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SYMPOSIUM  
IN HONOR OF PROFESSOR LUTZ



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## TABLE OF CONTENTS

### SYMPOSIUM IN HONOR OF PROFESSOR LUTZ

ROBERT E. LUTZ: PAUL E. TREUSCH PROFESSOR OF LAW EMERITUS.....	273
<i>Beth Caldwell and Warren Grimes</i>	
<b>ARTICLES</b>	
BOB LUTZ – EXPERT, MENTOR, AND FRIEND .....	275
<i>Diane Penneys Edelman</i>	
STICKY BELIEFS ABOUT TRANSNATIONAL LITIGATION .....	284
<i>Christopher A. Whytock</i>	
AT THE INTERSECTION OF NATIONAL, INTERNATIONAL, AND EUROPEAN LAWS: THE EXAMPLE OF THE HUNGARIAN FOOD VOUCHER CASES – SOME THOUGHTS ON THE RELATIONSHIP BETWEEN NATIONAL, INTERNATIONAL, AND EUROPEAN LAWS .....	297
<i>Marcel Szabó</i>	
HOW TO ENACT AN INTERNATIONAL ARBITRATION STATUTE .....	318
<i>Daniel M. Kolkey</i>	
THE ALL IMPORTANT “G” IN ESG AND ITS RELATIONSHIP TO GOOD GOVERNANCE AND CORPORATE COMPLIANCE IN ANTI-CORRUPTION: TOWARDS A MORE HOLISTIC APPROACH .....	340
<i>Lucinda A. Low</i>	
THE CONCEPT OF SUSTAINABILITY IN INTERNATIONAL LAW: A RESEARCH AND POLICY BIBLIOGRAPHY.....	361
<i>Joseph F. C. DiMento and Jessica Pierucci</i>	
AGAINST SYSTEMIC REVIEW OF FOREIGN JUDGMENTS.....	367
<i>William S. Dodge</i>	

GLOBAL LEGAL EDUCATION, THE GLOBALIZING LEGAL PROFESSION, AND THE FUTURE OF INTERNATIONAL LAW .....	386
<i>Austen Parrish</i>	
THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION: SOME CHALLENGES AND RESPONSES.....	401
<i>Bruno Simma and Giorgia Sangiuolo</i>	
THE UNITED NATIONS SECURITY COUNCIL IN THE 21 <sup>ST</sup> CENTURY: WHERE ARE WE NOW AND WHERE ARE WE HEADING? .....	430
<i>Bruce C. Rashkow</i>	
THE UNITED STATES SETTLES CLAIMS AGAINST SUDAN.....	451
<i>Ronald J. Bettauer</i>	
WILL THE NORTH AMERICAN AUTO INDUSTRY SURVIVE BIDEN AND AMLO’S POLICIES? .....	465
<i>David A. Gantz</i>	
RESURGENT AUTHORITARIANISM AND THE INTERNATIONAL RULE OF LAW.....	483
<i>Wayne Sandholtz</i>	
THE CHALLENGES OF TEACHING PRIVATE INTERNATIONAL LAW.....	506
<i>David P. Stewart</i>	
INTELLECTUAL PROPERTY IN PLANT MATERIAL IN THE ASEAN COUNTRIES.....	529
<i>Christoph Antons</i>	
WHO USES THE U.S.? LAW FIRMS, GLOBALIZATION, AND APPROACHES TO PRESENCE IN THE U.S.....	550
<i>Carole Silver</i>	
THE ROLE OF THE ABA’S “SUMMITS” IN FACILITATING GLOBAL NETWORKS AND INTERNATIONAL CROSS-BORDER LEGAL PRACTICE .....	589
<i>Laurel Terry</i>	
HUMAN RIGHTS DEROGATIONS IN NATIONAL EMERGENCIES: LESSONS FROM AFRICA .....	640
<i>Aaron Fellmeth</i>	
DISCLAIMING WARRANTIES THAT WERE NEVER IMPLIED: THE IRRELEVANCE OF UCC SECTION 2-316 FOR ARTICLE 35 OF THE CISG .....	685
<i>William P. Johnson</i>	
RETHINKING THE WTO – A TRIBUTE TO BOB LUTZ .....	716
<i>Paul B. Stephan</i>	
DEAD OR ALIVE? THE FOREIGN INVESTMENT PROTECTION IN THE EU AFTER THE EXPIRY OF THE INTRA-EU BITS.....	731
<i>Aleksander Gubrynowicz and Marek Wierzbowski</i>	
THE CHALLENGE OF CREATING A CONCEPT OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT IN THE MEXICAN CONSTITUTION ACCORDING TO INTERNATIONAL LAW.....	747
<i>Antonio Olguín-Torres</i>	
OLYMPIC LAW TODAY.....	768
<i>Christoph Vedder</i>	

**NOTES & COMMENTS**

LOST, ABANDONED, AND FORGOTTEN: REFUGEE PROTECTION IN THE TIME OF COVID .... 810  
*Sultan R. Alshawa*

HIT EM' WHERE IT HURTS: THE UNITED STATES SHOULD CRIMINALIZE EMPLOYMENT  
DISCRIMINATION TO MAKE BAD BEHAVIOR KNOWN AND FACILITATE IMPROVEMENT ..... 831  
*Juliet Di Pietro*

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**ROBERT E. LUTZ:  
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EMERITUS**

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Beth Caldwell and Warren Grimes

The symposium in this issue is dedicated to Professor Robert E. Lutz in honor of his distinguished and continuing career of legal service to the law school, to the legal profession, and to the community of nations.

Professor Lutz's leadership, passion and academic prowess were demonstrated early on as an undergraduate at the University of Southern California, where he served in leadership positions and graduated in 1968 as a member of Phi Beta Kappa. His leadership continued at the University of California, Berkeley Law School, where he was a co-founder of the Environmental Law Quarterly, the first environmental journal in the U.S. Lutz received his J.D. in 1971 and went on to clerk for U.S. District Court Judge Edward Schwartz (S.D. Ca.). He worked as an associate at Pillsbury Madison & Sutro, served as Deputy Regional Counsel of the Federal Energy Administration, and directed the Institute for Coastal Law and Management at the University of Southern California. His first full-time teaching position was at the McGeorge Law School.

In 1978, Lutz joined the faculty of Southwestern Law School. He has held several distinguished professorships, including his current position as the Paul E. Treusch Professor of Law Emeritus. His law-school centered activities included directing the first ABA-accredited study-abroad program in China, co-founding and serving as a faculty advisor for this Journal, and bringing numerous international experts to the school to teach and write about environmental law and various international public and private law topics.

All the while, Professor Lutz was active in bar association activities, including the California State Bar's International Law Section. In 2014, that section awarded him the Warren M. Christopher International Lawyer of the Year Award for his numerous international law achievements.

On a national level, from 1983-1987, Professor Lutz served as Editor-in-Chief of the *International Law Journal*, the flagship journal of the ABA's International Law Section. Lutz participated in exchanges of U.S. lawyers with bars and law societies in a variety of countries, including China, Cuba, India, Guatemala, Brazil, South Africa, and Iran. He led a number of these delegations. In 1980 and 1984, Lutz received Alexander von Humboldt grants to study at the University of Munich and the University of Augsburg. More recently, he has received Fulbright grants to lecture and teach in Eastern European nations.

Professor Lutz's scholarship covers transnational law treatment of environmental law, public and private international law, and international aspects of the law profession. His reputation has led to experience as an arbitrator under the NAFTA agreement and to consulting for the State Department, the United States Trade Representative, and the WTO. In his work, Lutz was unfailingly principled. He has fought to vindicate the role of lawyers around the world in their role as protectors of victims of oppressive or autocratic regimes.

This substantial list of accomplishments and awards does not provide a complete picture of Professor Lutz. He is a kind and giving colleague and collaborator who reaches out to help others. As a teacher, he was always ready to answer a student's questions and helped many find their way to international related law practice. As a colleague, he was ever ready to engage with ideas for teaching, and he is generous about sharing ideas about research or writing endeavors.

Professor Lutz loves to laugh and could infectiously brighten the day for those around him by embellishing life's frustrations or the latest political gaff. His remarkable ability to make and retain friends all over the world was valuable in his own work and in assisting colleagues.

Perhaps the finest tribute to Professor Lutz is the list of contributors to this symposium, each of whom has had fruitful collaborations with him. Each took the time to contribute a substantive piece to this symposium in his honor, reflecting their high regard for Professor Lutz. The depth and breadth of their articles reflect the impressive scope of Professor Lutz's many contributions to the field. We join in saluting this scholar and lawyer who has done so much to foster the international rule of law.

# BOB LUTZ—EXPERT, MENTOR, AND FRIEND

Diane Penneys Edelman\*

RENOWNED EXPERTISE.....	275
MENTORSHIP .....	279
FRIENDSHIP .....	283

When one thinks of a synonym, they may think of synonymous adjectives like “fast” and “quick,” “easy” and “simple”—or synonymous nouns like “soda” and “pop.” But what is synonymous with Robert E. Lutz, Paul E. Treusch Professor of Law Emeritus in Residence at Southwestern Law School?

The words that immediately come to mind are “renowned expert, mentor, and friend.” Those are the synonyms that define Bob Lutz to me, and I am honored to share why I “define” Bob in this way.

## RENOWNED EXPERTISE

Starting with Bob as an “expert” is simple.<sup>1</sup> One only needs to look at the breadth of his scholarship, service, and the recognition that he has received during his amazing career. As a professor at Southwestern Law School for more than forty-four years, Bob has contributed profoundly to the education of thousands of students, produced reams of scholarship, and

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\* Professor of Law and Director of International Programs, Villanova University Charles Widger School of Law. The author is Co-Chair of the American Bar Association International Section’s International Legal Education and Specialist Certification Committee, which she co-chaired with Bob Lutz for several years. She has directed and taught in summer programs in Montréal and Rome, served as a Fulbright Specialist at European Humanities University in Vilnius, Lithuania, and taught abroad virtually as well. Heartfelt thanks to Gabrielle (“Gabby”) Talvacchia, Villanova Law ‘22, for her great research assistance.

<sup>1</sup> I address Bob’s reputation as “renown” later. *See infra* text accompanying notes 12-19.

brought renown to his institution.<sup>1</sup> Where did it all begin? Where did Bob's inspiration and unbounded fascination with all things international come from? Likely, before he attended Berkeley Law, where he founded Berkeley's Ecology Law Quarterly, which is "among the oldest and most prestigious journals publishing environmental law scholarship."<sup>2</sup> Perhaps this passion started when Bob went to college and law school as a first-generation student. Or perhaps the spark was ignited while Bob was working at the well-known firm, then known as Pillsbury, Madison & Sutro.<sup>3</sup> While working there, he received a Volkswagen Fellowship to Germany, where he ended up researching and writing about international environmental law, resulting in "what was then considered a seminal/groundbreaking article,"<sup>4</sup> titled "The Laws of Environmental Management: A Comparative Study."<sup>5</sup> Thus, as a burgeoning expert in comparative and international environmental law, Bob Lutz moved towards government service, with stints at other educational institutions, before eventually settling in at Southwestern Law School in 1978.<sup>6</sup>

Since his arrival at Southwestern Law, Bob has taught a broad range of subjects, and has been involved in numerous professional organizations. Unsurprisingly, he calls his service to the profession a "cornerstone" of his career.<sup>7</sup> And what a career it has been. Just last year, attorney and podcast host Howard Miller<sup>8</sup> interviewed and profiled Bob, describing him as "an

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1. The details of Bob's incredible training and experience before his arrival at and during his career at Southwestern is best spelled out in his faculty biography on Southwestern's website. *See generally Faculty, Robert E. Lutz*, SW. L. SCH., <https://www.swlaw.edu/faculty/emeritus/robert-lutz> (last visited Mar. 8, 2022).

2. *See About Ecology Law Quarterly*, ECOLOGY L. Q., <https://www.ecologylawquarterly.org/about/> (last visited Mar. 3, 2022).

3. Now Pillsbury Winthrop Shaw Pittman LLP, the firm's history traces back to 1874. *See PILLSBURY LAW*, <https://www.pillsburylaw.com/en/> (last visited Mar. 8, 2022); *see also Pillsbury Madison & Sutro LLP*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/books/politics-and-business-magazines/pillsbury-madison-sutro-llp> (last visited Mar. 8, 2022).

Prior to working at Pillsbury, Bob clerked with Chief Judge Edward J. Schwartz of the United States District Court for the Southern District of California. *See Robert E. Lutz, Member Spotlight: Robert E. Lutz*, ABA (Dec. 16, 2020), [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2020/voice-of-experience--december-2020/member-spotlight--robert-e--lutz/](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2020/voice-of-experience--december-2020/member-spotlight--robert-e--lutz/) [hereinafter *ABA Member Spotlight*].

4. *ABA Member Spotlight*, *supra* note 4.

5. Robert E. Lutz, II, *The Laws of Environmental Management: A Comparative Study*, 24 AM. J. COMP. L. 447, 447 (1976).

6. *See ABA Member Spotlight*, *supra* note 4.

7. *Id.*

8. Howard B. Miller is a JAMS (Judicial Arbitration and Mediation Services, Inc.) Mediator, Arbitrator, and Referee/Special Master. Miller was also President of the State Bar of California and a professor at the University of Southern California Gould School of Law. *See*

individual, a pioneer, and a person who's had an enormous impact on law practice . . . [who has received] virtually every award" for his work, and has been "chair of virtually every committee that exists."<sup>9</sup>

What does all of this mean? Simply put, Bob is a leader. He has chaired both committees and sections of the American Bar Association (ABA), Association of American Law Schools (AALS), Los Angeles Bar Association, and the California Bar Association. He has also served on federal government committees and centers focused on international trade, dispute resolution, and ethics.<sup>10</sup> Bob became an international arbitrator and had a role in engineering the "extraordinary growth" of the field in California, including participating in drafting a law that would become the 1996 California International Arbitration and Conciliation Act.<sup>11</sup>

Along his professional path, Bob faced challenges that he met with careful planning and grace. He began his term as Chair of the ABA International Law Section just one month before the September 11<sup>th</sup> terrorist attacks. However, he was able to keep the Section's focus on improving the world through international law by encouraging members to attend its fall meeting that year in Monterrey, Mexico, *and* to hold its annual Spring 2002 meeting in New York—the first major conference in that city since that fateful date.<sup>12</sup>

Yet, even with his deep involvement in law *practice*, Bob saw, and strongly promoted, the importance of international legal *education*, a field that has been slower than others in developing student and law school engagement.<sup>13</sup> Toward this goal, Bob highlighted three crucial areas of study that law students should engage in to develop an understanding of, and the appropriate skills for, international legal practice, namely 1) public international law, which includes the role of States, the "limitations, porousness, and ability of transnational activity," the instruments and other sources of international law, best practices between nations and with non-governmental organizations (NGOs), the role of human rights and its

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Howard B. Miller, *Esq.*, *FCIArb*, JAMS <https://www.jamsadr.com/howard-miller/> (last visited Mar. 8, 2022).

9. *197: A Model Life in International Law: Celebrating Professor Robert Lutz*, DAILY JOURNAL (June 25, 2021), <https://soundcloud.com/losangelesdailyjournal/197-a-model-life-in-international-law-celebrating-professor-robert-lutz>.

10. See *ABA Member Spotlight*, *supra* note 4.

11. See CAL. CIV. PROC. CODE §§ 1297.11-1297.432 (1996); *197: A Model Life in International Law: Celebrating Professor Robert Lutz*, *supra* note 10.

12. See *197: A Model Life in International Law: Celebrating Professor Robert Lutz*, *supra* note 10.

13. See John A. Barrett, Jr., *International Legal Education in U.S. Law Schools: Plenty of Offerings, But Too Few Students*, 31 INT'L LAW. 845, 845-46 (1997).

connection with transnational business activities; 2) international business transactions; and 3) comparative or foreign law study. Courses in these areas helped students gain an understanding of how other countries solve legal problems and how other legal systems work.<sup>14</sup> He consistently urged his colleagues to teach these courses and encouraged students to take them.

Bob's commitment to the importance of international legal education is also evidenced by his many publications devoted to that field. In addition to founding Berkeley Law's *Ecology Law Quarterly* as a law student, Bob revived the ABA International Law Section's journal, *The International Lawyer*, and served as its Editor-in-Chief for five years.<sup>15</sup> His goal in reviving *The International Lawyer* was to emphasize to its readers the important relationship between legal scholarship and law practice; Bob believed that the goal of law journals should not be simply to showcase intellectual and analytical aspects of the law, but to train lawyers by publishing articles about legal developments and issues that would be helpful to *practitioners*.<sup>16</sup> Bob also co-founded the ABA's Senior Law Division in 1986 to encourage the organization's experienced lawyers to continue to learn and to promote their involvement in *pro bono* legal work.<sup>17</sup> It is no surprise that interviewer Miller described Bob's work as "pathbreaking," and called him a "giant, in international law, in law practice in California, and in legal education."<sup>18</sup> Hence, my description of Bob and his career as "renowned."<sup>19</sup>

The above certainly qualifies Bob as an expert. However, there is more. Bob's expertise as a scholar is reflected in his publications in numerous fields, almost too numerous to count. This includes nearly two dozen articles on environmental law, his writings on the legal profession and ethics, guides on international commercial arbitration, and his exposition on the work of international organizations, entities and agreements (such as CAFTA—the Dominican Republic-Central America-United States Free Trade Agreement, the World Trade Organization, NAFTA—the North American Free Trade Agreement, the International Court of Justice, and the General Agreement on Tariffs and Trade), terrorism, human rights, election law, and discussions of legal issues in

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14. *See 197: A Model Life in International Law: Celebrating Professor Robert Lutz, supra* note 10.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See supra* note 1.



Mexico and Hong Kong.<sup>20</sup> Overall, Bob has more than eighty publications to his name, along with more than a dozen textbooks.<sup>21</sup> His dedication to both scholarship and practice have been rewarded with the State Bar of California International Law Section's Warren M. Christopher "International Lawyer of the Year Award," for "legal practitioners who render extraordinary service to [the legal] profession in the field of international law."<sup>22</sup> He has also received the ABA International Section Lifetime Achievement Award and was appointed to the California Supreme Court's International Commercial Arbitration Working Group.<sup>23</sup>

#### MENTORSHIP

What about Bob Lutz as a mentor? Of course, his scholarly work has provided guidance for many, focusing on these varied areas of law. However, Bob's work, both in writing and action, also exemplifies his dedication to *training and guiding* law students as well as the academic community to focus on the importance of international legal education. Training and guidance equate to mentorship.

That is where Bob's role as a mentor comes in. During the last thirty years, along with his other seventy-plus publications, Bob has produced several articles focusing on teaching international law.<sup>24</sup> As far back as 1992, Bob focused on how academia could better assist the "international

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20. This vast collection of scholarship can be found with legal search engines such as LEXIS, WESTLAW, and others. *See, e.g.*, Robert E. Lutz, *An Essay Concerning the Changing International Legal Profession*, 18 S.W. J. INT'L L. 215 (2011); Robert E. Lutz, *International Arbitration and Judicial Intervention*, 10 LOY. L.A. INT'L & COMP. L.J. 621 (1988); Robert E. Lutz, *The World Court in a Changing World: An Agenda for Expanding the Court's Role from a U.S. Perspective*, 27 STAN. J. INT'L L. 265 (1991); Robert E. Lutz, *On Combating the Culture of Corruption*, 10 S.W. J. L. & TRADE AM. 263 (2004).

21. Bob's publications are listed on his Southwestern faculty page. Additionally, Southwestern notes that Bob is available for media comment on 24 topics related to legal practice, approximately half of which are international in nature. *See Faculty, Robert E. Lutz, supra* note 2.

22. *See California Life Fellow Robert Lutz*, AM. B. FOUND. (Aug. 15, 2014), <https://www.americanbarfoundation.org/fellows/news/506>.

23. *See Professor Robert Lutz Appointed to Task Force on International Commercial Arbitration*, S.W. L. BLOG (Feb. 21, 2017), <https://www.swlaw.edu/swlawblog/201702/professor-robert-lutz-appointed-task-force-international-commercial-arbitration#:~:text=Last%20year%2C%20he%20received%20a%20Lifetime%20Achievement%20Award,as%20the%20Outstanding%20International%20Lawyer%20of%20the%20Year>.

24. *See, e.g.*, Robert E. Lutz, *Comparative Observations About Transnational Legal Education and Legal Scholarship*, 46 INT'L LAW. 625 (2012); Robert E. Lutz, *On Scholarship in the American Legal Academy: An Essay*, 46 INT'L LAW. 673 (2012); Robert E. Lutz, *Reforming Approaches to Educating Transnational Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449 (2012) [hereinafter *Reforming Approaches*]; Robert E. Lutz, *Teaching, Practicing and Serving the International Legal Profession*, 13 WHITTIER L. REV. 163 (1992) [hereinafter *Teaching, Practicing, and Serving the Int'l Legal Profession*].

legal profession” by instilling in students the knowledge that every type of legal practice involves international legal issues.<sup>25</sup> When a handful of professors were espousing this same view, Bob recognized the potential growth of international legal practice, and the growing presence of international legal issues in courts and in business transactions.<sup>26</sup> Not only has Bob emphasized the increasing breadth of opportunities in international practice, but he has also advised students on how to best prepare themselves for opportunities in international practice by appreciating cultural differences, learning new languages, and gaining exposure to issues that will arise in international practice through their coursework.<sup>27</sup> Urging law students to develop and improve their future profession, Bob coaches “Give to it, and it will give to you!”<sup>28</sup> In so doing, he follows through with his article’s thesis: “Teaching, practicing and serving the legal profession, while seemingly disparate activities, are uniquely linked.”<sup>29</sup>

Later in his career, Bob remained focused on the importance of educating lawyers to understand the nuts and bolts of international practice. In the “golden anniversary” edition of the ABA’s *The International Lawyer*, Bob celebrated the significant growth of the journal’s content, which began as a newsletter, and emphasized the importance to continuously include practical articles for practitioners and informative reports regarding major developments in international subjects to keep up with the “increasing complexities of transnational and international legal practice.”<sup>30</sup> Indeed, he promoted and celebrated the publication of a collection of articles focused on transnational legal education and scholarship, and stressed that the American legal profession was facing two “main challenges.” First, how to respond “to the paradigmatic changes related to legal practice itself, brought about largely by the revolution in electronic communication and information technologies, the rapid integration and globalization of national economies, recessionary economic times, shifting demographics, and a growing standardization of professional requirements involving legal services.” Second, the challenge for U.S. legal educators to find proper responses to these changes in the practice of law.<sup>31</sup> Further, he touched on the ethical and technological challenges affecting

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25. See *Teaching, Practicing, and Serving the Int’l Legal Profession*, *supra* note 25, at 165-67.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 163.

30. Robert E. Lutz, *Treasuring What is Golden: The International Lawyer at Fifty*, 50 INT’L LAW. 19, 21 (2017).

31. *Reforming Approaches*, *supra* note 25, at 449-50.

legal practice, and emphasized the need for curricular reform in law schools to “prepare students to function as lawyers in a transnational legal world[.]”<sup>32</sup> He encouraged the development of robust legal study-abroad programs, the expansion of law school curricula to more effectively train students in substantive international law and practical skills for transnational work, including experimentation with technology transnationally.<sup>33</sup>

Bob’s work has also focused on the significant role that technology plays in the globalization of the work of the legal profession, noting areas such as licensing and ethics.<sup>34</sup> Bob noted almost a dozen years ago:

[T]echnology and the blurring of the borders of national and, in the United States, state regulation of the [legal] profession, will force the profession to continue to cope with the velocity and intensity of these impacts. As long as the profession’s core values remain valid, the changes wrought by technology and the other forces that drive globalization will continue to pose challenges and test the legal profession.<sup>35</sup>

Bob recognized the importance of the role of the ABA and other national institutions, to “continue to play a role in developing norms of professional behavior applicable to the profession nationally and to maintain a vigilant watch over technological developments having the capacity to impact the profession.”<sup>36</sup>

Bob Lutz has mentored thousands of attorneys by means of his ongoing emphasis on the ever-evolving nature of transnational law practice, and the consequent requirement for today’s lawyers to be properly trained for the demands and unique nature of this field. Moreover, he both explicitly and implicitly trained his students and fellow attorneys by leading and participating in legal exchanges with lawyers from more than a dozen countries,<sup>37</sup> and by teaching abroad on a regular basis.<sup>38</sup>

Bob also mentored by sharing opportunities with others. Bob acknowledges that “[w]itnessing student growth and their successes is exhilarating and personally satisfying” and that “service to the profession is a cornerstone of [my] career[.]”<sup>39</sup> As Chair of the ABA’s International

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32. *Id.* at 452.

33. *Id.* at 453-54.

34. *See An Essay Concerning the Changing International Legal Profession*, *supra* note 21, at 221-22.

35. *Id.*

36. *Id.* at 222-23.

37. The countries consisted of Brazil, China, Costa Rica, Cuba, Guatemala, India, Iran, Ireland, Lebanon, Scotland, South Africa, and Syria. *See Faculty, Robert E. Lutz*, *supra* note 2.

38. *Id.*

39. *See ABA Member Spotlight*, *supra* note 4.

Section from 2001 to 2002, Bob nurtured others—including this author—toward growth and leadership in the Section. More than a dozen years ago, Bob encouraged me to seek leadership in the Section’s International Legal Education and Specialist Certification Committee, a committee that “connects international legal academics, program directors, students, practicing lawyers, and bar leaders toward the goal of developing top-notch educational, training and specialist certification programs.”<sup>40</sup> His guidance, as former Chair of the Section and now one of its Senior Advisors, was invaluable, and has led me to years as a Co-Chair—including several years serving as a Co-Chair with him. That experience would have been daunting had Bob not been a natural mentor.

Mentorship is part and parcel of leadership,<sup>41</sup> and Bob Lutz is a prime example of a person who is both. During my years as Co-Chair, with Bob and others, Bob has always encouraged me in my work, whether it be toward the goal of meeting planning, Committee responsibilities, or giving presentations. His passion for international legal education did not stand in the way of him encouraging that passion in others; he was happy to share and nurture it.

Bob has mentored me individually as well. In addition to kindly introducing me to colleagues from both the U.S. and abroad, through work with the ABA, Bob offered me a unique opportunity during the COVID-19 pandemic, when international travel for teaching or attending conferences abroad was impossible. Bob invited me to join him and Professor Christopher Kelley,<sup>42</sup> of the University of Arkansas School of Law at Fayetteville, in teaching abroad virtually for the American Bar Association Rule of Law Initiative (“ABA-ROLI”)<sup>43</sup> in Chisinau, Moldova. Titled “LEAD” for “Legal Empowerment Through Advancing Debate,” we presented lectures via Zoom to judges and law professors in Moldova seeking to “integrat[e] legal reasoning exercises in teaching law,” and to “share course syllabus design practices incorporating legal reasoning exercises.” Not only was this experience deeply enriching, but it also led to

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40. See *International Law: Committee Descriptions and Leadership*, ABA [https://www.americanbar.org/groups/international\\_law/committees/committee-descriptions-and-leadership/](https://www.americanbar.org/groups/international_law/committees/committee-descriptions-and-leadership/) (last visited Mar. 10, 2022).

41. See *Leaders as Mentors*, 25 MENTORING & TUTORING: PARTNERSHIP LEARNING 391 (2017).

42. Professor Kelley is another academic passionate about international legal education; She has a Fulbright experience in both Ukraine and Moldova, and taught Legal Writing virtually at the Taras Shevchenko National University Law Faculty in Kyiv, Ukraine, for many years. See Christopher R. Kelley & Natalia Borozdina, *Internationalizing the U.S. Law Classroom: Lessons Learned from Teaching Transnationally*, 52 INT’L LAW. 131, 132 n.9 (2019).

43. See *Rule of Law Initiative*, ABA [https://www.americanbar.org/advocacy/rule\\_of\\_law/](https://www.americanbar.org/advocacy/rule_of_law/) (last visited Mar. 10, 2022).

a second invitation for me to teach virtually with ABA-ROLI, this time to teachers at several law schools in Tashkent, Uzbekistan.<sup>44</sup>

These experiences were extremely rewarding, and opened my eyes to how, even in the face of a crippling pandemic, international legal education can continue to take place without traveling abroad. In fact, this experience convinced me that once the pandemic subsides, teaching virtually will remain an effective, inexpensive, and yet, still personal way of sharing ideas and teaching internationally.<sup>45</sup> I would not have known how rewarding and inspiring this work would be without Bob Lutz's mentorship.

#### FRIENDSHIP

We often view our professional colleagues as acquaintances and less commonly as friends. With Bob Lutz, he is both a colleague and a friend. He is a courteous colleague—albeit one with many more years of presenting, publications, and overall experience. All the while, he is a friend guiding this author to develop stronger leadership skills in the ABA and beyond. Although this section of this article is the shortest, its impact on this author's growth as an international legal educator has been most significant. Simply put, Bob Lutz is a great scholar, great leader, great mentor, and great friend. It should be no surprise that, just as Bob advised law students to “give to the legal profession and it will give back to you,”<sup>46</sup> Bob has impacted many with the great joy and growth that *he* has been able to give to us.

Thank you, Bob, and congratulations on all your well-deserved recognition. Continue to inspire and share your expertise, mentorship, and friendship!

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44. This course, titled “Building Bridges in the Rule of Law Community,” was hosted by Westminster University in Tashkent, and focused on presenting a legal skills seminar and developing a related handbook.

45. See generally Dianne Penneys Edelman, *The Silver Lining of the COVID-19 Pandemic: Building Effective – and Enduring – International Legal Education Opportunities*, 46 S. ILL. U. INT'L L. J. 35 (2021) (discussing the benefits of virtual learning).

46. See *Teaching, Practicing, and Serving the Int'l Legal Profession*, *supra* note 25.

# STICKY BELIEFS ABOUT TRANSNATIONAL LITIGATION

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Christopher A. Whytock\*

I.	INTRODUCTION.....	284
II.	BIAS AGAINST FOREIGN LITIGANTS .....	286
III.	BIAS IN FAVOR OF DOMESTIC LAW .....	288
IV.	TRANSNATIONAL FORUM SHOPPING.....	289
V.	FORUM NON CONVENIENS .....	292
VI.	CONCLUSION: WHY STICKY BELIEFS AND WHAT CAN BE DONE? .....	295

## I. INTRODUCTION

Transnational litigation is an increasingly active field of scholarship,<sup>1</sup> teaching,<sup>2</sup> and legal practice.<sup>3</sup> So far, however, scholars have devoted

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\* Professor of Law and Vice Dean, University of California, Irvine School of Law. I thank Professor Bob Lutz for his many important contributions to the study and practice of transnational litigation and arbitration, for his interest in my early work, and for his warmth and mentorship. I am grateful to the Editors for the opportunity to participate in this special issue honoring him.

1. See, e.g., Samuel P. Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 AM. J. COMP. L. 793 (2007); Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015); Donald E. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of International Law Litigation*, 100 GEO. L.J. 709 (2012); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018); Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019); ROBERT E. LUTZ, A LAWYER’S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD (2007); Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344 (2016); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011).

2. See, e.g., GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (6th ed. 2018); DONALD EARL CHILDRESS III, MICHAEL D. RAMSEY & CHRISTOPHER A. WHYTOCK, TRANSNATIONAL LAW & PRACTICE (2d. ed. 2020); MATHIAS W. REIMANN, JAMES C. HATHAWAY, TIMOTHY L. DICKINSON & JOEL H. SAMUELS,

relatively little effort to the empirical study of transnational litigation.<sup>4</sup> As a result, we have a limited understanding of—and a limited ability to assess claims about—transnational litigation in action.<sup>5</sup>

This state of affairs is fertile ground for what one might call “sticky beliefs” about transnational litigation—beliefs that begin with assertions, which are often intuitive or commonsensical but made without empirical support, and then uncritically repeated by courts, lawyers, and scholars until they become entrenched conventional wisdom. The problem is that even though sticky beliefs are often unreliable, they can influence the decisions of courts, the development of law and policy, and transnational litigation scholars’ understanding of their object of study.

In this essay, I offer a small sampling of sticky beliefs about transnational litigation that were eventually subjected to empirical evaluation and found to have shaky evidentiary foundations. I first discuss two types of supposed bias in the U.S. legal system: bias against foreign litigants and bias in favor of domestic law. I next discuss the so-called transnational forum shopping claim—the claim that levels of transnational litigation in U.S. courts are high and increasing, largely due to forum shopping by foreign plaintiffs—as well as a variety of claims about the forum non conveniens doctrine. I conclude with some conjectures about

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TRANSNATIONAL LAW: CASES AND MATERIALS (2013); JOACHIM ZEKOLL, , MICHAEL G. COLLINS & GEORGE RUTHERGLEN., TRANSNATIONAL CIVIL LITIGATION (2013).

3. See CHILDRESS ET AL., *supra* note 2, at xxix-xxx (describing trends in transnational practice); ZEKOLL ET AL., *supra* note 2, at v (“Globalization has turned transnational civil litigation—once a niche topic—into a burgeoning field that has become an integral part of the practice of U.S. lawyers.”). As used in this Essay, “transnational litigation” refers to litigation that has connections—personal or territorial—to more than one country. A personal connection is an affiliation between a State and a person involved in, or affected by, a dispute. Examples of personal connections include nationality, citizenship, habitual residence, domicile, statutory seat, or principal place of business. A territorial connection is a connection between a dispute being litigated and a country’s territory. For example, a territorial connection exists with the country where an event giving rise to the dispute occurred; where a person or thing that is a subject of, or affected by, the dispute is located; or where the court adjudicating the dispute is located. From the perspective of the United States, litigation is transnational if it has a personal or territorial connection to at least one foreign country (for example, at least one foreign party).

4. See Paul R. Dubinsky, *The Future of Transnational Litigation in U.S. Courts: Distinct Field or Footnote?*, 101 AM. SOC’Y INT’L L. PROC. 365, 366 n.10 (2007) (“Surprisingly, little has been done by the Federal Judicial Center, the National Center for State Courts, or the Judicial Conference of the United States to provide Congress or the public with hard data on the number and kind of suits in the system with a transnational component, however that may be defined.”).

5. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (“[I]f we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one.”).

why there are sticky beliefs about transnational litigation, and what should be done about them.

## II. BIAS AGAINST FOREIGN LITIGANTS

In a 1996 study, Kevin Clermont and Theodore Eisenberg noted the conventional wisdom that “non-Americans fare badly in American courts. Foreigners believe this. Even Americans believe this.”<sup>6</sup> Using statistical analysis of a dataset of more than 90,000 civil actions filed in the U.S. District Courts, they found that “[i]n actions between an American and a non-American, non-Americans win 63% of the cases, whereas, inversely, Americans win only 37%.”<sup>7</sup> Even after controlling for other factors, they found that foreign citizenship of a party increased the likelihood of winning and that this effect was substantively large and statistically significant.<sup>8</sup> They acknowledged that “[a]n explanation for these significant differences is not obvious,”<sup>9</sup> but they did offer some conjectures. They firmly rejected the notion that U.S. courts are biased in favor of foreign parties.<sup>10</sup> Instead they proposed an explanation based on the selection of cases by parties:

[T]he most plausible and powerful explanation for the foreigner effect is that foreigners are reluctant to litigate in America for a variety of reasons, including the apprehension that American courts exhibit xenophobic bias and the pecuniary and nonpecuniary distastes for litigating in a distant place. Foreigners abandon or satisfy most claims and, presumably, persist in the cases that they are most likely to win. Thus, cases involving a foreign litigant, as plaintiff or defendant, are usually cases in which the foreigner has the stronger hand.<sup>11</sup>

In a follow-up study in 2007, Clermont and Eisenberg found the win rates of domestic and foreign plaintiffs had converged and leveled out by 2001; after 2001, the foreign plaintiff win rate again rose relative to domestic plaintiffs; and the win rates thereafter began converging again.<sup>12</sup>

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6. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1120 (1996) [hereinafter Clermont & Eisenberg, *Xenophilia*].

7. *Id.* at 1123.

8. *Id.* at 1131.

9. *Id.* at 1123.

10. *See id.* at 1132.

11. *Id.* at 1133-34.

12. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. OF EMPIRICAL LEGAL STUD. 441, 457 (2007) [hereinafter *Before and After*]. In this article, the authors also critically evaluate two empirical studies that suggested xenophobia, or a perceived “home court advantage” in some contexts. *See* Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1519 (2003); *see also* Utpal



Arguing that these findings were consistent with their case selection theory, they conjectured that during the 1980s, litigants assumed xenophobia prevailed, leading foreign plaintiffs to pursue only relatively strong cases. With the end of the Cold War and increasing globalization, this perception declined, thus gradually reducing the case selection effect. Then, after the 9/11 attacks, foreign parties again—albeit temporarily—feared litigating in U.S. courts, thus producing briefly renewed divergence.<sup>13</sup> In other words, “case selection drives the outcomes for foreigners.”<sup>14</sup>

Overall, Clermont and Eisenberg reject the conventional wisdom that foreign parties face systematic xenophobia in U.S. courts. Instead, they argue, “[f]oreigners’ aversion to a U.S. forum, an aversion that waxes and wanes over the years, can elevate the foreigners’ success rates. Consequently, researchers should be wary of drawing structural or cultural explanations from the changeable pattern of outcome data.”<sup>15</sup> More broadly, they point out the danger of sticky beliefs about the legal system:

[T]hese findings about foreigners in American courts reveal a deeper problem with knowledge of the legal system. Most observers probably have believed that judgments run against foreigners in American courts. As usual, even basic descriptive data about the functioning of American courts was lacking. [There is a] need to verify, notwithstanding compelling anecdotal evidence, deeply held beliefs about how the legal system works.<sup>16</sup>

Consistent with Clermont and Eisenberg’s study, my own empirical analysis of choice-of-law decisions by U.S. District Courts in transnational tort cases did not reveal bias in favor of domestic parties.<sup>17</sup> Using multivariate logit analysis controlling for a variety of factors that may influence international choice-of-law decision-making, I found that a U.S. party’s preference for domestic law did not increase the probability that a judge applied domestic law.<sup>18</sup> However, these findings do not imply that

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Bhattacharya, Neal Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation*, 50 J.L. & ECON. 625 (2007).

13. *Before and After*, *supra* note 12, at 457-59.

14. *Id.* at 464.

15. *Id.*

16. Clermont & Eisenberg, *Xenophilia*, *supra* note 6, at 1143.

17. Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719 (2009) [hereinafter Whytock, *Myth of Mess*].

18. *Id.* My findings in international tort cases were consistent with a study by Symeonides that examined 100 choice-of-law decisions by state and federal courts in product liability cases (not focusing on transnational cases) and found that “[d]espite impressions to the contrary, ... courts do not favor local over non-local litigants.” SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 338 (2006).

U.S. courts are never biased against foreign parties. As discussed below, there is evidence of bias in forum non conveniens decision-making.<sup>19</sup>

### III. BIAS IN FAVOR OF DOMESTIC LAW

Another sticky belief about transnational litigation is that American courts are biased in favor of the application of domestic law when they make international choice-of-law decisions.<sup>20</sup> As one leading choice-of-law scholar argued, the modern approaches have an “inherent forum law preference.”<sup>21</sup> As another put it, “if [plaintiffs’ attorneys] are competent they will at least be generally aware that the U.S. court selected will apply a modern conflicts approach that has... pro-forum... tendencies....”<sup>22</sup> This pro-domestic-law bias purportedly encourages transnational forum shopping into U.S. courts by raising plaintiffs’ expectations that judges will apply plaintiff-favoring U.S. substantive law in transnational litigation.<sup>23</sup>

The belief that choice-of-law decision-making is biased in favor of domestic law is not entirely unsupported by evidence. Indeed, several studies seemed to reveal such bias.<sup>24</sup> However, none of them focused specifically on transnational litigation. Nor did any of them attempt to control for the merits of pro-domestic law arguments under choice-of-law

19. See *infra* Part V.

20. See, e.g., EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 107 (4TH ED. 2004) (noting “homeward trend” in American choice of law); Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007) (“[C]ompared to the *lex loci* rule, the modern rules have one unmistakable consequence: they make it more likely that the forum court will apply local tort law to wrongs that occurred in another jurisdiction.”); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT’L L.J. 559, 560 (2002) (arguing that “[b]oth the empirical evidence and the existing scholarly consensus... indicate that there is a strong tendency under all modern conflicts systems to apply forum law”); see also SYMEONIDES, *supra* note 18, at 334 (noting “widely held assumption” that courts applying modern methods have strong pro-forum-law bias).

21. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 148 (spec. ed. 2005).

22. Whitten, *supra* note 20, at 568.

23. See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 558 (1989) (arguing that modern choice-of-law methods’ forum-law tendency “present[s] yet another incentive to the forum shopper”); Whitten, *supra* note 20 (describing the impact of pro-domestic-law bias on transnational forum shopping).

24. See Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989); Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291 (2000). But see SYMEONIDES, *supra* note 18, at 338 (in empirical study of choice-of-law decisions in product liability cases, finding that “[d]espite impressions to the contrary,... courts do not unduly favor the law of the forum”).

doctrine.<sup>25</sup> The problem is that one cannot reliably interpret pro-domestic law decision rates without controlling for factors associated with the merits of choice-of-law decisions. After all, if, in the aggregate, the merits of litigants' pro-domestic law arguments are systematically stronger than the merits of their pro-foreign law arguments under the applicable choice-of-law rules, then a high pro-domestic law decision rate may merely reflect the impartial application of those rules to the facts of each case rather than bias in favor of domestic law. Because prior studies did not attempt to control for the merits, it is unclear whether they provide evidence of actual pro-domestic law bias.

