Constitutional Reform*

On October 10, 2016, Sudan concluded a far-reaching two-year National Dialogue held with political parties, armed movements, government officials, and non-governmental organizations, tribal leaders, religious groups, and others.<sup>103</sup> The resulting National Document agrees to establish a new constitution and framework for Sudan, with just three groups not signing on: the Justice and Equality Movement, the Sudan Liberation Army, and the Sudan People's Liberation Movement—North.<sup>104</sup>

K. TANZANIA

1. *Marriage Act Partially Unconstitutional*

In July 2016, the Tanzanian High Court found sections of the Tanzania Law of Marriage Act unconstitutional.<sup>105</sup> The act set a minimum age of 14 for girls to marry and 18 for boys which the High Court found to contravene provisions against gender discrimination.<sup>106</sup>

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101. *South Sudanese President Signs NGO Bill into Law*, SUDAN TRIB. (Feb. 11, 2016), <http://sudantribune.com/spip.php?article57988>.

102. *South Sudan: Laws Regulating Non-Governmental Organizations Enacted*, LIBR. OF CONGRESS (Feb. 16, 2016), <http://www.loc.gov/law/foreign-news/article/south-sudan-laws-regulating-non-governmental-organizations-enacted/>.

103. Lawrence Freeman, *National Dialogue Creates New Potential for Sudan*, CENTRE FOR RES. ON GLOBALIZATION (Oct. 15, 2016), <http://www.globalresearch.ca/national-dialogue-creates-new-potential-for-sudan/5551082>.

104. *Id.*

105. Elin Martinez & Alexandra Kotowski, *Dispatches: Tanzanian High Court Rules against Child Marriage*, HUM. RTS. WATCH (July 8, 2016), <https://www.hrw.org/news/2016/07/08/dispatches-tanzanian-high-court-rules-against-child-marriage>.

106. *Id.*



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L. UGANDA

1. *NGO Act Now Law*

The Non-Governmental Organizations Act was signed into law on January 30, 2016.<sup>107</sup> Under the law NGOs operating in the country must be registered with the government.<sup>108</sup> One of the most contentious sections prohibits “any act, which is prejudicial to the interests of Uganda and the dignity of the people of Uganda” which civil society groups, including LGBT organizations, fear may limit their ability to operate.<sup>109</sup>

V. Southern Africa

A. ANGOLA

1. *Amnesty Law Introduced*

In July 2016, Angola approved a law to release inmates with prison sentences of up to 12 years.<sup>110</sup> The law grants amnesty to prisoners convicted of common crimes who have completed at least half their sentences and will apply to national as well as foreign citizens.<sup>111</sup>

2. *Accession to New York Convention*

In August 2016, Angola acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>112</sup> The National Assembly also approved mediation and conciliation regimes as alternative conflict resolution mechanisms.<sup>113</sup>

B. COMOROS

1. *Former Coup Leader Elected President*

Former coup leader Azali Assoumani was elected president of Comoros in May after the elections were held for a second time due to voting

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107. Lizabeth Paulat, *Ugandan Parliament Passes Controversial NGO Bill*, VOA (Dec. 15, 2015, 1:02 PM), <http://www.voanews.com/a/uganda-ngo-bill/3104064.html>.

108. The Non-Governmental Organisations Act (2016) Cap. 1 § \_ (Rep. of Uganda) *available at* [http://www.ulii.org/ug/legislation/act/2016/1/The%20Non%20Governmental%20Organisations%20ACT%202016-1\(1\).pdf](http://www.ulii.org/ug/legislation/act/2016/1/The%20Non%20Governmental%20Organisations%20ACT%202016-1(1).pdf).

109. *Id.*

110. Herculano Coroado et. all, *Angola's Government to Release Thousands of Inmates to Free Up Overloaded Jails*, REUTERS (July 21, 2016), <http://af.reuters.com/article/topNews/idAFKCN1012PQ>.

111. *Id.*

112. *Legal News: Angola*, MIRANDA LAW FIRM (Aug. 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161005\\_f7f93a.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161005_f7f93a.pdf).

113. *Id.*

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irregularities.<sup>114</sup> Assoumani's victory over the ruling party's candidate Mohamed Ali Soilihi was marred by broken ballot boxes, interruptions, ballot stuffing accusations, and violence.<sup>115</sup>

C. BOTSWANA

1. *Fracking Rights Sold*

In late 2015, Botswana sold rights to a UK energy company to drill in protected Kgalagadi Park lands along the South African border. Conservationists and park officials expressed concern about the impact on wildlife from the drilling that would occur.<sup>116</sup>

2. *Botswana Affirms ICC Commitment*

Botswana criticized neighboring South Africa's decision in October 2016 to withdraw from the International Criminal Court, finding the move incompatible with obligations to the African Union and stating that it "betrays the rights of the victims of atrocious crimes to justice and. . . undermines the progress made to date in the global efforts to fight impunity."<sup>117</sup> Botswana reaffirmed its commitment to the ICC.<sup>118</sup>

D. LESOTHO

1. *Vice Chancellor Survives Attack*

On May 6, 2016, Acting Vice Chancellor of the National University of Lesotho Professor Mafa Sejananmane and his family survived a gunshot attack at his home in Lesotho.<sup>119</sup> The African Union Commission expressed concern at the deteriorating state of the rule of law and human rights in Lesotho and supported the Southern African Development Community (SADC) to implement the Phumaphi report and address the political crisis in Lesotho.<sup>120</sup>

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114. *Assoumani Officially Declared President-Elect of Comoros*, AFR. NEWS (May 16, 2016), <http://www.africanews.com/2016/05/16/assoumani-officially-declared-president-elect-of-comoros/>.

115. *Id.*

116. Jeff Barbee, *Botswana Sells Fracking Rights in National Park*, THE GUARDIAN (Dec. 2, 2015), <https://www.theguardian.com/environment/2015/dec/02/botswana-sells-fracking-rights-in-national-park>.

117. Chika Udeh, *Botswana Condemns SA's Withdrawal From the ICC*, BUZZ S. AFR. (Oct. 26, 2016), <http://buzzsouthafrica.com/botswana-condemns-sas-withdrawal-from-the-icc-2/>.

118. *Id.*

119. Press Release, African Union, AU Expresses Concern over Political Developments in the Kingdom of Lesotho, (May 16, 2016).

120. *Id.*

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E. MADAGASCAR

1. *President Names New PM*

In April 2016, President Hery Rajaonarimampianina appointed the interior minister, Solonandrasana Olivier Mahafaly, as the new prime minister, two days after a confused announcement over the resignation of the previous office-holder.<sup>121</sup> The president's office had announced that Prime Minister Jean Ravelonarivo and his cabinet had resigned, an action Ravelonarivo denied.<sup>122</sup> Mahafaly was confirmed as prime minister and head of government.<sup>123</sup>

F. MALAWI

1. *Land Bills Signed Into Law*

In 2016, President Peter Mutharika signed a series of Land Bills into law, purportedly to enact policies from the 2002 Land Policy.<sup>124</sup> Proponents highlight provisions allowing for the registration of customary land to individuals (including women).<sup>125</sup> Critics say the legislation stripped tribal chiefs of traditional powers and that the new laws failed to address historical imbalances with foreigners.<sup>126</sup>

G. MAURITIUS

1. *ICCA Comes to Mauritius*

In May 2016, Mauritius hosted the 23rd Congress of the International Council for Commercial Arbitration, the first time the ICCA has held its bi-annual Congress in Africa.<sup>127</sup> Mauritius has made conscious reforms to update its legislation (enacting the International Arbitration Act 2008), establish a new arbitral institution (with the London Court of International Arbitration), and create a panel of arbitration judges within its judiciary.<sup>128</sup>

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121. Lovasoa Rabary, *Madagascar President Names New PM After Resignation Confusion*, REUTERS (Apr. 10, 2016, 2:36 PM), <http://www.reuters.com/article/us-madagascar-politics-idUSKCN0X70TA>.

122. *Id.*

123. *Id.*

124. Zawadi Chilunga, *Malawi President Mutharika Assents to Land Bills*, ALLAFRICA (Sept. 14, 2016), <http://allafrica.com/stories/201609140735.html>.

125. *Id.*

126. Brian Ligomeka, *Malawi's New Land Bill Protects Descendants of Colonial Settlers*, NEWS 24 (July 15, 2016), <http://www.news24.com/Africa/News/malawis-new-land-bill-protects-descendants-of-colonial-settlers-20160715>.

127. *ICCA 2016 Congress Mauritius: 8-11 May 2016*, ICCA [http://www.arbitration-icca.org/conferences-and-congresses/ICCA\\_2016\\_Congress\\_Mauritius.html](http://www.arbitration-icca.org/conferences-and-congresses/ICCA_2016_Congress_Mauritius.html). (last visited Mar. 23, 2017).

128. *ICCA Comes to Mauritius*, THOMSON REUTERS: PRAC. LAW ARB. BLOG (Apr. 26, 2016), <http://arbitrationblog.practicallaw.com/icca-comes-to-mauritius/>.

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H. MOZAMBIQUE

1. *Banking*

In 2016 the Mozambique Central Bank imposed limits on using international bank cards to make payments abroad, with a maximum annual limit of about \$9,100 U.S.D.<sup>129</sup> Fees charged by the Mozambique Stock Exchange and the Securities Central in transactions with treasury bonds used as collateral in the interbank money market were exempted.<sup>130</sup>

2. *Health*

In 2016, in accord with Decree 48/2015 of December 31, 2015, the Council of Ministers created the Medical Emergency Service of Mozambique (SEMMO) responsible for the Medical Emergency Integrated System.<sup>131</sup>

I. NAMIBIA

1. *Namibian Citizenship*

Referring to Article 4 of the Namibian Constitution which provides that those born in Namibia “whose fathers or mothers are ordinarily resident in Namibia at the time of their birth” (and not illegal immigrants or diplomats), are Namibian citizens by birth, the Supreme Court ruled in 2016 that “ordinarily resident” includes parents on work visas, as considered on a case-by-case basis.<sup>132</sup> Factors include whether the person normally lives in Namibia and whether objective proof shows the person’s intention to make Namibia their habitual home.<sup>133</sup>

J. SOUTH AFRICA

1. *Court Rulings Against President Zuma*

In March 2016, South Africa’s highest court ruled that President Jacob Zuma had violated the constitution by refusing to pay back some of the millions in state funds spent to remodel his private home.<sup>134</sup> The High Court of Appeals also overturned a 2009 decision by the National

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129. *Legal News: Mozambique*, MIRANDA LAW FIRM (November 2015-January 2016), [http://www.mirandalawfirm.com/uploadedfiles/20161007\\_981e8f.pdf](http://www.mirandalawfirm.com/uploadedfiles/20161007_981e8f.pdf).

130. *Id.*

131. *Id.*

132. See Werner Menges, *Supreme Court Confirms Child’s Citizenship Right*, THE NAMIBIAN (June 24, 2016), <http://www.namibian.com.na/152360/archive-read/Supreme-Court-confirms-childs-citizenship-right>.

133. Toni Hancox & Dianne Hubbard, *A Constitutional Crisis?*, THE NAMIBIAN (July 22, 2016), <http://www.namibian.com.na/153494/archive-read/A-Constitutional-Crisis>.

134. Norimitsu Onishi, *Jacob Zuma’s Home Improvements Violated South Africa’s Constitution, Court Finds*, NEW YORK TIMES (Mar. 31, 2016), [http://www.nytimes.com/2016/04/01/world/africa/south-africa-court-president-jacob-zuma.html?\\_r=0](http://www.nytimes.com/2016/04/01/world/africa/south-africa-court-president-jacob-zuma.html?_r=0).

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Prosecuting Authority to drop 783 corruption charges against him, ruling the decision was “irrational.”<sup>135</sup>

K. SWAZILAND

1. *King May Overrule or Ignore High Court Ruling*

In September 2016, Swaziland’s High Court declared most of the Suppression of Terrorism Act and the Sedition and Subversive Activities Act unconstitutional.<sup>136</sup> But a 1973 Royal Decree appears to remain the country’s supreme law pursuant to which powers vested in King Mswati III may allow for the court ruling to be set aside by royal proclamation or simply ignored.<sup>137</sup>

L. ZAMBIA

1. *Constitutional Changes Precede Election*

On January 5, 2016, President Edgar Lungu approved a new constitution, *inter alia*, setting a date for the next elections.<sup>138</sup> Lungu was re-elected in August with 50.35% of the vote, just over the 50% needed to avoid a second round under the new system, defeating Hakainde Hichilema who alleged electoral fraud.<sup>139</sup>

M. ZIMBABWE

1. *Child Marriage Outlawed*

In January 2016, the Constitutional Court of Zimbabwe outlawed child marriage, ruling that the Constitution set a minimum age of 18 and striking down contrary laws.<sup>140</sup>

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135. Ed Cropley, *South Africa’s Finance Minister Dismisses ‘Frivolous Fraud Charge*, REUTERS (Oct. 14, 2016), <http://www.reuters.com/article/us-safrica-gordhan-idUSKBN12E0YQ>.

136. Gary van Staden, *Opinion: Swazi Court Throws out Terror Act but Victory May Be Short-Lived*, CNBC (Sept. 22, 2016), <http://www.cnbc.com/news/southern-africa/2016/09/22/swaziland-court-throws-out-terror-act-but-victory-may-be-short-lived/>.

137. *Id.*

138. Constance Johnson, *Zambia: Constitutional Changes on Citizenship, Elections*, LIB. OF CONGRESS: GLOBAL LEGAL MONITOR (Jan. 13, 2016), <http://www.loc.gov/law/foreign-news/article/zambia-constitutional-changes-on-citizenship-elections/>.

139. *Zambia’s President Edgar Lungu Declared Election Winner*, BBC (Aug. 15, 2016), <http://www.bbc.co.uk/news/world-africa-37086365> (last visited November 20, 2016).

140. Sebastian Mhofu, *Zimbabwe’s Constitutional Court Outlaws Child Marriages*, VOA (Jan. 20, 2016), <http://www.voanews.com/a/zimbabwe-constitutional-court-outlaws-child-marriages/3154549.html>.

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2. *Unconstitutional: Life Imprisonment Without Parole*

In July 2016, the Constitutional Court ruled life imprisonment without the possibility of parole or release on license process unconstitutional.<sup>141</sup> The court ordered that all prisoners serving life imprisonment sentences be eligible for parole and released on licence pending legislative amendment.<sup>142</sup>

**VI. African Institutions**

A. AFRICAN UNION

1. *Commission Elections Postponed*

Elections to the AU's Commission scheduled for the 27th Heads of State Assembly of the AU in July, including the chairmanship, were postponed to January 2017 after the matter deadlocked. South African Dr. Nkosazana Dlamini-Zuma remains chair until the elections.<sup>143</sup>

B. ECOWAS

1. *ECOWAS Court Finds Against Nigeria*

In October 2016, the court of the Economic Community of West African States ruled that Nigeria acted unlawfully, *inter alia*, in arresting former Nigerian National Security Advisor Sambo Dasuki.<sup>144</sup> Dasuki, who faces trial in Nigeria for the alleged diversion of \$2.1 billion U.S.D. to purchase arms in the past administration, turned to the ECOWAS court when rearrested by Nigeria's State Security Service after meeting bail.<sup>145</sup>

C. EAST AFRICAN COMMUNITY

1. *EALA Former Speaker Hearings*

In July 2016, the East African Court of Justice heard the matter of former Speaker of the East African Legislative Assembly, Ugandan Margaret Nantongo Zziwa, who was impeached in 2014.<sup>146</sup> Zziwa, who claims her

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141. Obediah Makoni v. Commissioner of Prisons and Minister of Justice Legal and Parliamentary Affairs, Judgment No CCZ 8/16, Const. Application No. CCZ 48/15, ZWCC 8 (July 13, 2016).

142. *Id.*

143. See John Mukum Mbaku, *Stalemate in Kigali: African Union Fails to Elect a Chairperson*, BROOKINGS INST. (July 21, 2016), <https://www.brookings.edu/blog/africa-in-focus/2016/07/21/stalemate-in-kigali-african-union-fails-to-elect-a-chairperson/>.

144. Evelyn Okakwu, *ECOWAS Court Orders Dasuki's Release, Imposes N15 Million Fine on Nigerian Government*, PREMIUM TIMES (Oct. 4, 2016), <http://www.premiumtimesng.com/news/headlines/211938-ecowas-court-orders-dasukis-release-imposes-n15-million-fine-on-nigerian-government.html>.

145. *Id.*

146. See *Former EALA Speaker Wants Her Job Back*, IGIHE (Aug. 1, 2016), <http://www.en.igihe.com/news/former-eala-speaker-wants-her-job-back.html>.

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removal from office was unlawful on technical grounds under the Treaty for the Establishment of the East African Community, has sought reinstatement and compensation of \$2 million U.S.D.<sup>147</sup>

2. *EAC Delays EU Trade Deal*

In September 2016, Tanzania delayed the East African bloc's conclusion of an EU Economic Partnership Agreement with Uganda, stating the deal needed further consideration.<sup>148</sup> Kenya and Rwanda have signed the agreement which grants the EU free access to the EAC with lower export tariffs for the bloc to Europe, but the agreement needs approval from all members of the EAC.<sup>149</sup>

D. AFRICAN DEVELOPMENT BANK (AfDB)

1. *Jumbo Loans to Power South African*

In July 2016, the AfDB signed loan facilities of \$1.34 billion U.S.D. with South Africa's power utility, Eskom, for capital expenditure aimed at boosting electricity generation in the continent by approximately 10%.<sup>150</sup> Eskom's capital expenditure program for 2016-20 covers investments in new generation, plant refurbishment, transmission lines, and capacity-building over \$17 billion U.S.D.<sup>151</sup> The agreement constitutes the largest syndicated loan approved to date in Africa.<sup>152</sup>

E. AFRICAN EXPORT-IMPORT BANK

1. *Export Development Fund Established*

In November 2016, Afreximbank announced it was establishing a "Fund for Africa Export Development" to help African countries respond to recurrent adverse economic shocks.<sup>153</sup>

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147. *Id.*

148. Fumbuka Ng'wanakilala, *East African Community Says Will Delay Signing Trade Deal with EU*, REUTERS (Sept. 8, 2016) <http://www.reuters.com/article/us-africa-trade-idUSKCN11E1UM>.

149. *Id.*

150. Press Release, African Development Bank, *Lighting Up and Powering Africa: AfDB Boosts Eskom's Electricity Generation Capacity with a USD 1.34 Billion Jumbo Loan* (July 8, 2016).

151. *Id.*

152. *Id.*

153. *Afreximbank Announces Export Development Fund*, AFR. EXPORT-IMPORT BANK (Nov. 22, 2016), <https://afreximbank.com/afreximbank-announces-export-development-fund/>.

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F. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

1. *EU Trade Agreement*

In June 2016, the EU signed an Economic Partnership Agreement with SADC countries Botswana, Lesotho, Mozambique, Namibia, South Africa, and Swaziland.<sup>154</sup> SADC members including the DR Congo, Madagascar, Malawi, Mauritius, Zambia, and Zimbabwe are negotiating EU agreements through other regional groups.<sup>155</sup>

G. COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA

1. *Madagascar Assumes Comesa Leadership*

Madagascar hosted Comesa's 2016 summit in October with the country's president Hery Rajaonarimampianina assuming its leadership.<sup>156</sup> Since last January, Antananarivo has hosted at least five major international meetings.<sup>157</sup>

H. ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES (ECCAS)

1. *ECCAS Creates AIDS Fund*

In February 2016, ECCAS health ministers established a fund to reinforce the region's AIDS response.<sup>158</sup> The ministers set up a unit to improve cross-border HIV prevention and a mechanism to source antiretroviral medicines aiming to increase the proportion of pregnant women and children receiving antiretroviral medicines.<sup>159</sup>

I. UNION DU MAGHREB ARABE (UMA)

1. *Tunisian Secretary General Elected*

On May 5, 2016, former Tunisian Minister of Foreign Affairs Taieb Bacchouche succeeded his compatriot Habib Ben Yehya as Secretary

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154. *South African Development Community (SADC)*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/> (last visited Apr. 8, 2017).

155. *SADC Legal Texts and Policy Documents*, TRALAC (Nov. 4, 2016), <https://www.tralac.org/resources/by-region/sadc.html>.

156. Rivonala Razafison, *Madagascar to Host 2016 Comesa Summit*, AFR. REV. (Apr. 3, 2015), <http://www.africareview.com/news/Madagascar-to-host-Comesa-summit-next-year/979180-2675352-314xyz/index.html>.

157. *Id.*

158. Press Release, UNAIDS, *Economic Community of Central African States Creates a Special Fund for Health to Strengthen its Response to Aids*, (Feb. 12, 2016).

159. *Id.*



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General of UMA.<sup>160</sup> Established in 1964, the Union was inactive until 1999 and calls persist for it to have a greater role.<sup>161</sup>

J. OHADA

1. *Agreements in Intellectual Property and Arbitration*

In May 2016, the predominantly West African Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) signed a Cooperation Agreement with the African Organization for Intellectual Property (OAPI).<sup>162</sup> In June 2016, it concluded a Partnership Agreement with the Paris-based International Chamber of Commerce's International Court of Arbitration.<sup>163</sup>

2. *Insolvency Law*

In October 2016, the World Bank determined that the 17 members of OHADA had, *inter alia*, implemented the Uniform Act on Insolvency Law, which it is revising with respect to business accounting.<sup>164</sup>

K. UN MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS (UNMICT)

1. *UNMICT President Gives Fourth Annual Report*

In November 2016, UNMICT President Theodor Meron presented the Mechanism's fourth Annual Report to the UN General Assembly.<sup>165</sup> Meron recalled that, with the closure of the UN International Criminal Tribunal for Rwanda in 2015, the Mechanism had assumed its remaining functions.<sup>166</sup>

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160. *Union du Maghreb Arabe: un Tunisien nouveau secrétaire général* [Union of the Arab Maghreb: a Tunisian New Secretary General], AUJOURD'HUI (May 5, 2016), <http://aujourd'hui.ma/actualite/union-du-maghreb-arabe-un-tunisien-nouveau-secretaire-general>.

161. Ghita Ismaili, *Terrorisme: La Tunisie veut renforcer sa coopération avec le Maroc* [Terrorism: Tunisia Wants to Reinforce its Cooperation with Morocco], AL HUFFINGTON POST (May 11, 2016), [http://www.huffpostmaghreb.com/2016/05/11/terrorisme-tunisie-maroc\\_n\\_9900672.html](http://www.huffpostmaghreb.com/2016/05/11/terrorisme-tunisie-maroc_n_9900672.html).

162. *OAPI, L'OAPI et l'OHADA accordant leur violon* [OAPI and OHADA Get Their Acts Together], <http://www.oapi.int/index.php/fr/toute-lactualite/615-loapi-et-lohada-accordent-leur-violon> (last visited Nov. 26, 2016).

163. Press Release, The Permanent Secretary of OHADA, Professor Dorothé SOSSA Signs a Partnership Agreement With the President of the International Court of Arbitration of the International Chamber of Commerce of Paris, Mr. Alexis MOURRE, OHADA-ICC Cooperation, (June 23, 2016).

164. *Doing Business 2017: Equal Opportunity for All*, WORLD BANK, <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf> (last visited Apr. 8, 2017).

165. Press Release, UNMICT, President Meron Presents Fourth Annual Report to the United Nations General Assembly and Calls on Turkey to Release Judge Aydin Sefa Akay from Detention, <http://www.unmict.org/en/news/president-meron-presents-fourth-annual-report-uk-16> (Nov. 9, 2016).

166. *Id.*

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## Asia Pacific

CONTRIBUTORS: DOMINIQUE HOGAN-DORAN SC AND DR. STEPHEN TULLY (AUSTRALIA); STEVE SAUNDERS, NAKO INOUE SHATZ, KYOTA KONNAI (JAPAN); YAP YEONG HUI, TRISHELEA SANDOSAM (MALAYSIA); SATYAJIT GUPTA (MYANMAR); AND RICARDO SILVA (TIMOR LESTE). EDITOR: JUSTIN G. PERSAUD

### I. Australia

#### A. GENERAL MATTERS

Federal legislation was passed in 2016, including the *Food Standards Australia New Zealand Amendment (Forum on Food Regulation and Other Measures) Act 2016* (No. 7, 2016),<sup>1</sup> *Offshore Petroleum and Greenhouse Gas Storage Amendment Act 2016* (No. 13, 2016),<sup>2</sup> *Courts Administration Legislation Amendment Act 2016* (No. 24, 2016),<sup>3</sup> and *Northern Australia Infrastructure Facility Act 2016* (No. 41, 2016).<sup>4</sup>

#### B. PUBLIC INTERNATIONAL LAW

The Australian courts were involved in a series of cases that touched upon public international law. One court held no customary international legal rule or general principle existed under which an individual can acquire rights of private ownership over *terra nullius*—here, islands not yet claimed by any State—which States must recognize.<sup>5</sup> In another case, Nauru was held to be immune from jurisdiction after an indemnity was sought for counter-claims it made.<sup>6</sup> The court also examined immunity when assessing the income tax liability of a former officer of international organizations.<sup>7</sup>

Other cases addressed an attempt to identify patients, which was rejected by reference to privacy.<sup>8</sup> Likewise, a smoking ban was assessed in light of a patient's right to dignity.<sup>9</sup> The court also looked at individual liberty, in the

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1. *Food Standards Australia New Zealand Amendment (Forum on Food Regulation and Other Measures) Act 2016* (Cth) (Austl.).

2. *Offshore Petroleum and Greenhouse Gas Storage Amendment Act 2016* (Cth) (Austl.).

3. *Courts Administration Legislation Amendment Act 2016* (Cth) (Austl.).

4. *Northern Australia Infrastructure Facility Act 2016* (Cth) (Austl.).

5. See *Ure v The Commonwealth* [2016] 236 FCR 458 (Austl.).

6. See *Bannon v Nauru Phosphate Royalties Trust* [No.1] [2016] 311 FLR 93 (Austl.).

7. See *Commissioner of Taxation v Jayasinghe* (Unreported, Federal Court of Australia, Allsop CJ et al., 9 June 2016).

8. See *Tikiri Pty Ltd v Fung* (Unreported, Supreme Court of Victoria, Ierodiaconou AsJ, 5 Aug. 2016) (Austl.).

9. See *De Bruyn v Victorian Inst of Forensic Mental Health* [2016] 48 VR 647 (Austl.).

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context of executive power, that prolonged detention.<sup>10</sup> Finally, the court determined that the construction given under Australian law to “intentionally inflicted” in the definitions of “torture” and “cruel or inhuman treatment or punishment” and of “intended to cause” in the definition of “degrading treatment or punishment” did not require considering treaties.<sup>11</sup>

With respect to international child abduction, one court overturned a finding that a child could be habitually resident in two States. Another court determined that no judicial discretion existed to order a child’s return if settled in Australia.<sup>12</sup>

Other court decisions in Australia included, *inter alia*:

- A Commonwealth law authorizing Australia’s participation in detaining asylum seekers on Nauru was constitutionally valid.<sup>13</sup>
- The application of the foreign act of State doctrine.
- Australia’s non-refoulement obligations.<sup>14</sup>
- Non-mandatory considerations when cancelling visas because protection visa applications can be made.<sup>15</sup>
- Amendments in a class action by asylum seekers detained on Christmas Island, determining that Australia had a duty of care to provide healthcare to them.<sup>16</sup>
- The Minister for Immigration and Border Protection (MIBP) was obliged to exercise reasonable care to discharge the responsibility he assumed to procure an abortion for an asylum seeker relocated to Papua New Guinea.<sup>17</sup>
- The consistency of trade practices legislation with Australia’s international obligations was considered.<sup>18</sup>
- An application to set aside an arbitral award by reference to the Model Law on International Commercial Arbitration was unsuccessful.<sup>19</sup>

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10. See *Foster v Shaddock* (Unreported, Supreme Court of Queensland, Atkinson J, 17 June 2016) 43 (Austl.).

11. See *SZTAL v Minister for Immigration and Border Protection* [2016] 243 FCR 556 (Austl.).

12. See *State Cent Auth. & Gedeon* (Unreported, Family Court of Australia, Dawe J, 5 Aug. 2016).

13. See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] 257 CLR 42 (Austl.).

14. See *BCR16 v Minister of Immigration and Border Protection* (Unreported, Federal Court of Australia, Moshinsky J, 17 Aug 2016) (Austl.).

15. See *Minister of Immigration and Border Protection v Le* (Unreported, Federal Court of Australia, Allsop CJ, 9 Sep 2016).

16. See *AS v Minister of Immigration and Border Protection (Ruling No 4)* (Unreported, Supreme Court of Victoria, Forrest J, 30 June 2016) (Austl.).

17. See *Plaintiff S99/2016 v Minister of Immigration and Border Protection* [2016] 243 FCR 17 (Austl.).

18. See *Australian Competition and Consumer Comm’n v P T Garuda Indonesia Ltd* [2016] 244 FCR 190.

19. See *Sino Dragon Trading Ltd v Noble Resources Int’l Pte Ltd* (Unreported, Federal Court of Australia, Beach J, 13 Sep 2016).

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Courts also reviewed an unsuccessful challenge to a ministerial decision to approve a coal mine project, given emission impacts on the Great Barrier Reef, which occasioned consideration of the precautionary principle and Australia's obligations under the World Heritage Convention.<sup>20</sup> Additionally, a claim on a maritime lien so characterized under the law of the place where it attached will be maintainable in Australia even if no such lien would attach if the same events occurred in Australia.<sup>21</sup>

**C. PRIVATE INTERNATIONAL LAW**

Several cases impacting private international law were also decided in 2016. One court discussed when foreign judgments were sought to be recognized and enforced.<sup>22</sup> Another court set aside a judgment because the foreign court lacked jurisdiction.<sup>23</sup> Another court stayed the execution of a registered judgment pending appeal in the foreign court.<sup>24</sup>

Other cases on private international law included:

- The “conflict of laws” clause in the Australian Consumer Law in circumstances in which the real and closest connection of a contract was not Australian law.<sup>25</sup>
- Seeking to serve subpoenas on foreign entities located outside Australia.<sup>26</sup>
- Not infringing on the comity of nations;
- The relevancy of a State's banking secrecy laws;<sup>27</sup> and
- Consideration of certain articles of the Model Law on Cross-Border Insolvency.<sup>28</sup>

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20. See *Australian Conservation Found Inc v Minister for the Env't* (Unreported, Federal Court of Australia, Griffiths J, 29 Aug 2016).

21. See *Ship “Sam Hawk” v Reiter Petroleum Inc* (Unreported, Federal Court of Australia, Allsop CJ et al., 28 Sep 2016).

22. See *Talacko v Talacko* (Unreported, Supreme Court of Victoria Court of Appeal, Ashley JA et al., 28 July 2016) (Austl.); see also *Bank of South Pac Tonga v Emberson* (Unreported, Supreme Court New South Wales, Wilson J, 1 Apr 2016) (Austl.); see also *Resorts World at Sentosa Pte Ltd v Kok* (Unreported, Supreme Court of Western Australia, Sanderson Master, 30 Mar 2016).

23. See *Privatbrauerei Erdinger Weissrau Werner Brombach Gmbh v World Brands Australia Pty Ltd* (Unreported, Supreme Court of Western Australia, Gething AMaster, 15 Jan 2016).

24. See *LFDB v SM (No 2)* (Unreported, Federal Court of Australia, Griffiths J, 23 Mar 2016).

25. See *Australian Competition and Consumer Comm'n v Valve Corp (No 3)* (Unreported, Federal Court of Australia, Edelman J, 24 Mar 2016).

26. See *Titan Enter (Qld) Pty Ltd v Cross* (Unreported, Federal Court of Australia, Logan J, 19 Oct 2016).

27. See *Ceramic Fuel Cells Ltd (In Liq) v McGraw-Hill Fin, Inc (No 2)* (Unreported, Federal Court of Australia, Wigney J, 10 Aug 2016).

28. See *Legend Int'l Holdings Inc (as debtor in possession of the assets of Legend Int'l Holdings Inc) v Legend Int'l Holdings Inc* (Unreported, Supreme Court of Victoria, Randall AsJ, 2 June 2016) (Austl.); see also *Wood v Astra Res Ltd (UK Co No 07620218)* (Unreported, Federal Court of Australia, White J, 7 Oct 2016).

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**D. OTHER DEVELOPMENTS**

Significant treaty action included the entry into force of implementing resolutions from the International Maritime Organisation, an air services agreement with Laos, and an agreement on port state measures to prevent illegal fishing.

Developments also arose in international arbitration. The Permanent Court of Arbitration determined that it lacked jurisdiction to consider claims by Philip Morris Asia Ltd. and that Australia's plain packaging legislation was expropriation under an investment protection agreement.<sup>29</sup> A Commission decided that it was competent to continue conciliation concerning the maritime boundary between Timor-Leste and Australia.<sup>30</sup>

**II. Japan**

**A. CONSTITUTIONAL CHANGES<sup>31</sup>**

Japan's lower house of parliament voted in September 2015 to allow Japanese Self Defense Forces (SDF) to participate in military action even though Japan is not directly threatened. Following Upper House elections in July 2016, the ruling Liberal Democratic Party now has enough votes in both houses of the Parliament to propose actual changes to the law.<sup>32</sup> The proposal is still controversial with most people opposed to any change.

A bill passed in 2015 that lowered the age for voting to eighteen years of age. The law took effect in June 2016 just in time for the Upper House election on July 10. The increase in the number of voters was estimated to be only two percent, and many people in the new voter rolls may have been unaware of the change or did not participate in the vote. Following that change, further discussions suggested lowering the Age of Majority from the current age twenty to age eighteen by amending the Civil Code.<sup>33</sup>

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29. Philip Morris Asia Ltd (China) v. Commonwealth (Austl.), Case No. 2012-12, Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2015), [http://www.italaw.com/sites/default/files/case-documents/italaw7303\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf).

30. Conciliation between Timor-Leste and Commonwealth (Austl.), Case No. 2016-10, PCA Case Repository, Decision on Competence (Perm. Ct. Arb. 2016).

31. The Japan sections on Constitutional Changes and Cyber Law were authored by Steve Saunders. The Japan section on Significant Changes in Business Law in Japan in 2016 was contributed by Naoko Inoue Shatz and Kyota Konnai. Naoko Inoue Shatz is the managing attorney at Shatz Law Group PLLC and licensed to practice in Washington State and New York State. Her primary areas of practice are corporate law, employment law, and commercial litigation. Kyota Konnai is a visiting foreign attorney at Shatz Law Group PLLC and licensed to practice in Japan (temporarily inactive while in the United States).

32. *Diet Panel Reopens Talks on Constitutional Revision for First Time Since February*, THE JAPAN TIMES (Nov. 16, 2016), <http://www.japantimes.co.jp/news/2016/11/16/national/politics-diplomacy/diet-panel-reopens-talks-constitutional-revision-first-time-since-february/#page>.

33. Reiji Yoshida, *Age of Adulthood Targeted for Revision Next Year*, THE JAPAN TIMES (Sep. 1, 2016), <http://www.japantimes.co.jp/news/2016/09/01/national/age-adulthood-targeted-revision-next-year/#.WPk181MrLV0>.

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**B. CYBER LAW**

In October 2014, the Tokyo District Court ordered Google to remove information from its search engine about a man who was alleged to have been involved in criminal activity. In December 2015, the same court also ordered Yahoo to remove the same information from its search engine database. The court reasoned that it was a violation of the plaintiff's right to privacy. On December 8, 2015, the Sapporo District Court also issued an injunction requiring Google to remove information about the plaintiff's arrest and fine in 2003. The judge ruled that this was no longer a socially significant issue.<sup>34</sup> The decision seems to parallel developments in personal privacy rights in the European Union.

**C. SIGNIFICANT CHANGES IN BUSINESS LAW IN JAPAN IN 2016**

First, the amendment to the Companies Act came into effect on May 1, 2015. In particular, Article 327-2 of the amended Act requires publicly traded companies to explain, during their annual shareholders meetings, their reasons why it is not appropriate to have an outside director who is familiar with foreign investments. The Act does not mandate the companies subject to compliance to appoint an outside director, yet 95.8 percent of the publicly traded companies have designated at least one outside director as of July 14, 2016.<sup>35</sup>

This amended Act also requires publicly traded companies to provide a new corporate governance audit and supervisory committee by way of a "Company with Audit and Supervisory Committee."<sup>36</sup> This caused about 680 out of about 3,500 publicly traded companies to set up their internal audit and supervisory committee by June 2016.<sup>37</sup>

Second, the Securities Listing Regulations Rule 436-3 and Rule 445-3 regarding Japan's Corporate Governance Code were created and became effective in June 2015. Rule 436-3 requires publicly traded companies to explain reasons for compliance or non-compliance with seventy-three Principles of the Corporate Governance Code in their "Report Concerning

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34. *Yahoo, Google Ordered by Courts in Tokyo, Sapporo to Cut Search Results Suggesting Criminal Behavior*, THE JAPAN TIMES (Dec. 8, 2015), <http://www.japantimes.co.jp/news/2015/12/08/national/crime-legal/court-tells-yahoo-japan-like-told-google-strike-search-results-plaintiff/#.VpsVl1KNPig>.

35. TOKYO STOCK EXCHANGE, INC., APPOINTMENT OF INDEPENDENT DIRECTORS BY TSE-LISTED COMPANIES [FINAL FIGURES] 5 (2016), available at <http://www.jpx.co.jp/english/news/1020/b5b4pj00000170dd-att/20160727-2.pdf>.

36. Kaisha-ho [Companies Act], Law No. 86 of 2005, art. 327 (Japan), translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> (Japan).

37. US ISS "Four or More Outside Directors" Requested Company with Audit Committee, NIKKEI SINBUN (Japan), July 2, 2016, <http://www.nikkei.com/article/DGXLZO04372280R00C16A7DTA000/>.

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Corporate Governance.”<sup>38</sup> Because Principle 4.8 under Rule 436-3 of the Corporate Governance Code requires publicly traded companies to appoint at least two independent directors, 60.4 percent of the companies subject to the compliance had designated more than two independent directors as of July 14, 2016.<sup>39</sup>

Third, the government published several administrative orders to create an enforcement mechanism under the Revised Act on the Protection of Personal Information in 2016. In 2015, this Act created a new category of highly protected personal information, called “sensitive personal information,”<sup>40</sup> and authorized the usage of numerous anonymous data for business purposes. To ensure compliance with the Act, these administrative orders became effective in January 2017.<sup>41</sup>

Finally, two revisions of competition laws became effective in 2016. Those are: (1) the Revised Unfair Competition Prevention Act, which strengthens protections of trade secrets;<sup>42</sup> and (2) the Revised Act against Unjustifiable Premiums and Misleading Representations, which creates new enforcement method to prevent misleading representations in businesses.<sup>43</sup>

### III. Malaysia<sup>44</sup>

#### A. COMPANIES ACT 2016

The Companies Act 2016 introduces extensive changes to the existing company law regime in Malaysia in line with modern business practices by simplifying procedures and reducing costs while improving internal controls, governance, and corporate responsibility.<sup>45</sup> The Act enables incorporation of single-member, single-resident director companies; however, the need to have two resident directors for public companies is retained. Additionally, the Memorandum and Articles of Association will be replaced with an optional Constitution. The Act will set out default processes and provisions

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38. TOKYO STOCK EXCHANGE, INC., YUKASHOKEN JYOJYO KITEI (SECURITIES LISTING REGULATIONS) 80 (2016), *available at* [http://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq000001vyt-att/securities\\_listing\\_regulations\\_\(r1-r826\)\\_20161104.pdf](http://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq000001vyt-att/securities_listing_regulations_(r1-r826)_20161104.pdf).

39. TOKYO STOCK EXCHANGE, INC., *supra* note 35, at 4.

40. Kojin joho hogo ho [Act on the Protection of Personal Information], Law No. 65 of 2015, art. 2 para. 3 (Japan), translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> (Japan).

41. *See id.*, art. 36.

42. Fusei kyoso boshi ho [Unfair Competition Prevention Act], Law No. 54 of 2015, art. 2 para. 1–10, art. 5 para. 2 (Japan), translated in (World Trade Organization), <http://www.wto.org>.

43. Futo keihinrui oyobi futo hyoji boshi ho [Act Against Unjustifiable Premiums and Misleading Representations], Law No. 118 of 2014, art. 8 (Japan), translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp> (Japan).

44. The Malaysia section was authored by Yap Yeong Hui and Trishelea Sandosam.

45. Bernama, *Dewan Rakyat Passes Companies Bill 2015 with Amendment*, NEW STRAITS TIMES (Apr. 5, 2016), <http://www.nst.com.my/news/2016/04/137304/dewan-rakyat-passes-companies-bill-2015-amendment>.

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necessary for a company to function, and if a company wants to tailor certain provisions to meet its own needs, it can adopt a Constitution. The Act also introduces a no-par value regime. All shares of a company shall have no par or nominal value, which means that companies need not set any minimum value for shares.

The Act dispenses the requirement for annual general meetings for private companies. Audited accounts are no longer laid before the AGM for private companies. Instead, there will be a timeline to circulate the audited accounts among the shareholders and then for filing with the Companies Commission of Malaysia. In addition, the Act introduces two new corporate rescue mechanisms: corporate voluntary arrangement (“CVA”) and judicial management.<sup>46</sup> The CVA is a procedure that allows a company to put up a proposal to its creditors for a voluntary arrangement. The implementation of the proposal is supervised by an independent insolvency practitioner who would report to the Court on the viability of the proposal. The judicial management mechanism allows a company or its creditors to apply for an order to place the management of a company in the hands of a qualified insolvency practitioner. A moratorium would give the company temporary respite from legal proceedings by its creditors.

Although passed by the Parliament on April 28, 2016, the Act has yet to come into force.<sup>47</sup> It is expected that the Act will come into force in stages as early as the first quarter of 2017.<sup>48</sup>

## B. NATIONAL LAND CODE

The National Land Code was amended to, *inter alia*, require foreign citizens and foreign companies to seek state authority approval before acquiring industrial land or interest therein in West Malaysia. The National Land Code (Amendment) Act 2016 also sets out regulations to introduce and facilitate deposit of instruments through electronic means.<sup>49</sup>

## C. NATIONAL SECURITY COUNCIL (NSC) ACT 2016

The NSC Act 2016 came into force on August 1, 2016. It allows for the establishment of the NSC, chaired by the Prime Minister of Malaysia, which has wide powers of entry, search, and seizure in “security” areas declared by

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46. The Companies Act 2016 is not yet in force. Companies Act 2016 (Act No. 777/2016) (Malay.).

47. *Companies Bill 2015 to Take Effect Next Year*, THE STAR (Sep. 6, 2016), <http://www.thestar.com.my/business/business-news/2016/09/06/companies-bill-2015-to-take-effect-next-year/>.

48. *See id.*

49. The amendments are not yet in force. National Land Code (Amendment) Act 2016 (Act No. A1516/2016) (Malay.).



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the Prime Minister.<sup>50</sup> The Bar Council of Malaysia has expressed concern over the vast executive powers conferred to the NSC.<sup>51</sup>

**D. TRANS-PACIFIC PARTNERSHIP AGREEMENT (“TPPA”)**

Malaysia signed the TPPA on February 4, 2016.<sup>52</sup> Touted as a vehicle to increase market access for Malaysian businesses, the TPPA was overwhelmingly approved by both houses of Parliament on January 27 and 28 of 2016, respectively.<sup>53</sup>

**E. KEY EMPLOYMENT LEGISLATION**

The Minimum Wages Order 2016 increased the minimum wages from RM900 to RM1000 per month for employees in West Malaysia and from RM800 to RM920 for those in East Malaysia.<sup>54</sup> Regarding Social Security, the Employees Provident Fund Act 1991 (EPF Act) was amended to provide for payment of contributions in accordance with Sharia principles.<sup>55</sup> Additionally, the Employees’ Social Security Act 1969 (ESSA 1969) now requires all employees, irrespective of wages, to contribute and be insured under the Act.<sup>56</sup>

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50. National Security Council Act 2016 (Act No. 776/2016) (Malay.).

51. Press Comment, Steven Thiru, National Security Council Act 2015 Has All the Hallmarks of Authoritarianism (June 15, 2016), [http://www.malaysianbar.org.my/press\\_statements/press\\_comment\\_%7C\\_national\\_security\\_council\\_act\\_2015\\_has\\_all\\_the\\_hallmarks\\_of\\_authoritarianism.html](http://www.malaysianbar.org.my/press_statements/press_comment_%7C_national_security_council_act_2015_has_all_the_hallmarks_of_authoritarianism.html).

52. Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, But Years of Negotiations Still to Come*, REUTERS (Feb. 4, 2016), <http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S>.

53. *Mustapa: TPPA Promises Greater Market Access*, THE STAR (Feb. 4, 2016), <http://www.thestar.com.my/business/business-news/2016/02/04/mustapa-says-tppa-promises-greater-market-access/>.

54. This includes employees paid based on piece rate, tonnage, trip, or commission. The Minimum Wages Order 2016 also sets out new daily and hourly minimum wage rates. Minimum Wages Order 2016, P.U. (A) 116 (Apr. 29, 2016) (Malay.).

55. The EPF Act governs Malaysia’s mandatory savings scheme aimed at providing financial security for employees in their retirement. It was amended through the Employees Provident Fund (Amendment) Act 2016, which was fully in force on August 1, 2016. Employees Provident Fund (Amendment) Act 2016 (Act No. A1504/2016) (Malay.).

56. The ESSA 1969 provides social security coverage for employees and their dependents in case of contingencies, like injury during the course of employment, invalidity, or death, as well as occupational diseases. The amendments were made via the Employees’ Social Security (Amendment) Act 2016, which came into force on June 1, 2016. Employees’ Social Security (Amendment) Act (Act No. A1508/2016) (Malay.).

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F. NEW PUBLIC SECTOR APPOINTMENTS

Datuk Muhammad Ibrahim was appointed the eighth Governor of the Central Bank of Malaysia for a five-year term effective May 1, 2016.<sup>57</sup> Datuk Dzulkifli Ahmad, a senior officer with the Attorney-General's Chambers, was appointed the new Malaysian Anti-Corruption Commission (MACC) Chief Commissioner, effective August 1, 2016 to July 2021.<sup>58</sup> These new appointments to two of the most important public bodies in Malaysia came on the back of appointment of a new Attorney General in the second half of 2015.<sup>59</sup>

IV. Myanmar<sup>60</sup>

Myanmar saw significant changes on the political and legal front with an elected parliament coming into place in early 2016. The National League for Democracy (NLD) formed the Government, and U Htin Kyaw was elected President, “essentially as a proxy” for the NLD leader Aung San Suu Kyi, “who is constitutionally barred from being the president.”<sup>61</sup>

A. LEGISLATIVE REFORMS

To encourage real estate investment, Myanmar's Union Parliament passed the Condominium Bill on January 22, 2016.<sup>62</sup> According to this law, foreigners are now allowed to own land in Myanmar. Total foreign ownership is limited to forty percent; however, there is a restriction on management of the condominium building.<sup>63</sup>

The Banks and Financial Institutions Law,<sup>64</sup> enacted on January 25, 2016, aims to reform Myanmar's banking regulations by laying down guidelines for commercial, state-owned, private, and foreign banks. It also includes rules of operation for nonbanking financial institutions and development banks. The law has introduced provisions for minimum capital requirement, raising paid up capital, and reserve requirements.

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57. Press Release, Announcement of Bank Negara Malaysia Governor by Prime Minister Najib Razak (Apr. 27, 2016), [http://www.bnm.gov.my/index.php?ch=en\\_press&pg=en\\_press&ac=4159&lang=en](http://www.bnm.gov.my/index.php?ch=en_press&pg=en_press&ac=4159&lang=en).

58. Farik Zolkepi, *Dzulkifli Ahmad is New MACC Chief*, THE STAR (July 29, 2016), <http://www.thestar.com.my/news/nation/2016/07/29/dzulkifli-ahmad-is-new-macc-chief/>.

59. Loshana K Shagarandm & M. Mageswari, *Mobamed Apandi Ali Replaces Gani Patail as Attorney-General*, THE STAR (July 28, 2015), <http://www.thestar.com.my/news/nation/2015/07/28/gani-patail-terminated/>.

60. Satyajit Gupta authored the section on Myanmar.

61. Radio Free Asia, 2015 MYANMAR GENERAL ELECTIONS, <http://www.rfa.org/english/news/special/burelection/home.html> (last visited Apr. 21, 2017).

62. Nwe Oo & Dino Santaniello, *Myanmar's Condominium Law of 2016: A Foundation for Foreign Investment in Guide to Doing Business in Thailand* 5 (LEX MUNDI 2016).

63. *See id.*

64. Financial Institutions Law (Act No. 20/2016) (Malay.).

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Myanmar's parliament enacted the Arbitration Law,<sup>65</sup> replacing the previous arbitration legislation that was more than seventy years old.<sup>66</sup> This enactment "has given effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Myanmar acceded [in] April 2013."<sup>67</sup> The law is based on the UNCITRAL Model Law on International Commercial Arbitration 1985.

"Myanmar's political leader Daw Aung San Suu Kyi issued guidelines for acceptance of gifts to Myanmar's civil servants as part of the government's drive to eradicate bribery and corruption in Myanmar."<sup>68</sup>

"On July 7, 2016, Myanmar's Ministry of Commerce issued a [n]otification to remove trade restrictions on [ ]foreign joint venture companies trading in construction material[ ]."<sup>69</sup>

On February 14, 2016, the Ministry of Environment Conservation and Forestry issued the Environmental Assessment Procedure. The procedure provides a new set of rules introduced for evaluating the environmental impact of local projects.

The mining sector in Myanmar has been very restricted for foreign investors. With the amendment of the existing mining laws, "the biggest change has been to introduce the possibility of the Myanmar government taking equity in the project instead of a [thirty percent] entitlement under the product sharing contract."<sup>70</sup>

The Myanmar Investment Commission (MIC) updated the list of restricted business activities by adding activities that can damage watershed forests, religious sites, traditional worship sites, farm and grazing lands, and water resources. This list primarily focuses on protecting the environment.

## B. OTHER DEVELOPMENTS

President Obama lifted U.S. economic sanctions on Myanmar to show support for the country's political reforms and economic growth and to facilitate trade between the two countries. The move eased restrictions on Myanmar's financial institutions, allowed certain transactions related to U.S.

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65. Arbitration Law (Act No. 5/2016) (Malay.).

66. Roger Milburn, *Myanmar Gives Effect to New York Convention by Enacting Arbitration Law*, BERWIN, LEIGHTON, PAISNER LAW: EXPERT LEGAL INSIGHTS (Jan. 19, 2016), <http://www.blplaw.com/expert-legal-insights/articles/myanmar-gives-effect-new-york-convention-enacting-arbitration-law>.

67. *Id.*

68. Chris Hughes et al., *Myanmar Issues Guidelines to Combat "Rampant and Obvious" Bribery*, LEXOLOGY (Apr. 20, 2016), <http://www.lexology.com/library/detail.aspx?g=9a78b6ae-0c14-473c-a215-c6b0bfda87df>.

69. Yuwadee Thean-ngarm et al., *Myanmar: Trade Restrictions Removed for Traders of Construction Materials*, TILLEKE & GIBBINS (July 20, 2016), <http://www.tilleke.com/resources/myanmar-trade-restrictions-removed-traders-construction-materials>.

70. Marius Toime & Chris Hughes, *Myanmar Mining - An Update on Recent Developments*, LEXOLOGY (Feb. 8, 2016), <http://www.lexology.com/library/detail.aspx?g=e2591765-5f8e-49d7-a552-5d157bebebac>.

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individuals living in the country, and removed seven state-owned enterprises and three state-owned banks from the United States' blacklist.

On March 4, 2016, the Myanmar Foreign Banking Licensing Committee granted preliminary banking licenses for operation in Myanmar to the Bank for Investment and Development of Vietnam, State Bank of India, Taiwan's Sun Commercial Bank, and South Korea's Shinhan Bank.

The Central Bank of Myanmar released regulations for mobile financial service providers, opening up the sector to non-banking financial institutions. "The new regulations are intended to promote access to banking services, particularly in rural areas where the population often has limited access to traditional banking."<sup>71</sup>

On June 7, 2016, the Myanmar Investment Commission (MIC), a government body under the Ministry of Planning and Finance that appraises domestic investment proposals in Myanmar, was reconstituted, including the appointment of eleven new members.

The President announced the appointment of a new economic steering committee on June 16, 2016. Led by the National Planning and Finance Ministers, the committee consists of parliamentarians, financial experts, and ministers. The committee aims to review the country's trade, monetary, and fiscal investment policies.