In a 2009 study, I attempted to mitigate this problem by analyzing the choice-of-law decisions of U.S. District Courts in transnational tort cases using multivariate statistical analysis.<sup>26</sup> I found that U.S. District Court judges decided that domestic law should apply at an estimated rate of only 37.1%, which for the reasons given above does not demonstrate lack of pro-domestic law bias. However, I also found that the likelihood that a court applied domestic law depended largely on two factors generally associated with the merits of a decision to apply domestic law: the nationality of the parties and the location of the conduct and injury. When these were all or mostly domestic, U.S. District Court judges applied domestic law at an estimated rate of almost 90%, but when they were mostly or all foreign they did so at an estimated rate of only 15%.<sup>27</sup> Moreover, I found that the nationality of the parties and the location of the conduct and injury were the most important predictors of choice-of-law decisions,<sup>28</sup> and that a choice-of-law method often linked by commentators to pro-domestic law bias—the Second Restatement method—actually reduced the likelihood of pro-domestic law decisions compared to other methods.<sup>29</sup> Together, these findings suggest that the choice-of-law decisions of the U.S. District Courts in transnational tort cases are driven largely by factors that are generally relevant under choice-of-law doctrine rather than by pro-domestic law bias.

#### IV. TRANSNATIONAL FORUM SHOPPING

Another sticky belief is that the level of transnational litigation in U.S. courts is high and increasing, due largely to forum shopping by foreign

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25. See Whytock, *Myth of Mess*, *supra* note 17, at 751-53.

26. *See id.*

27. *Id.* at 768-69.

28. *Id.*

29. *Id.* at 771-73.

plaintiffs.<sup>30</sup> Perhaps the most memorable version of this transnational forum shopping claim is Lord Denning's famous quip: "As a moth is drawn to the light, so is a litigant drawn to the United States."<sup>31</sup> Litigants invoke this claim when moving to dismiss transnational litigation,<sup>32</sup> and judges do so when granting or affirming dismissals.<sup>33</sup> In addition to using the transnational forum shopping claim to argue for case-specific outcomes, some litigants use it to argue for doctrinal changes intended to discourage plaintiffs from bringing transnational claims to U.S. courts and protect business defendants from such claims. Although it would be difficult to demonstrate a cause-and-effect relationship between these advocacy efforts and the Supreme Court's adoption of anti-forum shopping measures, litigants using this strategy have a track record of success.<sup>34</sup> Moreover, in

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30. See, e.g., HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS v (2008) (asserting that there has been a "growing torrent" of transnational cases in the last thirty years); Paul R. Dubinsky, *The Future of Transnational Litigation in U.S. Courts: Distinct Field or Footnote?*, 101 AM. SOC'Y INT'L L. PROC. 365, 366 (2007) (arguing that "certain facts on the ground are clear: [i]n recent decades, litigation in U.S. courts with a foreign or international component has been growing in volume...."); *Radeljak v. Daimlerchrysler Corp.*, 719 N.W.2d 40, 50 n.1 (Mich. 2006) (Markman, J., concurring) (claiming "an increasing number of foreign citizens are being injured by, and bringing lawsuits against, [American] companies"); Ángel R. Oquendo, *Justice for All: Certifying Global Class Actions*, 16 WASH. U. GLOBAL STUD. L. REV. 71, 72 (2017) ("Ever more often, the U.S. judiciary has had to adjudicate claims staked by foreigners, who may or may not reside in the United States...."); Jeremy Ostrander, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments*, 22 BERKELEY J. INT'L L. 541, 582 (2004) (claiming an "increasing presence of foreign plaintiffs in U.S. courts").

31. *Smith Kline & French Laboratories Ltd and others v. Bloch* [1983] 1 WLR 730, CA.

32. See, e.g., Brief of Defendant-Appellee at 35, *Imamura v. Gen. Elec. Co.*, 957 F.3d 98 (1st Cir. 2020) (No. 19-1457), 2019 WL 3714644, at \*35 (arguing successfully that Court of Appeals should affirm lower court's forum non conveniens dismissal; asserting that "[t]he American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts"); Brief for Defendants-Appellees at 19-20, *Giglio Sub S.N.C. v. Carnival Corp.*, 523 F. App'x 651 (11th Cir. 2013) (No. 12-15533-CC), 2013 WL 1399472, at \*19-20.

33. See, e.g., *Rolls-Royce Commercial Marine, Inc. v. New Hampshire Ins. Co.*, No. 09-61329-CIV. 2010 WL 5067608, at \*7 (S.D. Fla. 2010) (granting motion to dismiss on forum non conveniens grounds; stating that "[w]ithout the doctrine of forum non conveniens, 'American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.'"); *Auxer v. Alcoa, Inc.*, Nos. 2:09cv995, 2:09cv1429, 2:09cv1430, 2:09cv1431, 2:09cv1438, 2010 WL 1337725, at \*4 (W.D. Pa. 2010) (granting motion to dismiss on forum non conveniens grounds and stating that "Courts are suspicious that a foreign plaintiff's decision to bring suit in the United States is motivated by a search for a jurisdiction with laws that would be the most favorable for the claim").

34. See, e.g., Brief for Petitioners at 44, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (No. 10-76), 2010 WL 4624153 at \*44, (arguing successfully the Supreme Court should hold that claim against foreign subsidiaries of U.S. corporation should narrow the scope of general jurisdiction over corporations; asserting that "[m]any foreign corporations view

*Piper Aircraft Co. v. Reyno*, the Court expressly relied on the transnational forum shopping claim to justify its endorsement and invigoration of the forum non conveniens doctrine as a measure to reduce transnational litigation in U.S. courts.<sup>35</sup>

In a recent article, I theoretically assessed and empirically evaluated the transnational forum shopping claim.<sup>36</sup> Theoretically, I argued that there are reasons to doubt the claim: changes in U.S. law have made the U.S. legal system less attractive to plaintiffs than it may once have been, and meanwhile legal changes abroad have made other legal systems more attractive.<sup>37</sup> Empirically, using data on approximately 8 million civil actions filed in the U.S. District Courts since 1988, I showed that transnational diversity cases represent only a small portion of overall litigation in the

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the potential for liability in the American legal system as a considerable deterrent, taking the view that ‘[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.’”); Brief for Petitioner at 32, *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007) (No. 06-102) 2006 WL 3203257, at \*32 (arguing successfully that the Supreme Court should hold that district courts may grant forum non conveniens dismissals without first determining whether it has jurisdiction; arguing that “allowing forum non conveniens to be decided at the outset will ensure that the doctrine does not become an illusory protection for foreign litigants. Compared with the jurisdictional rules that prevail in most other countries, the bases for jurisdiction in United States courts are exceedingly generous to plaintiffs. Forum non conveniens has thus properly been regarded in the international arena as a flexible tool for limiting the risk that essentially foreign disputes would nonetheless be drawn to United States courts.”); Brief for Petitioners at 26, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 226391, at \*26 (arguing successfully that the Supreme Court should dismiss Sherman Act claims based on harm suffered abroad by price-fixing conduct that allegedly raised prices in the United States and foreign countries; arguing that “[t]he interpretation adopted by the court of appeals would flood the federal courts with foreign claims by all persons who can allege injury from conduct that also injured ‘someone’ in U.S. commerce. With the globalization of economic activity, foreign harms can almost always be linked to some domestic harm. There is every reason to expect that foreign claimants will attempt to assert claims under U.S. law in federal court to obtain the treble damages, liberal discovery rules, jury trials and class action procedures not available in many of their own jurisdictions.... As the Solicitor General has noted, foreign plaintiffs are bringing antitrust claims to recover for injuries arising from purely foreign transactions with ‘increasing frequency.’”).

35. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 252 (1981) (“[I]f conclusive or substantial weight were given to the possibility of a change in law, the forum non conveniens doctrine would become virtually useless. Jurisdiction and venue requirements [in U.S. courts] are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous.... The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.”).

36. See generally Christopher A. Whytock, *Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment*, J. OF EMPIRICAL LEGAL STUD. (2022) (<https://onlinelibrary.wiley.com/doi/10.1111/jels.12306>) [hereinafter *Transnational Litigation*].

37. See *id.* at Part II.

district courts, their level has decreased overall, and U.S., not foreign, plaintiffs file most of them.<sup>38</sup> The data also revealed that federal question filings by foreign resident plaintiffs are not extensive or increasing either.<sup>39</sup> These findings challenge the transnational forum shopping claim and law reforms based on it, and suggest that lawyers, judges, scholars and policymakers should no longer rely on it.<sup>40</sup>

## V. FORUM NON CONVENIENS

There are also a variety of sticky beliefs about the forum non conveniens doctrine, which gives courts discretion to dismiss transnational litigation if there is an available and adequate alternative forum.<sup>41</sup> It is sometimes assumed that the alternative forum requirement makes forum non conveniens more akin to a transfer doctrine than a dismissal doctrine, the premise being that a plaintiff will refile the claim in the defendant's proposed foreign court.<sup>42</sup> A 1987 study by David Robertson empirically challenged that belief.<sup>43</sup> Based on a survey of lawyers representing plaintiffs in suits dismissed on forum non conveniens grounds, he found

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38. *See id.* at Part III.B.

39. *Id.* at Part IV.C.

40. These findings build on the older and less systematic analysis in, Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) [hereinafter *Forum Shopping System*] (identifying downward trend in transnational diversity litigation in the U.S. District Courts during the period studied), which were also reported in this journal in 2011 in connection with a conference organized by Professor Lutz. *See generally* Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L 31 (2011). The findings also build on those of Clermont and Eisenberg focusing on win rates of U.S. and foreign litigants but also identifying decline of judgments in transnational diversity cases. *See* Clermont & Eisenberg, *Xenophilia*, *supra* note 6; *Before and After*, *supra* note 12. Some have speculated that transnational litigation in state courts may be increasing. *See, e.g.*, Childress, *supra* note 1; Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397 (2018). So far, however, this conjecture has not been empirically evaluated, due to limited available state court data.

41. *Piper Aircraft Co.*, 454 U.S. at 254 n.22 (1981) (“At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied.”).

42. *See* David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L. Q. REV. 398, 417 (1987) (noting the “impression that dismissing a transnational case for forum non conveniens is little more drastic than transfer of a case to another federal court”).

43. *Id.* at 417.

that “these cases hardly ever make it to trial in a foreign forum.”<sup>44</sup> “Pretending that such dismissals are not outcome-determinative,” he argued, “is ‘a rather fantastic fiction.’”<sup>45</sup>

An empirical study by Joel Samuels posed a different challenge to this belief.<sup>46</sup> He examined every published forum non conveniens decision by U.S. federal courts since 1982, and found that the alternative forum requirement is often treated as discretionary, not meaningfully analyzed, or bypassed altogether.<sup>47</sup> Another empirical study, by Michael Lii, reinforced Samuels’ conclusion.<sup>48</sup> Based on an analysis of 692 federal forum non conveniens decisions, he found that courts decide that an available and adequate alternative forum is lacking in only 18% of cases.<sup>49</sup> Although he found that foreign countries with the lowest tier of rule-of-law ratings were more likely to be deemed inadequate than those with the highest, they were nevertheless found adequate most of the time (67%).<sup>50</sup> These studies suggest the forum non conveniens doctrine as actually applied is unlikely to ensure that suits will only be dismissed if an adequate alternative forum is available for the plaintiff.

Despite these findings, courts sometimes persist in thinking of the forum non conveniens doctrine as a transfer doctrine.<sup>51</sup> This sticky belief may make courts more willing to grant forum non conveniens motions than if they confronted the likelihood that in some cases dismissal may deny the plaintiff a meaningful opportunity to seek a remedy.

Another sticky belief is related to the federal forum non conveniens doctrine’s distinction between domestic and foreign plaintiffs. While there is “ordinarily a strong presumption in favor of the plaintiff’s choice of

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44. *Id.*

45. *Id.* at 418.

46. See generally Joel H. Samuels, *When is an Alternative Forum Available - Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059 (2010).

47. *Id.* at 1061.

48. See generally Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOBAL L. & BUS. 513 (2009).

49. *Id.* at 526, tbl. 4.

50. *Id.* at 542, tbl. 19.

51. See, e.g., *Conflict Kinetics, Inc. v. Goldfus*, No. 1:21-cv-010912021 2021 WL 6133790, at \*2 (E.D. Va. 2021) (referring to “transfer under forum non conveniens”); *Nippon Shinyaku Co., Ltd. v. Sarepta Therapeutics, Inc.*, No. 21-1015-LPS, 2021 WL 4989489, at \*3 (D. Del. 2021) (stating that “cases in federal court may be transferred for forum non conveniens”); *Perusahaan Umum Listrik v. M/V Tel Aviv*, 711 F. 2d 1231, 1239 (5th Cir. 1983) (referring to forum non conveniens dismissal as “effectively transferring” the action to the alternative forum); *In Re Union Carbide Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 F. Supp. 842, 845 (S.D.N.Y. 1986) (referring to forum non conveniens doctrine as allowing an action “to be transferred to a more convenient forum”); *Syndicate 420 at Lloyd’s London v. Early Am. Ins.*, 796 F. 2d 821, 830 n.11 (5th Cir. 1986) (referring to “transfer under forum non conveniens”).

forum,” a foreign plaintiff’s choice “deserves less deference” than that of a U.S. plaintiff.<sup>52</sup> In *Piper Aircraft Co. v. Reyno*, the U.S. Supreme Court explained:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.<sup>53</sup>

In other words, the plaintiff’s citizenship is believed to be a proxy for convenience rather than a basis for discrimination.

However, my own empirical study of federal forum non conveniens decisions, which used logistic regression analysis to control for multiple factors that may influence those decisions, raises doubts about the belief that the lesser deference standard is merely a nondiscriminatory proxy for convenience. If the plaintiff’s citizenship were indeed merely a proxy for convenience, then after controlling for other factors affecting convenience—such as the defendant’s citizenship (which generally should be correlated with how convenient it would be for the defendant to litigate in a U.S. court) and the place of the plaintiff’s injury and the defendant’s conduct (which generally should be correlated with the location of evidence and witnesses)—the plaintiff’s citizenship should not have a major independent effect on forum non conveniens decisions.<sup>54</sup> Yet it does: other things being equal, U.S. district court judges are approximately 25% more likely to dismiss on forum non conveniens grounds when the plaintiff is foreign than when the plaintiff is a U.S. citizen.<sup>55</sup> Moreover, if convenience were driving decisions, then the defendant’s citizenship should have an impact—but this does not appear to be the case.<sup>56</sup>

Although further analysis would be necessary to reach a more definitive conclusion, this finding suggests that *Piper*’s distinction between U.S. and foreign plaintiffs, as applied by the U.S. District Courts, is not merely a proxy for convenience, but instead may discriminate against foreign plaintiffs as such. Some lower courts have noted that the distinction

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52. *Piper Aircraft Co.*, 454 U.S. at 265-66.

53. *Id.* at 256.

54. Cf. Paula K. Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. MAR. L. & COM. 185, 194 (1987) (“[A] court should not grant an FNC dismissal to a defendant who has shown only slight inconvenience, merely because the opposite party is not a U.S. citizen or resident. Such a doctrine would place foreigners in an unfavorable position *qua* foreigners, and they should be able to successfully counter it by appealing to a treaty designed to protect them in such situations.”).

55. See Whytock, *Forum Shopping System*, *supra* note 40, at 524 tbl. 6.

56. *Id.* at tbl. 5.



between foreign and domestic plaintiffs may violate the guarantee of equal access in bilateral friendship, commerce, and navigation treaties, which require each signatory to give the other signatory's citizens access to its courts equal to that given to its own citizens.<sup>57</sup> My findings may lend support to that conclusion.

Interestingly, my study indicated that the plaintiff's citizenship does not have a statistically significant effect on decisions by judges nominated by Democratic presidents, whereas it does have a substantively large (an estimated 32.6%) and statistically significant effect on decisions by judges nominated by Republican presidents.<sup>58</sup> This, too, suggests that the lesser deference standard does not genuinely operate as a proxy for convenience. Rather, it suggests that it may have more to do about normative views about "forum shopping" and the appropriateness of allowing foreign plaintiffs to seek remedies in U.S. courts.<sup>59</sup>

## VI. CONCLUSION: WHY STICKY BELIEFS AND WHAT CAN BE DONE?

What explains sticky beliefs about transnational litigation? I will venture a few conjectures. First, empirically evaluating propositions about transnational litigation is laborious. Thus, it is unsurprising that claims are so often made without first empirically testing them. Second, in the abstract, the sticky beliefs surveyed here are generally plausible, based on reasonable intuitions, and sometimes combined with apt anecdotes. When assertions have these qualities, they are easy to believe and prone to become sticky even if they lack sound empirical support. Third, in some cases, sticky beliefs are instrumental in the sense that their content is intended—explicitly or implicitly—to serve a particular end, and for that reason they may sometimes be deliberately cultivated. For example, the transnational forum shopping claim is used by interest groups to argue for law reforms that limit the litigation exposure of multinational corporations

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57. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 380 (4th ed. 2007) (discussing cases holding that courts must treat foreign plaintiffs as U.S. citizens for forum non conveniens purposes if they are citizens of signatories of treaties with equal-access provisions); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 281–82 (5th ed. 2006) (noting approximately twenty-five such treaties and arguing that discrimination in forum non conveniens decision making could violate them). See generally Allan Jay Stevenson, *Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 *HASTINGS INT'L & COMP. L. REV.* 267 (1990) (analyzing the relationship between the forum non conveniens doctrine and equal-access provisions).

58. Whytock, *Forum Shopping System*, *supra* note 40, at 524 tbl. 6.

59. *Id.* at 526.

by increasing restrictions on court access,<sup>60</sup> and the characterization of the U.S. Supreme Court's lesser deference standard for *forum non conveniens* as a proxy for convenience offers a convenient mask for a rule that might otherwise be considered xenophobic.<sup>61</sup>

The best response to sticky beliefs is to subject them to more rigorous scrutiny. If they do not have a basis in empirical evidence, they should not be stated as established facts and repeated uncritically. For those beliefs that seem most consequential for law or policy or the most interesting from a scholarly perspective, resources can be invested to subject them to empirical testing. Although this takes time, and such resources are scarce, the empirical assessment of sticky beliefs offers a promising avenue for future transnational litigation scholarship.

The studies surveyed in this essay raised doubts about the beliefs they assessed, but this will not always be the case. Sticky beliefs that survive empirical testing can be relied upon with greater confidence by judges, lawyers, policymakers and scholars. That said, empirical support for a conclusion should not turn that conclusion into a sticky belief of its own. In general, empirical analysis is less about proof than about assessing how much certainty one can have in a proposition. Moreover, as transnational litigation evolves, prior empirical studies may no longer reflect realities as closely as they might have when they were undertaken; and future studies that use different data or methods may reach different conclusions. For all these reasons, it is important to critically evaluate sticky beliefs, while taking care not to produce new ones in the process.

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60. Whytock, *Transnational Litigation*, *supra* note 36, Part I.

61. See *Myers v. Boeing Co.*, 794 P.2d 1272, 1280-81 (Wash. 1990) (criticizing and rejecting *Piper*'s lesser deference standard; reasoning that "[t]he Court's reference to the attractiveness of United States courts to foreigners, combined with a holding that, in application, gives less deference to foreign plaintiffs based on their status as foreigners, raises concerns about xenophobia").

**AT THE INTERSECTION OF NATIONAL,  
INTERNATIONAL, AND EUROPEAN LAWS:  
THE EXAMPLE OF THE HUNGARIAN  
FOOD VOUCHER CASES – SOME  
THOUGHTS ON THE RELATIONSHIP  
BETWEEN NATIONAL, INTERNATIONAL,  
AND EUROPEAN LAWS**

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I. INTRODUCTION .....	298
II. THE RELEVANCE OF BILATERAL INVESTMENT PROTECTION AGREEMENTS .....	300
III. HUNGARIAN FOOD VOUCHER CASES – FACTUAL AND LEGAL CONTEXT .....	302
IV. ASSESSMENT OF HUNGARIAN FOOD VOUCHER LEGISLATION FROM THE PERSPECTIVE OF EU LAW .....	303
V. RECENT CHANGES IN EU LAW ON INVESTMENT PROTECTION – EVENTS LEADING UP TO THE <i>ACHMEA</i> RULING OF THE CJEU .....	305
VI. THE <i>ACHMEA</i> CASE: A TURNING POINT IN EU LAW .....	309
VII. THE PROCEEDINGS AGAINST HUNGARY BEFORE THE ICSID .....	311
VIII. AND THE STORY CONTINUES... ..	314
IX. EPILOGUE .....	315

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## I. INTRODUCTION

State legislation and law enforcement often face the difficulty of choosing between a rule of national law and a conflicting provision of international law binding on that state. From the perspective of public international law, it can generally be stated that, in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>1</sup> From time to time, however, there are cases where states (whether for political, economic or other reasons) nevertheless enact or maintain in force national legislation that is contrary to the obligation they had undertaken in an international treaty. In such cases, they must bear the consequences arising from the violation of the treaty under international law.

The European Union (EU)’s legal system is characterized by a number of peculiarities concerning the applicability of the rules of national and international law. The most important principle governing the relationship between EU law and national law is the principle of primacy, as set out by the Court of Justice of the European Union (CJEU) in *Costa v E.N.E.L.*<sup>2</sup> — a principle whose main source is still the case law of the European Court of Justice, for the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are silent on the same.<sup>3</sup> Under the principle of primacy, if a directly applicable rule of EU law conflicts with the domestic law of a Member State, the rules of EU law shall prevail and be applied in all cases; meanwhile, conflicting national rules shall be disregarded.<sup>4</sup> According to the approach of the CJEU, the principle of primacy is absolute: even secondary sources of EU law (above all regulations, decisions, directives) take precedence over even the highest-level rules of the Member States (that is, the Member States’ constitutions).<sup>5</sup> However, the primacy of EU law means precedence in terms of application and not in terms of annulment: a provision of national law that is contrary to EU law does not become invalid or ineffective, but is

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1. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 332 [hereinafter Vienna Convention].

2. Case C-6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585, 594.

3. See Declaration No. 17 in the Treaty of Lisbon Amending on European Union and the Treaty Establishing the European Community declaration 17, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon] (“The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.”).

4. *Costa*, E.C.R. 585, at 594.

5. Case C-11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 114.

inapplicable. Member State authorities (including courts) shall automatically disapply Member State legislation that is contrary to EU law when deciding a case before them, enforcing EU law.<sup>6</sup>

The relationship between EU law and international law is rather complex. On the one hand, the EU, as an international organization, has the power to conclude an international agreement only on a matter in which the corresponding powers are expressly conferred on it under the TFEU or the TEU.<sup>7</sup> On the other hand, these international treaties concluded by the EU are binding on its institutions and all the Member States.<sup>8</sup> In the hierarchy of sources of EU law, these international treaties take primacy over secondary sources of law, but may not conflict with the rules of primary EU law.

Based on the foregoing, the following may be established. First, in the case of legislation or enforcement, it must always be examined who has the power to act: the Member States (exclusive competence of a Member State which does not fall within the competence of the European Union), the European Union (exclusive competence of the Union in matters where the Member States no longer have the power to adopt national rules) or both (so-called mixed competences and mixed agreements). Second, in matters covered by EU law, Member States must take into account their obligations under public international law and Union law. Third, in cases where the law of a Member State is contrary to the rules of public international law or Union law, different legal consequences may apply. As far as an international obligation assumed by a state is concerned, that state may decide (on the basis of economic, political or other considerations) not to meet the given obligation, bearing the (public international law) consequences thereof. By contrast, the obligations flowing from EU law (owing to the primacy of EU law) must be implemented unconditionally and automatically by the Member States, and those may ultimately be enforced by the CJEU. Fourth, where an issue is governed by international law and EU law in the same way, the EU Member States are also required (in accordance with the principle of the primacy of EU law) to implement the rules of public international law unconditionally. However, where an issue is governed differently by public international law and EU law, Member States are required to enforce the provisions of EU law—their own international obligations notwithstanding.

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6. Case C-106/77, *Simmenthal* (II), 1978 E.C.R. 629.

7. See Consolidated Version of the Treaty on the Functioning of the European Union art. 216, Oct. 26, 2012, 2012 O.J. (C 326) 144 [hereinafter TFEU].

8. *Internationale Handelsgesellschaft*, E.C.R. 114.

## II. THE RELEVANCE OF BILATERAL INVESTMENT PROTECTION AGREEMENTS

In today's globalized world, foreign investment is becoming ever more important, since multinational and transnational enterprises and corporations play an increasing role in shaping (and developing) world trade and international economic relations. It is of paramount importance for these foreign undertakings to receive adequate legal protection for their typically long-term investments, as the longevity of the investment and the legislative and enforcement opportunities offered by the host country may affect the value and operation of foreign investment in several ways.

Emerich de Vattel was the first to raise the idea that the elevated protection of foreign investors should be guaranteed by separate rules,<sup>9</sup> one of the most obvious ways thereof being the conclusion of bilateral international agreements (investment protection agreements). The first generation of investment protection agreements is the so-called FCN treaties which adequately met the requirements of their age as treaties of friendship, commerce and navigation.<sup>10</sup> However, with the intensification of international economic and trade relations, they have been gradually replaced by BITs (bilateral investment treaties) aimed at reciprocally promoting, encouraging and protecting investment made by undertakings resident in one country to be carried out in another country.<sup>11</sup> Since protection becomes necessary exactly because the host state may violate the investor's rights and disputes may arise in which neither state's court can be expected to rule impartially, BITs usually provide for a dispute settlement mechanism that is independent of the affected states.<sup>12</sup>

The purpose of the so-called first-generation BITs was to protect foreign investors in politically unstable but resource-rich states.<sup>13</sup> According to UNCTAD, the first BIT concluded, between the Federal Republic of Germany and Pakistan, on November 25, 1959 (entered into force on April 28, 1962).<sup>14</sup> However, from the second half of the 1980s, and even more so from the 1990s, an increasing number of BITs have been

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9. EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW* 207 (Béla Kapossy & Richard Whatmore eds., 2008).

10. Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, *GOETTINGEN J. OF INT'L L.*, 455, 461 (2013).

11. *See id.* at 475.

12. *See id.* at 475-76.

13. *Id.* at 472.

14. U.N. Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999*, at 57, UNCTAD/ITE/IIA/2 (2000) [hereinafter UNCTAD].

concluded between developing countries, making the need to protect foreign investment a generally accepted rule.<sup>15</sup> The first BITs of the Central and Eastern European states (including Hungary) were also concluded in that period.<sup>16</sup> The purpose of these currently existing bilateral treaties is for the contracting states to create and maintain mutually favorable conditions for their investors in the territory of the other contracting party, thereby promoting the development of trade relations between the states concerned and strengthening confidence in investment.<sup>17</sup> While the interest of capital-exporting states may be best explained by protecting the interests of their investors, the interest of capital-importing states may be best explained by attracting foreign investors.<sup>18</sup> Legislation must therefore deal with a rather contradictory situation: while foreign investors require maximum safety of their investments and profits (and, in addition, often require special treatment), host states seek to ensure the benefits of foreign capital investment primarily for their own national economy and economic development, while they reject any attempt to restrict their own (partly economic, partly political) freedom of choice.

Hungary (while still a socialist state) concluded its first investment protection treaty in 1986.<sup>19</sup> As of late March 2022, Hungary has a total of forty-three BITs in force.<sup>20</sup> In the 1980s and the first half of the 1990s, Hungary concluded BITs primarily with states whose business associations could be counted on as potential investors during the transition period (such as Austria, the United States, France, the United Kingdom, Germany, Italy). Today, Hungary is basically concluding treaties with states that may be the target of Hungarian investments.<sup>21</sup> Hungary has never had a bilateral investment protection treaty with two Member States of the European Union: Estonia and Malta.<sup>22</sup> As discussed below, the EU Member States have gradually terminated these BITs between each other in recent years due to their corresponding obligation under EU law. A common feature of Hungary's BITs is that they almost invariably require the application of the

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15. *Id.* at 4.

16. *Id.* at 62.

17. *Id.* at 1.

18. *Id.*

19. *Id.* at 62.

20. *International Investment Agreements Navigator: Hungary*, UNITED NATIONS UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/94/hungary> (last visited Oct. 6, 2022).

21. *See Id.* (Examples of such states include Kosovo, and Bosnia and Herzegovina, which are close to Hungary, and Azerbaijan, the United Arab Emirates, Jordan, and Mongolia from more remote areas); UNCTAD, *supra* note 14, at 2.

22. *International Investment Agreements Navigator: Hungary*, *supra* note 20.

International Centre for Settlement of Investment Disputes (ICSID)'s procedure in the event of a dispute between an investor and Hungary.<sup>23</sup>

### III. HUNGARIAN FOOD VOUCHER CASES – FACTUAL AND LEGAL CONTEXT

The Hungarian Personal Income Tax Act<sup>24</sup> has long allowed employers to provide fringe benefits known as “cafeteria” to their employees under taxation rules that are more favorable than those applicable to wages. The market for these fringe benefits has traditionally been dominated by three French enterprises: Edenred, Le Cheque Déjeuner and Sodexo.<sup>25</sup> The activities of these enterprises fell under the first BIT concluded by Hungary on November 6, 1986, when the Government of the Hungarian People's Republic signed an agreement with the Government of the French Republic on mutual promotion and protection of investments (entered into force on September 30, 1987).<sup>26</sup> The BIT remained in force after Hungary's accession to the European Union in 2004.

In 2010, the Hungarian government decided to restructure the fringe benefits scheme: on the one hand, the Széchenyi Pihenő Kártya,<sup>27</sup> commonly known as the Széchenyi Leisure Card or SZÉP card, was introduced with the aim of increasing the use of services related to the preservation of health and a healthy lifestyle and, on the other hand, the already existing traditional cafeteria market was transformed, and the Erzsébet vouchers were introduced.<sup>28</sup>

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23. With states that are not parties to the Washington Convention establishing the ICSID, *ad hoc* arbitration is usually stipulated in the bilateral treaties. International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules* (2006), <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> [hereinafter ICSID].

24. 1995. évi XXXVI. törvény a személyi jövedelemadóról szóló (Act CXVII of 1995 on Personal Income Tax) (Hung.).

25. Alexis Cheney, *France's 'Ticket Restaurant,' or 'Ticket Resto,' Program, Explained*, FRENCHLY (June 3, 2019), <https://frenchly.us/frances-ticket-restaurant-or-ticket-resto-program-explained/>.

26. UNCTAD, *supra* note 14, at 62.

27. Named after István Széchenyi (1791-1860), an outstanding figure of the Reformation, also known as “the Greatest Hungarian.” He is known for the establishment of the Hungarian Academy of Sciences, the construction of the Chain Bridge in Budapest, and the creation of Hungarian shipping and shipbuilding; MKB SZÉP Card, MKB Bank Széchenyi Pihenő Kártya.

28. Named after Saint Elisabeth of Hungary (1207-1231), the daughter of the Hungarian king Andrew II who was known as the helper of the poor, the sick, and the needy; *Here is why the Hungarian Government Spent €20 Million Advertising its own Company with a Monopoly*, ÁTLÁTSZÓ (May 15, 2018), <https://english.atlatszo.hu/2018/05/15/here-is-why-the-hungarian-government-spent-e20-million-advertising-its-own-company-with-a-monopoly/>. (Erzsébet vouchers are the most popular fringe benefits in Hungary. The vouchers were introduced in 2010,



The Erzsébet vouchers were issued by the Hungarian public benefit foundation Magyar Nemzeti Üdülési Alapítvány (Hungarian National Holiday Foundation), which was established by the government back in 1992 together with six trade unions.<sup>29</sup> The vouchers may be used to buy both cold and hot food, as well as certain products and services.<sup>30</sup> Accordingly, the newly released Erzsébet vouchers became a direct market competitor of the cafeteria vouchers issued by Edenred, Le Cheque Déjeuner and Sodexo. In the case of the Erzsébet vouchers, however, the government provided that the proceeds from the issuance of such vouchers could be used by the foundation to “significantly reduce the number of children who are deprived of multiple meals a day, to ensure healthy food for their age, the health status necessary for studies and the possibility of active recreation for regeneration.”<sup>31</sup> Based on the legislator’s decision, fringe benefits for purchasing ready-to-eat food (cold or hot food, up to a monthly HUF 8,000, i.e. approximately USD 27) received more favorable taxation than salaries only if the employer provided the benefit in the form of Erzsébet vouchers.<sup>32</sup> Meanwhile, the same benefit was subject to a higher tax rate on vouchers issued by Edenred, Le Cheque Déjeuner and Sodexo.<sup>33</sup>

#### IV. ASSESSMENT OF HUNGARIAN FOOD VOUCHER LEGISLATION FROM THE PERSPECTIVE OF EU LAW

The European Commission found the Hungarian cafeteria legislation, presented in the previous section, contrary to EU law in respect of both the SZÉP card and the Erzsébet vouchers. Therefore, infringement proceedings were launched against Hungary before the CJEU.<sup>34</sup> In this study, only the Erzsébet voucher-related elements of the proceedings against Hungary before the CJEU will be elaborated upon, given that only these elements of the proceedings affected the legal situation of the three French undertakings directly. The European Commission argued that a regulation that allowed only one Hungarian undertaking (namely the aforementioned Magyar

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and over the next six years “the Hungarian government spent more than 20.4 million euros on advertising the Erzsébet food vouchers,” which are distributed by a “state-owned company.”)

29. *See id.*

30. *Id.*

31. Case C-179/14, *European Commission v. Hungary*, ECLI:EU:C:2016:108, ¶ 21 (Feb. 23, 2016) (quoting 2012. évi CI. törvény a Az Erzsébet-programról Hungarian Act CIII of 2012 on the Erzsébet Program).

32. *Id.* ¶ 11.

33. *Id.* ¶ 1.

34. *Id.*

Nemzeti Üdülési Alapítvány) to issue preferentially-taxed cafeteria vouchers is contrary to essential elements of EU law, namely, the freedom of establishment<sup>35</sup> and the freedom to provide services,<sup>36</sup> since they exclude other Member States' undertakings from entering the cafeteria voucher market, either as a company established in Hungary or as a cross-border service provider. In the proceedings, the Hungarian Government argued that, in view of the above-mentioned, non-economic, social objectives of the Erzsébet program, the Member State enjoys a high degree of freedom in the adoption of such social policy measures, as opposed to a range of economic activities which are extremely strictly regulated by EU law.<sup>37</sup> However, the CJEU made it clear in its judgment that "the national legislation [...] under which exclusive rights to carry on an economic activity are conferred on a single, private or public, operator, constitutes a restriction both of the freedom of establishment and of the freedom to provide services."<sup>38</sup> Such restrictions may only be justified in exceptional cases, in accordance with the requirements of necessity and proportionality, but during the proceedings the Hungarian government could not justify the need to monopolize the issuance of Erzsébet vouchers.<sup>39</sup>

Pursuant to Art. 260(1) TFEU, "[i]f the Court of Justice of the European Union finds that a Member State has failed to fulfill an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court."<sup>40</sup> The Hungarian State finally fulfilled this obligation under EU law on July 1, 2020, partly by repealing the Act in question and partly by abolishing the Erzsébet vouchers.<sup>41</sup> As a result, the Hungarian cafeteria legislation was in line with EU law again.

However, the infringement proceedings cannot compensate for the damage caused to natural and legal persons (in this case the three French undertakings excluded from the cafeteria voucher market) through the adoption of measures contrary to EU law. In such cases, based on the *Francovich and Bonifaci* case-law of the CJEU, natural or legal persons harmed may bring an action for damages against the infringing Member State before its national courts (and not before the CJEU) for breaching EU

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35. *Id.* ¶ 148 (addressing TFEU art. 49).

36. *Id.* ¶ 150 (addressing TFEU art. 56).

37. *Id.* ¶¶ 137-38.

38. *Id.* ¶ 164.

39. *Id.* ¶¶ 170,172.

40. TFEU, *supra* note 7, art. 260.

41. 2020. évi LXIV. törvény - az Erzsébet-táborokról (Act LXIV of 2020 on the Elizabethan Camps) (Hung.) (repealing certain provisions of the Hungarian Act CIII of 2012 on the Erzsébet Program that contradicted EU law).

law.<sup>42</sup> However, establishing a Member State's liability for damages is conditional upon the infringement being sufficiently serious,<sup>43</sup> a criterion that allows a Member State court some discretion in assessing the consequences of an infringement committed by a Member State. BITs, on the other hand, serve the purpose, among many other things, of ensuring that the injured investor's claim for damages is not decided by the court and on the basis of the law of the perpetrating Member State.<sup>44</sup> This safeguards the adequate and objective protection of the foreign investor's rights and interests. In this respect, it can be concluded that EU law is less effective in protecting the legal interests of foreign investors than BITs.

#### V. RECENT CHANGES IN EU LAW ON INVESTMENT PROTECTION – EVENTS LEADING UP TO THE *ACHMEA* RULING OF THE CJEU

In the 2000s, fundamental changes took place in EU law concerning the legal protection of foreign investments. Hungary, as a Member State of the European Union, had to take these into account.

Upon the European Commission's initiative, the CJEU had already decided in March 2009 that certain provisions of the BITs of some Member States concluded with third countries (that is, not the BITs themselves at that time) were contrary to EU law.<sup>45</sup> Following these decisions, the Treaty of Lisbon entered into force on December 1, 2009, amending Art. 207 of the TFEU to extend the common trade policy, which falls within the exclusive competence of the Union, to "foreign direct investments."<sup>46</sup> This means that, after December 1, 2009, Member States were no longer in the position to conclude BITs with third countries, and the power to conclude such treaties became a sole competence of the European Union. However, the Treaty of Lisbon did not provide for the fate of BITs that had previously been concluded (not only in accordance with the rules of public international law, but also in accordance with EU law). The first step in resolving this complicated legal situation was the adoption of Regulation (EU) No. 1219/2012 which required Member States to notify the Commission of all BITs they had previously concluded, which could remain in force until whichever time the EU would conclude a BIT with the

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42. Cases C-6/90 and C-9/90, *Francovich and others*, 1991 E.C.R. I-5403, ¶¶ 34-35.

43. Cases C-46/93 and C-48/93, *Brasserie du Pecheur and Factortame*, 1996 E.C.R. I-1131, ¶ 51.

44. ICSID, *supra* note 23, ¶ 15.

45. Case C-205/16, *Commission v Austria*, ECLI:EU:C:2009:118, ¶ 39 (Mar. 3, 2009); Case C-249/06, *Commission v Sweden*, ECLI:EU:C:2009:119, ¶ 15 (Mar. 3, 2009); Case C-118/07, *Commission v Finland*, ECLI:EU:C:2009:715, ¶¶ 48-51 (Nov. 19, 2009).

46. TFEU, *supra* note 7, art. 207.

relevant third country.<sup>47</sup> This also meant that, over time (as the European Union exercises this new competence), BITs between Member States and third countries were to be gradually replaced by a system of BITs concluded by the European Union. By the time this study was closed in late January 2022, the European Union had concluded a total of seventy-one treaties containing investor protection provisions. This approach is significantly broader than the scope of BITs in the traditional sense.<sup>48</sup> However, this seemingly favorable picture is overshadowed by the fact that only two of these treaties are specifically aimed at protecting investments (the European Union concluded such a treaty with Viet Nam and Singapore), but none of these are in force.<sup>49</sup>

Yet, for the purposes of this study (since both Hungary and France are Member States of the European Union and the case of Erzsébet vouchers concerned a BIT concluded between these two states), it is not the legal fate of the BITs concluded between third countries but that of a BIT concluded between two particular EU Member States that is of importance. This issue was not directly regulated by the Lisbon Treaty or Regulation (EU) No 1219/2012, so above all, it was up to the CJEU to assess the compatibility with EU law of BITs concluded between the Member States.

Pursuant to Art. 351 of the TFEU, “[t]he rights and obligations arising from agreements concluded before January 1, 1958, or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the established incompatibilities.”<sup>50</sup> Art. 351 of the TFEU applies not only to its wording but also to the approach of the CJEU to contracts between Member States.<sup>51</sup> Hence, in such cases, there is no explicit treaty provision governing the legal fate of BITs concluded between EU Member States. Nevertheless, the principle of the primacy of EU law also applies *mutatis mutandis* in these cases: international agreements concluded by Member States which are contrary to EU law must be set aside by the Member States’ authorities and are therefore inapplicable.

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47. Regulation No. 1219/2012, art. 2-3, 2012 O.J. (L 351) 40, 41-43.

48. See *International Investment Agreements Navigator: European Union*, UNITED NATIONS UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/groupings/28/eu-european-union> (last visited Oct. 6, 2022).

49. *Id.*

50. TFEU, *supra* note 7, art. 351.

51. See, e.g., Case C-235/87, *Matteucci v Communauté française de Belgique*, ECLI:EU:C:1988:460 (Sept. 27, 1988).

As mentioned earlier, however, the primacy of EU law means, on the one hand, only a priority of application and not a priority of annulment: that is, it merely renders rules contrary to EU law inapplicable and not invalid. On the other hand, the scope of the principle of primacy is limited: it is binding only on the authorities of the Member States (including the courts of the Member States). Yet, as described above, one of the characteristics of BITs is that disputes between investors and Member States are not dealt with by Member State authorities but by an independent external forum (the ICSID in many cases or *ad hoc* arbitration in other cases) to which the principle of primacy does not apply.