"A new foreign exchange committee [was] established for the purposes of developing the interbank market in Myanmar. The committee comprises representatives from three state banks, nine international lenders, and [nineteen] local commercial banks, and will bring state, domestic, and international banks together for the first time."<sup>72</sup>

The Myanmar Companies Act is under review by Directorate of Investment and Company Administration (DICA) with assistance from the Asian Development Bank. It is anticipated the latest draft will be presented to parliament for consideration in the coming sessions. One of the key developments includes a potential amendment to the definition of "foreign company," a company owned more than the prescribed percentage by an overseas corporation or other foreign person. The exact level of the prescribed percentage has not yet been disclosed, but this opens the door for joint ventures between Myanmar and foreign investors to benefit from classification as a Myanmar company in relation to permitted activities, licenses, permits, and land rights. While it is not known at this time what the final form of the amended Myanmar Companies Act will be, it is anticipated that many of the changes could lead to greater transparency and certainty for company administration for investors.

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71. Chris Hughes et al., *Myanmar Postcard - April 2016*, LEXOLOGY (Apr. 29, 2016), <http://www.lexology.com/library/detail.aspx?g=24b8ad37-5cf5-4353-b9e7-67cde723d3c8>.

72. Chris Hughes et al., *BLP's Myanmar Postcard - May 2016*, LEXOLOGY (May 27, 2016), <http://www.lexology.com/library/detail.aspx?g=7a47774f-332e-45d4-9d45-94309db54bd5>.

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**V. Timor-Leste**<sup>73</sup>

A. BANKING

On December 24, 2015, the Central Bank of Timor-Leste (*Banco Central de Timor-Leste*) amended the rules on deposit and withdrawal of United States dollars by banking institutions operating in the country,<sup>74</sup> as well as the rules on clearing and settlement of checks,<sup>75</sup> by means of Instructions 2/2015 and 3/2015, respectively.

B. CORPORATE/BUSINESS

“Considering the need to adopt economic diversification measures aimed at [] reducing dependence on revenues from mineral resources, the Government [] created the National Commission for Trade Facilitation” (Resolution 6/2016 of February 17, 2016),<sup>76</sup> which is a forum to promote dialogue between all stakeholders involved (*e.g.*, the Government and the private sector) in trade facilitation matters, “with a view to making recommendations to the Government, as well as coordinating all governmental work on this [] matter.”<sup>77</sup>

The Government also created the Control and Supervisory Authority for Economic Activities, Health and Food<sup>78</sup> (Decree-Law 26/2016 of June 29, 2016), which shall be responsible for controlling and monitoring the enforcement of regulations applicable to food trade and health requirements applicable to certain premises.<sup>79</sup>

In July 2016, the Parliament approved the Consumer Protection Law (Law 8/2016 of July 8, 2016), which covers matters such as rights and duties in consumer transactions, contractual and legal protection, and credit.<sup>80</sup> The new regime imposes duties on producers, importers, retailers, and vendors, prohibits abusive practices and contractual clauses, and sets forth penalties for breach of its rules.<sup>81</sup>

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73. By Ricardo Silva, Partner at Miranda Alliance’s Lisbon Headquarters. Ricardo Silva is the coordinator of Miranda Alliance’s Timor-Leste practice, Co-Head of the Firm’s Energy group, and Coordinator of the Houston liaison office. Ricardo can be reached at Ricardo.Silva@mirandalawfirm.com.

74. *Timor-Leste Legal News - December 2015 through February 2016*, MIRANDA LAW FIRM, <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-december-2015-through-february-2016> (last visited Apr. 21, 2017).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Timor-Leste Legal News - June through August 2016*, MIRANDA LAW FIRM, <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-june-through-august-2016> (last visited Apr. 21, 2017).

79. *Id.*

80. *Id.*

81. *Id.*

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C. ENERGY & NATURAL RESOURCES

In the mining sector, in line with the need to promote the diversification of the non-oil sector and taking into consideration the vision of the 2011–2030 Strategic Development Plan, the Government approved the special interest of the Investment Project for a limestone extraction unit and cement production plant in Baucau (Resolution 43/2015 of November 25, 2015).<sup>82</sup> Moreover, the Government granted the National Petroleum Authority the powers to also act as regulatory authority for the mining sector, which shall hereafter be designated as the “National Petroleum and Mining Authority” (*Autoridade Nacional do Petróleo e Minerais*, ANPM) (Decree-Law 1/2016, of December 28, 2016).<sup>83</sup>

In the electricity sector, the Government approved the Regulations on Electric Energy Licensing and Tariffs (Decree-Law 33/2016 of August 17, 2016).<sup>84</sup> The Regulations set forth rules on “electricity tariffs and prices, as well as the terms applicable to access to the electricity supply and distribution public network, including control and supervision conditions and applicable penalties.”<sup>85</sup>

The downstream sector also was subject to major developments, with the enactment of ANPM Regulation 1/2016 of March 2, 2016, and ANPM Directive 1/2016 of April 6, 2016, which approved the Regulations on Installation and Operation of Storage Facilities and the rules on Storage and Retail Sale of Kerosene, respectively. Regulation 1/2016 covers, amongst other things, the terms and conditions applicable to the design, construction, installation, modification, maintenance, operation, and decommissioning of storage facilities for fuels and other products, as well as the applicable licensing fees and penalties.<sup>86</sup> Directive 1/2016 covers kerosene storage and retail sale activities, and contains rules on storage infrastructures, atypical storage infrastructures, retail sale, manpower, temporary authorizations, inspections, and penalties.<sup>87</sup>

Additionally, during 2016, the Offshore Petroleum Operations Regulations were approved (Decree-Law 32/2016 of August 17, 2016), addressing matters concerning offshore petroleum activities in the Timor-Leste Exclusive Area, such as prospecting authorizations, exploration, development, and production operations, and applicable requirements on

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82. *Timor-Leste Legal News - September through November 2015*, MIRANDA LAW FIRM, <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-september-through-november-2015> (last visited Apr. 21, 2017).

83. *Timor-Leste Legal News - December 2015 through February 2016*, *supra* note 74.

84. *Timor-Leste Legal News - June through August 2016*, *supra* note 78.

85. *Id.*

86. *Timor-Leste Legal News - March through May 2016*, MIRANDA LAW FIRM, <http://www.mirandalawfirm.com/en/insights-knowledge/publications/legal-news/timor-leste-legal-news-march-through-may-2016> (last visited Apr. 21, 2017).

87. *Id.*

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facilities design and operation, health, safety, and environment, as well as local content and procurement of goods and services.<sup>88</sup>

**D. ENVIRONMENT**

Legislative developments in the environmental sector included the approval of the regulations on the inspection and calibration of gasoline and diesel pumps (Ministerial Diploma 21/2016 of March 9, 2016)<sup>89</sup> and the legal framework applicable to the creation and management of the National System of Protected Areas (Decree-Law 5/2016, of March 16, 2016).<sup>90</sup>

**E. FORESTRY**

Recognizing the importance of sandalwood to the Timor-Leste people and economy, the Government classified sandalwood as an iconic plant of national value (Resolution 41/2015 of November 18, 2015).<sup>91</sup> The statute sets forth, amongst other things, that (1) due to its scarcity, sandalwood must have special protection by the public institutions, as well as by natural and legal persons; (2) cutting, extraction, and sale of sandalwood is prohibited; and (3) activities relating to sandalwood inventory, research, and plantation shall be intensified.<sup>92</sup>

**F. GAMBLING**

The gambling sector also saw major developments during 2016. By means of Decree-Law 6/2016 of April 20, 2016, the Government approved the legal framework applicable to the licensing, operation, and control of activities regarding social and entertainment gambling (*e.g.*, bingo, lotteries, contests, on-line games), slot machines, and traditional games (*e.g.*, cock fighting).<sup>93</sup> Under this statute, except for cock fighting and *Kuro*,<sup>94</sup> concession for gambling activities is subject to a public tender process, with the Ministry of Tourism being responsible for supervising the sector and issuing the mandatory authorizations.

**G. HEALTH**

By means of Decree-Law 14/2016 of June 8, 2016, the Government approved rules aimed at controlling and preventing the consumption of tobacco products in the country.<sup>95</sup> The statute sets forth strict requirements on tobacco trading and addresses, *inter alia*, labeling and packaging

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88. *Timor-Leste Legal News - June through August 2016*, *supra* note 78.

89. *Timor-Leste Legal News - March through May 2016*, *supra* note 86.

90. *Id.*

91. *Timor-Leste Legal News - September through November 2015*, *supra* note 82.

92. *Id.*

93. *Timor-Leste Legal News - March through May 2016*, *supra* note 86.

94. *Kuro* is a traditional dice game.

95. *Timor-Leste Legal News - June through August 2016*, *supra* note 78.

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requirements, tobacco composition, and limitations on promotion and marketing of tobacco products. The new rules also determine certain consumption restrictions (*e.g.*, prohibiting smoking in specific areas) and foresee consumption prevention measures, the involvement of public authorities in the control of tobacco products, and the applicable penalties.

#### H. INFRASTRUCTURE

On the infrastructure front, the Government approved Decree-Law 43/2015 of December 28, 2015, which sets forth the legal framework applicable to the Tibar Port Public-Private Partnership; thereby, granting the Government powers to execute the contract for the design, construction, financing, implementation, operation, and management of the country's new deep-water port.<sup>96</sup> The framework includes, *inter alia*, rules on tariffs, land rights, and dispute resolution mechanisms. Additionally, the Infrastructure Fund's legal framework was amended to guarantee the same response to the financial needs without overloading the State Budget (Decree-Law 13/2016 of May 18, 2016).<sup>97</sup>

#### I. MARITIME BOUNDARIES

Decree-Law 4/2016 of March 16, 2016 created the Council for the Definitive Delimitation of the Maritime Boundaries between Timor-Leste and the Commonwealth of Australia and the Republic of Indonesia (*Conselho para a Delimitação Definitiva das Fronteiras Marítimas*, "CDDFM").<sup>98</sup> Chaired by the Prime-Minister, the CDDFM is responsible for, *inter alia*, (1) defining the conditions and goals of the negotiation for a treaty for the definitive delimitation of maritime borders between these countries, and (2) monitoring the negotiation procedure.<sup>99</sup> On September 26, 2016,<sup>100</sup> the Conciliation Commission confirmed that it is competent to continue with the conciliation process to resolve the disputed maritime boundary between Australia and Timor-Leste.<sup>101</sup>

#### J. PRIVATE INVESTMENT

Through Decree-Law 45/2015 of December 30, 2015, the Government created the Agency for the Promotion of Investment and Exports of Timor-Leste (TradInvest Timor-Leste), which is a public institute entrusted with

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96. *Timor-Leste Legal News - December 2015 through February 2016*, *supra* note 74.

97. *Timor-Leste Legal News - March through May 2016*, *supra* note 86.

98. *Id.*

99. *Id.*

100. Press Release, Permanent Court of Arbitration, Conciliation Between the Democratic Republic of Timor-Leste and the Commonwealth of Australia (Sep. 26, 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/09/Press-Release-No.-4-EN.pdf>.

101. MARITIME BOUNDARY OFFICE, <http://www.gfm.tl/>.



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promoting and monitoring private investment, reinvestment, and exports from the country.<sup>102</sup>

**K. STATE ADMINISTRATION**

The Government approved the organizational structures of the Ministry of Finance (Decree-Law 38/2015 of October 7, 2015),<sup>103</sup> the Ministry of Commerce, Industry and Environment (Decree-Law 39/2015 of November 4, 2015),<sup>104</sup> the Institute for Business Development Support (Ministerial Diploma 26/2015 of November 25, 2015),<sup>105</sup> and the Ministry of Petroleum and Mineral Resources (Decree-Law 16/2016 of June 22, 2016).<sup>106</sup>

The Government also approved the rules applicable to the execution, monitoring, and report of the General State Budget (Government Decree 1/2016 of February 1, 2016),<sup>107</sup> and the National Parliament approved the *Sucos*' Law, which sets forth the powers and authority of the *Sucos*<sup>108</sup> and their respective association bodies, as well as the rules on the appointment of the respective members (Law 9/2016 of July 8, 2016).<sup>109</sup>

**L. TOURISM**

The tourism sector was also subject to developments during 2016, notably through the approval, by means of Decree-Laws 17/2016 and 19/2016 of June 22, 2016, of the rules on the licensing, installation, classification, and operation of Camping Sites<sup>110</sup> and for the licensing and operation of travel and tourism agencies.<sup>111</sup>

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102. *Timor-Leste Legal News - December 2015 through February 2016, supra* note 74.

103. *Timor-Leste Legal News - September through November 2015, supra* note 82.

104. *Id.*

105. *Id.*

106. *Timor-Leste Legal News - June through August 2016, supra* note 78.

107. *Timor-Leste Legal News - December 2015 through February 2016, supra* note 74.

108. *I.e.*, public entities, with an associative nature, created due to historical, cultural, or traditional circumstances, whose members are bound by family or traditional ties in a given area.

109. *Timor-Leste Legal News - June through August 2016, supra* note 78.

110. *Id.*

111. *Id.*

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## Canada

ANGELA E. WEAVER, HON. DEL W. ATWOOD, JACQUELINE BART,  
MELISSA N. BURKETT, SUNITA D. DOOBAY, DANIEL G.C. GLOVER,  
JULIA L. JOHNSON, SERGIO R. KARAS, ADAM MAUNTAH, TAHA  
QURESHI, TAYLOR SCHAPPERT, AND CARRIE A. WRIGHT\*

### I. Overview<sup>1</sup>

The year 2016 witnessed several significant developments for Canada. Namely, on the international front, Canada's government: (1) formally removed Canada's objector status to the United Nations Declaration on the Rights of Indigenous Peoples; (2) announced legislative amendments to implement the OECD's tax avoidance-related Multilateral Competent Authority Agreement for the Common Reporting Standard, and introduced tariff-reducing legislation; and (3) increased trade-mark protections, in line with the recently signed Comprehensive Economic and Trade Agreement with the European Union.

Domestically, the Canadian government mandated the obtaining of electronic travel authorizations by non-exempt individuals wishing to enter or transit through Canada, and began actively enforcing employer compliance with Canada's two primary immigration programs: the Temporary Foreign Worker Program and the International Mobility Program.

Finally, in the courts, the Supreme Court of Canada recognized the importance of the World Bank Group in combatting corruption, while, in a case presently under appeal—and having the potential to significantly impact the country's resource-exploration industries—Alberta's Court of Queen's Bench considered the interplay between the Federal *Bankruptcy and Insolvency Act* and certain provincial legislation governing the petroleum industry.

### II. Canada Removes Objector Status to UN Declaration on the Rights of Indigenous Peoples<sup>2</sup>

In spring 2016, Canada dropped its objector status to the United Nations Declaration on the Rights of Indigenous Peoples (the "Declaration"). However, the history of the Declaration reaches back much further. On

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\* Edited by Angela E. Weaver. Individual authors will be identified by section.

1. Authored by Angela E. Weaver.

2. Authored by the Honourable Judge Del W. Atwood of the Provincial Court of Nova Scotia.

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May 7, 1982, the United Nations Economic and Social Council authorized its Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish an annual working group on indigenous populations tasked with reviewing developments on the promotion and protection of the human rights and fundamental freedoms of Indigenous people.<sup>3</sup> The working group initiated the start of a years-long inquiry into the pressing plight of Indigenous peoples, recognizing from its inception the need to promote and protect their human rights and fundamental freedoms.

However, as urgent as this task might have been, it took slightly more than twenty-five years for the General Assembly of the United Nations to adopt the Declaration on the Rights of Indigenous Peoples.<sup>4</sup> On the day of its adoption, the United Nations High Commissioner for Human Rights, Louise Arbour (who had served as a justice of the Supreme Court of Canada from 1999 through 2004) observed that, “the hard work and perseverance of indigenous peoples and their friends and supporters in the international community has [sic] finally borne fruit in the most comprehensive statement to date of indigenous peoples’ rights.”<sup>5</sup> Her comment crystallized the import of the legal breakthrough.

Yet, it must have discouraged the High Commissioner that her own national government was one of four states to have voted against the Declaration.<sup>6</sup> Former Canadian Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, Chuck Strahl P.C., explained the nay vote as, “[b]y signing on, you default to this document by saying that the only rights in play here are the rights of First Nations. And, of course, in Canada, that’s inconsistent with our Constitution.”<sup>7</sup>

The contentious points underlying this supposed sovereignty-based objection appeared to be:

- Article 3 of the Declaration, which recognized Indigenous peoples’ right to self-determination, including the right to “freely determine their political status and freely pursue their economic, social and cultural development;”
- Article 4, which affirmed Indigenous peoples’ right to “autonomy or self-government in matters relating to their internal and local affairs;”

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3. Economic and Social Council Res. 1982/32 (May 7, 1982).

4. G.A. Res. 61/295 (Sept. 13, 2007).

5. *United Nations adopts Declaration on Rights of Indigenous Peoples*, UN NEWS CENTRE (Sept. 13, 2007), available at <http://www.un.org/apps/news/story.asp?NewsID=23794#.WOF0kIrL6Y>.

6. Voting Record of Resolution A/RES/61/295, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295>.

7. Steven Edwards, *Tories defend ‘no’ in native rights vote*, MONTREAL GAZETTE (Sept. 14, 2007), [https://www.google.com/#q=http://www.pressreader.com/canada/montreal-gazette/20070914/281706905302273&\\*](https://www.google.com/#q=http://www.pressreader.com/canada/montreal-gazette/20070914/281706905302273&*.).

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- Article 5, which acknowledged the right of Indigenous peoples “to maintain and strengthen their distinct political, legal, economic, social and cultural institutions;” and, finally,
- Article 26, which declared that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”

Eminent human rights counsel Paul Joffe’s tour-de-force article, rebutting the former Conservative Government’s position on the Declaration, identified that the federal government failed to consult with Indigenous peoples regarding state action in which Indigenous rights and interests were at stake. It refused to meet with Indigenous organizations to discuss the Declaration, engaged in the disingenuous lobbying of states in opposing the Declaration, misled the Canadian public by insinuating the Declaration jeopardized the rights of non-Indigenous Canadians, cited solicitor-client privilege for not disclosing the legal basis for opposing the Declaration, ignored its human-rights obligations under the UN Charter, and politicized Indigenous rights, thereby undermining Indigenous security and development.<sup>8</sup>

Two developments in 2015, however, spurred a significant public policy shift regarding First Nations peoples. First, the Truth and Reconciliation Commission of Canada released its report into the tragic legacy of Indigenous residential schools. The Final Report of the Commission called upon the Government to adopt fully, and implement the Declaration.<sup>9</sup> Then, nine months later, a new Parliament was elected under current Prime Minister Justin Trudeau. As a result, on May 10, 2016, Minister of Indigenous and Northern Affairs Carolyn Bennett reversed Canada’s objector status to the Declaration.<sup>10</sup>

Progress does not always trace a straight line. As recently as November 2016, in a case involving the duty of a provincial government to consult with a local First Nation regarding a natural-gas development, counsel for the Province of Nova Scotia denied in their written pleadings that a duty to consult exists, given their assertion that the First Nation contesting the development was conquered.<sup>11</sup> The strategy impugns several Supreme Court of Canada decisions that affirm the existence of a governmental duty to consult with Indigenous peoples whenever their interests are at stake in cases involving state action.<sup>12</sup> While the Court has described reconciliation with Canada’s Indigenous peoples as being a process flowing from

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8. Paul Joffe, *UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation*, 26 NAT. J. CONSTT. L. 121, 164-171 (2010).

9. *Final Report of the Truth and Reconciliation Commission of Canada Volume One: Summary 325*, TRUTH AND RECONCILIATION COMMISSION OF CANADA (2015), [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec\\_Summary\\_2015\\_05\\_31\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf).

10. Economic and Social Council, Rep. on the fifteenth session, U.N. Doc. E/2016/43-E/C.19/2016/11, at 8 (2016).

11. *Sipekne’katik v. Nova Scotia (Environment)*, 2017 NSSC 23 (2016).

12. *See, e.g., Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 at ¶ 11.

constitutionally guaranteed rights rather than a final legal remedy,<sup>13</sup> its progress remains incomplete.

### **III. Common Reporting and Due Diligence Standard to be Implemented<sup>14</sup>**

On June 2, 2015, Canada signed the Multilateral Competent Authority Agreement<sup>15</sup> (MCAA). The MCAA governs the Common Reporting and Due Diligence Standard (CRS).<sup>16</sup> The CRS was developed following a request at the G20 April 2009 Summit. The OECD was asked to develop a streamlined, automatic exchange of financial information between member countries aimed at combatting tax avoidance and evasion, as well as improving tax compliance. It concurred. In 2010, the MCAA was amended by Protocol, and was opened for signature on June 1, 2011, by members of the OECD and the Council of Europe, and non-member states alike.

The MCAA, currently with 87 signatories,<sup>17</sup> is, in the words of Pascal Saint-Amans, OECD Centre for Tax Policy and Administration Director:

the most comprehensive multilateral instrument available for tax cooperation and exchange of information. It provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes. This co-operation includes automatic exchange of information, simultaneous tax examinations and international assistance in the collection of tax debts.<sup>18</sup>

The information exchanged annually will include all types of investment income (including interest, dividends, income from certain insurance contracts, and other similar types of income), but also account balances and sales proceeds from financial assets. The financial institutions that are required to report under the CRS do not only include banks and custodians, but also other financial institutions such as brokers, certain collective investment vehicles, and certain insurance companies. Reportable accounts

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13. *Id.* at ¶ 32.

14. Authored by Sunita D. Doobay of TaxChambers LLP.

15. See *Multilateral Competent Authority Agreement*, OECD, <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/multilateral-competent-authority-agreement.pdf> (last visited Apr. 2, 2017).

16. *Standard for Automatic Exchange of Financial Information- Common Reporting Standards*, OECD, available at <https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf> (last visited Nov. 24, 2016).

17. *Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date*, OECD (Nov. 2, 2016), <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf>.

18. *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*, OECD (Nov. 2013), [http://www.oecd.org/ctp/exchange-of-tax-information/MAC\\_Background\\_Brief\\_for\\_Journalists\\_November\\_2013.pdf](http://www.oecd.org/ctp/exchange-of-tax-information/MAC_Background_Brief_for_Journalists_November_2013.pdf).

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include accounts held by individuals and entities (which includes trusts and foundations), and the standard includes a requirement to look through passive entities to report on the individuals that ultimately control these entities.<sup>19</sup>

To date, the United States has not ratified the MCAA. Instead, it continues to rely on the provisions of the Foreign Account Tax Compliance Act<sup>20</sup> (FATCA) and bilateral intergovernmental agreements to ensure that financial institutions report to the IRS bank accounts held outside of the United States that are in excess of U.S. \$50,000.

On the tax front, on April 15, 2016, the Canadian Department of Finance announced legislative amendments to Part XIX of the Income Tax Act<sup>21</sup> for the purpose of implementing the CRS in Canada. CRS will be implemented in Canada on July 1, 2017. Canadian Financial Institutions will report the following information on non-resident account holders to the Canada Revenue Agency (CRA):

- identifying information for the account holder (name and address);
- taxpayer identification numbers;
- date of birth;
- account number;
- account balance or value at end of the year; and,
- certain amounts paid or credited to the account.<sup>22</sup>

Accounts held by certain type of entities, such as publicly traded companies, government entities, international organizations, and the Bank of Canada will not have to be reported. Likewise, Registered Retirement Saving Plans, Registered Retired Income Funds, Registered Private Pension Plans, Registered Disability Savings Plans, and Registered Education Savings Plans are not reportable entities.<sup>23</sup> Furthermore, trusts in respect of which the trustee is a reporting financial entity that reports with respect to all reportable accounts of the trust do not have to report.

On the question of whether a non-resident is a resident of a reporting jurisdiction, Canada will take an inclusive approach to information gathering. Rather than filtering on the basis of whether a non-resident is a tax resident of Canada or of the United States, Canadian financial institutions will simply gather all reportable non-resident financial accounts and remit the information to the CRA. The CRA, in turn, will scrutinize

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19. *Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date*, *supra* note 17, at 3.

20. *Foreign Account Tax Compliance Act of 2009* is the name of the House and Senate bills in which the provisions first appeared. See H.R. 3933, 111th Cong. (2010) and S. 1934, 111th Cong. (2010).

21. Income Tax Act, R.S.C. c L-1 (hereinafter ITA).

22. *Common Reporting Standard*, CANADA REVENUE AGENCY, <http://www.cra-arc.gc.ca/gncy/bdgt/2016/qa08-eng.html> (last visited Nov. 24, 2016).

23. *FATCA and the Canada-US Intergovernmental Agreement (IGA): Information for Clients*, CANADIAN BANKERS ASSOCIATION, <http://www.cba.ca/fatca-and-the-canada-us-intergovernmental-agreement-iga-information-for-clients> (last visited Apr. 10, 2017).

the information to determine whether the account holder is a resident of a reporting jurisdiction and, if so, remit the information to the reporting jurisdiction.

Part XIX of the ITA proposes to phase in compliance with CRS. Accounts opened after July 1, 2017, will be deemed new financial accounts. For each new individual account opened after June 30, 2017, the Canadian financial institution in question will have to obtain a self-certification, the purpose of which is to assist the financial institution in determining the residence of the individual.<sup>24</sup> An entity opening a new account will also have to provide a self-certification indicating its tax residence. Further self-certification will be required in the case of passive non-financial entities, such as trusts and foundations, to identify whether the controlling persons are reportable persons.<sup>25</sup> The need to look through a passive non-financial reporting person will arise if its residency is not determinable. By 2019, extant financial accounts with a balance over \$1,000,000 must be reviewed. By 2020, the protocol will apply to accounts with balances exceeding \$250,000.

#### **IV. Geographical Indication Protection Expands Under CETA<sup>26</sup>**

The day after signing the Comprehensive Economic and Trade Agreement (“CETA”) with the European Union on October 30, 2016,<sup>27</sup> the Government of Canada introduced legislation to implement the trade deal. In addition to eliminating ninety-five percent of existing tariffs applied to goods traded between the two jurisdictions, CETA expands the trade-mark protection of geographical indications to a wide array of agricultural products.

Under Canada’s current trade-mark legislation, protection of geographical indications extends only to wine and spirits. For example, covered products such as cognac and champagne can only be labelled as such if they originate from the respective geographic regions of Cognac and Champagne. The Trade-mark Act (Act) defines geographical indications (GI) as an indication, word or symbol, that identifies a wine or spirit as originating in the territory, region, or locality of a member of the World Trade Organization, where a quality, reputation, or other characteristic of the wine or spirit is essentially attributable to its geographical origin.<sup>28</sup>

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24. *Id.*

25. *Id.*

26. Authored by Daniel G.C. Glover, Julia L. Johnson, and Taha Qureshi of McCarthy Tétrault LLP.

27. See *Comprehensive Economic and Trade Agreement*, GOVT. OF CANADA (Oct. 30, 2016), <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>.

28. See *Trade-marks Act*, R.S.C. 1985, c. T-13, § 2 (hereinafter, “Act”).

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Canada's Bill C-30 expands the definition of a GI to include agricultural foods and products, including products such as milk, olives, and beer.<sup>29</sup> Similarly, it grants to Canadian producers of agricultural foods and products, such as maple syrup, access to equivalent protection in the European Union. Commercial adoption or use of any new protected GI is prohibited,<sup>30</sup> and no person may use a protected GI for comparative advertising purposes on packaging or labels.<sup>31</sup>

The changes extend to import and export procedures. Covered products may not be exported or imported if the product itself, or its label or packaging, bears a protected GI, but the product does not originate from the territory, or was not produced in accordance with the law.<sup>32</sup>

The protections will be accorded in two main phases. Certain pre-cleared GIs and their translations will be entered by the Registrar of Trade-marks on the coming into force of the Act.<sup>33</sup> These will be sheltered from future attack based on disuse, use as a customary name, or confusion (these provisions appear to be designed to deter domestic producers from ambushing European or Korean GIs, pursuant to CETA and the Canada-Korea Free Trade Agreement). Future GIs may be fast-tracked by being added to Annex 20-A of CETA.

Where fast-tracking is unavailable, new GIs must be approved by a responsible Minister of the Canadian Government, and then subject to an objection process. They are also subject to subsequent possible expungement based on disuse, use as a customary name, or confusion.<sup>34</sup> Presumably, this path will be used in respect of non-European Union GIs, such as Basmati rice.

Moreover, as part of the Registrar of Trade-marks' supervision of the list of GIs, translations must be included for GIs of agricultural foods and products.

The listing of GIs provides new grounds of attack for trade-mark opposition including on the basis that the proposed GI does not qualify as a GI at the time the Minister proposes it be added to the list, either because it does not originate in the listed territory, or because a quality, reputation, or other characteristic of the product or food is not essentially attributable to its geographical origin. Such argument may lead to interesting expert evidence on terroir in future cases. Other possible grounds for opposition include that the proposed GI is identical to a term customary in common language in Canada, that it is not protected under the laws of the country of

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29. Bill C-30, *An Act to Implement the Comprehensive Economic and Trade Agreement Between Canada and the European Union and its Member States and to Provide for Certain other Measures*, 1st Sess, 42nd Parl, 2016 (hereinafter, "Bill C-30").

30. Act, *supra* note 28, at § 11.15(1)-(3).

31. *Id.* at § 11.16(3)-(4).

32. Bill C-30, *supra* note 29, at § 71.

33. *Id.* at § 115.

34. Act, *supra* note 28, at § 11.12-11.13.



origin, that it is confusing with a registered, applied-for, or common law trade-mark, and that the proposed translation is not faithful.<sup>35</sup>

Exceptions to the new rules can protect existing Canadian trade-mark rights, and provide relief for common linguistic usage. For example, the new rules do not apply to GIs that are identical to common names, such as Valencia orange and Black Forest ham.<sup>36</sup> Furthermore, an exception applies to GIs that are confusing with respect to a registered Canadian trade-mark, a Canadian trade-mark previously used, but not yet abandoned, or a pending Canadian trade-mark, provided that the use or application be in good faith, without knowledge that the trade-mark in question is a protected GI.<sup>37</sup> This exception to the GI rules is significant, as it protects existing good faith trade-marks in Canada.

Finally, the amendments allow any interested person to challenge the presence of a GI on the Registrar's list of protected GIs. The Federal Court has new, exclusive jurisdiction to summarily hear an application for such a challenge, and to order the Registrar to remove an indication or translation from the Registrar's list on any valid grounds.<sup>38</sup> The amendments also provide greater power to the Registrar, allowing it to reject, in its discretion, a statement of objection that it determines does not raise a substantial issue.

#### **V. Government Introduces Electronic Travel Authorization<sup>39</sup>**

In 2016, a new era of airline passenger pre-screening dawned in Canada. Following the American example, Canada now requires that airline passengers provide personal and background information before travelling. The initiative aims to minimize the number of visitors who may be deemed inadmissible when appearing at a port of entry.

Electronic travel authorizations (eTA) were made available as of March 15, 2016, and visa-exempt foreign nationals flying to, or transiting through Canada were expected to obtain them. The requirement became mandatory as of September 29, 2016, such that individuals not otherwise exempt from obtaining an eTA will face considerable difficulty when attempting to board a flight to Canada. Travelers are well advised to determine whether they require an eTA and, if so, to make an application well in advance of the anticipated travel date.

Amendments to the Immigration and Refugee Protection Act (IRPA) created the requirement for visa-exempt foreign nationals to apply for an eTA, and establish the means by which the application must be made (*i.e.*, through the electronic system),<sup>40</sup> while the Immigration and Refugee Protection Regulations (IRPR) create the requirement for visa-exempt

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35. Bill C-30, *supra* note 29, at § 62(1).

36. *Id.* at § 65(1).

37. *Id.* at § 67.

38. *Id.* at § 67.

39. Authored by Sergio R. Karas of Karas Immigration Law Professional Corporation.

40. Immigration and Refugee Protection Act, S.C. 2001, c 27, S.11 (1.01) (Can.).

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foreign nationals to obtain an eTA before entering Canada, unless they are otherwise exempt by the regulations.<sup>41</sup>

The eTA imposes a new entry requirement for visa-exempt, non-U.S. foreign nationals travelling to Canada by air (travelers entering by land, sea, or rail are not required to obtain an eTA). The eTA program will pre-screen travelers to ensure their admissibility into Canada. The list of countries whose citizens require an eTA is found in section 190 of the IRPR.<sup>42</sup> American citizens and certain other small groups are exempt from obtaining an eTA. Specifically, section 7.1(2) of the IRPR exempts holders of a Temporary Resident Visa (TRV) from obtaining an eTA;<sup>43</sup> section 7.1(3) describes other travelers that are exempt.<sup>44</sup> Individuals who are required to obtain a TRV<sup>45</sup> by reason of their country of citizenship need not obtain an eTA, as they are prescreened at a visa post outside of Canada.

In terms of process, to apply for an eTA, foreign nationals must submit an application online. Applicants must provide passport details, personal details, occupation, previous travel, responses to background questions (to assess for health, criminality and immigration-related concerns), contact information, and a nominal filing fee. A text area at the end of the application form allows the applicant to briefly indicate if there are additional details for consideration. Here the applicant may express an urgent need to travel to Canada, or provide other relevant information. No documents can be uploaded or added to the eTA application.

After the application is received, the system creates a prospective application, performs an identity search to determine if the applicant already

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41. Immigration and Refugee Protection Regulations, SOR/2002-227 (Can.).

42. *Id.* at S.190. “A foreign national is exempt from the requirement to obtain a temporary resident visa if they

(a) are a citizen of Andorra, Antigua and Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Brunei Darussalam, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Federal Republic of Germany, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Papua New Guinea, Poland, Portugal, Republic of Korea, Samoa, San Marino, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sweden or Switzerland;

(b) are

(i) a British citizen,

(ii) a British overseas citizen who is re-admissible to the United Kingdom, or

(iii) a citizen of a British overseas territory who derives that citizenship through birth, descent, naturalization or registration in one of the British overseas territories of Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Island, Saint Helena or Turks and Caicos Islands; or

(c) are a national of the United States or a person who has been lawfully admitted to the United States for permanent residence.

43. *Id.* at S.7.1.(2).

44. *Id.* at S.7.1.(3).

45. *Id.* at S.179.

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exists in the databases, and associates the application with any existing unique client identifier (UCI). If no adverse information is found, the system will notify the applicant by e-mail that the eTA has been approved. An eTA is valid for the earlier of five years, or the expiry of the applicant's passport.<sup>46</sup> A designated officer can cancel it in certain enumerated instances.<sup>47</sup>

Where an application cannot be automatically approved, it will be sent for manual review by the Immigration, Refugees and Citizenship Canada (IRCC) Operations Support Centre (OSC), where officers can request additional documents, or a security screening, or both. Where a decision cannot be made due to the need for an interview or other factors, the application will be referred to a visa office, while other circumstances—including applications that result in the need for a Permanent Resident Determination or a Temporary Resident Permit—will require assessment in an overseas mission. Cases referred to overseas missions will be handled in the same way that Temporary Resident Visa applications are processed. An officer may request an interview with the applicant. Applicants whose eTAs are refused will receive an e-mail explaining the decision.<sup>48</sup>

Unlike a Temporary Resident Visa, no counterfoil is provided on approval of an eTA, so there exists no physical proof of the presence or validity of an eTA. Rather, eTAs are enforced using the Canada Border Services Agency (CBSA) Interactive Advance Passenger Information ("I-API") system. I-API is an enhancement of the previous Advanced Passenger Information ("API") program, automating the previous manual process, and requiring air carriers to submit traveler API earlier—at check-in instead of takeoff. I-API will confirm whether any necessary IRCC authorization to travel (a visa or eTA) is linked to the traveler's passport and, if, and only if, such is the case, permit the printing of a boarding pass.<sup>49</sup>

The advent of eTAs raise legal concerns. It is unclear whether there is sufficient legislative authority for the making of a determination that a visa-exempt traveler is inadmissible to Canada prior to such traveler appearing at a post of entry for a full examination, or if such runs afoul of the basic principle of fairness. Also, in preventing a traveler who requires an eTA and does not possess it from boarding a flight bound for Canada, the eTA system implicitly deputizes airline personnel to enforce immigration legislation. These issues will spark litigation.

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46. *Id.* at S.12.

47. *Id.* at S.12.06.

48. *Id.* at S.182.1.

49. See *Electronic Travel Authorization*, GOVT. OF CANADA (Dec. 1, 2016), <http://www.cic.gc.ca/english/resources/tools/temp/eta/>.

## **VI. Canada's Employer Compliance Regime: Arguably the World's Most Stringent<sup>50</sup>**

On December 1, 2015, Canada's employer compliance regulatory regime came into force.<sup>51</sup> The regulations (the Regulations) were designed to encourage employer compliance by providing a range of consequences for infringing the conditions of Canada's two main immigration programs: the Temporary Foreign Worker Program (TFWP), which encompasses all work permits issued in furtherance of a Labour Market Impact Assessment (LMIA), and the International Mobility Program (IMP), encompassing all work authorizations issued without an LMIA.<sup>52</sup> The regulations also allow the Government to address situations where employers have benefited financially from disregarding the law.

Regardless of the program utilized, the Regulations compel employers to live up to the terms of the foreign worker's employment as disclosed at the time of the application. These include: wage, working conditions, benefits, vacation days, occupation, location of employment, and job duties.<sup>53</sup> Employers must maintain, for six years, all documents required to demonstrate compliance with the terms of the foreign worker's employment.<sup>54</sup>

Employment and Social Development Canada/Service Canada (ESDC) administers the employer compliance regime. ESDC can perform two types of audits:

- an inspection;<sup>55</sup> and/or
- a review under ministerial instruction.<sup>56</sup>

An Employer Compliance Review (ECR), a third type of audit under the TFWP, is conducted in the course of assessing a new LMIA application.<sup>57</sup>

The Regulations allow ESDC to conduct inspections without a warrant on any premises where a foreign worker performs work,<sup>58</sup> except where the foreign worker is employed in a private dwelling (which auditors may enter with the occupant's consent, or with a warrant).<sup>59</sup> During an inspection,

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50. Authored by Jacqueline Bart and Carrie A. Wright of BartLAW Canadian Immigration.

51. Immigration and Refugee Protection Regulations, SOR/2002-227, §§ 209.93-209.997 (Can.).

52. See *Harper Government Brings in Stiff New Penalties for Those Who Abuse Foreign Worker Programs* (July 6, 2015), <http://news.gc.ca/web/article-en.do?nid=996239>.

53. Immigration and Refugee Protection Regulations, SOR/2002-227, §§ 209.2(1)(a)(iii), 209.3(1)(a)(iv).

54. *Id.* at §§. 209.2(1)(b)(i), 209.2(1)(b)(ii), 209.3(1)(c)(i), 209.3(1)(c)(iii).

55. *Id.* at §209.5; see *Employer Compliance Inspections*, GOVT. OF CANADA (Jan. 26, 2016), <http://www.cic.gc.ca/english/resources/tools/temp/work/permit/compliance.asp>.

56. See *Revocation of Work Permit Due to Public Policy Considerations*, GOVT. OF CANADA (Jan. 21, 2016), [www.cic.gc.ca/english/resources/tools/temp/work/permit/revocation.asp](http://www.cic.gc.ca/english/resources/tools/temp/work/permit/revocation.asp).

57. See *Temporary Foreign Worker Program Compliance*, GOVT. OF CANADA (May 5, 2016), [www.esdc.gc.ca/en/foreign\\_workers/employers/employer\\_compliance.page#h2.1-h3.5](http://www.esdc.gc.ca/en/foreign_workers/employers/employer_compliance.page#h2.1-h3.5) ("TFWP Compliance").

58. IRPR, *supra* note 47, at §§. 209.8(1), 209.8(3), 209.9(1), 209.9(3).

59. *Id.* at §§ 209.8(5), 209.9(5).

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ESDC is authorized to ask the employer, or any employee, any relevant questions,<sup>60</sup> compel the employer to produce for examination any documents found on the premises,<sup>61</sup> use copying equipment on the premises, require the employer to make copies, or remove documents to make copies for examination,<sup>62</sup> take pictures or make video/audio recordings,<sup>63</sup> examine anything on the premises,<sup>64</sup> compel an employer to use any computer or electronic device on the premises to allow the auditor to examine any documents contained in, or available to, the device,<sup>65</sup> and require any person on the premises to accompany or assist the auditor.<sup>66</sup>

In the event an employer is found non-compliant, the Regulations provide for a number of consequences, including the following:

- a warning;<sup>67</sup>
- administrative monetary penalties up to \$100,000 per violation,<sup>68</sup> to a maximum of \$1 million per year, per employer;<sup>69</sup>
- one-, two-, five- or ten-year, or permanent bans from utilizing Canada's immigration programs;<sup>70</sup>
- publication of employer's name and address on a public website with details of the violation(s) and/or consequence(s);<sup>71</sup> and,
- the revocation of previously-issued LMIA's.<sup>72</sup>

The appropriate penalties for violations are determined based on a points system, which takes into account the following factors:

- the type of violation as defined by the Regulations;<sup>73</sup>
- the employer's compliance history;<sup>74</sup>
- the severity of the violation;<sup>75</sup>
- the size of the employer's business (for financial penalties only);<sup>76</sup> and
- whether the employer voluntarily disclosed information about potential non-compliance before an inspection was initiated.<sup>77</sup>

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60. *Id.* at §§ 209.8(2)(a), 209.9(2)(a).

61. *Id.* at §§ 209.8(2)(b), 209.9(2)(b).

62. *Id.* at §§ 209.8(2)(c), 209.9(2)(c).

63. *Id.* at §§209.8(2)(d), 209.9(2)(d).

64. *Id.* at §§ 209.8(2)(e), 209.9(2)(e).

65. *Id.* at §§ 209.8(2)(f), 209.9(2)(f).

66. *Id.* at §§ 209.8(2)(g), 209.9(2)(g).

67. *Id.* at § 209.996(4)(d).

68. *Id.* at § 209.98 and Schedule 2.

69. *Id.* at § 209.992(1).

70. *Id.* at § 209.99(1).

71. *Id.* at § 209.997.

72. *Harper Government Brings in Stiff New Penalties for Those Who Abuse Foreign Worker Programs, supra* note 52.

73. Immigration and Refugee Protection Regulations, SOR/2002-227 §§ 209.97, S.2 (Can.).

74. *Id.* at §§ 209.991(1)(a)(i), 209.991(1)(b)(i), Schedule 2.

75. *Id.* at §§209991(1)(a)(ii), 209.991(1)(b)(ii), Schedule 2.

76. *Id.* at Schedule 2.

77. *Id.* at § 209.991(1)(d).

In addition to consequences for non-compliance with the Regulations, violations may also constitute offences under the *Immigration and Refugee Protection Act*,<sup>78</sup> including:

- misrepresentation,<sup>79</sup> or aiding and abetting misrepresentation;<sup>80</sup> penalties for these offences include up to five years in jail for officers and directors of the corporation/employer, and up to \$100,000 in fines,<sup>81</sup> and employees can be banned from entering Canada for a period of five years;<sup>82</sup> and
- allowing an employee to work without proper authorization;<sup>83</sup> penalties include up to two years in jail for officers and directors of the corporation/employer, and up to \$50,000 in fines.<sup>84</sup>

The imposition of penalties for these offences is not limited to employers in Canada. The Immigration and Refugee Protection Act extends the applicability of the Act outside of Canada.<sup>85</sup> In addition, there is no requirement that employers knowingly employ a foreign worker without proper authorization. The Act indicates that a person who fails to exercise due diligence in this regard is deemed to know that the work was not properly authorized.<sup>86</sup>

This extensive immigration compliance regime is one of the most rigorous compliance regimes in the world. It makes Canada arguably the toughest on employers who fail to comply with the Regulations, so they must proactively review compliance documentation. It follows then, that corporate counsel should also conduct immigration due diligence in merger and acquisition transactions to verify that their clients do not inherit liabilities.

## **VII. World Bank Group v. Wallace, 2016 SCC 15<sup>87</sup>**

In April of 2016, the Supreme Court of Canada decided *World Bank Group v. Wallace*,<sup>88</sup> and in the process, confirmed that international organizations enjoy immunity from compulsory legal process in member states, absent an express waiver. The Court also defined the parameters of the disclosure that an accused can seek from third parties when challenging judicial authorization to obtain wiretap evidence.

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78. Immigration and Refugee Protection Act, S.C. 2001, c 27 (Can.).

79. *Id.* at § 126.

80. *Id.* at § 127.

81. *Id.* at § 128.

82. *Id.* at § 40(2)(a).

83. *Id.* at § 124(1)(c).

84. *Id.* at § 125.

85. *Id.* at § 135.

86. *Id.* at § 124(2).

87. Authored by Adam Mauntah of the Department of Justice, Canada Revenue Agency Legal Services. The opinions expressed herein are those of the author and do not necessarily reflect those of the Government of Canada.

88. *World Bank Group v. Wallace*, 2016 S.C.R. 15 (Can.).

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The World Bank Group is composed of five organizations, including, *inter alia*, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The Integrity Vice-Presidency (INT) is an independent investigative unit within the World Bank Group.<sup>89</sup> The INT received tips about corruption in the process for awarding a contract to supervise construction of a bridge, which was being funded partly with World Bank Group loans.<sup>90</sup> Given that a Canadian firm and some of its principals were alleged to have engaged in corrupt practices, INT voluntarily shared with the Royal Canadian Mounted Police (RCMP) certain documents from INT's investigation. The RCMP obtained a wiretap authorization,<sup>91</sup> allowing the RCMP to intercept private communications.<sup>92</sup>

The RCMP investigation led to charges under the Corruption of Foreign Public Officials Act.<sup>93</sup> Having received the pre-trial disclosure to which they were entitled,<sup>94</sup> the four accused in the matter brought an *O'Connor*<sup>95</sup> application, seeking records from INT that had not been provided to the RCMP and, therefore, not included in its disclosure. The accused wanted to compel two INT investigators to testify in the proceedings.<sup>96</sup> Moreover, they brought a *Garofoli*<sup>97</sup> application, arguing that the affidavit sworn by the RCMP officer in support of the application for the wiretap authorizations was deficient, and that the authorization should therefore not have been granted.<sup>98</sup> The accused sought the additional evidence for their *Garofoli* application.

The Court considered whether the World Bank Group could be compelled to produce records, and whether its personnel could be compelled to testify. The World Bank Group submitted that the INT enjoys immunities from which the IBRD benefits,<sup>99</sup> including the inviolable<sup>100</sup> nature of its archives and the status of its personnel as being immune from legal process.<sup>101</sup>

The Court unanimously accepted these submissions. Interpreting the relevant provisions of the IBRD and IDA Articles of Agreement (the

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89. *Id.* ¶ 13; see also *Annual Update*, WORLD BANK, <http://pubdocs.worldbank.org/en/118471v475857477799/INT-FY16-Annual-Update-web.pdf>.

90. 2016 S.C.R. 15 at ¶ 14.

91. Criminal Code, R.S.C. 1985, c C-46 (Can.), §§185-186.

92. 2016 S.C.R. 15 at ¶ 16.

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

94. See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.).

95. *R. v. O'Connor*, [1995] 4 S.C.R. 411 (Can.).

96. *Id.* ¶ 23.

97. *R. v. Garofoli*, [1990] 2 S.C.R. 1421 (Can.).

98. *Id.* ¶¶ 34-35.

99. Immigration and Refugee Protection Act, C. 2001, c 27 at ¶ 32.

100. *IDA Articles of Agreement*, INTERNATIONAL DEVELOPMENT ASSOCIATION, <https://ida.worldbank.org/sites/default/files/IDA-articles-of-agreement.pdf> (last visited Apr. 10, 2016).

101. *Id.* at Article VII, §8 and Article VIII, §8.

Articles), which have the force of law in Canada,<sup>102</sup> the Court held that the Ontario judge who issued the subpoenas had interpreted the provisions too narrowly: the term “archives” covers all records, not only those that have a historical value with which the term “archives” may be associated in everyday language.<sup>103</sup> The immunities in both sections five and eight of the Articles were held to be absolute and not functional such that the World Bank Group need not prove that the immunity is required for it to carry out a particular function.<sup>104</sup> The Court also held that the World Bank Group did not waive immunity by assisting the RCMP, as INT had clearly stated it was acting without prejudice to its right to claim immunity.<sup>105</sup>

The scope of an *O'Connor* application for third-party records in the context of a *Garofoli* application was narrowly defined by the Court: only documents of probative value to what the officer who swore the Affidavit knew or ought to have known will be relevant, and the scope of disclosure ordered by the Court will be limited accordingly.<sup>106</sup> The accused, having received disclosure from the Crown, would have to show the relevance of other records in light of that information; their arguments as to the relevance of the INT records were held to be speculative.<sup>107</sup>

This decision is seen as recognizing the important role of the World Bank Group in combating corruption.<sup>108</sup> It is a judicial statement that countries must accept that, for international organizations to function properly and benefit its supporters, the records and personnel of such organizations cannot be subject to undue judicial or executive interference by any member state.

## **VIII. Redwater and its Implications for Directors and Officers<sup>109</sup>**

### **A. BACKGROUND**

On May 19, 2016, the Alberta Court of Queen’s Bench (the Court) released its highly anticipated decision in the *Redwater Energy Corporation (Re)* case.<sup>110</sup> The case involved a Calgary-based oil and gas company that was petitioned into bankruptcy by its secured lender.<sup>111</sup> A summary of the salient facts are as follows.

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102. Bretton Woods and Related Agreements Act, R.S.C. 1985, c B-7.

103. Immigration and Refugee Protection Act at ¶¶ 70-74.

104. *Id.* ¶ 64.

105. *Id.* ¶¶ 95-96.

106. *Id.* ¶¶ 138-40. Whether the alleged facts are true is a matter to be determined at trial.

107. *Id.* ¶¶ 142-143.

108. Annual Update, *supra* note 89, at 6.

109. Authored by Melissa N. Burkett and Taylor Schappert of Osler, Hoskin & Harcourt LLP.

110. *Redwater Energy Corporation (Re)*, 2016 CanLII 278 (Can. Alta. Q.B.) (“Redwater”).

111. *Redwater Energy Corp. Certificate of Filing*, GRANT THORNTON (Nov. 2, 2015), [http://www.granthornton.ca/resources/creditor\\_updates/documents/Redwater%20Energy%20Corp/Certificate%20of%20Filing%20-%20Nov%202015%20-%20Redwater.pdf](http://www.granthornton.ca/resources/creditor_updates/documents/Redwater%20Energy%20Corp/Certificate%20of%20Filing%20-%20Nov%202015%20-%20Redwater.pdf).



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A trustee, empowered to act in respect of all of the property of the debtor,<sup>112</sup> purported to take possession and control of the Alberta Energy Regulator (AER) licenses, permits, and approvals for twenty of Redwater's approximately 127 licensed properties, while disclaiming the others.<sup>113</sup> In response, the AER issued closure and abandonment orders (the Abandonment Orders), advising the Trustee that it must abandon Redwater's wells and facilities on behalf of the licensee, and that disregarding the Abandonment Orders would result in the AER commencing abandonment proceedings and seeking recovery of its costs from the Trustee.<sup>114</sup> The AER subsequently applied for an order compelling the Trustee to comply with the Abandonment Orders (the Application). The Application was supported by the Orphan Well Association (the OWA), a non-profit organization that operates under the delegated authority of the AER and whose purpose is to conduct abandonment or site reclamation activities on specific properties designated by the AER as orphans.<sup>115</sup>

The issues before the court were whether federal bankruptcy legislation granted the trustee the power to disavow itself of some, or all of the assets of the debtor, and whether Provincial environmental legislation required the trustee to assume the debtor's environmental liabilities related to the oil and gas assets.

**B. THE PARTIES' POSITIONS**

The Trustee, relying on the doctrine of Federal paramountcy, argued that an operational conflict existed between the Bankruptcy and Insolvency Act (BIA) and the Oil and Gas Conservation Act and Pipeline Act (collectively, the Environmental Legislation), and that section 14.06(4) of the BIA provided that the Trustee had no personal liability, whereas the Environmental Legislation imposed personal obligations on the Trustee to comply with the AER's orders.<sup>116</sup> The AER argued that section 14.06 of the BIA permitted the Trustee to disclaim an interest in real property only, that the interests at stake did not constitute real property, and that the Trustee was not required to comply in its personal capacity, but rather as the trustee of the estate,<sup>117</sup> with the AER's orders.

**C. THE COURT'S DECISION**

Chief Justice Wittmann held there to be an operational conflict between the BIA and the Environmental Legislation: the BIA allowed the Trustee to renounce some assets, and not be responsible for environmental

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112. *Redwater*, ¶¶ 14-15; Bankruptcy and Insolvency Act, R.S.C. 1985, c B-3 ("BIA"), §§ 16(3) and 20(1).

113. *Id.* ¶ 22.

114. *Id.* ¶ 23.

115. *Id.* ¶¶ 33-35.

116. *Id.* ¶ 86.

117. *Id.* ¶ 91.

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abandonment and remediation work, while the Environmental Legislation did not allow the Trustee to renounce licensed assets because “licensee” includes a trustee or receiver.<sup>118</sup> Therefore, the Environmental Legislation must be inoperative to the extent of the conflict. The AER filed a Notice of Appeal on May 27, 2016.

**D. BULLETIN 2016-10**

Anticipating the Redwater decision, the AER released Bulletin 2016-10, which “remind[s] licensees and their directors and officers of their statutory responsibilities when ceasing operations because of insolvency.”<sup>119</sup> The bulletin, together with the Redwater decision, reinforces that the AER may enforce environmental abandonment and remediation work against a licensee, including through taking action against directors and officers personally.<sup>120</sup>

In Alberta’s current economic climate, the impact of Redwater on directors and officers of struggling oil and gas companies is significant.<sup>121</sup> One possible implication of Bulletin 2016-10 is that liquidation will become preferred to restructuring in light of abandonment obligations that continue post-restructuring.

**E. BULLETIN 2016-16**

After Redwater, the AER released Bulletin 2016-16, which imposed changes designed to “minimize risks to Albertans” arising from the decision.<sup>122</sup> The implications of Bulletin 2016-16 are significant, and include the following:

- license approval delays—the AER will process license eligibility applications as “non-routine;”
- uncertainty for existing transactions—the AER may require evidence that a license holder and its officers and directors continue to maintain adequate insurance before approving existing but previously unused licenses or transfer applications; and,
- limiting opportunities for smaller producers—the AER will require all transferees to have a demonstrated liability management ratio (LMR) of 2.0 or higher immediately following a license transfer. The

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118. *Id.* ¶ 181.

119. *Bulletin 2016-10: Obligations of Licensees When in Insolvency or When Otherwise Ceasing Operations*, THE ALBERTA ENERGY REGULATOR (Apr. 8, 2016), <https://www.aer.ca/documents/bulletins/Bulletin-2016-10.pdf>.

120. *Id.*

121. *E.g.*, in Redwater, the estimated cost of complying with the Abandonment Orders was over \$5,000,000, whereas the deemed value of those assets was only \$547,000 (*Redwater* at ¶ 72.).

122. *Bulletin 2016-16: Licensee Eligibility – Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, THE ALBERTA ENERGY REGULATOR (June 20, 2016), <https://www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf>.

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consequence is that smaller producers, more likely to have a LMR less than 2.0 are effectively prevented from transferring or acquiring licenses.

Bulletins 2016–10 and 2016–16 demonstrate the AER’s intent to use all available regulatory avenues in response to Redwater. In the meantime, directors and officers of struggling oil and gas companies must be mindful of possible liability for the environmental and remediation actions (or inactions) of companies in these difficult times.

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## China

ATHENA JIANGXIAO HOU,\* RONG ZHOU,\* JINGBING LI, YANLING ZHENG, HELEN XIAOQIN XU, HUNTER WENXIONG QIU, NANCY LIPING ZHANG, CINDY YUSU WU, AND QIAN XIE

This article summarizes selected international legal developments during 2016 in China.

### I. Trademark Law Development<sup>1</sup>

2016 witnessed remarkable progress in Chinese trademark law enforcement, including strengthened protection of well-known trademarks, reduced burden of proof for well-known trademarks, application of the anti-dilution principle, fact-specific determination of similarity and relatedness of goods, prohibition of bad faith registration, protection for famous movie and character names, and courts' emphasis on consistent trials and adjudication standards.

#### A. PROTECTION OF WELL-KNOWN TRADEMARKS

To provide better protection to well-known trademarks, the China Trademark Office ("CTMO"), the Trademark Review and Adjudication Board ("TRAB"), and courts have reduced the burden of proof necessary to prove that a trademark is well-known, and applied the anti-dilution principle.

##### 1. *Burden of Proof for Well-Known Trademarks*

Trademark Law<sup>2</sup> identifies several factors for determination of well-known trademarks, including trademark reputation; the duration of trademark use; the duration, extent, and geographical scope of trademark promotion; and trademark protection efforts.<sup>3</sup> Foreign companies had experienced substantial evidentiary difficulty in proving their trademarks are well-known in China; they were often required to submit audited economic

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\* Athena Jiangxiao Hou, General Counsel of Fuyao Glass America Inc., and Rong Zhou, attorney with Podo Legal LLC, edited this article.

1. Jingbing Li and Yanling Zheng, senior partner and partner of ZY Partners respectively, authored this section.

2. See 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 Committee of Nat'l People's Congress, Aug. 23, 1982, effective Mar.1, 1983), art. 14, 1983 Standing Comm. Nat'l People's Cong. Gaz. [hereinafter Trademark Law].

3. *Id.*

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data, tax certificates, and industry rankings. In 2016, the CTMO, the TRAB, and courts provided relief to well-known trademarks that have acquired high brand awareness through long-term use in China.

For instance, the CTMO recognized “耐克” (Nai Ke, the Chinese equivalent of NIKE) as a well-known trademark for clothing and shoes in a trademark opposition case.<sup>4</sup> The Beijing Intellectual Property Court (“Beijing IP Court”) recognized Nike’s swoosh logo as a well-known trademark for clothing, shoes, and hats in a trademark invalidation case.<sup>5</sup> That decision was upheld on appeal.<sup>6</sup>

In trademark invalidation lawsuits filed by Procter & Gamble Company (“P&G”) against a Chinese cosmetics company<sup>7</sup>, the Supreme People’s Court (“SPC”) recognized P&G’s trademarks “玉兰” (Yu Lan, the Chinese equivalent of OLAY) and “玉兰油” (Yu Lan You, the Chinese equivalent of OLAY Oil) as a well-known trademarks of cosmetics. Significantly, the SPC instructed courts to conduct a comprehensive evidentiary evaluation in determining the well-known status. Information including sales volume, sales contracts, advertising contracts, invoices, profits, and tax payment certificates was not requisite evidence to prove the well-known status of a trademark.

## 2. *The Anti-Dilution Doctrine*

A well-known trademark in China is entitled to anti-dilution protection, and thus identical or similar trademarks may be prohibited from being used or registered for dissimilar goods and services.<sup>8</sup> A “well-known trademark” is one that is well-known in the relevant public sector, which includes the consumers of relevant goods and services, and other business operators that are closely related to the sales and marketing of such goods and services.<sup>9</sup>

In 2016, courts granted anti-dilution protection to well-known trademarks in several cases. The SPC affirmed a decision granting the well-known status to “宝马” (Bao Ma, the Chinese equivalent of BMW), and extended

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4. Nike Innovate C.V. v. Taiwan Nailuo Screw Industry Co., Ltd., (2016) Shang Biao Yi Zi No. 0000031588 Decision (Sept. 6, 2016) (China).

5. Nike Innovate C.V. v. TRAB & Quanzhou City Luo Jiang Chao Sheng Shoes Co., Ltd., (2015) Jing Zhi Xing Chu Zi No. 4577 Administrative Judgment (Dec. 7, 2015) (China).

6. Nike Innovate C.V. v. TRAB & Quanzhou City Luo Jiang Chao Sheng Shoes Co., Ltd., (2016) Jing Xing Zhong No. 4133 Administrative Judgment (Oct. 25, 2016) (China).

7. The Procter & Gamble Company v. TRAB & Shantou City Weishida Cosmetics Co., Ltd., (2016) Zui Gao Fa Xing Zai Nos. 12 and 13 Administrative Judgments (May 19, 2016). (China).

8. See Trademark Law *supra* note 2, art. 13; Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law to the Trial of Cases of Civil Disputes over the Protection of Well- Known Trademarks, art. 9.

9. Interpretation of Supreme People’s Court on Several Issues Concerning the Application of Laws in Trying Civil Cases Involving Trademark Disputes No.32 Judicial Interpretation of 2002, (promulgated Oct. 12, 2009, effective Oct. 16, 2002), St Council Gaz, art. 8. (China).

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anti-dilution protection to the trademark for garments.<sup>10</sup> In another case, the SPC affirmed a decision granting the well-known status to “法拉利” (Falali, the Chinese equivalent of Ferrari), and extended protection to the trademark for eyeglasses.<sup>11</sup>

To determine whether to extend protection to a trademark for goods in different fields, the SPC directs courts to consider the degree of association of goods covered by the trademark at issue. In practice, the TRAB and courts generally will not provide unlimited cross-classification protection to well-known trademarks. Before they decide whether a trademark will dilute the distinctiveness of a well-known trademark, the TRAB and courts consider whether the goods covered by the competing trademarks are related, and whether the respective public sectors overlap.

In an opposition appeal case involving the “PHOTOSHOP” trademark for computer software products and the competing mark “PHOTOSHOP” for cosmetics, the Beijing Higher People’s Court considered the overlap of the respective public sectors of the competing marks, the similarity of the trademarks, and the distinctiveness and fame of Adobe Systems Incorporated’s trademark “PHOTOSHOP.” The court concluded that the registration and use of the opposed mark for cosmetics would damage the close relationship between Adobe’s “PHOTOSHOP” trademark and computer software products, and thus dilute the distinctiveness of this well-known trademark.<sup>12</sup>

In another opposition appeal case where the opposed mark was “星巴克” (Xing Ba Ke, the Chinese equivalent of Starbucks) for computerized carving machines, the Beijing Higher People’s Court recognized the well-known status of Starbucks’s trademark “星巴克” for coffee products and café services. However, the court refused to extend anti-dilution protection to Starbucks because the respective goods and services covered by the trademarks were not related, and therefore misleading the relevant public to associate the opposed mark with Starbucks was unlikely.<sup>13</sup>

In practice, it is challenging to show the likelihood of confusion and dilution. The TRAB and courts may reach different conclusions on these issues.

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10. Bayerische Motoren Werke Aktiengesellschaft v. TRAB, PAN Guanghua, & U.S.A. Treasured Horse Dress Limited, (2016) Zui Gao Fa Xing Shen No. 336 Administrative Ruling (March 24, 2016) (China).

11. FERRARI S.P.A. v. TRAB & Beijing Bailihao Glasses Co., Ltd., (2016) Zui Gao Fa Xing Shen No. 305 Administrative Ruling (Mar. 31, 2016) (China).

12. Adobe Systems Incorporated v. TRAB & Beijing Lian Tuo Chuang Xiang Technology Development Co., Ltd., (2016) Jing Xing Zhong No. 1377 Administrative Judgment (Aug. 29, 2016) (China).

13. Starbucks Corp. v. TRAB & MENG Xiangzeng, (2016) Jing Xing Zhong No. 1920 Administrative Judgment (August 24, 2016) (China).

## B. SIMILAR GOODS AND SERVICES

Until recent years, the CTMO, TRAB, and courts have relied on the CTMO Similar Goods and Services Classification Form (the “Classification Form”) to determine the similarity of goods and services. In recent years, the TRAB and courts have included in their similarity determination other factors including functions, manufacturers, sales channels, and consumers related to the goods and services.

In 2016, the SPC published two exemplar cases applying a more flexible and reasonable standard to determine similarity. In *Blancpain*,<sup>14</sup> the SPC held, “Under the circumstances where the cited trademark bears [a] relatively high degree of distinctiveness[,] and enjoys [a] certain reputation or where the opposition petitioner has shown apparent bad faith of free-riding, the Court shall adopt [a] more flexible standard in determining similarity of goods.” There, the opposed mark “Blancpain” and registered mark “BLANCPAIN” cover goods in different classes as stated in the Classification Form—clothing, shoes, and leather belts versus clocks and watches respectively. However, the SPC held there was similarity, because the goods involved are closely associated in terms of functions, sales channels, and consumers.

In another case involving a registered mark “益达” (YiDa, the Chinese equivalent of EXTRA) for chewing gum and an opposed mark “益达” (the Chinese equivalent of EXTRA & its Pinyin formation) for toothpaste, the SPC found similarity in goods because the functions, sales modes, and consumption characteristics of these goods were closely related, and consumers cannot distinguish the source of goods under these marks.<sup>15</sup>

## C. PROHIBITION OF BAD FAITH REGISTRATIONS

In 2016, the CTMO, TRAB, and courts became more active in prohibiting bad faith registrations. The CTMO applies Article 7 and Article 10.1 (7) of Trademark Law to preclude bad faith registrations. To determine the existence of bad faith, the CTMO examines several factors including similarity of marks, the registered trademark’s fame and influence, the overlap of goods or services, and the bad faith conduct of copying or plagiarizing the original trademark. Where the opposed trademark is a copy or imitation of the more influential trademark and the trademark similarity causes consumer confusion, the CTMO typically finds bad faith.

The TRAB and courts apply a different article—Article 44.1 of Trademark Law—to strike down bad-faith filings, especially in cases where a later-filed trademark applicant commits rampant squatting activities, and

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14. BLANCPAIN SA v. TRAB & CHEN Weixiong, (2016) Zui Gao Fa Xing Zai No. 10 (June 24, 2016) (China).

15. Wm. Wrigley Jr. Co. v. TRAB & Guangzhou Qian Cai Cosmetics Co., Ltd., (2016) Zui Gao Fa Xing Zai No. 71 (Sept. 26, 2016) (China).

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files several challenges.<sup>16</sup> The TRAB and courts hold that such bad faith acts disturb normal trademark administration order, injure public interests, and constitute “registration acquired by any other illicit means” under Article 44.1.

Most significantly, in a trademark opposition case filed by an individual to challenge the trademark 飘柔 (Piao Rou, the Chinese equivalent of Rejoice),<sup>17</sup> the Beijing IP Court affirmed the application of Article 44.1, and detailed how to determine attempts to obtain a trademark registration “with any other illicit means” under Article 44.1. The three-judge panel, led by The Honorable Su Chi, the president of Beijing IP Court, expressed the court’s commitment of “no-tolerance” towards bad faith filings. The decision was affirmed on appeal.<sup>18</sup>

#### D. FAMOUS MOVIE AND CHARACTER NAMES

Trademark protection of merchandising rights is not expressly provided in Chinese law. Nevertheless, in a series of opposition appeals in connection with “驯龙高手 HOW TO TRAIN YOUR DRAGON” and “功夫熊猫 KUNG FU PANDA” in 2015, the Beijing First Intermediate People’s Court and the Beijing Higher People’s Court have explicitly held that merchandising rights to the name of famous movies and characters are protectable as prior rights to a trademark registration.<sup>19</sup>

However, in subsequent opposition appeals related to “功夫熊猫 KUNG FU PANDA” filed by the same applicant,<sup>20</sup> the same trial court dismissed DreamWorks Animation L.L.C.’s claim related to merchandising rights on the ground that such rights are not explicitly set out in Chinese law. The court held such famous movie and character names are protectable legal property rights because the intellectual input and labor investments created commercial value and business opportunities.

In recent final judgments in the four opposition appeals related to “功夫熊猫 KUNG FU PANDA,” the Beijing Higher People’s Court did not address merchandising rights. Rather, it held “功夫熊猫 KUNG FU PANDA” is a famous movie name to be protected under the Anti- Unfair

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16. Trademark Law, *supra* note 2, art. 44.1.

17. HE Dun v. TRAB and The Procter & Gamble Company, (2015) Jing Zhi Xing Chu Zi No. 2474 Administrative Judgment (Dec. 30, 2015) (China).

18. HE Dun v. TRAB and The Procter & Gamble Company, (2016) Jing Xing Zhong No. 1606 (June 30, 2016) (China).

19. DreamWorks Animation L.L.C. v. TRAB and Suzhou Snail Digital Technology Co., Ltd., (2014) Yi Zhong Xing (Zhi) Chu Zi No. 8924 Administrative Judgment (Jan. 19, 2015) (China). DreamWorks Animation L.L.C. v. TRAB and HU Xiaozhong, (2015) Gao Xing (Zhi) Zhong Zi Nos. 1968, 1969 and 1973 Administrative Judgments (Aug. 20, 2015).

20. DreamWorks Animation L.L.C. v. TRAB, Shanghai Weipu Apparel Co., Ltd., (2014) Yi Zhong Xing (Zhi) Chu Zi Nos. 4270, 4272, 4273, 4274, 4275, 4276 and 4277 Administrative Judgments (Sept. 20, 2015). DreamWorks Animation L.L.C. v. TRAB, Shanghai Weipu Apparel Co., Ltd., (2014) Yi Zhong Xing (Zhi) Chu Zi No. 7986 Administrative Judgment (Nov. 20, 2015).



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Competition Law.<sup>21</sup> The court directed two factors be considered in defining the scope of protection: name popularity and social influence, and the likelihood of confusion.<sup>22</sup>

**E. CONSISTENT TRIAL AND ADJUDICATION STANDARDS**

Chinese court opinions are not binding precedents. In cases involving similar fact scenarios and statutes, the TRAB and courts often render inconsistent decisions. In order to apply consistent adjudication standards in intellectual property cases, the SPC established the Research Base of Intellectual Property Case Guidance within the Beijing IP Court. In 2016, the Beijing IP Court emphasized the following precedent set by cases with similar facts in trademark disputes, and identified in its opinions the precedent upon which it relied.

In *Gap (ITM) Inc. v. the TRAB*,<sup>23</sup> which involved Gap's trademark application of 盖璞内衣 (Gai Pu Nei Yi, the Chinese equivalent of GAP BODY), the SPC criticized the TRAB for inconsistent decisions in cases involving similar facts under the pretext of case-by-case review. The SPC encouraged courts to apply principles of fairness through adjudication consistency and predictability.

**II. Draft Amendments to Anti-Unfair Competition Law<sup>24</sup>**

In February 2016, the Legislative Affairs Office of the State Council released the Draft Amendments to Anti-Unfair Competition Law for public comments.<sup>25</sup> The Anti-Unfair Competition Law has not been amended since it was promulgated in 1993. Set forth below are highlights of the proposed amendments relating to intellectual property.

**A. THE CURRENT LAW**

The current thirty-three-article Anti-Unfair Competition Law is supplemented by several regulations and judicial interpretations, including

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21. See Anti-Unfair Competition Law of the People's Republic of China (promulgated by the Third Sess. Of the Standing Comm. Of the Eighth National People's Congress, Sept. 2, 1993) art. 5 (lawinfochina) (China).

22. *DreamWorks Animation L.L.C. v. TRAB and Beijing Wei Bo Intellectual Property Agent Co., Ltd.*, (2016) Jing Xing Zhong Nos. 2012 and 3808 Administrative Judgment (November 3, 2016). *DreamWorks Animation L.L.C. v. TRAB and Shanghai Weipu Apparel Co., Ltd.*, (2016) Jing Xing Zhong No. 3508 Administrative Judgment (Nov. 3, 2016). *DreamWorks Animation L.L.C. v. TRAB and Shanghai Tobacco Group Co., Ltd.*, (2016) Jing Xing Zhong No. 2307 Administrative Judgment (Nov. 3, 2016).

23. *Gap (ITM) Inc. v. TRAB*, (2016) Zui Gao Fa Xing Zai No. 7 Administrative Judgment (Mar. 22, 2016).

24. This section is authored by Helen Xiaoqin Xu, partner of Allbright Law Offices.

25. See Notice of The Legislative Affairs Office of The State Council on Publication of the Anti-Unfair Competition Law (Draft Amendments) for Public Comments (Feb. 25, 2016) (China) [hereinafter Draft Amendments].

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*Several Regulations on the Prohibition of Acts of Unfair Competition Involving the Passing-off of a Name, Packaging or Trade Dress Peculiar to Well-Known Merchandise,*<sup>26</sup> and the *Interpretations of the Supreme People's Court on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition.*<sup>27</sup> These supplementary regulations and rules provide administrative enforcement authority, definitions of key terms, and practical guidance for handling related civil actions.

The Anti-Unfair Competition Law intersects with several other laws. The Anti-Unfair Competition Law and Trademark Law both prohibit counterfeiting of registered trademarks. The Anti-Unfair Competition Law specifically refers to the Trademark Law concerning enforcement against counterfeiting registered trademarks. Where the act of unfair competition is passing-off of a registered trademark, the statutory damages provision in the Trademark Law applies. The Anti-Unfair Competition Law provides alternative relief to brand owners when no remedy is available under intellectual property laws.

#### B. HIGHLIGHTS OF THE DRAFT AMENDMENTS

The Draft Amendments contain thirty-five articles, including revisions of thirty articles, the addition of nine new articles, and the removal of seven articles.

The Draft Amendments expand the current list of unfair competition conduct by introducing a broadly defined concept “business identifier.” A business identifier is “a sign used to distinguish a commodity producer or business operator, including but not limited to a well-known commodity’s name, packaging, decoration and shape, as well as a company name, abbreviation, trade name, main body of domain names, webpage.”<sup>28</sup>

Abuse of business identifiers to create “market confusion” is prohibited. The concept of market confusion, or confusion as to the source of goods, refers to “the misunderstanding by the relevant public as to the producer or marketer of a commodity, or to the existence of certain link between the producers or marketers of commodities.”<sup>29</sup> This amendment signifies a shift of focus from regulating businesses and the market to protecting consumers.

To be consistent with other laws, the Draft Amendments also remove existing paragraphs which address registered trademarks, indications of

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26. Zhonghua Renmin Gongheguo Gongdhang Xingxheng Guanlijiju Ling (中华人民共和国国家工商行政管理局令) [Order Of The State Administration For Industry And Commerce Of The People's Republic Of China] (promulgated by St. Industry & Commerce Admin., July 6, 1995, effective July 6, 1995), <http://www.chinacourt.org/law/detail/1995/07/id/23002.shtml>.

27. Interpretation Of The Supreme People 's Court On Several Issues Concerning The Application Of Law In Civil Cases Of Unfair Competition (promulgated by Supreme People's Court, Jan.12, 2007, effective Feb.1, 2007), <http://www.chinacourt.org/law/detail/2007/01/id/114671.shtml>.

28. Draft Amendments, *supra* note 25, art.5.

29. *Id.*

product quality, and misleading advertising, which are each respectively addressed by the Trademark Law, Product Quality Law, and Advertising Law.

The Draft Amendments provide new and reinforced enforcement measures. Enforcement authorities previously had no means to regulate modifications or variations of a company name. Under the Draft Amendments, the enforcement authorities shall have the power to impose penalties where a company uses a third party's registered or unregistered well-known trademark in its company name and creates market confusion. The authorities are empowered to order the company to file a company name registration modification within one month. In serious circumstances, the offending party's business license can be revoked.

The Draft Amendments are currently pending for public comments. The State Council will, after having adopted the Draft Amendments, submit them to the Standing Committee of the National People's Congress for review.

### **III. China Adopts a Record-Filing System For Foreign Direct Investments in Industry Sectors Not on the "Negative List"<sup>30</sup>**

All foreign direct investments into China and subsequent changes were previously subject to case-by-case review, and prior approval by the Ministry of Commerce or its local branches (the "MOFCOM"). No joint venture contracts and articles of associations of foreign investment enterprises ("FIE") could take effect until approval was granted by MOFCOM. Such an extensive MOFCOM approval system caused substantial delays and uncertainty to the closing of foreign direct investment ("FDI") transactions. Various MOFCOM branches and officials also exercised frequent and inconsistent discretion to direct changes to the substantive terms of the joint venture contracts and articles of association.

To facilitate FDI, and streamline regulatory approval process, a "negative list" based record-filing system has been initially tested in Shanghai free trade zones since 2014. Under the pilot record-filing system, FDI in industry sectors not restricted or prohibited by the Catalogue of Industries for Guiding Foreign Investment, as amended in 2015 and to be updated from time to time (the "Catalogue"), or those in encouraged sectors but subject to limitations on foreign ownership or management control ("negative list") were subject to the record filing system, while those on the "negative list" subject to special entry administrative measures, continue to be subject to the MOFCOM approval requirements. Following successful implementation of the record-filing process in three additional free trade zones in Tianjin, Guangdong, and Fujian, MOFCOM decided to roll out a nationwide record-filing system, and grant foreign investors "pre-establishment national treatment" subject to a "negative list."

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30. This section is authored by Wenxiong Hunter Qiu, partner of Zhong Lun Law Firm.

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On September 3, 2016, related FIE Laws were amended to the effect that the establishment of any FIE in any industry sector not subject to special entry administrative measures (*i.e.* not on the “negative list”) will no longer be subject to the approval requirements of MOFCOM.<sup>31</sup> Effective October 1, 2016, FDI in industry sectors not on the “negative list” shall follow the record-filing requirement. This is a significant change in China’s FDI regulatory regime.<sup>32</sup>

To implement amendments to the FIE related laws, on October 8, 2016, MOFCOM enacted the Provisional Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises, the Order of the Ministry of Commerce of the People’s Republic of China [2016] No. 3 (the “Provisional Measures”). The Provisional Measures set forth its scope of application; the timing, process, and filing requirements; and the authorities in charge of the filing. The key provisions concerning the “negative list” based record-filing system in the Provisional Measures are in the draft Foreign Investment Law which MOFCOM published on January 19, 2015 for public comments.

**A. NATURE OF THE RECORD-FILING SYSTEM**

Under the new record-filing system, completion of filing with MOFCOM is not a prerequisite for registration with the State Administration of Industry and Commerce (“SAIC”) and other government agencies. In contrast, an applicant in the previous approval system was required to obtain an FIE approval certificate before it could register with the SAIC to obtain a business license. Furthermore, the effective date of the shareholders’ agreement and articles of association will no longer be conditional upon the completion of the record-filing; it can start from the date the agreements are executed and approved by their respective board or shareholders’ resolutions.

**B. DETAILS OF THE RECORD-FILING SYSTEM**

Filings of incorporation and change of FIEs are submitted to MOFCOM’s provincial branches in the respective jurisdictions.<sup>33</sup> Under the Provisional Measures, to establish a new FIE, the record-filing can be completed either before, or within 30 days after, issuance of a business license by the SAIC.<sup>34</sup> To change an existing FIE, record-filing can be completed within 30 days. An FIE or its investor can fill out required

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31. MAYER BROWN JSM, *China Revises Inbound Foreign Investment Laws* (Sep. 9, 2016).

32. *Id.*

33. Waishang Touzi Qiye Sheli Ji Biangeng Beian Guanli Zhanxing Banfa (外商投资企业设立及变更备案管理暂行办法) [Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises] (promulgated by Ministry of Commerce of the People’s Republic of China, effective Oct. 8, 2016), <https://hk.lexiscn.com/law/law-english-1-2951857-T.html> [hereinafter Provisional Measures].

34. *Id.*

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information, and submit required documents in a record-filing system established by MOFCOM.<sup>35</sup> MOFCOM only makes a prima facie review of the filed information, and determines whether the record-filing applies.<sup>36</sup> Upon submission of all required information, MOFCOM has three working days to complete the record-filing, and to notify applicants of its decision.<sup>37</sup> An FIE or its investor can obtain a filing receipt from MOFCOM, which is not required for registration with the SAIC, and other government agencies.<sup>38</sup> Therefore, record-filing is for informational purpose. This is fundamentally different from the previous approval system of MOFCOM.

C. APPLICATION SCOPE

The Provisional Measures apply to incorporation and change of FIEs in industries not subject to special administrative measures for foreign direct investments (*i.e.* not on the “negative list”).<sup>39</sup> Industry sectors subject to special administrative measures include sectors prohibited or restricted for foreign investment and sectors encouraged for foreign investments but subject to ownership restrictions or management control restrictions under the Catalogue for the Guidance of Foreign Investment Industries (the “Catalogue”) — the so-called negative list.<sup>40</sup> FIEs in industries on the “negative list” remain subject to MOFCOM review and approval. The Catalogue includes over 300 industries where foreign investment is encouraged and merely thirty-eight industries where foreign investment is restricted. The transition to the record-filing system is expected to eliminate the need to seek MOFCOM approval for most FDI transactions.

D. UNRESOLVED ISSUES

The record-filing system represents a modest but practical and effective approach to improve China’s FDI regulatory regime. Certain conflicts between the FIE related laws and the Company Law remain to be resolved. Regulation of FDI into restricted industry sectors through variable interest entities needs to be addressed. These issues will likely be addressed in the forthcoming Foreign Investment Law currently under deliberation by the legislature. Successful implementation of the record-filing system will lay a solid foundation for the enactment of the Foreign Investment Law.

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Catalogue for the Guidance of Foreign Inv. Indus, Announcement No.22 of the Nat’l Dev. & Reform Comm’n & the Ministry of Commerce, (effective Apr. 10, 2015). (China).

#### **IV. Foreign Investment in the Chinese Real Estate Market<sup>41</sup>**

The real estate industry is a pillar industry in China, and is essential to the development of its national economy. Changes in the regulation of foreign investment in the real estate industry reflect changes of China's macroeconomic policy. Since 2006, Chinese economy has been on a track of rapid growth, then became slow running, and then increased to steady growth. Accordingly, Chinese policy on foreign investment in the real estate industry evolved from close scrutiny to gradual liberalization.

China's booming real estate industry has attracted tremendous interest of FDI since 2000. Foreign-invested real estate companies, with funding from offshore banks and shareholders, caused a dramatic increase in the total volume of the foreign loans in China's real estate industry.<sup>42</sup> During 2006 through 2013, MOFCOM and other government authorities issued a number of polices and regulations to restrict foreign investment in the real estate market. Since 2014, the real estate industry experienced intensive readjustment, and government authorities formulated a series of policies aiming to lessen administrative intervention, and to loosen foreign investment restrictions.

As explained more fully in section III, on October 8, 2016, the MOFCOM promulgated the Provisional Measures, permitting certain FIEs to use a record-filing system. For those FIEs, prior approval of MOFCOM and/or its local branches is no longer required in most instances.<sup>43</sup> If a proposed FIE is in a restricted industry sector or an "encouraged" industry (which entails equity and senior management related requirements), prior approval by MOFCOM and/or its local branches is required. If a proposed FIE does not fall within the aforesaid categories, then the online record-filing procedure applies. Pursuant to the 2015 Catalogue, foreign investment for construction of golf courses and villas is prohibited, while foreign investment for development, construction, and operation of all other types of real estate projects is not restricted or prohibited.

After the promulgation of the Provisional Measures, real estate FIEs, which engage in development, construction, and operation of real estate projects other than golf course or villa projects follow the online record filing procedure, rather than MOFCOM's prior approval procedure. According to the Provisional Measures,<sup>44</sup> incorporation filings can be completed either before, or after the issuance of the business license by SAIC.

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41. This section is authored by Nancy Liping Zhang and Cindy Yusu Wu, partner and attorney of Junhe Law Offices respectively.

42. During the first half of 2006, the newly borrowed foreign debt by foreign invested real estate was \$1.735 billion, a year-on-year growth of 203.32%; by the end of June 2006, the foreign debt by foreign invested real estate accounted for 92.23% of the foreign debt by the whole real estate industry in China.

43. See Provisional Measures, *supra* note 33, art 2.

44. *Id.* arts. 5, 6.

Although the Provisional Measures of record-filing system dramatically simplifies the process under which MOFCOM and its local branches administer the incorporation of real estate FIEs, other regulations applicable to real estate FIEs are not automatically revoked. The completion of the foreign exchange registration is a prerequisite step for real estate FIEs to open a capital account, to inject the capital funds, and to convert foreign currency into Chinese currency. Real estate FIEs may be subject to certain operational requirements, including the thresholds for obtaining loans or converting foreign currency loans into Chinese currency; the requirement of a “principal of self-use” for purchasing real estates by foreign companies and individuals;; and the requirement of a “principal of commercial presence” for purchasing not-for-self-use real estates in China.<sup>45</sup> Before MOFCOM and other government authorities issue clear guidance on these issues, there may be variation in local practices. Companies are advised to closely monitor legislation and policy developments in these areas.

#### **V. Carbon Emission Trading System<sup>46</sup>**

To reduce greenhouse gas emissions, China announced it will roll out a nationwide market-based carbon emission-trading system (“ETS”) in early 2017.<sup>47</sup> Because China is the world’s largest carbon emitter and a key player in global trade, the establishment of an ETS in China is a milestone for international carbon trading.

A standard ETS, or “cap and trade” system is a market-based mechanism in which a regulating body establishes an upper limit (“cap”) on the total amount of emissions for a limited compliance period from the regulated entities.<sup>48</sup> Initially, a number of “allowances” equal to the cap will be distributed to the regulated entities through auction and allocation.<sup>49</sup> Regulated entities are required to report their emissions and submit equivalent allowances at the end of the compliance period. When there is a deficit in allowances, the entities generally are permitted to buy extra allowances on the market to meet their emission reduction obligation. Alternatively, they can purchase carbon offsets, which are generated by emission reducing activities not regulated by the cap. The design of such a scheme is expected to leverage private sector forces to reduce future growth

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45. See Circular on the Standardization of Access to and Administration of Foreign Investment in the Real Estate Market (Jian Zhu Fang [2006] No.171).

46. This section is authored by Rong Zhou.

47. John Chen Liu, *Assembling China’s Carbon Markets: The Carbons, the Business and the Marginalized*, ASH CENTER FOR DEMOCRATIC AND INNOVATION, HARVARD KENNEDY SCHOOL (Jun. 2016), [http://ash.harvard.edu/files/ash/files/assembling\\_chinas\\_carbon\\_markets.pdf?m=1466106853](http://ash.harvard.edu/files/ash/files/assembling_chinas_carbon_markets.pdf?m=1466106853).

48. Virgilio, N. & S. Marshall, *Foreign Carbon Strategies in Climate Change Mitigation: Confronting Challenges Through on-the-Ground Experience*, THE NATURE CONSERVANCY, Arlington, Virginia, 11 (2009), <https://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/Feb2010/MCFC-medressingle1.pdf>.

49. *Id.*

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in carbon dioxide (“CO<sub>2</sub>”) emissions from the regulated sectors such as power, industry, and manufacturing.

China’s Twelfth Five-Year Plan (2011-2015) (“12th FYP”), approved by the National People’s Congress, provides that China will establish statistical and verification systems for greenhouse gas emissions, and gradually establish a carbon emissions trading system.<sup>50</sup> The 12th FYP sets forth a target to reduce the CO<sub>2</sub> emissions per unit of gross domestic product by 17%.<sup>51</sup> Since 2014, pilot emission trading projects have been launched across the provinces of Guangdong and Hubei, and in the cities of Beijing, Shanghai, Shenzhen, Chongqing and Tianjin.<sup>52</sup>

These trading projects account for almost 4 million tons of carbon emission quotas, making China the world’s second largest carbon trading market, following the European Union’s ETS.<sup>53</sup> According to the *Environomist China Carbon Market Research Report 2016*, “carbon emissions trading in China, while still facing significant challenges, is exceeding performance expectations. The pilots have achieved 95% compliance rates, there is growing interest and attention from non-pilot areas, and capacity for businesses to engage in ETS is increasing.”<sup>54</sup>

In early 2016, the National Development and Reform Commission issued a notice on earnestly implementing the key work of the national carbon ETS. It outlined a three-stage plan for developing a national ETS: 1) the preparatory stage during which the ETS infrastructure be completed by the end 2016; 2) the second stage during which a national ETS be introduced and perfected to achieve stable operation from 2017 to 2020; and 3) the third stage for ETS expansion and exploring integration in the international carbon market.<sup>55</sup>

While there are still many factors to evaluate in the development of the ETS, a major concern appears to be the determination of a balance between administrative regulation of carbon prices and the free rein of market economy principles. Furthermore, a most critical area for ETS building is legal infrastructure. Effective implementation of a nationwide scheme will require a strong legal framework to ensure compliance and enforcement. It

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50. Fei Teng, *Status of China’s Regional Trading Programs: Progress and challenge*, *Institute of Energy, ENVIRONMENT AND ECONOMY OF TSINGHUA UNIVERSITY* (Aug. 13, 2013), [http://unfccc.int/files/focus/mitigation/application/pdf/status\\_of\\_chinas\\_regional\\_trading\\_programs.pdf](http://unfccc.int/files/focus/mitigation/application/pdf/status_of_chinas_regional_trading_programs.pdf).

51. *Id.*

52. Han Guoyi et al., *China’s Carbon Emission Trading: An Overview of Current Development* pg 23, STOCKHOLM ENVIRONMENT INSTITUTE (2012).

53. Ilario D’Amato, *China Will Launch World’s Biggest Carbon Market In 2016* (Sept. 2014), <https://www.theclimategroup.org/news/china-will-launch-worlds-biggest-carbon-market-2016>.

54. U.N.DEV.PROGRAMME, *Launch of China Carbon Market Research Report* (Feb. 23 2016), <http://www.cn.undp.org/content/china/en/home/presscenter/articles/2016/02/23/launch-of-china-carbon-market-research-report-2016.html>.

55. *Environomist China Carbon Market Research Report 2016*, pg 24, ENVIRONMIST (2015), [http://carbonpulse.com/wpcontent/uploads/2016/02/2016nvironomist\\_China\\_Carbon\\_Market\\_Research\\_Report\\_En\\_20160217\\_CW.pdf](http://carbonpulse.com/wpcontent/uploads/2016/02/2016nvironomist_China_Carbon_Market_Research_Report_En_20160217_CW.pdf).



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is important to have uniform rules on monitoring, reporting, and verification nationwide. Given the economic inequality within China, balancing the interests of the highly developed regions against those in the low-income western regions is an important consideration in building a nation-wide carbon market.

The establishment of a national carbon market in 2017 will be just a beginning of China's efforts in moving forward to a market-based approach in regulating carbon emissions. The Chinese government is determined to establish an effective national ETS. It hopes to develop the largest carbon-trading scheme and expects it to connect to the other ETSs to make the impact worldwide. While uncertainties remain, the effectiveness of China's national ETS is likely to mark a new era post the Paris Climate Conference, and would be crucial in mitigating the effects of carbon emissions for the earth.

## **VI. Maritime Law<sup>56</sup>**

In December 2015, the SPC issued two judicial interpretations on the Maritime Law. The two judicial interpretations, effective on March 1, 2016, are the Provisions on Jurisdiction in Maritime Proceedings ("Provisions on Jurisdiction")<sup>57</sup> and the Provisions on Scope of Cases in Maritime Proceedings ("Provisions on Scope of Cases").<sup>58</sup> In addition, on February 28, 2015, the SPC issued a judicial interpretation on ship arrest and judicial sale ("Provisions on Ship Arrest and Judicial Sale"), which became effective on March 1, 2015.<sup>59</sup>

### **A. JURISDICTION**

The Provisions on Jurisdiction change the geographical jurisdiction of Dalian Maritime Court and Wuhan Maritime Court in accordance with the needs of maritime economic development and maritime adjudication work.<sup>60</sup> Most notably, the Provisions on Jurisdictions extend the jurisdiction of Dalian Maritime Court to the Tumen River of Jilin Province and the Songhua River of Heilongjiang Province.<sup>61</sup>

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56. This section is authored by Qian Xie, attorney with Wong Fleming, P.C.

57. *Zui Gao Ren Min Fa Yuan Guan Yu Hai Shi Su Song Guan Xia Wen Ti De Gui Ding* (最高人民法院关于海事诉讼管辖问题的规定) [Provisions of the Supreme Peoples Court on Jurisdiction in Maritime Proceedings] (promulgated by the Supreme People's Court, Dec. 28, 2015, effective Mar. 1, 2016) (China). [hereinafter Provisions on Jurisdiction].

58. *Provisions of the Supreme Peoples Court on Scope of Cases in Maritime Proceedings* (promulgated by the Supreme People's Court, Dec. 28, 2015, effective Mar. 1, 2016) (China). [Hereinafter Provisions on Scope of Cases].

59. *Zui Gao Ren Min Fa Yuan Guan Yu Kou Ya Yu Chuan Bo Shi Yong Fa Lv Ruo Gan Wen Ti De Gui Ding* (最高人民法院关于扣押与拍卖船舶使用法律若干问题的规定) [Provisions of the Supreme People's Court on Ship Arrest and Judicial Sale] (promulgated by the Supreme People's Court, Dec. 8, 2014, effective Mar. 1, 2015).

60. Provisions on Jurisdiction, *supra* note 57, art. 1.

61. *Id.*

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The Provisions on Jurisdiction specify the principles for determining jurisdiction in maritime administrative cases.<sup>62</sup> Local maritime courts shall be the trial courts in administrative cases. The Higher People's Court where a maritime court is located shall review appeals of judgments and rulings made by a local maritime court.<sup>63</sup>

The Provisions on Jurisdiction clarify the rules on jurisdictional challenges to prevent forum shopping.<sup>64</sup> Rulings on jurisdiction can be appealed to the local Higher People's Court. The new rule will ensure that all maritime-related cases are heard by maritime courts whose expertise in maritime and admiralty law makes them better candidates to adjudicate such cases, thereby enhancing the consistency and quality of court decisions in maritime cases.<sup>65</sup>

**B. SCOPE OF CASES**

The Provisions on Scope of Cases expand the scope of cases that can be heard by the maritime courts, setting out a total of 112 types of cases that can be brought.<sup>66</sup> The cases are divided into the following categories: maritime tort disputes, maritime contract disputes, ocean and sea navigable waters exploitation and environmental protection related disputes, maritime administrative cases, and maritime procedural matters.<sup>67</sup> Article 3 of the Provisions on Scope of Cases specifically includes disputes concerning underwater dredging construction, land reclamation, and artificial islands, which are particularly notable in light of the recent territorial disputes in the South China Sea.<sup>68</sup>

**C. SHIP ARREST AND JUDICIAL SALE**

*1. Judicial Sale of an Arrested Ship under Bareboat Charter*

The Maritime Law does not address whether a petitioner is entitled to petition for a judicial sale of a ship when the ship is arrested in connection with claims against the bareboat charterer. Article 3 of the Provisions on Ship Arrest and Judicial Sale clarifies that an arrested ship may be sold through a judicial sale in connection with claims against the bareboat charterer, even if the ship is on bareboat charter and the owners are not liable for the claims.<sup>69</sup> To better protect their interests, ship owners must ensure that a bareboat charter contract contains express language requiring

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<sup>62.</sup> *Id.* at art. 2.

<sup>63.</sup> *Id.*

<sup>64.</sup> *Id.* at art. 3.

<sup>65.</sup> *Id.*

<sup>66.</sup> Provisions on Scope of Cases, *supra* note 58.

<sup>67.</sup> *Id.*

<sup>68.</sup> *Id.* at art. 3.

<sup>69.</sup> Provisions of the Supreme People's Court on Ship Arrest and Judicial Sale, *supra* note 59, art. 3.

the bareboat charterer to indemnify the owner if the ship is arrested for claims resulting from the charterer's operation of the ship.

2. *Amount of Security*

Under Article 73 and Article 74 of the Special Maritime Procedural Law, the petitioner for ship arrest shall provide security to the court in the form of a cash deposit, guarantee, or collateral, which will be paid to the respondent as compensation in the event that the arrest is later determined to be wrongful.<sup>70</sup> The Special Maritime Procedural Law does not provide clear guidance for calculating the amount of security. The Provisions on Ship Arrest and Judicial Sale clarify that the amount of security shall be assessed so as to reflect the costs and expenses of ship maintenance during the arrest; the loss of earnings during the arrest; and the cost incurred by the respondent in providing security for the release of the ship.<sup>71</sup> If the security subsequently proves to be insufficient to cover the respondent's potential loss, the court may order the petitioner to provide additional security.<sup>72</sup>

3. *Maintenance Costs of an Arrested Ship*

The Provisions on Ship Arrest and Judicial Sale clarifies that either the ship owner or the bareboat charterer is responsible for all costs of the maintenance of the arrested ship.<sup>73</sup> If the ship owner or bareboat charterer fails to maintain the ship, the court may appoint a third party or the petitioner who applies for ship arrest to maintain the ship. The costs incurred will be deducted from the proceeds of the judicial sale.<sup>74</sup>

4. *Judicial Sale*

The Provisions on Ship Arrest and Judicial Sale provides the sale of an arrested ship be conducted by an auction committee of a maritime court. The court will conduct an appraisal and set a reserve price for the ship before the public auction.<sup>75</sup> At the first attempt of the public auction, the reserve price must be no less than eighty percent of the appraisal value.<sup>76</sup> If the public auction fails after two attempts, the court may arrange for a private sale of the ship at no less than fifty percent of the appraisal value.<sup>77</sup>

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70. Zhong Hua Ren Min Gong He Guo Hai Shi Su Song Te Bie Cheng Xu Fa (中华人民共和国海事诉讼特别程序法) [Special Maritime Procedural Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Congress, Dec. 25, 1999, effective Jul. 1, 2000), art. 73 and art. 74.

71. Provisions of the Supreme People's Court on Ship Arrest and Judicial Sale, *supra* note 59, art.5.

72. *Id.*

73. *Id.* art.7.

74. *Id.*

75. *Id.* art. 12.

76. *Id.*

77. *Id.* art. 13.

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Finally, the court can sell the ship at less than fifty percent of the appraisal value, provided that over two thirds of registered creditors give their consent.<sup>78</sup> If all the above attempts failed, the court may release the ship from arrest.<sup>79</sup>

5. *Order of Priority for Distribution of Sale Proceeds*

After deduction of the legal expenses incurred in connection with the arrest and sale of the ship as well as expenses incurred for the common interests of all claimants, the remaining sale proceeds shall be distributed in the following order:<sup>80</sup>

1. Claims secured by maritime lien resulting from claims for crew wages, crew personal injury, port dues, salvage remuneration, and tort liability for collision and other damage;
2. Claims secured by possessory lien;
3. Claims secured by mortgage;
4. Other claims in connection with the sale of the ship.

In addition, the Provisions on Ship Arrest and Judicial Sale relax the registration requirement for judicial sale. Under the new Provisions, petitioners who apply for a judicial sale of the ship are permitted to directly participate in the distribution of the sale proceeds without having to register their claims with the court.<sup>81</sup>

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78. *Id.* art. 14.

79. *Id.*

80. *Id.* art. 22.

81. Provisions of the Supreme People's Court on Ship Arrest and Judicial Sale, *supra* note 59, art.18.

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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

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## Europe

THOMAS STANTON, MATTHEW SOPER, JAMES HENRY BERGERON,  
STEVEN KOURTIS, EVA TZAVALA, ROSELYN S. SANDS, REMY  
NERRIERE, AND ANGELIQUE DEVAUX\*

This Article updates selected international legal development in 2016 in European Law.

### **I. Whose Prerogative is it Anyway? Britain's Referendum to Withdraw from EU Draws Constitutional Legal Challenges**

On June 23, 2016, the British people voted to exit the European Union (EU), or simply “Brexit.” The United Kingdom’s EU Referendum, in which a record 72.2 percent of the electorate voted, resulted in 48.1 percent choosing to “remain” and a surprising 51.9 percent opting to “leave.”<sup>1</sup>

Immediately after the plebiscite’s unexpected outcome, a snowball reaction began that caused turmoil in Britain’s political leadership,<sup>2</sup> a weakened pound-sterling, havoc within financial markets<sup>3</sup>, and raised challenges to the royal prerogative power.<sup>4</sup> Following the vote, solicitors at Mishcon de Reya, acting on behalf of an anonymous group of clients, sought assurances the government would not act without Parliament.<sup>5</sup>

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\* Thomas Stanton, James Henry Bergeron (Developments in NATO), Matthew Soper (Whose Prerogative is it Anyway? Britain’s Referendum to Withdraw from EU Draws Constitutional Legal Challenges), Steven Kourtis and Eva Tzavala (Immigration and Refugee Developments in Greece), Roselyn S. Sands (Posting of Workers in Europe), Remy Nerriere (The 2016 Reform of Contract Law in France), Angelique Devaux (New EU Regulations in Matter of Couples’ Properties).

1. *Official Result of the EU Referendum is Declared by Electoral Commission in Manchester*, UK ELECTORAL COMMISSION (June 24, 2016), <http://www.electoralcommission.org.uk/1-am-a/journalist/electoral-commission-media-centre/news-releases-referendums/official-result-of-the-eu-referendum-is-declared-by-electoral-commission-in-manchester>.

2. *PM-in-Waiting Theresa May Promises ‘A Better Britain’*, BBC (July 11, 2016), <http://www.bbc.com/news/uk-politics-36768148>.

3. Stephen Fidler et al., *U.K. Vote Sets Off Shockwaves Across Europe; Britain’s Decision Shifts EU’s Course, Poses Test for Other EU Leaders Grappling with Populist Discontent*, WALL ST. J. (June 24, 2016, 7:37 PM) <https://www.wsj.com/articles/u-k-vote-sets-off-shockwaves-across-europe-1466811442>.

4. Owen Bowcott, *Article 50 Legal Case ‘Is Attempt to Reverse Brexit’, Court Told*, THE GUARDIAN (Oct. 17, 2016) <https://www.theguardian.com/politics/2016/oct/17/article-50-legal-case-is-attempt-to-reverse-brexit-court-told>.

5. Owen Bowcott, *UK Government Faces Pre-Emptive Legal Action Over Brexit Decision: Law Firm Says Article 50 Cannot Be Triggered Without Full Debate and Vote by Parliament*, THE GUARDIAN (Jul. 4, 2016), <https://www.theguardian.com/law/2016/jul/03/parliament-must-decide-whether-or-not-to-leave-the-eu-say-lawyers>.

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A. R (MILLER) V SECRETARY OF STATE FOR EXITING THE EU

In October 2016, the High Court of Justice’s three most senior judges—Lord Thomas of Cwmgiedd, Sir Terence Etherton, and Lord Justice Sale—heard oral arguments in London addressing whether the Crown, acting through the government, is entitled to use royal prerogative powers to trigger Article 50 of the Treaty on European Union (TEU).<sup>6</sup> The issue central to this debate is whether the Prime Minister is entitled to use powers of the royal prerogative to commence the two year exiting process without a vote in Parliament.<sup>7</sup> This case is the biggest British constitutional question of the century and pits the royal prerogative powers of the executive branch against the sovereign powers of Parliament to determine the rights and duties of citizens before the law. The government lost in the high court and is currently appealing to the UK Supreme Court.<sup>8</sup> Prime Minister Theresa May, through a spokesperson, “confirmed that the government’s planned timetable for triggering Article 50 is unchanged after the court ruling.”<sup>9</sup>

1. *Royal Prerogative*

The royal prerogative powers were historically exercised by Britain’s monarch acting on his or her own initiative. Today, by constitutional convention, the monarch exercises the prerogative on the advice of the prime minister and the cabinet. It is under the royal prerogative that money is minted, assets allocated for war, pardons granted, and foreign affairs conducted.<sup>10</sup>

2. *Parliamentary Sovereignty*

In the British constitutional system, the doctrine of “parliamentary sovereignty”<sup>11</sup> implies the Parliament of Westminster is the supreme legal authority for the entire United Kingdom. Contrast this principle with the United States’ system of government, where a codified constitution is the

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6. R. (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC (Admin) 2768.

7. Steve Castle, *Without a Constitution, ‘Brexit’ Is Guided by a Prerogative. But Whose?*, N.Y. TIMES (Oct. 16, 2016), [http://www.nytimes.com/2016/10/17/world/europe/without-a-constitution-brexit-is-guided-by-a-prerogative-but-whose.html?\\_r=0](http://www.nytimes.com/2016/10/17/world/europe/without-a-constitution-brexit-is-guided-by-a-prerogative-but-whose.html?_r=0).

8. *Brexit Court Ruling Appeal Date Set For 5 December*, BBC (Nov. 8, 2016), <http://www.bbc.com/news/uk-politics-37913911>.

9. *PM Calls with President Tusk and President Hollande: 4 November 2016*, GOV.UK (Nov. 4, 2016), <https://www.gov.uk/government/news/pm-calls-with-president-tusk-and-president-hollande-4-november-2016>.

10. See COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION*, (7th ed., Cambridge Univ. Press 2011); see A. W. BRADLEY & K. D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (16th ed., Pearson Higher Educ. 2014). (CUP 2011).

11. See A.V. DICEY, *AN INTRODUCTION TO THE LAW OF THE CONSTITUTION* 3–72 (8th ed., Macmillan 1915); see also Jackson v. Attorney General [2005] UKHL 56, ¶ 9, [2006] 1 A.C. 262.