The European Commission's position on this issue has long been clear: the existence of BITs between Member States is contrary to EU law, since the special protection guaranteed by the BITs is only provided by the host Member State to investors of another Member State participating in the BIT and not to investors of the other Member States. This ultimately constitutes discrimination on the basis of citizenship (nationality in the case of legal persons). In addition, the Commission argued that maintaining BITs between Member States was unnecessary, since EU internal market rules (in particular the provisions governing the freedom of establishment and free movement of capital) adequately regulate and protect cross-border investments, and all Member States are subject to uniform rules.<sup>52</sup> The Commission has consistently sought to enforce this position (that is, that the existence of BITs is contrary to EU law) in proceedings before the ICSID and other arbitration courts, but with little success. Without being exhaustive, the Commission made such submissions, *e.g.*, in *Eastern Sugar*,<sup>53</sup> *Eureko*,<sup>54</sup> *EURAM*,<sup>55</sup> and *Micula*<sup>56</sup> but the Commission's argument was not upheld in any of those judgments. The arbitration courts, which are independent of the Member States in each case, without exception, held that the BITs invoked in these cases were valid and effective treaties under public international law and that any conflict between the BITs and EU law had no relevance to the resolution of an international dispute. The arbitration courts reasoned that, contrary to the Commission's position, it should be assessed whether the Treaty of Lisbon (and, consequently, the TFEU) and the BITs invoked in individual disputes can be regarded as

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52. *European Commission – Fact Sheet: September Infringements' Package: Key Decisions, Press Room*, EUROPEAN COMMISSION (Sept. 29, 2016), [https://ec.europa.eu/commission/presscorner/detail/EN/MEMO\\_16\\_3125](https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_16_3125).

53. *Eastern Sugar B.V. (Netherlands) v The Czech Republic*, SCC No. 088/2004, ¶ 119 (2007) (quoting the Commission's letter from January 13, 2006).

54. *Eureko B.V. v The Slovak Republic*, PCA Case No. 2008-13, ¶ 175-96 (2010).

55. *EURAM v The Slovak Republic*, PCA Case No. 2010-17, at 2 (2011).

56. *Micula v Romania*, ICSID Case No. ARB/05/20, Award, ¶ 316-17 (Dec. 11, 2013).

successive agreements in the same subject matter. According to Art. 59 of the 1969 Vienna Convention, a treaty shall be considered terminated if all the parties to it conclude a later treaty relating to the same subject matter and it appears from the later treaty or is otherwise established that the parties intended that matter to be governed by that treaty; or the provisions of the later treaty are incompatible with those of the earlier one to the extent that the two treaties cannot be applied at the same time.<sup>57</sup> Based on the approach taken by the arbitration courts, the following three main categories of cases may be distinguished.

(i) In cases where the infringement of investors' rights took place before the accession of the host Member State to the European Union, recourse to the rules of successive treaties with the same subject matter is conceptually excluded.<sup>58</sup> In such cases, the date of the infringement instead of the date of the commencement (or adjudication) of the dispute will be decisive for the arbitration court. The practical importance of this provision, which logically follows the rules of public international law, was most significant in the years following the accession of the ten new Member States to the EU in 2004.

(ii) In *Eastern Sugar*, the arbitration court concluded that the TFEU (more precisely the Treaty establishing the European Community, TEC) and the BIT concluded between the Czech Republic and the Netherlands could not be considered treaties having the same subject matter. Thus, it was conceptually impossible to apply Art. 59 of the 1969 Vienna Convention.<sup>59</sup> The arbitration court also pointed out that, even if the two treaties were to be regarded as having the same subject matter, neither of the two alternative conditions in Art. 59 were satisfied: the parties' intention to replace the BIT with the TEC cannot be established and their two treaties do not preclude their simultaneous application as the free movement of capital and the freedom of establishment under the TEC and investment protection under the BIT complement and reinforce each other.<sup>60</sup>

(iii) In *Eureko*, the Commission argued that Art. 30(3) should apply instead of Art. 59 of the 1969 Vienna Convention (which provides for the termination of previous treaties). According to Art. 30(3), although the BIT may not be considered terminated, its provisions shall apply only in so far as they do not conflict with the provisions of the TEC as a subsequent treaty. However, the arbitration court found that the BIT in question had not

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57. Vienna Convention, *supra* note 1, art. 59.

58. *Award on Jurisdiction, Binder v Czech Republic*, UNCITRAL ¶ 62 (2007).

59. *Eastern Sugar B.V.*, *supra* note 53, ¶¶ 160-65.

60. *Id.* ¶¶ 167-69.

been terminated,<sup>61</sup> and the protection afforded by the BIT was wider than the legal protection guaranteed by the provisions of the TEC. In view of these findings, the arbitration court decided that the rules of Art. 30 of the 1969 Vienna Convention apply.<sup>62</sup>

On the basis of these cases, it may clearly be established that, under the 1969 Vienna Convention, the provisions of the BITs between the Member States of the European Union and the provisions of the TEC (TFEU) constitute parallel and applicable international treaties, that is, the existing legal conflict is not manifested fundamentally at the level of international law, but rather at the level of EU law.

## VI. THE *ACHMEA* CASE: A TURNING POINT IN EU LAW

Despite the European Commission's consistent position, the vast majority of Member States have not taken any steps to eliminate BITs concluded with other Member States. In the autumn of 2016, the European Commission therefore decided to initiate infringement proceedings against a number of Member States.<sup>63</sup> Based on the Commission's approach, it can be established that BITs were contrary to EU law for three reasons: (i) they regulated issues relating to the freedom of establishment and the free movement of capital, whereas the Member States would have had the option to regulate these areas only where EU law does not address these issues at all; (ii) as already mentioned, the provisions of the BITs constitute a discrimination on the grounds of nationality by not treating investors in all EU Member States uniformly, but guaranteeing additional protection for some investors, thereby violating an essential element of EU law and the internal market; and (iii) providing for the possibility of international arbitration allows EU law to be completely disregarded and possibly to be undermined by arbitration courts,<sup>64</sup> as disputes between investors and Member States, which are also relevant to EU law, would fall entirely

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61. *Eureko B.V.*, *supra* note 54, ¶¶ 244-45.

62. *Id.* ¶¶ 245, 262.

63. *European Commission – Fact Sheet: September Infringements' Package: Key Decisions*, *supra* note 52; See Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties, *Press Release*, EUROPEAN COMMISSION (June 18, 2015), [https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement\\_en](https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en). The Member States concerned were Austria, the Netherlands, Romania, Slovakia, and Sweden. The Commission initiated proceedings against these Member States because they have previously been the subject of arbitration awards based on a BIT.

64. Tamás Szabados, *A tagállamok közötti beruházásvédelmi egyezmények az uniós jogban* [Investment protection agreements between Member States in EU law] LVIII (3-4) *Állam- és Jogtudomány* 17, 34-36 (2017) (Hung.).

outside the jurisdiction of the CJEU. It is against this background that the CJEU ruled in *Achmea* in March 2018.<sup>65</sup>

The immediate background to *Achmea* can be summarized as follows.<sup>66</sup> A BIT was concluded between the Netherlands and Czechoslovakia on April 29, 1991, to which Slovakia also became a legal successor on January 1, 1993 (with the creation of an independent Slovakia). Achmea BV, formerly Eureko BV, was part of a Dutch insurance group that set up a subsidiary in Slovakia in 2004 under the name Union Healthcare and offered private health insurance. In 2006, the newly elected Slovak government took several steps to abolish the private health insurance system in Slovakia, prompting Achmea to appeal to the Permanent Court of Arbitration in October 2008. The *ad hoc* arbitration court acting in that case was based in Frankfurt am Main, Germany, and on December 7, 2012, found that the measures taken by the government of Slovakia had violated the provisions of the BIT and ordered Slovakia to pay damages. The government of Slovakia then applied to the Provincial High Court in Frankfurt for the annulment of the arbitration award (the jurisdiction of the German court was based on the seat of the *ad hoc* arbitration court). Following the dismissal of the application by the German court of first instance, Slovakia filed an appeal against that decision and the *Bundesgerichtshof* (Federal Court of Justice) as court of second instance brought a preliminary reference before the CJEU.

In a landmark judgment on March 6, 2018, the CJEU concluded that arbitration courts acting under a BIT could not be classified as courts that may request a preliminary ruling under Art. 267 of the TFEU on the interpretation or validity of EU law, although a dispute between an investor and an EU Member State cannot be separated from EU law.<sup>67</sup> However, if the BIT allows the interpretation of EU law to be carried out by a forum that does not have the power to bring proceedings before the CJEU on the interpretation of EU law, BITs concluded between Member States are certainly incompatible with EU law in this procedural respect.<sup>68</sup> However, the CJEU has gone beyond this case, holding in general that EU law “precludes a provision in an international agreement concluded between

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65. Case C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018).

66. Opinion of Advocate General, Case C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158 (Sept. 19, 2017).

67. *Id.* ¶ 60.

68. Opinion of Advocate General, Case C-284/16, *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158 (Sept. 19, 2017) (The subject matter of the main proceedings was the annulment of an arbitration award, so that the European Court of Justice could examine the situation of BITs between Member States in EU law solely from the aspects of procedural law.)



Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.”<sup>69</sup> However, it is also important to point out that *Achmea* could only be brought before the CJEU because the *ad hoc* arbitration court in the main proceedings was based in Germany and the applicable law was ultimately German law, which option is excluded for the ICSID having their own procedural regime.

The preliminary ruling in *Achmea* posed an interesting legal dilemma for Member States and investors. There was no doubt that BITs between Member States were still valid and effective in public international law, but it was now also clear that these BITs are incompatible with EU law. However, the primacy of EU law and the obligations arising from EU law are binding only on the Member States and the Member States’ authorities: neither investors nor arbitrators can be held liable for failing to comply with a judgment of the CJEU. Meanwhile, a Member State may ultimately be held liable before the CJEU for the infringement of EU law in connection with such a decision by the investors and the action of the arbitration court. Member States therefore had to choose between considering the interests of foreign investors, taking on the risk of infringement proceedings before the CJEU, or opting for full compliance with EU law, thereby committing themselves to provide a less favorable legal environment for foreign investors. An assessment of the situation becomes even more complex because, although the European Union may be considered a single market in legal terms, investment within the Member States is directed mainly from the more developed Member States in the West, towards the less developed Member States in Eastern Europe. This also means that the interests of the Member States of the European Union cannot be considered to be exactly the same: Member States receiving foreign investments are more likely to comply with EU law, while investors in the capital-exporting Member States were in favor of maintaining as far as possible the rules of public international law providing for a higher level of legal protection. The interest of Hungary, which joined the European Union in 2004, is an example of the former, exhibiting full compliance with EU law.

## VII. THE PROCEEDINGS AGAINST HUNGARY BEFORE THE ICSID

While the *Achmea* case was still pending before the competent German courts (and at the same time, infringement proceedings against Hungary

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69. *Achmea*, *supra* note 65, ¶ 60.

were pending before the CJEU), the three French undertakings affected by the amended Hungarian cafeteria legislation, Edenred, Le Checque Déjeuner and Sodexo, initiated the ICSID's procedure separately, on the basis of the BIT concluded between Hungary and France.<sup>70</sup>

When the *Achmea* judgment was rendered, two of the three proceedings were still pending before the ICSID (in *Edenred* the ICSID had already adopted a decision in December 2016). In the earlier *UP and CD Holding* case (the case of Le Checque Déjeuner), the arbitration court had already established its jurisdiction in 2016, but since then the litigants had explicitly referred to the findings in *Achmea*, and the arbitration court re-examined its jurisdiction and concluded that the decision of the CJEU did not affect its jurisdiction.<sup>71</sup> According to the arbitration court, the ICSID's procedure is fundamentally different from the jurisdiction of the arbitration court in *Achmea*. In this case, the procedure is based on the ICSID Convention and no national court of a Member State has the power to review or annul the award.<sup>72</sup> The arbitration court also emphasized that, even if it were correct to argue that the ICSID Convention is contrary to EU law as a result of *Achmea*, and that Hungary is obliged to denounce it, such a decision could not have a retroactive effect on proceedings already commenced, since international treaties may not be terminated retroactively.<sup>73</sup> Finally, the arbitration court pointed out that even if the BIT between Hungary and France had (or should have) been terminated on May 1, 2004 (upon Hungary's accession to the European Union), some of its provisions would have remained in force for 20 years (so-called survival clause),<sup>74</sup> including the rules on the ICSID's jurisdiction. Hence, even if the BIT had been terminated on May 1, 2004, the ICSID's jurisdiction could have been established (however, no such termination was made by Hungary or France either then or thereafter).<sup>75</sup>

In *Sodexo*, which was also pending when the *Achmea* judgment was delivered by the CJEU, the European Commission itself lodged an *amicus*

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70. *Hungary to Pay EUR 73 Million to French Voucher Company Sodexo*, HUNGARY TODAY (May 27, 2021), <https://hungarytoday.hu/hungary-pay-eur-73-million-french-voucher-company-sodexo/> (referencing *Edenred S.A.*, ARB/13/21 (Dec. 13, 2016); *UP and C.D Holding Internationale*, ARB/13/35 (Oct. 9, 2018); and *Sodexo Pass International S.A.S.*, ARB/14/20 (Dec. 10, 2021)).

71. *UP and C.D Holding Internationale v. Hungary*, ARB/13/35, ¶¶ 254-55 (Oct. 9, 2018).

72. *Id.*

73. *Id.* ¶¶ 261-62.

74. *Id.* ¶ 265 (recalling art. 12(2) of the BIT concluded between Hungary and France: "investments made prior to the expiration of this [treaty shall] remain [in force] for a period of 20 years from the date of expiry.")

75. *Id.*

*curiae* brief stating that as a result of *Achmea*, European Union law also took precedence over that provision of the BIT between Hungary and France which allows for the ICSID's procedure in the event of a dispute between the investor and the host state. The European Commission also referred to Art. 30(3) of the 1969 Vienna Convention on this procedural issue, stating that EU law, which could be considered "later law" (*lex posteriori*) due to Hungary's accession to the EU in 2004, undermined the earlier arbitration clause (*legi priori*) set out under the BIT between Hungary and France. Lastly, the Commission stated that, as a result of *Achmea*, the ICSID tribunal's award would not be enforceable at a later date.<sup>76</sup> However, the arbitration court did not share the Commission's reasoning. First, the arbitration court stated that "the decisions of this arbitration panel are not threatened to be subject to annulment proceedings in an EU Member State"<sup>77</sup> as the ICSID tribunal is an arbitration court based on a separate international convention (the ICSID Convention) outside the European Union as opposed to the arbitration court established in Frankfurt am Main under the law of a Member State (Germany) and acting in *Achmea*. Second, the ICSID tribunal also stated that it is not its duty to rule on whether Hungary had violated the EU law, "the principles of international courtesy and fair trial do not require any court to deny jurisdiction in favor of another."<sup>78</sup> Third, given that the material scope of the TFEU and the BIT are not the same, Arts. 30 and 59 of the 1969 Vienna Convention are not applicable to the case.<sup>79</sup>

Regarding substantive issues, the ICSID tribunal found in all three cases that Hungary had infringed the provisions of the Hungary-France BIT, as the radical transformation of the cafeteria market deprived the French undertakings concerned of the use and disposal of their investments and rendered such investments valueless which was tantamount to a state measure equivalent to expropriation. According to the ICSID tribunal, although the reform of the cafeteria market was theoretically of a general nature, it had a *de facto* direct, exclusive, and international impact on the three French undertakings concerned and, although Hungary invoked social aspects, the Hungarian government's measures were expressly directed to drive the three French undertakings out of the Hungarian market.<sup>80</sup> For all

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76. *Sodexo Pass International S.A.S. v Hungary*, ARB/14/20, ¶ 95 (Jan. 28, 2019).

77. *Id.*

78. *Id.*

79. *Id.* ¶ 192.

80. *Id.* ¶¶ 327, 362.

these reasons, the ICSID tribunal awarded a high amount of damages to the three French undertakings.<sup>81</sup>

#### VIII. AND THE STORY CONTINUES...

Although the ICSID tribunal could undoubtedly legitimately decide to settle the disputes before it under the provisions of the valid and effective BIT (pointing out, *inter alia*, the differences between the proceedings before it and the arbitration proceedings on which *Achmea* was based), it is also true that the ruling of the CJEU in *Achmea* provided clear guidance to the effect that BITs concluded between Member States were no longer compatible with EU law. The majority of EU Member States (twenty-three Member States) therefore concluded an international treaty on May 5, 2020, terminating the BITs between them,<sup>82</sup> which entered into force on August 29, 2020.<sup>83</sup> Under the treaty, BITs between individual EU Member States expire on the date on which such treaty enters into force in respect of both parties to that BIT. In the case of Hungary, this date was November 28, 2020, while in the case of France, the treaty entered into force on August 28, 2021. As a result, the BIT concluded between Hungary and France also expired at that time.

Pursuant to Art. 5 of the Treaty, the provisions of a specific BIT relating to arbitration proceedings may not serve as a basis for a new arbitration procedure (initiated after March 6, 2018, the date of the *Achmea* judgment).<sup>84</sup> Consequently, the arbitration courts shall decline jurisdiction and terminate existing arbitration proceedings. At the very least, it is an interesting question whether a contractual provision of a seemingly self-executing nature such as the arbitration rule under the BITs may be overridden by another international treaty for the period during which the BIT has not yet expired. This issue is particularly interesting if we also take into account that, in many cases, BITs contain provisions that continue to

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81. See HUNGARY TODAY, *supra* note 70 (Sodexo was entitled to damages in the amount €72,881,361. Le Cheque Déjeuner was entitled to damages in the amount of €23,160,000. While the award in the case of *Edenred S.A.* is not public, it has been reported that the damages awarded to the applicant was also around €23 billion.).

82. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union art. 2, May 29, 2020, 2020 O.J. (L 169) 1, 4 [hereinafter 2020 Treaty]. Belgium, Luxembourg, Italy, Portugal, and Romania did not ratify the treaty until the finalization in February 2022. Austria, Finland, Ireland, and Sweden are not parties to the treaty.

83. Information concerning the entry into force of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, Aug. 29, 2020, 2020 O.J. (L 281) 1, 1.

84. 2020 Treaty, *supra* note 82, art. 5.

apply even after the relevant BIT has ceased to exist for years (as seen in the case of *Le Cheque Déjeuner*, spanning up to twenty years). In my view, therefore, the answer to this question is negative: as long as the BIT is valid and effective, or at least one of its survival clauses is still in force, there is no doubt that the arbitration court may conduct arbitration proceedings under that BIT. The possible consequences under EU law of arbitration proceedings thus lawfully conducted under international law should not be borne by the Member State concluding the BIT instead of the foreign investor.

The treaty concluded by EU Member States in 2020 also contains clear, but legally questionable rules for the enforcement of arbitration awards pending on March 6, 2018 (the date of the *Achmea* judgment). Pursuant to Art. 7, the concerned states shall request the competent national court to set aside, or as the case may be, annul the arbitration award already rendered or refuse to recognize and enforce it.<sup>85</sup> Art. 9 of the Treaty essentially forces the investor to reach an agreement in the form of a structured dialogue.<sup>86</sup> While the compatibility of the relevant treaty provisions with EU law can hardly be called into question in this case (if only because the Member States concerned comply essentially with their obligations arising from the *Achmea* judgment under this international treaty), these provisions are extremely detrimental to investors who, at the time the *Achmea* judgment was rendered, had ongoing proceedings against an EU Member State under a BIT (such as the three French undertakings).

## IX. EPILOGUE

In June 2020, Hungary promulgated the treaty on the termination of bilateral investment agreements between EU Member states by means of Act LXI of 2020. What is interesting about the promulgating Act is that Section 6(a) of that Act repealed Decree No 59/1987. (XI. 29.) MT of the Council of Ministers promulgating the BIT concluded between Hungary and France in Hungarian law. This also meant that, although the BIT between Hungary and France was valid and effective until August 28, 2021 (that is, the date on which the 2020 Treaty entered into force in respect of France) as a result of the 2020 Treaty and pursuant to Art. 12(2) of the BIT, certain provisions of the BIT must still be applied by the parties for a further period of twenty years, even though the BIT has now become *de facto* inapplicable in Hungarian law. This is because the Hungarian legal system is dualistic, and the promulgation of a given treaty in domestic law

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85. *Id.* art. 7.

86. *Id.* art. 9.

is a procedural precondition for the application of international treaties concluded by Hungary.

Despite the changing legal environment, Sodexo Pass International S.A.S. attempted to implement the ICSID tribunal's decision in Hungary. However, in its order, the Budapest Court of Appeal concluded that at the request of Sodexo Pass International S.A.S., enforcement against the Hungarian state was not possible on the basis of the ICSID tribunal's judgment.<sup>87</sup> This is because, on the one hand, after the annulment of the BIT, an arbitration award based on the BIT cannot be enforced according to the rules of Hungarian law. On the other hand, according to the Budapest Regional Court, the lack of enforceability means that under Article 7 of the 2020 Treaty, state parties (including Hungary) may request the competent national courts to set aside or annul the arbitration award or, as the case may be, refuse its recognition and enforcement, which provision shall also be applicable to the arbitration award of Sodexo Pass International S.A.S.<sup>88</sup> In this context, the Budapest Regional Court also pointed out that the Budapest Regional Court, as a court of an EU Member State, is obliged to follow the findings of the decision made in *Achmea* in the case pending before it. As a result, Sodexo Pass International S.A.S., although successful in an international forum against the Hungarian state, was unable to enforce the judgment under EU law. Sodexo Pass International S.A.S. also initiated proceedings in the case before the Constitutional Court of Hungary, but before the Constitutional Court ruled on the petition, Sodexo Pass International S.A.S. withdrew their constitutional complaint on January 3, 2022.<sup>89</sup> This may have been due to an agreement between the French undertaking concerned and Hungary, although neither official nor unofficial information on such an agreement has come to light. And while the matter seems to have been resolved, substantial practical experience has been obtained on the relationship between national, international, and EU law.

According to the interpretation of the CJEU, in any matter affecting EU law, only a judicial forum may act, which may, if necessary, seek an interpretation of the law from the CJEU, and arbitration courts are in principle not classified as such a forum.<sup>90</sup> Indeed, the CJEU's ruling in *Achmea* forced Member States to prevent the application of an international agreement that is otherwise self-executing (namely BITs valid and in force between the Member States) and the implementation of the resulting

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87. See Order No 2201-3.Pkf.25.414/2020/4 of Budapest Court of Appeal.

88. 2020 Treaty, *supra* note 82, art. 7.

89. In such cases, the Constitutional Court shall terminate the constitutional complaint procedure in accordance with their current rules of procedure.

90. *Achmea*, *supra* note 65, ¶ 60.

decisions. The rules of EU law are not suitable to prevent foreign investors from initiating proceedings before an international arbitration court under a BIT concluded between Member States (this will remain possible for decades after the termination of the specific BIT) but are suitable to prevent the enforcement of such arbitration awards, ultimately hollowing out the provisions of the BITs. In the author's view, following the ruling in *Achmea*, Member States had to choose between two principles both present in EU law: the CJEU's monopoly on the interpretation of European Union law and the protection of fundamental human rights (including the right to property and fair trial). The CJEU made it clear in its ruling that even the unity of the European internal market and the protection of the interests of the citizens and residents of the European Union cannot be more important than ensuring that the CJEU is fully competent in all circumstances. Otherwise, it would not have been necessary to reduce the level of protection already achieved, *i.e.*, to make it impossible to proceed for the arbitration fora, generally independent of the Member States and generally accepted under international law, but to extend it generally to all investment protection cases.

This approach is particularly worrying because, although the European Union is essentially a single internal market, there are still significant differences in terms of the development and legal systems between the individual Member States. And in the event of an infringement of EU law (as follows by *Francovich and Bonifaci* mentioned above), it is not the CJEU but, ultimately, one of the judicial bodies of the Member State that committed the infringement against the investor.

# HOW TO ENACT AN INTERNATIONAL ARBITRATION STATUTE

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By Daniel M. Kolkey\*

THE <i>BIRBROWER</i> DECISION AND ITS AFTERMATH.....	319
THE FIRST ATTEMPT TO AUTHORIZE FOREIGN ATTORNEYS TO REPRESENT PARTIES IN INTERNATIONAL ARBITRATIONS IN CALIFORNIA .....	324
THE WINDING ROAD TO SUCCESS .....	325
<i>a. The Overtures</i> .....	325
<i>b. The Task Force</i> .....	327
<i>c. The Report’s Recommendations</i> .....	331
<i>d. The Bill and the Legislative Track</i> .....	335
<i>e. The Working Group’s Efforts to Pass the Bill</i> .....	337

In 1988, California opened itself for business for international commercial arbitrations with the adoption of an international arbitration code<sup>1</sup> based on the UNCITRAL Model Law on International Commercial Arbitration. That model law, which was developed by the United Nations Commission on International Trade in 1985, reflected a “worldwide consensus on key aspects of international arbitration practice ... accepted by States of all regions.”<sup>2</sup> I was one of the primary attorneys involved in drafting California’s international arbitration code.<sup>3</sup> And Professor Robert

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1. CAL. CODE CIV. PROC. §§ 1297.11-1297.17 (1988).

2. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, [https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration).

3. The other California attorney primarily involved was Albert Golbert.



Lutz, whom we honor in this symposium, was an active member of the cozy coterie of California attorneys who participated in that effort.

However, ten years later, a judicial decision undermined California's effort to welcome international commercial arbitration. On January 5, 1998, the California Supreme Court issued its opinion in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,<sup>4</sup> expressly “declin[ing] ... to craft an arbitration exception” to the prohibition against the unlicensed practice of law in California.<sup>5</sup>

The California Legislature promptly amended the California Code of Civil Procedure to provide a means for out-of-state attorneys licensed in other U.S. states to represent their clients in domestic arbitrations in California.<sup>6</sup> But it failed to provide any means for out-of-state attorneys or foreign attorneys to represent their clients in *international* commercial arbitrations held in California.

It took twenty years for members of the California State Bar to get a statute enacted that expressly authorized foreign and U.S. out-of-state attorneys to represent their clients in international commercial arbitrations held in California. Once again, Professor Lutz played an important role in that enactment. The anatomy of that statute's enactment is the subject of this article, which may also serve as a road map for adopting other state legislation addressing international commercial transactions.

#### THE *BIRBROWER* DECISION AND ITS AFTERMATH

California Business and Professions Code section 6125 provides, “No person shall practice law in California unless the person is an active licensee of the State Bar.”<sup>7</sup>

In *Birbrower*, the California Supreme Court had to decide whether the “practice [of] law in California”<sup>8</sup>—as contemplated in section 6125—included legal services preparing for an arbitration sited in California. There, a New York law firm had performed legal services in California on behalf of a California corporation regarding a dispute subject to a California-sited arbitration governed by California substantive law.<sup>9</sup> Although the dispute was settled and never actually went to arbitration, attorneys from the New York law firm traveled to California several times

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4. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119 (1998).

5. *Id.* at 133; *see also id.* at 134 n.4.

6. CAL. CODE CIV. PROC. § 1282.4(b) (2015).

7. Cal. Bus. & Prof. Code § 6125.

8. *Birbrower*, 17 Cal. 4th at 125.

9. *Id.* at 119.

to meet with their California client and its accountants and to interview potential arbitrators.<sup>10</sup> They also filed a demand for arbitration in the San Francisco office of the American Arbitration Association.<sup>11</sup> And they returned to California to discuss a proposed settlement agreement.<sup>12</sup>

After settling the dispute, the California client sued the New York law firm for legal malpractice.<sup>13</sup> The firm counterclaimed that the client had breached its fee agreement.<sup>14</sup> In response, the former client alleged that the firm had violated California Business and Professions Code section 6125 by practicing law without a license, rendering the agreement unenforceable.<sup>15</sup>

The California Supreme Court observed that since section 6125 prohibited an unlicensed person from “practic[ing] law in California,” it had to determine what constituted the practice of law “*in California*.”<sup>16</sup> It observed that “[s]ection 6125 has generated numerous opinions on the meaning of ‘practice of law,’ but none on the meaning of ‘in California.’”<sup>17</sup> It determined that the term “practice of law” included performing services in court and “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.”<sup>18</sup> And it ruled that the “practice of law ‘*in California*’ entail[ed] sufficient contact with the California client to render the nature of the legal service a clear legal representation,” as determined by the quantity and the “nature of the unlicensed lawyer’s activities in the state.”<sup>19</sup> It cautioned that its “definition does not necessarily depend on or require the unlicensed lawyer’s physical presence in the state” since such physical presence was merely “one factor [the court] may consider in deciding whether the unlicensed lawyer has violated section 6125.”<sup>20</sup> However, it did “reject the notion that a person automatically practices law ‘*in California*’ whenever that person practices California law anywhere, or ‘virtually’ enters the state by telephone, fax, email, or satellite.”<sup>21</sup> And while recognizing some exceptions to the practice of law, the Supreme Court ultimately “decline[d] ... to craft an arbitration exception to section 6125’s prohibition of the

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10. *Id.* at 125.

11. *Id.*

12. *Id.*

13. *Id.* at 126.

14. *Id.*

15. *Id.*

16. *Id.* at 128 (emphasis added).

17. *Id.*

18. *Id.*

19. *Id.* (emphasis added).

20. *Id.*

21. *Id.* at 129.

unlicensed practice of law in [California].”<sup>22</sup> It explained that “[a]ny exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law.”<sup>23</sup>

As a result, the state high court determined that the law firm’s “extensive activities within California”<sup>24</sup>—which included travel to California on several occasions to meet with its California client, to interview potential arbitrators, and to assist its client in settling its dispute with a California-based company, plus the filing of a demand for arbitration with the San Francisco office of the American Arbitration Association—constituted the unauthorized practice of law in California, thereby invalidating its fee agreement “to the extent it authorize[d] payment for the substantial legal services [it] performed in California.”<sup>25</sup> It did, however, allow the law firm to seek to recover fees for the services that it performed in New York.<sup>26</sup>

Relevant to international commercial arbitrations, in dictum, citing California Code of Civil Procedure section 1297.351—which is part of California’s international commercial arbitration and conciliation code—the Court stated that “in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar.”<sup>27</sup> This dictum may have provided a patina of protection for those attorneys who were not licensed in California but who had represented clients in international commercial arbitrations sited in California.

However, this protection had chinks in its armor. Section 1297.351 did not actually provide a licensing exception for international commercial arbitration. Yes, that code provision provides that “[a] person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California.”<sup>28</sup> But it is located in the middle of a separate chapter, entitled “Conciliation,” addressing conciliation of disputes arising from an international commercial agreement.<sup>29</sup> It is surrounded by sections addressing the appointment of conciliators,<sup>30</sup> the report of

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22. *Id.* at 133.

23. *Id.* at 133-34.

24. *Id.* at 135.

25. *Id.* at 124.

26. *Id.*

27. *Id.* at 133.

28. CAL. CODE CIV. PROC. § 1297.351 (1988).

29. *Id.* §§ 1297.341-1297.343.

30. *Id.*

conciliators,<sup>31</sup> confidentiality in conciliations,<sup>32</sup> and stays of judicial or arbitration proceedings during the pendency of the conciliation.<sup>33</sup> Thus, in context, section 1297.351 only afforded an exception for international commercial *conciliations*.<sup>34</sup>

The *Birbrower* opinion elicited a forceful dissent from a single justice, arguing that an earlier opinion by the Court had more narrowly defined the practice of law as “the representation of another in a judicial proceeding or an activity requiring the application of the degree of legal knowledge and technique possessed by a trained legal mind”<sup>35</sup> and observing that “[r]epresenting another in an arbitration proceeding does not invariably present difficult or doubtful legal questions that require a trained legal mind for their resolution”<sup>36</sup> since arbitrators, unless required to act in conformity with legal rules, may base their decisions upon broad principles of justice and equity.<sup>37</sup> In support of her conclusion, the dissenting justice cited a federal court that had held that a firm of New Jersey lawyers not licensed to practice law in New York was entitled to recover payments for its legal services in a New York arbitration.<sup>38</sup> But the dissent failed to persuade the majority.

In response to the *Birbrower* decision, the California Legislature promptly amended California Code of Civil Procedure section 1282.4 to provide a means for out-of-state attorneys licensed in other U.S. states to represent parties in California arbitrations. That section—which has been amended multiple times since its 1998 passage—provides that out-of-state attorneys may represent clients in California arbitrations provided they

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31. *Id.* §§ 1297.361-1297.362.

32. *Id.* § 1297.371.

33. *Id.* §§ 1297.381-1297.382.

34. In addition, any protection for a non-California attorney’s representation of a client in a California international arbitration afforded by the Supreme Court’s dictum in *Birbrower* was further undermined by the Legislature’s enactment of amendments to California Code of Civil Procedure section 1282.4 in 1998. As discussed below, those amendments provided a procedure for U.S. attorneys from other states to represent a party in a domestic arbitration in California in response to *Birbrower*. But in doing so, the Legislature added subdivision (j)(3) to section 1282.4, which provided that “[e]xcept as otherwise specifically provided” in the amendments, “to the extent that *Birbrower* is interpreted to expand or restrict” the right or ability of a party to be represented by any party in a nonjudicial arbitration proceeding, “it is hereby abrogated except as specifically provided in this section.” Cal. Code Civ. Proc. § 1282.4, subdiv. (j)(3). Literally read, this subdivision provided that any interpretation of *Birbrower* to expand the right to represent a party in an international commercial arbitration was “hereby abrogated.”

35. *Birbrower*, 17 Cal. 4th at 145 (Kennard, J., dissenting).

36. *Id.*

37. *Id.*

38. *Id.* at 147 (citing *Williamson v. John D. Quinn Const. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982)).

satisfy several requirements.<sup>39</sup> These include (i) listing an active member of the California State Bar as the attorney of record in the arbitration, (ii) filing a certificate with the arbitrator(s) or arbitral forum, the State Bar, and the parties and their counsel, providing specified information regarding the out-of-state attorney, and (iii) obtaining the approval of the arbitrator(s) or arbitral forum for the out-of-state attorney to appear.<sup>40</sup> The California Supreme Court thereafter adopted rules to implement the statutory procedures, which included a fee to be paid to the State Bar.<sup>41</sup>

But neither section 1282.4 nor the rule adopted by the Supreme Court addressed the right of *foreign* attorneys to represent parties in arbitrations in California. And significantly, neither section 1282.4 nor the Court's rule authorized *U.S. out-of-state attorneys* to represent parties in an international commercial arbitration held in California. One reason for the latter omission was that California's international commercial arbitration and conciliation code expressly "supersede[d] Sections 1280 to 1284.2, inclusive,"<sup>42</sup> of which section 1282.4 was part. Good reason existed for superseding that range of sections at the time that the international commercial arbitration code was enacted in 1988: The sections of California's domestic arbitration regime, which the international arbitration code excluded, involved provisions that were inconsistent with international arbitration principles or that would be covered by federal law for purposes of an international arbitration.<sup>43</sup> And of course, at the time California's international commercial arbitration code was enacted in 1988, section 1282.4's authorization in 1998 for out-of-state attorneys to participate in California arbitrations did not exist.

In short, the Legislature apparently did not recognize that by choosing to place the procedure for out-of-state U.S. attorneys to represent their clients in California arbitrations into section 1282.4, they were placing it in a section that California's international commercial arbitration code had superseded.

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39. CAL. RULES OF COURT, rule 9.43.

40. *Id.*

41. *Id.*

42. CAL. CODE CIV. PROC. § 1297.17 (1988).

43. California Code of Civil Procedure sections 1280 to 1284.2 cover, among other things, California's unique *stay of arbitrations* when a party to the arbitration is also a party to pending litigation with a third party, ethical standards for arbitrators in California arbitrations, discovery in arbitrations in California, provisional remedies, and the validity and enforcement of domestic arbitration agreements under California law (in contrast to the federal law governing international arbitration). *Id.* §§ 1281.4, 1281.85, 1283, 1281.8, and 1281.

## THE FIRST ATTEMPT TO AUTHORIZE FOREIGN ATTORNEYS TO REPRESENT PARTIES IN INTERNATIONAL ARBITRATIONS IN CALIFORNIA

In 2013, a group of California attorneys met to discuss how to enact a law that would authorize foreign attorneys to represent their clients in international commercial arbitrations in California.<sup>44</sup> Howard Miller, a past President of the California State Bar and an influential member of the California bar, took the lead in developing the statutory language, contacting the California State Bar, and gaining the approval of such legislation from the State Bar Board of Trustees.

By February 2014, Miller had managed to persuade a state senator, Senator Bill Monning, who was also a member of the Senate Judiciary Committee, to sponsor the legislation that would authorize foreign attorneys to represent their clients in international arbitrations in California. To promote the bill, a prominent member of the California trial bar and I wrote letters in support of the bill to the State Senate Judiciary Committee, which unanimously passed the bill out of committee. Within three months, by May 2014, the bill was unanimously passed out of the State Senate.

What could go wrong? Plenty. The California Supreme Court has “inherent authority over the discipline of licensed attorneys in th[e] state”<sup>45</sup> and more generally, it has the inherent “power to regulate the practice of law” in the state.<sup>46</sup> It raised concerns about the bill, which, after all, by virtue of its *Birbrower* decision, sought to authorize unlicensed attorneys to “practice law” in California. And just to kick a bill when it’s down, a staff member for the State Assembly Judiciary Committee, to which the bill had been referred, suggested that the foreign attorneys should be required to register *and* pay a fee in order to represent their clients in international commercial arbitrations sited in California. Such requirements, however, would have deterred foreign attorneys from choosing to arbitrate in California in the first place. In light of these developments, Senator Monning, an experienced legislator, withdrew his bill.

But this exercise offered valuable lessons: All stakeholders needed to be consulted *before* moving such a bill forward; accommodations to the stakeholders had to be made in advance to eliminate any legitimate opposition; any potential opposition from outside the stakeholders had to be sufficiently assuaged to avoid giving legislative staff leverage to insist on registration and fees, which would undermine the attractiveness of the bill;

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44. The group was comprised of Howard Miller, Cedric Chao, Steve Smith, and Daniel M. Kolkey.

45. *In re Attorney Discipline System*, 19 Cal. 4th 582, 592 (1998).

46. *Id.*

and California's international arbitration bar needed to feel a sense of ownership in the bill so that they would generate a great deal of support for it. In short, we needed Professor Robert Lutz.

## THE WINDING ROAD TO SUCCESS

### *a. The Overtures*

In 2015 and 2016, I got in touch with the California Supreme Court's staff about the prospect of proposed legislation to authorize foreign attorneys to represent their clients in international commercial arbitrations in California. It was clear that we needed to make a persuasive presentation to the Court not only concerning the unique nature of international arbitration—in which the forum for the arbitration may be a neutral site with no other connection with the dispute and where the governing law may not be California law—but also concerning the Court's legitimate concerns about attorneys licensed in other jurisdictions representing their clients in arbitral proceedings in California.

In the first half of 2016, another prominent member of California's international arbitration bar, Jeff Dasteel, drafted an excellent memorandum that could be presented to the Court's staff that explained the background regarding the issue, including the practices in other jurisdictions that permitted foreign attorneys to represent their clients in international arbitrations. I then corresponded with the California Chief Justice's principal attorney at that time, providing a copy of the memorandum in July. But nothing immediately transpired.

However, in the autumn of 2016, I attended a reception for a program at which the California Chief Justice was speaking. At that reception, I mentioned the issue to both the Chief Justice and her current principal attorney, Carin Fujisaki (now serving on the California Court of Appeal as an associate justice). Shortly thereafter, the Chief's principal attorney asked that I prepare a letter to the Chief Justice, setting forth a description of the nature and importance of international commercial arbitration to California, why the court should support efforts to permit foreign lawyers to participate in international commercial arbitrations situated in California, and the options available for authorizing foreign lawyers to represent their clients in such arbitrations.

Heartened by the Chief Justice's open-minded attitude toward the issue, I submitted such a letter to the Court on December 21, 2016. It explained the following:

First, I observed that in sophisticated international commercial transactions, parties are concerned about how and where their future

disputes will be resolved and that international arbitration is a preferred means for resolving international commercial disputes because it allows both parties to avoid being subjected to the other party's courts (and thus to the other party's home advantage), and further, that arbitral awards are more easily enforced than a national court's judgments as a result of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>47</sup>

Second, I argued that despite California's prominence and highly developed infrastructure, foreign parties have historically been reluctant to agree to arbitrate in California, and that despite the enactment of California's international commercial arbitration and conciliation code in 1988, obstacles remained because a foreign party's own attorneys were not permitted to represent it in an international commercial arbitration in California.

Third, I noted that the *Birbrower* decision had declined to craft an arbitration exception to the prohibition in California Business and Professions Code section 6125 against the unlicensed practice of law in California and that the California Legislature had only provided a means for out-of-state attorneys licensed in other U.S. states to represent parties in domestic arbitrations in California.

Fourth, I observed that the selection of a venue in international commercial arbitrations was highly competitive with London, Paris, Geneva, Singapore, and Hong Kong, among other leading jurisdictions, permitting a party to an international commercial arbitration to be represented by any lawyer chosen by it. Further, New York—a leading jurisdiction for international arbitrations in the U.S.—and Florida—which seeks to establish itself as a venue for Latin American-related arbitrations—expressly allow foreign attorneys to appear in arbitrations taking place in those states.

Finally, I set forth three options for allowing foreign and out-of-state attorneys to represent parties in international commercial arbitrations in California: (1) the enactment of a statute that authorized an attorney licensed in any jurisdiction to participate in an international commercial arbitration in California, such as Senator Monning's bill in 2014; (2) a procedure for foreign attorneys to participate in international commercial arbitrations in California, similar to the procedure for *pro hac vice* admissions for out-of-state U.S. attorneys in California Code of Civil Procedure section 1282.4 (while noting that this option involves the

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47. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.



payment of a fee which would probably discourage foreign attorneys from selecting California as a venue for international arbitration); or (3) a judicial determination that the practice of law does not cover international commercial arbitrations, which could be implemented by rule, rather than statute, pursuant to the Court's inherent authority over the regulation of the practice of law.

On December 27, I received a response from the Chief Justice's principal attorney asking that the letter be supplemented to address additional questions from the Court, which I did within three days.

*b. The Task Force*

On February 3, 2017, the Chief Justice's office scheduled a call with me on Monday, February 6, to "discuss international arbitration." We held the call, and the next day, I started receiving calls from attorneys who had been personally contacted by the Chief Justice to serve on a task force that the Chief Justice had organized, identifying me as the chair of "the Supreme Court International Commercial Arbitration Working Group."

The other members that the Chief Justice named were Professor Robert Lutz, Fred Bennett (then with Quinn Emanuel), Cedric Chao (then with DLA Piper), Maria Chedid (then with Baker & McKenzie), Jeffrey Dasteel (with the UCLA School of Law), Sally Harpole (an international arbitrator and attorney with a focus on Asia), Steve Smith (then with Jones Day), and Abraham Sofaer (a former federal judge, former legal advisor to the U.S. State Department, and the founder and chairman of Federal Arbitration, Inc.). Saul Bercovich was named as the working group's State Bar liaison, and Carin Fujisaki was named as the California Supreme Court's liaison.

Following his appointment, Professor Lutz emailed me, "I was delighted to receive a phone call from Chief Justice Cantil-Sakauye on Monday inviting me to join a new Task Force on International Arbitration, which I understand you will chair. I am honored to join with you (again!) and look very much forward to working with you on this important issue(s)."

The Chief Justice thereafter sent a letter dated February 10, 2017, to all members of the working group, stating that Court wished to know whether "foreign and out-of-state lawyers should be permitted to represent parties in [international] arbitrations in California" and added that "[t]he report of the working group should include an analysis of all California laws and regulations relevant to the court's consideration of allowing non-California-licensed foreign and out-of-state attorneys to participate in international

commercial arbitration in California.<sup>48</sup> She admonished, “Bearing in mind that the California Supreme Court has an interest in ensuring the competent practice of law within the state’s borders, and an interest in ensuring the integrity of California-based international commercial arbitrations, the working group should identify issues and make recommendations for one or more regulatory options that might be considered for effectuating foreign and out-of-state attorney representation in international commercial arbitrations while safeguarding these interests. The report should identify the benefits and drawbacks of each recommended regulatory option, and should offer draft court rule language and/or statutory language as necessary for possible implementation.”<sup>49</sup>

Accordingly, in chairing the working group, based on the lessons from the prior aborted effort, I kept in mind the following:

1. We needed to satisfy the Supreme Court’s and State Bar’s legitimate interests in ensuring the competent practice of law within the state’s borders, even if other jurisdictions did not share the same interest.
2. Any legal regime would need to be sufficiently attractive to foreign attorneys and arbitrators so that any requirements in California would not dissuade attorneys from agreeing to arbitrate in California. Among other things, I wanted to avoid requiring the payment of a fee for the privilege of representing a party in an international commercial arbitration in California or any obligation to register. Based on the aborted effort to enact such a statute in 2014, I also knew that a staff attorney for one of the judiciary committees might argue in favor of such a fee to be paid by foreign attorneys in order to represent their clients in an international arbitration in California.
3. In terms of gaining the Supreme Court’s acceptance and the legislative passage, it would help if the statute or rule (if we decided to pursue the latter route) was based on an accepted standard or model law. In short, a precedent for our proposed language would validate it.
4. The proposal also needed to address anticipated legislative objections from any influential groups. The enactment of

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48. Letter from Chief Justice Cantil-Sakauye, to Daniel M. Kolkey (Feb. 10, 2017) (on file with author).

49. *Id.*

legislation is, after all, a political act, not a merit-based adjudication. In that connection, there was an ongoing, heated dispute between the California trial lawyers and the business community regarding the benefits and disadvantages of arbitration. Accordingly, we needed to satisfy the trial attorneys bar that this authorization would not affect their practice or serve as a precedent that might impact their objections to arbitration.

5. If possible, I also wanted unanimous approval by the working group for our recommendations. Any dissenting opinion might interfere with the proposal's passage. And if support for a bill faltered, the price for passage might be a requirement for fees and registration for the privilege of practicing law in an international commercial arbitration in California.
  
6. Finally, the Chief Justice had indicated that she wanted to get a report expeditiously.

To address each of these considerations and complete the project expeditiously, I proposed at our first meeting that we break into smaller subcommittees that would simultaneously address different parts of our charge. One committee would develop the analysis of the laws and regulations relevant to the Court's consideration of any proposed statute or rule and would research which U.S. states allowed foreign attorneys to represent parties in international commercial arbitrations in their jurisdictions and their procedures for doing so. That committee then split up its research assignments among its members. In that connection, we were fortunate to have two academics to assist with such research—Professor Robert Lutz and Jeff Dasteel. However, every member of the working group made significant contributions, enthusiastically collected useful data, and performed extensive legal research

The other committee would develop proposals for permitting foreign and out-of-state attorneys to represent their clients in international commercial arbitrations in California. I placed myself on that committee to make sure that the options would be acceptable to both the Court and the Legislature. Indeed, I had an outline of my preferred approach in my mind, which is always important in successfully chairing a meeting, even if one is persuaded, as is often the case, to modify the tentative outline during the process, because it can keep the discussion focused. And regardless of where the committee's debate led, I knew that I needed to find ways to

accommodate competing interests and find common ground while not losing sight of my key priorities.

Significantly, only Professor Lutz and the State Bar's liaison served on both committees.

Finally, to complete this project as expeditiously as possible, meetings of the committee as a whole were scheduled and held on February 15, February 27, March 6, and March 13, 2017.

By February 26, the research committee had drafted its research, which I submitted to two capable associates in my office, Jenna M. Yott and Priyah Kaul, to begin compiling into a draft report.

By March 6, the committee developing proposals for allowing out-of-state and foreign attorneys to represent their clients in international commercial arbitrations in California submitted its array of options to the full working group: (1) an authorization based on an American Bar Association commission's recommendation for a "Model Rule for the Temporary Practice by Foreign Lawyers,"<sup>50</sup> (2) a modified version of the foregoing recommendation, which added the requirement that only a member of the California bar could give advice on California law (which was not the working group's preferred option, but which option needed to be aired and objections thereto considered by all), (3) an authorization based on a New York rule authorizing foreign attorneys to represent their clients in international arbitrations sited in that state, (4) a variation of that New York rule, which required an attorney who is not a member of the California Bar to associate a California-licensed counsel where the dispute was governed by California substantive law, and (5) an authorization based on a streamlined version of California Code of Civil Procedure section 1282.4.

In guiding the development of these proposals, I had been particularly attentive of the concerns of the Supreme Court and State Bar. At the same time, the Court's and State Bar's liaisons needed to hear the arguments from the international arbitration bar in favor and against certain aspects of the proposals. Still, where the liaisons for the Court or State Bar pushed back, I needed to find a resolution that would satisfy all members of the working group. After each meeting of the committee responsible for proposals, I drafted up the proposals and circulated them among the members.

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50. See American Bar Association Commission on Multijurisdictional Practice Report to the House of Delegates, *Model Rule for Temporary Practice by Foreign Lawyers*, Report 201J (Jan. 29, 2022), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_migrated/201j.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201j.authcheckdam.pdf) [hereinafter *Model Rule*].

By March 13, the working group had made all of the key decisions regarding the proposed legislative alternatives and its ranking of those alternatives. My office's associates, Ms. Yott and Ms. Kaul, then compiled all of the materials into a draft report, which I revised, edited, and then circulated to the working group members on March 25. Members of the working group then provided comments and minor revisions to both the proposals and the report, which I incorporated.

Since the Court wanted to consider the report and recommendations in time for its administrative conference, the final meeting to approve our report was scheduled for April 5, 2017, at which time the working group provided some final edits and unanimously approved it.

*c. The Report's Recommendations*

On April 11, 2017, the final version of the report was sent to the Court. To address the Court's and the State Bar's concerns, it noted that each proposal was drafted with the objective of subjecting attorneys to California's professional and ethical standards and its disciplinary authority—an approach consistent with the approach taken by New York and Florida. But it declined to require registration by the foreign or out-of-state attorneys or the payment of a fee. It also noted that unduly restricting foreign attorneys from representing their clients in California-based international commercial arbitrations appeared unnecessary because the selection of California as the arbitral venue may have little connection with the jurisdiction in which the dispute arises and there may be little relationship between the dispute and the practice of law in California. The report also observed that even where California law was negotiated as the governing law for the dispute, a stringent regime for authorizing foreign attorneys to represent their clients in California-sited international arbitrations might not protect the practice of law in California, but merely prompt parties to choose a non-California venue for the arbitration. In this light, a stringent regime for authorizing foreign attorneys to represent parties in international commercial arbitrations would simply result in the selection of a non-California forum, which protected neither the integrity of California law nor the procedural rights of any California parties to the arbitration.

The working group therefore recommended, as the best solution, an authorization based principally on the Model Rule for Temporary Practice by Foreign Lawyers recommended by the American Bar Association's Commission on Multijurisdictional Practice,<sup>51</sup> revised to adapt the rule to

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51. *Id.*

better suit California. Alternatively, as a second choice, the working group supported a proposal based on the New York rule, while raising, but discouraging, a third option based on California's authorization for out-of-state attorneys to appear in domestic arbitrations.

Under the Model Rule for Temporary Practice by Foreign Lawyers—the working group's preferred basis for the legislation—a foreign attorney in order to qualify under the rule “must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law ... and subject to effective regulation and discipline by a duly constituted professional body or public authority.”<sup>52</sup>

In such a case, under the Model Rule, as relevant here, the attorney is not deemed to engage in the unauthorized practice of law in a U.S. jurisdiction when the lawyer performs services, on a temporary basis in the jurisdiction, that (1) “are undertaken in association with a lawyer” licensed in that jurisdiction who actively participates in the matter;<sup>53</sup> *or* (2) “are in or reasonably related to a pending or potential arbitration” or other alternative dispute resolution proceeding held or to be held in that jurisdiction “if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice”;<sup>54</sup> *or* (3) “are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice,”<sup>55</sup> *or* (4) “arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice”<sup>56</sup> or (5) “are governed primarily by international law or the law of a non-United States jurisdiction.”<sup>57</sup>

While alternatives (3) and (4) (the legal services are performed for a client residing in the lawyer's jurisdiction *or* are reasonably related to a matter that has a substantial connection to a jurisdiction where the lawyer is authorized to practice) offer likely scenarios where a foreign lawyer might be retained for an arbitration outside of the lawyer's jurisdiction, those grounds have clear limits. By contrast, alternative (2) can be construed more broadly since there, the legal services for the arbitration need only arise out of, or be reasonably related to, the lawyer's practice.

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52. *Id.* subdiv. (b).

53. *Id.* subdiv. (a)(1).

54. *Id.* subdiv. (a)(3).

55. *Id.* subdiv. (a)(4)(i).

56. *Id.* subdiv. (a)(4)(ii).

57. *Id.* subdiv. (a)(5).

The working group then added an additional requirement not found in the Model Rule: In harmony with New York's rule and to address the interests of the California Supreme Court and the State Bar, the working group's proposal added that any foreign or out-of-state attorney providing services relating to a California international commercial arbitration would be deemed to have agreed to be subject to the California Rules of Professional Conduct and the laws of California otherwise governing the conduct of attorneys as well as to California's disciplinary authority. Since New York has a similar provision and has successfully attracted international arbitrations, this did not appear to be an impediment.

In recommending the proposal based on the Model Rule to the California Supreme Court, the working group's report noted the following considerations that argued against any registration or *pro hac vice* requirement:

- (1) It was unlikely that a registration requirement or the submission of a *pro hac vice* application to an arbitrator would provide any additional safeguards to the parties in light of the very nature of an international commercial arbitration in which sophisticated parties are capable of selecting qualified counsel.
- (2) Registration requirements have not been viewed as necessary to protect parties in international commercial arbitrations, as demonstrated by their absence in the leading foreign jurisdictions and U.S. jurisdictions that had adopted a "Fly in-Fly out" rule for representing parties in international arbitrations.
- (3) Such a requirement would simply discourage attorneys from choosing California as a venue for international commercial arbitrations. As a philosophical matter, no occupational licensing system should be employed to the point that its sole function is to act as a barrier to entry.
- (4) In order to reinforce that international commercial arbitrations involve sophisticated parties engaged in a commercial dispute that do not need the protection of a *pro hac vice* application or registration, the working group expressly provided in its proposal that it did not apply to (i) routine employment, healthcare, and consumer disputes, such as those involving the acquisition or lease of goods or services primarily for personal, family, or household use, (ii) any dispute concerning an application for employment, or

(iii) any dispute that concerns the terms or conditions of employment or the right to employment *as long as* it did not primarily concern the right to, or misappropriation of intellectual property. However, because some international commercial arbitrations can involve a dispute over the misappropriation of trade secrets, which might be characterized as an employment dispute, the working group carved out an exception from the exemption of employment disputes where the primary dispute concerns the misappropriation of intellectual property. These carve-outs also served the purpose of assuring California trial attorneys that this statute would not affect their practice, including their retention for handling such disputes, in any way.

While the working group also offered an alternative proposal based on the New York rule, which authorized U.S. out-of-state and foreign attorneys to provide legal services on a temporary basis,<sup>58</sup> that rule was not as good a fit for California. The New York rule authorized legal services on a temporary basis if the lawyer was admitted to practice as an attorney in another state, the District of Columbia, or a non-U.S. jurisdiction *if* it was undertaken in association with an attorney admitted to practice in New York, or arose out of or was reasonably related to the lawyer's practice in a jurisdiction in which the lawyer was authorized to practice.<sup>59</sup> These alternatives were, of course, included in the working group's proposal based on the recommended Model Rule. However, the New York rule's principal authorization for foreign or U.S. out-of-state attorneys—where the temporary legal services “are in or reasonably related to a pending or potential ... arbitration ... if the services are not services for which the forum requires *pro hac vice* admission”<sup>60</sup>—arguably could not be applied to arbitration in California because California required *pro hac vice* admission for out-of-state attorneys to engage in domestic arbitrations.<sup>61</sup>

Another consideration was that New York limits any such representation to legal services performed “on a temporary basis in th[e] State,”<sup>62</sup> whereas the working group's proposal did not impose a temporal element for appearances in international commercial arbitrations in California, simply limiting the services, whatever the duration, to an

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58. N.Y. RULE OF CT. OF APPEALS FOR THE TEMP. PRACTICE OF LAW IN NEW YORK § 523.2 [hereinafter N.Y. RULE].

59. *Id.* §§ 523.2(a)(3)(i), (iv).

60. *Id.* § 523.2(a)(3)(iii).

61. CAL. CODE CIV. PROC. § 1282.4, subdiv. (b)(2) (2015).

62. N.Y. RULE, *supra* note 58, § 523.2(a).



international commercial arbitration or a related alternative dispute resolution proceeding.

On April 25, 2017, the Court agreed that there was merit in the working group's preferred recommendation based on the Model Rule and did not object to our pursuing legislation.

*d. The Bill and the Legislative Track*

Within a month, after checking with Howard Miller (who had been involved in the earlier, aborted effort in 2014), Senator Monning agreed to sponsor the legislation, which became Senate Bill No. 766.

In order to meet committee deadlines, Senate Bill No. 766 was introduced as a two-year bill. But after Senator Monning's office submitted the working group's draft statute to the California Legislature's Legislative Counsel, the latter restructured the proposal and altered the language.

I reviewed the Legislative Counsel's draft of the bill, and a literal reading imposed on *California*-licensed attorneys the same conditions imposed on foreign attorneys for purposes of representing a party in an international commercial arbitration in California. This made no sense since California attorneys were already fully licensed to represent parties in California, and such language would likely generate unnecessary opposition to the bill.

However, recognizing that the Legislative Counsel wanted to put her mark on the legislation, rather than persuade her to return to our structure, I kept the structure in place, but revised the text of the bill to make it accurately reflect the decisions of the working group. In doing so, I made certain to keep the Supreme Court, the State Bar, the bill's sponsor, the working group, and Howard Miller advised of my proposed edits. The Legislative Counsel then incorporated the edits, to which I made further minor edits to make sure that the legislation faithfully followed the working group's recommendation.

As presented to the legislative committees (and as enacted), Senate Bill No. 766 now provided as follows:

1. The bill applied to a "qualified attorney," defined as an individual not admitted to practice law in California, but who was admitted to practice law in a state or territory of the United States or the District of Columbia, or a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys at law or

the equivalent.<sup>63</sup> The attorney also had to be “[s]ubject to effective regulation and discipline by a duly constituted professional body or public authority of that jurisdiction” and in good standing in every jurisdiction in which he or she is admitted or otherwise authorized to practice.<sup>64</sup>

2. Under the bill, notwithstanding California Business and Professions Code section 6125—which (as previously noted) prohibits the practice of law in California except by an active member of the state bar—“a qualified attorney may provide legal services in an international commercial arbitration or related conciliation, mediation, or alternative dispute resolution proceeding if any of the following conditions is satisfied”:<sup>65</sup>
  - (i) “The services are undertaken in association with” a California licensed attorney who “actively participates in the matter,”<sup>66</sup> or
  - (ii) “The services arise out of or are reasonably related to the attorney’s practice in a jurisdiction in which the attorney is admitted to practice”<sup>67</sup> (this is a very broadly phrased authorization that could be interpreted to cover most cases in which the foreign attorney was deemed by a client to be qualified to handle the international arbitration), or
  - (iii) “The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice”<sup>68</sup> (this authorizes representation of clients in the attorney’s home jurisdictions), or
  - (iv) “The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice”<sup>69</sup> (this transactional relationship of the matter to the foreign attorney’s jurisdiction(s) provides another basis for the attorney

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63. CAL. CODE CIV. PROC. § 1297.185, subdiv. (a) (2019).

64. *Id.* § 1297.185, subdiv. (b)-(c).

65. *Id.* § 1297.186, subdiv. (a).

66. *Id.* § 1297.186, subdiv. (a)(1).

67. *Id.* § 1297.186, subdiv. (a)(2).

68. *Id.* § 1297.186, subdiv. (a)(3).

69. *Id.* § 1297.186, subdiv. (a)(4).

- to represent a client in a California international commercial arbitration), or
- (v) “The services arise out of a dispute governed primarily by international law or the law of a foreign or *out-of-state jurisdiction*”<sup>70</sup> (in other words, if the dispute is not primarily governed by California law, this affords an alternative authorization to represent the client in the international commercial arbitration, which is significantly broader than the Model Rule’s version, which is limited to disputes governed by international law or “the law of a *non-United States jurisdiction*”<sup>71</sup>). Significantly, if the dispute is governed by California law and none of the other alternative grounds for authorization exist, it is likely that a California attorney would be associated as counsel, thereby allowing the foreign attorney to invoke authorization (i) above.

As a safeguard for the Supreme Court, the law provides that it does not authorize the attorney to appear *in court* unless *pro hac vice* status is granted<sup>72</sup>—which presumably would be the case in any U.S. state—and that the qualified attorney is subject to “the jurisdiction of the courts and disciplinary authority of this state with respect to the California Rules of Professional Conduct and the laws governing the conduct of attorneys to the same extent as a member of the State Bar of California.”<sup>73</sup> This parallels New York’s rule. Finally, the law permits the State Bar to report complaints and evidence of disciplinary violations to the appropriate disciplinary authority of any jurisdiction where the attorney is authorized to practice law.<sup>74</sup>

*e. The Working Group’s Efforts to Pass the Bill*

Once the legislation was finalized, the working group came to the aid of getting it enacted. Jeff Dasteel helped draft a fact sheet supporting the legislation for Senate Bill No. 766. And Professor Lutz, Cedric Chao, Maria Chedid, and Sally Harpole all offered to assist in soliciting letters of

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70. *Id.* § 1297.186, subdiv. (a)(5) (emphasis added).

71. *Model Rule*, *supra* note 50, subdiv. (a)(5) (emphasis added).

72. CAL. CODE CIV. PROC. § 1297.187 (2019).

73. *Id.* § 1297.188, subdiv. (a).

74. *Id.* § 1297.188, subdiv. (b).

support. That is where Professor Lutz's reputation, rich experience, and extensive contacts from a life in international law made a big difference.

Maria Chedid quickly solicited a letter of support from the Silicon Valley Arbitration & Mediation Center. Sally Harpole successfully solicited support from the International Bar Association's Arbitration Committee and the American Bar Association's Standing Committee on International Trade in Legal Services

And Professor Lutz successfully solicited support from, among others, the Beverly Hills Bar Association, Jack Coe (the associate reporter for the American Law Institute's International Arbitration Law Restatement), the California Dispute Resolution Council (with help from Sally Harpole), the American Arbitration Association's International Center for Dispute Resolution, the ABA Center for Professional Responsibility, the California Lawyers Association, and (with assistance from Sally Harpole) the American Bar Association Standing Committee on International Trade in Legal Services.

Despite the absence of any opposition to the bill, a staff member of the Senate Judiciary Committee called me about a concern regarding the bill's authorization that the State Bar *may* report disciplinary complaints against a foreign or out-of-state attorney to that attorney's appropriate disciplinary authority. He was concerned that such an authorization might imply that the State Bar does not have that authority in other circumstances. I urged him not to remove the language (which the State Bar liaison had approved), but after checking with the State Bar and the working group, I proposed adding a sentence that stated that nothing herein should be construed to limit any existing authority that the State Bar has to report complaints.

That proved satisfactory, and by February, the State Senate had unanimously passed the bill.

While I was on vacation, Professor Lutz and Maria Chedid agreed to handle any issues that arose while the bill traveled through the Assembly. Sure enough, counsel for the Assembly Judiciary Committee raised a concern about the same subdivision that the Senate Judiciary Committee staffer had questioned, but with a different point. He noted that subdivision (b) of proposed section 1297.188 of the Code of Civil Procedure states: "The State Bar of California *may* report complaints and evidence of disciplinary violations against an attorney practicing pursuant to this article to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted ..."<sup>75</sup> (Italics added.) He questioned why the bill did not *mandate* that the State Bar report "potential bad actors" to their out-of-

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75. *Id.*

state licensing agency. Professor Lutz and Ms. Chedid were able to persuade him that this permissive language was consistent with California's and New York's general approach of giving the state agency discretion whether to take action. Indeed, a mandatory reporting requirement would have interfered with the State Bar's discretion based on the intent, nature, and materiality of the purported violation. As a result of their response, no changes were made, and the bill was characterized as "non-controversial" and placed on the Assembly Judiciary Committee's consent calendar.

On June 12, 2018, the bill passed out of the Assembly Judiciary Committee.

On July 10, 2018, the Assembly passed the bill on a 69-0 vote.

With the bill on its way to the Governor's desk, and with an enthusiasm enriched by his experience, Professor Lutz once again spearheaded the effort to solicit letters of support to the Governor to seek his signature. And that enthusiasm made a difference. As Ralph Waldo Emerson once observed, "Enthusiasm is the mother of effort, and without it nothing great was ever achieved."<sup>76</sup> In this case, in the short twelve-day period before the Governor's deadline to veto the bill,<sup>77</sup> Professor Lutz had successfully solicited support from the American Arbitration Association and its international division, the International Centre for Dispute Resolution (ICDR), the Beverly Hills Bar Association, and the American Bar Association's Standing Committee on International Trade in Legal Services. The State Bar's liaison with the working group, Saul Berkowitz, who had moved to the California Lawyers Association, arranged for it to also support signature of the bill.

On July 18, 2018, the Governor signed Senate Bill No. 766, which took effect on January 1, 2019.

The circuitous route that this legislation took from the 2014 aborted legislative effort *to* a chat at a reception in 2016 with the Chief Justice *to* the formation of a working group in 2017 *to* its unanimous report *to* the Court's approval in April 2017, and *through* the Legislature in 15 months confirms the wisdom of Abraham Lincoln's adage: "All rising to a great place is by a winding stair."<sup>78</sup>

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76. *Ralph Waldo Emerson Quotes*, BRAINYQUOTE.COM, [https://www.brainyquote.com/quotes/ralph\\_waldo\\_emerson\\_134859](https://www.brainyquote.com/quotes/ralph_waldo_emerson_134859) (last visited Jan. 26, 2022).

77. See CAL. CONST. art. IV, § 10, subdiv. (b)(3).

78. JAMES C. HUMES, *THE WIT & WISDOM OF ABRAHAM LINCOLN* 42 (1996).

# THE ALL-IMPORTANT “G” IN ESG AND ITS RELATIONSHIP TO GOOD GOVERNANCE AND CORPORATE COMPLIANCE IN ANTI-CORRUPTION: TOWARDS A MORE HOLISTIC APPROACH

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Lucinda A. Low\*

INTRODUCTION.....	341
I. GOOD CORPORATE GOVERNANCE—GENERAL NORMS .....	343
A. <i>International Guidance—the OECD Corporate Governance Principles</i> .....	343
B. <i>Domestic U.S. Guidance and Norms</i> .....	345
1. Guidance .....	345
2. Binding Decisions and Norms .....	347
II. STANDARDS FOR SOCIALLY RESPONSIBLE BUSINESS CONDUCT ..	349
A. <i>International Norms and Guidance</i> .....	349
1. UN Global Compact.....	349
2. OECD Guidelines for Multinational Enterprises .....	349
3. Sector, Issue, or Activity-Specific Standards.....	350
III. GOOD CORPORATE GOVERNANCE IN THE ANTI-CORRUPTION ARENA.....	351
A. <i>The Conduct at Issue and the Advent of Risk Prevention Practices</i> .....	351
B. <i>Anti-Corruption Compliance Programs</i> .....	353
IV. TOWARDS A MORE HOLISTIC APPROACH TO GOVERNANCE AND COMPLIANCE FOR INTERNATIONAL BUSINESSES.....	359

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## INTRODUCTION

In recent years, ESG (Environmental, Social, and Governance) has become a regulatory and business focus, in response to increased societal pressures for businesses to become more accountable for their impact on the environment and take a more socially responsible stance vis-à-vis not only their workers but more broadly in relation to their supply chains, surrounding communities, and even more broadly in relation to human rights, data security, privacy, and public welfare.

On the regulatory side, with respect to environmental issues, Europe has led the way with the Green Deal, supply chain due diligence measures, and other initiatives.<sup>1</sup> The United Kingdom has played a leadership role on a number of social and human rights issues, as exemplified by its adoption of the Modern Slavery Act.<sup>2</sup> The United States has been slower to develop regulatory initiatives in this area, but the Securities and Exchange Commission (SEC) has proposed regulations and has recently questioned the adequacy of disclosures made by SEC-reporting companies (“greenwashing”).<sup>3</sup> On June 21, 2022, the Uyghur Forced Labor

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1. E.g., *A European Green Deal*, EUR. COMM’N, [https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en) (last visited Aug. 24, 2022); see *EU taxonomy for sustainable activities*, EUR. COMM’N, [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-taxonomy-sustainable-activities_en) (last visited Aug. 24, 2022). On February 23, 2022, the EU Commission issued a proposal for a Supply Chain Directive on corporate sustainability due diligence, see *Corporate sustainability due diligence*, EUR. COMM’N, [https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence\\_en](https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en) (last visited Aug. 24, 2022). Several European countries have already enacted legislation in this area; this directive, once effective, would “level the playing field” for companies in (and doing business in) the European Union.

2. Modern Slavery Act 2015, c. 30 (Eng.), <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

3. On March 21, the Securities and Exchange Commission (SEC) released its long-awaited proposed rule requiring public companies to disclose certain climate-related information in their registration statements and annual reports. For a discussion of the proposed rule, see Elizabeth A. Cassady et al., *SEC Releases Proposed Rule on Climate Disclosure Requirements for Public Companies*, STEPTOE (Mar. 23, 2022), <https://www.stepto.com/en/news-publications/sec-releases-proposed-rule-on-climate-disclosure-requirements-for-public-companies.html>. On May 25, the Securities and Exchange Commission (SEC) released a proposed rule requiring specific disclosures from certain investment funds and advisors on their environmental, social, and governance (ESG) strategies. See Elizabeth A. Cassady & Ashelen Vicuña, *SEC Releases Proposed ESG Disclosure Rule for Investment Advisors and Funds*, STEPTOE (June 2, 2022), <https://www.stepto.com/en/news-publications/sec-releases-proposed-esg-disclosure-rule-for-investment-advisors-and-funds.html>. On June 10, 2022, the press reported that the SEC was investigating Goldman Sachs over its ESG funds. See Praveen Paramasivam, *U.S. SEC*

Prevention Act came into effect in the United States.<sup>4</sup> The U.S. Department of Homeland Security has emphasized the importance of effective supply chain tracing by companies.<sup>5</sup>

While the “E” and “S” elements of ESG tend to dominate attention, this article focuses on the “G” as the key element not only of successful ESG efforts but for good corporate practices more generally. In particular, it will examine how the “G” in the context of “ESG” may intersect with good governance and compliance standards in other regulatory compliance contexts, and particularly in the anti-corruption/transparency context.

This article will argue that for multinational businesses, the “G”—i.e., good governance, including strong internal controls and corporate compliance measures—is the key to effective ESG, just as it is the key to effective anti-corruption compliance. It will also argue that the “G” in “ESG” should not be defined or implemented in such a way that it undercuts or conflicts with the “G” in anti-corruption efforts. Indeed, the two overlap in multiple respects, and can be mutually complementary and reinforcing. As this article will show, many leading standards dealing with corporate social responsibility include bribery and corruption on the same footing as human rights, labor, and the environment. Both companies and regulators should recognize these qualities of complementarity and approach the two areas in a way that is mutually beneficial, rather than treating them as separate and distinct silos. This is especially true when supply chains and, more generally, third-party relationships, are considered.

Some may even argue that anti-corruption is part of ESG. This position may stem from the assumption that ESG is just a new name for corporate social responsibility. And there is no question that corruption has not just legal but social implications. For example, the so-called “social license” of a foreign investor to operate in another country—a particularly important issue for long-term investors in industries such as the extractives sector—can be threatened by corrupt practices.<sup>6</sup> Corruption also has reputational consequences for any firm that has been found to have engaged in it,

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*investigating Goldman Sachs over ESG funds—WSJ*, REUTERS (June 10, 2022, 3:16 PM), <https://www.reuters.com/business/us-sec-investigating-goldman-sachs-over-esg-funds-wsj-2022-06-10/>.

4. See Stephanie Sheridan et al., *Understanding the Uyghur Forced Labor Prevention Act and What Comes Next*, STEPTOE: GLOB. TRADE POL’Y BLOG (Feb. 14, 2022), <https://www.steptoeglobaltradeblog.com/2022/02/understanding-the-uyghur-forced-labor-prevention-act-and-what-comes-next/>.

5. U.S. Dep’t of Homeland Sec., *Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China* (June 17, 2022).

6. *Gabriel Res. Ltd. v. Romania*, ICSID Case No. ARB/15/31, Notice of Arbitration (July 21, 2015).



particularly in consumer-focused businesses, public procurement, and certain other sectors. It is therefore concerned with more than simple legal compliance. With ESG's leading focus on the "E" and "S" rather than the "G" (which some even assume only operates in relation to those two areas, rather than a broader "G"), and the lack of any mention of "C," this approach seems to give short shrift to the issue of corruption, despite the fact that it, like ESG, is a values-driven arena. Thus, this article will take the approach outlined earlier, of its status as a separate but complementary area.

This article will begin with the topic of good corporate governance both generally and more specifically as it has evolved in international standards for corporate responsibility and anti-corruption compliance. It will then discuss how governance in this area relates to governance in the ESG arena, with a particular focus on businesses that are engaged in cross-border trade, investment, financing, or other forms of transnational business activity.

## I. GOOD CORPORATE GOVERNANCE—GENERAL NORMS

Standards of corporate governance have been articulated at both the international and national levels.

### A. *International Guidance—the OECD Corporate Governance Principles*

At the international level, one leading instrument is the Recommendation on Principles of Corporate Governance ("Principles") of the Organization for Economic Cooperation and Development (OECD).<sup>7</sup> First adopted in 2015 and elaborated in a Recommendation of the Council in 2022 (the "2022 Recommendation"),<sup>8</sup> the Principles are designed for use in multiple jurisdictions with different corporate structures. They have been endorsed by the Financial Stability Board as a key standard for sound financial systems, and used by other bodies as well, including the G20 group of countries, international organizations such as the World Bank, and others. They are particularly applicable to publicly traded companies,<sup>9</sup> but

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7. See Org. for Econ. Coop. and Dev. [OECD], *G20/OECD Principles of Corporate Governance* (2015), <http://www.oecd.org/corporate/principles-corporate-governance/>. The OECD has also articulated complementary principles for state-owned enterprises, see OECD, *Recommendation of the Council on Guidelines on Corporate Governance of State-Owned Enterprises* (June 2015), [https://one.oecd.org/document/C\(2015\)85/en/pdf](https://one.oecd.org/document/C(2015)85/en/pdf).

8. OECD, *Recommendation of the Council on Principles of Corporate Governance* (2022), <https://legalinstruments.oecd.org/public/doc/322/322.en.pdf>.

9. *Id.* at 6.

many parts of the Principles also have relevance to privately held enterprises as well.

The 2022 Recommendation succinctly frames the topic as follows:

“Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”<sup>10</sup>

In terms of the Principles’ relationship to other areas, the 2022 Recommendation states that:

“The Principles recognise the interests of employees and other stakeholders and their important role in contributing to the long-term success and performance of the company. Other factors relevant to a company’s decision-making processes, such as environmental, anti-corruption or ethical concerns, are considered in the Principles but are treated more explicitly in a number of other instruments including the OECD Guidelines for Multinational Enterprises, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UN Guiding Principles on Business and Human Rights, and the ILO Declaration on Fundamental Principles and Rights at Work, which are referenced in the Principles.”<sup>11</sup>

The Principles consist of six major principles, each elaborated with a series of sub-principles and commentary. The six major principles are as follows:

1. Ensuring the Basis for an Effective Corporate Governance Framework: The corporate governance framework should promote transparent and fair markets, and the efficient allocation of resources. It should be consistent with the rule of law and support effective supervision and enforcement.
  
2. The Rights and Equitable Treatment of Shareholders and Key Ownership Functions: The corporate governance framework should protect and facilitate the exercise of shareholders’ rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.
  
3. Institutional Investors, Stock Markets, and Other Intermediaries: The corporate governance framework should provide sound incentives

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10. *Id.*

11. *Id.*

throughout the investment chain and provide for stock markets to function in a way that contributes to good corporate governance.

4. **The Role of Stakeholders in Corporate Governance:** The corporate governance framework should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

5. **Disclosure and Transparency:** The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

6. **The Responsibilities of the Board:** The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.<sup>12</sup>

These OECD Principles are content-neutral, in the sense that they do not focus on any particular types of corporate activities that may give risk to specific risks or obligations, beyond the area of the core functioning of the company.

#### *B. Domestic U.S. Guidance and Norms*

Within the U.S., there are binding governance norms for certain enterprises, as well as non-binding guidance.

##### 1. Guidance

At the domestic level, multiple groups, including the Business Roundtable, have been active in articulating principles of corporate governance. In 2016, the Roundtable identified eight guiding principles of corporate governance, as follows:

1. The board approves corporate strategies that are intended to build sustainable long-term value; selects a chief executive officer (CEO); oversees the CEO and senior management in operating the company's

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12. See OECD, *supra* note 7.

business, including allocating capital for long-term growth and assessing and managing risks; and sets the “tone at the top” for ethical conduct.

2. Management develops and implements corporate strategy and operates the company’s business under the board’s oversight, with the goal of producing sustainable long-term value creation.
3. Management, under the oversight of the board and its audit committee, produces financial statements that fairly present the company’s financial condition and results of operations and makes the timely disclosures investors need to assess the financial and business soundness and risks of the company.
4. The audit committee of the board retains and manages the relationship with the outside auditor, oversees the company’s annual financial statement audit and internal controls over financial reporting, and oversees the company’s risk management and compliance programs.
5. The nominating/corporate governance committee of the board plays a leadership role in shaping the corporate governance of the company, strives to build an engaged and diverse board whose composition is appropriate in light of the company’s needs and strategy, and actively conducts succession planning for the board.
6. The compensation committee of the board develops an executive compensation philosophy, adopts and oversees the implementation of compensation policies that fit within its philosophy, designs compensation packages for the CEO and senior management to incentivize the creation of long-term value, and develops meaningful goals for performance-based compensation that support the company’s long-term value creation strategy.
7. The board and management should engage with long-term shareholders on issues and concerns that are of widespread interest to them and that affect the company’s long-term value creation. Shareholders that engage with the board and management in a manner that may affect corporate decision-making or strategies are encouraged to disclose appropriate identifying information and to assume some accountability for the long-term interests of the company and its shareholders as a whole. As part of this responsibility, shareholders should recognize that the board must continually weigh both short-term and long-term uses of capital when determining how to allocate it in a way that is most beneficial to

shareholders and to building long-term value.

8. In making decisions, the board may consider the interests of all of the company's constituencies, including stakeholders such as employees, customers, suppliers and the community in which the company does business, when doing so contributes in a direct and meaningful way to building long-term value creation.<sup>13</sup>

As can be seen, these guiding principles focus on the allocation of responsibilities between the Board of Directors and company management, the relationship with shareholders, and on the elaboration of Board responsibilities across key committees. Like the OECD Principles, they are aimed at publicly traded companies. They have less to say about transparency or other stakeholders than the OECD Principles, but like the OECD Principles, they do mention sustainability as a long-term goal.

## 2. Binding Decisions and Norms

Apart from guidance and principles, which are "soft" law, there are legally binding norms and decisions that have driven corporate governance standards in recent years. One of the leading court decisions regarding the responsibilities of corporate boards of directors is the *Caremark* case decided by the Delaware Chancery Court in 1996.<sup>14</sup> *Caremark* held, in the context of the settlement of a stockholder derivative action, that the defendants, directors of the corporation, had failed to oversee, supervise, and monitor management, leading to significant losses to the company as a result of its criminal prosecution for violation of certain health care statutes.

The Chancellor determined that the obligation of corporate directors included:

"A duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may... render a director liable for losses caused by non-compliance with applicable legal standards."<sup>15</sup>

The test that the Chancellor ultimately identified in *Caremark* was a "lack of good faith as evidenced by a sustained or systematic failure of a director to exercise reasonable oversight."<sup>16</sup>

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13. See Bus. Roundtable, *Principles of Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 8, 2016), <https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/>.

14. *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A. 2d 959 (Del. Ch. 1996).

15. *Id.* at 970.

16. *Id.* at 971.

Although considered to be a high standard for liability to be established, in the years that followed, *Caremark* had a profound effect on boards of directors in the United States in terms of their focus on compliance programs in a variety of areas.<sup>17</sup> Although not all companies are organized in Delaware, many are, and Delaware is considered a leading jurisdiction for corporate law decisions. The impact of such a decision is therefore not limited to Delaware companies.

Moreover, for public companies, the incentives created by the *Caremark* decision were expanded and reinforced first, by the Sarbanes-Oxley legislation, passed in the wake of the Enron scandal, in 2002, and later, in 2010, the Dodd-Frank legislation. These statutes established, among other things, a periodic disclosure regime within public companies to ensure that material information is reported up to management and ultimately, the Board, and to encourage and protect whistleblowing activity.<sup>18</sup>

In the enforcement context, the United States Sentencing Guidelines for Business Organizations<sup>19</sup> have also operated as an incentive for companies to adopt and maintain compliance programs designed to prevent, detect, and remediate conduct that would implicate criminal laws. The United States, unlike many countries, has corporate criminal liability. However, prosecutors have discretion as to whether to prosecute individuals or companies for misconduct, and even if a company is prosecuted, penalties may be mitigated by such programs. The U.S. Attorney's Manual, now called the Justice Manual, also instructs prosecutors to take such programs into account.<sup>20</sup>

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17. For a good discussion of the *Caremark* decision and subsequent cases, see E. Norman Veasey & Randy J. Holland, *Caremark at the Quarter-Century Watershed: Modern-Day Compliance Realities Frame Corporate Directors' Duty of Good Faith Oversight, Providing New Dynamics for Respecting Chancellor Allen's 1996 Caremark Landmark*, 76 BUS. L. 1, 2 (2020).

18. Sarbanes-Oxley, § 302, 15 U.S.C. § 7241 (2002) (responsibility of corporate officers for the accuracy and validity of corporate financial reports); Sarbanes-Oxley, § 404(a), 15 U.S.C. § 7262(a) (2002) (reporting on the state of a company's internal controls over financial reporting); Sarbanes-Oxley, § 806, 18 U.S.C. § 1514A(c) (2002); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (codified at 15 U.S.C. § 78u-6).

19. See U.S. SENT'G GUIDELINES MANUAL §8B2.1 cmt. background (U.S. SENT'G COMM'N 2021) (requiring that "The organization's governing authority [generally the Board of Directors] shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.")

20. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S § 9-28.800 (2018) ("In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate

## II. STANDARDS FOR SOCIALLY RESPONSIBLE BUSINESS CONDUCT

### A. *International Norms and Guidance*

While the international governance standards reviewed in Section I.A. are generic in nature and do not focus on particular types of corporate activities, other international standards or guidance documents do have such a focus. Two leading examples are the UN Global Compact, and the OECD Guidelines for Multinational Enterprises. There are also many standards that are sector- or activity-specific. The more general of these instruments place bribery and corruption on the same plane as environmental, human rights, and labor issues.