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highest law and the Supreme Court has the power to judicially review acts of Congress and the executive. In the UK, courts cannot generally overrule legislation and no parliament can pass laws binding a future parliament.<sup>12</sup>

**B. EU REFERENDUM ACT**

The legal authority for the EU Referendum came from legislation passed by Parliament in December 2015.<sup>13</sup> The act said nothing whatsoever about the effect of the vote's outcome, and the referendum was persuasive and not binding on the government. In practice, the UK government will likely have to respect the vote's results.

**C. TEU ARTICLE 50: WITHDRAWING FROM EU**

Under Article 50 of the TEU, the framework is laid for withdrawing from the EU. A two-part process is required for invoking Article 50. First, a Member State must "decide" to withdraw, and second, a Member State "shall notify" the European Council (Council) of its desire to withdraw.

A "decision," for the purposes of Article 50(1) of the TEU, must be in accordance with the given Member State's own constitutional requirements. This means that a "decision" is made by either the exercise of the prerogative powers (i.e. the Prime Minister acting on behalf of the Crown) or through a piece of primary legislation (i.e. Parliament acting in its role as sovereign).

*1. Looking Forward*

The British government announced it planned to "notify" the Council of the withdrawal decision by the end of March 2017. The Queen's 2017 Speech to Parliament will be used to introduce the Great Repeal Bill, which will nullify the 1972 European Communities Act. The anticipated date to make Brexit official would be the end of March 2019, which would be in time for the 2020 General Election.<sup>14</sup>

The government's timetable could be complicated by the Supreme Court upholding the High Court's decision, Scotland pressing for a second Independence Referendum, or the Prime Minister asking the Queen to dissolve Parliament, triggering a shotgun election.

Even if the Supreme Court upholds the claimant's position that Parliament, as supreme constitutional law, must vote to "decide" to withdraw, more likely than not, members of Parliament will uphold the people's determination to leave the EU.

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12. Matthew Soper, *Brexit, International Law & The UK Constitution*, 13 A.B.A. SEC. OF INT'L LAW, EUR. UPDATE 1, 711 (Jul. 2016).

13. European Union Referendum Act 2015, c. 36 (UK).

14. See 616 PARL. DEB. H.L. (6th ser.) (2016) col. 125585 (U.K.).



## II. Developments in NATO<sup>15</sup>

The North Atlantic Treaty Organisation has had a busy year with several key decisions and initiatives.

The year began with a continuation of efforts to implement the Response Action Plan (RAP) announced at the Wales Summit of Heads of State and Government in September 2016.<sup>16</sup> Responding to Russian aggression in Ukraine and the spread of ISIL, the RAP called for the stand-up of a reformed, faster, and larger NATO Response Force (NRF). The spearhead of this new NRF would be a Very High Readiness Joint Task Force (VJRF) that could respond to crises within days. Achieving this response would require force commitments from allies. A number of small logistics nodes, called NATO Force Integration Units, are to be established in Eastern Europe to aid reception of NATO forces in a crisis.

At the Defense Ministers Meeting held from February 11-12, 2016, Germany, Greece, and Turkey proposed that NATO support efforts to stem illegal migrant trafficking across the Aegean Sea between the Turkish coast and the nearby Greek Islands.<sup>17</sup> The ministers approved the task, which sent Standing NATO Maritime Group Two into the Aegean to conduct monitoring of migrant crossings and to relay that information to the Greek and Turkish Coast Guards as well as the European Border and Coast Guard Agency (FRONTEX). The activity continued through the end of 2016. By May 2016, migrant flows across the Aegean had largely collapsed due to the EU-Turkey agreement on migrant returns, the closing of the borders of some East European states, and, to some extent, the NATO effort.<sup>18</sup>

One notable aspect of the Aegean tasking was the breakthrough in NATO-EU relations with the establishment of a direct link and information sharing between Allied Maritime Command in the UK and FRONTEX.<sup>19</sup>

Several major decisions were made at the July NATO Warsaw Summit (Summit).<sup>20</sup> The RAP was declared achieved and the stand-up on the VJTF confirmed. In addition, NATO announced plans to establish an “enhanced

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15. James Henry Bergeron, Chief Political Advisor, Allied Maritime Command NATO. All comments are made in a private capacity.

16. Press Release, NATO, Wales Summit Declaration (Sept. 5, 2014), [http://www.nato.int/cps/en/natohq/official\\_texts\\_112964.htm](http://www.nato.int/cps/en/natohq/official_texts_112964.htm).

17. See *NATO Defence Ministers Agree on NATO Support to Assist with the Refugee and Migrant Crisis*, NATO (Feb. 11, 2016), [http://www.nato.int/cps/en/natohq/news\\_127981.htm](http://www.nato.int/cps/en/natohq/news_127981.htm).

18. See *Migrant Flows into Greece Fall in 2016, But Change Little into Italy*, PEW RES. CTR. (Sept. 6, 2016), [http://www.pewresearch.org/fact-tank/2016/09/06/fewer-refugees-entering-europe-than-in-2015-but-asylum-backlog-still-growing/ft\\_16-08-24\\_migrants\\_greeceitalymonthly/](http://www.pewresearch.org/fact-tank/2016/09/06/fewer-refugees-entering-europe-than-in-2015-but-asylum-backlog-still-growing/ft_16-08-24_migrants_greeceitalymonthly/).

19. See *Assistance For the Refugee and Migrant Crisis in the Aegean Sea*, NATO (Jun. 27, 2016), [http://www.nato.int/cps/en/natohq/topics\\_128746.htm](http://www.nato.int/cps/en/natohq/topics_128746.htm); see also *FRONTEX and NATO to Cooperate in the Aegean Sea*, FRONTEX (May 6, 2016), <http://frontex.europa.eu/news/frontex-and-nato-to-cooperate-in-the-aegean-sea-nZMSYr>.

20. Press Release, NATO, WARSAW SUMMIT COMMUNIQUÉ, ¶ 100 (Jul. 9, 2016), [http://www.nato.int/cps/en/natohq/official\\_texts\\_133169.htm?selectedLocale=EN](http://www.nato.int/cps/en/natohq/official_texts_133169.htm?selectedLocale=EN).

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forward presence” (EFP) of four brigades into North Eastern Europe to act as a deterrent against Russian aggression, one each in Estonia, Latvia, Lithuania and Poland, with the United States providing the framework for the Polish brigade.<sup>21</sup> EFP goes beyond the NRF/VJTF posture in having a permanent forward presence on the Baltic Region of rotationally deployed forces, as against a force on call to deploy rapidly from elsewhere. The implementation of EFP will occur through 2017.

A number of major decisions were made in the maritime domain. The Summit confirmed that Operation Ocean Shield, NATO’s counter-piracy operation, Operation Ocean Shield would end in December 2016.<sup>22</sup> The last pirating of a vessel occurred in May 2012, and there were new demands on NATO naval forces. But a new mission was stood up in the Mediterranean where Operation Sea Guardian (OSG) replaced Operation Active Endeavour (OAE). OAE was an Article V collective defense operation aimed at supporting counter-terrorism efforts. The new, evolved OSG mission is a broad, non-Article V maritime security operation that adds mandates for freedom of navigation protection, and maritime interdiction operations, such as arms embargoes, energy security, and critical infrastructure protection. OSG was declared active at the October Defense Ministerial.<sup>23</sup>

The Summit also decided to explore NATO’s role in the Mediterranean migrant crisis and in responding to the crisis in Libya to support and complement the EU’s Operation Sophia.<sup>24</sup> At the Defense Ministerial in October, in order to stem migrant trafficking, NATO announced maritime support to Operation Sophia that will take the form of logistic support and information sharing.<sup>25</sup> The potential NATO roles in capacity building of the Libyan coast guard and implementation of the UNSCR 2292 arms embargo on Libya have yet to be decided.

Regarding Russia, the Warsaw Summit communique stressed alliance solidarity against intimidation or aggression, and reasserted the role of nuclear deterrence.<sup>26</sup> Special attention was paid to the importance of the Atlantic and the need to protect sea lines of communication between North America and Europe—the first time in decades this has been a concern.<sup>27</sup> The need for effective strategic anticipation was highlighted, supporting NATO monitoring and tracking of Russian naval and air deployments.<sup>28</sup>

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21. *Id.* at ¶ 40.

22. *Id.* at ¶ 90.

23. *Id.* at ¶ 91; see *Operation Sea Guardian*, NATO (Oct. 27, 2016), [http://www.nato.int/cps/en/natohq/topics\\_136233.htm](http://www.nato.int/cps/en/natohq/topics_136233.htm).

24. WARSAW SUMMIT COMMUNIQUÉ, *supra* note 20, at ¶ 924.

25. See Jens Stoltenberg, Secretary General of NATO, Remarks During Press Conference Following a Meeting of the North Atlantic Council (Oct. 27, 2016), [http://www.nato.int/cps/en/natohq/opinions\\_136837.htm?selectedLocale=EN](http://www.nato.int/cps/en/natohq/opinions_136837.htm?selectedLocale=EN).

26. WARSAW SUMMIT COMMUNIQUÉ, *supra* note 20, at ¶ 514.

27. *Id.* at ¶ 23.

28. *Id.* at ¶ 47.

The next Summit was announced to take place in Brussels in mid-2017, which aligns with the opening of the new NATO Headquarters building.

### III. Immigration and Refugee Developments in Greece<sup>29</sup>

Since World War II, Greece has traditionally been a country of origin for migrants to the United States, Australia, and Northern Europe. However, since the early 1990s, Greece has steadily developed into a host country for immigrants originating from the Balkan states, ex-Soviet Union states, Africa, Asia, and the Middle East. For many decades, Greece lacked a consistent immigration and asylum policy, leading to a long-standing practice of government tolerance towards foreigners residing and working illegally in Greece. Refugee status determination procedures fell under the competency of the Ministry of Public Order. Recognition rates were very low—close to zero.<sup>30</sup> Greek police authorities lacked both resources (human and infrastructure) and adequate training to properly and timely examine asylum claims. Even basic human rights, such as the right to be informed in a language that a refugee applicant understands, accommodation in adequate living conditions, and access to asylum procedures had been, in practice, denied. The European Court of Human Rights, in its leading case *M.S.S. v. Belgium and Greece*, condemned Greece on “major structural deficiencies” of the asylum procedure.<sup>31</sup> Finally, in 2013, Greece implemented Law 3907/2011,<sup>32</sup> creating an autonomous specialized asylum service, staffed by civil servants competent to adjudicate on applications for international protection. Statistics from the first year of its operation showed a remarkable improvement in recognition rates.<sup>33</sup>

However, in 2015, Greece witnessed an unprecedented mass influx of mixed flows (migrants and refugees), mainly from Syria, Afghanistan, Pakistan, Iraq, and some African countries. According to the United Nations High Commissioner for Refugees (UNHCR), a total of 856,723

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29. Steven Kourtis is counsel to Fortsakis Diakopoulos Mylonogiannis & Associates Law Firm, Athens, Greece, and Eva Tzavala is a human rights lawyer and teaching assistant at the school of law, University of Athens.

30. In 2009, 0.04 percent of international protection claims were granted asylum, whereas in 2010, the corresponding rate was 0.5 percent. Amnesty Int’l, *Greece: Briefing To Committee Against Torture*, AI Index EUR 25/002/2010 (Jul. 27, 2010). <https://www.amnesty.org/en/documents/EUR25/002/2010/en/>.

31. *M.S.S. v. Belgium and Greece*, 2011 Eur. Ct. H.R. 108.

32. Nomos (2016: 4375), Gov. Gazette 2016, (Greece) (amending N. 3907/2011 (Greece)); Nomos (2016: 4399), Gov. Gazette A:51 (Greece) (amending N. 3907/2011 (Greece)).

33. *Statistics of the New Greek Asylum Service (June 2013 – May 2014)*, HELLENIC REPUBLIC: MIN. OF PUBLIC ORDER AND CITIZEN PROTECTION, [http://asylo.gov.gr/en/wp-content/uploads/2014/06/1406\\_oneyearstats\\_en.pdf](http://asylo.gov.gr/en/wp-content/uploads/2014/06/1406_oneyearstats_en.pdf) (stating that for the period from June 2013 to May 2014, there has been a 20.1 percent recognition of refugee status and subsidiary protection at first instance and an additional 13.9 percent recognition at second instance).

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refugees and migrants arrived at Greek shores.<sup>34</sup> Greek police data indicates 872,519 arrests of irregular migrants at the sea borders arriving from Turkey in 2015.<sup>35</sup> Local police authorities on the Aegean islands, with the assistance of FRONTEX and the European Asylum Support Office (EASO), struggled to comply with EU law requirements for registration, identification, and fingerprinting of all new arrivals.<sup>36</sup> As soon as the first reception process was completed, newcomers were able to freely move within Greek territory and reach the Greek-FYROM borders in order to move onto their destination country further north.<sup>37</sup>

In March 2015, in the aftermath of this sudden influx, certain European countries (FYROM, Croatia, Slovenia, Hungary, and Austria) closed their borders or severely restricted access to their territory, even to people in clear need of international protection. In May 2015, the European Commission (EC) took the initiative to propose that the Council trigger Article 78, paragraph 3 of the Treaty on the Functioning of the European Union Mechanism and introduce a temporary relocation scheme, requiring a fair distribution of third country nationals among Member States with an average recognition rate (refugee status and subsidiary protection) equal or higher than 75 percent.<sup>38</sup> The allocation of asylum seekers was determined based on factors related to host countries (population, GDP, unemployment, and pending asylum applications).<sup>39</sup> The European Council adopted the

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34. *Most Common Nationalities of Mediterranean Sea Arrivals from January 2016*, OPERATION PORTAL: REFUGEES SITUATIONS, <http://data2.unhcr.org/en/situations/mediterranean?id=83> (last visited Apr. 23, 2017).

35. *Statistics Illegal Immigration Figures 2015*, HELLENIC POLICE (2015), [http://www.astynomia.gr/index.php?option=OZo\\_content&lang=%27..%27&perform=view&id=50610&Itemid=1240&lang](http://www.astynomia.gr/index.php?option=OZo_content&lang=%27..%27&perform=view&id=50610&Itemid=1240&lang) (last visited Apr. 23, 2017).

36. See *European Agenda on Migration – Factsheets*, EURO. COMM’N: MIGRATION & HOME AFFAIRS, [https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/background-information_en) (last visited Apr. 23, 2017); see Council Regulation No. 603/2013, 2013 O.J. (L 180) 1 (EU).

37. FYROM stands for the Former Yugoslav Republic of Macedonia. A dispute currently exists between states that recognize the country as the Republic of Macedonia and those that recognize it as FYROM. Greece uses the former term while the United States uses the latter.

38. Based on Eurostat data, updated on a quarterly basis. Iraqi recognition rate dropped in 2016, in comparison with high recognition rates in 2015. Afghani recognition is steadily increasing and is now close to seventy-two percent. *Asylum Quarterly Report*, EUROSTAT (Mar. 15 2017), [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_quarterly\\_report;Question\\_&Answers](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report;Question_&Answers), HELLENIC REPUBLIC: MIN. OF INTERIOR AND ADMIN. REFORM (Jul. 2016), <http://asylo.gov.gr/en/wp-content/uploads/2016/07/Qandanswers.pdf> (noting that in July 2016, eligible countries of origin were Bahrain, Central African Republic, Dominica, Eritrea, Laos, Saudi Arabia, Seychelles and Syria); *File: First Instance Decisions in the EU-28 By Outcome, Selected Citizenships, 2nd Quarter 2016*, EURO. COMM’N (Sep. 22, 2016), [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First\\_instance\\_decisions\\_in\\_the\\_EU-28\\_by\\_outcome,\\_selected\\_citizenships,\\_2nd\\_quarter\\_2016.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_in_the_EU-28_by_outcome,_selected_citizenships,_2nd_quarter_2016.png).

39. For more details, see European Commission Press Release, *Refugee Crisis: European Commission Takes Decisive Action – Questions and Answers* (Sept. 9, 2015), [http://europa.eu/rapid/press-release\\_MEMO-15-5597\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5597_en.htm).

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above proposal, allocating 40,000 places for relocation in July 2015<sup>40</sup> and another 120,000 places in September 2015.<sup>41</sup> Specifically, in two years' time, 63,302 people would be relocated from Greece. However, in 2015 only eighty-two people were relocated due to the limited number of open pledges from receiving countries and the slow registration pace of asylum and relocation claims from the Greek authorities. As the EU relocation scheme is on a voluntary basis, Member States seem reluctant to follow EC decisions, while considering other types of assistance, such as financial aid.<sup>42</sup>

As of November 2016, 170,373 Syrians, Afghanis, Iraqis, Pakistanis, Iranians, and other nationalities arrived in Greece by sea. Greek police data through the end of August 2016 report 166,335 people arrested for illegal entry and stay in Greece. Due to the closing of the Western Balkan route, thousands of refugees and migrants were stranded in different locations in Greece (on the islands, mainland, along the Greece-FYROM borders, and the Port of Piraeus). The increase of its reception capacity (accommodation places) became a top priority for the Greek state. To this end, old military camps and ex-Olympic complexes in Attica, Northern Greece, and elsewhere became operational to host the different nationalities arriving from the islands, the controversial Idomeni camp on the Greek-FYROM border, and the Piraeus Port. At present, up to fifty-two camps are operating in Greece (both permanent and temporary facilities, on the islands and mainland).

Greece eventually became a host country for refugees rather than a transit country. Today, refugees in Greece have three options: (1) seeking asylum in Greece; (2) relocation to another EU country, if they fulfill the criteria; and (3) reunification with a close family relative (as specified in the Dublin III Regulation).<sup>43</sup> However, the capacity of the Asylum Service to register and process all applications was limited due to the financial constraints imposed on Greece by the EU and the International Monetary Fund, in place since 2009 as a result of the Greek debt crisis. This led to the frustration of refugees as their basic right of access to asylum was *de facto*

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40. European Commission Press Release, Outcome of the Council Meeting: 3405th Council Meeting (July 2015), <http://www.consilium.europa.eu/en/press/press-releases/2015/09/14-jha-relocation-refugees/> (outlining the adoption, by consensus, of a resolution of the representatives of the governments of the Member States, meeting within the council, on relocating forty thousand persons in clear need of international protection from Italy and from Greece).

41. Council Decision 2015/1523, 2015 O.J. (L 239) 146 (EU); Council Decision 2015/1601, 2106 O.J. (L 248) 80 (EU).

42. The United Kingdom and Denmark opted out of the Council's decisions. Based on recent data (as of Oct. 11, 2016), Austria and Hungary have not yet opened any pledges, while the Czech Republic, France, Germany, Poland, Slovakia, Spain, and Sweden have offered limited places. On the contrary, figures from Cyprus, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg, Malta, and Portugal reveal a positive stance towards the relocation program.

43. Council Regulation 604/2014, 2014 O.J. (L 180) 31 (EU). The European Commission submitted a proposal of a recast regulation last April. See *Proposal for a Regulation of the European Parliament and of the Council*, COM (2016) 270 final (Apr. 5, 2016).

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denied.<sup>44</sup> In order to alleviate this problem, from May to July 2016, mobile units of the Asylum Service, in cooperation with UNHCR and EASO personnel, implemented a pre-registration of refugee's claims inside their place of temporary residence (camps). A total of 27,592 people were pre-registered. The pace of relocation procedures increased, and by November 8, 2016, 5,376 persons in total were effectively relocated from Greece.<sup>45</sup>

At the external relations level, an EU-Turkey Statement was signed on March 18, 2016 in order to mitigate mixed migratory flows trespassing across EU borders from Turkey.<sup>46</sup> According to the agreement, all irregular migrants or rejected asylum seekers who entered into Greek territory from Turkey from March 20, 2016 onwards will be returned to Turkey. As of September 28, 2016, only 578 returns were completed. Legal concerns were raised concerning the characterization of Turkey as the "first country of asylum" and the "safe third country" under refugee and human rights law.<sup>47</sup> Asylum experts from other EU countries came to assist in the process, whereas new independent appeal committees went into effect August 2016.<sup>48</sup> The EU-Turkey joint operation plan also comprises a resettlement scheme for Syrians from Turkey directly to EU countries on a one-for-one basis, with an aim to combat human smuggling networks. According to the same source, 1,614 Syrian refugees have been resettled from Turkey to Europe. In addition, on September 28, 2016, a council decision was adopted to officially allow Member States to use the unallocated 54,000 places (which were initially reserved for Hungary) for relocation or resettlement of Syrians from Turkey.<sup>49</sup>

Irrespective of the implementation progress of the EU-Turkey Statement, Greek immigration policy is now focused on the integration of the asylum seekers by enabling them to exercise their rights to accommodation,

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44. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948); Charter of Fundamental Rights of the European Union, art. 18, 2102 O.J. (C 326) 391 (EU).

45. See *Annex to the Communication from the Commission to the European Parliament, the European Council and the Council: Seventh Report on Relocation and Resettlement*, COM (2016) 720 final (Sep. 11, 2016).

46. European Council Press Release 144/16, EU-Turkey Statement, 18 March 2016 (Mar. 18, 2016), <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

47. See *The Situation of Refugees and Migrants Under the EU-Turkey Agreement of 18 March 2016*, COUNS. OF EUROPE-PARLIAMENTARY ASSEMBLY (2016), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22738&lang=en> (last visited Apr. 23, 2017).

48. *Public Statement*, GREEK REPUBLIC: NAT'L HUMAN RIGHTS INSTITUTIONS, [http://www.nchr.gr/images/pdf/apofaseis/prosfuges\\_metanastes/Dimosia%20dilwsi%20EEDA.pdf](http://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/Dimosia%20dilwsi%20EEDA.pdf) (last visited Apr. 23, 2017) (showing how 4375/2016 as amended by L. 4399/2016 regulates, among others, the functioning of Reception and Identification Centers (hotspots), and institutes the newly established Independent Appeal Committees with the participation of administrative judges, which raises, according to the National Commission for Human Rights, issues of constitutionality).

49. European Commission Press Release, *Managing the Refugee Crisis, EU-Turkey Statement*, European Commission (Oct. 4, 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-3218\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3218_en.htm).

employment, and education. Priority is given to unaccompanied minors and other vulnerable asylum seekers. In conclusion, based on two years of accumulated experience, Greek authorities, as well as its population, rose to the challenge and met all expectations, in spite of the unprecedented character of the refugee crisis and the deep-rooted financial crisis that Greece continues to experience.

#### **IV. Posting of Workers in Europe<sup>50</sup>**

The freedom of movement of persons and services is one of the fundamental principles of the European Union and a cornerstone of the EU's single market. Article 56 of the Treaty on the Functioning of the European Union organizes the rules for temporarily assigning workers to supply those services in other Member States. However, due to the divergence of employment laws in European countries and the differing levels of protection that these laws provide, the free movement of workers throughout Europe raises issues.

To protect the rights of these workers, the EU set forth mandatory rules of minimum protection in the host country for employees posted to perform temporary work in another Member State. The basis for these protections is Directive 96/71/EC (1996 Directive), which concerns the posting of workers in the framework of the provision of services.<sup>51</sup>

Since 1996, the world has changed at an accelerated rate—particularly in the globalization of the world economy. After 20 years of experience, it became apparent that social dumping and abuse of these rules mandated a reform. This resulted in the EU reinforcing the rules on posting of workers by a new directive, Directive 2014/67/EU (2014 Directive), on the enforcement of the 1996 Directive.<sup>52</sup> The 2014 Directive should be effective throughout the EU by June 18, 2016, which is the deadline for the Member States to transpose the new Directive.

##### **A. DIRECTIVE 96/71/EC ON THE POSTING OF WORKERS**

The 1996 Directive sets up a broad framework for the posting of workers within the EU; Member States transposed this into their own legislation in order to ensure the protections provided to workers.

Article 2 of the 1996 Directive defines a “posted worker” as “a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.”<sup>53</sup> As the posting is temporary, the employee is expected to resume working in the country of

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50. Roselyn S. Sands, EY Société d'Avocats, Paris, France. The author wishes to thank Anissa Yeftene, as well as the employment lawyers of the EY Labor and Employment Law network, for their generous contributions to this paper.

51. Council Directive 96/71, 1997 O.J. (L 18) 1 (EC).

52. Council Directive 2014/67, 2014 O.J. (L 159) 11 (EU).

53. Council Directive 96/71, *supra* note 51, at art. 2.

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origin after carrying out his or her task abroad. The home country employer is in charge of ensuring the return and the cost relating to the return of the posted worker to the home country.

To ensure a minimum level of protection, Article 3 of the 1996 Directive creates an obligation for the employer.<sup>54</sup> The employer guarantees that the terms and conditions of employment of posted workers are not less favorable than those provided by law, regulation, or administrative provision, and/or by collective agreements from the hosting Member States regarding notably maximum work periods, minimum rates of pay, equality of treatment, and safety and hygiene.

1. *New Directive 2014/67/EU On the Enforcement of Directive 96/71/EC*

On May 15, 2014, Directive 2014/67/EU was implemented, modifying the 1996 Posting of Workers Directive. The deadline for Member States' transposition of this new directive was June 18, 2016.<sup>55</sup>

The 2014 Directive is intended to help fight abuse and circumvention of the applicable rules, in particular via the use of "fake" companies, and assure that specific situations qualify as genuine postings. The 2014 Directive also provides for additional rights to posted employers in order to increase their rights in the subcontracting chain. Indeed, following the 2014 Directive, Member States must now ensure that posted workers in the subcontracting sector can hold their direct subcontractor, in addition to or instead of the employer, liable for all wages owed. Thus, the business relationship may be at risk if violations occur and customers are held liable.

Another main part of the new 2014 Directive is focused on increasing cooperation between national authorities and administrations in charge of compliance. These changes include time limits for the supply of information between national authorities as well as the implementation of fines for companies that fail to comply with the applicable regulations. Posted workers can also bring legal action either in the home or host jurisdiction.

France was the first country to transpose the 1996 and 2014 Directives. As France is very protective of employees' rights and provides a high level of social security protections, employing workers in France represents a significant cost for companies. Thus, it was fundamental for France's business and social model to quickly fight against social dumping.

As of November 2016, the following countries have not yet implemented the 2014 Directive in their national legislation: Bulgaria, Croatia, Czech Republic, Estonia, Luxembourg, Slovenia, and Portugal. Belgium is currently debating the conditions under which the 2014 Directive will be implemented in the country. Some countries, like Germany, found that

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<sup>54</sup> *Id.* at art. 3.

<sup>55</sup> Council Directive 2014/67, *supra* note 52.



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local law already takes the 2014 Directive into account and that no transposition is required.

On March 8, 2016, the EC proposed another revision of the rules on posting of workers within the EU, aiming to strengthen the fight against social dumping. Most notably it creates an obligation for posted workers to receive the same remuneration as local workers, and not only the minimum hourly rate.<sup>56</sup>

Given the increasingly burdensome EU directives on posting of workers, companies must be prudent in ensuring compliance with European and national rules. Employment law and social security risks, as well as civil and criminal sanctions, can damage the reputations of companies posting its workers. Home and host companies, and in certain circumstances the client user company, can be held jointly and severally liable for the unauthorized use of posted employees in EU Member States. As a result, strategic workforce planning has become a key challenge for multinational companies.

**V. The 2016 Reform of the Contract Law in France<sup>57</sup>**

On October 1, 2016, an important reform of contract law entered into force in France.<sup>58</sup> The clear objective of the reform is to modernize the substance of contracts in order to contribute to contractual accessibility and readability while keeping to the spirit of the French civil code. In a globalized economy, France was penalized for not updating the law of contracts and obligations, particularly since the number of European and international projects has increased, such as the European Contract Code of the Gandolfi Group (2000),<sup>59</sup> the Principles of European Contract Law drawn up by the Lando Commission (2003),<sup>60</sup> and the Draft Common Frame of Reference.<sup>61</sup>

At the international level, the French contract law reform issue is also economic, particularly because such “Doing Business” reports published by

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56. *EU Commission Proposal for a Directive of the European Parliament and the Council Amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services*, COM (2016) 128 final (Aug. 8, 2016).

57. Remy Nerriere, *Cheuvreux Notaires*, Paris, France.

58. Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations [Ordonnance No. 2016-131 of 10 February 2016 to reform the law of contracts, the general regime and the proof of obligations], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Feb 11, 2016.

59. GIUSEPPE GANDOLFI, *CODE EUROPEEN DES CONTRATS : AVANT-PROJET* (Gandolfi ed., Milan, Giuffrè 2007).

60. OLE LANDO ET AL., *PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II* (Kluwer Law International 2000).

61. *PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR)* (Christian von Bar et al. ed., European Law Publishers 2009).

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the World Bank regularly emphasize the common law systems. French law has suffered from a complex, unforeseeable, and unpopular image. Therefore, in this context, by adopting a clearer style and a more didactic presentation, the reform of contract law constitutes a positive factor for attracting foreign investors in France.<sup>62</sup>

The French contract law reform is an aspect of substantive French law; however, the reform includes numerous innovations inspired by these European and international norms; as a consequence, all economic actors must update their contract and commercial practices accordingly. The main features relate to each step of contract law, from the genesis of the contract to its execution and termination.

In the pre-contractual phase, among other things, the reform provides the following points:

- A duty to inform which is of decisive importance for the consent of the other contracting party. The parties may neither limit nor exclude this duty, otherwise the contract is void;<sup>63</sup>
- A duty to respect business confidentiality;<sup>64</sup> and
- That the breaking-off of pre-contractual negotiations are free from control.

The pre-contractual phase gives a definition of the preliminary contracts' legal system, including pre-emption contracts and unilateral promises, by reinforcing the legal security of contract.

Going a step further, the reform is audacious, providing in particular with the nullity of unfair provisions including standard form contracts<sup>65</sup> signed between companies .<sup>66</sup> The new rules tend to protect the weaker party by accounting for social and economic disparities between contracting parties.

Another important element of this reform is the consecration of the notion of economic violence: a contract may be void if one contracting party exploits the other's state of dependence and obtains an undertaking to which the latter would not have agreed in the absence of such constraint, gaining from it a manifestly excessive advantage.<sup>67</sup> For example, this would concern relations between franchisor and franchisee or supplier and distributor.

With regard to the execution of contracts, the reform also states that a party may have the unilateral right to reduce the price proportionally after the contract is signed when the other party has performed its obligations

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62. JOHN CARTWRIGHT ET AL., THE LAW OF CONTRACT, THE GENERAL REGIME OF OBLIGATIONS, AND PROOF OF OBLIGATIONS (République Française: Ministère de la Justice) (ebook), [http://www.textes.justice.gouv.fr/art\\_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf](http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf).

63. *Id.*, at § 1, art. 1112-1.

64. *Id.*, at § 1, art. 1112-2.

65. CARTWRIGHT, *supra* note 62, at § 1, art. 1110, n.5 (explaining that "standard form contract" translates into *contrat d'adhésion*, "more literally 'a contract to which one adheres' and whose conclusion therefore involves no or little choice."

66. Provisions creating a significant imbalance in terms of rights and obligations between the parties.

67. *Id.*, at § 2, art. 1143.

imperfectly, and that one party may ask the other contracting party to renegotiate the contract if a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance that is excessively onerous for a party who had not accepted the risk of such a change.

The concept of good faith is generalized to the whole process of contracting. A new section of the Civil Code reminds that contracts must be negotiated, formed, and performed in good faith.<sup>68</sup> This provision is a matter of public policy. The mechanisms of the transfer of contracts and obligations are now defined in the Civil Code, which should facilitate fluidity and business security.

Furthermore, innovative solutions have been introduced to allow contractual parties to terminate when there is uncertainty in the French contract. As such, one contracting party may question the other about some identified issues so that no significant threat may thereafter void the contract. The ability to question contractual parties would prevent third parties or contracting parties from contesting the contract thereafter. This should include representation of one of the contracting parties at the time the agreement is signed. Therefore, new prerogatives are offered to contracting parties in order to prevent litigation or to resolve any litigation without a judge.

## **VI. New EU Regulations in Matter of Couples' Properties<sup>69</sup>**

The EU long ago set an objective to maintain and develop an area of freedom, security, and justice in which the free movement of persons is ensured. Once again, couples have a place of honor within the objective this year. On June 24, 2016, the EU published two new regulations in order to ensure legal certainty for couples as regards to their assets and thus guarantee a certain legal predictability.<sup>70</sup>

Hence, after successions, cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships are subject to regulations.<sup>71</sup>

None of the regulations provide a definition of marriage or registered partnership because these definitions belong to the national law of the Member States and, unlike the United States, no uniform definition has been achieved in Europe. Nevertheless, both EU regulations focus on the property consequences of marriage and registered partnerships due to more

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68. *Id.*, at § 1, art. 1104.

69. Angélique Devaux, *Diplômée Notaire, LL.M., Cheuvreux Notaires, Paris, France.*

70. Council Regulation 2016/1103, 2016 O.J. (L 183) 1(EU); Council Regulation 2016/1104, 2016 O.J. (L 183) 30 (EU). Council regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

71. Council Regulation 650/2012, 2012 O.J. (L 201) 107 (EU).

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and more international couples living with cross border elements as a result of the opening of borders and the multiplication of exchanges in Europe.<sup>72</sup>

The two regulations aim to unify conflicts of laws in matters of partners' and married couples' properties, and to put an end to fragmentation of applicable law to matrimonial property regimes and the property consequences of registered partnerships.

Determining the applicable law is essential because it governs *inter alia* the classification of property of either or both spouses or partners into different categories during and after marriage or partnership, the transfer of property from one category to the other, the responsibility of spouses or partners for liabilities and debts between them, the powers, rights, and obligations of either or both spouses or partners with regard to property, the dissolution of the matrimonial property regime and the partition, the distribution or liquidation of the property upon dissolution of the registered partnership, the effects of the matrimonial property regime or the property consequences of registered partnerships on a legal relationship between a spouse or a partner with third parties, and the material validity of a matrimonial property regime or a partnership property agreement.<sup>73</sup>

Both new EU regulations position couples at the center of these decisions by encouraging party autonomy. In other words, couples may now elect, before or during marriage and/or registered partnership, the applicable law to their matrimonial property regime or the consequences of their registered partnership. This can be either the law of the state where the spouses, future spouses, partners, or future partner is habitually a resident at the time the agreement is concluded; the law of the state where one of them is a national; or the law of the state where the partnership was created, provided the choice is expressed in writing, dated, and signed—by hand or electronically—by both parties.<sup>74</sup>

At the European level, although the two regulations have been adopted by only 18 Member States, the main extent is the recognition and enforcement of any matrimonial property regime and property consequences of registered partnership decisions in other member states without the need for a particular procedure, unless such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought.<sup>75</sup>

At the international level, the most important part of the regulations remains their universal scope, meaning that the EU regulations apply even if the governing law is the law of a third state (like the United States). Moreover, no *renvoi* to a European member state is allowed, so the substance of the law of the third state may automatically apply in any European

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72. DCFR, *supra* note, at 61.

73. *Id.*

74. *Id.*

75. Belgium, Bulgaria, The Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, The Netherlands, Austria, Portugal, Slovenia, Finland, Sweden, and Cyprus.

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Member State unless the content of the third state's law is manifestly incompatible with the public policy (*ordre public*) of the forum.<sup>76</sup>

As a consequence, the two new regulations allow for the unity of the governing law regardless of where the assets are located. This avoids any conflict of laws, both in Europe and when a third state is involved. The new regulations also provide recognition of the foreign law in order to ensure the mobility of international couples. Therefore, the two new regulations create a bridge between European Member States and other countries in matters of couples' property.

The two EU regulations will globally enter into force on January 29, 2019.

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<sup>76</sup> *Renvoi* means "to send back."

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## **India**

KAVITA MOHAN, ASEEM CHAWLA, SHAMIK SAHA, SHARANYA G. RANGA, NEIL LOPEZ, RADHIKA PARIKH, MANSI SETH, NIHAL KOTHARI, PRAJAKTA MENEZES, ANAND DESAI, AJAY SHAW, SATYAJIT GUPTA, GYANENDRA KUMAR, AAKANKSHA JOSHI, RAGHAV VASHISHT, DEBJANI AICH, SHRUTI CHOPRA, JAYESH H. ARUNABH CHOUDHARY, AVIKSHIT MORAL, POORVI CHOTHANI, AND NAMRATA PATODIA RASTOGI\*

This Article surveys significant legal developments in India during 2016.<sup>1</sup>

### **I. India's Foreign Direct Investment Policy in 2016**

The Government of India pursued its reform-oriented path in 2016 to ensure India maintains its vantage position in attracting foreign investment. While the policy framework on Foreign Direct Investment (FDI) remains largely unchanged with sectors classified under the automatic or the approval route for FDI, there has been a steady liberalization process with many sectors classified under the automatic route. Sectoral caps and related conditions have also been relaxed to better facilitate the inflow of FDI into India.

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\* The committee editors were Kavita Mohan, GDLSK LLP (Washington D.C.); Aseem Chawla, Founder, ASC Legal, Solicitors & Advocates (New Delhi, India); and Shamik Saha, ASC Legal, Solicitors & Advocates (New Delhi, India). Section I was authored by Sharanya G. Ranga, Partner, and Neil Lopez, Associate, Advaya Legal; Section II was authored by Radhika Parikh, Nishith Desai Associates (Mumbai, India) and Mansi Seth, Nishith Desai Associates (New York); Section III was authored by Nihal Kothari, Partner, and Prajakta Menezes, Principal Associate, Khaitan & Co.; Section IV was authored by Anand Desai, Managing Partner, and Ajay Shaw, Partner, at DSK Legal; Section V was authored by Satyajit Gupta, Advaita Legal, (New Delhi, India); Section VI was authored by Gyanendra Kumar, Partner, Cyril Amarchand Mangaldas (New Delhi, India); Section VII was authored by Aakanksha Joshi, Partner, and Raghav Vashisht, Associate, Economic Laws Practice, Advocates & Solicitors; Section VIII was authored by Debjani Aich, Partner, Kochhar & Co.; Section IX was authored by Shruti Chopra (New York and India); Section X was authored by Jayesh H, Founding Partner, Arunabh Choudhary, Partner and Avikshit Moral, Partner, Juris Corp; Section XI was authored by Poorvi Chothani, Managing Partner, LawQuest (Mumbai); Section XII was authored by Namrata Patodia Rastogi (Washington D.C.).

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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A. KEY SECTORAL CHANGES

1. *E-commerce*

The policy announcement for FDI in e-commerce in March 2016 permitted up to 100 percent of FDI under the automatic route in the “marketplace model of e-commerce” subject to a host of conditions.<sup>2</sup> The “marketplace model of e-commerce” refers to an e-commerce entity providing a technology platform to act as a facilitator between the buyer and the seller. Marketplace entities can provide ancillary services to sellers relating to warehousing, logistics, order fulfilment, call centre, payment collection, and other services.<sup>3</sup> FDI in the inventory-based business model has been prohibited. Marketplace entities have been restricted from directly or indirectly influencing the sale price of goods and services. Further, only up to 25 percent of the sales effectuated through the e-commerce marketplace is permitted through each vendor.<sup>4</sup> The regulations have increased the cost of doing business in this sector with companies adopting structural changes to be in compliance thereof.

2. *Civil Aviation*

FDI in scheduled air transport services has been increased from 49 percent to 100 percent under the approval route.<sup>5</sup> FDI in existing projects has also been permitted up to 100 percent under the automatic route with the aim of modernizing airport infrastructure. These liberalised FDI norms, along with the National Civil Aviation Policy unveiled in June 2016,<sup>6</sup> are expected to be a game-changer for the civil aviation sector in India.

3. *Other Sectors*

There has been a significant relaxation of norms in sectors such as defense, private security, pharmaceuticals, single-brand retail trading, and broadcasting.<sup>7</sup>

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2. Ministry of Com. & Indus., Dep’t of Indus. Policy & Promotion: *Guidelines for Foreign Direct Inv. (FDI) on E-commerce* (2016), [http://dipp.nic.in/English/acts\\_rules/Press\\_Notes/pn3\\_2016.pdf](http://dipp.nic.in/English/acts_rules/Press_Notes/pn3_2016.pdf).

3. *Id.*

4. *Id.*

5. MINISTRY OF COM. & INDUS., DEP’T OF INDUS. POLICY & PROMOTION: REV. OF FOREIGN DIRECT INV. (FDI) POLICY ON VARIOUS SECTORS (2016), [http://dipp.gov.in/English/acts\\_rules/Press\\_Notes/pn5\\_2016.pdf](http://dipp.gov.in/English/acts_rules/Press_Notes/pn5_2016.pdf).

6. Press Release, Press Info. Bureau, Gov’t of India, Ministry of Civ. Aviation, Nat’l Civ. Aviation Policy, 2016: Salient Features (June 15, 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=146238>.

7. MINISTRY OF COM. & INDUS., DEP’T OF INDUS. POLICY & PROMOTION: CONSOLIDATED FDI POLICY CIRCULAR OF 2016 (2016), [http://dipp.gov.in/English/Policies/FDI\\_Circular\\_2016.pdf](http://dipp.gov.in/English/Policies/FDI_Circular_2016.pdf).

#### 4. *Deferment of Consideration*

A notable policy amendment permits deferment of purchase consideration in transfer agreements for a maximum period of eighteen months from the date of the definitive agreements and up to 25 percent of the total consideration sans prior approval.<sup>8</sup> Parties can open an escrow account in India for depositing the deferred consideration or for indemnity purposes, up to a period of eighteen months in accordance with the stipulated guidelines. This is expected to provide flexibility to entities while structuring cross-border M & As.

## II. Tackling Black Money in India

The Income Declaration Scheme (IDS) was announced in the 2016 Union Budget as a window for Indian taxpayers to declare undisclosed income, also known as black money, and to clear up past tax transgressions. However, the current Government's crusade against black money started much earlier, with a Supreme Court-monitored Specific Investigation Team being constituted in Prime Minister Modi's first cabinet meeting. In addition to introducing the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BMA),<sup>9</sup> the Government has also taken steps to renegotiate tax treaties for effective information exchanges, enable lower classes to open bank accounts, amend the Benami Transactions (Prohibitions) Act, 2016,<sup>10</sup> and encourage use of digital payments—all in an effort to curb the prevalence of black money in India.

### A. BLACK MONEY ACT, 2015

In 2015 the Government notified the BMA, which imposes a tax of 30 percent and penalty of up to 90 percent on all undisclosed foreign income and assets. BMA also provided for a one-time window for persons affected by the legislation to make voluntarily disclosure prior to September 30, 2015. Disclosures made during the window were subject to the same tax, but a lower penalty of 30 percent.<sup>11</sup>

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8. *Foreign Exchange Mgmt. Act Notification*, RES. BANK OF INDIA. (May 20, 2016), [https://rbi.org.in/SCRIPTS/BS\\_FemaNotifications.aspx?Id=10431](https://rbi.org.in/SCRIPTS/BS_FemaNotifications.aspx?Id=10431).

9. *The Black Money (Undisclosed Foreign Income & Assets) & Imposition of Tax Act, 2015*, MINISTRY OF LAW AND JUST. (May 26, 2015), <http://www.indiacode.nic.in/acts-in-pdf/2015/201522.pdf>.

10. *The Benami Transactions (Prohibition) Amend. Act, 2016*, MINISTRY OF LAW AND JUST. (Aug. 10, 2016), <http://www.prsindia.org/uploads/media/Benami/Benami%20Transactions%20Act,%202016.pdf>.

11. See *The Black Money (Undisclosed Foreign Income & Assets) & Imposition of Tax Act, 2015*, *supra* note 9.



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**B. INCOME DECLARATION SCHEME, 2016<sup>12</sup>**

Unlike BMA's disclosure window, the IDS, effective as of June 1, 2016, was an opportunity for persons to disclose undisclosed income *other than* foreign income/assets. Income disclosed under the IDS was subject to tax at 30 percent, as well as access and a penalty on the taxed amount, resulting in an effective 45 percent tax. The disclosures were to be made by September 30, 2016, and payment was to be made by November 30, 2016. Further, subject to certain conditions, these disclosures were not subject to the wealth tax and persons making these disclosures were not subject to prosecution under the Income Tax Act, 1961, the Wealth Tax Act, 1957, and/or the Benami Transactions (Prohibition) Act, 2016.

As per media reports, while the disclosure window under BMA was considered unsuccessful because it only resulted in about 4,000 crore rupees<sup>13</sup> being unearthed, the IDS was much more effective as it brought more than 65,000 crore rupees<sup>14</sup> to taxation. IDS' success may be attributed to several efforts to spread awareness and the Revenue Department's strategic use of information and data mining to reach out to relevant taxpayers in order to encourage disclosures.

**C. LATEST MOVE—DEMONETIZATION ON NOVEMBER 8, 2016**

On November 8, the Government cancelled denominations of 500 and 1000 rupees and replaced these with new 500 and 2000 rupee notes, which could be exchanged for cancelled notes or withdrawn at banks subject to monetary caps.<sup>15</sup> Keeping in mind that the most widely used denominations, by value, are the 500 and 1000 rupee notes, these notes constitute a substantial portion of the total black money in India. Thus, with its decision to cancel these denominations, the Government has arguably made worthless the coffers of black money stashed away undisclosed to banks or revenue authorities.

Over the past two years, the Government has been working to eliminate black money and prevent corruption and monetary abuse. This past year has not only seen the Government's most effective disclosure scheme, but also

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12. *The Income Declaration Scheme Rules, 2016*, GOV'T OF INDIA, MINISTRY OF FINANCE (May 19, 2016), [http://www.incometaxindia.gov.in/communications/notification/notification33\\_2016.pdf](http://www.incometaxindia.gov.in/communications/notification/notification33_2016.pdf).

13. *Black Money: Gov't Collects Rs 3,770 cr from Over 600 Stash Holders*, THE ECON. TIMES (Oct. 1, 2015), <http://economictimes.indiatimes.com/news/economy/finance/black-money-government-collects-rs-3770-cr-from-over-600-stash-holders/articleshow/49177887.cms>.

14. *Rs 65,000 Crore Revealed in Black Money Disclosure Scheme*, THE TIMES OF INDIA (Oct. 2, 2016), <http://timesofindia.indiatimes.com/india/Rs-65000-crore-revealed-in-black-money-disclosure-scheme/articleshow/54635098.cms>.

15. Rajesh K. Singh & Iain Marlow, *India Abolishes 500 & 1,000 Rupee Notes to Fight Corruption*, BLOOMBERG NEWS (Nov. 8, 2016) <https://www.bloomberg.com/news/articles/2016-11-08/india-abolishes-inr500-1-000-rupee-notes-to-fight-corruption>.

the culmination of its work through demonetization resulting in the devaluation of any remaining undisclosed funds.

### **III. Imminent Introduction of GST in India**

In 2017, the Indian Government will be implementing major indirect tax reforms by replacing the multiple indirect taxes that have fragmented the Indian market with a uniform Goods and Services Tax (GST).<sup>16</sup> The dismantling of tax barriers among twenty-nine States will make India a common market, leading to consolidation of manufacturing facilities and modernisation of the supply chain. Through these measures, it is expected that the Indian GDP growth rate will be boosted by up to 2 percent.<sup>17</sup>

The hallmark of the proposed GST is to subsume multiple indirect taxes and allow seamless input tax credit throughout the value chain. All business entities will be treated as “pass through” entities eligible for credit of input taxes and the tax incidence will be borne by the ultimate consumer. This fundamental change will improve the competitiveness of indigenous manufacturing because the cascading impact of taxes will be eliminated from the cost.

The Indian Government has also taken initiatives to promote an investor-friendly tax regime that is transparent and non-adversarial. The entire tax administration process is being digitized, including filing of tax returns, online payment and refund of tax, approving input tax credit, and tax assessment. A special purpose vehicle, GSTNET, is being used to facilitate this process.

Further, the Indian Government is determined to eliminate unaccounted money from the economic system so that savings are used productively. As discussed above, radical step to demonetise high value currency notes was taken on November 8, 2016. Digitalisation of the entire GST process with automatic checks on business transactions is a step in the same direction.

The proposed GST structure in India is unique compared to other countries. There is a dual levy of GST, Central GST and State GST, on the same value of each transaction. The tax payment is also split accordingly and will get credited directly to the Central GST and respective State GST Accounts by GSTNET. In the case of inter-state transactions and imports, Integrated GST (IGST) will be collected, which will be an aggregate sum of Central GST and State GST. This will then be split between the Central

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16. *The Const. (One Hundred & First Amend.) Act, 2016* MINISTRY OF LAW AND JUST. (Sept. 8, 2016), [http://lawmin.nic.in/ld/The%20Constitution%20\(One%20Hundred%20and%20First%20Amendment\)%20Act,%202016.pdf](http://lawmin.nic.in/ld/The%20Constitution%20(One%20Hundred%20and%20First%20Amendment)%20Act,%202016.pdf).

17. Vijay Kelkar, *'A well-designed GST can boost GDP growth by 2%'*, MONEYTODAY (Dec. 2009), <http://www.businesstoday.in/moneytoday/expert-view/a-well-designed-gst-can-boost-gdp-growth-by-2percent/story/8474.html>.

and State.<sup>18</sup> Accordingly, the Indian Parliament has passed separate legislations for Central GST and Integrated GST. State Assemblies are now in the process of passing respective State GST Acts, which have uniform tax law and procedures. Some States have already passed GST Act of respective State.

Under this system, the challenge for a business, especially service providers having a PAN India presence, is in statewide registration and records maintenance. Tax disputes are likely in the event tax payment is made to an incorrect tax jurisdiction.

GST will change the way business is conducted in India. The parity between import of goods and sourcing from local manufacturers will also change. It promises to provide immense opportunities for restructuring business processes and the supply chain as well as improving profitability and competitiveness. It is critical that existing businesses and potential investors proactively assess the implication of this monumental change in order to optimize benefits.

#### **IV. The Insolvency and Bankruptcy Code**

India's Insolvency and Bankruptcy Code, 2016 (Code)<sup>19</sup> aims to provide a single comprehensive bankruptcy and insolvency law for reorganization and insolvency resolution of corporate persons, partnership firms, and individuals, in a time bound manner, applying consistent and coherent provisions to affected stakeholders. It introduces the requirement for these entities to avail themselves of the services of professionals. This should help resolve bankruptcy and insolvency situations efficiently which, in turn, is a positive step for business.

The Code provides for the establishment of the following institutional framework:

- The Insolvency and Bankruptcy Board of India (Board) will act as the insolvency regulator, exercising regulatory oversight over insolvency professionals, insolvency professional agencies, and informational utilities.<sup>20</sup>
- The Debt Recovery Tribunal (DRT) will be the adjudicating authority for individuals and unlimited liability partnership firms, and appeals shall lie with the Debt Recovery Appellate Tribunal.<sup>21</sup> The National Company Law Tribunal (NCLT) shall be the adjudicating authority

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18. *Model IGST Law*, GST COUNCIL SECRETARIAT (Nov. 2016) 21, <http://www.cbec.gov.in/resources/htdocs-cbec/gst/draft-igst-law-25-11-2016.pdf;jsessionid=E2085B0C8E5271FF7CCC859C1B292214>

19. *The Insolvency & Bankr. Code, 2016, Bill No. 349-C of 2015*, <http://www.prsindia.org/administrator/uploads/media/Bankruptcy/Bankruptcy%20Code%20as%20passed%20by%20LS.pdf>.

20. *Id.* at 80.

21. *Id.* at 76.

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for companies and limited liability entities, and appeals of NCLT decisions will go to the National Company Law Appellate Tribunal.<sup>22</sup>

- Insolvency professionals must be members of Insolvency Professional Agencies registered with the Board. The Board shall make model bylaws that may be adopted by insolvency resolution agencies to ensure competency, and the professional and ethical conduct of its members.<sup>23</sup>
- Information utilities registered with the Board will collect, collate, authenticate, and disseminate financial information from companies and creditors of companies.<sup>24</sup>
- The Code prescribes an insolvency resolution process (IRP) for corporations with a strict timeline of 180 days, with a one-time extension of ninety days.<sup>25</sup> During this process, creditors and the debtor are required to deliberate on viability of the business of the debtor and formulate a plan if the business is found to be viable. Each decision by the creditors' committee requires a 75 percent majority vote and is binding on the corporate debtor and all its creditors.<sup>26</sup>
- The NCLT can order a moratorium for the period of the IRP during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the debtor.<sup>27</sup>
- The NCLT can appoint an insolvency professional or "Resolution Professional" to administer the IRP, whose primary function is to take over the management of the corporate debtor and operate its business as a going concern under the broad directions of a committee of creditors.<sup>28</sup>
- In the event no resolution plan is agreed upon, or the creditors or NCLT decide to liquidate the debtor, the adjudicating authority will pass an order for liquidation of the debtor.<sup>29</sup>
- The Code also changes the priority waterfall for distribution of liquidation proceeds. After the costs of insolvency resolution, secured debt together with workmen dues for the preceding twenty-four months, rank highest in priority. Central and State Government dues stand below the claims of secured creditors, workmen dues, employee dues, and other unsecured financial creditors.<sup>30</sup>

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22. *Id.* at 34.

23. *Id.* at 81.

24. *Id.* at 86.

25. *Id.* at 12.

26. *The Insolvency & Bankr. Code, supra* note 19, at 16.

27. *Id.* at 12.

28. *Id.* at 13.

29. *Id.* at 21.

30. *Id.* at 30-31.

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- Finally, the Code enables the Government to enter into bilateral arrangements to deal with cross border implications of insolvencies, which will work on principles of reciprocity.<sup>31</sup>

## V. Amendments to Indian Arbitration Law

The [Indian] Arbitration and Conciliation Act 1996 (Arbitration Act) is based on the United Nations Commission on International Trade Law Model Law. In the two decades since, arbitration in India has been plagued by various issues, including costs and procedural delays, making it no better than litigation through courts. The Law Commission of India took up this issue and provided its recommendations by way of its 246th report in 2014. With this background, the Government promulgated an ordinance on October 23, 2015 to carry out wide-ranging changes to the law governing arbitration in India. This was followed by amendments to the Arbitration Act being passed by the Parliament.<sup>32</sup>

### A. KEY CHANGES

The amendments have allowed international commercial arbitration proceedings, in which at least one of the parties is a foreign entity, to access certain provisions set out in Part I of the Arbitration Act. Most notably, this includes Section 9, which allows parties to approach Indian courts for interim measures. This is significant, as the last few years have seen contradictory judicial pronouncements in this arena.

A newly introduced Section 29B now provides the parties an option to choose a fast track procedure to conduct the arbitration. Under the fast track procedure, the award is required to be made within a period of six months from the date the arbitral tribunal enters upon reference. To opt for this procedure, parties are required to expressly agree in writing to have their dispute resolved by the fast track procedure. Such agreement has to be made at a stage prior to, or when, the arbitral tribunal is being appointed.

The amendments endeavour to provide more clarity on the substantive law and procedure regulating the award of costs in arbitration as well as the circumstances that the court or tribunal shall consider before an award of costs is made.

Section 34 of the Arbitration Act provided that an arbitral award could be set aside if the court finds that the arbitral award is in conflict with the public policy of India. However, the scope and extent of the term “public policy” has been vulnerable to being exploited by judgment debtors who attempt to set aside an unfavourable arbitral award. The amendment attempts to address this issue by clarifying the meaning of an award being in conflict with the public policy of India by referring to the instances set out by the

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31. *Id.* at 91.

32. *The Arbitration & Conciliation (Amend.) Act, 2015*, MINISTRY OF LAW AND JUST. (Dec. 31, 2015), <http://www.indiacode.nic.in/acts-in-pdf/2016/201603.pdf>.

Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric Co.*<sup>33</sup> However, these instances are still not entirely objective in nature.

Summing up, the amendments to Indian arbitration law are well intentioned and, subject to them being followed “in letter and spirit” by tribunals, courts, and parties to arbitration, bound to improve the arbitration scenario in India. Since Indian arbitrations are usually ad hoc, the true aim of these amendments is to introduce some much-needed discipline.

On the other hand, the amendments might have certain negative ramifications as well. For example, applying Section 9 to international commercial arbitrations might create more ambiguity, especially since foreign courts may exercise concurrent jurisdiction due to the seat of arbitration being offshore.

## **VI. Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015**

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Act)<sup>34</sup> was brought into force with retrospective effect from October 23, 2015. The intent of the Act is to ensure speedy disposal of high value, complex commercial disputes, and to bring about reform in the civil justice system in India.<sup>35</sup> The Act provides for the development of Commercial Courts,<sup>36</sup> as well as for the development of Commercial Divisions<sup>37</sup> and Commercial Appellate Divisions<sup>38</sup> in the Indian High Courts<sup>39</sup> for adjudicating commercial disputes exceeding the specified value of one crore rupees.

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33. *Renusagar Power Co. Ltd. Vs. Gen. Electric Co.*, (1993) SCR 31-32 (India).

34. *The Com. Courts, Com. Division & Com. App. Division of High Courts Bill, 2015*, Bill No. XXV of 2015, <http://www.prsindia.org/uploads/media/Commercial%20courts/Commercial%20courts%20bill,%202015.pdf>.

35. *Com. Division & Com. App. Division of High Courts & Com. Courts Bill, 2015*, LAW COMMISSION OF INDIA (Jan. 2015), [http://lawcommissionofindia.nic.in/reports/Report\\_No.253\\_Commercial\\_Division\\_and\\_Commercial\\_Appellate\\_Division\\_of\\_High\\_Courts\\_and\\_Commercial\\_Courts\\_Bill\\_2015.pdf](http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and_Commercial_Courts_Bill_2015.pdf).

36. Section 2(1)(b) of the Act states that “‘Commercial Court’ means the Commercial Court constituted under sub-section (1) of section 3.” *The Com. Courts, Com. Division & Com. App. Division of High Courts*, *supra* note 34, at 2.

37. “Commercial Division” means the Commercial Division in a High Court constituted under sub-section (1) of section 4 of the Act. *The Com. Courts, Com. Division & Com. App. Division of High Courts*, *supra* note 34, at 4.

38. “Commercial Appellate Division” means the Commercial Appellate Division in a High Court constituted under sub-section (1) of section 5 of the Act. *The Com. Courts, Com. Division & Com. App. Division of High Courts*, *supra* note 34, at 4.

39. There are twenty four High Courts in India, which exercise supervisory jurisdiction and superintendence over all courts and tribunals throughout the territories in relation to which they exercise jurisdiction. *Jus Dicere, Const. Law, DISCOVER THE WORLD OF LAW* (Apr. 13, 2017), <https://www.jdicere.com/revisional-power-vis-vis-writ-proceedings-article-226-227-constitution-india/>.

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**A. COMMERCIAL DISPUTES**

The commercial disputes forming the subject-matter of the Act may arise out of a broad range of transactions and activities, including the following:

- Ordinary transactions of merchants, bankers, financiers, and traders;
- Export or import of merchandise or services;
- Joint venture agreements;
- Shareholder agreements;
- Agreements relating to immovable property used exclusively in trade or commerce; and
- Intellectual property rights.<sup>40</sup>

**B. CONSTITUTION OF COURTS UNDER THE ACT**

The Act requires state governments<sup>41</sup> to constitute, after consultation with the concerned High Court, such number of Commercial Courts at the district level as it may deem necessary for exercising the jurisdiction and powers conferred under this Act. However, the Act provides that Commercial Courts shall not be constituted for the territory over which the High Court has ordinary original civil jurisdiction *i.e.*, where the High Court is the court of first instance. In all High Courts having ordinary civil jurisdiction (such as the High Courts at Delhi, Bombay, Calcutta, Madras, and Himachal Pradesh), the Chief Justice of the High Court may, by order, constitute a Commercial Division having one or more benches consisting of a single Judge, for the purpose of exercising the jurisdiction and powers conferred on it under this Act. Further, a Commercial Appellate Division shall be set up in all the High Courts to hear appeals against (1) Orders of Commercial Division of the High Courts; and (2) Orders of the Commercial Courts. The Act further accords jurisdiction for arbitration matters as well. While the efficacy of the Act remains to be seen, procedural reforms contemplated under the Act are expected to significantly improve India's existing legal institutions.

**VII. Changes in the Indian Trust Act**

The Indian Trust Act, 1882 (Trust Act) was enacted more than a century ago, and was based primarily on the English trust laws. Until 1882, the development of the law of private trust was fully entrusted to the courts of India. In the year 1879, the Law Commission, with the intention to codify laws on private trusts, drafted the first bill on the subject matter, which was later enacted as the Indian Trust Act, 1882. Over the past century, certain amendments have been made to the Trusts Act, primarily to expand the

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40. Section 2 (1)(c) of the Act defines the term "Commercial Disputes." *The Com. Courts, Com. Division & Com. App. Division of High Courts*, *supra* note 34, at 2.

41. India has twenty-nine states and seven union territories. *State & Union Territories*, KNOW INDIA, [http://knowindia.gov.in/knowindia/state\\_uts.php](http://knowindia.gov.in/knowindia/state_uts.php) (last visited Apr. 15, 2017)

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scope of its applicability. In July this year, the Indian Parliament made a substantive amendment to the Trusts Act in order to relax the restrictions on the investment of trust property.<sup>42</sup>

A. EARLIER POSITION

Section 20 of the Trust Act previously stated that “where the trust property consists of money and cannot be applied immediately or at an early date for the purposes of the trust, the trustee is bound to invest only in the securities enumerated under the section.” These included some pre-independence securities, such as securities issued by the United Kingdom and Ireland, by municipalities of the Presidency towns of Bombay, Madras, and Calcutta (erstwhile administrative divisions of the British India), and the port trust of Rangoon town and Karachi. Apart from the securities enlisted therein, Section 20 allowed investment in securities authorized by the instrument of trust *i.e.*, the trust deed, securities of the State or the Central Government wherein the principal amount and the interest is guaranteed by such Government, or specific securities which are expressly notified by the Central Government<sup>43</sup> or under the rules of any High Court for such investment. Section 20A of the Trusts Act restricts the trustee from purchasing redeemable stock at a premium in the securities as provided under Section 20 if the price exceeds the redemption value. The investment limitations remained even after independence, although since then, the ability of an Indian trustee to acquire the foreign securities listed was restricted under foreign exchange laws.

B. CURRENT POSITION

Given that the Trusts Act was enacted prior to independence and hence contained references to securities issued in the United Kingdom and erstwhile British India, an alignment with the current political and legal scenario was necessary. All securities that were specifically listed have been deleted and the provision now requires investment in any of the securities or class of expressly authorized by the instrument of trust, or the securities notified by the Central Government. Further, the restriction on the ability of the trustee to acquire redeemable shares at a value higher than the redemption value has been deleted.

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42. *The Indian Trusts (Amend.) Act, 2016*, MINISTRY OF LAW AND JUST. (July 26, 2016), [http://www.prsindia.org/uploads/media/Indian%20Trust/Indian%20Trusts%20\(Amendment\)%20Act,%202016.pdf](http://www.prsindia.org/uploads/media/Indian%20Trust/Indian%20Trusts%20(Amendment)%20Act,%202016.pdf).

43. These notifications refer to specific securities issued at a specific time. As an example, under this provision the Central Government has, in the past, notified bonds of Indian Railways Finance Corporation as notified on March 6, 1996, and unsecured Redeemable Flexi Bonds of Industrial Development Bank Of India Limited as notified on February 23, 1996. *Indian Railway Fin. Corp.*, A GOVT OF INDIAN ENTERPRISE, <http://irfc.nic.in/bond.asp?lang=1> (last visited Apr. 15, 2017).



With this amendment, the Central Government is not required to expressly notify a security as being eligible for investment. Instead, greater autonomy and flexibility has been conferred on trustees to make decisions on investment of trust-money based on their assessment of the risk return trade off and the relevant provisions of the trust deed.

## **VII. India—Reforms in Employment and Labour Laws in 2016**

### **A. THE PAYMENT OF BONUS (AMENDMENT ACT), 2015 (BONUS AMENDMENT ACT)<sup>44</sup>**

The Bonus Amendment Act, which was passed on December 31, 2015, and published on January 1, 2016, incorporates critical changes to the Payment of Bonus Act, 1965 (PB Act), which is a social welfare legislation law providing for payment of statutory bonus. Key changes with retrospective effect from April 1, 2014 are:

1. Amendment to the eligibility limit of an “employee,” whereby an employee earning a monthly salary/wages of Rs. 21,000 is eligible for statutory bonus, an increase from the earlier monthly cap of Rs. 10,000.
2. Under the PB Act, if an eligible employee’s monthly salary/wage exceeded Rs. 3,500 (approx. USD 58), the minimum or maximum statutory bonus payable was calculated as if the monthly salary/wage was Rs. 3,500. This monthly ceiling is now increased to Rs. 7,000 or the minimum Government-notified wage notified, whichever is higher.

The retrospective application of the PB Amendment Act caused widespread pushback from employers, as it required an employer to account for a higher payout going back two financial years. This has been legally challenged in various States, with the High Courts across several States, including Tamil Nadu and Karnataka, passing interim orders staying the retrospective application.

### **B. THE CHILD LABOUR (PROHIBITION AND REGULATION) AMENDMENT ACT, 2016 (CL AMENDMENT ACT)<sup>45</sup>**

The CL Amendment Act was passed in July 2016, amending the Child Labour (Prohibition and Regulation) Act, 1986. Key features of this Act are:

1. A child is not allowed to work in any occupation, as compared to the earlier prohibition preventing a child from working in specified

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44. *The Payment of Bonus (Amend.) Act, 2015*, MINISTRY OF LAW AND JUST. (Dec 31. 2015), <http://www.prsindia.org/uploads/media/Payment%20of%20Bonus/Payment%20of%20Bonus%20Act,%202015.pdf>.

45. *The Child Labour (Prohibition & Reg.) Amend. Bill, 2016, Bill No. LXII-C of 2012*, <http://www.prsindia.org/uploads/media/Child%20Labour/Child%20labour%20as%20passed%20by%20RS.pdf>.

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employments. There are certain exceptions, such as helping the family or family enterprise after school hours or during vacation, provided these activities do not interfere with a child's education or occur in specified hazardous occupations or processes.

2. The penalties for employing a child have been substantially increased.
3. The introduction of the concept of an "adolescent," a person fourteen to eighteen years of age, who is prohibited from working in specified hazardous occupations and processes, including mines.

These amendments have been welcomed because of the overriding restriction on employing a child. The amendments also support the Government's position that exceptions are required to ensure that India's artisanal and farming work continues, while also giving a child the right to education.

**C. THE MATERNITY BENEFIT (AMENDMENT) BILL, 2016 (MB BILL)<sup>46</sup>**

In August 2016, the MB Bill, seeking to amend the Maternity Benefit Act, 1961 (MB Act), was passed by the Lok Sabha and now needs to be passed by the Rajya Sabha and receive Presidential assent. Key features are:

1. Paid maternity leave increased from twelve to twenty-six weeks.
2. The concepts of a "commissioning mother" and an adoptive mother have been introduced, both of whom are entitled to twelve weeks paid maternity leave.
3. The concept of "work from home" has been introduced.
4. An establishment with fifty employees needs to set up a crèche facility.

The amendments are progressive in nature, covering a wider ambit for the term "mother," and providing more maternity leave. From an employer's perspective, however, there will be greater financial implications due to the increased paid maternity leave payment as well as an increase in the benefits needed to be paid to the new categories of eligible female employees.

**IX. The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016**

In 2010, the Indian Government started issuing Aadhaar cards, a twelve-digit unique identification number to all the residents<sup>47</sup> of India, to provide certain subsidies, benefits, and services to these individuals. To provide legislative support to the legality of this Aadhaar card, particularly with the

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46. *The Maternity Benefit (Amend.) Bill, 2016, Bill No. XLIII of 2016*, <http://www.prsindia.org/uploads/media/Maternity%20Benefit/Maternity%20Benefit%20Bill,%202016.pdf>.

47. "Resident" is an individual who has resided in India for a period amounting to 182 days or more in the twelve months immediately preceding date of application for enrollment. *The Aadhaar (Targeted Delivery of Fin. & Other Subsidies, Benefits & Serv.) Act, 2016*, MINISTRY OF LAW AND JUSTICE 3 (Mar. 25, 2016), [https://uidai.gov.in/beta/images/the\\_aadhaar\\_act\\_2016.pdf](https://uidai.gov.in/beta/images/the_aadhaar_act_2016.pdf).

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use of the Aadhaar card and protection of information collected during enrollment, the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (Aadhaar Act) came into force on March 26, 2016.<sup>48</sup>

A. ENROLLING TO OBTAIN THE AADHAAR CARD

To obtain an Aadhaar card, an individual is required to provide biometric<sup>49</sup> and demographic information<sup>50</sup> (Identity Information). The Aadhaar Act requires that the enrolling agency inform the individual about the way their information will be used, with whom it intends to share the information, and the right to access the information, including the procedure for making such requests.

B. AUTHENTICATION OF THE AADHAAR NUMBER

By paying certain fees, any agency or person (requesting entity) can submit Identity Information to the Unique Identification Authority of India<sup>51</sup> (UIDAI) for authentication of the Aadhaar number. The requesting entity must, however, obtain consent before collecting this Identity Information and ensure that it is only used for authentication. The individual shall also be provided details on what information may be shared upon authentication, how it may be used, and alternatives to submission of Identity Information. Further, when responding to such authentication requests, the UIDAI can provide any Identity Information, excluding core biometric information *i.e.*, fingerprints or iris scans.

C. PROTECTION OF INFORMATION

The UIDAI specifies the various processes relating to data management and security protocols under the Aadhaar Act. Further, the agencies, consultants, advisors, or any other persons appointed or engaged by the UIDAI must also have in place appropriate technical and organizational security measures as specified by the UIDAI.

Further, no core biometric information *i.e.*, finger prints, iris scans, or other biological attributes can be shared except for information required for generating the Aadhaar number and for authentication purposes. Further, neither the Aadhaar number nor core biometric information shall not be published, displayed, or posted publically. However, the Identity

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48. *Id.* at 1.

49. Includes the photograph, fingerprint, iris scan, or such other biological attributes of an individual. *Id.* at 3.

50. Includes information relating to the name, date of birth, address, or other relevant information of an individual but shall not include race, religion, caste, tribe, ethnicity, language, records of entitlement, income, or medical history. *Id.* at 3.

51. The UIDAI assigns Aadhaar numbers to residents of India. *Id.* at 2.

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Information collected may be revealed in the interest of national security or on the order of a court.

**D. OFFENCES AND PENALTIES**

The Aadhaar Act specifies penalties for various offences, including impersonating another person, unauthorized collection of Identity Information, unapproved disclosure, transmission or copying of information, or acting in contravention of any agreement or arrangement made pursuant to the Aadhaar Act. Further, an unauthorized person may be subject to fines as well as imprisonment if any information in the centralized database is disrupted, destroyed, stolen, concealed, or altered. A requesting entity or an enrolling agency shall also be penalized if it fails to comply with the requirements and rules provided under the Aadhaar Act.

Lastly, courts are not permitted to recognize any offenses punishable by the Aadhaar Act unless the complaint is made by the UIDAI or any officer or person authorized by it.

**X. Key Commercial Aspects of RERA on Buyers and Builders**

The real estate sector in India has been unregulated and unorganised for years. As a result of this, the need for regulation by an authority along the lines of SEBI, IRDA, etc. was felt. The Real Estate (Regulation & Development) Act, 2016 (“RERA”)<sup>52</sup> has been enacted with the objective of ensuring transparency in real estate transactions and protecting consumers’ interest. To achieve the aforesaid objectives, RERA establishes a regulatory body, the Real Estate Regulatory Authority, which has been empowered to regulate the projects from the time the project launches until the conveyance of the land to the society/association of buyers. RERA was partially notified and has been in force since May 1, 2016, followed by the Central Government enacting rules that will apply to the Union territories.<sup>53</sup> The key provisions under the RERA regime that significantly impact the buyers and the developers are discussed below.

Seventy percent of the project receipts from the buyers have to be parked in a separate account, which can only be used for the land purchase and construction cost earmarked to that specific project. This may result in higher external borrowing for developers and the escalation of prices for the buyers. This will also impact the fund raising capability of developers as

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52. *The Real Est. (Reg. & Dev.) Act, 2016*, MINISTRY OF LAW AND JUST. (Mar. 25, 2016), <http://www.indiacode.nic.in/acts-in-pdf/2016/201616.pdf>.

53. 59 Sections of the Real Estate (Regulation and Development) Act, 2016 were notified by the Ministry of Housing & Urban Poverty Alleviation on April 27, 2016, bringing the Act into force and effect as of May 1, 2016. Press Release, Press Info. Bureau, Gov’t of India, Ministry of Housing & Urban Poverty Alleviation (Apr. 30, 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=142595>.

collateral creation will change as the projects will fall under the Authority in case of default.<sup>54</sup>

Developers will have to register each project with the Authority before even making an offer for sale. This will infuse much needed transparency and accountability as the Authority will monitor the projects right from their inception. This provision covers both residential and commercial projects under its ambit, but exempts projects that: (i) are less than 500 square metres or, (ii) entail the construction of less than eight apartments.<sup>55</sup>

The developer is liable to either rectify or compensate the buyer for any structural defects or any other defect in workmanship, quality or provision of services, or any other obligations for a period of five years from the allotment of handing over of possession. This strict defect liability will ensure that the developers are circumspect about the quality of their construction.<sup>56</sup>

Further, the definition of “carpet area” has been provided under the Act, leaving no ambiguity for liberal interpretation or exploitation by the developers. In fact, the RE Sector will benefit due to the standardization from calculation of apartment units based on carpet area and not the entirety of the apartment and its external structures.<sup>57</sup>

Another noteworthy provision is the requirement for the promoters to first enter into a written agreement for sale with the buyers and register said agreement before accepting any advance payment or application fee, not exceeding 10 percent of the cost. This limit on receipt of advance payment shall make the developer more accountable towards consumer.<sup>58</sup> Lastly, the buyers shall be entitled to claim refund of the amounts paid, along with interest, as well as seek compensation from the developers in case of building closure or other developer noncompliance.<sup>59</sup>

## **XI. Indian Immigration Law Updates**

### **A. LANDLORDS IN INDIA MUST REPORT THE STAY OF FOREIGN NATIONALS ON THEIR PREMISES**

There was increased enforcement in 2016 of a long-standing regulation that tracks the stay of foreign nationals in India. The regulations provide that “Any Hotel/Guest House/Dharmashala (charitable housing)/Individual House/ University/Hospital/Institute/Others etc. who provide accommodation to foreign nationals must submit the details of the residing foreign national in Form C to the Registration authorities within twenty-

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54. *The Real Est. Act*, *supra* note 52, at 8.

55. *Id.* at 7.

56. *Id.* at 15.

57. *Id.* at 2.

58. *Id.* at 14.

59. *Id.* at 16.

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four hours of the arrival of the foreign national at their premises.”<sup>60</sup> Although hotels, guest houses, hospitals, and hostels were previously required to file a Form C about foreign nationals living on their premises, in 2016, this regulation was also strictly enforced against individual or private home owners, including landlords.<sup>61</sup>

**B. MANDATORY BIO-METRIC COLLECTION FOR 7 INDIA VISA CATEGORIES WHEN APPLYING IN LONDON**

On August 5, 2016, the High Commission of India in London announced in a Press Release that, effective August 19, 2016, biometrics enrollment is required for visa applicants in certain visa categories.<sup>62</sup>

**C. RESIDENCE RIGHTS THROUGH INVESTMENTS**

India has decided to welcome certain foreign nationals who are willing to make significant investments in India by granting long term, hassle-free residence rights in India.<sup>63</sup> The information available to the public at present refers to this as “permanent residence status,” but what is being offered is an initial residence status of ten years followed by an extension of another ten years.<sup>64</sup>

The “permanent residence status” that will be granted to foreign investors for up to twenty years, including multiple visits, is meant to encourage job creation in the country. According to the official statement issued after the union cabinet, chaired by Prime Minister Narendra Modi, took the decisions, the benefit under the foreign direct investment policy is available to investors who will bring a minimum of Rs. ten crore (about \$1.5 million) into the country and generate twenty jobs every year.<sup>65</sup> The minimum investment required under this scheme could be either Rs. ten crore (about \$1.5 million) in eighteen months or Rs. twenty-five crore (\$ 3.6 million) in thirty-six months. Further, under current regulations, most foreign nationals could qualify for naturalization as Indian citizens after staying in India for twelve years in qualifying long-term status, subject to certain criteria.<sup>66</sup>

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60. *Form C*, BUREAU OF IMMIGR. (Aug. 11, 2015), <http://boi.gov.in/content/form-c>; *Ministry of Home Affairs Notification*, THE GAZETTE OF INDIA: EXTRAORDINARY (Mar. 18, 2016), <http://egazette.nic.in/WriteReadData/2016/168653.pdf>.

61. *Ministry of Home Affairs Notification*, *supra* note 60.

62. Zeenat Phophalia, *India: Mandatory Bio-metric Collection For 7 India Visa Categories When Applying In London*, MONDAQ (Sept. 6, 2016), <http://www.mondaq.com/india/x/524626/work+visas/Mandatory+Biometric+Collection+for+7+India+Visa+Categories+When+Applying+in+London>.

63. Abhijit Roy Chowdhury & Bibhudatta Pradhan, *India Considers \$1.5 Million Residence Visa to Woo Investment*, BLOOMBERG (Aug. 31, 2016), <https://www.bloomberg.com/news/articles/2016-08-30/india-said-to-mull-1-5-million-residence-visa-to-woo-investment>.

64. *Id.*

65. *Id.*

66. *Id.*

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**D. GRANT OF CITIZENSHIP MADE EASIER FOR CERTAIN PAKISTANI NATIONALS**

In an effort to allow certain minorities from Pakistan to continue to live and work in India, the Modi-led government has put forth a proposal on August 23, 2016 to simplify the process of obtaining Indian citizenship for these individuals.<sup>67</sup> Under the proposal, certain Pakistani nationals staying in India on a long term visa will be permitted to open bank accounts with prior RBI approval, subject to certain conditions, to buy property, obtain a Permanent Account Number (PAN) and Aadhaar Number, and given permission to become self-employed or to do business in the country.

**XII. Indian Climate Change and Clean Energy Update**

Internationally, the Modi government continued to strengthen India's engagement on climate change and clean energy issues in 2016.<sup>68</sup> An overview of the agreements, policies, and initiatives announced in 2016 is below.

**A. INTERNATIONAL**

**1. Paris Agreement**

Over 190 countries, India included, adopted the Paris Agreement<sup>69</sup> at the 21st Conference of the Parties (COP 21) of the United Nations Framework Convention on Climate Change (UNFCCC) held in Paris in December 2015. As part of this Agreement, countries, including India, for the first time agreed to a universal, legally binding global climate deal. The Paris Agreement would be in force when at least fifty-five Parties to the UNFCCC accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions deposit their instruments of ratification, acceptance, approval, or accession. To fulfill this requirement, India ratified the Paris Agreement on October 2, 2016.<sup>70</sup> The Paris Agreement came into force on November 4, 2016.

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67. Grant of Various Facilities to Persons Belonging to Minority Communities in Afghanistan, Bangladesh & Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis & Christians, Staying in India on Long Term Visa (LTV), [http://mha1.nic.in/pdfs/LTVFacilities\\_230816.pdf](http://mha1.nic.in/pdfs/LTVFacilities_230816.pdf) (last visited Apr. 15, 2017).

68. Aseem Chawla et al., *India*, 50 THE YEAR IN REVIEW 613 (2016), [http://www.americanbar.org/content/dam/aba/uncategorized/international\\_law/\\_yir641.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/international_law/_yir641.auth_checkdam.pdf).

69. *The Paris Agreement*, UNITED NATIONS, [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) (last visited Apr. 14, 2017).

70. Press Release, Press Info. Bureau, Gov't of India, Ministry of Environment & Forests: Cabinet Approves Ratification of the Paris Agreement (Sept. 28, 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=151205>.

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2. *Mission Innovation*

On November 30, 2015, a global initiative of twenty-two countries and the European Union launched Mission Innovation. Members of Mission Innovation have committed to double their governments' clean energy research and development (R&D) investments over five years, while encouraging greater levels of private sector investment in transformative clean energy technologies. India was one of the initial signatories of Mission Innovation and at the Ministerial in San Francisco in June 2016, announced its plans to double clean energy R&D investment from \$72 million to \$142 million over a period of five years.<sup>71</sup>

3. *Montreal Protocol / Kigali Amendment*

The Kigali Amendment, an amendment to the Montreal Protocol, was adopted in 2016 with the aim to phase down hydrofluorocarbons (HFCs), a potent greenhouse gas. The amendment establishes a schedule of targets and timetables for all developed and developing countries to reduce their use of HFCs. As part of this amendment, by the year 2047, India must have reduced its 2024-26 levels of HFC use by 85 percent.<sup>72</sup>

B. NATIONAL

1. *Coal*

In the annual budget for fiscal year 2016-17, the Modi government increased the clean energy cess on coal mined and imported from Rs 200 (\$2.94) to Rs 400 (\$5.88) per metric ton.<sup>73</sup> The revenue collected from this cess will be used to finance the Clean Environment Fund.

2. *Renewables*

A National Wind Solar Hybrid Policy<sup>74</sup> is being drafted by the Ministry of New and Renewable Energy. This policy aims to provide a framework for promotion of large grid connected wind-solar PV systems. Apart from

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71. *India Announces Plan to Double the Inv. in Next 5 Years in Clean Energy Research*, DEP'T OF BIOTECHNOLOGY, <http://www.dbtindia.nic.in/press-release-san-francisco-us-2nd-june-2016/> (last visited Apr. 15, 2017).

72. David Doniger, *Countries Adopt Kigali Amend. to Phase Down HFCs*, NRDC (Oct. 14, 2016), <https://www.nrdc.org/experts/david-doniger/countries-adopt-kigali-amendment-phase-down-hfcs>; Amitabh Sinha, *Kigali Delivers Second Big Climate Deal; Montreal Protocol Amended to Eliminate HFCs*, IENATION (Oct. 15, 2016), <http://indianexpress.com/article/india/india-news-india/kigali-delivers-second-big-climate-deal-montreal-protocol-amended-to-eliminate-hfcs-3083930/>.

73. *Gov't Doubles Clean Energy Cess on Coal to Rs 400 Per Tonne*, THE TIMES OF INDIA (Feb. 29, 2016), <http://timesofindia.indiatimes.com/budget-2016/industry/Union-Budget-2016-Govt-doubles-Clean-Energy-Cess-on-coal-to-Rs-400-per-tonne/articleshow/51191619.cms>.

74. Press Release, Press Info. Bureau, Gov't of India, Ministry of New & Renewable Energy: Wind Solar Hybrid Policy to Strengthen Energy Security of India (Aug. 1, 2016), <http://pib.nic.in/newsite/printrelease.aspx?relid=148106>.



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providing energy security, the policy is expected to help achieve better grid stability.

**PUBLISHED IN COOPERATION WITH  
SMU DEDMAN SCHOOL OF LAW**

## **Latin America and Caribbean**

EDGAR ODIO, JOÃO OTÁVIO OLIVÉRIO; JOSÉ FRANCISCO MAFLA,  
LEONARDO SEMPÉRTEGUI V., LUCILA HEMMINGSEN,  
AND MAURICIO BECERRA DE LA ROCA\*

This Article reviews significant international law developments in 2016 in Latin American and Caribbean countries, including Argentina, Bolivia, Columbia, Costa Rica, Ecuador, and Peru.

### **I. Argentina**

#### **A. AMENDMENTS TO CENTRAL BANK REGULATION**

The Argentine Central Bank issued two main Communications, “A” 5850<sup>1</sup> and “A” 6037,<sup>2</sup> amending several of the Central Bank’s regulations and terminating de facto measures granting more flexibility to the Argentine foreign exchange market.

Communication “A” 5850 restored the possibility for Argentine residents to acquire foreign currency (with a limit of USD 2 million per calendar month—a cap that was later lifted) and put an end to various restrictions, such as those on (i) payment of services to related companies abroad; (ii) exchange transactions without prior registration of such transactions with the Federal Tax Authority; (iii) acquisition of currency (or payments abroad) for tourism and travel; (v) withdrawals from ATMs outside Argentina; and (vi) the obligation to bring funds originating from debt taken abroad into Argentina.<sup>3</sup>

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\* João Otávio Olivério, founding partner of Olivério Advogados, Brazil, and Lucila Hemmingsen, partner of Kirkland & Ellis, USA, are the co-editors of this article. Lucila Hemmingsen also contributed the section on Argentina. Mauricio Becerra de la Roca Donoso, managing partner at Becerra de la Roca Donoso & Asociados, contributed the section on Bolivia. José Francisco Mafla, Partner at Brigard & Urrutia, Colombia, contributed the section on Colombia. Edgar Odio, Partner; Sergio Aguiar, Silvia Valverde, Juan Pablo Lara, and Manfred Banks, Pragma Legal, Costa Rica, contributed the section on Costa Rica. Leonardo Sempértegui V., Partner of Sempértegui Ontaneda Abogados, Ecuador, contributed the sections on Ecuador and Peru.

1. BANCO CENTRAL DE AL REPÚBLICA ARGENTINA, COMMUNICATION “A” 5850 (Dec. 15, 2015), <http://www.bcra.gov.ar/Pdfs/comytexord/A5850.pdf>; BANCO CENTRAL DE AL REPÚBLICA ARGENTINA, COMMUNICATION “A” 6037 (Aug. 8, 2016), <http://www.bcra.gov.ar/Pdfs/comytexord/A6037.pdf>.

2. BANCO CENTRAL DE AL REPÚBLICA ARGENTINA, COMMUNICATION “A” 6037 (Aug. 8, 2016), <http://www.bcra.gov.ar/Pdfs/comytexord/A6037.pdf>.

3. Grupo Supervielle S.A., Registration Statement (Form F-1) (Apr. 15, 2016).

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Communication “A” 6037, in turn, was aimed at simplifying the market functioning by, amongst other things, (i) lifting the monthly limits on acquisition of foreign currency by Argentine residents; (ii) replacing the requirement to file supporting documents for exchange transactions by Argentine residents by a sworn statement; and (iii) removing restrictions on the payments for the import of goods.<sup>4</sup>

**B. NEW IMPORT LICENSE SYSTEM**

The Federal Tax Authority (AFIP), through General Resolution 3823<sup>5</sup> of December 21, 2015, terminated the import regime that required AFIP’s prior approval and filing of an affidavit for clearance of imports into Argentina, and replaced it with a monitoring system named *Sistema Integral de Monitoreo de Importaciones* (SIMI).

Resolution 5/2015<sup>6</sup> of the Production Ministry implemented automatic and non-automatic import licenses to work within the SIMI, based on whether the products fall within the Mercosur Common Nomenclature’s tariff codes (automatic licenses) or those codes created by this or subsequent resolutions (non-automatic licenses). With this new regime, the government aimed to protect certain Argentine industries under the non-automatic import license umbrella but “opened” the market to other products.

**C. NEW ANTI-CORRUPTION LEGISLATION**

In an effort to combat corruption and improve Argentina’s prospects for membership in the OECD, the Executive Branch prepared a new anti-corruption package consisting of three bills: a plea bargaining bill, an asset-forfeiture bill, and an international bribery bill. As of November 2016, just as the plea bargaining bill had been enacted, becoming Law 27304 (Plea Bargaining Law),<sup>7</sup> while the other two bills were still pending before Congress.

The Plea Bargaining Law amended the Criminal Code by extending the pre-existing plea-bargaining provisions to crimes related to the public

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4. *Important News on FX Regulations: The Argentine Central Bank continues to simplify the FX Market*, TAVARONE, ROVELLI, SALIM, & MIANI ABOGADOS (Aug. 8, 2016), <http://www.trsym.com/en/important-news-on-fx-regulations-the-argentine-central-bank-continues-to-simplify-the-fx-market/>.

5. Resolución General 3823 de la Administración Federal de Ingresos Públicos, Dec. 21, 2015 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/255000-259999/257180/norma.htm>

6. Resolución 5/2015 Ministerio de Producción, Dec. 22, 2015 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/255000-259999/257251/norma.htm>. Resolution 5/2015 was subsequently supplemented by Resolution No. 2/2016 of January 7, 2016, and Resolution No. 172/2016 of July 5, 2016, both issued by the Secretary of Commerce, amending the tariff codes requiring either an automatic or a non-automatic license.

7. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 1 [41, 276] (Buenos Aires, 2016) (Arg.), [hereinafter Law No. 27304], <http://servicios.infoleg.gob.ar/infolegInternet/anexos/265000-269999/267115/norma.htm>.

administration pertaining to corruption of, or by, public officials. The Law sets forth the reduction in, and potential exemption of, sentences for those who cooperate with the government by providing true information on the perpetrators or participants in corruption crimes.<sup>8</sup>

The asset-forfeiture bill<sup>9</sup> aims to enable an expedited forfeiture by the State of those assets that were acquired as a result of illegal activities, whether located in Argentina or abroad. The international bribery bill<sup>10</sup> sets forth a liability regime for companies and other legal entities for corruption-related crimes, including crimes against the public administration and international bribery.

#### D. PUBLIC-PRIVATE PARTNERSHIPS

In an attempt to help finance infrastructure projects in the country, a new law regulating Public-Private Partnerships was enacted on November 16, 2016.<sup>11</sup> The Law defines Public-Private partnership contracts as those contracts entered into by and between the National Public Administration (whether centralized or decentralized) and private parties (e.g., contractors) with the purpose of developing projects in the fields of infrastructure, activities and services, productive investments, applied investigation and/or technological innovation, and ancillary services to those.

## II. Bolivia—Bolivia to Join Mercosur as Full Member

Bolivia is currently a Mercado Común del Sur (Mercosur) associated State and aspires to be a full member with all benefits. Bolivia's full participation in the bloc has been under negotiation since 2007, when at the XXXII MERCOSUR Summit of Presidents, CMC Decision No. 01/07 of January 18, 2007, was adopted, creating an Ad Hoc Working Group for Bolivia's accession as a full member of Mercosur.<sup>12</sup> On July 17, 2015, at the Mercosur summit in Brasilia, the member countries, Argentina, Brazil, Paraguay, Uruguay, and Venezuela,<sup>13</sup> signed a new protocol for Bolivia's entry into the organization.<sup>14</sup> A previous accession protocol for Bolivia had already been signed by the other four Member States in 2012, when Paraguay was

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8. *See id.*

9. Bill of Law No. 1406-D-16 (Arg. 2016). (Extinción de Dominio y Repatriación de Bienes).

10. Bill of Law No. 0030-PE-2016 (Arg. 2016). (Responsabilidad Penal de las Personas Jurídicas).

11. Law No. 2738, Nov. 16, 2016, [31,514] B.O. 1 (Arg.).

12. *See Decisión CMC No. 01/07 Mercosur (Jan. 1, 2007) (Arg.)*, <https://gestorweb.mercosur.int/files/564e3fbcc9344903fc3aef4c>.

13. As of December 2016, Venezuela has been suspended from Mercosur. *Mercosur suspends Venezuela over trade and human rights*, BBC NEWS (Dec. 2., 2016), <http://www.bbc.com/news/world-latin-america-38181198>.

14. Graciela Rodriguez-Ferrand, *Mercosur: Protocol for Accession of Bolivia Approved*, THE LAW LIBRARY OF CONGRESS (Aug. 18, 2015), <http://www.loc.gov/law/foreign-news/article/mercosur-protocol-for-accession-of-bolivia-approved/>.

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temporarily suspended from Mercosur because of a coup against its former president Fernando Lugo.<sup>15</sup>

The government of Bolivia awaits the approval of its protocol of accession to Mercosur by Brazil's Congress, which is expected to occur before the first half of 2017.<sup>16</sup> Bolivia's full accession to Mercosur is currently only delayed by Brazil's "internal procedures," despite previously obtaining approval from Argentina, Uruguay, Venezuela, and Paraguay.<sup>17</sup> From the time that Brazil delivers the protocol of accession, at least 30 days must pass for the conditions to take effect under which Bolivia, within four years, has to adopt Mercosur rules to be part of all systems of the bloc.<sup>18</sup>

Mercosur has a strategic character for Bolivia, as 70 percent of its boundaries are next to the countries that make up this bloc.<sup>19</sup> In economic terms, the main exchange between Bolivia and Mercosur occurs in the gas sector, accounting for about 94 percent of its exports due to the gas export contracts with Brazil and Argentina. The remaining 6 percent consists of powdered milk, crude oil, fresh bananas, and natural barium sulfate, and other items as well.<sup>20</sup> Therefore, some believe Bolivia's accession will not offer major trade benefits to the country given the dominance of hydrocarbon sales to Mercosur member states.<sup>21</sup>

The biggest impact is likely to be from a policy perspective, notably Bolivia's adoption of the Common External Tariff (CET). There are some important differences in certain sectors between Bolivia's tariff structures and the bloc's tariff structures, particularly in mid-tech manufacturing, where the rates levied on Bolivian imports from other countries other than Mercosur's countries are considerably lower. This is particularly relevant in the automotive sector. Consequently, the Andean country's convergence with the CET could prompt Mercosur to export industrial goods to Bolivia.<sup>22</sup>

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15. See E.F.E., *Bolivia firma protocolo de adhesión al Mercosur*, EL DÍA (Jul. 17, 2015), [https://www.eldia.com.bo/index.php?articulo=Bolivia-firma-protocolo-de-adhesion-al-Mercosur&cat=1&pla=3&id\\_articulo=176283](https://www.eldia.com.bo/index.php?articulo=Bolivia-firma-protocolo-de-adhesion-al-Mercosur&cat=1&pla=3&id_articulo=176283).

16. See *Bolivia Awaits Brazil's Decision to Join Mercosur*, PRESNA LATINA (Aug. 19, 2015), <http://www.plenglish.com/index.php?o=RN&id=2697&SEO=bolivia-awaits-brazils-decision-to-join-mercosur>.

17. *Id.*

18. *Id.* (quoting Brazil's Deputy Minister of Foreign Trade, Clarems Endara).

19. See Walker San Miguel Rodríguez, *Bolivia en el Mercosur*, LA RAZON (Jul. 26, 2015), [http://www.la-razon.com/index.php?\\_url=/suplementos/animal\\_politico/Bolivia-Mercosur\\_0\\_2313968624.html](http://www.la-razon.com/index.php?_url=/suplementos/animal_politico/Bolivia-Mercosur_0_2313968624.html).

20. See Gretel Ledo, *Bolivia in the Mercosur: what are the real benefits?*, INTERNATIONAL DEMOCRACY WATCH, <http://www.internationaldemocracywatch.org/index.php/news-archive/532-bolivia-in-the-mercosur-what-are-the-real-benefits>.

21. See *Political Risk Analysis - No Major Trade Benefits From Mercosur Membership - SEPT 2015*, BMI RESEARCH (Jul. 2015), <http://www.latinamericamonitor.com/political-risk-analysis-no-major-trade-benefits-mercosur-membership-sept-2015>.

22. See *Progress and significance of Bolivia's accession to MERCOSUR*, NETWORK FOR JUSTICE IN GLOBAL INVESTMENT (Aug. 27, 2014), <http://justinvestment.org/2014/08/progress-and-significance-of-bolivas-accession-to-mercosur/>.

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Another relevant aspect is the possibility of accessing funds from Mercosur's FOCEM (Structural Convergence Fund), a mechanism through which the largest countries of the bloc contribute resources to specific projects. Bolivia may be the recipient of these financial resources for infrastructure or productive modules.<sup>23</sup>

### III. Colombia

#### A. TRADE AGREEMENTS

The President of the Republic of Colombia ratified Laws 1747 of 2014 and 1763 of 2015, which, respectively, approved the Free Trade Agreements (FTAs) signed with the Republic of Korea and the Republic of Costa Rica.<sup>24</sup> However, according to the Colombian Constitution, such FTAs must be submitted to constitutionality control by the Constitutional Court of Colombia<sup>25</sup> for them to be effective. In 2016, decisions 184 and 157,<sup>26</sup> issued by the Court, declared the FTAs and their respective approving Laws constitutional and thus enforceable. Subsequently, Decrees 1078 of 2016 and 1231 of 2016 were issued by the Colombian Congress to regulate and develop the tariff and market access commitments acquired under the FTAs.<sup>27</sup>

The treaty with Korea could generate more agricultural export opportunities to the Asian market.<sup>28</sup> Many view the treaty with Costa Rica as an opportunity to promote investment, diversify exports, and contribute to the country's growth.<sup>29</sup>

#### B. CUSTOMS REFORM

Decree 390, the most recent customs reform in Colombia, became effective in 2016.<sup>30</sup> The decree seeks to modernize foreign trade operations through a computerized system and risk assessment mechanisms, facilitate trade, and provide greater security and confidence to actors participating in international trade operations. One of its main goals is to strengthen risk

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23. *Id.*

24. *FTA with Korea and Costa Rica*, BRIGARD & URRUTIA (July 6, 2016), <http://bu.com.co/en/newsandpublications/342>

25. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P] art. 241.10.

26. *See* Sentencia C-184/16, CORTE CONSTITUCIONAL DE COLOMBIA, Apr. 14, 2016. (Colom.); *see also* Sentencia C-157/16, CORTE CONSTITUCIONAL DE COLOMBIA, Apr. 6, 2016. (Colom.).

27. *COLOMBIA CONTENT UPDATES*, [https://content.managementdynamics.com/TW/REFERENCE/status/update\\_colombia.html](https://content.managementdynamics.com/TW/REFERENCE/status/update_colombia.html) (last visited Mar. 23, 2017).

28. *See Los retos del TLC entre Colombia y Corea, ¿quiénes ganan?* DINERO (Apr. 28, 2016), <http://www.dinero.com/edicion-impres/pais/articulo/tlc-entre-colombia-y-corea-del-sur-2016-entra-en-vigencia/222965>.

29. *See ¿Qué gana Colombia con la entrada en vigencia del TLC con Costa Rica?* DINERO (Aug. 1, 2016), <http://www.dinero.com/economia/articulo/el-tlc-con-costarica-entra-en-vigencia>

30. D. 390, marzo 7, 2016, DIARIO OFICIAL [D.O.] (Colom.).

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management in customs control in order to neutralize corruption and money laundering, prevent environmental risk, and ensure security in the logistics chain. Additionally, this regulation defines who are deemed as subjects responsible for complying with customs duties, and broadened its scope for sanctioning purposes. But it also included provisions that aim to reduce punitive circumstances and facilitate trade. For example, formal errors that do not affect the value of the duties, taxes, or sanctions will not be punished by the Colombian Customs Authority. Likewise, formal errors will not result in seizure or confiscation of the merchandise.

C. TRANSNATIONAL CORRUPTION

Law 1778 was enacted on February 2, 2016, regulating the liability of legal entities for acts of international corruption.<sup>31</sup> The Law grants power to the Superintendence of Companies to investigate and sanction legal entities whose employees, contractors, administrators, or associates give, offer, or promise a foreign public official a sum of money, any object of pecuniary value, or other benefit for the latter to carry out, omit, or delay acts related to the exercise of his or her functions and to an international transaction. Parent companies will also be liable (and may be sanctioned) if their subordinates perform acts of international bribery with their consent or tolerance.

Accordingly, legal entities may be sanctioned with fines up to approximately forty-four million USD and a suspension on the ability to contract with any Colombian government entity for up to twenty years. Additionally, liable companies will be prohibited from receiving incentives or subsidies from the government for a term of five years, and sanctions will be published in a daily newspaper of broad circulation and registered in the Trade Registry.

D. TAX REFORM

On October 19, 2016, the Minister of Finance and Public Credit, Mauricio Cárdenas, filed before the Colombian Congress Bill No. 178 of 2016, proposing a structural tax reform to strengthen the fight against tax evasion.<sup>32</sup> Adopting the reform has been a controversial issue among the different sectors of the economy, given that, among other changes, this regulation proposes to (i) increase the Value Added Tax (VAT) on products that currently have a VAT of 16 percent; (ii) charge the so-called wealth tax to companies or individuals with a net worth of approximately one million pesos (approximately 334 USD); (iii) charge VAT for connection and internet access services to middle class taxpayers, who, as of 2016, are exempt from making such payments; and (iv) strongly sanction tax evaders.

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31. L. 1778, Feb. 2, 2016, DIARIO OFICIAL [D.O.] (Colom.).

32. Proyecto de Ley No. 178 de 2016, GACETA DEL CONGRESO 894/16. (Colom.).

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As of December 2016, the Bill was still pending final debates in Congress, and final determinations are expected promptly.

E. PEACE NEGOTIATIONS WITH FARC

Since 2013, the Colombian government has been negotiating with the FARC guerrilla group, in Havana, Cuba, to reach an agreement that could eventually end a fifty-two year internal conflict. In July 2016, both parties agreed to a definite ceasefire, and on August 24, 2016, they announced a final Peace Accord.<sup>33</sup> The Accord would have committed FARC to turn in its arms to representatives of the United Nations, demobilize, and, under certain conditions, transition into a civil society.

Accordingly, the Colombian congress regulated the plebiscite for endorsement of the Peace Accord through Law 1806 of 2016<sup>34</sup> and through Decree 1391<sup>35</sup> of the same year. Colombian people were summoned to decide whether to support or reject it. On October 2, 2016, the plebiscite was held, and, unexpectedly, by a very narrow majority, Colombians voted not to approve the concluded Peace Accord.<sup>36</sup>

As of October 2016, the government and the opposition worked together to agree upon essential issues that needed to be discussed with FARC. On November 12, 2016, the President announced that FARC and the Government had agreed to a new Peace Accord that amended certain points and was intended to satisfy the concerns of the opposition. The new Peace Accord was signed on November 24, 2016, and this time, it was submitted to Congressional approval.<sup>37</sup> On November 30, 2016, the Peace Accord was approved by an absolute majority. Furthermore, the Constitutional Court endorsed the so-called “fast track:” a mechanism that grants the congress powers to approve regulations regarding the implementation of the Peace Accord in half the time it would normally take and grants powers to the President to issue decrees with the force of law.<sup>38</sup> Since December, congress studied the amnesty law that was approved in the first debate. Although there is no clear path on how this new Accord will be implemented in practice, there is a consensus among Colombians that it is of paramount importance to achieve positive outcomes for the country.

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33. See *Acuerdo Final para la Terminación del Conflicto y La Construcción de una Paz Estable y Duradera* (Aug. 24, 2016), Oficina del Alto Comisionado para la Paz.

34. L. 1806, agosto 24, 2016, DIARIO OFICIAL [D.O.] (Colom.).

35. D. 1391, agosto 30, 2016, DIARIO OFICIAL [D.O.] (Colom.).

36. Sibylla Brodzinsky, *Colombia referendum: voters reject peace deal with Farc guerrillas*, THE GUARDIAN (Oct. 3, 2016), <https://www.theguardian.com/world/2016/oct/02/colombia-referendum-rejects-peace-deal-with-farc>.

37. Nicholas Casey, *Colombia and FARC Sign New Peace Deal, This Time Skipping Voters*, THE NEW YORK TIMES (Nov. 24, 2016), [https://www.nytimes.com/2016/11/24/world/americas/colombia-juan-manuel-santos-peace-deal-farc.html?\\_r=0](https://www.nytimes.com/2016/11/24/world/americas/colombia-juan-manuel-santos-peace-deal-farc.html?_r=0).

38. Nicholas Casey, *Colombia's Congress Approves Peace Accord With FARC*, THE NEW YORK TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/world/americas/colombia-farc-accord-juan-manuel-santos.html>.



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**IV. Costa Rica**

**A. NEW CIVIL PROCEDURE CODE**

The new Costa Rican Civil Procedure Code<sup>39</sup> is probably the most important piece of legislation passed this year. It addresses the country's need to guarantee a swift yet effective judicial process on civil matters and to put an end to long processes that many times take more than a decade to receive a final judgement. The process will be less formal and based on orality. Appeals will be limited and the enforcement of the sentence will no longer require a new process.

**B. LABOR LAW**

In addition, congress also passed an amendment to the Labor Code.<sup>40</sup> This amendment brings changes for judicial procedure, making it more expeditious. It also facilitates collective bargaining and the right to strike. For individual workers, it provides more protections, particularly against discriminatory treatment and unfair termination. Employers must specify the cause for termination in termination letters.

**C. COMMERCIAL CODE**

The Commercial Code was amended to strengthen the protection of minority shareholders.<sup>41</sup> Shareholders that own at least 10 percent of the stock capital now have the right to inspect transaction documents when the value of the transaction exceeds 10 percent of the total assets, and can request an accounting audit of all the corporate records. The amendment also includes an obligation on the Board of Directors to approve a corporate governance policy stating that a pre-approval by the Board of Directors is required for the acquisition, sale, mortgage, or pledge of assets that account for 10% percent or more of the total value of the assets.

**D. AMENDMENT ON THE LAW OF NARCOTICS**

The Law of Unauthorized Drugs, Money Laundering, and Terrorist Financing Activities<sup>42</sup> has been amended to enhance the powers of the authorities fighting against terrorism financing and activities and money laundering. Every financial entity must report to the Unit of Financial Intelligence (UFI) of the Costa Rican Institute on Drugs when an uncommon activity or wire transfer is detected. These new powers include the possibility to freeze assets, including bank accounts, as soon as the UFI starts an investigation.