#### 1. UN Global Compact

The UN Global Compact<sup>21</sup> contains ten principles related to corporate sustainability to which companies are encouraged to adhere. They fall into four categories: human rights (Principles 1 and 2);<sup>22</sup> labor (Principles 3-6);<sup>23</sup> environment (Principles 7-9);<sup>24</sup> and corruption (Principle 10).<sup>25</sup> They are derived from various international, and particularly UN, instruments, that have achieved wide acceptance.<sup>26</sup> Currently 9,500 companies have declared their adherence to the Compact. The UN has elaborated tools to help companies implement the compact.<sup>27</sup> The Compact has no associated enforcement mechanism.

#### 2. OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises, first developed in 1976 and updated in 2010, are “non-binding principles and standards for

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actions rather than unquestioningly ratifying officers’ recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization’s compliance with the law.”) *See, Caremark*, 698 A. 2d at 968-70.

21. Global Compact, *The Ten Principles*, available at <https://www.unglobalcompact.org/>.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Deloitte, *UN Global Compact Management Model: Framework for Implementation*, U.N. GLOBAL COMPACT (2010).

responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”<sup>28</sup>

The Guidelines’ Recommendations for responsible business conduct, set forth in part I of the Guidelines, are divided into eleven parts: Part I, Concepts and Principles; Part II, General Policies; Part III, Disclosure; Part IV, Human Rights; Part V, Industrial Relations; Part VI, Environment; Part VII, Combating Bribery, Bribe Solicitation and Extortion; Part VIII, Consumer Interests; Part IX, Science and Technology; Part X, Competition; and Part XI, Taxation. As such, they cover the same areas of subject matter as the UN Global Compact and also several additional areas not covered by the Compact.<sup>29</sup> The OECD Council established National Contact Points (NCPs) to which complaints about business non-compliance with the Guidelines can be made by affected persons.<sup>30</sup>

The OECD developed guidance to assist companies in the implementation of the Guidelines: OECD Due Diligence Guidance for Responsible Business Conduct.<sup>31</sup>

### 3. Sector, Issue, or Activity-Specific Standards

Beyond the ten general principles of the UN Global Compact and the OECD Guidelines, these organizations and others have elaborated multiple guidance documents for either sector-, issue- or activity-specific conduct. Virtually all of these, like the Compact and Guidelines, are “soft” laws, but in some cases are reflected in binding national legislation.

From the OECD, they include: institutional investors; the extractive industries; the garment and footwear sector; agriculture; mineral supply chains, including conflict-affected and high-risk areas and child labor.<sup>32</sup>

In January 2012, the United Nations published the Guiding Principles on Business and Human Rights,<sup>33</sup> a set of thirty-one principles directed at both business and governments elaborating the core concepts of “protect, respect and remedy” in relation to human rights.

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28. OECD, *OECD Guidelines on Multinational Enterprises 2011 Edition* (2011).

29. *Id.*

30. *Id.* at 72.

31. OECD, *OECD Guidance Due Diligence Guidance for Responsible Business Conduct* (2018).

32. OECD, *supra* note 31.

33. Guiding Principles on Business and Human Rights: *Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, 3 (Mar. 21, 2011) [hereinafter U.N. Guiding Principles].



From this brief cataloging of international norms dealing with corporate social responsibility, it can be seen that they deal with all of the same areas that are covered by the concepts of ESG, plus others. All include corruption as part of the key areas to be addressed, but none of them really deal with governance as such, or fully explore the link between good governance and compliance. However, good governance standards have been amply developed in the anti-corruption area. This article will therefore now turn to an examination of these standards.

### III. GOOD CORPORATE GOVERNANCE IN THE ANTI-CORRUPTION ARENA

#### A. *The Conduct at Issue and the Advent of Risk Prevention Practices*

Corruption, especially of public sector officials, is a criminal offense in virtually all countries. It is also prohibited by a host of international treaties, both regional and global.<sup>34</sup> In addition to prohibitions on domestic bribery, many countries today have laws prohibiting the bribery of foreign public officials in the course of international business (transnational bribery, also referred to as TNB).<sup>35</sup> An international treaty, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Convention” or “OECD Convention”) has been instrumental in the adoption of such laws.<sup>36</sup>

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34. The first international treaty to focus on the issue of corruption was the Inter-American Convention Against Corruption, adopted in 1996. See Organization of American States, *Inter-American Convention Against Corruption*, OAS (Mar. 29, 1996), <http://www.oas.org/juridico/english/sigs/Convenco.html> (text of Convention and signatories and ratifications). Other regional treaties include: (1) the Council of Europe Criminal and Criminal Law Conventions on Corruption, ETS Nos. 173 and 174, both adopted in 1999. See Criminal Law Convention on Corruption, Jan. 7, 2022, 173 ETS, <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=173> and Criminal Law Convention on Corruption, Jan. 11, 2003, 174 ETS <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=174>; (2) the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, adopted in 1997, OJ C 195, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41997A0625%2801%29>; and (3) the African Union Convention on Preventing and Combating Corruption, adopted in 2003, available at <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>. Also in 2003, a global instrument, the United Nations Convention Against Corruption, was adopted. It entered into force in December 2005 and currently has 189 States Parties. See U.N. Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 9, 2003).

35. Examples include the United Kingdom’s Bribery Act 2010, Brazil’s Clean Company Act, and France’s Sapin II legislation. See also *infra* note 37.

36. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 4 (1998), available at <https://www.oecd.org/corruption/oecdantibriberyconvention.htm>. Currently forty-four countries

TNB laws began with the enactment in 1977 of the U.S. Foreign Corrupt Practices Act (FCPA),<sup>37</sup> which stood alone for about twenty-five years. From the outset, as a statute with both civil and criminal dimensions, the FCPA gave rise to the risk of corporate liability. Such liability could arise through various routes: through vicarious liability for the acts of officers, directors, shareholders, employees, or agents (referred to in this article as “direct payments liability”), or through payments made to “any person” while “knowing” that a pass-through to a foreign official or other covered recipient would occur (referred to in this article as “third-party, or indirect payments liability”).<sup>38</sup>

Under the FCPA’s “any person” third party liability standard, knowledge is not limited to actual knowledge, but also includes the awareness of facts that indicate a high probability that an improper payment will occur.<sup>39</sup> This standard has brought in the concept of “red flags”—basically risk indicators specific to the corruption area—that companies ignore at their peril.<sup>40</sup> This third-party liability risk has spawned extensive compliance efforts. Even before *Caremark* and the developments above incentivizing corporate compliance programs, companies were advised by enforcement authorities that to of misconduct, they were putting their head in the sand regarding the conduct of intermediaries, they should take certain precautions when engaging and working with third parties. These precautions included performing anti-corruption-focused due diligence on potential third parties and the adoption other safeguards to prevent and detect potential improper practices. Accordingly, companies began anti-corruption corporate compliance programs.

Since then, the scope of such programs has grown enormously, as have the expectations for what companies need to do to make such programs effective. While such programs are not a defense to liability under the FCPA, they do mitigate penalties and can even—given the extent of

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(thirty-eight OECD Member States and six non-Member States) are party to the Convention. See OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Ratification Status as of May 2018*, (May 2018), <https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>. All forty-four States Parties have adopted legislation prohibiting TNB, as required by the Convention.

37. 15 U.S.C. §§ 78dd-1 to -3.

38. See *id.* §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

39. *Id.* §§ 78dd-1(f)(2), dd-2(h)(3), dd-3(f)(3).

40. *A Resource Guide to the U.S. Foreign Corrupt Practices Act 23*, THE DEP’T OF JUST. & THE SEC. AND EXCH. COMM’N (2d ed. 2020).

prosecutorial discretion—result in a decision not to prosecute entirely or prosecute for a more limited set of conduct.<sup>41</sup>

In addition, the FCPA's accounting provisions, designed to complement the anti-bribery provisions—although applicable only to SEC reporting companies—the “issuers” subject to the 15 U.S.C. §78dd-1 anti-bribery prohibition provide an important complement to those programs through those accounting standards, in particular the internal controls requirement. Under this provision,<sup>42</sup> issuers are required to devise and maintain systems of internal accounting controls that will provide reasonable assurances that expenditures of corporate funds are being made consistent with management authorization, that transactions are being recorded sufficiently for the purposes of auditability and the preparation of financial statements, as well as for management oversight. As the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have acknowledged, although the statute speaks in terms of internal *accounting* controls, the control requirements these provisions establish for issuers overlap significantly with the control expectations for anti-corruption compliance programs.<sup>43</sup>

Other national TNB statutes and enforcement regimes fall into roughly three categories: (1) countries that take an approach similar to the U.S. approach and treat compliance efforts as mitigating—e.g., Brazil, under the Clean Company Act<sup>44</sup>; (2) countries that mandate a compliance program (e.g., Spain and Chile); and (3) countries that have a compliance defense. In this last category is the United Kingdom, whose 2010 Bribery Act contains a defense to its Section 7 strict liability offense for so-called “adequate procedures.”<sup>45</sup>

### B. Anti-Corruption Compliance Programs

Anti-corruption compliance programs are expected to establish systems of control around those activities that give rise to anti-corruption compliance risks. Although each company's risk profile is different,

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41. FCPA Corporate Enforcement Policy, Justice Manual, U.S. Department of Justice, §9-47.120 (2020), available at <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>, subsection 3.c, Timely and Appropriate Remediation in FCPA Matters.

42. 15 U.S.C. § 78m(b)(2)(B).

43. THE DEP'T OF JUST. & THE SEC. AND EXCH. COMM'N, *supra* note 40.

44. Adria Perez, *Parallel Lives: How Brazil and the United States Consider Leniency Agreements and Compliance Programs*, NYSBA (New York Bar Association, New York, N.Y.), Fall 2015, at 20.

45. Bribery Act 2010, c. 23, § 7 (UK), <https://www.legislation.gov.uk/ukpga/2010/23/contents>.

depending on where it does business and how it does business, there are widely recognized risk areas in the anti-corruption space.

Very specific compliance expectations have been articulated at both the national and international levels for companies to effectively prevent, detect, and remediate corrupt practices in the course of their business activities. As will be discussed below, the foundation of these expectations is good corporate governance. There is significant convergence between the compliance standards that have been developed at the international level with those that have been put forward at the domestic (national) level, particularly in countries that adhere to the OECD Anti-Bribery Convention.

For instance, the OECD Good Practice Guidance, updated in 2021 as part of a Recommendation of the Council on Further Combating Bribery of Foreign Public Officials in International Business Transactions,<sup>46</sup> sets forth the following sixteen elements as comprising good practices for ensuring effective internal controls, ethics and compliance programs or measures for the purpose of preventing and detecting foreign bribery:

1. Strong, explicit, and visible support and commitment from the board of directors or equivalent governing body and senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery with a view to implementing a culture of ethics and compliance;
2. A clearly articulated and visible corporate policy prohibiting foreign bribery, easily accessible to all employees and relevant third parties, including foreign subsidiaries, where applicable and translated as necessary;
3. Compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;
4. Oversight of ethics and compliance programmes or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies, senior management, the board of directors or equivalent governing body, the supervisory board or their relevant committees, are the duty of one or more senior corporate officers, such as a senior compliance officer, with an adequate level of autonomy from

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46. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (2009).

management and other operational functions, resources, access to relevant sources of data, experience, qualification, and authority;

5. Ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas:

- i. gifts;
- ii. hospitality, entertainment and expenses;
- iii. travel, including customer travel;
- iv. political contributions;
- v. charitable donations and sponsorships;
- vi. facilitation payments;
- vii. solicitation and extortion;
- viii. conflicts of interest;
- ix. hiring processes;
- x. risks associated with the use of intermediaries, especially those interacting with foreign public officials; and
- xi. processes to respond to public calls for tender, where relevant.

6. Ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, inter alia, the following essential elements:

- i. properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular continued oversight of business partners throughout the business relationship;
- ii. informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery;
- iii. seeking a reciprocal commitment from business partners;
- iv. implementing mechanisms to ensure that the contract terms, where appropriate, specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered;

- v. where appropriate, ensuring the company's audit rights to analyse the books and records of business partners and exercising those rights as appropriate;
- vi. providing for adequate mechanisms to address incidents of foreign bribery by business partners, including for example contractual termination rights.

7. A system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

8. The use of internal control systems to identify patterns indicative of foreign bribery, including as appropriate by applying innovative technologies;

9. Measures designed to ensure effective periodic communication and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for business partners;

10. Appropriate measures to encourage and provide positive support and incentives for the observance of ethics and compliance programmes or measures against foreign bribery at all levels of the company including by integrating ethics and compliance in human resources processes, with a view to implementing a culture of compliance;

11. Measures to address cases of suspected foreign bribery, which may include:

- i. processes for identifying, investigating, and reporting the misconduct and genuinely and proactively engaging with law enforcement authorities;
- ii. remediation, including, *inter alia*, analysing the root causes of the misconduct and addressing identified weaknesses in the company's compliance programme or measures;
- iii. appropriate and consistent disciplinary measures and procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery; and

iv. appropriate communication to ensure awareness of these measures and consistent application of disciplinary procedures across the company.

12. Effective measures for providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions, as well as measures to ensure there is no retaliation against any person within the company who is instructed or pressured, including from hierarchical superiors, to engage in foreign bribery and chooses not to do so;

13. A strong and effective protected reporting framework, including: i. internal, confidential, and where appropriate, anonymous, reporting by, and protection against any form of retaliation for, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for reporting persons willing to report breaches of the law or professional standards or ethics occurring within the company on reasonable grounds; ii. clearly defined procedures and visible, accessible, and diversified channels for all reporting persons to report breaches of the law or professional standards or ethics occurring within the company.

14. Periodic reviews and testing of the internal controls, ethics and compliance programmes or measures, including training, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, both on a regular basis and upon specific developments, taking into account the company's evolving risk profile, such as:

- i. changes in the company's activity, structure and operating model,
- ii. results of monitoring and auditing,
- iii. relevant developments in the field,
- iv. evolving international and industry standards, and
- v. lessons learned from a company's possible misconduct and that of other companies facing similar risks based on relevant documentation and data.

15. In cases of mergers and acquisitions, comprehensive risk-based due diligence of acquisition targets; prompt incorporation of the acquired business into its internal controls and ethics and compliance programme; and training of new employees and post-acquisition audits;

16. External communication of the company's commitment to effective internal controls and ethics and compliance programmes.

The DOJ and SEC provide a very similar list in their *Resource Guide to the Foreign Corrupt Practices Act*.<sup>47</sup>

Other international standards—notably, all soft law instruments—include Transparency International's Business Principles on Countering Bribery,<sup>48</sup> the World Economic Forum's Partnership Against Corruption Initiative,<sup>49</sup> and others, contain similar formulations.

At the national level, both soft and hard law standards exist. In the United States, the DOJ and SEC have included a section on compliance in the *Resource Guide to the Foreign Corrupt Practices Act* that details their expectations.<sup>50</sup> In addition, deferred prosecution agreements (a form of non-trial resolution of criminal charges that typically defer prosecution of a company on those charges pending compliance with various conditions, including compliance conditions) typically set out in an annex detailed compliance expectations for the companies subject to such resolutions.<sup>51</sup>

In the United Kingdom, whereas noted earlier “adequate procedures” provide a defense to strict corporate liability under Section 7 of the Bribery Act 2010, the authorities have provided guidance on the content of such procedures.<sup>52</sup> Individual settlements also reflect those compliance expectations.<sup>53</sup>

Thus, in the anti-corruption field, a substantial convergence has taken place around the types of standards and controls that companies engaged in international business activities should adopt. This convergence has emerged over the last twenty-five years at the international level with the emergence of international standards.

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47. See THE DEP'T OF JUST. & THE SEC. AND EXCH. COMM'N, *supra* note 40, at 56-67.

48. *Business Principles for Countering Bribery*, TRANSPARENCY INT'L (Dec. 30, 2013), [https://files.transparencycdn.org/images/2013\\_BusinessPrinciples\\_PT.pdf](https://files.transparencycdn.org/images/2013_BusinessPrinciples_PT.pdf).

49. *Partnering Against Corruption Initiative*, WORLD ECON. FORUM, <https://www.weforum.org/communities/partnering-against-corruption-initiative> (last visited Nov. 12, 2022).

50. THE DEP'T OF JUST. & THE SEC. AND EXCH. COMM'N, *supra* note 40, at 65.

51. See, e.g., *United States v. Glencore Int'l.*, No. 3:22-cr-71, ECF No. 18 (D. Conn. May 24, 2022).

52. Ministry of Just., *The Bribery Act 2010: Guidance* (2011).

53. See, e.g., *SFO enters into €991m Deferred Prosecution Agreement with Airbus as part of a €3.6bn global resolution*, SFO (Jan. 31, 2020), <https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/>.



#### IV. TOWARDS A MORE HOLISTIC APPROACH TO GOVERNANCE AND COMPLIANCE FOR INTERNATIONAL BUSINESSES

The foregoing review has shown that regardless of the specific area of focus, good corporate governance and compliance builds on a common foundation: a board of directors that is focused on providing the guidance and oversight expected by international and domestic standards; management that sets the "tone at the top," implements the board's guidance, and ensures that specific controls systems are developed and implemented to manage the risks, legal and otherwise, faced by the company, and responds to stakeholder demands for proper stewardship, and the specific controls themselves.

The ESG movement could learn much from thinking that has taken place in the anti-corruption arena about effective compliance. Like "E" and "S," successful compliance efforts in the anti-corruption space are values-driven. Transparency and integrity are core values articulated in many companies' compliance programs. While compliance with laws such as the FCPA and its counterparts are an important part of the goal of anti-corruption compliance programs, many companies, in the author's experience, are as concerned with establishing an ethical culture and protecting against reputational risk as they are with legal risk in this arena.

The "G" as it relates to ESG will necessarily evolve as the standards for "E" and "S" continue to develop and crystallize into legal obligations. Companies will need to elaborate internal strategies for compliance and risk management, as they have done in the anti-corruption area. They will need to conduct risk assessments and prioritize key risks. While the measures they adopt with "E" and "S" solely in mind may not intersect with financial and accounting controls to the same extent as in the anti-corruption area, much can be learned from the experience with developing effective compliance programs in the anti-corruption area. As the OECD Good Practice Guidance clearly demonstrates, anti-corruption compliance cuts across a wide range of business activities, much wider than trade controls or competition laws, and is values-based. It implicates not only third parties as a core risk area, but a company's own work force in multiple areas. The same can be said for the environmental and social areas.

As such, a more holistic and less siloed approach to achieving responsible business conduct would seem to offer efficiencies and benefits to companies. Boards should consider carefully how to approach their role: Is it through creation of a new ESG committee that will seek to execute a charter independent of other Board Committees, such as the Compliance or Audit Committee? While the need for an Audit Committee undoubtedly remains strong, should the role of any Compliance Committee be

particularly reconsidered? Especially for companies engaged in international business, given that standards for responsible business conduct are not limited to “E” and “S,” but include at least “C,” should the charter be broadened consistent with the scope of those expectations?

Anti-corruption controls have direct relevance to environmental activities such as permitting and regulatory compliance and may also have direct interaction with human rights-focused and labor activities in both public and private-sector dimensions. Supply chain concerns are also common to both arenas. Community development programs, which may have an environmental or health and welfare focus, will also benefit from incorporating measures to ensure transparency and integrity. Thus, as companies elaborate their control strategy, they will want to consider an approach that prioritizes complementarity, avoiding siloing, and efficiencies.

Companies and their advisors may wish to consider these issues as they grapple with the expanding set of expectations and responsibilities that the ESG movement creates.

# THE CONCEPT OF SUSTAINABILITY IN INTERNATIONAL LAW: A RESEARCH AND POLICY BIBLIOGRAPHY

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Joseph F. C. DiMento\* and Jessica Pierucci\*\*

I.	INTRODUCTION.....	362
	<i>An essential preface about terminology.....</i>	362
II.	THE SEARCH METHOD .....	363
III.	SOME GENERAL THEMES .....	364
	THE BIBLIOGRAPHY .....	APP. I

*It is an honor to be part of this Festschrift for Bob Lutz, a dear friend and colleague. Bob has been helpful to us at UCI for many years, both in general ways and in our work on NAFTA and on the Arctic and international law. In a way, his work is fundamental to our focus in this piece on sustainability: his work has assisted in almost innumerable ways in making international law a potent force in maintaining transnational cooperation and commerce.*

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## I. INTRODUCTION

At the most fundamental level, international law is about (and exists to maintain) sustainability. This is clearly the case in our own central focus of scholarship on environmental and cultural protection. However, sustainability is a major goal of international law in many, if not all, other sectors. Among these are those which we present in this bibliography: trade, business, security, the law of war, and others as noted.

Even when the goal is to change, as opposed to sustain, a status quo, as is the case with human rights, the ultimate objective is to sustain, to allow, to continue, to survive. There, change is the fundamental process to bring all people into the protection of the rule of law, existentially to sustain the diversity of peoples: the human race.

The meaning of sustainability in some sub fields of international law, our own, environmental and cultural survival and thriving, is a critically central and challenging concern. As we have laid out elsewhere, some notions of sustainability can conflict with others: the physical environment and traditions of indigenous peoples for example.<sup>1</sup>

This bibliography reflects the evolution of terms in law, and it inventories various understandings in several sectors of society with a heavy influence on environmental sustainability broadly understood.

### *An essential preface about terminology.*

Here we need to say a word about whether the bibliographic topic is the concept of Sustainability or the policy of Sustainable Development. There is a distinction, and it is a reflection of controversy and scholarly analysis. The United Nations (UN) has offered:

[W]hat is the difference between sustainable development and sustainability? Sustainability is often thought of as a long-term goal (i.e. a more sustainable world), while sustainable development refers to the many processes and pathways to achieve it (e.g. sustainable agriculture and forestry, sustainable production and consumption, good government, research and technology transfer, education and training, etc.)...<sup>2</sup>

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1. For our understanding, see, *inter alia*, Joseph F. C. DiMento, et al., *Arctic Sustainability Law: Almost Sufficient*, 47 N.C. J. INT'L L. 247 (2022) and JOSEPH F. C. DIMENTO, POLAR SHIFT: THE ARCTIC SUSTAINED (2022).

2. *Sustainable Development*, UNESCO (Jan. 28, 2017, 1:29 AM), <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-sustainable-development/sustainable-development/> [<https://webarchive.unesco.org/web/20170128012941/http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-sustainable-development/sustainable-development/>].

Like many commentators or observers, the UN considers that “There are four dimensions to sustainable development—society, environment, culture and economy—which are intertwined, not separate. Sustainability is a paradigm for thinking about the future in which environmental, societal and economic considerations are balanced in the pursuit of an improved quality of life.”<sup>3</sup> It is the “overarching paradigm”<sup>4</sup> of the UN.

We have compiled this bibliography with coverage of both sustainability and sustainable development. We offer this product as a research and policy resource. We ourselves have employed many contributions in it for policy-oriented reasons, including our work on the Arctic.

The bibliography is organized first by time. The 600 entries are listed chronologically from Pre Brundtland<sup>5</sup> to the most recent, that is, Summer 2022. Other organizing dimensions are noted through two forms of code. We indicate whether a work is Descriptive, Historical, or Analytical. These distinctions are not easily made and many of the writings have more than one goal. We also specify whether the article or book focuses on a sector (agriculture, trade, environment, etc.), region, definition, or principle. Certainly, there are other ways to organize a corpus of this size and with various potential uses, but we offer these to facilitate inquiry by criteria which may be the focus of the user.

## II. THE SEARCH METHOD

We provide a wide-ranging bibliography of English language articles and books published from 1983 to the present (Summer, 2022) discussing the definition of sustainability and/or sustainable development in the context of international law and/or environmental law. This is not a bibliography of all books and articles with some relation to sustainability and/or sustainable development. That list would surely stretch into the

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3. *Id.*

4. *Id.*

5. *The Report of the World Commission on Environment and Development: Our Common Future*, commonly referred to as the Brundtland Report, is generally understood to be a major initiating event in the history of a focus on sustainability. In 1987, the Commission defined sustainability as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.” Pre-Brundtland concern with the future of the planet and humans on it was addressed in a number of important reports and publications, many without specific reference to the term sustainability, such as those of the Club of Rome. Its 1972 report was its first:

*The Limits to Growth*. See *The Report of the World Commission on Environment and Development: Our Common Future*, U.N. Docs. 1, 16 (1987), <http://www.un-documents.net/our-common-future.pdf>.

thousands. Instead, this list is curated to share resources with enough focus on sustainability and/or sustainable development to aid the reader in deciphering the meaning of these terms in a legal context.

The methodology for locating and selecting books and articles for inclusion in the bibliography seeks to help readers further understand both the scope and limitations of the list. First, searches were focused on English language materials. Thus, the inclusion of materials in other languages is merely selective and does not aim to be comprehensive. Second, searches were focused on 1983 to the present. The Brundtland Commission was formed in 1983 and the commission published the arguably most widely cited definition in this area in 1987. Interestingly, searches back to 1983 only ultimately yielded relevant results starting in 1987, the year of the commission's report. Third, articles and books that merely mention sustainability and/or sustainable development without providing a descriptive, analytical, and/or historical discussion of the definition of one of these terms were excluded from the bibliography. Fourth, searches were focused on discussions in the context of law, specifically international and environmental laws.

Article research focused on the databases HeinOnline, LegalTrac, and Legal Source. Book research focused first on materials in the UC Library Search catalog containing resources held across the University of California system, with additional research in WorldCat, a worldwide catalog of resources. Research across these platforms showed repetition leading us to believe the list is as comprehensive as possible, but there are surely accidental omissions.

However, we are confident of having identified many of the important works.

### III. SOME GENERAL THEMES

For the Festschrift based on our preliminary review of the corpus we offer a few impressions:

Overall, the database evidence encompasses a large and, to us, surprisingly broad (if not everywhere, deep) interest in the concepts of sustainability and sustainable development across many disciplines and sectors of the economy. Some sectors focusing on sustainability may at first seem surprising to those outside of a field or discipline. For example, for the environmental lawyer, there is a strong and convincing coverage in business law.

In fact, sustainability is a major emphasis in the corporate and trade world. Here, sustainability focuses on keeping active, productive, profitable activities (a business, an industry, or a trade) without comprehensive

attention to the effects that acting to sustain types of commerce have on the physical environment. To put it in caricature form: some of the work to sustain activities/industries/enterprises have unsustainable effects on the environment.

There is a great deal of divergence in views as to what these concepts mean and whether they should be made **action forcing and directive** (some even advocate the evaluation by quantitative standards and benchmarks either as inputs or outputs.) An alternative that some scholars, policymakers, and commentators hold is to consider the ideas **heuristics**. Their value is to keep decision-makers and policy makers who are interested in maintaining the quality of the planet focus on an overall orientation to doing that. Some call these distinctions “hard” and “soft” versions of sustainable development. The “hard” version would impose real restrictions on the nature and extent of development in the name of sustainability. The “soft” version treats sustainable development as a set of very general guidelines or goals, a position reinforced by the **essential hortatory** nature of the Rio Declaration.<sup>6</sup>

While sustainability and sustainable development overlap in many ways including in elements of their definition, in much of the literature, the overlap is quite limited. Either the emphasis is on development, with environment being a secondary or tertiary pillar, or the emphasis is heavily on environmental protection. Therein emphases can be exclusive to the physical environment or include cultures and traditions.<sup>7</sup>

With the above noted caution that the distinctions among analytical, historical, and descriptive offerings are rather arbitrary, we calculate about forty-three percent as analytical, and the rest is evenly divided between historical treatment and simply descriptive work.<sup>8</sup>

From our preliminary coding, one observes the following trends. It is no surprise that many articles are on international law. However, some fundamentally focus on environmental law even if not in the international context. With regard to geographical coverage of the articles, about 273

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6. See John S. Applegate & Alfred C. Aman, Jr., *Introduction-Syncopated Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD 1, 2-3 (2001).

7. These pillars are not necessarily mutually exclusive. See Applegate and Aman’s analysis comparing the Stockholm Declaration of 1972 and Principle 21’s focus on “a fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being.” Rio Principle 1 states: “Human beings are at the centre of concerns for sustainable development.” Some even argue that “Rio replace[s] a right to a healthy environment with a right to develop, and environmental protection was relegated to a distinctly secondary status.” *Id.*

8. We have done our coding without undertaking interrater reliability. That is we have not checked whether different coders would reach roughly similar results. See Joseph DiMento, *International Environmental Law: A Global Assessment*, 33 ENV’T. L. REP. 10387, 10421 (2003).

have a regional focus with a heavy emphasis in North America. This is predictable given our database. Following North America is Europe in general, Asia, Africa, Oceania, and South America. The Arctic is a focus of a very small number. As for sector analysis: governance is a leading category. Here, evenly divided is a focus on national courts and international courts. As for substantive areas of sustainability: land-use is followed by a focus on the law of the sea, water, and air. A large number of contributions are business related and coverage is even larger when one includes trade, the World Bank, and economics. A small number focus on gender and sustainability. Chronologically, the years with the largest number of entries are 2002 and 2013.

Looking forward to further development of the concepts, some of the literature focuses on very specific ideas and recommendations. Some writers, for example, would require environmental impact assessment of (very specific project focused definitions of) sustainability. Some would quantify standards within industries and measure progress in meeting standards in an ongoing way with periodic benchmarking.

There is also a critical literature that considers both concepts (but primarily sustainable development) as vehicles for “Greenwashing” if not “Greenwashing” itself. That term means to offer assessments of the high positive environmental value of one’s product, service, or activity when those flowery conclusions aim to divert attention from damaging, unsustainable enterprises. Descriptors are phrases to allow development to go forward with an emphasis on the economic pillar while paying homage to what are the sought general goals in the larger society.



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# AGAINST SYSTEMIC REVIEW OF FOREIGN JUDGMENTS

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I. SYSTEMIC REVIEW IN U.S. LAW AND PRACTICE .....	370
II. IMPLICATIONS FOR JUDGMENTS RECOGNITION IN THE UNITED STATES AND ABROAD .....	374
III. THE ROLE OF STATE DEPARTMENT COUNTRY REPORTS.....	378
IV. ALTERNATIVES TO SYSTEMIC REVIEW .....	381
V. CONCLUSION .....	382

When a court in the United States is asked to recognize and enforce a foreign judgment, should it focus only on the specific judgment at issue, or should it also consider, more generally, the quality of the foreign court system that produced the judgment? The 2005 Uniform Foreign-Country Money Judgments Recognition Act, adopted in twenty-nine states, provides that a court may not recognize a foreign-country judgment if “the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.”<sup>1</sup> Its predecessor, the 1962 Uniform Foreign Money-Judgments Recognition Act, still in force in nine states, contains a similar provision.<sup>2</sup>

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1. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(1) (NAT’L CONF. COMM’RS UNIF. STATE L. 2005) [hereinafter 2005 UNIFORM ACT] (adopted in Alabama, Arizona, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, and Washington).

2. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1) (NAT’L CONF. COMM’RS UNIF. STATE L. 1962) [hereinafter 1962 UNIFORM ACT] (adopted in Alaska,

Yet very few decisions have denied recognition of foreign judgments based on systemic lack of due process.<sup>3</sup>

As a case study, this essay considers the recent decisions in *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, in which the New York Supreme Court refused to recognize a Chinese judgment based on systemic lack of due process, and New York's Appellate Division reversed that decision on appeal.<sup>4</sup> The case arose from an ordinary business dispute. Shanghai Yongrun had invested in Kashi Galaxy, and Kashi Galaxy agreed to repurchase the investment before an initial public offering.<sup>5</sup> When Kashi Galaxy breached the contract by failing to pay the full repurchase price, Shanghai Yongrun brought suit in Beijing, as provided by the parties' agreement.<sup>6</sup> After a trial, in which the defendants were represented by counsel, the Beijing court granted judgment for the plaintiff.<sup>7</sup> The decision was affirmed on appeal but could not be enforced because there were insufficient assets in China.<sup>8</sup>

Shanghai Yongrun then filed suit in New York state court seeking to enforce the Chinese judgment against the defendant's assets in the United States. The defendant did not point to any specific defect in the Chinese proceeding but instead argued that the judgment could not be recognized because China as a whole lacks impartial tribunals and procedures compatible with due process of law.<sup>9</sup> The New York Supreme Court agreed. The Court quoted passages from the State Department's Country Reports on Human Rights Practices for 2018 and 2019 noting "limitations on judicial independence" and "rampant" corruption in China.<sup>10</sup> The Court held that these reports "conclusively establish as a matter of law that the PRC [People's Republic of China] judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the

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Connecticut, Florida, Maryland, Massachusetts, Missouri, New Jersey, New York, Ohio, and Pennsylvania).

3. See *infra* notes 40-55 and accompanying text.

4. *Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co.*, No. 156328/2020, 2021 WL 1716424 (N.Y. Sup. Ct. Apr. 30, 2021), *rev'd sub nom.* *Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu*, 203 A.D.3d 495 (N.Y. App. Div. 2022). The author wrote an amicus brief on behalf of fifteen professors of international litigation arguing for reversal. See Brief for Shanghai Yongrun Inv. Mgmt. Co. as Amici Curiae Supporting Plaintiff-Appellant, *Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu*, 203 A.D.3d 495 (N.Y. App. Div. 2022) (Case No. 2021-01637) [hereinafter *Shanghai Yongrun Amicus Brief*].

5. *Shanghai Yongrun Inv. Mgmt. Co.*, 2021 WL 1716424, at \*2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at \*3.

10. *Id.* at \*5.



requirements of due process of law in the United States.”<sup>11</sup> Whether there were defects in the specific proceeding was irrelevant, the Court reasoned, because the systemic lack of due process ground “addresses the entire system, not just the underlying litigation.”<sup>12</sup>

The Appellate Division reversed in a brief opinion.<sup>13</sup> “The allegations that [the] defendants had an opportunity to be heard, were represented by counsel, and had a right to appeal in the underlying proceeding in the People’s Republic of China...” the Court held, “sufficiently pleaded that the basic requisites of due process were met.”<sup>14</sup> The State Department’s Country Reports, “which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not utterly refute plaintiff’s allegation that the civil law system governing this breach of contract business dispute was fair.”<sup>15</sup>

By reversing the Supreme Court’s decision on systemic lack of due process, the Appellate Division avoided serious negative consequences. If the Appellate Division had instead upheld the decision, no Chinese judgments would henceforth be entitled to recognition and enforcement in New York. The decision could have led to the same result in other states too, since the laws in the thirty-seven other states that have adopted either the 1962 or the 2005 Uniform Act contain the same grounds for non-recognition. The decision would also have effectively ended the recognition and enforcement of U.S. judgments in China. China recognizes U.S. judgments based on reciprocity,<sup>16</sup> which would be hard to maintain if U.S. courts condemned the Chinese legal system as incapable of producing judgments entitled to recognition. Finally, the decision would have opened the door to questioning judgments from other countries besides China. Recent State Department Country Reports express concerns for 141 other countries about judicial independence, corruption, or both. These are concerns similar to those that the New York Supreme Court relied on with respect to China.<sup>17</sup>

This essay argues against systemic review as a ground for denying recognition to foreign-country judgments. Part I discusses the origins of this

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11. *Id.*

12. *Id.*

13. *Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu*, 203 A.D.3d 495 (N.Y. App. Div. 2022).

14. *Id.* at 495.

15. *Id.* The court also held that the Country Reports did not constitute “documentary evidence” on which a motion to dismiss could be based under Rule 3211 of New York’s Civil Practice Law and Rules. *Id.*

16. *See infra* notes 70-72 and accompanying text.

17. *See Shanghai Yongrun Inv. Mgmt. Co.*, 2021 WL 1716424 at \*5.

ground and the rarity of U.S. decisions relying on it. Part II explains the implications of the *Shanghai Yongrun* case for the recognition of Chinese judgments in the United States and for U.S. judgments in China. Part III considers whether courts should rely on State Department Country Reports to decide if a country lacks impartial tribunals and procedures compatible with due process under the Uniform Acts. Part IV argues that case-specific grounds for non-recognition are sufficient to police foreign judgments, rendering the systemic ground unnecessary. Part V briefly concludes.

## I. SYSTEMIC REVIEW IN U.S. LAW AND PRACTICE

The origins of systemic lack of due process as a ground for non-recognition lie in the U.S. Supreme Court's decision in *Hilton v. Guyot*.<sup>18</sup> *Hilton* established a presumption in favor of recognizing foreign judgments, but subject to a number of caveats:

we are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh ....<sup>19</sup>

Some of the caveats developed into case-specific grounds for non-recognition, such as lack of personal jurisdiction, lack of subject matter jurisdiction, insufficient notice, and fraud.<sup>20</sup> *Hilton*'s reference to "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries"<sup>21</sup> became the basis for the systemic lack of due process ground.

The Supreme Court decided *Hilton* under general common law.<sup>22</sup> However, in 1938, *Erie Railroad Co. v. Tompkins* abolished general common law,<sup>23</sup> and three years later, the Supreme Court held that federal

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18. *Hilton v. Guyot*, 159 U.S. 113 (1895).

19. *Id.* at 202-03.

20. See 2005 UNIFORM ACT, *supra* note 1, §§ 4(b)(2)-(3), (c)(1)-(2) (listing these grounds); 1962 UNIFORM ACT, *supra* note 2, §§ 4(b)(2)-(3), (c)(1)-(2).

21. *Hilton*, 159 U.S. at 202.

22. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 reporters' note 1 (AM. L. INST. 2018).

23. *Erie R.R. Co. v. Tompkins* 304 U.S. 64, 78 (1938).

courts sitting in diversity had to apply state choice-of-law rules.<sup>24</sup> Since then, it has been accepted that state law governs the recognition and enforcement of foreign judgments, including in cases involving federal courts sitting in diversity.<sup>25</sup>

In 1962, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a uniform act that states could adopt to govern the recognition and enforcement of foreign judgments.<sup>26</sup> The aim of this act was to facilitate the enforcement of U.S. judgments abroad by providing evidence of reciprocity to civil law countries that required reciprocity and were reluctant to accept anything short of a legislative enactment as sufficient proof.<sup>27</sup> The drafters attempted to codify existing law,<sup>28</sup> with the act's systemic lack of grounds in due process for non-recognition based directly on *Hilton*.<sup>29</sup> During the NCCUSL's discussion, various speakers mentioned China,<sup>30</sup> the Soviet Union,<sup>31</sup> and Cuba<sup>32</sup> as countries to which this ground for nonrecognition might apply. However, the reporters felt that "some general description" was better than listing specific countries because circumstances might change.<sup>33</sup>

In 2005, the NCCUSL adopted a revised version of the uniform act.<sup>34</sup> It left the systemic lack of due process ground unchanged<sup>35</sup> but added two new case-specific grounds: (1) that "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment";<sup>36</sup> and (2) that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."<sup>37</sup> The comments to the 2005

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24. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

25. *See, e.g., DeJoria v. Maghreb Petroleum Exploration, S.A.* 804 F.3d 373, 378 (5th Cir. 2015) ("Because federal jurisdiction in this case is based on diversity of citizenship, we apply Texas law regarding the recognition and enforcement of foreign judgments.").

26. *See* 1962 UNIFORM ACT, *supra* note 2.

27. *See* National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of the Whole, Uniform Foreign Money Judgment Recognition Act 3-4 (1961) (remarks of Kurt Nadelmann).

28. *Id.* at 6-7 (remarks of Kurt Nadelmann).

29. *Id.* at 30 (remarks of Kurt Nadelmann) ("We used the language which is in *Hilton* [v. Guyot ...]").

30. *Id.* at 12 (remarks of Mr. Havighurst).

31. *Id.* (remarks of Willis Reese).

32. *Id.* at 31 (remarks of Kurt Nadelmann).

33. *Id.* at 12 (remarks of Willis Reese).

34. 2005 UNIFORM ACT, *supra* note 1, § 4(b)(1).

35. *Id.* § 4 cmt. 4 ("The mandatory grounds for nonrecognition stated in subsection (b) are identical to the mandatory grounds stated in Section 4 of the 1962 Act.").

36. *Id.* § 4(c)(7).

37. *Id.* § 4(c)(8).

Uniform Act contrast these case-specific grounds with systemic lack of due process, noting that the new grounds allow a court to deny recognition when bribery of the judge or political bias result in the denial of “fundamental fairness in the particular proceedings.”<sup>38</sup>

Although systemic lack of due process has been a codified ground for nonrecognition of foreign judgments for more than fifty years,<sup>39</sup> only a handful of U.S. decisions besides *Shanghai Yongrun* have denied recognition to foreign judgments on that basis.<sup>40</sup> The leading case is *Bridgeway Corp. v. Citibank*,<sup>41</sup> in which the District Court for the Southern District of New York denied enforcement of a judgment that the Liberian Supreme Court issued during Liberia’s civil war.<sup>42</sup> The Court found that “justices and judges served at the will of the leaders of the warring factions,” that “the courts that did exist were barely functioning,” and that “[t]he due process rights of litigants were often ignored, as corruption and incompetent handling of cases were prevalent.”<sup>43</sup> More recently, in *Chevron Corp. v. Donziger*,<sup>44</sup> the Court refused to recognize an Ecuadoran judgment based on uncontested expert testimony that the Ecuadoran judiciary did not operate impartially.<sup>45</sup> Another case often counted in this category is *Bank Melli Iran v. Pahlavi*,<sup>46</sup> denying recognition of an Iranian judgment against the sister of the former Shah. Although the court in *Bank Melli Iran* did invoke systemic lack of due process as the ground for denying recognition,<sup>47</sup> it made a case-specific determination that the Shah’s

38. *Id.* § 4 cmts. 11-12.

39. In 1963, Maryland became the first state to adopt the 1962 Uniform Act. By 1970, seven states had adopted the act, including California, Illinois, and New York. *Foreign-Country Money Judgements Recognition Act: Enactment History*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?communitykey=ae280c30-094a-4d8f-b722-8dcd614a8f3e&tab=groupdetails#LegBillTrackingAnchor> (last visited Oct. 28, 2022).