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39. Law No. 9342, Apr. 8, 2016, LA GACETA 68, Alcance 54. (Costa Rica).

40. Law No. 9343, Jan. 25, 2016, LA GACETA, 16, Alcance. (Costa Rica).

41. Law No. 9392, Oct. 4, 2016, LA GACETA, 190. (Costa Rica).

42. Law No. 8204, Aug. 1, 2016, LA GACETA, Alcance 134. (Costa Rica).

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E. INTERNATIONAL BRIBERY

The Law Against Corruption and Illicit Enrichment in the Government Service redefined the crime of international bribery, in line with the FCPA, to penalize those who offer, promise, or give to a public official of another country, directly or through an intermediary, any gift, payment, or undue advantage, either for that official or for another person or entity, so that the official performs, delays, or omits any act or wrongly asserts influence derived from his or her position over another official.<sup>43</sup>

F. TAXES

Due to structural fiscal constraints, the government has been promoting several pieces of legislation to enhance the power of the tax authority and to increase the tax revenue.<sup>44</sup> Furthermore, Costa Rica has entered into several different bilateral cooperation and double taxation agreements. The most recent agreement is with the Federal Republic of Germany, which went into effect on January 1, 2017 and follows the agreement signed with Spain in 2011. Also, in 2016, Costa Rica signed agreements related to information exchange and now has treaties with the following countries: Argentina, Australia, Canada, Faroe Islands, Finland, France, Greenland, Iceland, Mexico, Netherlands, Norway, Sweden, and the United States.<sup>45</sup>

G. INVESTMENT FUNDS

The latest amendment to the Costa Rican Regulation on Management Companies and Investment Funds will make it possible for any entity, whether public or private, to invest through a public offer, on every infrastructure project on the market (*i.e.*, transportation, construction, renewable energy) and not solely real estate development, as was previously the case. The amendment also changed the minimum amount required to invest from fifty thousand USD to one thousand USD.<sup>46</sup>

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43. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1-3 a, 78dd-1, 78dd-2, 78ff, 78m, 78o (2012)).

44. L. Arias, *Government wants to hike taxes to boost income*, THE TICO TIMES (Mar. 14, 2015), <http://www.ticotimes.net/2015/03/14/government-wants-to-hike-taxes-to-boost-income>.

45. Acuerdos de Intercambio de Información Tributaria y Convenios de Doble Imposición vigentes y/o en proceso de ratificación, MINISTERIO DE HACIENDA, [http://www.hacienda.go.cr/docs/57f3bbf71693d\\_Listado%20de%20Acuerdos%20de%20Int%20Info%20y%20Doble%20Imp%20DIT%20sharepoint.pdf](http://www.hacienda.go.cr/docs/57f3bbf71693d_Listado%20de%20Acuerdos%20de%20Int%20Info%20y%20Doble%20Imp%20DIT%20sharepoint.pdf) (last visited Mar. 23, 2017).

46. Ley N° 122, julio 15, 2016, La Gaceta [D.O.] 1 (Costa Rica).

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**V. Ecuador**

**A. LAW AMENDING THE ARMED FORCES AND NATIONAL POLICY'S  
SOCIAL SECURITY REGIME**

This new law establishes that the Social Security Institute of the Armed Forces will be part of the national social security system.<sup>47</sup> The General Director of the Social Security Institute of the Armed Forces shall be elected from a list submitted by the Minister of National Defense.<sup>48</sup> Military on active duty, officers, candidate aspiring troops, or conscripts who are providing their services to the date of issue of the amended Law, or who enter the facility after that date, will not be entitled to benefits under the life insurance and occupational accident insurance.<sup>49</sup>

**B. ORGANIC LAW OF SOLIDARITY AND STEWARDSHIP**

The Solidarity and Stewardship Organic Law establishes the collection of contributions to enable the planning, construction, and reconstruction of public and private infrastructure in Manabi, an Ecuadorian province, which was affected by the earthquake that occurred on April 16, 2016.<sup>50</sup> The solidarity contributions are as follows: people who receive a monthly remuneration equal to or greater than one thousand dollars will pay a contribution equal to one day's salary during the next eight months (using a table as reference); people who, until January 1, 2016, have individual assets equal to or greater than one million dollars, will pay the contribution of 0.90 percent, according to the rules established in the law; companies that carry out economic activities and are subject to income tax, will pay a contribution of 3 percent of their profits, which will be calculated by reference to the taxable income of fiscal year 2015; there will be a contribution of 1.8 percent of the cadastral valuation of 2016 on all existing real estate in Ecuador; and, on the representative rights of capital of companies based in Ecuador, owned by companies existing in tax havens or other foreign jurisdictions are created only once.<sup>51</sup> Additionally, the law establishes that new productive investments set up in the next three years in the affected areas will be exempt from paying income tax for five years as of the investment.<sup>52</sup>

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47. Oficio No. T.7329-SGJ-16-614, art. 1, Registro Oficial [R.O.] No. 867, octubre 21, 2016, Armed Forces and National Police's Social Security Law Amendment (*Ley reformativa del Régimen de seguridad social de Fuerzas Armadas y Policía Nacional*) (Ecuador).

48. *See id.* at art. 6.

49. *See id.* at art. 45.

50. Oficio No. T. T.7315-SGJ-16-315, art. 1, Registro Oficial [R.O.] No. 759, mayo 20, 2016, Armed Forces and National Police's Social Security Law Amendment Organic law of solidarity and stewardship (*Ley orgánica de solidaridad y de corresponsabilidad ciudadana*) (Ecuador).

51. *See id.* at arts. 2-6.

52. *See id.* at art. 9.

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C. ORGANIC CODE FOR GENERAL PROCESSES

This new Code regulates the procedural processes in all areas except constitutional, electoral, and criminal law.<sup>53</sup> Previously, in Ecuador, the written system was more popular than any oral system. This generated setbacks in the processes in terms of time, speed, and procedural costs. At present, the claims are resolved with reasoned decision at the hearing.<sup>54</sup> People will be notified with a single oral pronouncement of the decision.<sup>55</sup> Recourse to the terms will be counted from the notification of the judgment or order written.<sup>56</sup> Evidence will be presented orally during the trial hearing.<sup>57</sup> Processes that are pending on the effective date of this Code shall continue until completed in accordance with the regulations in force at the time of their inception.<sup>58</sup> In all matters not provided for in the General Organic Code of Processes, the current provisions of the Organic Code of Children and Adolescents, Organic Tax Code, Civil Code, Labor Code, and Code of Commerce shall be observed in a supplementary manner.<sup>59</sup>

D. HEALTH INSURANCE LAW

This organic law aims to regulate, monitor, and control the establishment and operation of companies that finance health insurance services as well as the provision of those services.<sup>60</sup> This law approved the content of health insurance plans and contracts<sup>61</sup> and prohibited health insurance companies from refusing to cover or renew a contract due to preexisting diseases, conditions or state of health, sex, gender identity, or age.<sup>62</sup> Pursuant to this new law, companies will have to perform the respective coordination of benefits within public entities and observe the procedure established by the National Health Authority for payment priority among public and private entities.<sup>63</sup> The insurance companies must cancel or reimburse the Public Health Network for the amounts paid for health care to people under public health coverage who are also holders and/or beneficiaries of private health insurance.<sup>64</sup>

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53. Oficio No. SAN-2016-0797, art. 1, Registro Oficial [R.O.] No. 506, mayo 22, 2015, Organic Code for General Process (*Código Orgánico General de Procesos*) (Ecuador).

54. *See id.* at art. 79.

55. *See id.*

56. *See id.*

57. *See id.* at art. 159.

58. *See id.* at Transitory Disposition 1.

59. *See id.* at Final Disposition 1.

60. Oficio No. SAN-2016-1835, art. 1, Registro Oficial [R.O.] No. 863, octubre 17, 2016, Health Insurance Law (*Ley Orgánica de Seguros y Medicina Prepagada*) (Ecuador).

61. *See id.* at art. 1.

62. *See id.* at art. 33.

63. *See id.* at General Disposition 4.

64. *See id.* at General Disposition 5.

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**VI. Peru**

**A. NATIONAL FOCUSING SYSTEM (SINAFO)**

Law No. 30435, enacted on May 17, 2016, created the National Focusing System (SINAFO).<sup>65</sup> Public intervention should be aimed at a specific segment of the population that presents a set of characteristics or the conditions that constitute a situation of disadvantage or vulnerability identified within the framework of the outcome of some social policy. The proposal for targeted public intervention must have a technical support and content structure determined by the Ministry of Development and Social Inclusion.<sup>66</sup> This law is mandatory for all entities of public administration.<sup>67</sup> Within the framework of SINAFO, a set of guidelines, rules, and instruments are defined to identify the eligibility criteria for individuals, households, housing, populated centers, communities, population groups, or geographic jurisdictions that will be users of public interventions that provide goods or services aimed at achieving a specific social purpose through generation and transfer of information in order to facilitate the implementation of targeted interventions.<sup>68</sup>

**B. PARAMETERS AND PROCEDURAL GUARANTEES FOR THE CONSIDERATION OF THE CHILD'S HIGHEST INTEREST**

Law No. 30466, enacted on June 17, 2016, aims to establish procedural parameters and guarantees for the primary consideration of the best interest of the child in the processes and procedures in which the child is immersed.<sup>69</sup> The best interest of the child is a right, a principle, and a procedural rule that gives the child the right to have his or her best interest in all measures that affect him or her directly or indirectly.<sup>70</sup> For the primary consideration of the best interests of the child, in accordance with General Comment 14, the following parameters are taken into account: universal, indivisible, interdependent, and interrelated character child rights; recognition of children as right holders; nature and scope of the Convention on the Rights of the Child; and respect, protection, and realization of all the rights recognized in the Convention on the Rights of the Child.<sup>71</sup> The Ministry of Women and Vulnerable Populations, in the exercise of its guiding function

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65. Ley N° 30435, art. 1 [Law N° 30435], Creating the National Focusing System (Sinafo) (*Que Crea El Sistema Nacional De Focalización (SINAFO)*), May 17, 2016, EL PERUANO, No. 587425 (Peru).

66. *See id.* at art. 6.

67. *See id.* at art. 2.

68. *See id.* at art. 4-4.1.

69. Ley N° 30466, art. 1 [Law N° 30466], Ley Que Establece Parámetros Y Garantías Procesales Para La Consideración Primordial Del Interés Superior Del Niño [Establishing Parameters and Procedural Guarantees for the Primarily Consideration of the Superior Interest of the Child], June 17, 2016, EL PERUANO, No. 589716 (Peru).

70. *See id.* at art. 2.

71. *See id.* at arts. 4.1-4.8.

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of the National System of Comprehensive Child Care, carries out the follow-up of the corresponding actions.<sup>72</sup>

**C. LEGAL ENTITIES: BRIBERY**

Law No. 30424, enacted on April 21, 2016, regulates the administrative responsibility of legal entities for the crime of transnational active bribery.<sup>73</sup> For the purposes of this Law, legal entities are considered bodies of private law, and so too are associations, foundations and unregistered committees, irregular societies, entities that manage an autonomous heritage, and Peruvian State entities or mixed-economy companies.<sup>74</sup> Legal persons are to be administratively liable for the offense of active transnational bribery when the illegal act has been committed in the company's name or on its behalf and for its direct or indirect benefit. The company will be liable for any act carried out by (a) the company's directors, legal representatives, or contractual and corporate bodies acting in the exercise of the functions of their office; (b) individuals providing any service to the company; and (c) individuals when not exercising due control and surveillance by the administrators, legal representatives, or contractual and corporate bodies.<sup>75</sup> The law provides for the following penalties and sanctions in the event of breach: fines; disqualification (suspension of corporate activities; prohibition of activities of the same kind or nature of those whose conduct has been committed, aided, or concealed; prohibition to contract with the State); cancellation of licenses, concessions, rights, and other administrative or municipal authorizations; closure of their premises or establishments; and dissolution.<sup>76</sup>

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72. *See id.* at Final Disposition.

73. *See* Ley N° 2738, art. 1 [Law N° 27811], Ley Que Regula La Responsabilidad Administrativa De Las Personas Jurídicas Por El Delito De Cohecho Activo Transnacional [That Regulates the Administrative Responsibility of Legal Entities for the Crime of Transnational Active Bribery], Apr. 21, 2016, EL PERUANO, No. 583798 (Peru).

74. *See id.* at art. 2.

75. *See id.* at art. 3.

76. *See id.* at art. 5.

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**PUBLISHED IN COOPERATION WITH**  
**SMU DEDMAN SCHOOL OF LAW**

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## **Mexico**

ANA KAREN INZUNZA SÁNCHEZ, BIANKA ARYESHA LLAMAS COVARRUBIAS, EDUARDO SÁNCHEZ MADRIGAL, FERNANDA AMBROSIO AGRAZ, JOSÉ ANTONIO CERVANTES ACOSTA, JOSÉ EDGARDO MUÑOZ LÓPEZ, JOSÉ FRANCISCO MACÍAS CALLEJA, MARÍA DEL ROCÍO DE ORTA ABÚNDI, SOYLA H. LEÓN TOVAR, YURIXHI GALLARDO MARTÍNEZ, SUSAN BURNS, editor, EDUARDO SÁNCHEZ MADRIGAL, assistance editor, and ZEL SACCARI, transactions editor

Mexico's fifty-seventh President, Enrique Peña Nieto, began his campaign in 2012, promising to be a reform champion. He began immediately with the Pacto por Mexico (Pact for Mexico), signed by the leaders of the three main political parties. The Pacto por Mexico has initiated many much-anticipated reforms. In some areas, notably human rights and gay rights, the progress is tenuous. In other areas, the reforms are in their infancy. It is too soon to assess the viability of the reforms. One thing is certain—two-thirds of the way into President Enrique Peña Nieto's presidency, which is not without its detractors, the reforms are pointing Mexico in the right direction. 2016 saw the trend toward reform advanced on all fronts, with the legislature taking the leading role, resulting in several legally significant changes.

### **I. Mexico's Supreme Court of Justice**

#### **A. EQUALITY IMPROVEMENTS FOR WIDOWHOOD PENSION IN MEXICO**

Mexico's 2011 Constitutional amendment on human rights represented an enormous step towards the protection and guaranty of the fundamental rights of its population. The 2011 Constitutional amendment<sup>1</sup> expanded the scope of Mexico's Constitution by including a series of provisions for Mexican authorities in the exercise of their respective duties, seeking to provide and secure the widest protection to rights of the human person.

On August 24, 2016, the Second Chamber of Mexico's Supreme Court ruled that men are as equally entitled to receive a widowhood pension as women are. The Second Chamber reached the decision based on the

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1. Decreto por el que se modifica la denominación del Capítulo I del Título Primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos [Decree by which the denomination of Chapter I, Title First, of the Political Constitution of the United States of Mexico is modified and several provisions are amended], Diario Oficial de la Federación [DOF] 10-06-2011 (Mex.).



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revision resource 371/2016, to which the Supreme Court granted an amparo. The Second Chamber held that Article 152 of the Social Security Law<sup>2</sup> (*Ley del Seguro Social*) violated the principles of non-discrimination and equality,<sup>3</sup> and therefore it should be considered unconstitutional.

The Justices of the Second Chamber of Mexico's Supreme Court ruled that the imposition of unjustified and differentiated requirements to obtain a widowhood pension clearly violated Article 1 of Mexico's Constitution, constituted gender discrimination, and assaulted human dignity. In the same regard, the Second Chamber found that Social Security encompasses not only the rights of workers, but also the rights of their families to be free from gender-based requirements in obtaining a widowhood pension.<sup>4</sup>

**B. SAME-SEX ADOPTION**

Several states, *e.g.*, Coahuila, Chihuahua, Quintana Roo and Mexico City, have recognized same sex marriage. In November 2015, the Supreme Court ruled clearly that same-sex marriages were constitutionally permitted in Mexico.

Despite recognition of same-sex marriage in several states and the Supreme Court's decisions—and perhaps in response to substantial protests—Mexico's Chamber of Deputies voted down President Enrique Peña Nieto's proposed constitutional amendment to permit same-sex marriage in a stunning rejection by his own party (PRI).<sup>5</sup> The vote, viewed as a major setback for gay rights in Mexico, was widely lauded by religious organizations.

Although Mexico's jurisprudence in the area of discrimination has rapidly evolved in the last five years—beginning with reform of the Article 1 of the Mexican Constitution<sup>6</sup>—it is clear that Mexico's legal system is struggling with the evolution of ethical and behavioral norms. The Supreme Court has made giant strides that have been kept in check by the legislature.

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2. Published on March 12th, 1973, article 152 imposed excessive requirements for widowers, different from the required for widows who attempt to obtain a pension, such as the existence of a total incapacity and economic dependence of the widow on the deceased wife.

3. Noticia de la Suprema Courte de Justicia de La Nación, *Evolución Normativa del Poder Judicial de la Federación* [Normative Evolution of the Judicial Power of the Federation], formato HTML, <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=4370>, consultada el 4 de abril de 2017) (Mex.).

4. *Id.*

5. *Mexico Congressional Committee Nixes Constitutional Amendment on Same-Sex Marriage*, (Nov. 11, 2016), <http://www.constitutionnet.org/news/mexico-congressional-committee-nixes-constitutional-amendment-same-sex-marriage>.

6. Decreto por el que se modifica la denominación del Capítulo I del Título Primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos [Decree by which the denomination of Chapter I, Title First, of the Political Constitution of the United States of Mexico is modified and several provisions are amended], *Diario Oficial de la Federación* [DOF] 10-06-2011 (Mex.).

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The Supreme Court recently declared that any law prohibiting homosexual persons from adopting is discriminatory and, therefore, unconstitutional in an action brought by the Human Rights Commission of the State of Campeche, challenging the constitutionality of Article 19 of its local Civil Convivance Partnerships Regulatory Law (*Ley Regulatoria de Sociedades Civiles de Convivencia del Estado de Campeche*).<sup>7</sup> In a power-packed two sentence decision, the Supreme Court held that sexual orientation is not relevant for the formation of a family or to adopt a child and declared that any prohibition on that basis is unconstitutional. The strongly held, differing views on this subject in Mexico demonstrate that this is a difficult issue. Critics argue that the decision violates Article 40 of the Mexican Constitution.<sup>8</sup> It remains to be seen which view will prevail: Did the Supreme Court overstep its boundaries, or did the Supreme Court properly exercise its function to apply and interpret the Constitution?

## **II. Human Rights**

### **A. AYOTZINAPA: A NON-BINDING INTERNATIONAL HUMAN RIGHTS MECHANISM IN ACTION**

On September 26, 2014, around one hundred Ayotzinapa students travelled 150 miles to Iguala city, to raise funds for their school activities. That night in the city, for unknown reasons, the local Iguala police and of the neighboring municipality of Cocula opened fire against the students. Six students died and others were injured. Forty-three students have been missing since that night.

The Federal Authorities conducted the initial investigation. They reached a conclusion that was strongly disputed by the victims' families and a considerable sector of civil society. In 2015, the Inter-American Commission on Human Rights (IACHR) began a review of the events. Based on an agreement signed in 2014 between Mexico, the victims and the IACHR, the IACHR designated an Interdisciplinary Group of Independent Experts (IGIE) to conduct a technical analysis of the actions undertaken by Mexico in this case.

After six months of work, on September 6, 2015, the IGIE published its (non-binding) report. The report offered some noteworthy conclusions contesting the government's official version, including characterizing the crimes as enforced disappearances. The IGIE recommended reconsideration of the hypothesis and investigation lines. The IGIE's

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7. Adopción. El Artículo 19 de la Ley Regulatoria de Sociedades Civiles de Convivencia del Estado de Campeche Viola el Principio de Igualdad y No Discriminación [Adoption. Article 19 of the Regulatory Act of Civil Society Coexistence of the State of Campeche Violates the Principle of Equality and No Discrimination], Suprema Corte de Justicia de la Nación [SCJN], Gaceta del Semanario Judicial de la Federación, Décima Época, tomo I, Septiembre de 2016, Tesis P./J. 14/2016 (10a.), Página 5 (Mex.).

8. Constitución Política de los Estados Unidos Mexicanos [CP], artículo 40, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

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mandate was extended until April 30, 2016, and Mexican authorities expressed their willingness to cooperate. The day after the report was published, Enrique Peña Nieto gathered with the students' families and ordered the creation of a special agency to search for the disappeared students.

In November 2016, the Special Follow-up Mechanism, whose purpose is to monitor compliance with Precautionary Measure 409/14 and with the IGIE's recommendations,<sup>9</sup> presented a Work Plan. The Work Plan consists of four basic objectives:<sup>10</sup> "(1) monitor the progress of the investigation; (2) provide advisory assistance and support to the process of searching for the disappeared; (3) ensure that comprehensive attention is given to the victims and their relatives, and (4) promote any structural measures appropriate to resolution of this matter and ensure that such an event does not happen again."

IACHR Rapporteur for Mexico and Coordinator of the Follow-Up Mechanism, Commissioner Enrique Gil Botero expressed his disappointment in Mexico's receptiveness towards the specific technical recommendations made by IGIE. He stated that the Mechanism expects Mexico's full cooperation to reach the objectives of the Work Plan.<sup>11</sup>

### III. Legislative Reform

#### A. THE POLITICAL REFORM OF MEXICO CITY

##### 1. *Historical Background of the Federal District (Distrito Federal)*

In November 1824, the Constituent Congress approved (by forty-nine votes against thirty-two) that Mexico City should become the Federal District ("Distrito Federal" or "D.F."), seat of the Executive, Legislative, and Judicial branches of the federal government. Such situation was materialized in Article 50 of the 1824 Mexican Constitution (Article 44 of the current Constitution) by instructions of Guadalupe Victoria, the first elected President of Mexico. While there have been several unsuccessful attempts to transform D.F. into a federal State, in 2016 the D.F. was successfully transformed into a federal State. The decree by which various articles of the Mexican Constitution were amended and derogated was published in the Official Journal of the Federation (*Diario Oficial de la Federación* or

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9. On July 29, 2016, the IACHR issued Resolution 42/16 by which it decided to implement a special mechanism to follow up on the Precautionary Measure 409/14 and on the recommendations made by the Inter-Disciplinary Group in its 2015 and 2016 reports.

10. Inter-American Commission on Human Rights [Inter-Am. Comm'n H.R.], *WORK PLAN? "Special Follow-Up Mechanism to the Ayotzinapa Case"*, at 2, (November 2016), <http://www.oas.org/en/iachr/docs/pdf/WorkPlan-FollowUpMechanism-Nov2016.pdf>.

11. Press Release, Organization of American States, IACHR Presents its Work Plan for the Follow-Up Mechanism to the Ayotzinapa Case (Nov. 10, 2016), [http://www.oas.org/en/iachr/media\\_center/PReleases/2016/165.asp](http://www.oas.org/en/iachr/media_center/PReleases/2016/165.asp).

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“DOF”) on January 29, 2016. That decree effectively transformed D.F. into Mexico’s thirty-second federal State.

2. *Concept and legal nature of the Federal District (Distrito Federal)*

Article 44 of the Mexican Constitution<sup>12</sup> established that D.F. was an entity with its own legal personality and different from the rest of the States. It is the seat for the three branches of Federal Government and hence it is the capital of Mexico. It is an integral and permanent part of the Mexican Federation and also the seat for the numerous offices of the Federal Government’s local authorities, which is why it is subject to the same existing obligations for the States.

The President of Mexico (Federal Executive branch), the Federal Congress with its Chambers of Deputies and Senators (Federal Legislative branch) and the Mexican Supreme Court (Federal Judicial branch), are all located within D.F.’s territory, along with the Offices that locally govern said District. Nevertheless, because its nature is significantly different from the rest of the States’, it was referred to with a different terminology. Before the amendment, instead of a Governor, D.F. would have a Mayor (Jefe de Gobierno) in charge of the local Executive branch, it does not have a local Congress, but a Legislative Assembly (Asamblea Legislativa) for the local Legislative branch, and the High Tribunal of Justice (Tribunal Superior de Justicia) for the local Judicial branch. D.F.’s territory is divided into delegations instead of municipalities. D.F. does not have a local Constitution, but a Government Statute (Estatuto de Gobierno).

3. *Initiatives to Transform D.F. into a Federal State*

Altogether, the Legislative Assembly, Federal Deputies, Local Congresses and the Federal Executive, presented a total of 109 law initiatives (bills) to transform D.F. into a Federal State. In January 2016, more than fifty articles of the Federal Constitution were amended, changing D.F.’s denomination and granting it almost the same powers as the rest of the States.<sup>13</sup> Some of the provisions contained in Articles 76 and 105 of the Mexican Constitution were derogated,<sup>14</sup> such as the exclusive power of the Senate to appoint and remove D.F.’s Mayor from office, and Mexico’s Supreme Court’s jurisdiction to review cases that involve a conflict between a State or municipality and D.F. (similar to a writ of certiorari).

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12. Constitución Política de los Estados Unidos Mexicanos [CP], artículo 44, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

13. Viridiana Rios, *Mexico City Will Become a State*, Wilson Center (June 2, 2016), <https://www.wilsoncenter.org/article/mexico-city-will-become-state>.

14. Constitución Política de los Estados Unidos Mexicanos [CP], artículo 76, 105, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

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4. *Legal and Political Consequences of the Reform*

Some of the legal and political consequences of the Reform are: the change of name from “Federal District” (Distrito Federal) to “Mexico City” (Ciudad de México),<sup>15</sup> regardless of the fact that it will remain as the seat of the Federal Government; replacement of the Legislative Assembly for a local State Congress, integrated by deputies and not by representatives anymore, with the power to vote and approve law initiatives; the creation of a local Constitution, whose final draft should be approved on January 31, 2017, superseding the Government Statute.<sup>16</sup> The Constituent Congress is currently evaluating the convenience of including provisions regarding the rights of same-sex couples, the use of marijuana, and the people’s right to recall elections for Governor and local government officials, within the final draft of the new Constitution. Mexico City’s Mayor will become a Governor, who will no longer need the President’s approval to appoint the chief executive officers of the Public Safety Department and of the Office of the Attorney General. The delegations shall become territorial demarcations, which imply the presence of a municipal police force and an increase in federal funding. Mexico City will be able to decide on its debt limit (which was previously authorized by the Chamber of Deputies), accountability, and the auditing of its fiscal year. The Federal Government will remain responsible for the financing of education and health services.

After 192 years of existence, D.F. became another federal State. The new status offers greater autonomy, because the Federal Branches of the government will no longer make the essential decisions for the City. To some, this reform represents an improvement for Mexico, providing now an equalitarian position for all of its States and allowing Mexico City to remain the seat of the Federal Government with greater autonomy and resources to satisfy its own needs. The sentiment is that Mexico City did not lose leadership, but rather gained self-determination as a State. Others consider it to be an imposition of left-liberal ideology and express concern that the new city’s Constitution is unsustainable and incomplete, failing to properly address issues such as corruption and pollution, for example.

B. NEW OPPOSITION SYSTEM FOR TRADEMARKS

On April 26, 2016, Mexico’s Federal Chamber of Deputies approved an amendment to several articles of the Industrial Property Law (Ley de la Propiedad Industrial).<sup>17</sup> The amendment implemented a new opposition system for trademarks. The amendment was published in the Official

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15. Rios, *supra* note 13.

16. *Id.*

17. Ley de la Propiedad Industrial [Law of Industrial Property] [LPI], Diario Oficial de la Federación [DOF] 27-06-1991, últimas reformas DOF 01-06-2016 (Mex.), *available at* [http://www.diputados.gob.mx/LeyesBiblio/pdf/50\\_010616.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/50_010616.pdf).

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Journal of the Federation (Diario Oficial de la Federación) on June 1, 2016,<sup>18</sup> and became effective on September 1, 2016. As expressed by the Mexican Industrial Property Institute (Instituto Mexicano de la Propiedad Industrial or “IMPI”) in a press release last August, the new system intends to “inhibit disloyal commercial practices” by serving as a tool to protect legitimate owners’ rights and to optimize the efficacy of the trademark registration process.<sup>19</sup> The much-anticipated trademark opposition system seeks to become an incentive for foreign investment by adapting Mexico’s Industrial Property legislation to global standards of efficiency and protection. The amendment clearly aims to comply with the standards of the Madrid Protocol. Now, after a long wait, Mexico has finally become part of the numerous countries that protect the rights of the public to oppose to a trademark registration request before registration is granted.

The new system can be found mainly in Article 120 of Mexico’s Industrial Property Law.<sup>20</sup> It sets forth a simple process by which any person who wishes to oppose a trademark registration request can do so the day following publication of a request in the Industrial Property Gazette (essentially ten business days after a request is filed) and before one month has passed since its filing. To oppose a trademark registration, the opponents must base their arguments on the prohibitions contained in Articles 4 or 90 of Mexico’s Industrial Property Law<sup>21</sup> and submitted in writing to the IMPI, along with a payment receipt and any evidence deemed relevant by the opponent to discredit the legitimacy of the requesting party’s claim of trademark ownership. The opposition does not interrupt the registration process and will be published along with any other opposition in the Gazette.

One relevant characteristic is that opponents will not be recognized as legitimate third parties or as any type of party whatsoever in the process, and all of the oppositions presented will merely be persuasive and not binding for the IMPI when deciding whether or not to grant trademark ownership to the requesting party. Furthermore, a requesting party may submit a response to the arguments of the opponent(s) within a one-month period, but is not compelled to do so, nor will their silence be considered as an implied acceptance.

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18. Decreto por el que se reforman y adicionan diversas disposiciones de la Ley de la Propiedad Industrial [Decree by which various provisions of the Industrial Property Law are reformed and added], artículo 120, Diario Oficial de la Federación [DOF] 01-06-2016 (Mex.) *available at*, <http://www.wipo.int/edocs/lexdocs/laws/es/mx/mx152es.pdf>.

19. Press Release, Instituto Mexicano de la Propiedad Industrial, *Entra en vigor Sistema de Oposición de marcas en México* [Mexican Trademark Opposition System enters into force] (30-08-2016), <http://www.gob.mx/imp/prensa/entra-en-vigor-sistema-de-oposicion-de-marcas-en-mexico>.

20. Ley de la Propiedad Industrial [Law of Industrial Property] [LPI] artículo 120, Diario Oficial de la Federación [DOF] 27-06-1991, últimas reformas DOF 01-06-2016 (Mex.), *available at* [http://www.diputados.gob.mx/LeyesBiblio/pdf/50\\_010616.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/50_010616.pdf).

21. *Id.* at art. 4, 90.

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Legal professionals have regarded this amendment with skepticism. They are concerned that the new system will increase the length of time for the trademark registration process because similar transformations have proven to compromise the authority's efficiency in the first few months following their implementation. Moreover, according to Article 14m of IMPI current service fares, the cost for the study of an opposition is \$3,733.72 Mexican pesos plus tax (approximately \$208.00 USD), which is significantly more than the cost for a trademark's registration request itself.<sup>22</sup> Because the Mexican business sector is predominantly comprised of small and medium size companies, imposing such an elevated economic burden for the defense of their rights could signify a weakening of the legal certainty intended by the amendment. It is a process that only bigger companies can afford and utilize.

Nevertheless, the motives behind the amendment suggest that it is only one of several modifications necessary to update Mexico's Industrial Property Law. Despite its flaws, such an achievement is to be celebrated because it grants a wider range of process for the defense of the legitimate trademark owners' rights. Ideally, the new system will decrease the presence of unlawful trademarks in the market, as it offers legitimate trademark owners the means to defend their rights before ownership over their trademark is granted to another party. Before the amendment, any person who wished to oppose a trademark would have to do so through an administrative procedure after the trademark ownership was granted, and would necessarily have to prove the existence of a legitimate legal interest. Therefore, even though the costs are quite high, the opposition system may spare legitimate trademark owners from the expenses traditionally incurred in an administrative procedure and expedite the defense of their rights, if IMPI deems their arguments persuasive enough.

C. AMENDMENT TO MEXICO'S GENERAL LAW OF BUSINESS ORGANIZATIONS-INTRODUCING THE SIMPLIFIED SHARES CORPORATION

On March 16, 2016, Mexico's Department of Economy (SE) published in the Official Journal of the Federation (*Diario Oficial de la Federación* or DOF) a congressional decree upon which several amendments to the General Law of Business Organizations (*Ley General de Sociedades Mercantiles* or LGSM)

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22. Instituto Mexicano de la Propiedad Industrial, Servicios que ofrece el IMPI Tarifas Marcas, Avisos y Nombres Comerciales [Services Offered by IMPI Rates Trademarks, Notices and Trade Names], gob.mx (14-01-2016), <http://www.gob.mx/impi/acciones-y-programas/servicios-que-ofrece-el-imp-i-tarifas-tarifas-marcas-avisos-y-nombres-comerciales?state=published>.

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were approved. The amendments became effective on September 15, 2016.<sup>23</sup>

The most relevant innovation among these amendments is the introduction of the Simplified Shares Corporation (*Sociedad por Acciones Simplificadas* or SAS), a new type of business entity with unique characteristics that allow it to be incorporated electronically<sup>24</sup> and with a sole shareholder.<sup>25</sup> For decades, such possibilities have been thoroughly discussed by several authors but never legally recognized until March's decree.

Although the new business entity could (and was in fact designed to) be appealing to entrepreneurs who wish to incorporate their businesses without necessarily including additional shareholders or incurring notary public expenses,<sup>26</sup> the SAS has two main limitations that may be discouraging:

- a. Only shareholders who are natural persons and are not controlling shareholders on any other business association may integrate a SAS; and
- b. The annual total income of a SAS may not exceed 5 million Mexican pesos,<sup>27</sup> as adjusted for inflation.

Legislators included the first limitation to prevent *SAS* from being incorporated with the purpose of serving as a subsidiary for bigger entities, and thus ensuring that they remain as small and medium size businesses. As to the second limitation, the annual total income of a *SAS* may not exceed 5 million Mexican pesos, or otherwise it would have to be transformed into another type of business entity.<sup>28</sup> The amount limit for the income will be adjusted annually based on the updating factor published by the Department of Economy every December. If shareholder(s) do not comply with their duty to transform the company, they become jointly and severally liable to third parties for outstanding company indebtedness.

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23. Decreto por el que se reforman y adicionan diversas disposiciones de la Ley General de Sociedades Mercantiles [Decree by which several provisions of the General Law of Business Organizations are amended and added], Diario Oficial de la Federación, 14-03-2016 (Mex.).

24. Ley General de Sociedades Mercantiles [General Law for Commercial Corporations] [LGSM] art. 263, Diario Oficial de la Federación, 04-08-1934, últimas reformas DOF 14-03-2016 (Mex.).

25. *Id.* art. 262(I).

26. Newsletter, Cámara de Diputados Boletín N°. 0916, Aprueba Cámara de Diputados facilitar trámites para crear micro y pequeñas empresas en sólo 24 horas [Mexico's Chamber of Deputies approved a facilitated process to incorporate micro and small companies in only 24 hours] (02-02-2016), <http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Boletines/2016/Febrero/09/0916-Aprueba-Camara-de-Diputados-facilitar-tramites-para-crear-micro-y-pequenas-empresas-en-solo-24-horas>.

27. Approximately \$243, 000.00 USD.

28. Ley General de Sociedades Mercantiles [General Law for Commercial Corporations] [LGSM] art. 260, Diario Oficial de la Federación [DOF], 04-08-1934, últimas reformas DOF 14-03-2016 (Mex.).



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1. *Incorporation*

As mentioned above, *SAS* is intended to be an affordable option for start-ups and entrepreneurs with limited resources. These small enterprises are not required to formalize incorporation before a notary public, but rather through an electronic system of the Department of Economy (*Secretaría de Economía*) in which a serial number is assigned to each application,<sup>29</sup> sparing the shareholder(s) from the high costs of the traditional incorporation required for other types of business entities. Moreover, the shareholder(s) must select and agree on the standardized corporate bylaws suggested by the *SE*, under which the new entity will be governed.<sup>30</sup> The denomination of each *SAS* must be previously authorized by the *SE*<sup>31</sup> and the shareholder(s) signs the final deed with an electronic signature<sup>32</sup> (*e.firma*). The *SE* evaluates the compliance of the corporate bylaws with the provisions of the *LGSM* and sends the deed to Public Registry of Commerce (*Registro Público de Comercio*) for final approval.<sup>33</sup> Once all the legal requirements have been met and the Public Registry has issued an inscription notice, the incorporation deed can prove the legal existence and effectiveness of a *SAS* without the need of additional formalization.<sup>34</sup>

2. *Shares*

The shared capital of an *SAS* can be obtained by issuing shares or securities with adjustable or no par value. The shares of an *SAS* must be released or payable within one year from the inscription of the corporation in the Public Registry of Commerce and are not subject to any restriction on their circulation (freely transferred). Once they are fully subscribed and paid, it is necessary to publish a notice in the *SE* electronic system. An *SAS* must electronically publish its financial statements on an annual basis. If the company fails to do so for two consecutive years, it may be dissolved by a default notice from the Department of Economy. *SAS* may not issue different types of shares. All must have the same value and grant the same rights.

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29. *Id.* art. 263(I).

30. *Id.* art. 262(II).

31. *Id.* art. 262(III).

32. The electronic signature (*e.firma*) is a digital file that identifies a person when performing internet transactions on various governmental websites. *See id.* at art. 262(IV).

33. A *SAS* must be registered in the Public Registry of Commerce so that it may become enforceable before third parties. This requirement applies to all other Mexican business entities and seeks to provide legal certainty. *See id.* art. 2, 20, 263(V).

34. *Id.* art. 263(VII).

3. *Supreme Corporate Governance Body – Shareholders’ Assembly*<sup>35</sup>

If the *SAS* has only one shareholder, they are considered its Supreme Corporate Governance Body by default. But if the corporation has two or more shareholders, all of them constitute Shareholders’ Assembly.<sup>36</sup>

The decisions approved by the Assembly are made by a majority of votes, via physical presence at a meeting, or by electronic means, if allowed by the bylaws. In either case, a registry book must be kept with the record of all the approved resolutions. Furthermore, all shareholders have the right to participate and vote in the decisions of the *SAS*. Any shareholder may bring issues to the Assembly’s attention by addressing an electronic or written notice to the manager.<sup>37</sup>

To be valid, the Assembly must be convened by the manager of the corporation through the online system of the Department of Economy at least five days prior to date on which the Assembly is to be held. The agenda for the meeting and all related documents must be attached to the call for meeting. If the administrator refuses to summon the meeting within fifteen days following receipt of a shareholder’s request, the corresponding judicial authority may make the call instead.<sup>38</sup>

Unless agreed otherwise, the alternative dispute resolution methods contained in the Mexican Code of Commerce<sup>39</sup> are taken into account in resolving the controversies arising among the shareholders and/or third parties.

4. *Representation*

The administrator, who must be a shareholder of the *SAS* in all cases, has the power to enter into or perform all acts and agreements encompassed in the corporate purpose or that are directly linked with the existence and functioning of the *SAS*.<sup>40</sup> If the shareholders decide on a form of governance or management that is not legally permitted for a *SAS*, they are required to transform it into a different business entity and formalize their agreement before a notary public.<sup>41</sup> The manager must submit the *SAS*’s financial information via the online system of the Department of Economy. Failure to do so for two consecutive years leads to dissolution of the entity.<sup>42</sup>

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35. *Id.* art. 266.  
36. *Id.* art. 267.  
37. *Id.* art. 268(III).  
38. *Id.* art. 268.  
39. *Id.* art. 270.  
40. *Id.* at art. 267.  
41. *Id.* art. 269.  
42. *Id.* art. 272.

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5. *Differences from the Limited Liability Company*<sup>43</sup> (*Sociedad de Responsabilidad Limitada or SRL*)

Even though Mexico's LGSM eliminates certain requirements to facilitate the incorporation of SAS, it imposes certain limitations on SAS that do not apply to an SRL. Thus, it is essential to evaluate the advantages and disadvantages of an SAS and an SRL before deciding on incorporating one type of business entity or the other.

While an SAS may be integrated by one or more shareholders, an SRL requires at least two shareholders to be legally incorporated and must be incorporated before a notary public or a public broker<sup>44</sup> (*corredor público*), except for certain subcategories of SRL, such as those used for artisan, small business or public interest purposes.<sup>45</sup>

While the LGSM does not allow improperly formed SAS companies,<sup>46</sup> it does recognize that a SRL exists from the moment it presents itself as such to third parties. The SRL is also more versatile and often used to structure large companies, due to its lack of income-related restrictions. The SRL it is required by law to allocate five percent of its net profits on a yearly basis for a legal reserve fund.

D. THE ADVERSARIAL ACCUSATORIAL SYSTEM

Several articles of the Mexican Constitution were amended to adopt a new type of accusatorial justice system based on the five main principles encompassed in Article 20 of the Mexican Constitution: openness, challenge, concentration, continuity and immediacy.<sup>47</sup>

The amendments aim to optimize the functioning of institutions at different levels of Mexico's criminal justice system responsible for public

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43. The SRL is similar to the limited liability company (LLC), a business form that since 1988 has gained favor in the U.S. See Kevin W. Finck, HOW TO FORM A CALIFORNIA CORPORATION OR LLC FROM ANY STATE: SMARTSTART SERIES 4, 70 (2005).

44. In Mexico, the functions and characteristics of a *corredor público* are similar to those of a notary public, but are limited to commercial transactions exclusively.

45. Ley de Sociedades de Responsabilidad Limitada de Interés [Limited Liability Company Public Interest Law] [LSRLIP], Diario Oficial de la Federación [DOF], 31-08-1934 (Mex.); Ley Federal para el Fomento de la Microindustria y la Actividad Artesanal [Federal Law Promoting Artisan and Small Businesses], Diario Oficial de la Federación [DOF], 26-01-1988, Últimas reformas DOF 09-04-2012 (Mex.).

46. While the LGSM calls for proving "the company's formation through the articles of incorporation," it fails to note that an SAS may be created with a single shareholder. On the other hand, a contract is formed when at least two parties consent to an agreement. Ley General de Sociedades Mercantiles [General Law for Commercial Corporations] [LGSM] art. 263(VII), Diario Oficial de la Federación [DOF], 04-08-1934, últimas reformas DOF 14-03-2016 (Mex.).

47. "Article 20. The penal system shall be accusatorial and oral. It shall be governed by the principles of openness, challenge, concentration, continuity and immediacy." Constitución Política de los Estados Unidos Mexicanos [CP], artículo 20, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

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safety, prosecution, justice and social reintegration of criminals. Among the innovations of the reform, perhaps the most relevant is the transition from an inquisitorial criminal system to an adversarial system.<sup>48</sup>

Traditionally, the role of a judge in a criminal procedure has been more flexible. In the new system, the prosecution and the defense have wider and more equitable responsibilities in the investigation of possible crimes. Likewise, the new system recognizes defendants' rights to adequate legal representation and defense, to be exclusively provided by certified attorneys with law degrees. Moreover, criminal procedures will be conducted publicly and orally, in contrast to the former system where parties would file their motions in writing. As a result of this reform, trials will now be continuous and held before impartial judges who will preside over cases without the power to delegate duties to a secretary.

Another relevant aspect of the reform is the increased emphasis on the recognition of human rights for victims and the accused, and the possibility of resolving conflicts through alternative dispute resolution systems or summary judgments (*procedimiento abreviado*). With the introduction of the National Law of Alternative Dispute Resolution Mechanisms for Criminal Procedures (*Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal*), the alternative dispute resolution mechanisms provide the opportunity for victims of minor crimes to reach an amicable settlement with the offender without unnecessary expenses or lengthy procedures. With respect to serious crimes found in Article 167 of the National Code of Criminal Procedure (*Código Nacional de Procedimientos Penales*), the list has been significantly narrowed down,<sup>49</sup> to the extent that only murder, human trafficking, crimes against public health or against the nation, will be punishable with preventive imprisonment.

Because of the broad scope of the reform, the Legislative Branch of Federal Government established an eight-year implementation period, which concluded on June 18, 2016.

Goals of the new criminal justice systems include eliminating corruption—which has permeated the judiciary branch throughout various levels of government—and overcoming bad judicial system practices. When the penal reform started, it was deemed feasible to have separate judges supervising each stage of a process to reach greater impartiality and adherence to the law, both for motions and case decisions.

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48. Constitución Política de los Estados Unidos Mexicanos [CP], artículo 20, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

49. Código Federal de Procedimientos Penales [Federal Code of Criminal Procedures] [CFPP], art. 167, Diario Oficial de la Federación [DOF], 30-08-1934, últimas reformas DOF 17-06-2016 (Mex.). Serious crimes formerly listed in article 194 of the Federal Code of Criminal Procedure included organized crime, kidnapping, terrorism, theft, forced disappearance, among others. Código Federal de Procedimientos Penales [Federal Code of Criminal Procedures] [CFPP], art. 194, Diario Oficial de la Federación [DOF], 30-08-1934, últimas reformas DOF 14-03-2014 (Mex.).

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But despite amendments to various articles of the Constitution, the creation of new institutions and even of the National Code of Criminal Procedure, the efficient functioning of the new justice system requires the will, commitment, and work of the entire Mexican government, attorneys, and society itself. Just a few months have passed since the introduction of the adversarial system, and deficiencies have already been identified within the new system's institutions and among its operators.

Some of the issues that require immediate attention are the lack of proper infrastructure for the recently introduced oral hearings nationwide, and the inadequate training of judges, attorneys, and police officers in the new system. These deficiencies affect the right to legal certainty of the parties in a criminal procedure. In addition, the investigation stage, intended as a period of time for the prosecution to gather evidence, often delays unnecessarily the process for months and compromises the constitutional right to prompt and expedited justice of victims and defendants.

The lack of preparation of government officials, deficiencies in the chain of custody, and the inappropriate preservation of crime scenes and evidence, have led to several procedural violations. Those violations resulted in the release of felons whose prosecution was based on an illegal or inadequate detention.

#### **IV. Professional Certifications**

##### **A. MANDATORY CERTIFICATION IN JALISCO: A FIRST STEP IN A LONG ROAD**

The State of Jalisco is the first State in Mexico to establish mandatory certification for specific professions including the legal profession.<sup>50</sup> The new requirements are based on the Law for the Exercise of Professional Activities of the State of Jalisco (*Ley para el ejercicio de las Actividades Profesionales del Estado de Jalisco, LEAPEJ*), effective since January 1, 2016.<sup>51</sup> The LEAPEJ requires mandatory certification but not mandatory bar association membership.

Under the law, professionals may pursue their process of certification directly in the Office of Professions of the State, pursuant to Article 62 of LEAPEJ, or with the bar associations which may provide the certificate of professional competence and provide mandatory continuing legal education. The law does not require mandatory bar association membership. Recognizing that bar associations play an important role in the exercise of

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50. Other regulated professions include accounting, engineering, architecture and health services.

51. This state law differs in many aspects from the General Law of Professional Practice Subject to Mandatory Certification and Compulsory Licensing (*Ley General del Ejercicio Profesional Sujeto a Colegiación y Certificación Obligatoria*), introduced in the Federal Congress on 2014, with no significant advancements since.

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professional activity, the LEAPEJ provides rules related to the organization and supervision of bar associations.

Bar associations must be registered in the Office of Professions of the State. They also need to comply with specific requirements including a code of ethics. Moreover, bar associations will have sufficient authority to sanction their members if members violate the ethics code.

The LEAPEJ establishes some requirements for certification and provides that mandatory certification will begin in 2022. It affords benefits to those who start the process to obtain the state license during the first two years. The most important benefit is that the process of certification will require only the showing of evidence of mandatory continuing legal education for those who possess their license before 2018. The process of certification is repeated every five years. In contrast, anyone who does not have a license before the end of 2018, will have to follow the complete process including an examination.

LEAPEJ created new entities to regulate the professions. Concerns about its implementation are: Who will manage these new entities and what are the specific regulations? In general, however, the new law has been well received among lawyers who have started the process to obtain a local license. To obtain a federal license and practice law in Mexico, one only has to graduate from one of the more than a thousand law schools in the country. Mandatory certification, continuing legal education, or bar membership are not required just yet.

## **V. International Tribunals**

### **A. MEXICO'S RECENT EXPERIENCE AT THE COURT OF ARBITRATION FOR SPORT IN LAUSANNE, SWITZERLAND**

The Court of Arbitration for Sport (CAS) in Lausanne, Switzerland is an adjudicatory body established to handle disputes related to sports through arbitration and hear appeals from decisions made by most national and international sport associations.

In 2015, the International Swimming Federation (FINA) sued the City of Guadalajara and the State of Jalisco, the Mexican Swimming Federation (FMN), and Mexico's National Sport Commission (CONADE), over the cancellation of the seventeenth FINA World Championships scheduled to take place in the City of Guadalajara in 2017. FINA filed a claim for payment of a penalty clause for USD 5 million before the CAS based on an arbitration clause in the Host City Agreement that designated the CAS as the proper venue to resolve any dispute. FINA's complaint triggered the application of "ordinary" arbitration proceedings under the CAS Code. All Mexican respondents in the arbitration, except for FMN, denied that they were parties to the Host City Agreement on different grounds.

The Mexican respondents' refusal to be bound by the penalty clause led to retaliation by FINA. In January 2016, FINA temporarily suspended the

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FMN for “not fulfilling contractual obligations concerning the cancellation of the 2017 FINA World Championships in Guadalajara.” The suspension was based on clause 12 of the FINA Constitution that stipulates that “[a]ny Member, member of a Member, or individual member of a Member may be sanctioned . . . if duties and financial obligations to FINA are not fulfilled.” FINA’s sanction resulted in Mexican swimming athletes being barred from participating as members of the FMN in international competitions; they were able to participate as FINA athletes only.

In the middle of this suspension, Mexican diver Rommel Pacheco won gold in the three-meter springboard competition at the FINA Diving World Cup 2016 in Rio de Janeiro. Despite the Mexican victory, the flag raised highest during the medal ceremony was that of FINA. Mexican swimmers were also banned from using the Mexican uniform bearing Mexico’s coat of arms, flag, or name or to have their national anthem played during the gold award ceremonies.

Following an appeal by FMN, FINA agreed to lift the suspension, implicitly recognizing the lack of legal basis for the suspension. This allowed Mexican swimmers and divers to use the Mexican uniform, see the Mexican flag, and hear their national anthem again during the 2016 Rio Olympic Games.

Meanwhile, the CAS proceedings continued as expected until the final hearing in Switzerland in September 2016. At the hearing, FMN did not challenge the terms of the Host City Agreement, but requested the tribunal to find that the other three respondents were also liable. The City of Guadalajara argued that despite being listed as one of the Parties in the Host City Agreement, it was not bound by its terms, including the arbitration clause, because it had not signed the Host City Agreement and there was no other indication of tacit or express intention in the record. The State of Jalisco and CONADE similarly contended that in spite of the signature of their respective representatives on the Host City Agreement, they were not bound by its terms because their names were not contemplated as parties in the body of the Host City Agreement. In addition, CONADE and Jalisco claimed the reimbursement of approximately USD \$7 million that the Republic of Mexico, through CONADE and the State of Jalisco, had advanced as part of the funds requested by FINA to sponsor the event under a collateral contract called the Conditional Agreement.

In the end, the CAS arbitration offered all parties involved an opportunity to hear and understand the positions of their opponents. Those positions converged on one point, namely that their dispute should be settled soon and without further hostility for the benefit of all parties and for the improvement of the aquatic sport in Mexico and the world.

Against this background, some of the Mexican respondents acknowledged that the penalty clause became payable to FINA as a penalty under the Host City Agreement but that the penalty was already paid from funds available to FINA under the Conditional Agreement. CONADE and the State of Jalisco thus proposed that FINA set off the amounts of the penalty clause under the

Host City Agreement against the moneys paid by Mexico under the Conditional Agreement.

In light of this, FINA lifted the sanction against the FMN in the appeal proceeding, while all parties agreed on a full and final settlement of any and all claims against each other, including any claims between the Mexican respondents, in the ordinary arbitration. By granting an arbitral award on the agreed terms by the parties, the CAS panel opened the way for the renewal of fruitful cooperation and further development of aquatic sport in Mexico and the world.

## **VI. International Agreements**

### **A. NEW UNITED STATES-MEXICO AIR TRANSPORT AGREEMENT: BENEFITS AND CHALLENGES**

#### *1. Modernized United States Mexico Air Transport Agreement*

On July 22, 2016, the United States and Mexican governments “exchanged diplomatic notes” aiming at bringing into effect a more modern air transport agreement.<sup>52</sup> This United States-Mexico Air Transport Agreement (USMATA)<sup>53</sup> which became effective on August 21, 2016, has many benefits for both countries in terms of new and broader market access opportunities for air carriers of both sides of the border and for passengers.

#### *2. Benefits and Challenges of the Modernized United States-Mexico Air Transport Agreement*

Cargo air carriers will benefit from the execution of the new bilateral USMATA because they will be allowed to operate in new routes, strengthening trade and creating business opportunities for both countries. More United States and Mexican air carriers are entitled to serve in any city on both sides of the border and beyond. Opening new routes also provides passengers with more travel options at competitive fares.

The modernized USMATA potentially gives rise to new and more sophisticated alliances between air carriers from both countries. The new bilateral agreement grants operational flexibility, concedes new traffic rights to air carriers, lifts prior restrictions, and removes government interference. Those benefits provide an unprecedented opportunity for airlines to optimize operations and reach new markets in air transport services.

Of course, with the opportunity comes the challenge to guarantee that airport infrastructure meets the traffic demand of existing air carriers and

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52. Anthony Foxx, A New Era for U.S-Mexico Travel, Trade as Air Transport Agreement to Enters Into Force (July 25, 2016), <https://www.transportation.gov/briefing-room/new-era-us-mexico-travel-trade-air-transport-agreement-enters-force>.

53. Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, U.S.-Mex., Dec. 18, 2015, Department of State Press Releases, <https://www.state.gov/e/eb/rls/othr/ata/m/mx/250782.htm>.



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new entrants seeking to take advantage of the opportunities the new agreement offers.

Mexico has already taken decisive actions to face such challenges by building a new airport to handle increased air traffic. The new airport of Mexico City<sup>54</sup> is expected to commence operations in 2020, with a passenger capacity of 50 million per year and around 550,000 operations. When fully operational, the new airport will have a passenger capacity of up to 125 million on a yearly basis, and more than one million aircraft each year will be able to take off and land.<sup>55</sup> This expanded capability makes Mexico competitive in allocation of slots amongst air carriers,

### 3. *Conclusions*

United States and Mexico have accomplished an important milestone in the history of their commercial aviation relationship by adopting a new air transport agreement. As a result, air transport competition will be fostered; air carriers and passengers will be the recipients of important benefits created by the new agreement.

On the other hand, Mexican airlines must be prepared not only to take advantage of the new market opportunities but to face the challenges ahead. Mexican policy makers have the challenge to act proactively. They need to coordinate efforts with their US peers to guarantee fair and equal opportunities for airlines to compete in a level playing field.

Ultimately, the USMATA helps accomplish the main purposes of international civil aviation stated in the preamble of the Chicago Convention to establish international air transport services on the basis of equality, opportunity, and sound and economic operations.<sup>56</sup>

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54. *Advances Continue on Mexico City Airport*, MEXICAN NEWS DAILY (Jan. 5, 2016), <http://mexiconewsdaily.com/news/advances-continue-on-mexico-city-airport/>.

55. See GRUPO AEROPORTUARIO, *EL NUEVO AEROPUERTO INTERNACIONAL DE LA CIUDAD DE MÉXICO, VENTANA AL DESARROLLO REGIONAL DE LOS PRÓXIMOS 50 AÑOS* (Nov. 20, 2015), <http://www.sct.gob.mx/despliega-noticias/articulo/el-nuevo-aeropuerto-internacional-de-la-ciudad-de-mexico-ventana-al-desarrollo-regional-de-los-pr/>.

56. The Convention on International Civil Aviation, also known as the Chicago Convention of 1944 set the basis for the international regulation of air transport. See §§ 1, 2, 6.

## Middle East

NICOLAS BREMER, IBRAHIM SATTOUT, DANIA DIB,  
HASSAN ELKHALIL, JENNIFER URBAN, AND JONATHAN G. BURNS\*

This article discusses significant international legal developments in Egypt, Iraq, Kuwait, Lebanon, Saudi Arabia, and the United Arab Emirates.

### I. Egypt

In 2016, Egypt took steps to significantly alter its indirect tax regime. In July, the Egyptian government resolved to abandon the existing General Sales Tax (GST) and adopt a full-fledged Value Added Tax (VAT) system.<sup>1</sup> On August 29, 2016, the Egyptian legislature—the Egyptian People’s Assembly—passed the new Value Added Tax law (VAT Law), which was subsequently published in the Official Gazette and took effect on September 8, 2016.<sup>2</sup>

The new VAT Law replaced the current General Sales Tax Law, Law 11/1991 (GST Law).<sup>3</sup> Thus, as of September 8, 2016, businesses are required to comply with the VAT Law, though some areas and provisions of this new law still need clarification by the Egyptian Tax Authorities.<sup>4</sup>

Such clarification will be provided in the form of executive VAT regulations. Pursuant to the VAT Law, the Egyptian Minister of Finance shall issue such executive VAT regulations within thirty days from the VAT Law becoming effective.<sup>5</sup> Until then, the executive regulations issued with

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\* Dr. Nicolas Bremer authored Parts I, II, and VI.B. He is a German qualified lawyer and partner of the law firm Alexander & Partner advising on investments in the Near and Middle East. Dr. Bremer manages the firm’s UAE and Egypt offices. Ibrahim Sattout (Partner) and Dania Dib (Associate), ASAR – Al Ruwayeh & Partners, authored Part III. Hassan Elkhilil authored Part IV. Jennifer A. Urban authored Parts V.A and VI.A. She is an associate in the Transportation & Trade Group at Cozen O’Connor. Jonathan Burns is editor of the Middle East Committee’s contribution to the 2016 Year in Review, Vice-Chair of the Middle East Committee, and a United States trained and qualified associate at Dentons resident in Riyadh, Kingdom of Saudi Arabia.

1. Dean Kern, *Egypt VAT law published in the Official Gazette and takes immediate effect*, PRICEWATERHOUSECOOPERS (Sept. 2016), <https://www.pwc.com/m1/en/tax/documents/pwc-newsalert-egypt-vat-law-sept2016.pdf>.

2. *Id.*

3. Law No. 11 of 1991 (General Sales Tax Law), *Al-Jarisa Al-Rasmiyya*, (Egypt).

4. Kern, *supra* note 1.

5. Samar Rahman, *Egypt to Issue Executive Regulations of VAT law*, EUROFAST, <http://eurofast.eu/global/egypt-to-issue-executive-regulations-of-vat-law/>.

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respect to the GST Law will continue to apply to the extent they do not contradict the provisions of the VAT Law (Article IX, VAT Law).<sup>6</sup>

A. SCOPE OF THE NEW LAW AND VAT RATE

Prior to the VAT Law being introduced, GST was charged at a standard rate of 10%.<sup>7</sup> Under the new law, VAT will initially be charged at a reduced standard rate of 13% for the fiscal year 2016–2017.<sup>8</sup> Starting from the fiscal year 2017-2018, the standard VAT rate will be 14%.<sup>9</sup> Certain machinery and equipment will, however, be subject to a reduced rate of 5% (Article 3(1)).<sup>10</sup> No VAT will be charged on goods and services exported (Article 3(2)).<sup>11</sup>

Furthermore, in an effort to ease the VAT Law's impact on low-income households, certain basic goods and services will be exempt from VAT.<sup>12</sup> These goods and services comprise certain basic foods such as tea, sugar, raw vegetables, dairy products, bread, and fruit, as well as medicines, electricity, health care services, and natural gas.<sup>13</sup> In addition, banking transactions, insurance, and re-insurance—as well as education and training services—are exempt from VAT; as are goods produced and services rendered in free zones, provided they are not imported into the Egyptian mainland (Articles 6-7).<sup>14</sup>

Some goods and services will be subject to a supplementary indirect tax (Schedule Tax), either exclusively or in addition to VAT.<sup>15</sup> These goods and services are defined in Schedule No. 1 to the VAT Law.<sup>16</sup> The Schedule Tax will apply at different rates depending on the type of good or service.<sup>17</sup> Goods and services that are subject to both VAT and Schedule Tax are, *inter alia*, soda, cars, communications services and certain electronics such as TVs, refrigerators, and air conditioning units.<sup>18</sup> Goods and services that are

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6. Law No. 11 of 1991 (General Sales Tax Law), *Al-Jarisa Al-Rasmiyya*, (Egypt).

7. Adam Victor, *VAT: A Brief History of Tax*, THE GUARDIAN (Dec. 2010), <https://www.theguardian.com/money/2010/dec/31/vat-brief-history-tax>.

8. Abeer Abou Zeid, *Egypt: Value Added Tax (VAT) Law*, YOUSSEY SALEH & PARTNERS (Aug. 15, 2016), <https://yousrysaleh.com/Investment-in-Egypt/egypt-value-added-tax-vat-law/>.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Egypt issues VAT Law No. 67 of 2017*, ERNST & YOUNG (Sept. 8, 2016), [http://www.ey.com/Publication/vwLUAssets/Egypt\\_issues\\_VAT\\_Law\\_no.\\_67\\_of\\_2016/\\$FILE/2016\\_G\\_02773-161Gbl\\_Indirect\\_Egypt%20issues%20VAT%20Law%20no.%2067%20of%202016.pdf](http://www.ey.com/Publication/vwLUAssets/Egypt_issues_VAT_Law_no._67_of_2016/$FILE/2016_G_02773-161Gbl_Indirect_Egypt%20issues%20VAT%20Law%20no.%2067%20of%202016.pdf).

13. *Id.*

14. *Id.*

15. Kern, *supra* note 1.

16. *Id.*

17. *Id.*

18. *Id.*

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subject to Schedule Tax only include tobacco products, gasoline, transportation, and professional and consultation services.<sup>19</sup>

Furthermore, the VAT Law clarifies the tax treatment in a number of areas that were thus far unclear under the GST Law, such as sales by installments and consumed assets. This will reduce potential disputes between the tax payers and the Egyptian Tax Authority.

**B. THRESHOLD FOR VAT REGISTRATION AND TRANSITIONAL PROVISIONS**

Pursuant to Article 16(1) under the VAT Law, any business with a turnover of more than Egyptian Pound 500,000 is obligated to charge VAT.<sup>20</sup>

Businesses that were registered under the GST Law will be automatically considered registered for VAT purposes, provided their annual turnover exceeds the new registration threshold of Egyptian Pound 500,000 per year.<sup>21</sup> Businesses with a turnover of less than Egyptian Pound 500,000 per year are not required to register under the VAT Law.<sup>22</sup> Should the latter's turnover rise above the threshold, they will have to apply to the Egyptian Tax Authority for VAT registration within thirty days from the date of their turnover surpassing the threshold.<sup>23</sup> Furthermore, any business with a turnover of less than Egyptian Pound 500,000 per year may voluntarily opt to charge VAT (to benefit from VAT return, for example).<sup>24</sup>

Importers of taxable goods and services and manufacturers subject to the Schedule Tax who were registered under the GST Law will also be automatically considered as registered for VAT purposes, regardless of their turnover.<sup>25</sup> Where such enterprises were not registered under the GST Law, they are required to register with the Tax Authorities for VAT purposes within thirty days from the VAT Law entering into force.<sup>26</sup>

Businesses registered for VAT purposes are entitled to deduct the GST previously incurred on their purchases in accordance with the specific conditions set out in the VAT Law. Agreements concluded before the VAT Law enters into force, but that will be executed partially or fully after the VAT Law comes into effect, shall be modified to reflect the changes introduced in the law. For instance, the contract value will have to be amended to comply with the new VAT rates.

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19. *Id.*

20. Abeer Abou Zeid, *supra* note 8.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Abeer Abou Zeid, *supra* note 8.

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The new law grants businesses a three-month transitional period for reconciling their VAT position, during which the Egyptian Tax Authority will not levy fines for errors or omissions.<sup>27</sup>

1. *Tax Return*

As under the old GST regime, the VAT and Schedule Tax return must be submitted on a monthly basis.<sup>28</sup> And, the deadline for submitting the return did not change (two months from the end of each tax period, except for the April return that should be submitted by June 15 (Article 4)).<sup>29</sup>

2. *Reverse Charge*

How VAT is charged for services rendered in Egypt by a non-resident to a resident, or vice versa, depends on whether these services were acquired for private or business purposes. Where services are procured from abroad for private purposes, the recipient shall be liable to calculate and pay the tax due within thirty days from the date of sale.<sup>30</sup> Where services are acquired for business purposes, the recipient shall be treated as an importer and supplier of the service at the same time. This decision may lead to a neutral effect for the recipient as he will be able to deduct the VAT theoretically due on the service acquired.

a. *Input VAT Deduction*

Businesses registered in accordance with the VAT Law are entitled to deduct VAT incurred on goods and services acquired in relation to their taxable supplies. However, they are not entitled to deduct input VAT related to their exempt supplies or related to their supplies of goods and services subject to Schedule Tax.<sup>31</sup>

b. *VAT Refund*

The refund period has been reduced under the VAT Law.<sup>32</sup> VAT shall be refunded within forty-five days from the date of submitting the documented refund request.<sup>33</sup> Under the GST law, the period for GST refunds was three months.<sup>34</sup>

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27. Kern, *supra* note 1.

28. Abeer Abou Zeid, *supra* note 8.

29. *Id.*

30. *Id.*

31. Kern, *supra* note 1.

32. *Id.*

33. *Id.*

34. *Id.*

## II. Iraq

In October 2016, the Iraqi legislature issued a new Iraqi Labor Law, Law 37/2015 (New Law),<sup>35</sup> which replaced the old Iraqi Labor Law, Law 71/1987 (Old Law)<sup>36</sup> in its entirety and entered into force on February 7, 2016. The New Law seeks to align Iraqi employment legislation with the standards of the International Labor Organization (ILO). Although the New Law—as the Old Law—was drafted as a piece of federal legislation applying to the whole of Iraq, it remains to be seen whether it will be applied in the Kurdish region in Iraq. In fact, a regional labor law for the Kurdish region has been under review by the Kurdish parliament for some time now.

Most notably, the New Law introduced an end-of-service gratuity similar to that existing in other Middle Eastern jurisdictions, provisions of collective labor rights including the right to strike (which was banned in 1987 by the Old Law), and improved protection against discrimination in the workplace.

### A. REGIONAL EMPLOYMENT OFFICES

The New Law provides for the establishment of regional employment offices. The prime objective of these offices is to promote employment and assist unemployed persons in finding employment (Articles 18-19, New Law).<sup>37</sup> To this end, the New Law requires employers to notify the competent regional employment office of any open position in their business within ten days (Article 21).<sup>38</sup> Non-compliance with these regulations may be sanctioned by fines of no less than Iraqi Dinar 100,000 (USD 86.23) and not more than Iraqi Dinar 500,000 (USD 431.14) and/or imprisonment for a term of between three and six months (Article 24).<sup>39</sup>

### B. EMPLOYMENT OF FOREIGNERS

The New Law contains few changes relating to the employment of foreign employees. Unlike the Old Law, the New Law explicitly provides that foreigners may not be employed prior to or without procuring the relevant work permits (Articles 30-31);<sup>40</sup> the same was true under the previous labor law regime, but was not explicit. The only true amendment introduced by the New Law concerning the employment of foreigners is the obligation of the employer to cover all costs for the repatriation of its foreign workers upon termination of their employment (Article 32(1)).<sup>41</sup>

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35. Labor Law of 2015 (Iraq) [hereinafter “New Law”].

36. Labor Law No. 71 of 1987 (Iraq).

37. New Law, art. 18-19.

38. *Id.* art. 21.

39. *Id.* art. 24.

40. *Id.* art. 30-31.

41. *Id.* art. 32(1).

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1. *Probation Period*

Under the New Law, an employee may be employed for a probation period. Such probation period may not exceed three months and may not be renewed (Article 37(2)).<sup>42</sup>

2. *End-of-Service Gratuity*

Furthermore, the New Law introduced a statutory severance pay similar to the end-of-service gratuity existing in other Middle Eastern jurisdictions. Pursuant to Article 45 of the New Law, the employer shall pay an employee an end-of-service gratuity equal to two weeks pay for each year of service, unless the employee was terminated for cause or during the probation period.<sup>43</sup> Unlike similar provisions in other Middle East jurisdictions, the end-of-service gratuity pursuant to Article 45 is not limited by a cap.<sup>44</sup>

3. *Protection of Female Workers*

Another innovation of the New Law includes provisions protecting female employees. Key provisions govern treatment of pregnant women and working mothers (Articles 85 *et seq.*).<sup>45</sup> Moreover, the New Law explicitly prohibits both physical and verbal sexual harassment in the workplace.<sup>46</sup>

4. *Collective Worker Rights*

Among the most relevant change introduced by the New Law is the expansion of collective worker rights. The Old Law did not contain provisions governing the formation of unions and the right of employees to organize themselves in such organizations. However, certain collective worker rights were implicitly granted by the Old Law. For instance, specific articles of the Old Law referred to collective employment agreements and compelled employers to observe these agreements (*see, e.g.*, Article 37, Old Law).<sup>47</sup> Furthermore, the Old Law regulated the resolution of collective labor disputes (Articles 130 *et seq.*).<sup>48</sup> Such disputes could, however, only be resolved by involving either the competent ministry or the courts.

Under the New Law, the right to strike was reintroduced. This right was stricken in 1987 with the implementation of the Old Law. Since the New Law was enacted, workers may resort to peaceful strikes where a collective labor dispute cannot be resolved through the dispute resolution procedure provided for by the New Law (Article 162, New Law).<sup>49</sup>

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42. *Id.* art. 37(2).

43. *Id.* art. 45.

44. *Id.*

45. *Id.* art. 85.

46. *Id.*

47. *Id.* art. 37.

48. *Id.* art. 130.

49. *Id.* art. 162.

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In addition, the New Law now explicitly recognizes the right of workers to form and organize themselves in unions (Article 146)<sup>50</sup> and the union's role in negotiating collective employment agreements (Articles 148 *et seq.*).<sup>51</sup>

### III. Kuwait

The Kuwait legal landscape continued to develop in 2015 and 2016, and a number of new laws were promulgated. In addition to the legislative developments, 2016 was also marked by major transactions and projects, both on the government side and in the private sector.

#### A. MAJOR PROJECTS AND TRANSACTIONS

In April 2016, Kuwait National Petroleum Company (KNPC), one of the major oil companies in the country, obtained banking facilities from local and regional conventional and Islamic banks to finance the clean fuel project undertaken by KNPC in the amount of USD 11.35 billion.<sup>52</sup> The project is scheduled for completion in mid-2018. This is the first and largest successful financing in Kuwaiti Dinars (KD) for public companies in the oil sector in Kuwait.

In order to finance the deficit in the budget due to the low oil prices, the Kuwaiti government (similar to other countries in the region) issued KD 1.3 billion in bonds, beginning in April 2016.<sup>53</sup> It is also contemplated that beginning in 2017, the government will be issuing international bonds worth USD 10 billion for the same purpose.

In addition to other projects in the pipeline (such as the new airport, the development of Boubyan Island and Silk City, and other infrastructure projects), the government resorted to the PPP Law<sup>54</sup> and IWPP Law<sup>55</sup> through its PPP arm (the Kuwait Authority for Partnership Projects) to tender several infrastructure projects. The projects cover various sectors,

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50. *Id.* art. 146.

51. *Id.* art. 148.

52. NBK Capital Advised KNPC on KWD 1.2BN Loan Facility to Fund the Construction of the Clean Fuels Project, NBK CAPITAL PRESS RELEASE (Apr. 28, 2016), <https://nbkcapital.com/2016/nbk-capital-advised-knpc-kwd1-2bn-loan-for-clean-fuels-project/>; Reuters, *Kuwait's KNPC in Talks for \$6.4b in Loans for Clean Fuel Project*, THE JORDAN TIMES (May 29, 2016), <http://www.jordantimes.com/news/business/kuwaits-knpc-talks-64b-loans-clean-fuel-project>; Daniel Marsden, *Financing of Kuwait National Petroleum Company Clean Fuels Project*, FINANCE MONTHLY (Feb. 14 2017), <https://www.finance-monthly.com/2016/10/financing-of-kuwait-national-petroleum-company-clean-fuels-project/>.

53. *Kuwait's KNPC in Talks for \$6.4b in Loans for Clean Fuel Project*, *supra* note 52.

54. See Law No. 116 of 2014, *Kuwait Al Yom* No. 1197 of Aug. 17, 2014, at 9.

55. See Law No. 39 of 2010 (as amended), *Kuwait Al Yom* No. 981 of June 27, 2010.



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including power,<sup>56</sup> water and wastewater management,<sup>57</sup> and solid waste management.<sup>58</sup>

The private sector was also busy with several bonds and *Sukuk* issuances by Kuwaiti and regional conventional and Islamic banks under the Capital Markets Authority's newly issued bylaws<sup>59</sup> in order to comply with the Basel III capital adequacy requirements. In addition, Kuwait's largest ever M&A transaction conducted under the Capital Markets Law was completed by the acquisition of UAE's Adeptio AD Investments SPC Ltd of 67% of the share capital of Kuwait Food Company KSCP (Americana), triggering a mandatory takeover offer for the remaining 33% of the share capital of Americana.<sup>60</sup>

**B. LEGAL DEVELOPMENTS**

Numerous laws were promulgated by the Kuwaiti legislature in 2016. However, the analysis below focuses on the new laws which are of particular interest to investors.

1. *Agency Law No. 13 of 2016*<sup>61</sup>

Until recently, commercial agencies and distributorships agreements were governed by Law No. 36 of 1964<sup>62</sup> and Articles 271-286 of the Commercial Law.<sup>63</sup>

Certain amendments were introduced to the agency legal framework through the new Agency Law No. 13 of 2016, which among other provisions repealed Law No. 36 of 1964 while maintaining the provisions of the Commercial Law (particularly those that provide agents and exclusive distributors with statutory compensation in the event of termination or non-renewal of the agreement).<sup>64</sup>

The most important change introduced by Law No. 13 is the requirement for all agents and distributors to register the agreement at the Commercial

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56. *Power: Az-Zour North IWPP (Phase II), AlKhairan IWPP (Phase I) and Al Abdaliya Integrated Solar Combined Cycle Project*, KUWAIT AUTHORITY FOR PARTNERSHIP PROJECT, <http://www.ptb.gov.kw/en/Power>.

57. *Umm Al Hayman Waste Water Project*, KUWAIT AUTHORITY FOR PARTNERSHIP PROJECT, <http://www.ptb.gov.kw/en/water-and-Wastewater-Management>.

58. *Kabd Municipal Solid Waste Treatment Project*, KUWAIT AUTHORITY FOR PARTNERSHIP PROJECT, <http://www.ptb.gov.kw/en/Solid-Waste-Management>.

59. See CMA Decision No. 72 of 2015, *Kuwait Al Yom* No. 1261 of Nov. 10, 2015.

60. *ASAR- Al Ruwayeh & Partners Act as Kuwait legal Counsel to Adeptio in Kuwait's Largest Ever M&A Transaction Under the Capital Markets Law* (Oct. 30, 2016), [https://www.zawya.com/mena/en/story/ASAR\\_Al\\_Ruwayeh\\_Partners\\_acts\\_as\\_Kuwait\\_legal\\_counsel\\_to\\_Adeptio\\_in\\_Kuwait's\\_largest\\_ever\\_MA\\_transaction\\_under\\_the\\_Capital\\_Markets\\_Law-ZAWYA20161030075653/](https://www.zawya.com/mena/en/story/ASAR_Al_Ruwayeh_Partners_acts_as_Kuwait_legal_counsel_to_Adeptio_in_Kuwait's_largest_ever_MA_transaction_under_the_Capital_Markets_Law-ZAWYA20161030075653/).

61. See Law No. 13 of 2016, *Kuwait Al Yom* No. 1279 of Mar. 13, 2016, at 2.

62. See Law No. 36 of 1964 of July 15, 1964, *Kuwait Al Yom* No. 486.

63. See Decree Law No. 68 of 1980 of Jan. 19, 1981, *Kuwait Al Yom* No. 1338.

64. See Law No. 13 of 2016, art. 9.

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Agencies Register with the Ministry of Commerce and Industry (MOCI) in order for the agreement to be enforceable and effective (even between the parties) in Kuwait, and for the agent or distributor to benefit from the commercial agency regime, which was not the case under the old law.<sup>65</sup>

Unlike the previous legal framework, under the new law foreign principals should—in principle—now be able to appoint more than one agent or distributor, although this new position is not totally clear given the confusion created by Article 9 of the New Law.<sup>66</sup> Article 9 permits the substitution of the agent if the previous agency relationship was terminated by mutual consent of both parties, or if such relationship was terminated or cancelled pursuant to a final judgment.<sup>67</sup> It is unclear whether these provisions apply only to exclusive agency and distributorships, or if they extend to all type of agreements. If the latter, the appointment of more than one agent would be impossible in practice. Interested parties hope that the executive regulations will provide clarity on this issue.

Another major change introduced by the new law is that it opened the door for local traders to import products and goods to Kuwait, notwithstanding the existence of an exclusive agent for the same products and goods in Kuwait. While this provision clearly demonstrates the will of the legislature to open the market and increase competition, which should benefit consumers, it remains to be seen how the law will be implemented moving forward.

2. *Tenders Law No. 49 of 2016*

The current government procurement regime dates back to 1964. In order to modernize the legal framework in line with the best practices internationally, fill the gaps existing under the previous regime, and attract foreign investors, the Kuwaiti legislature promulgated the new Public Tenders Law (Tenders Law).<sup>68</sup>

Article 2 of the Tenders Law prohibits ministries and government instrumentalities from importing items or commissioning contractors to carry out works except through a public tender through the Central Tenders Committee.<sup>69</sup> However, the Tenders Law exempts certain governmental bodies from its scope of application, such as military contracts, the Central Bank of Kuwait contracts, and certain contracts and projects to be procured by the State-owned oil companies.<sup>70</sup>

One of the major developments introduced by the Tenders Law is the exemption of foreign contractors from the general requirement of doing business in Kuwait; that general requirement is the appointment of an agent

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65. *See id.*

66. *See id.*

67. *See id.*

68. *See* Law No.49 of 2016, *Kuwait Al Yom* No. 1299 of July 31, 2016.

69. *See id.*, art. 2.

70. *See id.*

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through whom the foreign contractor would be able to carry out its activities in Kuwait or the establishment of a company in Kuwait with one or more Kuwaiti partners who would own 51% of the share capital of the company.<sup>71</sup> Indeed, under the previous regime, foreign companies bidding on projects with the government were required to have a Kuwaiti agent registered at the Commercial Agencies Register at the MOCI. Pursuant to the new Tenders Law, foreign companies may now enter into contracts with the government and execute the work or supply the goods and products directly in Kuwait without the need to appoint an agent or even establish a company in Kuwait. There is no doubt that this development will be welcomed and will attract more foreign investors to the Kuwaiti market, as it should facilitate their entry and avoid the lengthy procedures linked to the registration of the agent or the incorporation of the company in Kuwait.

3. *Electronic Media Law No. 8 of 2016*<sup>72</sup>

Kuwaiti legislators continued to modernize the legal framework in Kuwait in the media and information technology sector and promulgated Law No. 8 of 2016 concerning “Electronic Media.”<sup>73</sup>

Pursuant to Article 6 of the Electronic Media Law, any entity that intends to establish or operate a website or electronic information facility must obtain a license from the Ministry of Information (MOI).<sup>74</sup> The validity of such license, if granted, is for ten years and may be renewed upon the request of the licensee subject to the MOI’s approval.<sup>75</sup>

Article 5 of the Electronic Media Law provides that it will apply to electronic sites and electronic information media of electronic publication houses, electronic news agencies, news services, websites, and audio-video satellite channels, among others.<sup>76</sup> However, the license may only be granted to Kuwaiti nationals and Kuwaiti companies provided that such companies are 100% Kuwaiti owned.<sup>77</sup>

Of particular importance are certain restrictions as to the content of the websites. According to the Electronic Media Law, websites subject to the law cannot publish, broadcast, rebroadcast, or quote any content that contains any material prohibited by the Press Law No. 3 of 2006 and Article 11 of the Audio Visual Media Law No. 61 of 2007.<sup>78</sup>

In summary, under these laws, criticism of God, the Holy Quran, the Prophet, the Companions of the Prophet, the wives or family members of

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71. Abdul Aziz Al-Yaqout, *Door to Total Foreign Ownership in Companies Opened in Kuwait*, KUWAIT TIMES (Mar. 2013), <http://news.kuwaittimes.net/door-total-foreign-ownership-companies-opened-kuwait/>.

72. See Law No. 8 of 2016, *Kuwait Al Yom* No. 1274 of Feb. 7, 2016.

73. See *id.*

74. See *id.*, art. 6.

75. *Id.*

76. *Id.* art. 5.

77. *Id.*

78. See Law No. 3 of 2006, *Kuwait Al Yom*; see also Law No. 61 of 2007, *Kuwait Al Yom*.

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Prophet Mohamed, or the Emir of Kuwait by way of insinuation, libel, sarcasm, or defamation is prohibited.<sup>79</sup>

In addition to the laws referred to above, a new law regarding copyright was issued to follow the global trend of granting utmost protection to these rights and to conform to the international treaties to which Kuwait is a party.<sup>80</sup> This new law repealed Law No. 64 of 1999 regarding intellectual property rights.<sup>81</sup>

As of late 2016, the Kuwait Municipality announced that the municipality is taking the necessary measures and decisions to turn Kuwait into a financial center. According to officials, certain financial center zones will be established, within which foreign investors would be permitted to operate and fully own companies and branches. Investors establishing in these zones will also benefit from certain other incentives, including tax and customs exemptions.

#### **IV. Lebanon**

##### **A. THE PSEUDO CONSTITUTIONAL CRISIS IN LEBANON**

On May 25, 2014, Michael Suleiman's presidential term expired, and Prime Minister Tamam Salam's government assumed presidential powers, thus bringing Lebanon's presidency into a vacuum.<sup>82</sup> The main objective of Salam's government was to elect a president. On its face, it appears that the failure to elect a president was due to different constitutional interpretations, or that the election is strictly a Lebanese affair when, in fact, there are many foreign parties who play an active and major role (through their local proxies) in the election of a president. For almost 29 months, these proxies failed to exercise their constitutional duties to elect a president for convenience reasons and due to external regional events like the raging war in neighboring Syria, making the presidential election in Lebanon difficult to attain.<sup>83</sup> Finally, on October 31, 2016, after a political settlement was reached with the blessing of the foreign actors, an election was held and Michel Aoun was elected as the 13th president of the Republic.

Although Article 49 of the Constitution states the President of the Republic shall be elected by secret ballot and by a two-thirds (2/3) majority of the Chamber of Deputies, after a first ballot, an absolute majority shall be sufficient.<sup>84</sup> However, political parties conveniently disagreed on how the election should have taken place, as if this were the first time the presidential

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79. *See id.*

80. *See* Law No. 22 of 2016, *Kuwait Al Yom* No. 1293 of June 19, 2016, at 3.

81. *See id.*

82. Mario Abou Zeid, *Lebanon Enters Dangerous Power Vacuum*, AL JAZEERA (May 30, 2014), <http://www.aljazeera.com/indepth/opinion/2014/05/lebanon-president-hezbollah-201453011253570784.html>.

83. *One Year On, Still No President for Lebanon*, THE TIMES OF ISRAEL (May 23, 2015), <http://www.timesofisrael.com/one-year-on-still-no-president-for-lebanon/>.

84. CONSTITUTION, art. 49 (1926) (Lebanon) [hereinafter "Lebanese Constitution"].

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election process under the Constitution had been practiced. As a result, sessions to elect a president were called about forty-four times with no results.<sup>85</sup>

Article 73 of the Constitution states, “One month at least and two months at most before the expiration of the term of office of the President, the Chamber shall be convened by its President to elect the new President.”<sup>86</sup> Despite the clear constitutional mandate, parliamentarians proudly exhibited their failure to elect a president after each session. Certain parliamentarians used to receive instructions from the Syrian regime on whom to vote for or elect as the president (normally a pro-Syrian president).<sup>87</sup> Today, the Syrian regime has problems of its own, and the Lebanese parliamentarians are at a loss.<sup>88</sup>

Although the office of the president remains mostly ceremonial, it helps maintain the balance of sectarian power in Lebanon, in addition to the president’s role as a key force in stabilizing the government.<sup>89</sup>

According to the unwritten national agreement, the president should be a Maronite Christian, the Prime Minister a Sunni, and the speaker of the house a Shiite.<sup>90</sup> During the presidential vacuum, the Lebanese Christians were at a loss because they were not represented in the then-current troika.<sup>91</sup>

## V. Saudi Arabia<sup>92</sup>

The Justice Against Sponsors of Terrorism Act (JASTA) was enacted to allow American citizens to bring civil cases against persons, organizations, and foreign nations that have in some way aided in terrorism against the United States.<sup>93</sup> JASTA proclaims that

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85. *Lebanon Parliament Failed Again and for the 44th Time to Elect a President*, YA LIBNAN (Sept. 8, 2016), <http://yalibnan.com/2016/09/08/lebanon-parliament-failed-again-and-for-the-44th-time-to-elect-a-president/>.

86. Lebanese Constitution, *supra* note 84, at art. 73.

87. Michael Young, *Lebanon’s Crisis and Electoral Politics*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Aug. 26, 2008), <http://carnegieendowment.org/sada/21566>.

88. See, e.g., *Why is There No President in Lebanon?*, QUORA (Mar. 31, 2016), <https://www.quora.com/Why-is-there-no-president-in-Lebanon>.

89. Martin Armstrong, *A Choice Between Warlords: Lebanon Can’t Elect a New President*, VICE NEWS (May 8, 2014), <https://news.vice.com/article/a-choice-between-warlords-lebanon-cant-elect-a-new-president>.

90. Lebanon: Presidential Election and the Conflicting Constitutional Interpretations, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/lebanon-election.php>.

91. Zeid, *supra* note 82.

92. Updates on liberalizations on foreign investment in Saudi Arabia’s capital markets and wholesale and retail trade sectors were published elsewhere in coordination with the International Investment and Development Committee and the International Mergers and Acquisitions and Joint Venture Committee, respectively. Updates on Saudi Arabia’s labor and employment law regime were published in coordination with the International Employment Law Committee.

93. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 114 Stat. 2040 (2016).

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“[p]ersons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nations of the United States or the national security, foreign policy, or economy of the United States”<sup>94</sup> should expect to be held liable and brought to court for these actions.<sup>95</sup> This Act is meant to provide persons and groups who have been harmed from terrorists’ acts in the United States a form of justice by allowing them to bring civil claims for their injuries.<sup>96</sup>

The motivation behind the enactment of JASTA was to give the September 11, 2001 terrorist attack victims’ families the ability to sue Saudi Arabia; however, the Act’s scope is not limited to this specific case.<sup>97</sup> There has been long term suspicions that the Saudi government provided support for the September 11th hijackers, especially because fifteen of the nineteen hijackers were from Saudi Arabia.<sup>98</sup> These suspicions have continually been denied by the Saudi government.<sup>99</sup> Even though these families may be able to bring a case against Saudi Arabia, it is uncertain if they would actually be able to enforce a judgment in their favor by, for example, attaching the assets of Saudi Arabia in the United States.<sup>100</sup> Further, the final version of JASTA does not allow for a federal court to require foreign nations to hand over assets to fulfill any judgments against them.<sup>101</sup>

Another concern surrounding JASTA is whether other countries will in turn take a similar measure to the Act against the United States and try to bring suit against the United States government for its actions abroad.<sup>102</sup> Although some see the bill as mostly symbolic, the question remains whether the symbolism is worth the potential consequences on foreign relations.<sup>103</sup> Former President Barack Obama stated that other countries could use JASTA as justification to bring suit against the United States government, diplomats, and the military, which would in turn harm the structured sovereign immunity standards currently in place and create more global security risks for nations acting on foreign soil.<sup>104</sup> Supporters of JASTA argue that international legal principles followed by the United States

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94. *Id.* at § 2(a)(6).

95. *Id.*

96. *Id.* at § 2(a)(7).

97. Zachary Laub, *What the 9/11 Lawsuits Bill Will Do*, COUNCIL ON FOREIGN RELATIONS (Sept. 28, 2016), <http://www.cfr.org/united-states/911-lawsuits-bill-do/p38350>.

98. Patricia Zengerle & Roberta Rampton, *Obama Vetoes Sept. 11 Saudi Bill, Sets Up Showdown with Congress*, REUTERS (Sept. 23, 2016, 6:44 PM), <http://www.reuters.com/article/us-usa-sept-idUSKCN11T237>.

99. *Id.*

100. Laub, *supra* note 97.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Veto Message from the President – S.2040*, THE WHITE HOUSE (Sept. 23, 2016), <https://www.whitehouse.gov/the-press-office/2016/09/23/veto-message-president-s2040>.

already have many exceptions, and this new Act would just add to the current exceptions and hold foreign governments accountable for providing support to terrorists.<sup>105</sup>

JASTA was a point of controversy between Congress and President Obama. On September 23, 2016, President Obama vetoed JASTA, claiming that it went against fundamental U.S. interests.<sup>106</sup> Five days later, Congress voted to override President Obama's veto of JASTA, which was the only override thus far during his presidency.<sup>107</sup> The vote in the Senate was 97 to 1 and the vote in the House of Representatives was 348 to 77.<sup>108</sup> Overall, it will take time to see the full implications from the enactment of JASTA.

## VI. United Arab Emirates

### A. UNITED ARAB EMIRATES ENACTS NEW NATIONAL SPACE SECTOR POLICY

On September 4, 2016, the United Arab Emirates (UAE) Council of Ministers approved the National Space Sector Policy.<sup>109</sup> This policy was implemented to allow the UAE to enter the space race with a goal of reaching Mars and becoming a leader in space sciences by the State's 50th anniversary of its foundation in 2021.<sup>110</sup>

The formation of the UAE Space Agency in 2014 was the official start to developing the nation's sustainable space sector, and is the first national space agency in the region.<sup>111</sup> According to the Vice President and Ruler of Dubai, Sheikh Mohammad bin Rashid, the UAE is recognized as a space industry leader in the Middle East, as it has invested over 20 billion Dirham (approximately \$272,260,740 USD) and it operates six satellites in orbit.<sup>112</sup>

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105. Julie Hirschfeld Davis, *Obama Vetoes 9/11 Bill, but Congressional Override is Expected*, N.Y. TIMES (Sept. 23, 2016), [https://www.nytimes.com/2016/09/24/us/politics/obama-veto-saudi-arabia-9-11.html?hp&action=click&pgtype=homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&\\_r=1](https://www.nytimes.com/2016/09/24/us/politics/obama-veto-saudi-arabia-9-11.html?hp&action=click&pgtype=homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=1).

106. *Id.*

107. Karoun Demirjian & Juliet Eilperin, *Congress Overrides Obama's Veto of 9/11 Bill*, WASH. POST (Sept. 28, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/09/27/senate-poised-to-vote-to-override-obamas-veto-of-911-bill/>.

108. *Id.*

109. UAE SPACE AGENCY, *UAE Space Agency Announces Details of National Space Sector Policy* (Sept. 7, 2016), <http://www.space.gov.ae/uae-space-agency-announces-details-national-space-sector-policy>.

110. *Id.*; Dr. Eng. Mohamed Al Ahabbi, Director General, UAE Space Agency, Aerospace Innovation & Suborbital Operations Keynote Address at 2nd ICAO/UNOOSA Symposium (Mar. 15, 2016), <http://www.icao.int/Meetings/SPACE2016/Presentations/1e%20-%20M.%20AlAhabbi%20-%20Welcome%20Remarks%20-%20UAE%20Space%20Agency.pdf>.

111. UAE SPACE AGENCY, *supra* note 109.

112. Thamer Al Subaihi, *National Space Policy Adopted by UAE Cabinet*, THE NATIONAL (Sept. 4, 2016), <http://www.thenational.ae/uae/science/national-space-policy-adopted-by-uae-cabinet; AlAhabbi, supra note 110>.

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Additionally, the 2020 launch of “The Hope” mission to Mars is the first Arab and Islamic mission to another planet.<sup>113</sup>

The National Space Sector Policy furthered a primary objective of the UAE Space Agency to regulate the space sector through new legislation regarding national security, international cooperation, and collaboration, and economic issues in both governmental and commercial activities within outer space.<sup>114</sup> On an international level, the UAE had already signed three United Nations Treaties related to space, including the Outer Space Treaty,<sup>115</sup> the Liability Convention,<sup>116</sup> and Registration Convention.<sup>117</sup> The National Space Sector Policy called for a continuation of adherence to international laws, which further portrays its interest in being recognized as a beneficial actor in the international space community and in helping to advance space technologies.<sup>118</sup> This policy is also aimed at strengthening the relationships between the government and private local actors to further increase national safety measures and disaster relief efforts.<sup>119</sup> Overall, the approval of the UAE’s space policy is seen as fundamental in the nation’s agenda for the coming years.<sup>120</sup>

**B. AMENDMENTS TO THE UAE LABOR LAW REGIME**

In late 2015, the United Arab Emirates’ (UAE) Federal Ministry of Labor (now Federal Ministry of Human Resources and Emiratization) (Ministry) issued three decrees amending certain provisions of the UAE Federal Labor Law, Federal Law 8/1980 (UAE Labor Law): Ministerial Decrees 764/2015,<sup>121</sup> 765/2015,<sup>122</sup> and 766/2015.<sup>123</sup> All three decrees came into effect in

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113. Caline Malek, *UAE’s Mars Space Mission Has a New Name: Hope*, THE NATIONAL (May 6, 2015), <http://www.thenational.ae/uae/uaes-mars-space-mission-has-a-new-name-hope>.

114. UAE SPACE AGENCY, *supra* note 109.

115. Treaty On Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205.

116. Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187.

117. Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 1023 U.N.T. S. 15.

118. *Space Agency Announces Details of Space Policy*, GULF NEWS (Sept. 7, 2016), <http://gulfnews.com/news/uae/government/space-agency-announces-details-of-space-policy-1.1892752>.

119. *UAE Adopts National Space Policy*, EMIRATES 24/7 (Sept. 5, 2016), <http://www.emirates247.com/news/uae-adopts-national-space-policy-2016-09-05-1.640206>.

120. *Id.*

121. Ministerial Decree No. 764 on Ministry of Labour-Approved Standard Employment Contracts (2015), *available at* [http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101785/122814/F2100407659/Ministerial%20Decree%20\(764\)%20on%20Standard%20Employment%20.pdf](http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101785/122814/F2100407659/Ministerial%20Decree%20(764)%20on%20Standard%20Employment%20.pdf).

122. Ministerial Decree No. 765 on Rules and Conditions for the Termination of Employment Relations (2015), *available at* [http://ilo.org/dyn/natlex/docs/ELECTRONIC/101784/122812/F568540522/Ministerial%20Decree%20\(765\)%20of%202015%20on%20the%20terminati.pdf](http://ilo.org/dyn/natlex/docs/ELECTRONIC/101784/122812/F568540522/Ministerial%20Decree%20(765)%20of%202015%20on%20the%20terminati.pdf).

123. Ministerial Decree No. 766 on Rules and Conditions for Granting a Permit to a Worker for Employment by a New Employer (2015), *available at* <http://ilo.org/dyn/natlex/docs/>



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January 2016. They introduced a compulsory standard employment agreement (Ministerial Decree No. 764), amended the provisions of the UAE Labor Law concerning termination of employment (Ministerial Decree No. 765), and introduced new conditions for obtaining new work permits (Ministerial Decree No. 766).

Furthermore, the Ministry amended some provisions of the Wage Protection System (WPS) when it passed Ministerial Decree No. 739 in the fall of 2016.<sup>124</sup> In particular, the new decree introduced increased penalties for non-compliance with the provisions of the WPS regulations.

1. *Standard Employment Contract*

Ministerial Decree No. 764 introduced a standard employment agreement.<sup>125</sup> Upon the decree entering into force on January 1, 2016,<sup>126</sup> this standard employment agreement is to be used for all new employment contracts concluded.<sup>127</sup> Furthermore, no UAE work permits for a foreign employee will be issued unless an employment contract executed by the employee and based on the standard employment agreement is provided to the Ministry.<sup>128</sup>

Employment contracts that were concluded prior to January 1, 2016, however, do not have to be reissued based on the standard employment agreement. Still, where such a contract is renewed, such renewal has to be based on the standard employment agreement.<sup>129</sup>

The provisions of the standard employment agreement may not be amended without the approval of the Ministry and the employee. Furthermore, only amendments that benefit the employee may be made.<sup>130</sup> Thus, the standard employment agreement represents the minimum standard to be afforded to all persons employed in the UAE.

Whether a side agreement that comprises amendments to the standard employment agreement will hold up under judicial review is thus far uncertain. Arguably such a side agreement could be regarded as void. This would be in line with a strict reading of Articles 4 and 5 of Ministerial

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ELECTRONIC/101783/122810/F695573065/Ministerial%20Decree%20(766)%20of%202015%20on%20Rules%20and%20Con.pdf.

124. *UAE Ministerial Decree No. 739 of 2016 Introduces New Penalties for Late and Non-Payment of Wages Under the Wages Protection System*, THOMSON REUTERS ZAWYA (Oct. 27, 2016), [https://www.zawya.com/mena/en/story/UAE\\_Ministerial\\_Decree\\_No\\_739\\_of\\_2016\\_introduces\\_new\\_penalties\\_for\\_late\\_and\\_nonpayment\\_of\\_wages\\_under\\_the\\_Wages\\_Protection\\_System-ZAWYA20161027092446/](https://www.zawya.com/mena/en/story/UAE_Ministerial_Decree_No_739_of_2016_introduces_new_penalties_for_late_and_nonpayment_of_wages_under_the_Wages_Protection_System-ZAWYA20161027092446/).

125. Ministerial Decree No. 764 on Ministry of Labour-Approved Standard Employment Contracts, *supra* note 121.

126. *Id.* art. 6.

127. *Id.* art. 1.

128. *Id.*

129. *Id.* art. 3.

130. *Id.* art. 4-5.

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Decree No. 764, which prescribe a precise precedence of the standard employment agreement.

Still, UAE courts may choose to uphold those provisions of a side agreement that are more beneficial to the employee than those of the standard employment agreement. Such a decision could be based on Article 7 of the Labor Law, which provides that an employment agreement may not deviate from the provisions set by the Labor Law, unless such deviation is to the benefit of the employee. This interpretation could be reconciled with the provisions of Ministerial Decree No. 764, since these provisions aim to further secure a minimum standard of employee rights. Still, under a strict literal interpretation of Article 4 of Ministerial Decree No. 764, any contractual provision that deviates from the standard employment agreement—whether beneficial to the employee or not—should be considered void, unless it was approved by the Ministry and the employee.

## 2. *Termination of Employment*

Ministerial Decree No. 765 amended certain provisions of the Labor Law concerning the termination of employment with effect as of January 1, 2016.<sup>131</sup>

Prior to Ministerial Decree No. 765, a contract concluded for a fixed term could not be terminated prior to the expiration of its term except for cause (Articles 115, 120-121, Labor Law). Pursuant to the amendments introduced by Ministerial Decree No. 765, a fixed term employment contract concluded for a term of no more than two years may now be terminated prior to the expiration of its term for convenience, provided that the party terminating the agreement observes the contractual notice period, which shall be at least one month but no more than three months.<sup>132</sup> Where the relevant employment contract was concluded prior to Ministerial Decree No. 765 entering into force and does not provide for such notice period, the notice period shall be three months.<sup>133</sup> Upon termination, both parties shall honor the employment agreement until the end of the notice period—payment of salary in lieu of notice is not permitted.<sup>134</sup> Furthermore, the party terminating the employment contract shall compensate the other party in the amount agreed upon, which shall not exceed three months' basic wages (excluding any additional benefits such as housing allowances, transportation allowances, and bonuses).<sup>135</sup> Where the amount of compensation is not determined in the employment contract, it shall be three months' basic wages.<sup>136</sup> Should a party infringe upon the

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131. Ministerial Decree No. 765 on Rules and Conditions for the Termination of Employment Relations, *supra* note 122.

132. *Id.* art. 1.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

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aforementioned conditions, all damages or losses sustained due to or in connection with the termination shall be borne by that party.<sup>137</sup>

Under the Labor Law, an employment contract concluded for an unlimited term may be terminated for convenience by either party by giving written notice. Prior to Ministerial Decree No. 765, the Labor Law did not comprise a statutory maximum notice period. As of January 1, 2016, such notice period may not exceed three months.<sup>138</sup> Ministerial Decree No. 765, however, does not state how this amendment will affect prior employment agreements providing for longer notice periods.

Moreover, the decree introduced provisions regulating when an employment agreement is deemed *de facto* terminated under the Labor Law. Such *de facto* termination shall occur if:

1. It is established that the employer has substantially failed to meet its contractual obligations.
2. The employee filed a complaint against his/her employer and an inspection has established that the employer's business has been inactive for a period exceeding two months.
3. The employee obtained a final court ruling stating that the employee is entitled to two months' pay or indemnification for wrongful termination.<sup>139</sup>

Ministerial Decree No. 766 introduced a number of new conditions for obtaining work permits for employees previously employed by a different UAE employer. Pursuant to Article 1 of Ministerial Decree No. 766, a new work permit for an employee already employed in the UAE by a different employer may only be granted if the existing employment agreement:

- was concluded for a fixed term and was not renewed upon its term expiring;
- was concluded for a fixed term and was terminated after its term was renewed and in compliance with the statutory and contractual requirements for termination;
- was concluded for an unlimited term and terminated in accordance with the relevant statutory and contractual provision;
- was terminated by the employer or by mutual agreement, provided that the employee was employed for at least six months. This minimum period does not apply where the relevant employee is a higher qualified employee; or
- was terminated due to the employer violating contractual or statutory regulations.<sup>140</sup>

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137. Ministerial Decree No. 765 on Rules and Conditions for the Termination of Employment Relations, *supra* note 122, at art. 1.

138. *Id.*

139. *Id.* art. 2.

140. Ministerial Decree No. 766 on Rules and Conditions for Granting a Permit to a Worker for Employment by a New Employer, *supra* note 123.

3. *Amendments of the UAE Wage Protection System*

In October 2016, the Ministry issued Ministerial Decree No. 739, which amended the regulations governing the UAE WPS.<sup>141</sup> In particular, the new amendments extended the scope of sanctions the Ministry may impose on employers who fail to comply with the WPS regulations. Sanctions may include, *inter alia*, restrictions on the number of visas and work permits the employer may procure, loss of specific classification, and fines.

The WPS is an electronic wages transfer system overseen by the Ministry. It was installed in the UAE by Ministerial Decree No. 788 on Protection of Wages, and serves to protect employee rights. In particular, it aims to ensure wages are paid in full and on time. Subscription to the WPS is obligatory for all employers in the UAE. Under the WPS, employers pay employees' wages via payroll services offered by authorized banks rather than directly to the employee.

Prior to the issuance of Ministerial Decree No. 739, employers failing to subscribe to and make salary payments through the WPS could be penalized (pursuant to Article 8 of Ministerial Decree No. 788) with temporary restrictions on the procurement of work permits. Under the new decree, the Ministry may refuse dealing with any employer who did not subscribe to the WPS.<sup>142</sup> Thus, non-compliant employers will not be able to procure any work permits or access any other services offered by the Ministry until they subscribe to the WPS.

Pursuant to Ministerial Decree No. 739, a payment shall be deemed late where an employee's salary is not paid within ten days of the due date.<sup>143</sup> Sanctions for late or non-payments will depend on the period of delay, the size of the employer's enterprise, and whether the employer is a repeat offender. When payment is delayed for at least ten days, the Ministry will issue a warning notice.<sup>144</sup> In case the payment is delayed for at least 16 days, the Ministry can suspend issuing work permits for the employer (Permit Suspension).<sup>145</sup> This Permit Suspension shall be lifted immediately after the outstanding wages are paid, provided that the employer is a first time offender. Should payment be delayed for at least one month, the Ministry may initiate legal proceedings against the employer, extend the Permit Suspension to all establishments of the employer (*i.e.* other companies owned by the employer), refuse registration of new establishments of the employer, and pull bank guarantees provided by the employer.<sup>146</sup> Furthermore, should the employer employ more than 100 persons within the UAE, the Permits Suspension will remain in place for at least two

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141. *UAE Ministerial Decree No. 739 of 2016 Introduces New Penalties for Late and Non-Payment of Wages Under the Wages Protection System, supra* note 124.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

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months after payment of outstanding wages.<sup>147</sup> If payment is delay for at least 60 days, the Ministry may impose fines in addition to the measures previously taken.<sup>148</sup>

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147. *UAE Ministerial Decree No. 739 of 2016 Introduces New Penalties for Late and Non-Payment of Wages Under the Wages Protection System*, *supra* note 124.