40. A recent empirical study of 587 U.S. state and federal decisions from 2000 to 2017 identified only six that denied recognition for systemic lack of due process. Samuel P. Baumgartner & Christopher A. Whytock, *Enforcement of Foreign Judgements, Systemic Calibration, and the Global Law Market*, 23 THEORETICAL INQUIRIES L. 119, 143 n.74 (2022). In my view, only two of these decisions should count—the *Bridgeway* and *Donziger* cases discussed below. Three of the decisions that Baumgartner and Whytock cite involve the *Osorio* case that was ultimately resolved on case-specific grounds. The other, *DeJoria*, was reversed on appeal. See *infra* notes 41-54 and accompanying text.

41. *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276 (S.D.N.Y. 1999), *aff’d*, 201 F.3d 134 (2d Cir. 2000).

42. *Id.* at 288.

43. *Id.* at 287.

44. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), *aff’d*, *Chevron Corp. v. Donziger*, 833 F.3d 74 833 F.3d 74 (2d Cir. 2016).

45. *Id.* at 609-14.

46. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995).

47. *Id.* at 1410.

sister “could not get due process in Iran” because of political influence and hostility to the Shah’s regime.<sup>48</sup> As Paul Stephan has noted, “[r]ather than ruling that foreigners faced systemic unfairness in Iran, the court looked at the characteristics of the litigation in question.”<sup>49</sup>

In three other cases, the district courts denied recognition of a foreign judgment for systemic lack of due process, but the decisions were reversed on appeal. In *Osorio v. Dow Chemical Co.*,<sup>50</sup> the Eleventh Circuit affirmed the decision to deny recognition on case-specific grounds but specifically declined to adopt the district court’s conclusion that Nicaragua does not provide impartial tribunals.<sup>51</sup> In *DeJoria v. Maghreb Petroleum Exploration, S.A.*,<sup>52</sup> the Fifth Circuit reversed the decision to deny recognition, concluding that the defendant had not met its “high burden” of showing “that the Moroccan judicial system lacks sufficient independence such that fair litigation in Morocco is impossible.”<sup>53</sup> The Uniform Act, the Court observed, “does not require that the foreign judicial system be perfect.”<sup>54</sup> Finally, as discussed above, in *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, New York’s Appellate Division reversed the New York Supreme Court’s decision to deny recognition based on systemic lack of due process, holding that the plaintiff had “sufficiently pleaded that the basic requisites of due process were met.” The Appellate Division also found that the State Department Country Reports on China, “which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters,” did not rebut those allegations.<sup>55</sup>

There are several reasons that U.S. courts might be reluctant to decide that a foreign court system is incapable of producing enforceable judgments. First, as others have noted, courts seem institutionally ill-equipped to decide such questions. “Systematic empirical research into foreign institutions is beyond the capacity of any judicial body,”<sup>56</sup> and

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48. *Id.* at 1411.

49. Paul B. Stephan, *Unjust Legal Systems and the Enforcement of Foreign Judgments*, in RECOGNITION AND ENFORCEMENT OF JUDICIAL JUDGMENTS 84, 93 (Paul B. Stephan ed., 2014).

50. *Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011) (per curiam).

51. *Id.* at 1279.

52. *Dejoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373 (5th Cir. 2015).

53. *Id.* at 382.

54. *Id.*

55. *Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu*, 203 A.D.3d 495 (N.Y. App. Div. 2022).

56. Stephan, *supra* note 49, at 88; *see also* Baumgartner & Whytock, *supra* note 40, at 122 (noting that “courts are not necessarily institutionally well suited to draw conclusions about the systemic adequacy of other legal systems”); Thomas Kelly, Note, *An Unwise and Unmanageable Anachronism: Why the Time Has Come to Eliminate Systemic Inadequacy as a Basis for*

“advocates for adversaries are not wholly trustworthy in their choice of studies.”<sup>57</sup> Second, courts may recoil at the implications of such a decision. To deny recognition of a foreign judgment on this ground, a court must conclude not just that the judgment before the court is tainted but that all judgments from the foreign legal system are similarly tainted. And, as discussed below in Part II, condemning a foreign legal system as incapable of producing enforceable judgments may impact the enforceability of U.S. judgments in that legal system.<sup>58</sup> Third, courts have the alternative of denying recognition based on other, case-specific grounds. This is particularly true in the twenty-nine states that have adopted the 2005 Uniform Act with its new case-specific grounds relating to lack of integrity and due process in the particular proceeding.<sup>59</sup>

## II. IMPLICATIONS FOR JUDGMENTS RECOGNITION IN THE UNITED STATES AND ABROAD

The decision that a foreign judgment is not entitled to recognition and enforcement on systemic grounds, because the foreign judicial system “does not provide impartial tribunals or procedures compatible with the requirements of due process of law,”<sup>60</sup> means that the U.S. court has concluded that the courts of the foreign country are incapable of ever producing a judgment that is entitled to recognition. As the New York Supreme Court put it in *Shanghai Yongrun*, “the fact that Defendants participated in the underlying litigation, were represented by an attorney, and appealed the trial court judgment ... is of no consequence” because this ground for nonrecognition “addresses the entire system, not just the

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*Nonrecognition of Foreign Judgment*, 42 GEO. J. INT'L L. 555, 572 (2011) (“American courts are simply not equipped to jump the epistemological hurdles to determine whether a foreign judicial system judicially objectively provides impartial tribunals and procedures compatible with the requirements of due process of law.”).

57. Stephan, *supra* note 49, at 88; see also Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U. L. REV. 1, 40 (2016) (noting that “[p]rivate litigants likely have no special insight into the general features of foreign legal systems”).

58. See *infra* Part II. Some authors have asserted that such determinations may cause difficulties in foreign relations that extend beyond the judgment context. See Kelly, *supra* note 56, at 557 (positing that such a determination might “create an international incident”); Stephan, *supra* note 49, at 88 (suggesting that such a determination “may antagonize the government in question, complicating its relations with the United States in unforeseeable and potentially unfortunate ways”). As Zachary Clopton has observed, however, such decisions “have not sparked international incident.” Clopton, *supra* note 57, at 5.

59. See *infra* Part IV.

60. 2005 UNIFORM ACT, *supra* note 1, § 4(b)(1); 1962 UNIFORM ACT, *supra* note 2, § 4(a)(1).

underlying litigation.”<sup>61</sup> This part considers the implications of such a decision for the recognition of foreign judgments in the United States and for the recognition of U.S. judgments abroad.

The effect of a decision finding a systemic lack of due process on other judgments from the same country depends on the rules of *stare decisis*.<sup>62</sup> The recognition of foreign judgments is governed by state law, and states are free to adopt their own rules of *stare decisis*.<sup>63</sup> In New York, one trial court’s decision is not binding on other trial courts.<sup>64</sup> A decision by New York’s Appellate Division, on the other hand, would be binding on all trial courts in New York.<sup>65</sup> Furthermore, a decision by the New York Court of Appeals would, of course, bind not just all state courts in New York but also federal courts sitting in diversity.<sup>66</sup> Within the federal system, a district court’s determination of state law is not binding on other district courts, but a federal Court of Appeals’ determination of state law is binding both on district courts in the circuit and on later panels within the same circuit.<sup>67</sup>

Obviously, the decision of a state or federal court with respect to New York law would not bind a state or federal court applying California law. On the other hand, the 2005 and 1962 Uniform Acts are *uniform* acts that are supposed to be interpreted consistently. Given that New York and California have both adopted the 2005 Uniform Act, it would be odd for Chinese judgments to be unenforceable in New York for systemic lack of

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61. *Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co.*, No. 156328/2020, 2021 WL 1716424, at \*5 (N.Y. Sup. Ct. Apr. 30, 2021)

62. One might argue that such decisions should have no precedential effect because a foreign legal system may have changed in the interim. In practice, however, judges tend to rely heavily on prior judicial decisions when the facts are difficult to ascertain, as they are for systemic questions. Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 965-67 (2017).

63. See Zachary B. Pohlman, Note, *Stare Decisis and The Supreme Court(s): What States Can Learn from Gamble*, 95 NOTRE DAME L. REV. 1731, 1747-52 (2020) (discussing *stare decisis* in state courts).

64. Just a few months before *Shanghai Yongrun*, another New York Supreme Court judge held “that the Chinese legal system comports with the due process requirements and the public policy of New York.” *Huizhi Liu v. Guoqing Guan*, Index No. 713741/2019 (N.Y. Sup. Ct., Jan. 7, 2020). The judge in *Shanghai Yongrun* concluded that he was not bound by that decision. *Shanghai Yongrun*, 2021 WL 1716424, at \*5.

65. See *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919-20 (N.Y. App. Div. 1984) (“The Appellate Division is a single statewide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule.” (citations omitted)).

66. Under the *Erie* doctrine, intermediate state court decisions are persuasive authority but do not bind federal courts tasked with applying state law. See 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 4507 (3d. ed. 2021) (discussing the determination of state law under the *Erie* doctrine).

67. *Anderson Living Tr. v. Energen Resources Corp.*, 886 F.3d 826, 834 (10th Cir. 2018).

due process, and, at the same time, be enforceable in California.<sup>68</sup> As noted above, thirty-eight states have adopted one of the two Uniform Acts containing systemic lack of due process as a ground for nonrecognition. This means that the refusal to recognize a foreign judgment on this ground has the potential to render judgments from that country unenforceable throughout much of the United States.

The refusal to recognize a foreign judgment for systemic lack of due process also has implications for the recognition and enforcement of U.S. judgments abroad. A number of other countries require reciprocity as a condition for enforcing foreign judgments.<sup>69</sup> Among these countries is China, which recognizes foreign judgments only if provided by treaty or based on the principle of reciprocity.<sup>70</sup> In 2022, China's Supreme People's Court adopted a new policy of *de jure* reciprocity under which reciprocity exists if a Chinese judgment would be recognizable under the foreign country's laws even if that country has not previously recognized a Chinese judgment.<sup>71</sup> This new policy of *de jure* reciprocity replaces the old policy of

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68. In the course of recognizing Chinese judgments, several federal district courts in California and Illinois have either rejected a challenge on systemic due process grounds or noted that such a challenge had not been made. See *Yancheng Shanda Yuanfeng Equity Inv. P'ship v. Wan*, 20-CV-2198, 2022 WL 411860, at \*9 (C.D. Ill. Jan. 10, 2022) (rejecting challenge for systemic lack of due process grounds); *Qinrong Qiu v. Hongying Zhang*, No. CV 17-05446-JFW, 2017 WL 10574227, at \*3 (C.D. Cal. Oct. 27, 2017) (concluding that "the Chinese court was an impartial tribunal"); *Glob. Material Techs., Inc. v. Dazheng Metal Fibre Co.*, No. 12 CV 1851, 2015 WL 1977527, at \*7 (N.D. Ill. May 1, 2015) ("GMT does not allege that the Chinese judicial system as a whole is biased and incompatible with principles of basic fairness."); *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187, at \*6 (C.D. Cal. July 22, 2009) ("RHC has not presented any evidence, nor does it contend, that the PRC court system is one which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.").

69. See STANDING INTERNATIONAL FORUM OF COMMERCIAL COURTS, MULTILATERAL MEMORANDUM ON ENFORCEMENT OF COMMERCIAL JUDGMENTS FOR MONEY (2d ed. 2020) (finding reciprocity requirements in Abu Dhabi, Cayman Islands, China, Gambia, Germany, Japan, Kazakhstan, Malaysia, Sierra Leone, South Korea, and Uganda among thirty-three countries surveyed).

70. *Zhonghua Renmin Gongheguo Minshi Susong Fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, last amended Dec. 24, 2021, effective Jan. 1, 2022), art. 289, 2022(1) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 96 (China).

71. *Quanguo Fayuan Shewai Shangshi Haishi Shenpan Gongzuo zuotanhui Huiyi Jiyao* (全国法院涉外商事海事审判工作座谈会会议纪要) [Minutes of the National Court's Symposium on Foreign-Related Commercial and Maritime Trials] art. 44 (Sup. People's Ct. Jan. 24, 2022) <http://cicc.court.gov.cn/html/1/218/62/409/2172.html>. Although the Minutes are not legally binding, they will guide Chinese judges in future cases involving the recognition and enforcement of foreign judgments. See Meng Yu & Guodong Duo, *China's 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments*, CONFLICT OF LAWS.NET (July 1, 2022), <https://conflictoflaws.net/2022/chinas-2022-landmark-judicial-policy-clears-final-hurdle-for-enforcement-of-foreign-judgments/>.



*de facto* reciprocity, which required that the foreign country had in fact previously recognized Chinese judgments.<sup>72</sup> Because Chinese courts have previously held that the United States satisfied the requirement of *de facto* reciprocity based in its prior recognition of Chinese judgments,<sup>73</sup> there seems little doubt that U.S. judgments will satisfy the more relaxed *de jure* standard.

But denying recognition of Chinese judgments based on systemic lack of due process would change that.<sup>74</sup> Maintaining judgment reciprocity with China does not require U.S. courts to recognize every Chinese judgment. U.S. courts have denied recognition on case-specific grounds when the Chinese court lacked personal jurisdiction over the defendant<sup>75</sup> or the Chinese judgment conflicted with another final judgment.<sup>76</sup> Denying recognition on the ground that China lacks impartial tribunals or procedures compatible with due process is fundamentally different from using case-specific grounds, however, because it indicates that Chinese judgments will never be recognizable or enforceable.

Whether a New York decision denying recognition of Chinese judgments for systemic lack of due process would have destroyed reciprocity with respect to the entire United States or only with respect to New York is an important question. Technically, each state constitutes its own jurisdiction for purposes of judgment recognition, and (as noted above) courts in California are not bound to follow those in New York. But in applying the old policy of *de facto* reciprocity, China did not distinguish among different states or between federal and state courts.<sup>77</sup> China's approach makes sense because of the substantial uniformity within the United States of state law on foreign judgments. Treating the United States as a single jurisdiction, however, also means that a decision in one state

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72. William S. Dodge & Wenliang Zhang, *Reciprocity in China-U.S. Judgments Recognition*, 53 VAND. J. TRANSNAT'L L. 1541, 1551-52 (2020) (discussing policy of *de facto* reciprocity).

73. See, e.g., *Liu v. Tao* (Wuhan Interm. People's Ct. June 30, 2017) (citing Hubei Gezhoubu Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798- FMC-SSx, 2009 WL 2190187 (C.D. Cal. July 22, 2009)), translated in appendix to Ronald A. Brand, *Recognition of Foreign Judgments in China: The Liu Case and the "Belt and Road" Initiative*, 37 J.L. & COM. 29 (2018).

74. Even proponents of review for systemic lack of due process admit that "there are possible reciprocal effects; Chinese courts will arguably be less likely to enforce U.S. judgments." Donald C. Clarke, *Judging China: The Chinese Legal System in U.S. Courts*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4150893](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4150893) (manuscript at 93).

75. See *Folex Golf Indus., Inc. v. Ota Precision Indus. Co.*, 603 F. App'x 576, 577 (9th Cir. 2015).

76. See *UM Corp. v. Tsuburaya Prod. Co.*, No. 2:15-cv-03764-AB (AJWx), 2016 WL 10644497, at \*8 (C.D. Cal. Sept. 22, 2016).

77. See Dodge & Zhang, *supra* note 72, at 1576-78.

denying recognition for systemic lack of due process has the potential to destroy reciprocity with respect to the entire United States.

### III. THE ROLE OF STATE DEPARTMENT COUNTRY REPORTS

Every year, the U.S. State Department produces Country Reports on Human Rights Practices.<sup>78</sup> In *Shanghai Yongrun*, the New York Supreme Court relied exclusively on the 2018 and 2019 Country Reports to conclude that China's courts suffer from a systemic lack of due process.<sup>79</sup> Indeed, the Court held that these reports "conclusively establish as a matter of law that the PRC judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law in the United States."<sup>80</sup> The Second Circuit has held that State Department Country Reports are admissible to show whether a foreign court system provides due process,<sup>81</sup> and a number of courts have considered such reports, although none prior to the *Shanghai Yongrun* decision relied on them exclusively or treated them as conclusive.<sup>82</sup> This Part considers the appropriateness of relying on Country Reports in this context, as well as the implications of doing so.

It is important to understand the purpose of these reports to evaluate the appropriateness of relying on them to assess foreign court systems for the purpose of recognizing foreign judgments.<sup>83</sup> Section 116 of the Foreign Assistance Act of 1961 bars development assistance "to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights."<sup>84</sup> Pursuant to this provision, the State Department is required to prepare reports on human rights practices with respect to all U.N. member states addressing a number of specific

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78. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/> [hereinafter 2020 COUNTRY REPORTS].

79. *Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co.*, No. 156328/2020, 2021 WL 1716424, at \*5 (N.Y. Sup. Ct. Apr. 30, 2021).

80. *Id.*

81. *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143 (2d Cir. 2000).

82. *See, e.g., Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1411-12 (9th Cir. 1995) (discussing other evidence); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 609-14 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016) (relying on expert testimony); *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 278 n.2 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000) (listing other sources).

83. I am grateful to Professor David Stewart, who previously headed the section within the State Department's Office of the Legal Adviser that prepares the Country Reports, for explaining the process to me. Any errors in describing the process are my own.

84. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified at 22 U.S.C. § 2151n(a)).

matters.<sup>85</sup> Section 502B of the Act additionally prohibits security assistance “to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”<sup>86</sup> Pursuant to this provision, the State Department must transmit a report with respect to each country for which it proposes security assistance covering various human rights topics.<sup>87</sup> Because of these statutory mandates, the Country Reports focus on human rights concerns and typically address foreign court systems within that context.<sup>88</sup> In fact, the country reports caution that “they do not state or reach legal conclusions with respect to domestic or international law.”<sup>89</sup>

Given the Country Reports’ focus on human rights, reliance on the reports to evaluate foreign court systems for other purposes may be misplaced. As Mark Jia has observed, authoritarian legal systems are often “bifurcated.”<sup>90</sup> “In routine commercial, civil, and even criminal matters,” Jia notes, “bifurcated legal systems will largely conform to modernist principles: the laws will be mostly written, consistent, and clear, and they will be applied by reasonably neutral and competent jurists,” whereas “in matters that are more politically consequential, written laws may yield to secret commands and otherwise autonomous judges may begin to resemble political agents.”<sup>91</sup> Indeed, China’s party officials increasingly expect courts “to resolve a great many of their routine cases in a more consistent and expert fashion.”<sup>92</sup> As the Appellate Division noted in *Shanghai Yongrun*, “the reports, which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not

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85. 22 U.S.C. § 2151n(d). These matters include the status of internationally recognized human rights; practices regarding coercion in population control; child labor practices; protections for refugees; violations of religious freedom; acts of anti-Semitism; the commission of war crimes, crimes against humanity, and genocide; extrajudicial killings; torture; recruitment of child soldiers; freedom of the press; trafficking in persons; child marriage; and other serious violations of human rights. *Id.* §§ 2151n(d), (f)-(g).

86. *Id.* § 2304(a)(2).

87. *Id.* § 2304(b). The topics include the commission of war crimes, crimes against humanity, and genocide; coercion in population control; violations of religious freedom; acts of anti-Semitism; extrajudicial killings, torture, and other serious violations of human rights; recruitment of child soldiers; and the protection of refugees.

88. *See, e.g.*, U.S. DEP’T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (INCLUDES HONG KONG, MACAU, AND TIBET) 15 (2021) (discussing Chinese court system under the heading entitled “Denial of Fair Public Trial”); *id.* at 58 (discussing corruption under the heading entitled “Freedom to Participate in the Political Process”).

89. 2020 COUNTRY REPORTS, *supra* note 78, APPENDIX A.

90. Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1720 (2020).

91. *Id.*

92. Mark Jia, *Specialized Courts, Global China*, 62 VA. J. INT’L L. 559, 609 (2022).

utterly refute plaintiff's allegation that the civil law system governing this breach of contract business dispute was fair."<sup>93</sup>

It is also worth noting the implications of relying on State Department Country Reports to judge the quality of foreign court systems for countries other than China. In *Shanghai Yongrun*, the New York Supreme Court focused specifically on statements in the 2018 and 2019 Country Reports for China concerning limitations on judicial independence and corruption.<sup>94</sup> The 2020 Country Reports, published in March 2021, expressed similar concerns in one or both of these areas for 141 countries apart from China, including several countries that do significant business with the United States and often produce judgments that parties seek to enforce in the United States.<sup>95</sup> With respect to judicial independence, the 2020 Reports express concerns about 102 countries,<sup>96</sup> including Mexico,<sup>97</sup> Brazil,<sup>98</sup> and Argentina.<sup>99</sup> With respect to corruption, the 2020 Reports express concerns about 133 countries,<sup>100</sup> including Italy,<sup>101</sup> Japan,<sup>102</sup> South Korea,<sup>103</sup> and

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93. *Shanghai Yongrun Inv. Mgmt Co. v. Maodong Xu*, 203 A.D.3d 495 (N.Y. App. Div. 2022).

94. *Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co.*, No. 156328/2020, 2021 WL 1716424, at \*5 (N.Y. Sup. Ct. Apr. 30, 2021).

95. See Baumgartner & Whytock, *supra* note 40, at 149, Appendix A, Figure A-1 (compiling states of origin of foreign judgments for which recognition was sought in the United States between 2000 and 2017).

96. See *Shanghai Yongrun* Amicus Brief, *supra* note 4, Appendix B.

97. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: MEXICO 13 (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/> ("Although the constitution and law provide for an independent judiciary, court decisions were susceptible to improper influence by both private and public entities, particularly at the state and local level, as well as by transnational criminal organizations.").

98. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BRAZIL 13 (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/brazil/> ("While the justice system provides for an independent civil judiciary, courts were burdened with backlogs and sometimes subject to corruption, political influence, and indirect intimidation.").

99. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ARGENTINA 7 (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/argentina/> ("The law provides for an independent judiciary, but government officials at all levels did not always respect judicial independence and impartiality.").

100. See *Shanghai Yongrun* Amicus Brief, *supra* note 4, Appendix C.

101. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: ITALY 12 (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/italy/> ("Officials sometimes engaged in corrupt practices with impunity. There were numerous reports of government corruption during the year.").

102. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: JAPAN 18 (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/japan/> ("Independent academic experts stated that ties among politicians, bureaucrats, and businesspersons were close, and corruption remained a concern.").

103. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SOUTH KOREA 17 (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights->

Spain.<sup>104</sup> Of course, one might argue that the State Department's concerns are milder for some countries than for others. But this would require U.S. courts to develop standards for telling when the concerns about judicial independence and corruption are sufficiently grave to amount to systemic lack of due process, something courts seem ill-equipped to do.<sup>105</sup> If courts were to take the Country Reports at face value and treats them as conclusive, as the New York Supreme Court did in *Shanghai Yongrun*, the number of countries whose judgments would become unenforceable in the United States would grow considerably.

#### IV. ALTERNATIVES TO SYSTEMIC REVIEW

If the State Department's Country Reports are unreliable in the context of judgments as Part III has argued, what are the alternatives? It is likely true, as Zachary Clopton has argued that only the federal political branches are institutionally well-equipped to make the kind of systemic judgments that the Uniform Acts call for.<sup>106</sup> Paul Stephan has raised the possibility that courts might look to other lists maintained by the federal government, such as U.S. Treasury sanctions.<sup>107</sup> But such sources have the same drawbacks as the Country Reports because they are not prepared for the purpose of determining whether foreign judgments should be enforced. Donald Clarke has suggested that the federal government could prepare reports targeted to the judgments context.<sup>108</sup> However, such a solution seems impractical without federal legislation. One must recall that *state* law governs the recognition and enforcement of foreign judgments in the United States. Systemic determinations by the federal government would not be binding under the existing Uniform Acts.

It makes more sense for U.S. courts to abandon the attempt to determine whether a foreign court system provides impartial tribunals and procedures compatible with due process and to focus instead on the case-specific grounds for nonrecognition. These include lack of jurisdiction, lack of notice, fraud, public policy, conflict with another final judgment, and

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practices/south-korea/ ("Nonetheless, officials sometimes engaged in corrupt practices with impunity, and there were numerous reports of government corruption. Ruling and opposition politicians alike alleged that the judicial system was used as a political weapon.").

104. U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: SPAIN 22 (2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/spain/> ("Corruption was a problem in the country.").

105. See *supra* notes 56-57 and accompanying text.

106. Clopton, *supra* note 57, at 31-32.

107. Stephan, *supra* note 49, at 88-89.

108. Clarke, *supra* note 74 (manuscript at 93); see also Clopton, *supra* note 57, at 40 (citing State Department Country Reports and terrorist financing lists as potential models).

conflict with a dispute resolution clause.<sup>109</sup> In the twenty-nine states that have adopted the 2005 Uniform Act, the case specific grounds also include lack of integrity in the rendering court (*e.g.* corruption) and lack of due process in the particular proceeding.<sup>110</sup> Unlike systemic evaluation, this kind of case-specific analysis falls squarely within the competence of the U.S. courts.<sup>111</sup> It may well be that the case-specific analysis will result in the recognition of fewer judgments from less reliable legal systems.<sup>112</sup> But the case-specific approach avoids the over-inclusiveness of denying recognition on systemic grounds when there are no defects in the judgment before the court.

## V. CONCLUSION

The systemic review of foreign court systems is an idea whose time has gone. It might have made sense when *Hilton v. Guyot* was decided in 1895 or even when the first Uniform Act was drafted in 1962. But today, it stands as an “artifact of an age when it was thought that it made sense to split the world up into civilized and uncivilized nations and treat their judgments accordingly.”<sup>113</sup> Even if the world was once capable of such clean divisions, it is much messier today. As the examples in Part III show, democratic systems can suffer from a lack of judicial independence and corruption, while autocratic systems can run reliable court systems for commercial cases.

U.S. courts can screen out foreign judgments undeserving of recognition and enforcement by applying the large range of case-specific grounds available under the Uniform Acts. Even if systemic lack of due

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109. See 2005 UNIFORM ACT, *supra* note 1, § 4; 1962 UNIFORM ACT, *supra* note 2, § 4.

110. See 2005 UNIFORM ACT, *supra* note 1, § 4(c)(7)-(8).

111. Clarke objects that courts can use case-specific grounds to police against unfairness “only when they have adequate information.” Clarke, *supra* note 74 (manuscript at 90). But if the party resisting recognition cannot prove unfairness in the specific proceeding it is not clear why it should win. Clarke concedes that “not all judgments from China or other illiberal legal systems are tainted,” which means that “simply ceasing the enforcement of such judgments will mean injustice to deserving plaintiffs.” *Id.* (manuscript at 93).

112. Baumgartner and Whytock found a correlation between indicators for the rule of law, judicial independence, and control of corruption and the recognition of foreign judgments in the United States between 2000 and 2017. Given the rarity of decisions denying recognition on systemic due process grounds, the correlation cannot be explained by direct application of that ground. Baumgartner & Whytock, *supra* note 40, at 143. They suggest that another possibility, the most plausible in my view, is that case-specific defects are less likely to occur in more reliable legal systems and more likely to occur in less reliable ones. *Id.* at 145.

113. Kelly, *supra* note 56, at 582; see also Stephan, *supra* note 49, at 87 (“[A]s decolonization took hold around the world, the distinction between civilized and uncivilized countries, and hence between good and bad judicial systems, seemed increasingly untenable”).

process remains on the books as a ground for nonrecognition, U.S. courts should give up trying to make such determinations. Indeed, the rarity of U.S. decisions denying recognition on this basis<sup>114</sup> indicates that, for the most part, they already have.

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114. *See supra* notes 39-55 and accompanying text.







# GLOBAL LEGAL EDUCATION, THE GLOBALIZING LEGAL PROFESSION, AND THE FUTURE OF INTERNATIONAL LAW

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Austen Parrish\*

INTRODUCTION.....	386
GLOBALIZING LEGAL EDUCATION.....	388
GLOBALIZING LAWYERS AND THE CHANGING GLOBAL LEGAL PROFESSION.....	394
INTERNATIONAL LAW AND COMPETING APPROACHES TO GLOBAL GOVERNANCE .....	397
CONCLUSION.....	400

## INTRODUCTION

Writing for this *Festschrift* in honor of Professor Robert E. Lutz is a privilege. Looking back at his remarkable career,<sup>1</sup> it would be hard to overstate Bob’s importance to Southwestern Law School and his impact on generations of students. For more than four decades, his scholarship as well as his leadership in a range of international law organizations<sup>2</sup> placed Bob

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1. Others in this issue underscore more of Bob’s many achievements and accolades. I note only that it’s not surprising the ABA Section of International Law recognized him with its 2016 Lifetime Achievement Award, and in 2014 he received the Warren Christopher “Lawyer of the Year” Award from the California Bar. This year, the Daily Journal interviewed Bob for its podcast hosted by the contributing editor Howard B. Miller. *See A Model Life in International Law: Celebrating Professor Robert Lutz*, DAILY J. (June 25, 2021), <https://www.dailyjournal.com/articles/363272-a-model-life-in-international-law-celebrating-professor-robert-lutz>.

2. As a few examples, Bob has served as the Chair of ABA International Law Section, Chair of the ABA Standing Committee on International Trade in Legal Services, Chair of Section of International Law of the Association of American Law Schools, and Chair of the Los Angeles

at the forefront of analyzing and shaping some of the biggest changes occurring in the public and private international law. While he worked with countless law students, he was also a mentor for and caring supporter of his colleagues.<sup>3</sup> When I began my career at Southwestern teaching international environmental law, I not only relied on the leading casebook, *International Environmental Law and Policy*, which Bob co-authored,<sup>4</sup> but I often sought him out for advice, guidance, and friendship.

Bob's remarkable career and intellectual interests have tracked many of the broader changes occurring within the field of international law. Bob is a practitioner and observer in several domains. If his earlier work focused on international and transnational environmental law regimes,<sup>5</sup> his more recent work assessed the substantial transformations of the legal profession wrought by globalization, technology, and the geopolitical shifts following the end of the Cold War.<sup>6</sup> The most prominent transformations include the dramatic globalization of legal education in the U.S. and beyond; the changing face of the profession as lawyers have tackled an increasingly wide range of transnational challenges; and the proliferation of global

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County Bar Association's International Law Committee. He co-founded the California Bar Association's International Law Section and served on Executive Committee of the California Lawyers Association's International Law Section. He was also a US member of the NAFTA Advisory Committee on Private Commercial Dispute Resolution, a member of the Advisory Committee on International Law to the U.S. State Department's Legal Adviser, and a member of the ABA's Center for Professional Responsibility's Committees on Professional Regulation and Professionalism, and the Commission on Ethics 20/20. As a Life-Member of the American Law Institute, he chaired a Blue-Ribbon Working Group on the Restatement of Foreign Relations Law of the United States (Fourth) and has been active with the American Bar Foundation Fellows' Research Advisory Council.

See *Robert Lutz to Receive Lifetime Achievement Award*, AM. L. INST. (July 25, 2016), <https://www.ali.org/news/articles/robert-lutz-receive-lifetime-achievement-award/>; Robert Lutz, *Member Spotlight: Robert E. Lutz*, AM. BAR ASS'N (Dec. 16, 2021), [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2020/voice-of-experience--december-2020/member-spotlight--robert-e--lutz/](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2020/voice-of-experience--december-2020/member-spotlight--robert-e--lutz/).

3. Whether his annual Oktoberfest celebrations for Southwestern Law School faculty and staff were a small part of his broader globalization efforts, or simply a love of good company and craft beer, is contested.

4. DANIEL BARSTOW MAGRAW ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (Edith Brown Weiss et al. eds., 1st ed. 1998).

5. See, e.g., Robert E. Lutz, *The Laws of Environmental Management: A Comparative Study*, 24 AM. J. COMP. L. 447 (1976).

6. See, e.g., Robert E. Lutz, *The Regulation of the Transnational Legal Profession in the United States*, 50 INT'L L. 445 (2017) (reprinted from a Festschrift symposium); Robert E. Lutz, *Comparative Observations About Transnational Legal Education and Legal Scholarship*, 46 INT'L L. 625 (2012); Robert E. Lutz, *Reforming Approaches to Educating Transnational Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449 (2012). See also *THE ABA SECTION OF INTERNATIONAL LAW, THE WORLD'S INTERNATIONAL LAWYERS SINCE 1878* (Robert E. Lutz & Aaron Schildhaus, eds., 2008).

governance approaches that compete with state-based international law. Indeed, much of Bob's most enduring work reflects his long-standing dedication to initiatives focused on the globalization of legal practice and academia.

This modest contribution to Bob's richly deserved *Festschrift* sketches out some of these transformations. It begins by describing how legal education has attempted to adapt to the demands of a globalizing legal profession, even when counter forces have pushed towards isolation. It ends by describing those regimes that, in some respects, compete with and seek to displace public international law and reimagine global governance. This short piece does not pretend to do justice to the depth of Bob's lifetime of work or to the many important contributions he has made over that half century. Rather, this piece provides a glimpse and the briefest of summaries by pulling together the work and observations of a range of colleagues, who I have been fortunate to work with and learn from, and who have been leaders in the field.

#### GLOBALIZING LEGAL EDUCATION

One area in which Bob has been intimately involved is the globalization of legal education. In the early 1980s, Bob founded and taught at the first ABA-accredited law school program in the People's Republic of China, at Zhongshan University in Guangzhou. Bob's long-standing work with Southwestern Law School's summer law program at the Summer Law Institute in Guanajuato, as well as his work with this journal are other examples. Bob led many of Southwestern's international initiatives and, over his career, participated in legal exchanges with the bars and law societies of China, Cuba, Scotland, Ireland, India, Guatemala, Costa Rica, Brazil, South Africa, Lebanon, Syria, and Iran, among others. He was recently granted a Fulbright scholarship to engage in research and teaching in Eastern Europe at Moldova State University's Law Faculty. Southwestern now offers more than sixty courses and seminars on international and comparative law. For many years, students could elect to take Public International Law as a first-year elective course. Bob's work helped pave the way and set the foundation for unique programs such as the Siderman Human Rights Fellowship and Southwestern's partnership with the Republic of Armenia.

The initiatives Bob helped launch at Southwestern mirror broader changes that have occurred throughout U.S. legal education overall.<sup>7</sup> Over the last few decades, courses on international, comparative,<sup>8</sup> and transnational law<sup>9</sup> have proliferated, both in the upper-division and the first-year curriculum.<sup>10</sup> For example, Harvard Law School, Michigan Law School, and Georgetown Law Center offered foundation courses focused on transnational legal issues.<sup>11</sup> More recently, the more innovative programs have focused not just on the substance of international law, but on studying international legal systems, lawyers, and the global legal profession. For example, at Indiana University Bloomington's Maurer School of Law, students are required to take a three-credit Legal Profession course, one section of which is focused on global lawyering.<sup>12</sup> At the University of California's Irvine School of Law, students are able to take a first-year course in international legal analysis, which for several years was required.<sup>13</sup>

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7. For an overview, see THE INTERNATIONALIZATION OF LAW AND LEGAL EDUCATION (Mortimer Sellers & Jan Klabbers eds., 2008). For Bob's discussion of the most significant ways that U.S. law schools help prepare global lawyers, see Lutz, *supra* note 6, at 453-54.

8. See Anthea Roberts et al., *Comparative International Law: Framing the Field*, 109 AM. J. INT'L L. 467 (2015).

9. Transnational law is now taught in law schools as a separate course from international law. Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 U.C. IRVINE L. REV. 97, 100 (2011). See also Eve Darian-Smith, *Transnational Legal Education*, in THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 1153 (Peer Zumbansen ed., 2021) ("This chapter examines the increasing demand for law schools in the United States and around the world to include courses that engage with the rapidly expanding field of transnational law and global legal processes."). On the broader trend, see Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479, 479 (2006) (noting "the move to globalize the curriculum at other law schools has gathered steam, fueled by conferences, symposia, and workshops . . . with current efforts aimed at ensuring 'that the vast majority, if not all, of law school graduates have exposure to issues of international, transnational, and comparative law.'")

10. ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 14-16 (Catherine L. Carpenter, ed. 2012) (upper division course titles have increased since 2002 with "noted additions in International Law . . ." and that international law had become one of the more popular areas for specialization and certificates); see also Larry Catá Backer, *Internationalizing the American Law School Curriculum (In Light of the Carnegie Foundation's Report)*, 2 IUS GENTIUM 49, 54 (2008).

11. Farid Ali, *Globalizing the U.S. Law School Curriculum: How Should Legal Educators Respond?*, 41 INT'L J. LEGAL INFO. 249, 266 (2013).

12. *A Different Approach to your First Year*, IND. UNIV. MAURER SCH. LAW, <https://law.indiana.edu/academics/jd-degrees/innovative/first-year.html> (last visited Mar. 24, 2022).

13. *International and Comparative Law*, U. C. IRVINE SCH. LAW, <https://www.law.uci.edu/academics/curriculum/international-law.html> (last visited Mar. 24, 2022).

Furthermore, the number of co-curricular activities and organizations with a global outlook have increased as the globalizing curricular trends in law schools have become more commonplace. Most schools now host international law student associations, along with other international activities. It has also become routine for law schools to host journals with a global or international focus,<sup>14</sup> or with specialized sub-fields from different countries.<sup>15</sup> In this way, Southwestern's Journal of International Law is similar to the range of international and transnational journals that have proliferated throughout the United States.<sup>16</sup> Indicative of the tendency toward specialization, this journal, for which Bob long-served as a faculty advisor, was known as Southwestern's Journal of Law and Trade in the Americas from its founding in 1994 through 2008.

Newer, and less common, are experiential learning opportunities that have a global focus and programs designed to improve cultural competencies.<sup>17</sup> For example, at Indiana University Bloomington, the Maurer School of Law offers an overseas global internship program. Each year, the school fully funds twenty to twenty-five law students, who work in more than twelve countries during their first or second-year summer.<sup>18</sup> Placements range from positions in intellectual property and business law in Argentina and Brazil, human rights in Mexico and Poland, to business and technology law in China, India, Taiwan, Thailand, and Vietnam, among others. Led by Professor Jayanth Krishnan, the Director of the Stewart Center on the Global Legal Profession, and Professor Christiana Ochoa, the school's Interim Dean and Academic Director of Indiana University's

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14. See generally Ignacio de la Rasilla, *A Very Short History of International Law Journals (1869–2018)*, 29 EUR. J. INT'L L. 137 (2018).

15. Steven R. Ratner and Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999) (“We have moved, it seems, from the establishment of new international law journals by law schools around the world to a proliferation of specialized international law journals and very specialized international lawyers”).

16. For a discussion of some of these trends, see Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transactional Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143 (2006); Simon Chesterman, *The Evolution of Legal Education: Internationalization, Transnationalization, Globalization*, 10 GERMAN L.J. 877, 881-83 (2009) (defining the first phase of transformation of legal education as internationalization, the second phase of transnationalization as a “shift” toward offering students experience abroad, and the third phase as globalization, in which “individual lawyers need to be comfortable in multiple jurisdictions, often simultaneously.”).

17. Carole Silver, *Getting Real About Globalization and Legal Education: Potential and Perspectives for the U.S.*, 24 STAN. L. & POL'Y REV. 457, 462 (2013) (describing the need for global experiential learning at U.S. law schools and the need for intercultural competency).

18. Stewart Fellows Global Internship Program, IND. UNIV. MAURER SCH. LAW, <https://law.indiana.edu/academics/global-experiences/stewart-fellows/index.html> (last visited Mar. 24, 2022).

Global Gateway in Mexico City, this program is one of the few in the U.S. that provides fully funded summer jobs to students.<sup>19</sup>

Summer abroad programs and semester abroad programs,<sup>20</sup> while still prevalent, seem to be less active than they had been prior to the Great Recession. For many years, Southwestern Law School hosted summer programs in Argentina, Canada, England, and Mexico. Bob taught or was involved in many of them. In Argentina, students who were fluent in Spanish could attend externships with the Argentina Supreme Court. Students in the Vancouver program could extern with the International Centre for Criminal Law Reform and Criminal Justice Policy, a UN affiliate, while some students would work with local environmental nonprofits. Even if there are fewer summer abroad opportunities for students now, semester abroad positions and joint degrees with foreign institutions are common and U.S. faculty now travel and visit foreign institutions often.<sup>21</sup>

Bob also promoted the growth of international LL.M. programs that allow a large number of international lawyers to work side-by-side with the JD students.<sup>22</sup> At one time, LL.M. programs were offered only by a relatively small number of law schools with long standing programs.<sup>23</sup> At Indiana University's Maurer School of Law, the LL.M. program for foreign-licensed lawyers started over a century ago, with its first international students graduating in the early 1900s.<sup>24</sup> From 2012 to 2016,

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19. See LINDA K. FARISS & KEITH BUCKLEY, INDIANA UNIVERSITY MAURER SCHOOL OF LAW: THE FIRST 175 YEARS 86 (2019).

20. For a current list, see *Foreign Programs*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/foreign\\_study/foreign\\_programs/](https://www.americanbar.org/groups/legal_education/resources/foreign_study/foreign_programs/) (last visited Mar. 24, 2022); see also Adelaide Ferguson, *Mapping Study Abroad in U.S. Law Schools: The Current Landscape and New Horizons*, NAFSA: ASS'N INT'L EDUC. 1 (2010).

21. Carrie Menkel-Meadow, 'Have Law Books, Computer, Simulations – Will Travel', *The Transnationalization of (Some of) the Law Professoriate*, in THE GLOBALIZATION OF LEGAL EDUCATION: A CRITICAL STUDY (Bryant Garth et al. eds. 2017).

22. See, e.g., Carole Silver & Swethaa S. Ballakrishnen, *Sticky Floors, Springboards, Stairways & Slow Escalators: Mobility Pathways and Preferences of International Students in U.S. Law Schools*, 3 U.C. IRVINE J. INT'L, TRANSN'L, & COMP. L. 39, 49 (2018); Carole Silver, *States Side Story: Career Paths of International LL.M. Students, or "I Like to Be in America,"* 80 FORDHAM L. REV. 2383, 2384 (2012).

23. Matthew S. Parker, *The Origin of LL.M Programs: A Case Study of the University of Pennsylvania Law School*, 39 U. PA. J. INT'L L. 825, 855 (2018) (a report to the ABA in 1906 noted that a 'master's degree in law' was offered in nineteen schools, all of them in the form of an LL.M") (citing REPORT OF THE COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR (1906), reprinted in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 1177-82 (Steve Sheppard ed., 1999)).

24. FARISS & BUCKLEY, *supra* note 19, at 127, 131 (describing the law school's first students from the Philippines, who arrived in 1904, and how the LL.M. degree for foreign lawyers was first offered in 1918).

other schools launched new foreign LL.M. programs in response to the pressures on legal education following the Great Recession.<sup>25</sup> The number of international JD students has grown recently.<sup>26</sup> In sum, the cross-border flows of students is significant.<sup>27</sup>

Law schools have also expanded their global research activities. A small number of law schools have even created specialized centers to focus on that changing nature of the legal profession. University of California, Irvine's Center on Globalization, Law and Society and Indiana University Bloomington's Center on the Global Legal Profession are particularly good examples, while a few other schools have similarly invested in studying globalization<sup>28</sup> or transnational law.<sup>29</sup> Some schools have even devoted entire symposia to the globalization of legal education.<sup>30</sup>

Of course, more could be done, as not all, and perhaps not even the majority, of U.S. law schools have embraced global legal education.<sup>31</sup> As

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25. Nora V. Demleitner, *Stratification, Expansion, and Retrenchment: International Legal Education in U.S. Law Schools*, 43 INT'L L. NEWS 1, 6 (2014) ("U.S. law schools experience[d] increasing fiscal pressure due to the downturn in the number of applicants to their JD programs, ever more of them have opened or increased the size of LL.M. program targeting foreign attorneys.").

26. Carole Silver & Swethaa Ballakrishnen, *Language, Culture, and the Culture of Language: International JD Students in U.S. Law Schools*, POWER, LEGAL EDUC., & L. SCH. CULTURES (2020) (tracking data on the proportion of JDs who are international students, including dates from interviews with approximately fifty international students); see also Carole Silver & Swethaa Ballakrishnen, *A New Minority? International JD Students in U.S. Law Schools*, 44 LAW & SOC. INQUIRY 647 (2019).

27. See Anthea Roberts, *Cross-Border Student Flows and the Construction of International Law as a Transnational Legal Field*, 3 U.C. IRVINE J. INT'L TRANSNATION'L & COMP. L. 1, 4-12 (2018).

28. See, e.g., *Stewart Center on the Global Legal Profession*, IND. UNIV. MAURER SCH. LAW; *Center on Globalization, Law, and Society* U. C. IRVINE SCH. LAW; *Center on the Legal Profession* HARV. L. SCH.

29. See, e.g., *Center for Transnational Litigation, Arbitration, and Commercial Law*, N.Y.U.; *Center for Transnational Legal Studies*, GEORGETOWN UNIV. L. CTR; *Center for Transnational Law and Business*, U.S.C. GOULD SCH. LAW; *The Dickinson Poon Transnational Law Institute*, KING'S C. LONDON.

30. *The Globalization of Legal Education: A Critical Study*, U.C. IRVINE SCH. LAW, <https://www.law.uci.edu/centers/glas/activities/globalization-legal-education-conference/> (last visited Mar. 24, 2022). For one of the earliest examples, see William D. Henderson, *The Globalization of the Legal Profession*, 14 IND. J. GLOB. LEG. S. 1, 1-2 (2007).

31. Rosa Kim, *Globalizing the Law Curriculum for Twenty-First-Century Lawyering*, 67 J. LEGAL EDUC. 905, 906 (2018) ("[T]he theory that law students need training to become solvers of global problems has not materialized into practice for the great majority of law schools"); Therese Kaiser-Jarvis, *Preparing Student for Global Practice: Developing Competencies and Providing Guidance*, 67 J. LEGAL EDUC. 949 (2018) ("U.S. law schools vary greatly in the attention they give to developing global competencies in their students"); John B. Attanasio, *Partnerships, Joint Ventures and Other Forms for Building Global Law Schools*, 18 DICK. J. INT'L L. 483, 484-85



one commentator stated, “[i]n sum, it is probably accurate to say that internationalization is not in the mainstream of the leading discussions of American legal education, but it is not entirely absent. That said, it is not so easy to characterize its presence.”<sup>32</sup>

These changes and pressures to globalize are not unique to the United States. Law schools in India,<sup>33</sup> China,<sup>34</sup> Indonesia,<sup>35</sup> Brazil,<sup>36</sup> and elsewhere<sup>37</sup> have begun to focus on preparing students for global legal markets,<sup>38</sup> and using global connections as a way to compete within domestic markets. The Jindal Global Law School in Sonipat, India is perhaps the most well-known and successful example.<sup>39</sup> A growing literature also explores the reasons, origins, and causes of the globalization of law and legal education.<sup>40</sup>

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(2000) (stating that globalization of legal education has lagged behind schools in other disciplines).

32. Frank K. Upham, *The Internationalization of Legal Education: National Report for the United States of America*, 62 AM. J. COMP. L. 97, 104 (2014).

33. See generally Yves Dezalay & Bryant G. Garth, *Battles Around Legal Education Reform: From Entrenched Local Legal Oligarchies to Oligopolistic Universals, India as a Case Study*, 3 U.C. IRVINE J. INT’L, TRANSNAT’L, & COMP. L. 143, 144-45 (2018); C. Raj Kumar, *Legal Education, Globalization and Institutional Excellence: Challenges for the Rule of Law and Access to Justice in India*, 20 IND. J. GLOB. LEGAL STUDIES 221 (2013); Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 4 AM. J. LEGAL HIST. 447, 455 (2004).

34. Cecily E. Baskir, *Legal Education in China: Globalizing with Chinese Characteristics*, 2 ASIAN J. LEGAL EDUC. 143 (2015); cf. Matthew S. Erie, *Legal Education Reform in China Through U.S. Inspired Transplants*, 59 J. LEGAL EDUC. 60 (2009).

35. Adriaan Bedner & Jacqueline Vel, *Legal Education in Indonesia*, 1 INDON. J. SOCIO-LEGAL STUD. 22 (2021).

36. Oscar Vilhena Vieira & Jose Garcez Ghirardi, *The Unstoppable Force, the Immovable Object: Challenges for Structuring a Cosmopolitan Legal Education in Brazil*, 3 U.C. IRVINE J. INT’L TRANSNAT’L & COMP. L. 119 (2018).

37. Trevor C. W. Farrow, *Globalizing Approaches to Legal Education and Training: Canada to Japan*, 38 HOSEI RIRON J. LAW & POL. 144, 148 (2005).

38. For discussions of global law schools and the internationalization of legal education generally, see Alberto Bernabe-Riefkohl, *Tomorrow’s Law Schools: Globalization and Legal Education*, 32 SAN DIEGO L. REV. 137, 147 (1995); THE INTERNATIONALISATION OF LEGAL EDUCATION (Christophe Jarmin & William van Caenegem eds., 2016).

39. See C. Raj Kumar, *Experiments in Legal Education in India: Jindal Global Law School and Private Nonprofit Legal Education*, in THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION: THE RISE OF THE CORPORATE LEGAL SECTOR AND ITS IMPACT ON LAWYERS AND SOCIETY 606 (D. Wilkins et al. eds. 2017).

40. Dezalay & Garth, *supra* note 33, at 7; see also YVES DEZALAY & BRYANT G. GARTH, LAW AS REPRODUCTION AND REVOLUTION: AN INTERCONNECTED HISTORY 143-44 (2021); YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 123 (2002). For a discussion in the Indian context, Krishnan, *supra* note 33, at 447.

In the United States, the globalizing of legal education is not limited to law schools; it also occurs at the undergraduate level. At Indiana University Bloomington, the Hamilton Lugar School of Global and International Studies (in collaboration with the Maurer School of Law) offers a BA in international law and institutions, one of the first of its kind.<sup>41</sup> The University of Arizona has also received some publicity for its BA program in China.<sup>42</sup> Of course, undergraduate courses and majors in international law have been around in other countries for a long time.<sup>43</sup> Outside the United States, where the study of law is not primarily part of a graduate program, such programs have been common.<sup>44</sup>

#### GLOBALIZING LAWYERS AND THE CHANGING GLOBAL LEGAL PROFESSION

It's not just legal education in the United States that has globalized. Legal education has largely reflected broader changes occurring in legal practice. Perhaps these changes are being driven by law schools in a sense that "all lawyers of the 21st century should be prepared to address international, trans-national or cross-border legal issues."<sup>45</sup> While globalizing trends may not be the only factor attracting students to global law schools,<sup>46</sup> and despite some recent retreats towards isolationism,<sup>47</sup>

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41. *Law and Institutions Degree Program on Cutting Edge of International Issues*, HAMILTON LUGAR SCH. NEWS (Apr. 20, 2021), <https://blogs.iu.edu/hamiltonlugar/2021/04/20/law-and-institutions-degree-program-on-cutting-edge-of-international-issues/>.

42. *UA Launches First Dual Degree Law Program in China*, ARIZONA UNIV. JAMES E. ROGER C. LAW (Jan. 12, 2016), <https://law.arizona.edu/news/2016/01/ua-launches-first-dual-degree-law-program-china>.

43. At Indiana University Bloomington, a BS in Law and Public Policy offered by the O'Neill School of Public and Environmental Affairs in collaboration with the Maurer School of Law has been offered since 2013. *Learn How the Law Works and Use it to Solve Problems and Shape Policy*, IND. UNIV. O'NEILL SCH. PUB. & ENVTL. AFFAIRS, <https://oneill.indiana.edu/undergraduate/degrees-majors/law-public-policy.html> (last visited Mar. 24, 2022).

44. *See, e.g., 12 Bachelor Programs in International Law*, KEYSTONE BACHELOR STUD., <https://www.bachelorstudies.com/Bachelor/International-Law/> (last visited Oct. 16, 2022).

45. Kaiser-Jarvis, *supra* note 31, at 950.

46. Kevin E. Davis & Xinyi Zhang, *Who Wants the Global Law School?*, 3 U.C. IRVINE J. INT'L TRANSN'L & COMP. L. 71, 71-73 (2018).

47. *Id.* at 74 (noting some trend away from globalization since the Great Recession); *see also* Kim, *supra* note 31, at 905 ("In the current post-Trump political climate, the concept of globalization has taken on a decidedly negative connotation. Nationalist and xenophobic movements in the United States and Europe have resurged as a reaction to what some view as the negative economic, social, and political effects of an increasingly interconnected world. Yet, just as the momentum in technological advancement in the digital age cannot be slowed, avoiding the reality of an increasingly globalized world by insisting on looking inward is futile.").

generally the trend to greater globalization of legal services has been well understood.<sup>48</sup>

Bob has been a keen observer of these changes. In a series of articles with several co-authors, he detailed the changes occurring within the U.S. legal profession, and the rise of the transnational lawyer, as a result of globalization.<sup>49</sup> In 2012, Bob highlighted the “rapid integration and globalization of national economies” and how “globalization is also a primary force behind curricular reforms that seek to prepare students to function as lawyers in a transnational legal world.”<sup>50</sup> Much of Bob’s most recent work and writings have addressed the ability of a lawyer to practice or consult in foreign jurisdictions.<sup>51</sup>

Global law firms with global practices are now common.<sup>52</sup> U.S. law firms have created new practice groups devoted to transnational disputes,<sup>53</sup> the American Bar Association has attempted to support transnational practice,<sup>54</sup> and a range of literature explores global legal service networks.<sup>55</sup> Cases involving foreign elements and noncitizen defendants have increased

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48. One of the early and leading symposia on the topic was Northwestern Law School’s Symposium on the Globalization of the Legal Profession in 2008. See Carole Silver et al., *Globalization and the Business of Law: Lessons for Legal Education*, 28 NW. J. INT’L L. & BUS. 399, 412 (2008) (introducing the symposium).

49. See, e.g., Robert E. Lutz et al., *Transnational Legal Practice Developments*, 39 INT’L L. 619 (2005); Laurel S. Terry et al., *Transnational Legal Practice*, 43 INT’L L. 563, 563-64 (2009).

50. Lutz, *supra* note 6, at 449, 452.

51. Robert E. Lutz, *An Essay Concerning the Changing International Legal Profession*, 18 SW. J. INT’L L. 215 (2011); Robert E. Lutz et al., *Cross-Border Legal Services*, 37 INT’L LAW. 987, 987, 989 (2003).

52. See Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 57-58 (2010); Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2201 (2007). See also D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study*, 14 IND. J. GLOBAL LEGAL STUD. 5, 5-6 (2007); Carole Silver, *Local Matters: Internationalizing Strategies for U.S. Law Firms*, 14 IND. J. GLOB. LEGAL STUD. 67, 69 (2007).

53. See Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1492 (2013); Paul Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT’L L. 301, 303 (2008) (describing creation of specialized practices); see also Press Release, Gibson, Dunn & Crutcher LLP, *Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group* (Dec. 15, 2010), <https://www.prnewswire.com/news-releases/gibson-dunn-launches-transnational-litigation-and-foreign-judgments-practice-group-111926789.html>.

54. See Laurel S. Terry & Carole Silver, *Transnational Legal Practice*, 49 ABA/SIL YIR (n.s.) 413 (2015).

55. See, e.g., Laurel S. Terry, *Global Networks and the Legal Profession*, 53 AKRON L. REV. 137 (2019).

in the United States as well.<sup>56</sup> It's common for U.S. lawyers to need to know something about international or transnational law and practice,<sup>57</sup> even if they are not practicing with global firms.<sup>58</sup> Over twenty years ago, scholars observed that "international law practice has grown from an obscure specialty to a robust field of professional endeavors for lawyers in many of the world's developed economies."<sup>59</sup> Others have reached similar conclusions.<sup>60</sup>

The extent of globalization is significant. As one recent article noted, "in 2018, the United States exported approximately \$10.3 billion in legal services and imported approximately \$3.4 billion in legal services . . . ."<sup>61</sup> The other statistics are equally compelling. In 2015, law firms located in forty-seven states had at least one foreign office, including both small and large firms.<sup>62</sup> As with global legal education, the phenomenon of globalizing legal practice is by no means limited to the United States, which may be a late comer in many respects.<sup>63</sup>

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56. The introduction to the Fourth Edition of Gary Born and Bo Rutledge's well-known casebook sums up the changes well. GARY BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* ix (5th ed. 2011) ("When the first edition of this book was completed in 1988, the field of international civil litigation did not exist in the United States. . . . Practitioners, as well as academics, now regard international civil litigation as a vital, and profoundly challenging, area of the law.").

57. RONIT DINOVIETZ ET AL., *AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 35 (2009) (indicating that nearly half of U.S. lawyers are called upon to solve transnational legal problems for their clients, with almost two-thirds of lawyers at large law firms and serving as inside counsel report an international component to their practices); see also DONALD E. CHILDRESS III ET AL., *TRANSNATIONAL LAW AND PRACTICE* 4 (Rachel E. Barkow et al. eds., 2nd ed. 2015) (describing the increase in transnational practice).

58. Laurel S. Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527, 527-28 (2008).

59. Peter L. Murray & Jens Drolshammer, *The Education and Training of a New International Lawyer*, in *THE INTERNATIONALIZATION OF PRACTICE OF LAW* 289, 290 (Jens Drolshammer & Michael Pfeifer eds., 2001).

60. Frank Sullivan, Jr., *International LL.M. Students: A Great Resource for U.S. Law Schools*, 22 IND. INT'L & COMP. L. REV. 219, 234-35 (2012) (book review) ("There is no courtroom in this country into which international considerations do not enter."); Adelaide Ferguson, *Mapping Study Abroad in U.S. Law Schools: The Current Landscape and New Horizons*, NAFSA: ASS'N INT'L EDUC. 4-6 (2010) (From a 2009 study of "10,740 active members of the Philadelphia Bar Association, 67.5 percent of the 1,050 lawyers responding reported working on a legal matter within the past year that required them to have some knowledge of foreign and/or international law."); see generally Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039 (2001).

61. Terry, *supra* note 55, at 143; see also Laurel S. Terry, *Transnational Legal Practice (International)*, 47 INT'L LAW 485, 490 (2013).

62. Terry, *supra* note 55, at 144.

63. Mihaela Papa & David B. Wilkins, *Globalization, Lawyers and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession*, 18 INT'L J. LEGAL PROF. 175 (2011) ("It is by now common knowledge that globalization is

## INTERNATIONAL LAW AND COMPETING APPROACHES TO GLOBAL GOVERNANCE

Finally, a third transformation of international law and global governance tracks well with Bob's own career and scholarly contributions. Bob began his career writing about international law and institutions. Some of his most influential work, focused on environmental law regimes, and detailed the growth of international agreements. His more recent work explored the rise of global networks, non-state actors, and pluralistic regimes that now often compete with, rather than complement, international law.

For decades, the nation-state and its territorial borders were the core focus of international law. Since the end of the Second World War, "the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries" were the three central principles that formed the foundation of the international legal system.<sup>64</sup> These legal principles undergirded a state-focused international system designed to reduce conflict, maintain peace, and constrain would-be empire-builders.<sup>65</sup> As such, the international legal system privileged multilateral collaborative efforts, over unilateral action.<sup>66</sup> Indeed, principles of cooperation, consultation, and negotiation<sup>67</sup>—combined with principles

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transforming virtually every sector of the world's economy, and that this transformation has important implications for the rapidly globalizing market for legal services. At the same time, as economic power shifts, India, China and other emerging economies are becoming central players in this market."); Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 L. & SOC'Y. REV. 771, 772 (2008). See Ethan Michelson, *Women in the Legal Profession, 1970-2010: A Study of the Global Supply of Lawyers*, 20 IND. J. GLOBAL LEGAL STUD. 1071, 1086 (2013), for an analysis of gender differences, studying data from eighty-six countries.

64. Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. INT'L AFF. 11 (2006).

65. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." U.N. Charter art. 2, ¶ 4. Hersch Lauterpacht described international law's mission as leading "to enhancing the stability of international peace, to the protection of the rights of man, and to reducing the evils and abuse of national power." Steve R. Ratner, *International Law: The Trials of Global Norms*, 16 FOREIGN POLY. 65, 65-66 (1998).

66. Harlan G. Cohen, *Multilateralism's Life Cycle*, 112 AM. J. INT'L L. 47, 50 (2018) (describing multilateralism as "a preference—a belief, that all things being equal, broader, more inclusive regimes would best solve the problems at hand, whether functionally or normatively"). See generally G. John Ikenberry, *Is American Multilateralism in Decline*, 1 PERSP. POL. 533 (2003). This, of course, never meant that unilateralism doesn't have a role to play. See also José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393 (2000).

67. *Lake Lanoux Arbitration (Fr. v. Spain)*, 12 R.I.A.A. 281, 315 (Arb. Trib. 1957) ("in accordance with the rules of good faith, to take into consideration the different interests, to try to give them every satisfaction compatible with the pursuit of its own interests and to show that it

of self-determination and non-intervention<sup>68</sup>—meant that states were to exhaust collaborative approaches before unilateral self-help measures were permitted.<sup>69</sup>

In recent decades, international law has further sought to constrain unbridled state power. International law, with an egalitarian focus on consent, limited certain forms of state action while enabling powerful states to use that power to reach multilateral agreement and benefit from international legal regulation. The rise of human rights, which imposed greater responsibilities on states, further reinforced these basic understandings. A state could no longer hide behind concepts of sovereignty to shield itself from scrutiny by the international community regarding the treatment of its own citizens.<sup>70</sup> Intervention into other states and formal interference in another state’s policies was permitted only in the face of grave crimes (such as genocide, crimes against humanity, and war crimes).<sup>71</sup>

Over the last several decades—responding to the disaggregation of law and legal institutions and the proliferation of non-state actors<sup>72</sup>—these foundational understandings of international law have been under attack. Driven by intractable global problems and the difficulties associated with obtaining international consensus, those advocating for an increased unilateral prerogative have gained influence.<sup>73</sup> In the U.S., the anti-

has a real desire to reconcile the interests of the other [Party.]”); Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, ¶¶ 74–75 (July 25) (describing the duty to consult). *See also* Pulp Mills on the River Uruguay (Arg. v Uru.), Judgment, 2010 I.C.J. Rep. 14 [77]; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16).

68. U.N. Charter art. 43, ¶ 1 (referring to self-determination as one of the purposes of the UN); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 1 (setting out the right to self-determination); International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

69. *See, e.g.,* Corfu Channel, (U.K. v. Alb.), 1949 I.C.J. Rep. 4 (Apr. 9) Albania, Judgment (condemning self-help approaches). *See* Evan J. Criddle & Evan Fox-Decent, *Mandatory Multilateralism*, 113 AM. J. INT’L L. 272 (2019), for a discussion of why international law often mandates multilateral approaches.

70. TIMOTHY WATERS, *BOXING PANDORA: RETHINKING BORDERS, STATES, AND SECESSION IN A DEMOCRATIC WORLD 2* (Yale Univ. Press 2020) (“The rise of human rights has eroded the notion that what happens inside the state is no one else’s business . . .”).

71. Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142, 143 (2006).

72. *See* ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* 32 (2004).

73. Jutta Brunnée, *Multilateralism in Crisis*, AM. SOC. INT’L LAW PROC. 335, 337-38 (Proceedings of the 112<sup>th</sup> Annual Meeting (2018)) (describing international law and the crossroads and a current crisis and arguing that the U.S. “has turned *against* multilateralism”); *cf.*, David

internationalism often present in Congress has made multilateral agreements hard to come by, while go-it-alone and interventionist approaches have dominated.

One of the more problematic, and misunderstood, symptoms of this trend has been the dramatic rise of extraterritorial, unilateral regulation of foreigners.<sup>74</sup> Rather than simply filling regulatory gaps, complementing international agreement, or serving as a step towards harmonization, unilateral extraterritorial regulation has increasingly served as a competing, hegemonic alternative to international law and its mechanisms.<sup>75</sup> While at one point primarily a U.S. strategy, the attempt to govern globally through domestic measures—untethered to international agreement—has been embraced broadly.<sup>76</sup> Since unilateral, extraterritorial regulation has increasingly reflected an unwillingness to engage multilaterally, this trend has also furthered isolationist tendencies. The result led to the question: why bother working with the United States if it can simply ignore the rules and act on its own through domestic processes?

Bob's work has long explored these pulls by the international legal system as well as the promises and limitations of international law and its institutions. In the early 1990s, Bob wrote about the International Court of Justice, lamenting the court's neglect by major powers and described ways to reinvigorate commitment to the Court and international institutions in an evolving world order.<sup>77</sup> Indeed, much of Bob's scholarship has sought to push back on anti-internationalism and anti-global perspectives in the U.S.<sup>78</sup> In his other writings, he has advanced practical solutions for

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Kaye, *Stealth Multilateralism: United States Foreign Policy Without Treaties—Or the Senate*, FOREIGN AFFS. 92 (Sept./Oct. 2013) (describing methods of bypassing multilateral agreement).

74. See Austen L. Parrish, *Fading Extraterritoriality and Isolationism? Developments in the United States*, 24 IND. J. GLOBAL LEGAL STUD. 207, 209 (2017), for a more in-depth treatment (arguing that a move away from extraterritorial unilateral regulation would “embrace a vision for global governance and a role for domestic courts in that system that is more consistent with foundational principles of international law”).

75. See also Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 403 (2005). See also Jean L. Cohen, *Whose Sovereignty? Empire versus International Law*, 18 ETHICS & INT'L AFFS., 1,3 (2004).

76. See ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* 21 (2020).

77. Robert E. Lutz, *The World Court in a Changing World: An Agenda for Expanding the Court's Role from a U.S. Perspective*, 27 STAN. J. INT'L L. 265, 267-68 (1991). See also Robert E. Lutz, *Perspectives on the World Court, the United States, and International Dispute Resolution in a Changing World*, 25 INT'L LAW. 675 (1991).

78. See, e.g., Robert E. Lutz, *Current Developments in the North American Free Trade Agreement: A Guide for Future Economic Integration Efforts*, 18 WHITTIER L. REV. 313, 315 (1997) (describing NAFTA and exploring issues of protectionism).

international collaboration on some of the world's most pressing global and transboundary challenges. At the same time, he recognized a space for unilateral enforcement and other activities, so long as they were connected to broader international discourse and collaboration.<sup>79</sup> In many ways, the central themes of Bob's work remain relevant to the enduring challenges that still beleaguer us, as skepticism about the effectiveness of international norms and institutions continue.<sup>80</sup>

#### CONCLUSION

Great law schools are built by great faculty. Bob's legacy, contributions, and scholarly writings over the course of four decades place him among this faculty who have shaped Southwestern Law School into what it is today. His many contributions to our understanding of international law, transnational lawyering, and the global legal profession should be celebrated, along with his lasting impact on Southwestern Law School's long-standing commitment to preparing students for an increasingly complex and global practice. As Bob takes emeritus status, it is only appropriate that the Southwestern Journal of International Law honors his many contributions through this richly deserved symposium.

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79. See, e.g., Robert E. Lutz, *An Essay Harmonizing National Environmental Laws and Policies*, 1 ENVTL POL'Y & L. 132 (1975) (urging greater collaboration and harmonization of national strategies); Robert E. Lutz, *The Export of Danger: A View from the Developed World*, 20 N.Y.U. J. INT'L L. & POL. 629, 671-72 (1988) (urging multilateral and international approaches in addition to unilateral ones to address hazardous waste, technologies, and substances); Robert E. Lutz, *On Combating the Culture of Corruption*, 10 SW. J. L. & TRADE AM. 263, 267-68 (2004) (arguing that combating corruption requires strong unilateral action combined with multilateral efforts and understandings and cautioning against "bullying, self-righteous, self-interested and coercive" approaches).

80. Criddle & Fox-Decent, *supra* note 69, at 273 (describing how "many states are reassessing the strategic value of multilateral cooperation and recalibrating their international commitments across a wide variety of contexts").



# THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION: SOME CHALLENGES AND RESPONSES

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Bruno Simma\* and Giorgia Sangiuolo\*\*

INTRODUCTION.....	402
THE HAGUE RULES, WHAT THEY ARE AND HOW THEY CAME TO BE .....	404
(a) <i>Treaty developments since the launch: the UN Binding Treaty</i> .....	406
(b) <i>National legislation addressing business and human rights violations</i> .....	408
(c) <i>Case law of national courts</i> .....	411
MAIN CRITICISMS TO THE HAGUE RULES AND OUR RESPONSE.....	414
(a) <i>Criticism One: Arbitration is not suited to resolve business and human rights disputes</i> .....	414
(b) <i>Criticism Two: The Hague Rules divert litigation from national courts and hinder public participation in the development and administration of the rule of law</i> .....	417
(c) <i>Criticism Three: Business-to-business arbitration under the Hague Rules does not pay heed to the truth-seeking and reparative needs of victims</i> .....	419

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(d) <i>Criticism Four: The Hague Rules cannot remedy undemocratic, underequipped and politically driven legal systems that prevent access to remedy</i> .....	420
(e) <i>Criticism Five: Arbitration under the Hague Rules is likely to be regarded as “guilty by association” with investor-state arbitration</i> .....	421
(f) <i>Criticism Six: The Hague Rules cannot operate absent global and binding instruments imposing high human rights standards</i> .....	422
(g) <i>Criticism Seven: Lack of compulsory jurisdiction has been identified as a significant problem</i> .....	424
(h) <i>Criticism Eight: The Hague Rules don’t address fundamental issues of inequality of arms</i> .....	427
CONCLUSIONS .....	428

## INTRODUCTION

The rise in power of multinational corporations over the past fifty years is well-documented.<sup>1</sup> Multinational enterprises have emerged as truly global actors, able to affect government policies in strategic, economic, and legal ways. Strategically, they often operate in sectors traditionally run by governments by providing infrastructures or other social services. Economically, they are powerful financial centres, wealthier than certain small countries.<sup>2</sup> Legally, multinational corporations tend to be independent of one specific state, except for the formal nexus of incorporation, and can restructure to quickly adapt to changing circumstances. From an international law standpoint, the large majority of international legal scholars argue that multinational corporations do not possess international legal personality, making it difficult to subject them to direct legal obligations applicable across borders.<sup>3</sup>

The comprehensive protection these entities have received, for instance, under international investment law, demonstrates how multinational corporations can often contribute to society’s economic and

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1. John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 *REGUL. & GOVERNANCE* 317 (2017).

2. John Mikler, *Global Companies as Actors in Global Policy and Governance*, in *THE HANDBOOK OF GLOB. COMPANIES* 1, 4 (John Mikler ed., 2013).

3. For an overview of this body of scholarship, as well as of the dissenting voices, see Jan Wouters & Anna-Luise Chané, *Multinational Corporations in International Law* (KU Leuven—Leuven Ctr. for Global Governance Stud., Working Paper No. 129, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2371216](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371216).

technical development. At the same time, these corporations can be responsible for breaches of human and environmental rights, spanning from the provision of unsafe or unhealthy working conditions, to discrimination against employees, to damage to people’s health through pollution, environmental accidents, and health and safety failures. However, they often walk away without being held accountable for those breaches due to the incapability or unwillingness of national and international authorities to regulate them effectively.

A range of initiatives has attempted to close this accountability gap. Reflecting the difficulty of creating binding obligations on non-state actors, the most widely used international law instruments deployed to date are international instruments of a “soft law” nature,<sup>4</sup> such as the UN Guiding Principles on Business and Human Rights (UNGPs)<sup>5</sup> and the OECD Guidelines.<sup>6</sup> More recently, an increasing number of countries have begun to address this gap by setting out human rights due diligence obligations on multinational enterprises in their own national legislation, such as through the French *Loi relative au devoir de vigilance*.<sup>7</sup> International treaties,<sup>8</sup> and

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4. Including the U.N. Global Compact (2019), available at <https://www.unglobalcompact.org>; the International Finance Corporation Performance Standards on Environmental and Social Sustainability, available at [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/publications/publications\\_handbook\\_pps](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_pps); the updated ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Janelle M. Diller, *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 41 INT’L LEGAL MATERIALS 184, 184-201 (2002)); and the 2011 OECD Guidelines for Multinational Enterprises, available at [www.oecd.org/daf/inv/mne/48004323.pdf](http://www.oecd.org/daf/inv/mne/48004323.pdf).

5. Off. of the High Comm’r, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, HR/PUB/11/04 (2011). The UNGPs are structured in three “Pillars”—(i) protect (states have the duty to protect against human rights abuses by all actors in society, including businesses and must therefore prevent, investigate, punish and redress human rights abuses that take place in domestic business operations); (ii) respect (business enterprises must prevent, mitigate and, where appropriate, remedy human rights abuses that they cause or contribute to); and (iii) remedy (states must ensure access to an effective remedy for those affected when human rights are violated by companies within their jurisdiction). The UNGPs are not legally binding—they are part of a growing body of non-binding “soft law” regulating the conduct of multinational enterprises. Note that the Hague Rules declaredly want to contribute to the implementation of pillar three of the UNGP (remedy).

6. *OECD Guidelines for Multinational Enterprises*, *supra* note 4, at 8.

7. *Loi 2017-399 du 27 mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d’ordre* [Law 2017-399 of March 27, 2017 Relating to the Duty of Vigilance of Parent Companies and Ordering Companies], *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 27, 2017.

8. For instance, the 2019 Netherlands Model Bilateral Investment Treaty allows for reductions in investor compensation for noncompliance with the UNGPs. *Netherlands Model Investment Agreement*, Neth., Mar. 22, 2019, <https://investmentpolicy.unctad.org>.

judicial and quasi-judicial national<sup>9</sup> and international courts and tribunals<sup>10</sup> have also proven to be increasingly efficient instruments to fill the governance gap between the power and regulation of corporations.

The Hague Rules on Business and Human Rights Arbitration (the “Hague Rules”), which the authors of this article have contributed to developing, are another instrument that aims to effectively address harm to human rights, or the environment caused by corporations. Launched in December 2019, the Hague Rules are a set of arbitral rules specifically devised to settle disputes arising from the alleged breach of human and environmental rights by businesses and their supply-chain partners across borders.

We have previously discussed why this ad hoc instrument for resolving such human rights disputes, alongside other national and international instruments, might prove beneficial for preventing and resolving human rights violations on the part of businesses.<sup>11</sup> Indeed, the Hague Rules have received a broadly positive reception from stakeholders and it would appear that they have recently been integrated into the Sustainable Investment Facilitation & Cooperation Agreement (SIFCA), a next-generation model bilateral investment treaty (BIT) developed for The Gambia.<sup>12</sup> In the present contribution, we want to take stock of how the landscape of remedies for human rights violations by businesses has evolved since the launch of the Hague Rules in 2019 and attempt to respond to the main criticisms raised to date in relation to the Rules.

#### THE HAGUE RULES, WHAT THEY ARE AND HOW THEY CAME TO BE

The idea of the Hague Rules was conceived in 2017 when a group of international lawyers and academics, the Working Group, started developing the possibility of using international arbitration as a method of

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9. See, e.g., the decisions of UK Courts in the cases of *Vedanta Res. PLC v. Lungowe and Okpabi v. Royal Dutch Shell PLC*. *Vedanta Res. PLC v. Lungowe* [2019] UKSC 20 (appeal taken from Zambia); *Okpabi v. Royal Dutch Shell PLC* [2021] UKSC 3 (appeal taken from Nigeria).

10. See, e.g., *The Environment and Human Rights*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, para. 155; *SERAP v. Fed. Republic of Nigeria* [2012] ECW/CCJ/APP/08/09 (ECOWAS, Dec. 14, 2012).

11. Bruno Simma & Giorgia Sangiuolo, *Advocating an Ad Hoc Forum for Business Human Rights Disputes*, in *THE STRUGGLE FOR HUMAN RIGHTS: ESSAYS IN HONOR OF PHILIP ALSTON* 122 (Nehal Bhuta et al. eds., 2021).

12. Robert L. Houston et al., *Notes from Practice: Announcing the SIFCA Framework – Is the Confluence of Investment Protection with Business and Human Rights the Future of Investment Treaties?*, KLUWER ARB. BLOG (Nov. 26, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/11/26/notes-from-practice-announcing-the-sifca-framework-is-the-confluence-of-investment-protection-with-business-and-human-rights-the-future-of-investment-treaties>.

resolving disputes over obligations and commitments arising out of human rights violations by businesses.<sup>13</sup> Initial consultations with stakeholders suggested that international arbitration could indeed help overcome some of the legal and practical barriers faced by individuals when bringing human rights claims through existing mechanisms of redress, particularly national courts, and provide an effective instrument to prevent and address the violation of human rights by businesses in line with Pillar III of the UNGPs.<sup>14</sup>

The Hague Rules were eventually launched on December 12, 2019 in a ceremony at the Peace Palace in The Hague. The final version of the Hague Rules is the product of a multi-stage process supported by the City of The Hague, which involved the creation of a “Sounding Board” comprising of stakeholders’ representatives, and two public consultations on an “Elements Paper”<sup>15</sup> and on a first set of draft rules.<sup>16</sup>

Regarding their content and structure, the Hague Rules are based on the 2013 UNCITRAL Arbitration Rules,<sup>17</sup> with amendments tailored to be applied in disputes raising environmental, social, and corporate governance issues, relating to human rights, environment, and climate change, rather than to purely commercial disputes. For instance, these amendments include requirements relating to the composition of the tribunal, which should be diverse, and the special expertise of the arbitrators (Article 11); a provision for multiparty claims (Article 19); rules on the taking of evidence that strike a balance among a number of factors, notably fairness, efficiency, cultural appropriateness and rights-compatibility (Article 32); support of third-party funding subject to certain guarantees of disclosure

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13. The Working Group is the group of international lawyers and academics that first conceived the idea of the Hague Rules. The Working Group consists of Claes Cronstedt, Jan Eijbouts, Steven Ratner, Martijn Scheltema, Robert Thompson, and Katerina Yiannibas. Cronstedt, et al., *International Business and Human Rights Arbitration* (Feb. 13, 2017) (unpublished proposal). In 2017, the Working Group entrusted the task of elaborating a set of rules on the topic – The Hague Rules – to a “Drafting Team.” For an overview of the background to the Rules, see Bruno Simma et al., *International Arbitration of Business and Human Rights Disputes: Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process* (elements paper) (Nov. 2018).

14. Wouters & Chané, *supra* note 3, at 16.

15. Simma et al., *supra* note 13. The Elements Paper set out the background, aim, and scope of the Hague Rules. It then provided an overview of thirteen main “elements” that were being considered at the time by the Drafting Team for the purpose of developing the Hague Rules, accompanied by a set of questions that were considered by stakeholders in a first public consultation, the results of which have shaped the development of the Hague Rules.

16. For the draft Hague Rules published for consultation in June 2019, see Bruno Simma et al., *Draft Arbitration Rules on Business and Human Rights* (draft paper) (June 2019).

17. U.N. Comm. on Int’l Trade L., Rep. on the Work of Its Forty-Sixth Session, U.N. Doc. A/68/462, supp. 17 (2013).

(Article 55); and the need that awards should be rights-compatible (Article 45).

The flexibility of the Hague Rules allows them to adapt to any dispute, regardless of the type of claimant(s), respondent(s), or subject matter of the dispute: they can be included in arbitration clauses in national or international commercial contracts, agreed on in arbitration agreements after a dispute has arisen, and even included as applicable rules in arbitration clauses of international treaties concluded by states and international organizations.<sup>18</sup> Despite the reference to “human rights” in their name, the Hague Rules can be used for any dispute that deals with “collective action” problems relating to environmental, social, and corporate governance issues. In all cases, awards under the Hague Rules may be enforced through national laws or international treaties, including the New York Convention.<sup>19</sup>

Each article of the Hague Rules is also accompanied by a “commentary,” which aims to provide users with some background on the rationale and intent pursued by the Drafting Team with each provision, as well as by a set of “model clauses” for their easy incorporation in contracts and arbitration agreements. The Hague Rules further include a “Code of Conduct” for arbitrators, which reflects the highest ethical standards and best practices of international arbitration at the time of their drafting.

A brief overview of the changes in the legal landscape surrounding the resolution and enforcement of BHR disputes since the launch of the Hague Rules

*(a) Treaty developments since the launch: the UN Binding Treaty*

Since the launch of the Hague Rules, the attention of the international community continues to be focused on the most important international initiative in the field of human rights violations by businesses: the development of the first legally binding international instrument which will attempt the following: “a.) to clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfill and promote human rights in the context of business activities, particularly those of transnational character; b.) To clarify and ensure respect and fulfilment of the human rights obligations of business enterprises; c.) To prevent and mitigate the occurrence of human rights abuses in the context of business

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18. Inter-Am. Ct. H.R., *supra* note 10; SERAP v. Federal Republic of Nigeria, at 9 [2012] ECOWAS 18/12.

19. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

activities by effective mechanisms of monitoring and enforceability; d.) To ensure access to justice and effective, adequate, and timely remedy for victims of human rights abuses in the context of business activities; e.) To facilitate and strengthen mutual legal assistance and international cooperation to prevent and mitigate human rights abuses in the context of business activities particularly those of transnational character, and provide access to justice and effective, adequate and timely remedy to victims of such abuses” (the so-called “Binding Treaty”).<sup>20</sup>

The initiative for a Binding Treaty builds upon a 2014 resolution tabled by Ecuador and South Africa and is being led by an open-ended working group established in 2014 by the UN Human Rights Council (UNHRC). The instrument, in the form of an international treaty, would hold corporations directly responsible for violating human rights. In its current form, the Binding Treaty provides that states should set out a legal framework at the national level suitable to prevent and address human rights abuses by and protect victims of businesses’ activities of a transnational character.<sup>21</sup> This includes ensuring that at minimum, victims should have effective access to courts and non-judicial grievance mechanisms of the state parties, including access to legal aid, the possibility to obtain restitution and compensation, and the right to have national and foreign judgments and awards promptly executed.

The Binding Treaty and the Hague Rules are thus complementary instruments: like the Hague Rules, the Binding Treaty is designed to implement the UNGPs. Like the Hague Rules, the Binding Treaty aims to shift the bulk of the responsibility for the violation of human rights from states to businesses. In terms of how the Binding Treaty will function, if agreed on the current terms, the Binding Treaty will establish a binding set of rules for multinational corporations that can be enforced across borders, including through the Hague Rules. Arbitration under the Hague Rules can further constitute a means through which states discharge their respective obligation under the Binding Treaty.<sup>22</sup> The Binding Treaty will also oblige contracting States to enforce awards rendered by arbitral tribunals,

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20. Open-Ended Intergovernmental Working Group, Rep. on the Work of Its Seventh Session, A/HRC/49/65/Add.1, art. 2 (2021).

21. The draft treaty is currently set to apply to “all business activities, including business activities of a transnational character,” although governments remain free to “differentiate” how business enterprises discharge these obligations “commensurate with their size, sector, operational context or the severity of impacts on human rights.” The obligations in question are all internationally recognized human rights and fundamental freedoms binding on the state parties and customary international law. *Id.* art. 3.3.

22. *Id.* art. 7.1.

including under the Hague Rules, in so far as they constitute an effective tool to implement the businesses' obligations.<sup>23</sup>

At the time of writing, negotiations for the Binding Treaty are still ongoing,<sup>24</sup> and a third draft of the treaty was published in July 2021.