148. *Id.*

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## **Russia/Eurasia**

KIMBERLY REED, ROMAN BUZKO, MARIA GRECHISHKINA,  
ANASTASIA HERASIMOVICH, MARYNA ILCHUK, SERGEY KIM, AND  
AMANDA WEIR\*

This article discusses significant international legal developments in corporate law, arbitration law, energy law, data privacy, and religious freedom in Russia, Kazakhstan, Belarus, and Ukraine.

### **I. Corporate Law**

In 2016, Russian law underwent several changes aimed at modernizing its corporate legal framework and implementing the results of recent civil law reforms. The major changes related to (a) the transfer of participation interests in a limited liability company; (b) approving major and related-party transactions; (c) record-keeping regarding beneficial owners; (d) the so-called “Fourth Antimonopoly Package;” and (e) judicial case law.

#### **A. TRANSFER OF PARTICIPATION INTERESTS IN AN LLC**

The rules pertaining to transferring participation interests in a Russian LLC were revised to curb malicious corporate raiding.<sup>1</sup> First, as of January 1, 2016, a participation interest is deemed transferred when a corresponding entry is made in the public register, whereas previously, transfer occurred upon notarization of the transaction. This procedural change impacts the drafting of purchase agreements, particularly provisions allocating risks prior to transfer. Second, certain corporate actions became subject to public notary certification, including (1) resolutions to increase a company’s charter capital; (2) a participant’s notice to withdraw from a company; (3) an offer to sell a participation interest to a third party; and (4) a participant’s request for a company to buy out its participation interest.

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\* Editor and co-author: Kimberly Reed (Reed International Law & Consulting LLC, Washington, DC). Authors: Roman Buzko (Buzko & Partners, St. Petersburg, Russia); Maria Grechishkina (Marks & Sokolov, LLC, Philadelphia, PA); Anastasia Herasimovich (Baker & McKenzie, Chicago, IL); Maryna Ilchuk (Arzinger Law Firm, Kiev, Ukraine); Sergey Kim (Centil Law, Almaty, Kazakhstan); Amanda Weir (Applied Solutions Consulting, Tampa, FL).

1. Federal’nyi Zakon RF O Ynesenii Izmenenij v Otdel’nye Zakonodatel’nye Akty Rossijskoj Federacii [Federal Law of the Russian Federation on Amendments to Individual Legislative Acts of the Russian Federation], SOBRANIE ZAKONODATEL’SIVA ROSSIJSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 391-FZ, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102386394&intelsearch=391-FZ+>.

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Third, the structure of option agreements for participation interests was clarified and improved. As of January 15, 2016, an option agreement for a participation interest may be exercised through a notarized irrevocable offer, which an offeree can subsequently accept through unilateral notarized acceptance. This limits the risk that the offeror changes its mind after granting the option but before the actual transfer.

**B. APPROVAL OF MAJOR AND RELATED-PARTY TRANSACTIONS**

Effective January 1, 2017, new regulations for major and related-party transactions narrowed the scope of transactions subject to approval.<sup>2</sup> The definition of “major transactions” changed from a firm threshold of twenty-five percent of the corporate assets’ book value to a more sophisticated criterion. Specifically, a transaction is now considered “major” and subject to approval if it both (1) results in the termination of the company’s business or changes the type or scale of its business; and (2) exceeds twenty-five percent of the company’s assets’ book value.

With respect to related-party transactions, the new law abolished the requirement of prior approval by non-related participants and shifted the focus to reporting and subsequent control. In addition, whether a party is “related” to a transaction will no longer require only a twenty percent or more “affiliation” with the relevant company.<sup>3</sup> Instead, the new rules require “control” of the relevant company, defined as controlling more than fifty percent of the governing body’s votes and appointing the sole executive body and/or more than fifty percent of the collective management body.<sup>4</sup> In practical terms, this significantly decreases the number of related-party

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2. Federal’nyi Zakon RF O Vnesenii Uzmeneniy v Federal’nyy Zakon RF “Ob Aktsionernykh Obshchestvakh” i Federal’nyy Zakon “Ob Obshchestvakh s Ogranichennoy Otvetstvennost’yu” v Chasti Regulirovaniya Krupnykh Sdelok i Sdelok, v Sovershenii Kotorykh Imeyetsya Zainteresovannost’ [Federal Law of the Russian Federation on Amendments to the Federal Law on Joint Stock Companies and Federal Law on Limited Liability Companies as Related to Major and Related-Party Transactions], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2016, No. 343-FZ, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102404843&intelsearch=343-FZ+>.

3. Other criteria also applied in the former law. *See, e.g.*, Zakon O Konkurentsii i Ogranichenii Monopolisticheskoy Deyatel’nosti na Tovarnykh Rynkakh [Law on Competition and Restriction of Monopoly Activity on Commodity Markets], VEDOMOSTI S’EZDA NARODNYKH DEPUTATOV RSFSR I VERKHOVNOGO SOVETA RSFSE [VED. RSFSR] [Bulletin of the Congress of People’s Deputies of the Russian Soviet Federal Socialist Republic and Supreme Council of the RSFSR], 1991, No. 948-1, Art. 4.

4. Federal’nyi Zakon RF O Vnesenii Izmeneniy v Federal’nyy Zakon RF “Ob Aktsionernykh Obshchestvakh” i Federal’nyy Zakon “Ob Obshchestvakh s Ogranichennoy Otvetstvennost’yu” v Chasti Regulirovaniya Krupnykh Sdelok i Sdelok, v Sovershenii Kotorykh Imeyetsya Zainteresovannost’ [Federal Law of the Russian Federation on Amendments to the Federal Law on Joint Stock Companies and Federal Law on Limited Liability Companies as Related to Major and Related-Party Transactions], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2016, No. 343-FZ (this requirement reflects an amendment to Federal Law of the Russian Confederation on Joint Stock Companies, 1995, No. 208-FZ, Art. 81, which required only twenty percent for control).

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transactions subject to pre-approval. Further, the law now requires companies to notify their boards or shareholders of a contemplated related-party transaction at least fifteen days in advance.

The rules for challenging major transactions and related-party transactions were also amended. To bring a claim, a shareholder (or group of shareholders) must hold no less than one percent of the company's share capital. Practitioners view this change as a limitation on minority shareholders' rights, since there was no such threshold before.

**C. RECORDS OF BENEFICIAL OWNERS**

As of December 21, 2016, Russian companies are required to identify and keep records on their beneficial owners.<sup>5</sup> A beneficial owner is defined as a person who ultimately owns, either directly or indirectly, a participation interest of more than twenty-five percent of an organization's share capital, or is able to control its actions. Russian companies are now required to: (1) undertake all reasonable and available measures to obtain information on the company's beneficial owners, including the owners' complete names, citizenships, dates of birth, passport data, copies of immigration documents (if applicable), addresses, and taxpayer identification numbers; (2) update such information at least once a year; (3) retain such information for a minimum of 5 years;<sup>6</sup> and (4) provide supporting documents upon the request of relevant governmental authorities. This duty of identification is enforced through newly introduced penalties of up to RUB 500,000 (approximately \$8,000 USD) for failure to comply.<sup>7</sup>

**D. "FOURTH ANTIMONOPOLY PACKAGE"**

Another set of legal changes pertains to antimonopoly (antitrust) law. The so-called "Fourth Antimonopoly Package"<sup>8</sup> took effect on January 5, 2016.

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5. O Vnesenii Izmeneniy v Federal'nyi Zakon RF "O Protivodeystvii Legalizatsii (Otnyvaniyu) Dokhodov, Poluchennykh Prestupnym Putem, i Finansirovaniyu Terrorizma" i Kodeks Rossiyskoy Federatsii ob Administrativnykh Pravonarusheniyyakh [Federal Law of the Russian Federation on Amendments to the Federal Law on Counteraction to Legalization (Laundering) of Criminal Proceeds and Financing of Terrorism and the Russian Federation Code of Administrative Offenses], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2016, No. 215-FZ, art. 1, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102401391&intelsearch=215-FZ>.

6. The law does not clarify whether this requires companies to retain the information for five years from the time they acquire it, or for five years after the relevant person is no longer a beneficial owner.

7. *Id.* at art. 2.

8. Federal'nyi Zakon RF O Vnesenii Izmeneniy v Federal'nyi Zakon "o Zashchite Konkurentsii" i Otdel'nyye Zakonodatel'nyye akty Rossiyskoy Federatsii [Federal Law of the Russian Federation on Amendments to Federal Law on Protection of Competition and Some Legislative Acts of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 275-FZ, art. 6, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102379622&intelsearch=275-FZ>; *see*



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Specifically, joint venture agreements between competitors are now subject to prior approval of the Federal Antimonopoly Service (FAS) if they meet standard merger control monetary thresholds. Also, merger control filings are meant to be more transparent, and, as such, the FAS is required to disclose on its official website certain information about transactions for which a request for approval has been submitted. Interested third parties now may submit statements relating to transactions under review and their impact on competition.

**E. FURTHER CASE LAW DEVELOPMENTS**

The positive legislative changes described above have been accompanied by valuable clarifications from the courts, a few of which are worthy of mention. In a seminal case, the Supreme Court of the Russian Federation confirmed for the first time that failure to vote in a manner agreed upon in a shareholders' agreement may result in contractual penalties.<sup>9</sup> Prior to this decision, it was unclear whether a court would enforce a monetary penalty for the breach of a contractual duty to vote or act in a particular way. In fact, this was one of the first times that the Supreme Court interpreted any of the new provisions for corporate agreements that were introduced in mid-2014. In another case, the Supreme Court allowed a company's ultimate beneficiaries (*i.e.*, those owning shares indirectly through a chain of foreign companies) to challenge corporate resolutions of the company's Russian subsidiaries in Russian national courts.<sup>10</sup> Previously, only direct shareholders could do so, which deprived ultimate beneficiaries of operational control over their subsidiaries.

**II. Arbitration and Civil Procedure**

**A. RUSSIA**

Reforms to the Russian arbitration system were enacted by Federal Law No. 382-FZ "On Arbitration in the Russian Federation" (Law 382-FZ)<sup>11</sup> and the related Federal Law No. 409-FZ "On Amending Certain Legislative Acts of the Russian Federation" (Law 409-FZ).<sup>12</sup> These new laws have

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*also* Corp. Couns. Guide to Int'l Antitrust § 11:9, Westlaw (database updated Nov. 2016) (identifies law as "Fourth Antimonopoly Package").

9. Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii [Russian Federation Supreme Court Plenary Ruling on Economic Disputes], VERKHOVNOGO SUDA ROSSIISKOI FEDERATSII [VERKH. SUD RF], Oct. 3, 2016, No. 304-??16-11978, p. 2-3.

10. Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii [Russian Federation Supreme Court Plenary Ruling on Economic Disputes], VERKHOVNOGO SUDA ROSSIISKOI FEDERATSII [VERKH. SUD RF], Mar. 31, 2016, No. 305-??15-14197, p. 7.

11. SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102386393&intelsearch=382-FZ>.

12. Federal'nyi Zakon RF O Vnesenii Izmeneniy v Otdel'nyye Zakonodatel'nyye akty Rossiyskoy Federatsii i Priznanii Utrativshim silu Punkta 3 Chasti 1 stat'i 6 Federal'nogo

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significantly affected domestic and international arbitration in Russia. Law 382-FZ replaced the existing law on domestic arbitration,<sup>13</sup> while Law 409-FZ brought existing laws, including the Law on International Commercial Arbitration (ICA Law),<sup>14</sup> the Arbitrazh Procedural Code,<sup>15</sup> and the Civil Procedure Code,<sup>16</sup> into conformity with Law 382-FZ. The bulk of both laws took effect on September 1, 2016, with some provisions taking effect later.<sup>17</sup>

While updating the general arbitration framework, these reforms significantly impact the status of *ad hoc* arbitrations and streamline important issues pertaining to arbitrability of corporate disputes.

Under the previous version of the ICA Law, parties generally could refer the following types of disputes to international commercial arbitration:

- (1) contractual or other civil law disputes arising from the parties' international economic activity, where at least one of the parties has a commercial enterprise abroad;
- (2) disputes between enterprises with foreign investments, international associations, and organizations established in Russia; and
- (3) disputes between the participants of the entities listed in (2) and other parties.

The updated ICA Law expands this list to include disputes where a substantial part of the obligations arising from the relationships between the parties is to be performed abroad, or where the subject matter of the dispute is most closely connected with a foreign state. It also extends the scope of disputes pertaining to international investment that may be made subject to international commercial arbitration.<sup>18</sup>

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Aakona "O Samoreguliruyemykh Organizatsiyakh" v Svyazi s Prinyatiyem Federal'nogo Zakona "Ob Arbitrazhe (Treteyskom Tazbiratel'stve) v Rossiyskoy Federatsii" [Federal Law of the Russian Federation on Amendments to Certain Legislative Acts of the Russian Federation and Annulment of Paragraph 3 of Part 1 of Article 6 of the Federal Law on Self-Regulatory Organizations in Connection with the Adoption of the Federal Law on Arbitration in the Russian Confederation], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 409-FZ, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102387173&intelsearch=409-FZ>.

13. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 53, available at <http://pravo.gov.ru/proxy/ips/?docbody=nd=102386393&intelsearch=382-FZ>.

14. See SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 409-FZ, *supra* note 12, at art. 2, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102387173&intelsearch=409-FZ>.

15. See *id.* at art. 9.

16. See *id.* at art. 10.

17. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 54; SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 409-FZ, *supra* note 12, at art. 13.

18. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 409-FZ, *supra* note 12, at art. 2(3), (5); SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(18).

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International arbitration institutions such as the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC) at the Chamber of Commerce and Industry of the Russian Federation may consider domestic disputes, but examination of such disputes will be governed by domestic arbitration law.<sup>19</sup>

Law 382-FZ introduces new rules for the creation and functioning of arbitration institutions. Such institutions may be created only under the auspices of non-commercial organizations and are required to obtain permission from the Russian Government,<sup>20</sup> although the law exempts the ICAC and the MAC from this requirement.<sup>21</sup> Arbitration awards rendered by arbitration institutions without permission will be treated as decisions made by an *ad hoc* arbitration.<sup>22</sup>

*Ad hoc* arbitrations are subject to a number of new limitations, including the following:

1. A party cannot waive its right to petition to a Russian court regarding the recusal of an arbitrator,<sup>23</sup> termination of an arbitrator due to inability to perform his or her duties,<sup>24</sup> a challenge to a jurisdictional ruling<sup>25</sup> or revocation of an award;<sup>26</sup>
2. Assistance from the Russian court in collecting evidence is not allowed;<sup>27</sup> and
3. *Ad hoc* arbitrations cannot decide corporate disputes.<sup>28</sup>

Importantly, corporate disputes may be considered only by institutional arbitration.<sup>29</sup> Law 409-FZ generally covers which corporate disputes are arbitrable<sup>30</sup> and identifies some corporate disputes that must meet additional requirements in order to become arbitrable.<sup>31</sup> Other specific types of corporate disputes cannot be subject to any arbitration, including:

1. Disputes related to convening general meetings of shareholders/participants or expelling participants;<sup>32</sup>

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19. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 409-FZ, *supra* note 12, at art. 2(6); SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(1).

20. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 44(8).

21. *Id.* at art. 44(1).

22. *Id.* at art. 52(13), (15), (16).

23. *Id.* at art. 13(3).

24. *Id.* at art. 14(1).

25. *Id.* at art. 16.

26. *Id.* at art. 40.

27. *Id.* at art. 30.

28. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 409-FZ, *supra* note 12, at art. 9(9).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

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2. Disputes arising out of notary certification of transactions involving shares in limited liability companies;<sup>33</sup>
3. Disputes related to challenges of individual directives, decisions, and actions of state, local, or similar governmental bodies, or public officials;<sup>34</sup> and
4. Disputes involving a company included in the list of Russian strategic entities subject to Federal Law 57-FZ<sup>35</sup> (except for share transactions that are not subject to preliminary approval).<sup>36</sup>

As of February 2017, parties may enter into arbitration agreements on arbitrable corporate disputes.<sup>37</sup> Subject to the requirements of Law 382-FZ, an arbitration agreement may be part of a Russian company's charter binding on all shareholders.<sup>38</sup>

**B. KAZAKHSTAN**

The Kazakhstan Civil Procedure Code (Civil Procedure Code or Code) took effect on January 1, 2016.<sup>39</sup> While retaining basic concepts of the previous code, the revised Civil Procedure Code introduces significant new items relating to trial procedure. One of the most important changes is a transition from the previous five-level judicial system<sup>40</sup> to a three-level judicial system comprised of courts of first instance, courts of appeal, and courts of cassation.<sup>41</sup>

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33. *Id.*

34. *Id.*

35. Federal'nyi Zakon RF O Poryadke Osushchestvleniya Inostrannykh Investitsiy v Khozyaystvennyye Obshchestva, Imeyushchiye Strategicheskoye Znachenie Dlya Obespecheniya Oborony Strany i Bezopasnosti Gosudarstva [Federal Law of the Russian Federation on the Procedure for Foreign Investment in Business Entities of Strategic Importance for National Defense and State Security], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2008, No. 57-FZ, art. 2, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102121606&intelsearch=57-FZ>.

36. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 409-FZ, *supra* note 12, at art. 9(9).

37. *Id.* at art. 13(7).

38. *Id.* at art. 2(8); SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 382-FZ, art. 7(7).

39. *New Civil Procedure Code of Kazakhstan*, GRATA FINANCE & SECURITIES GROUP, TENGRI NEWS (Feb. 16, 2016, 17:38), <https://en.tengrinews.kz/opinion/562/>.

40. *See* GRAZHDANSKIY PROTSESSUALNIY KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 1999, No. 411-II, art. 40; 42(2); 43; 44.

41. GRAZHDANSKIY PROTSESSUALNIY KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 2015, No. 377-V ZRK, chapters 18, 52, 54, available at [http://online.zakon.kz/document/?doc\\_id=34329053](http://online.zakon.kz/document/?doc_id=34329053).

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The Civil Procedure Code provides that investment disputes<sup>42</sup> are under the jurisdiction of the court of Astana;<sup>43</sup> however, if a party to an investment dispute is a “large investor,”<sup>44</sup> then the investment dispute is subject to the jurisdiction of the Supreme Court of Kazakhstan.<sup>45</sup> The Code also encourages dispute resolution by amicable means. For instance, a judge is obliged to encourage the parties to reconcile a dispute at all stages of civil procedure.<sup>46</sup> A conciliation process called the “participative procedure” was established and is to be conducted with the assistance of the parties’ attorneys through negotiations without the judge’s intervention.<sup>47</sup>

The Civil Procedure Code also introduced a new, shorter written court procedure,<sup>48</sup> which is like an ordinary proceeding but is simplified and conducted without the adversarial parties present.<sup>49</sup> Only specific categories of cases may be resolved through this type of proceeding.<sup>50</sup> Another change regards the tendering of evidence to the court. Currently, evidence is tendered at the preparatory stage of litigation<sup>51</sup> and also may be proffered at the judicial examination stage if the proffering party was unable, for justifiable reasons, to provide it at the preparatory stage.<sup>52</sup> But the Civil Procedure Code now mandates that a number of procedural actions, such as filing a counterclaim,<sup>53</sup> amending a claim,<sup>54</sup> and increasing or reducing claims,<sup>55</sup> may occur only at the preparatory stage. At the same time, the

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42. PREDPRINIMATELSKIY KODEKS RESPUBLIKI KAZAKHSTAN [Commercial Code of the Republic of Kazakhstan] 2015, No. 375-V ZRK, art. 296(1).

43. GRAZHIDANSKIY PROTSESSUALNYI KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 2015, No. 377-V ZRK, art. 27(4), *available at* [http://online.zakon.kz/document/?doc\\_id=34329053](http://online.zakon.kz/document/?doc_id=34329053).

44. A “large investor” is an individual or legal entity making investments into Kazakhstan that total at least two million Monthly Calculations Indexes (MCIs”). PREDPRINIMATELSKIY KODEKS RESPUBLIKI KAZAKHSTAN [Commercial Code of the Republic of Kazakhstan] 2015, No. 375-V ZRK, art. 274(4). In 2016, one MCI was equal to 2121 Kazakh tenge. Zakon Respubliki Kazakhstan o Respublikanskom Byudzhete na 2016-2018 [Law of the Republic of Kazakhstan on the Republican Budget for 2016-2018], 2015 No. 426-V ZRK, art. 11(4).

45. GRAZHIDANSKIY PROTSESSUALNYI KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 2015, No. 377-V ZRK, art. 28(2), *available at* [http://online.zakon.kz/document/?doc\\_id=34329053](http://online.zakon.kz/document/?doc_id=34329053).

46. At the preparation stage, a judge explains to the parties in a dispute their right to enter into a settlement agreement, a mediation agreement, a participative agreement, or apply to arbitration. *Id.* at art. 165(5). A judge is expected to urge the parties to use one of these methods of conciliation and to assist in the settlement of a dispute at all stages of litigation. *Id.* at art. 174(1).

47. *Id.* at art. 181(1), (2).

48. *Id.* at chapter 13.

49. *Id.* at art. 146(5).

50. *Id.* at art. 145.

51. *Id.* at art. 73(1).

52. *Id.*

53. *Id.* at art. 153(1).

54. *Id.* at art. 169(1).

55. *Id.*

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preparatory stage has been lengthened from seven business days<sup>56</sup> to fifteen business days,<sup>57</sup> and in extraordinary circumstances, it may be extended up to one month.<sup>58</sup>

The Civil Procedure Code established a cap on reimbursement for legal representation costs at ten percent of the adjudicated amount in the case of material (property) claims, and no more than 300 MCIs<sup>59</sup> in the case of moral (non-property) claims.<sup>60</sup> In addition, new rules for calculating the state fee (*i.e.*, filing fees and court costs) were established for claims of moral harm caused by the dissemination of information discrediting one's honor, dignity and business reputation (similar to Western concepts of libel and slander). Prior to the enactment of the Civil Procedure Code, the state's fee for such claims was fifty percent of MCI,<sup>61</sup> but now is one percent of the recovery requested for individuals<sup>62</sup> and three percent for legal entities.<sup>63</sup> The Civil Procedure Code does not require the payment of a state fee for filing an appeal petition, but the state fee is required when filing a cassation petition.

The Civil Procedure Code also changed the effective date of a judgment from a court of first instance. Whereas the Old Civil Procedure Code allowed fifteen days for appeal following the issuance of a court judgment,<sup>64</sup> as a general rule, the Code now provides that a court judgment comes into force one month after the date on which the judgment was awarded in its final form.<sup>65</sup>

The Civil Procedure Code expanded the powers of the courts of appeal as well. For example, a court of appeals now has the right to overturn a judgment and remand a case for reconsideration by a court of first instance in any of the following circumstances:<sup>66</sup> a case was considered by an improper composition of a court or in violation of jurisdictional rules;<sup>67</sup> a

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56. GRAZHDANSKIY PROTSESSUALNIY KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 1999, No. 411-II, art. 167.

57. GRAZHDANSKIY PROTSESSUALNIY KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 2015, No. 377-V ZRK, art. 164(1), *available at* [http://online.zakon.kz/document/?doc\\_id=34329053](http://online.zakon.kz/document/?doc_id=34329053).

58. *Id.*

59. GRAZHDANSKIY PROTSESSUALNIY KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 2015, No. 377-V ZRK, art. 113(1), *available at* [http://online.zakon.kz/document/?doc\\_id=34329053](http://online.zakon.kz/document/?doc_id=34329053).

60. *Id.*

61. Zañ O Nalogah i Drugih Objazatel'nyh Plate\_ah v Bjud\_et (Nalogovyy Kodeks) [Law on Taxes and Other Obligatory Payments Into the Budget (Tax Code)] No. 99-IV, art. 535(7).

62. *Id.* at art. 535(1).

63. *Id.*

64. GRAZHDANSKIY PROTSESSUALNIY KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 1999, No. 411-II, art. 334(3).

65. GRAZHDANSKIY PROTSESSUALNIY KODEKS RESPUBLIKI KAZAKHSTAN [Civil Procedure Code of the Republic of Kazakhstan] 2015, No. 377-V ZRK, art. 240(1), 403(3), *available at* [http://online.zakon.kz/document/?doc\\_id=34329053](http://online.zakon.kz/document/?doc_id=34329053).

66. *Id.* at art. 424 (5).

67. *Id.* at art. 427(4)(1).

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case was considered by a court of first instance in violation of the rules regarding language of court proceedings;<sup>68</sup> a court of first instance resolved a case regarding the rights and obligations of third parties not involved in the case;<sup>69</sup> or a judgment either was not signed by a judge or was signed by a judge who did not hear the case.<sup>70</sup>

The procedural rules for cassation courts have also undergone major changes. Generally, a cassation petition may be filed within six months of a judgment's effective date.<sup>71</sup> But if the procedure of appeal to the cassation court is improperly followed by a party, it is unlikely that the case will be considered by the cassation court.<sup>72</sup> According to the Civil Procedure Code, the following types of cases also cannot be considered by a cassation court:

1. a case considered through a simplified civil procedure;
2. a case settled by settlement agreement, mediation agreement, or participative agreement;
3. a case abandoned by the renunciation of the claim;
4. a case for material claims over 2000 MCIs for individuals and 30,000 MCIs for legal entities;
5. a case regarding the settlement of the insolvency of a debtor; and
6. a dispute arising from rehabilitative procedure and bankruptcy.<sup>73</sup>

But the Code establishes that the last two categories above (as well as certain other types of cases), regardless of appellate proceedings, may be considered by a cassation court at the behest of the Chairman of the Supreme Court and the General Prosecutor<sup>74</sup> if a judgment may cause irreversible harm to the lives and health of the people, economy, and/or security of Kazakhstan, violate the rights and lawful interests of an indefinite number of people or other public interests, or violate the uniform interpretation and application of laws by the courts.<sup>75</sup>

### III. Public-Private Partnership Law

Private participation in the development of public infrastructure through public-private partnerships (PPPs) is currently a global trend, including in post-Soviet countries such as Russia and Belarus. According to UN data, over fifty percent of the world's population now lives in urban areas, and many countries are becoming increasingly urbanized.<sup>76</sup> This global

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68. *Id.* at art. 427(4)(3).

69. *Id.* at art. 427(4)(4).

70. *Id.* at art. 427(4)(5).

71. *Id.* at art. 436(1).

72. *Id.* at art. 434.

73. *Id.*

74. *Id.* at art. 434(3).

75. *Id.* at art. 438(6).

76. *World's Population Increasingly Urban with More Than Half Living in Urban Areas*, UN (July 10, 2014), <http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html>.

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phenomenon is changing the landscape and infrastructure of many developing countries, and in 2016, lawmakers in Russia and Belarus modified their respective legislation on PPPs to facilitate improvements in the quality of life of their current and future residents.

A. RUSSIA

Until recently, PPPs in Russia were governed by Federal Law No. 115-FZ “On Concession Agreements” (Concession Law), dated July 21, 2005,<sup>77</sup> which outlined the procedure for execution and implementation of PPPs in Russia at the federal level. The Concession Law allowed a concessionaire to develop and use a project which was or would be owned by the government, but allowed only for a Build-Operate-Transfer (BOT) model, whereby private investors could not acquire ownership of a PPP project. Several projects in Russia have been and continue to be executed using the BOT model, including the Western High Speed Diameter toll road<sup>78</sup> and the Pulkovo Airport<sup>79</sup> in St. Petersburg.

On January 1, 2016, the new Federal Law “On Public-Private Partnership, Municipal-Private Partnership in the Russian Federation and Amending Certain Legislative Acts of the Russian Federation” (Russian PPP Law) took effect.<sup>80</sup> Some provisions of the new Russian PPP Law are similar to the Concession Law, but there are some noticeable differences.

While the new Russian PPP Law will co-exist with the Concession Law, the Russian PPP Law allows for ownership transfer from the government to a private partner (usually a project-specific or single-purpose company).<sup>81</sup> Whereas the Concession Law allowed only one type of PPP structure (BOT), the new law significantly expands the forms of PPP structures in Russia. It allows, among others, Build-Own-Operate (BOO), Design-Build-Own-Operate (DBOO), Design-Build-Operate-Transfer (DBOT), Design-Build-Own-Operate-Transfer (DBOOT), and Build-Operate-Transfer (BOT) structures.<sup>82</sup>

Under the Russian PPP Law, only a Russian legal entity may be a private partner in a PPP project, with the exception of certain other Russian entities such as state or municipal unitary enterprises or institutions, or non-profit

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77. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2005, No. 115-FZ, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102099032&intelsearch=115-FZ>.

78. *About the Company: PPP Agreement*, NORTHERN CAPITAL HIGHWAY, <http://nch-spb.com/eng/about-company/common-info/> (last visited Apr. 10, 2017).

79. *Public-Private Partnership Agreement (PPP Agreement)*, PULKOVO AIRPORT, <https://www.pulkovoairport.ru/en/about/agreement/> (last visited Apr. 10, 2017).

80. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 224-FZ, art 48, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102376338&intelsearch=224-FZ>.

81. *Id.* at art. 5.

82. *Id.* at art. 6.



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organizations created by the state or municipalities.<sup>83</sup> On the other hand, concessionaires under the Concession Law may be Russian or foreign legal entities, unincorporated partnerships, and sole proprietors.

The Concession Law allows the parties to a concession agreement to agree that disputes will be heard in Russian state courts or arbitration tribunals,<sup>84</sup> whereas the Russian PPP Law allows parties to a PPP agreement to choose any dispute resolution mechanism, presumably including arbitration by foreign tribunals.

In terms of financing and securing payments, the Concession Law does not allow concession projects to be pledged to a financing party, but a project developed under the Russian PPP Law may be pledged when a private partner secures the performance of its obligations under a separate agreement with the lender.<sup>85</sup> While there is a special tax regime for concession projects under the Russian Tax Code,<sup>86</sup> the Russian PPP Law does not contain any provisions relating to taxation. PPP projects most likely will fall under a tax regime created by different legal instruments (e.g., a combination of tax provisions in the Russian Tax Code, the Concession Law, and other tax laws and regulations relating to infrastructure projects).

## B. BELARUS

Unlike Russia, where infrastructure development has always been recognized as an important mechanism for economic growth, Belarus is only beginning to develop a legal framework regulating public infrastructure development. Belarus had no specific concession law before adopting its new law “On Public-Private Partnerships,” which took effect in July 2016 (Belarusian PPP Law).<sup>87</sup> Before enactment of the Belarusian PPP Law, the Investment Code of the Republic of Belarus (Investment Code) regulated concessions.<sup>88</sup> Until passage of the Belarusian PPP Law, only mineral assets

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83. *Id.* at art. 5.

84. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2005, No. 115-FZ, art. 17, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102099032&intelsearch=115-FZ>.

85. SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 224-FZ, art. 7, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102376338&intelsearch=224-FZ>.

86. Federal'nyi Zakon RF O Vnesenii Izmeneniy v Federal'nyi Zakon “O Kontsessionnykh Soglasheniyaikh” i Otdel'nyye Aakonodatel'nyye akty Rossiyskoy Federatsii [Federal Law of the Russian Federation on Amending the Federal Law On Concession Agreements and Some Legislative Acts of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2008, No. 108-FZ, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102122970&intelsearch=108-FZ>.

87. Zakon Respubliki Belarus O Gosudarstvenno-Chastnom Partnerstve [Federal Law of the Republic of Belarus On Public-Private Partnerships], 2015, No. 345-3, *available at* <http://www.pravo.by/main.aspx?guid=12551&p0=H11500345&p1=1>.

88. *See* INVESTITSIONNYY KODEKS RESPUBLIKI BELARUS [Investment Code of the Republic of Belarus], 2001, No. 37-3, art. 49, 76, *available at* <http://pravo.levonevsky.org/kodeksby/ink/20130317/index.htm>.

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could be offered for concession;<sup>89</sup> termination and compensation provisions of project agreements were not clearly regulated, and very limited sources of government support were available.<sup>90</sup> Thus, the Investment Code was an insufficient legal basis for the development of PPPs in Belarus, and the new Belarusian PPP Law was adopted to provide specific guidance.

Under the Belarusian PPP Law, PPPs can be developed in various sectors, including transportation, public utilities, health care, agriculture, education, culture, energy, and telecommunications.<sup>91</sup> The Belarusian PPP Law provides certain roles for the President of the Republic of Belarus, Council of Ministers, Ministry of Economy, Ministry of Finance, and other governmental bodies.<sup>92</sup> It allows for transfer of infrastructure to a private partner for possession and use, although ownership rights remain with the government.<sup>93</sup> The Belarusian PPP Law sets the following stages for PPP project development:

1. Preparation, review and valuation of tender offers relating to PPP projects;
2. Decision relating to development of a PPP project;
3. Tender process by which a private partner for a PPP project will be selected; and
4. Execution and performance of the PPP agreement.<sup>94</sup>

The Belarusian PPP Law allows many agreement provisions to be negotiated freely between the parties, but some provisions are mandatory. For example, the governing law of the PPP agreement must be Belarusian law,<sup>95</sup> and the PPP agreement must be registered with the Ministry of Economy.<sup>96</sup>

Financing of PPP projects in Belarus may be done by a Belarusian or foreign entity in full or in part.<sup>97</sup> Private partners enjoy all guarantees generally provided to investors, including guaranteed money transfer and protection against nationalization.<sup>98</sup> The Belarusian PPP Law also provides guarantees for creditors of private partners.<sup>99</sup> In addition to litigation, international arbitration is one of the dispute resolution mechanisms provided by the Belarusian PPP Law.<sup>100</sup>

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89. *Id.* at art. 51.

90. *Id.* at art. 12-13. International arbitration, however, is possible for foreign investors under the Investment Code. *Id.* at art. 46.

91. Zakon Respubliki Belarus O Gosudarstvenno-Chastnom Partnerstve [Federal Law of the Republic of Belarus On Public-Private Partnerships], 2015, No. 345-3, art. 5, *available at* <http://www.pravo.by/main.aspx?guid=12551&p0=H11500345&p1=1>.

92. *Id.* at ch. 2.

93. *Id.* at art. 25.

94. *Id.* at art. 6.

95. *Id.* at art. 24(3).

96. *Id.* at art. 24(4).

97. *Id.* at art. 26(1).

98. *Id.* at art. 36.

99. *Id.* at art. 37.

100. *Id.* at art. 39(2).

Initially, seven PPP pilot projects were planned in Belarus,<sup>101</sup> but only one transportation project is currently being developed: upgrading an 85-kilometer section of the M10 road, an international transportation corridor and alternate route between Belarus, the EU, Russia, and China.<sup>102</sup> As a result of the Belarusian PPP Law, the World Bank, the European Bank for Reconstruction and Development (EBRD), and the International Finance Corporation (IFC) are engaged in supporting this project. A private partner will design, build, operate, and maintain the motorway section, and in return, receive an “availability fee” from the Belarusian authorities.<sup>103</sup> The tender is expected to occur in 2017.<sup>104</sup>

Despite many unknowns, the Belarusian PPP Law and engagement of international organizations in the first PPP pilot project in Belarus provide an opportunity for global investors to assess regulatory and political risks for investment in Belarusian PPPs. While it is too early to analyze the effects of the new Russian PPP Law and the Belarusian PPP Law, it is important that PPPs in Russia and Belarus now extend beyond concessions. The new PPP laws provide universal terms and principles and an expanded list of acceptable PPP structures, as are found in PPP legislative frameworks in developed countries. The new PPP laws aspire to attract more private investors and funds to Russia and Belarus and to improve Russian and Belarusian infrastructure.

#### IV. Energy Law

##### A. UKRAINE

In 2016, Ukraine continued to implement the European Energy Community’s Energy Directives with the primary goal of liberalizing the Ukrainian energy market. The ongoing conflict with Russia in eastern Ukraine continues to significantly impact Ukraine’s energy market and overall economy. Ukraine’s main priority is improving its energy security, in part by increasing its own gas production. In late 2015, Tax Code reforms were adopted mandating decreases in gas production payments that were

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101. 7 *Pilot PPP Projects Chosen in Belarus*, NAT’L AGENCY OF INVESTMENT AND PRIVATIZATION, <http://www.investinbelarus.by/sp/press/news/c70f38b1f4ed8e30.html> (last visited Apr. 11, 2017).

102. Anton Usov, *EBRD to Help Belarus Prepare First PPP – M10 Road*, EUROPEAN BANK FOR RECONSTRUCTION & DEVELOPMENT (May 10, 2016), <http://www.ebrd.com/news/2016/ebd-to-help-belarus-prepare-first-ppp-m10-road.html>.

103. In PPP transportation contracts, “availability fee” or “availability payment” refers to a project delivery method whereby a governmental entity makes fixed payments to a private contractor for performance of the project regardless of demand. See Dr. Silviu Dochia & Michael Parker, *Introduction to Public-Private Partnerships with Availability Payments*, PUBLIC WORKS FINANCING, [http://www.pwfinance.net/document/research\\_reports/9%20intro%20availability.pdf](http://www.pwfinance.net/document/research_reports/9%20intro%20availability.pdf) (last visited Apr. 11, 2017).

104. Usov, *supra* note 102.

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enacted in 2014 and largely seen as unreasonable.<sup>105</sup> In addition, legislative amendments aimed at simplifying the process to obtain a license for gas production were developed.

Another very important development in the energy sector concerns the restructuring of Ukrainian oil and gas monopolist, the National Joint Stock Company (NJSC) Naftogaz, which will be carried out pursuant to a new law “On the Natural Gas Market”<sup>106</sup> and the Third Energy Package.<sup>107</sup> Unbundling gas transportation activity from gas production and supply should increase transparency in the sector and attract investment.<sup>108</sup> Investors are particularly interested in this reform because Ukrainian legislation provides that a foreign legal entity may own up to forty-nine percent of the operator of the Ukrainian gas transportation system. Another sign that Ukraine is opening its gas market is that a significant number of private traders entered Ukraine to import gas from Europe in 2016, demonstrating that Naftogaz no longer has a monopoly on importing gas.<sup>109</sup>

The Ukrainian electricity market underwent significant changes on September 22, 2016, when two important laws were approved by Parliament. First, Parliament adopted a law “On the National Commission for State Regulation of Energy and Utilities” (NCSREU),<sup>110</sup> statutorily mandating the NCSREU’s existence (as opposed to the previous situation of its existence only by regulation) in order to fulfill Ukraine’s commitment as a party to the EU Energy Community. The law also set out a transparent

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105. In 2015, the Ukrainian Parliament adopted amendments to the Tax Code that reduced the payment for extraction of natural gas to be sold to industrial consumers (to be paid by natural gas producers) from fifty-five percent to twenty-nine percent, and twenty-eight percent to fourteen percent, depending on the extraction depth (effective Jan. 1, 2016), and reduced the payment for extraction of natural gas to be sold to households from seventy percent to fifty percent for extractions up to 5km deep (effective Apr. 1, 2016), which was further reduced to twenty-nine percent (effective Jan. 1, 2017). *Tax Rates for Natural Gas Production Significantly Decreased*, CMS LAW (Dec. 30, 2015), <http://www.cms-lawnow.com/ealerts/2015/12/ukraine-tax-rates-for-natural-gas-production-significantly-decreased>.

106. See Zakon Ukrayini Pro Rynok Pryrodnoho Hazu [Law of Ukraine on the Natural Gas Market], 2015, No. 329-VIII, ch. 9, *available at* <http://zakon5.rada.gov.ua/laws/show/329-19>.

107. As a member of the European Energy Community since February 1, 2011, Ukraine implemented European Union directives in the energy sphere (the so-called “Third Energy Package”) by means of Directive 2009/73/EC concerning common rules for the internal market in natural gas and Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks.

108. On September 22, 2016, the Cabinet of Ministers of Ukraine passed a resolution on the management of Naftogaz, which provided for the transfer of 100% shares of the company to the Cabinet of Ministers of Ukraine. Postanova O Deyaki Pytannya Upravlinnya Publichnyim Aktsionernym Tovarystvom “Natsional’na Aktsionerna Kompaniya “Naftohaz Ukrainy” [Decree on Certain Issues of Managing JSC National Joint Stock Company Naftogaz of Ukraine], 2016, No. 675, *available at* <http://zakon2.rada.gov.ua/laws/show/675-2016-%D0%BF>.

109. See Annual Report, NAFTOGAZ (2015), *available at* [http://www.naftogaz.com/files/Zvity/Naftogaz\\_Annual\\_Report\\_2015\\_engl.pdf](http://www.naftogaz.com/files/Zvity/Naftogaz_Annual_Report_2015_engl.pdf).

110. Zakon Ukrayini [Law of Ukraine] No. 1540-VIII, 2016, *available at* <http://zakon5.rada.gov.ua/laws/show/1540-19>.

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procedure for appointing and rotating members of the NCSREU, ensuring that the regulator is professional, transparent, and independent. Second, Parliament approved an amendment to Ukraine's law "On the Natural Gas Market," which envisages a gradual transition from the current system of state-owned electricity purchaser<sup>111</sup> to a privatized model of operation using direct supply agreements, a market for "day-ahead" contracts, and a balancing market. These reforms will provide more transparency and healthier competition in the electricity market.

In mid-2016, the State Property Fund of Ukraine announced a new "oblenergo" (electricity supply company) sale schedule.<sup>112</sup> Currently, the State Property Fund of Ukraine is preparing for privatization of six electricity supply companies, three large hydro-electric power plants, and state co-generation power plants and coal mines.

Because Ukraine is an unusually large energy consumer, the International Monetary Fund (IMF) required the country to increase its tariffs on energy sources for private households to an economically viable level.<sup>113</sup> Therefore, energy efficiency has become a more important issue in Ukraine, attracting investment from international financial institutions and Ukrainian banks, which provide financing for energy efficiency and renewable energy projects. Aiming to increase the share of renewable energy in the country's energy balance, last summer, despite Ukraine's economic crisis, the new government adopted legislative amendments demonstrating its support for the development of renewables. Consequently, the renewable energy sector, together with "green" tariffs, is still attractive for investors in Ukraine.

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111. Historically, the state enterprise Energorynok bought all of the electricity produced in Ukraine (as a wholesale purchaser) and sold it to electricity supply companies (suppliers), which then sold it to customers. Purchased energy is sold by Energorynok to 27 oblast energy companies (oblenergo) and suppliers licensed to supply electricity with unregulated tariffs (as independent suppliers). Oblenergos sell electricity to final consumers with regulated tariffs. The new law allows power producers to sell their electricity directly to the suppliers through freely negotiated bilateral contracts, bypassing Energorynok entirely. Thus, the producer and supplier can mutually decide on the price, volume, and terms of the supply.

112. The sale schedule was approved by SPFU Order No.774 (Apr.15, 2016).

113. In 2015, the National Commission for State Regulation of Energy and Utilities passed a resolution providing for increased tariffs in five stages. See NCSREU Res. 220 (Feb. 26, 2015), available at <http://www.nerc.gov.ua/index.php?id=14359>. At a meeting on April 27, 2016, the Cabinet of Ministers set the unified gas price for the population at the level of UAH 6,879 per 1,000 cubic meters, effective May 1, 2016. The tariffs will constitute 100% of the "parity from import" price and will include inter alia the cost of gas transportation through pipelines and taxes. See Iuliia Ogarenko & Ivetta Gerasimchuk, *Winter Approaches: The Real Test for Ukraine's Energy Subsidy Reforms*, GLOBAL SUBSIDIES INITIATIVE (Sept. 1, 2016), <https://www.iisd.org/gsi/news/winter-approaches-ukraine-subsidy-reforms#ref1>.

## V. Data Privacy and Religious Freedom Law in Russia

On July 6, 2016, Russian President Vladimir Putin signed into law new counter-terrorism legislation commonly referred to as the “Yarovaya Law”<sup>114</sup> after its principal sponsor, arch-conservative senator Irina Yarovaya. The Yarovaya Law amended existing Russian federal laws on data retention and added restrictions on religious freedom. Most of the amendments took effect on July 20, 2016, although some (such as those relating to storage of metadata) will not take effect until July 1, 2018.<sup>115</sup>

### A. TELECOMMUNICATIONS PORTION OF YAROVAYA LAW

The amendments regarding telecommunications require “telecom providers” and “Internet arrangers”<sup>116</sup> to:

1. Allow access to communicated information (such as telephone calls, email messages, text messages, etc.) by Russian government investigators and prosecutors;

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114. Federal’nyi Zakon RF O Vnesenii Izmeneniy v Federal’nyi Zakon “O Protivodeystvii Terrorizmu” i Otdel’nyye Zakonodatel’nyye akty Rossiyskoy Federatsii v Chasti Ustanovleniya Dopolnitel’nykh mer Protivodeystviya Terrorizmu i Obespecheniya Obshchestvennoy Bezopasnosti [Federal Law on Amending the Federal Law on Combating Terrorism and Certain Legislative Acts of the Russian Federation to Establish Additional Measures to Counter Terrorism and Ensure Public Safety], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2016, No. 374-FZ, *available at* <http://pravo.gov.ru/proxy/ips/?docview&page=1&print=1&nd=102404066&rdk=0&&empire=>.

115. Ksenia Koroleva, “Yarovaya” Law – New Data Retention Obligations for Telecom Providers and Arrangers in Russia, LATHAM & WATKINS LLP: GLOBAL PRIVACY & SECURITY COMPLIANCE LAW BLOG (July 29, 2016), <http://www.globalprivacyblog.com/privacy/yarovaya-law-new-data-retention-obligations-for-telecom-providers-and-arrangers-in-russia/>.

116. The term “telecom provider” is defined as “a legal entity or a sole proprietor providing communication services on the basis of a Russian license.” Federal’nyi Zakon RF O Svyazi [Federal Law of the Russian Federation on Communications], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2003, No. 126-FZ, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102082548&intelsearch=126-FZ>; Koroleva, *supra* note 115. Communication services include “[r]eceiving, processing, storing, transferring or delivering any physical or electronic communications,” and provision of such services usually requires a license under Russian law. Ukazy Ob Utverzhdenii Perechnya Naimenovaniy Sslug Svyazi, Vnosimykh v Litsenzii, i Perechny Litsenziyonnykh Usloviy [Decree on Approval of a List of Communication Services Subject to a License and Rules and Procedures for Receipt of a License], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2005, No. 87-FZ, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102091109&intelsearch=87-FZ>; Koroleva, *supra* note 115.

The term “Internet arranger” is defined as “a person ensuring the functioning of information systems and/or software used to receive, transmit, deliver, and/or process electronic messages of Internet users” (e.g., social media). Federal’nyi Zakon RF Ob Informatsii, Informatsionnykh Tekhnologiyakh i o Zashchite Informatsii [Federal Law of the Russian Federation in Information, Information Technology and Data Protection], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 149-FZ, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102108264&intelsearch=149-FZ>; Koroleva, *supra* note 115.

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2. Stop providing communication services to any user who fails to respond to a request by investigators or prosecutors to confirm that user's identity;
3. Maintain inside the Russian Federation:
  - a. For three years (in the case of telecom companies) or one year (for Internet providers), the metadata information confirming transmission, receipt, delivery, and processing of voice data, text messages, pictures, video, sound, or other communications;
  - b. For six months, the actual contents of such communications.<sup>117</sup>

In addition, the law requires providers to supply any other information “which is necessary for these authorities to achieve their statutory goals” and to assist the authorities with decoding the data provided.<sup>118</sup> Violation of these provisions can result in an administrative fine of up to one million rubles.<sup>119</sup> Arguably, failure to maintain or provide more than one communication (e.g., several emails) could be viewed as multiple violations, but this is yet to be tested.

An uproar ensued over the passage of these provisions on legal, technical, and financial grounds. One of the major controversies surrounding the Yarovaya Law is that it appears to extend to all telecom or Internet providers who facilitate any communication to or from Russia, thus encompassing foreign providers such as Google, Facebook, Yahoo, and many others.<sup>120</sup> Many of these companies are located in countries that forbid, on privacy grounds, the tracking and maintenance of certain communications covered by the Russian law (such as telephone calls), putting these global providers in a position of having to violate either their own country's laws or Russian law (if they are to continue operating in Russia).<sup>121</sup> One western operator, Private Internet Access, immediately discontinued its business in Russia upon passage of the law for this reason.<sup>122</sup>

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117. The requirement that contents of communications be stored for six months will take effect on July 1, 2018 (or possibly July 1, 2023, if a current draft law seeking such postponement is passed). Koroleva, *supra* note 115.

118. SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2016, No. 374-FZ, *supra* note 114, at art. 13, 15.

119. Irina Yarovaya's “Anti-Terrorist” War on Civil Rights, MEDUZA (June 22, 2016, 15:51), <https://meduza.io/en/feature/2016/06/22/irina-yarovaya-s-anti-terrorist-war-on-civil-rights>; Russian Minister Expects No Rise in Telecom Prices Due to New Anti-Terror Law, TASS (July 7, 2016, 15:28), <http://tass.com/economy/886926>.

120. See Julianna Tabastajewa, *Yarovaya Law: Russian Parliament Passes Package of Laws on Data Retention Obligations*, LEXOLOGY (Sept. 12, 2016), <http://www.lexology.com/library/detail.aspx?g=F07d1a93-af0c-46da-b1e9-c2ad78c50437>.

121. See *id.*

122. *We Are Removing Our Russian Presence*, PRIVATE INTERNET ACCESS (July 2016), <https://www.privateinternetaccess.com/forum/discussion/21779/we-are-removing-our-russian-presence>.

**B. RELIGIOUS PORTION OF YAROVAYA LAW**

The Yarovaya Law also places restrictions on religious activities outside of designated places of worship.<sup>123</sup> The amendments to Russia's Religion Law<sup>124</sup> require that "missionary activity" be done "without hindrance" only at churches and other religious sites designated by the chapter, and that it is expressly forbidden to perform missionary activities in private homes. "Missionary activity" is defined as

the activity of a religious association, aimed at disseminating information about its beliefs among people who are not participants in that religious association, with the purpose of involving these people as participants. It is carried out directly by religious associations or by citizens and/or legal entities authorized by them, publicly, with the help of the media, the internet or other lawful means.<sup>125</sup>

Missionary activities may be performed only by authorized members of registered religious groups and organizations. Thus, only state-registered religious groups and organizations may engage in such religious expression.<sup>126</sup> The amendments prohibit even the informal sharing of beliefs, such as responding to a question, by individuals.<sup>127</sup> Citizens are required to report unauthorized religious activity to the government or face fines.<sup>128</sup> The law also increases the punishment for those engaging in "extremist" activity, a term used to prosecute Muslims and Jehovah's Witnesses.<sup>129</sup>

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123. Anugrah Kumar, *Russia Charges American Pastor Under New Anti-Evangelism Law*, CHRISTIAN POST (Oct. 2, 2016, 10:40 AM), <http://www.christianpost.com/news/russia-charges-american-pastor-under-new-anti-evangelism-law-170362/>.

124. Federal'nyi Zakon RF O Svobode Sovesti i o Religioznykh ob"Yedineniyakh [Federal Law of the Russian Confederation on Freedom of Conscience and Religious Associations], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1997 (as amended by 374-FZ), No. 125-FZ, art. 24(1), *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102049359&intelsearch=125-FZ>.

125. *Id.*; see also Victoria Arnold, *Russia: Anti-Sharing Beliefs Law First Use*, ISKON NEWS (Aug. 24, 2016), <https://iskconnews.org/russia-anti-sharing-beliefs-law-first-use,5760/>.

126. The amendments particularly affect Protestants and Jehovah's Witnesses in Russia, "who often do not have their own permanent buildings." Victoria Arnold, *Putin Signs Sharing Beliefs, "Extremism," Punishments*, FORUM 18 NEWS (July 8, 2016), [http://forum18.org/archive.php?article\\_id=2197](http://forum18.org/archive.php?article_id=2197).

127. *Id.*

128. K. Shellnutt, "Russia's Newest Law: No Evangelizing Outside of Church," Christianity Today, July 8, 2016, <http://www.christianitytoday.com/gleanings/2016/june/no-evangelizing-outside-of-church-russia-proposes.html>.

129. Victoria Arnold, "Extremism" Religious Freedom Survey, FORUM 18 NEWS (Sept. 13, 2016), [http://www.forum18.org/archive.php?article\\_id=2215](http://www.forum18.org/archive.php?article_id=2215).



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Violation of the religious portion of the Yarovaya Law can result in a fine of up to 50,000 rubles for individuals (about six weeks' wages for the average Russian) and one million rubles for organizations.<sup>130</sup>

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130. Elizabeth A. Clark, *Russia's New Anti-Missionary Law in Context*, RELIGIOUS FREEDOM INSTITUTE (Aug. 30, 2016), <https://www.religiousfreedominstitute.org/cornerstone/2016/8/30/russias-new-anti-missionary-law-in-context>.

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