(b) *National legislation addressing business and human rights violations*

An important trend that has continued since the launch of the Hague Rules is the adoption of mandatory human rights due diligence legislation in several states and regional organisations. This legislation requires businesses to identify actual and potential human rights impacts on employees, individuals, or communities affected by a company and its supply-chain partners, integrate these findings into their operations, and remediate any of these impacts.<sup>25</sup>

Since the launch of the Hague Rules, we note the adoption of three major pieces of legislation. Spearheaded by France and its “*Loi relative au devoir de vigilance*,”<sup>26</sup> Germany, the Netherlands, and Norway have passed, or are reinforcing, human rights due diligence legislation.<sup>27</sup> This legislation includes due diligence obligations to prevent and address not only human rights, but also social and environmental rights violations. Not all companies fall within the scope of the due diligence obligations contained in the legislation: German legislation covers, with few exceptions, only large companies established, domiciled, or having their principal place of business in Germany, and, to an extent, their direct and

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23. *Id.* art. 7.6.

24. Open-Ended Intergovernmental Working Group, Rep. on the Work of Its Seventh Session, A/HRC/49/65/Add.1, art. 2 (2021).

25. *Mandatory Human Rights Due Diligence (mHRDD)*, OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/en/special-procedures/wg-business/mandatory-human-rights-due-diligence-mhrdd> (last visited Sept. 15, 2022).

26. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2017-399DC, Mar. 27, 2017, J.O. (Fr.).

27. For Germany, see Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten [Lieferkettensorgfaltspflichtengesetz—LkSG] [Supply Chain Due Diligence Act], July 16, 2021, BUNDESGESETZBLATT (BGBl.) I 2021, 2959 entering into force on Jan. 1, 2023; for the Netherlands, Wet verantwoord en duurzaam internationaal ondernemen [Human Rights and Environmental Due Diligence Law], available at <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35761#wetgevingsproces>. This bill is set to replace the previous Child Labour Due Diligence Act (Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen [Wet zorgplicht kinderarbeid], Stb. 2019; for Norway, Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold [åpenhetsloven] [Transparency Act], Jan. 7, 2022, NORSK LOVTIDEND.



indirect suppliers,<sup>28</sup> whereas the Norwegian legislation addresses large companies and foreign companies which sell goods or provide services in the country.<sup>29</sup> The Dutch legislation, which builds upon the existing Child Labour Due Diligence Act, is the broadest in scope and extends the duty of care to all companies incorporated in the Netherlands and Caribbean Netherlands as well as “large” foreign companies which sell products on the Dutch market or carry out activities in the Netherlands. These companies have a duty to prevent, mitigate, reverse and remedy the negative impacts that it knows have, or reasonably suspects may have, adverse effects on human rights, labour rights or the environment in a country outside the Netherlands. All three sets of legislation establish certain economic thresholds for the application of due diligence obligations, with the aim of excluding smaller businesses that may not be able to sustain the added costs entailed in the due diligence requirements. They also set out certain transparency obligations, as well as limits to transparency to protect professional and business secrecy. Financial sanctions for breach of due diligence obligations are provided across all legislative initiatives, with the German legislation also foreseeing the possibility that a company may be excluded from public contracts.<sup>30</sup> In addition to financial sanctions, the Dutch legislation also provides for administrative or even criminal enforcement. At the time of writing, other EU Member States, such as Finland and Denmark, are also debating introducing similar legislation.<sup>31</sup>

We observe that the EU has taken note of this legislation and is preparing to act in the space of due diligence obligations for businesses at the time of this writing. The initiative for an EU Directive on “Mandatory Human Rights, Environmental and Good Governance Due Diligence”<sup>32</sup>

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28. Lieferkettensorgfaltspflichtengesetz [LkSG] [Supply Chain Due Diligence Act], July 16, 2021, [BGBl I 2021, 2959] §1, entering into force on Jan. 1, 2023.

29. Åpenhetsloven [Transparency Act], Jan. 7, 2022, NORSK LOVTIDEND §2.

30. Lieferkettensorgfaltspflichtengesetz [LkSG] [Supply Chain Due Diligence Act], July 16, 2021, [BGBl I 2021, 2959] §22, entering into force on Jan. 1, 2023.

31. *National & regional movements for mandatory human rights & environmental due diligence in Europe*, BUS. & HUM. RTS. RES. CTR., <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/> (last visited Sept. 21, 2022).

32. The Union has already adopted sectoral mandatory due diligence legislation in specific areas, including for operators that place timber and timber products on the internal market to due diligence requirements and requires traders in the supply chain to provide basic information on their suppliers and buyers to improve the traceability of timber and timber products. *See* Regulation 995/2010, of the European Parliament and of the Council of October 20, 2010 on the Obligations of Operators Who Place Timber and Timber Products on the Market, 2010 O.J. (L 295) 23. The legislation also rules on supply chain due diligence in order to curtail opportunities for armed groups, terrorist groups and/or security forces to trade in tin, tantalum and tungsten, their ores, and gold. *See* Regulation 2017/821, of the European Parliament and of the Council of

builds on a February 2020 study that found that mandatory due diligence legislation would have significant social, human rights, and environmental impacts.<sup>33</sup> The EU Commission has since committed to introduce a legislative initiative in this space.<sup>34</sup> In March 2021, the European Parliament also passed a resolution recommending that the EU Commission take action on corporate due diligence and corporate accountability.<sup>35</sup> The recommendation is accompanied by a non-binding legislative proposal on mandatory supply chain due diligence and the outline of a draft Directive encapsulating the views of the European Parliament on this matter. While not binding, the draft Directive still provides some indication of what an EU due diligence legislation could look like: it sets out broad mandatory corporate due diligence obligations on a large number of businesses to identify, prevent, manage, remedy, and report on human rights, environmental and good governance risks and violations in their value chains, upstream and downstream.<sup>36</sup> Companies are required to develop an effective due diligence strategy that takes into account adverse impacts on human rights, the environment, and good governance in their operations and business relationships, even if only potentially. Businesses also have obligations to prevent and remedy risks to human rights, the environment and good governance in their operations and business relationships, to publicly disclose risks and harm that occurred, and to provide for grievance mechanisms and remediation processes both as an early warning mechanism for risk-awareness and as a mediation system, allowing any stakeholder to voice reasonable concerns about potential or actual adverse impacts.<sup>37</sup> In determining the effectiveness of these grievance mechanisms, the Directive makes reference to Principle 31 of the UNGPs (according to which non-judicial grievance mechanism should be legitimate, accessible, predictable, safe, equitable, transparent, rights-compatible and adaptable).

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May 17, 2021 on the Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1.

33. British Institute of International and Comparative Law, Study on Due Diligence Requirements Through the Supply Chain, 2020, Eur. Comm'n (UK).

34. Didier Reynders, European Commissioner for Justice, Speech at RBC Working Group's Webinar on Due Diligence (Apr. 29, 2020).

35. European Parliament Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability No. 2020/2129 of 10 March 2021.

36. *Id.* art. 2. These are "large undertakings" governed by the law of an EU Member State or established in the territory of the European Union; all publicly listed small- and medium-sized undertakings; small- and medium-sized undertakings operating in high-risk sectors; and those governed by the law of a third country and not established in the territory of the European Union when they operate in the internal market selling goods or providing services.

37. *Id.* art. 9.

Sanctions for the violation of due diligence obligations include administrative sanctions,<sup>38</sup> a ban on the import of products linked to “serious human rights violations,” fines, and exclusion from public contracts.

Like the Binding Treaty, human rights due diligence is also complementary to the Hague Rules in various ways. First, like the Hague Rules, human rights due diligence is an element of the “smart mix of measures” that the UNGPs recommend that states should adopt to foster business respect for human rights.<sup>39</sup> Secondly, due diligence legislation articulates clear substantive environmental, social, and governance rules, the breach of which could be arbitrated under the Hague Rules. Finally, arbitration under the Hague Rules can arguably be regarded as one of the ways in which businesses can implement the obligations set out in due diligence legislation to prevent and remedy actual and potential human rights impacts on employees or individuals and communities negatively affected by its own and its supply-chain partners’ activity.

(c) *Case law of national courts*

The trend of national courts allowing action against parent companies for breach of human rights committed by their subsidiaries in a foreign territory—readers may recall the case of *Vedanta* before the UK Supreme Court<sup>40</sup>—has continued strong since the launch of the Hague Rules. Deploying new, creative arguments to “pierce the corporate veil” among parent companies and their foreign subsidiaries, national courts fill the

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38. *Id.* art. 13.

39. Off. of the High Comm’r, *supra* note 5; Wouters & Chané, *supra* note 3.

40. *Vedanta Res. PLC v. Lungowe* [2019] UKSC 20, *supra* note 9. In that case, the UK Supreme Court accepted jurisdiction over a claim brought by Zambian citizens allegedly affected by environmental damage and pollution resulting from the mining operations of the Zambian subsidiary of a UK-incorporated company, Vedanta Resources PLC. The Supreme Court found that, while Zambia would be the proper place for litigation, there was (in the case at issue) substantial risk that the defendants would not receive substantial justice in Zambia. The Supreme Court then went on to affirm that, based on the common law, it is well arguable that a holding company with a sufficient level of involvement in the operations of a subsidiary may have a legal duty towards individuals abroad who are injured as a result of the activities of that foreign subsidiary. The outcome of the merit of the case remains pending at the time of writing. This jurisprudence on the tort law duty of care was further confirmed by the UK Supreme Court in *Okpabi v. Royal Dutch Shell PLC* [2021] UKSC 3, where some Nigerian communities brought claims in negligence in England against the UK-incorporated Royal Dutch Shell, PLC and its Nigerian subsidiary for alleged pollution and environmental damage caused by oil leaks from pipelines operated by the subsidiary company. *Okpabi v. Royal Dutch Shell PLC* [2021] UKSC 3, *supra* note 9.

governance gap created by national company law rules and ensure the right to an effective remedy for victims of human rights violations.

For reasons of space, we limit ourselves to noting two main developments since the launch of the Hague Rules in December 2019. The first instance is the decision of the Canadian Supreme Court in *Nevsun Resources Ltd. v Araya* in February 2020.<sup>41</sup> In that decision, the Canadian Supreme Court confirmed that a claim against an Eritrean mining company for alleged breaches of domestic torts and customary international law rules having the nature of *jus cogens* could proceed against its Canadian parent company. Significantly, the majority of the Court, for the first time, opened the door to the possibility that customary international law rules of *jus cogens* may be relied upon against private companies for the acts of their subsidiaries abroad.

In short, the case was brought by three miners against a Canadian company, Nevsun Resources Ltd. (Nevsun), the ultimate owner of a mine in Eritrea. The three men alleged that they had been tortured and forced to work as slaves in the mine for years, until they managed to escape abroad, eventually obtaining the status of refugees. The workers brought proceedings against Nevsun for alleged breaches of domestic torts and customary international law, the latter in relation to slavery, forced labor, cruel, unusual, or degrading treatment, and crimes against humanity. Specifically, the plaintiffs argued that customary international law was part of Canadian law, which meant that Canadian courts should be able to hold Nevsun responsible for the harm they suffered. Nevsun disagreed, maintaining that the “act of state doctrine,” according to which national courts in one state do not have jurisdiction on the actions that another state has done within its own territory, meant that the company could not be sued for violating customary international law in Canada. Nevsun also disputed that customary international law may ground a claim for damages under Canadian law, as no statute creates such causes of action. A majority of the Canadian Supreme Court dismissed both of the arguments of Nevsun. First, the majority ruled that the act of state doctrine was not part of Canadian law and that Canadian courts are not barred from enquiring as to the lawfulness or validity of foreign laws, especially where this is necessary or incidental to the resolution of domestic legal controversies before the Canadian courts. The Court thus upheld the decision of the lower courts that the workers’ lawsuit could go forward. Second, the majority noted that common law may recognize a direct remedy for the miners’ claims as part of Canadian common law and that certain customary international law

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41. *Nevsun Res. Ltd. v. Araya*, [2020] S.C.C. 5 (Can.).

norms may be relied on by individuals, despite their inter-state character. However, the majority of the Supreme Court left it to the trial judge to determine “whether the common law should evolve so as to extend the scope of those norms to bind corporations”<sup>42</sup> and whether Nevsun breached customary international law and should therefore be held responsible. For better or worse, the case was eventually settled, leaving the questions returned to the trial judge without a final answer.

The second case we will refer to here is a case of the French *Cour de Cassation*, criminal section, of September 2021 in *Lafarge*.<sup>43</sup> Notably, in this case the *Cour de Cassation* upheld the indictment of the French multinational cement company Lafarge Holcim SA (Lafarge) for the complicity of its subsidiary Lafarge Cement Syria (LCS) in crimes against humanity and financing of terrorism committed by the Islamic State of Iraq and Syria and other armed groups in Syria. This is the first time a parent company faced a formal investigation for complicity in crimes against humanity abroad.

The facts of the case relate to the operation of the companies in Syria during the Syrian Civil War between 2011 and 2014. In order to continue its operations on the territory, LCS allegedly negotiated with armed groups and paid multimillion-dollar bribes to allow the movement of staff and goods inside the war zone. In 2016, eleven former Syrian employees and two NGOs filed a criminal complaint before French courts against Lafarge, and in 2017, the Paris Public Prosecutor opened an investigation for financing terrorism. In 2018, Lafarge, LCS, and some executives were indicted by French investigative judges for complicity in crimes against humanity. In November 2019, the Paris Court of Appeal confirmed the criminal indictments for the financing of terrorism but dismissed charges of complicity in crimes against humanity. The decision of the Court of Appeal was appealed to the *Cour de Cassation* which upheld the charges of financing terrorism and quashed the annulment of the charges of crimes against humanity. In particular, the *Cour de Cassation* found the existence of serious and corroborating evidence that not only the French mother company, Lafarge, had financed, via LCS, ISIS activities, but also had precise knowledge of the actions of the organisation, which were likely to constitute crimes against humanity. Interestingly, the Supreme Court added that Lafarge did not need to be willing to be associated with the crimes in order to be charged as an accomplice in the criminal proceedings in France.

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42. *Id.* § 113.

43. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Sept. 7, 2021, Bull. crim., No. 19-87.367 (Fr.).

## MAIN CRITICISMS TO THE HAGUE RULES AND OUR RESPONSE

Since their launch, the Hague Rules have received strong support from the public and private sector. We have noted above how they have been incorporated in the model FIPA of The Gambia. Among other things, they have also featured in reports on the use of arbitration to address ESG issues,<sup>44</sup> and a number of organisations have taken them as a model to develop sectoral arbitration rules. However, the Hague Rules have also attracted some criticisms regarding their appropriateness and efficacy in addressing human rights violations on the part of businesses. Some of these criticisms are more “ideological” and harder to respond to, whereas we believe we have a good response for others. All of them give us a welcome chance to test our thinking and conclusions during the drafting process.

In the present article, we survey the main critical views on the Hague Rules and list below the ones that we have found most challenging and to the point. Each of them is accompanied by some reflections on the thinking that went into the drafting. For further reflections and clarifications on the scope and functioning of the Rules, readers should also refer to the “Q&A” document prepared by the Drafting Team.<sup>45</sup>

*(a) Criticism One: Arbitration is not suited to resolve business and human rights disputes<sup>46</sup>*

There appears to be two main parts to this criticism. For the first one, it is well known to those practicing in the field of international investment arbitration, that arbitration is a “private” mechanism for the settlement of disputes and that it is not suited to settle disputes dealing with fundamental interests of society, such as those relating to the protection of human and

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44. Rep. of the U.N. Working Grp. on Bus. & Hum. Rights on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/47/39, at 22 (2021); Ulla Gläßer, et al., *Non-Judicial Grievance Mechanisms in Global Supply Chains: Recommendations for Institutionalisation, Implementation and Procedural Design* (2021); 999 I.C.C. Comm’n on Arb. & ADR, *Resolving Climate Change Related Disputes Through Arbitration and ADR 129* (2021). The authors were also made aware that the new International Labour Arbitration and Conciliation Rules (ILAC) are modelled around the Hague Rules. At the date of publication of this article, the text of these rules has not yet been published.

45. Ctr. Int’l Legal Coop., *The Hague Rules on Business and Human Rights Arbitration, Questions & Answers* (May 2021), <https://www.cilc.nl/cms/wp-content/uploads/2021/05/QA-The-Hague-Rules.pdf>.

46. Francois Holmey, *The Hague Rules on Business and Human Rights Arbitration*, THE L. SOC’Y GAZETTE (Jan. 17, 2020), <https://www.lawgazette.co.uk/legal-updates/the-hague-rules-on-business-and-human-rights-arbitration/5102761.article>; Iris Ng Li Shan, *On the Path to Justice: Exploring the Promise and Pitfalls of the Hague Rules on Business and Human Rights Arbitration*, 2 INST. TRANSNAT’L ARB. REV. 54, 66 (2020).

environmental rights. The argument essentially is that this type of dispute is best dealt with by national courts, the *bouche de la loi*,<sup>47</sup> whose embedment in the public law tissue of states gives them the necessary “legitimacy” to adjudicate on issues that go to the very core of society. The flexibility inherent to arbitration contributes to this criticism: unlike national courts, the argument goes that arbitration allows parties to “adapt” the dispute settlement proceedings to their needs. This includes the right of the parties to appoint decision-makers, limit the transparency of the proceedings, and select the law applicable to the dispute. According to critics, this flexibility would effectively allow parties to bypass certain procedural guarantees for the “good” decision-making traditionally featured by national courts.

In our view, this criticism overlooks that arbitration under the Hague Rules is not meant to displace or substitute the work of national courts, but rather provides those aggrieved by a situation of human rights breach an additional, effective mechanism to settle their dispute in the service of upholding rights that are quintessential to the functioning of society when other mechanisms at their disposal are unavailable or unsatisfactory for the parties. Looked at as a complementary, rather than alternative, route to national courts, arbitration under the Hague Rules so finds its “legitimacy” in the fact that it provides an *additional* tool to implement universal values and pursue community interests, which could otherwise not be upheld, or be equally satisfactorily upheld. The procedural flexibilities of arbitration that allow parties to “tailor” the decision-making to the circumstances of their case represent an essential tool to enable arbitration to complement other existing remedies for human rights disputes: arguably, it is those flexibilities that make litigants in human rights-related disputes able or willing to adjudicate their disputes; disputes that may otherwise remain unresolved, perpetuating a situation of human rights breach.

The experience of the Bangladesh Accords arbitrations, the first example of business and human rights arbitration proceedings, supports our argument.<sup>48</sup> There were two commercial arbitration cases arising out of the Bangladesh Accords, which are agreements signed among a number of global fashion brands and labor organisations operating in the garment industry in Bangladesh. The two cases were eventually settled, with one fashion brand agreeing to remedy a breach, and the other agreeing to pay compensation to the claimants. The two proceedings were subject to

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47. Charles Secondat de Montesquieu, *The Spirit of Laws* (Thomas Nugent, trans., 2010).

48. *IndustriALL Global Union v. Respondent*, 2016-36; 2016-37 PCA Case Repository (Perm. Ct. Arb. 2016). More information is available at *Bangladesh Accord Arbitrations*, PERMANENT CT. OF ARB., <https://pca-cpa.org/en/cases/152> (last visited Nov. 17, 2022).

confidentiality, so while the public knows about their existence, the identity of the respondent businesses remains undisclosed. One may certainly argue that the confidentiality of those proceedings runs against the need to make business and human rights arbitrations known to the public and to nurture a culture of protection of human rights by promoting awareness and legal certainty. Yet, those arbitration proceedings provided some needed reparation for the violation of human rights of workers in the garment industry in Bangladesh that probably would not have been otherwise available to them—and are indeed widely regarded as a victory for them—and it was the same confidentiality that arguably made it possible for the respondent brands to agree to arbitration in the first place.

Another side of this criticism that arbitration is not suited to resolve business and human rights disputes is more of a “procedural” nature. It revolves around the “arbitrability” of human rights violations by businesses, i.e., whether a dispute relating to the public interest, such as human and environmental rights, is capable in the first place of being settled by arbitration under national law. The argument is that arbitration is only available in so far as the domestic laws of the place of the arbitration (the “seat”) do not reserve the matter for domestic courts, and some countries indeed exclude disputes in the public interest that may be the subject of arbitration proceedings. Such exclusion has some relevant practical consequences, as it can hinder the enforceability of the arbitral awards rendered in the arbitration.<sup>49</sup> Therefore, arbitration of human rights disputes may, in certain cases, be barred by the law of the seat. Further, the enforcement and recognition of awards under the Hague Rules is governed by the 1958 New York Convention, and thus subject to the public policy defense in Article 5(2) of that Convention. Lack of state support for the Hague Rules may cause the awards rendered under it to be susceptible to enforceability issues. All of these may impact the legitimacy of the proceedings. For awards rendered under the Hague Rules to hold credibility, states must be readily willing to enforce them.

We note that, while the Hague Rules don’t expressly deal with the issue of the arbitrability of human rights disputes under the law of the seat, in practice they take it into consideration in two main ways. First, Article 1(2) states that, by using the Hague Rules, the parties to the dispute agree that they deem such dispute to have arisen out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention. As the commentary to Article 1 of the Hague Rules explains, this is a “deeming” provision intended to opt into the enforcement regime of the

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49. U.N. Comm. on Int’l Trade L., *supra* note 17, at arts. II (1), V(2)(a).



New York Convention and to waive certain potential defenses to its application, even where the underlying relationship or transaction may not be considered ‘commercial’ under the applicable law. Obviously, the deeming provision cannot prevail over the applicable law. However, the idea is that this provision, albeit not binding on the national courts tasked with the enforcement of the arbitral awards, will be taken into account by them when using their discretion to decide on the enforceability of the award. The provision may also operate as an “estoppel” to preclude a party from objecting to the enforcement of an award rendered under the Hague Rules on the basis of a ‘commercial’ reservation made by the relevant Contracting state(s) to the New York Convention.

Secondly, the Hague Rules deal with arbitrability through the considerations for the choice of the seat of arbitration set out in the commentary to their Article 20. The commentary invites tribunals and parties to select a place of arbitration where business and human rights disputes are legally allowed to be settled by arbitration, so as not to frustrate the agreement of the parties to submit such disputes to arbitration.

We acknowledge that neither of these considerations *per se* resolve the issue of the arbitrability of human rights violations by businesses. However, Articles 1 and 20 of the Hague Rules, read together with their commentaries, offer guidance to potential users on how to prevent that issue from arising in the first place, and may even protect the enforcement of awards rendered in arbitrations under the Hague Rules from specious objections.

*(b) Criticism Two: The Hague Rules divert litigation from national courts and hinder public participation in the development and administration of the rule of law*

The criticism is that the very channelling of disputes through arbitral tribunals, away from the courts, is undemocratic, because courts “promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights, as well as by allowing, or requiring, the citizenry to administer the law through jury service.”<sup>50</sup>

Let us note again that the underlying intention of the Hague Rules is not to supplant judicial proceedings, but rather to provide a framework for an alternative means of resolution available to potential parties alongside access to the court. The Hague Rules are thus meant to constitute one

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50. Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 293 (2004).

element of a larger array of remedies contemplated by Pillar III, available to parties when national courts are unavailable due to inaccessibility, lack of independence, corruption, lack of capacity, and other factors; where courts in a business's home state may refuse to accept such cases based on jurisdictional, corporate-law, and other legal doctrines; or also where other barriers to access in the form of costs or excessive delays for the parties exist. It would thus be a mistake to assume that arbitration may automatically "divert" disputes from national courts; rather, arbitration offers a choice to parties to use a consensual mechanism that allows parties that freely consent to it to overcome deficits or other difficulties with the relevant national legal systems when it is in their best interest to do so. Of course, we agree that issues of access to court should be addressed through improvements of national and international law rules applicable to cross-border disputes involving multinational business enterprises. However, we believe that it is not the existence of multiple avenues for remedying human rights violations that may hinder this process.

Even in a world where all national courts function effectively, arbitration through the Hague Rules may still be beneficial for those envisaging to effectively prevent or address business human rights disputes. Arbitration may also offer certain advantages compared to national courts that may, in some instances, make it preferable for parties over court proceedings. Examples of these include: (i) the existence of a neutral forum for dispute resolution, independent of both the parties and their home states; (ii) a specialized dispute resolution process in which the parties can participate in the selection of competent and expert adjudicators for their dispute; (iii) the possibility to obtain binding awards enforceable across borders; (iv) means of dispute resolution potentially cheaper and quicker than litigation, which is also able to (v) accord parties broad autonomy to agree upon the substantive laws and procedures applicable to their arbitrations. Provided that the national courts' route should always be available to litigants, we believe that, especially when it comes to protecting fundamental interests of society such as human rights, litigants should have the broadest array of means of recourse at their disposal to ensure that an effective remedy exists.

(c) *Criticism Three: Business-to-business arbitration under the Hague Rules does not pay heed to the truth-seeking and reparative needs of victims*<sup>51</sup>

It has been argued that arbitration under the Hague Rules will mostly be employed between business partners in supply chains and this will hinder their efficacy in delivering satisfaction to the victims of human rights' abuses themselves.

Our first thought about this criticism is that the Hague Rules were designed to address three main sets of disputes: (i) between victims and corporations, based on the latter's alleged human rights violations; (ii) between a corporation and one of its business partners, arising from the latter's breaches of its contractual obligations to respect human rights (e.g., suppliers in a supply chain); and (iii) between victims of human rights violations and a corporation, where victims may rely on an intra-businesses arbitration clause granting them the third-party beneficiary right to litigate against one of the stipulating business parties autonomously. In the absence of empirical data, it seems difficult to predict in which of these situations arbitration under the Hague Rules will be more frequently used in practice.

Secondly, the criticism fails to acknowledge that business-to-business arbitration may still deliver satisfaction to the victims, both directly and indirectly. Directly, Article 45(2) (Awards) of the Hague Rules provides to tribunals adjudicating a business-to-business dispute with an array of instruments, monetary and non-monetary, to ensure that the losing party makes good of the harm caused, including restitution, rehabilitation, satisfaction, specific performance and the provision of guarantees of non-repetition. When agreed to by the parties, the award can also contain recommendations for other measures that may assist in resolving the underlying dispute and preventing future disputes or the repetition of harm. So, one may well envisage that a tribunal may require a company found in breach of health and safety measures in an intra-business dispute to remedy those faults, with direct benefit for the workers involved.

Indirectly, two examples come to mind as to how victims of human rights breaches subject to business-to-business arbitration under the Hague Rules may also indirectly benefit from the arbitration proceedings: on the one hand, arbitration clauses in supply chain contracts may arguably well have the effect of preventing breaches of human rights-related obligations

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51. Shavana Haythornthwaite, *The Hague Rules on Business and Human Rights Arbitration: Noteworthy or Not Worthy for Victims of Human Rights Violations?*, KLUWER ARB. BLOG (May 5, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/05/05/the-hague-rules-on-business-and-human-rights-arbitration-noteworthy-or-not-worthy-for-victims-of-human-rights-violations>.

of business partners, making the perspective of the enforceability of this type of dispute more concrete for all signatories. On the other hand, one may envisage the case that victims of human rights breaches found by tribunals in business-to-business disputes may “piggyback” on the awards rendered in an arbitration under the Hague Rules when bringing a case for reparation against the business partner found in breach of the human rights obligations in the supply-chain contract in other fora, such as national courts.

*(d) Criticism Four: The Hague Rules cannot remedy undemocratic, underequipped and politically driven legal systems that prevent access to remedy.*<sup>52</sup>

The criticism that the Hague Rules, *per se*, cannot remedy undemocratic, underequipped and politically driven legal systems that prevent access to remedy is well-founded. The authors of the Hague Rules have always been well aware that, by themselves, the Hague Rules cannot change the legal culture of a state, as no procedural dispute settlement mechanism can.

However, arbitration under the Hague Rules can certainly be a supporting factor for a cultural shift in legal systems around the world. First, the Hague Rules can offer victims of human rights breaches an additional dispute-settlement mechanism that may allow them to obtain reparation for those breaches where other dispute settlement mechanisms would not easily be available. Secondly, the awareness itself that remedies for business human rights violations beyond state-remedies exist and can be effective, can contribute to mobilizing actors within those legal systems. Further, the delivery of awards by tribunals adjudicating under the Hague Rules can support the creation of a body of case-law that can be looked at and taken into account by national courts and other national institutions operating in this space. Finally, these arbitration proceedings can bring human rights violations in national legal systems around the world under the spotlight for the international community, and, with it, mobilize resources to build capacity for national institutions.

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52. *Id.*

(e) *Criticism Five: Arbitration under the Hague Rules is likely to be regarded as “guilty by association” with investor-state arbitration.*<sup>53</sup>

Investor-state arbitration has in recent years come under increasing fire from states, civil society, and certain parts of academia. Among other things, critics often regard investor-state arbitration as a tool at the service of multinational corporations, which is, at best, unable to take into account environmental and social rights, and, at worse, directly undermines them.

Without entering the merits of this debate, we will limit ourselves noting that arbitration under the Hague Rules is fundamentally different from investor-state arbitration in two main respects. First, as for its parties and subject matter, investor-state arbitration is designed to protect a specific category of individuals, foreign investors, from allegedly discriminatory or unfair state action. Arbitration under the Hague Rules is instead agnostic in relation to the nationality and nature of the parties, which in any case will primarily be private parties (corporations or claimants) as opposed to state actors.

Secondly, because they will not normally challenge states’ regulatory measures, awards of tribunals deciding on the basis of the Hague Rules are unlikely to have far-reaching implications for states and be regarded as impairing their right to regulate in the public interest, which is one of the main criticisms against investor-state arbitration. For this reason alone, arbitration under the Hague Rules will likely face a different reception from investor-state arbitration.

It is true that, as the inclusion of the Hague Rules in the model FIPA of The Gambia shows, the Hague Rules may, in the future, be deployed in investment arbitration proceedings. Yet, this does not seem to fundamentally change our conclusion that the Hague Rules will be regarded as “guilty by association” with investor-state dispute settlement. The Hague Rules could instead become part of the solution sought by the critics of investor-state arbitration. First, the Hague Rules lend themselves to being incorporated into investment agreements that provide obligations, in addition to rights, to investors to take responsibility for their actions that may negatively affect local communities and the environment. These agreements arguably already address many of the concerns traditionally put forward against international investment agreements that do not consider environmental, social and governance issues. That is, for instance, the case for the Gambia SIFCA model, which constitutes one example of the “new generation” of investment treaties attempting to counterbalance rights and obligations of investors and their impact on the host state. Secondly, even

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53. Ng Li Shan, *supra* note 46; Nevsun Res. Ltd., *supra* note 41.

if used in the context of the “old generation” investment treaties that do not impose obligations on investors, the inclusion of the Hague Rules in an investment treaty is likely to incorporate the reasoning of investment tribunals sustainability considerations through procedure. For instance, an investment tribunal deciding a dispute on the basis of the Hague Rules will have to be constituted based on the diversity and specialization considerations set out in Article 11 of the Hague Rules and satisfy itself with the “rights compatibility” of its award, regardless of whether the relevant treaty makes any reference at all to human rights, based on Article 45 of the Hague Rules.

Finally, we note that arbitration under the Hague Rules, in investor-state arbitration and beyond, could arguably become a tool for states to expand the reach of their human rights and environmental regulations beyond their geographical borders: on the one hand, encouragement, facilitation, or even directives for businesses to use arbitration in their activities that may result in human rights or environmental harm allows states to ensure an effective remedy to all those affected by the activities of certain categories of businesses subject to their jurisdiction wherever in the world the harm may occur. On the other hand, the flexibility of arbitration, which allows parties to select the law applicable to the dispute, also enables the application of states’ environmental and human rights laws and regulations *outside* of their territories, across global supply-chains. So, for instance, arbitration under the Hague Rules may apply certain obligations like the ones set out in the French *Loi devoir de vigilance* in disputes arising in any part of the world.

*(f) Criticism Six: The Hague Rules cannot operate absent global and binding instruments imposing high human rights standards.*<sup>54</sup>

This criticism builds on the issue of the absence of uniform binding rules regulating businesses’ conduct in the field of environmental, social, or human rights. The essence of this criticism is that the Hague Rules are merely a set of procedural rules, which will not be of use in the absence of substantive rules binding the activity of businesses impacting on environmental, social, or human rights.

The criticism is well founded in the sense that the Hague Rules are a set of procedural rules that will require substantive norms to operate.

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54. Bo Ra Hoebeke & Thomasina van Roosmalen, *The Hague Rules on Business and Human Rights Arbitration*, LINKLATERS (Jan. 6, 2020), <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2020/january/the-hague-rules-on-business-and-human-rights-arbitration>; Ng Li Shan, *supra* note 46.

However, the flexibility built into the Hague Rules and the recent legal developments in national and international law allow us to be optimistic that the current widespread absence of such standards will not be a showstopper for the use of the Hague Rules. Article 46(1) of the Hague Rules provides tribunals with wide flexibility in determining the rules applicable to the dispute: a tribunal may apply “the law, rules of law or standards” designated by the parties as applicable to the substance of the dispute. In the absence of this selection, they can apply the “law or rules of law” determined to be appropriate, including international human rights obligations (Article 46(2)).

These provisions have been designed to grant maximal autonomy and flexibility to the parties and to the tribunal to rely on provisions of different nature (including soft law; public/private) and origin (international/national). So, under Article 46(1), businesses could even decide to rely on industry codes to settle their disputes under the Hague Rules. The reference to “rules of law” in the first two paragraphs of Article 46 of the Hague Rules also allows tribunals and parties to rely on provisions agreed contractually to decide a dispute. This dispenses them of the need to find provisions of national or international law to which to “hook” arbitration under the Hague Rule.

The Hague Rules further allow parties and tribunals to decide to apply human rights standards included in international “soft law” instruments, such as the UNGPs or the OECD Guidelines for Multinational Enterprises. This has been done in practice, albeit outside the arbitration context, by FIFA in deciding to make the UNGPs compulsory for its contractual partners and suppliers.<sup>55</sup>

Tribunals and parties involved in a dispute under the Hague Rules may also rely on national or international human rights obligations of any states involved in the dispute, such as UN instruments, or regional human rights conventions. It is true that rules found in international instruments often contain open-ended provisions, drafted in broad terms, which may be difficult to apply in practice. However, it was seen above that a global sustainability trend within globally acting corporates and states is leading to the development of an increasing number of national rules on the corporate social responsibility of companies that can potentially be relied upon in arbitration proceedings by choice of the parties, states, or arbitral tribunals.

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55. Fédération Internationale de Football Association (FIFA), *FIFA Sustainable Sourcing Code* (2021). The Code builds on FIFA’s commitments to sustainability endorsed in its *Statutes and Human Rights Policy*, respectively. See Fédération Internationale de Football Association (FIFA), *FIFA Statutes* (2019) and Fédération Internationale de Football Association (FIFA), *FIFA’s Human Rights Policy* (2017).

In most states' constitutions, human rights entitlements such as the right to life and liberty, the prohibition of torture, and the right to a fair trial are often already guaranteed. In addition, it was seen above that states are increasingly adopting national legislation imposing human rights due diligence obligations on businesses specifically which may provide the legal framework for the application of the Hague Rules.

*(g) Criticism Seven: Lack of compulsory jurisdiction has been identified as a significant problem*

One of the most widespread criticisms of the Hague Rules goes to the very heart of arbitration and regards the issue of parties' "consent." A business and human rights dispute can only be resolved by arbitration if all the parties involved in the dispute agree to that. As companies do not want to be sued, it is "difficult to answer the question of why companies will agree to arbitrate here and set aside [...] notions, such as *forum non conveniens*."<sup>56</sup>

We are well aware of this practical issue, but we think that companies will have at least three good reasons to provide consent to arbitration under the Hague Rules. First, the increasing regulatory pressure is a key driver for companies to address human rights issues effectively. It was seen above how an increasing number of states are moving to adopt legislation that sets out broad duties for multinational companies, particularly relating to due diligence in the supply chain. Pressure also comes from the international level, where negotiations for the Binding Treaty are underway. International bodies continue to develop international guidelines and standards delineating the contours of companies' corporate social responsibility and thus the reputational risks connected to being associated with breaches of sustainability standards and rules. Companies also do not want to be perceived as falling below national and international standards, even when they are not under a legal requirement to comply. A KPMG report evidences how customers' expectations, employees' relationship, scrutiny from NGOs and media, labor unions and labor rights, suppliers, investors and lenders' scrutiny, is increasingly driving companies' choice to

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56. Siobhan Abraham, *Hague Rules on Business and Human Rights Arbitration and the Challenges Facing the Rules*, THOMSON REUTERS ARB. BLOG (Feb. 10, 2020), <http://arbitrationblog.practicallaw.com/hague-rules-on-business-and-human-rights-arbitration-and-the-challenges-facing-the-rules>; Haythornthwaite, *supra* note 51; Rachel Nicolson & Emily Turnbull, *The New Hague Rules on Business and Human Rights Arbitration – Effective Remedy or Strange Chimera?*, ALLENS (Feb. 10, 2020), <https://www.allens.com.au/insights-news/insights/2020/02/the-new-hague-rules-on-business-and-human-rights-arbitration-effective-remedy-or-strange-chimera>; Ng Li Shan, *supra* note 46.



ensure that sustainability rules and standards are respected throughout their supply chains and that stock market indices (such as the Dow Jones Sustainability Index and FTSE4Good) are also demanding more detail and transparency on human rights.<sup>57</sup> This makes access to capital for multinational enterprises depend on strong ESG programs, including human rights due diligence processes. Consent to arbitration under the Hague Rules would allow multinational enterprises to comply effectively and be regarded as complying with the regulations that requires them to exercise due diligence and control over increasingly long and complex global supply chains, thus preventing and addressing breaches of sustainability rules and guidelines. Unilateral offers to arbitrate to victims of human rights abuses through third-party beneficiary clauses might also tackle the image problems facing certain types of businesses in the public sphere.

Secondly, let us turn to the legal risks of not effectively preventing or addressing such risks with their supply chain partners or subsidiaries. Indeed, it was seen above that, even where mandatory legislation does not exist, the absence of an international dispute settlement mechanism to solve these disputes does not mean impunity. Cases like *Vedanta*<sup>58</sup> or *Nevsun Resources*<sup>59</sup> prove that national courts are increasingly willing to consider claims against parent companies for human rights violations of their subsidiaries abroad. In this context, arbitration under the Hague Rules allows corporations to take control of the parameters of the dispute as a risk management strategy: arbitration is a dispute settlement instrument that is likely to be more familiar to companies compared to litigation in foreign jurisdictions and offers flexibility to companies to adjust the dispute settlement mechanism around the specific circumstances of the case, for instance, by ensuring that the arbitrator has specific expertise in human or environmental rights, or selecting a language for the procedure that is accessible to all parties.

Thirdly, even beyond this, arbitration under the Hague Rules may align with corporations' expectations of clear sustainability rules able to create a level playing field across borders by improving or facilitating leverage with third parties to adopt non-negotiable standards without reducing competitiveness or innovation. We note, for instance, that this argument was factored into the letter in which a large number of UK multinational enterprises recently called on the government to "introduce a new legal requirement for companies and investors to carry out human rights and

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57. KPMG INT'L, ADDRESSING HUMAN RIGHTS IN BUSINESS: EXECUTIVE PERSPECTIVES (2016).

58. *Vedanta Res. PLC*, *supra* note 9.

59. *Nevsun Res. Ltd.*, *supra* note 41, at 87.

environmental due diligence,” and so to align to the trend of implementation of human rights due diligence and prevent abuse of human rights and environmental harm in global operations and value chains.<sup>60</sup> Similarly, the large majority of firms that participated in the European Commission’s study on due diligence requirements<sup>61</sup> indicated that a due diligence requirement at the EU level would benefit businesses by providing a “single harmonized EU-level standard (as opposed to a mosaic of different measures at domestic and industry level).” Another recent study indicated that businesses experienced similar benefits as a result of the introduction of the UK Bribery Act 2010 ten years ago.<sup>62</sup>

Whatever their reason may be, companies’ willingness to self-regulate and internalize costs in areas where collective action is needed should not be underestimated. We have mentioned above the Bangladesh Accords, where the tragic collapse of a garment factory that left 1,134 dead and many injured led to a voluntary agreement between over 200 leading international garment companies and two international trade union federations to ensure a fire and building safety program in Bangladesh. The agreement is complete with an administrating body, and disputes arising under it are subject to arbitration. Yet, that is not the first case of companies accepting to voluntarily self-regulate in order to address collective problems. Long before the Bangladesh Accords, multinational companies agreed to initiatives of self-regulation in the field of the environment, specifically oil spills, in the form of the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL) schemes.<sup>63</sup> Like the Bangladesh Accord, these were two voluntary schemes set up in the aftermath of ecological disasters. Through these schemes, tanker owners agreed to provide compensation in respect of oil spills through their Protection & Indemnity clubs (in the case of TOVALOP) and oil companies (in the case of CRISTAL). Administrating bodies were set up in the context of both initiatives to ensure the effective implementation of the compensation obligations adopted by the participating companies,<sup>64</sup>

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60. AMT FRESH ET AL., CALLING FOR A NEW UK LAW MANDATING HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE FOR COMPANIES AND INVESTORS (2021).

61. Off. of the High Comm’r, *supra* note 5.

62. IRENE PIETROPAOLI, ET AL., A UK FAILURE TO PREVENT MECHANISM FOR CORPORATE HUMAN RIGHTS HARMS 15-16 (2020).

63. For an overview of these schemes and the similarities with the Bangladesh Accords, see Graham Dunning, Expert on International Arbitration, Keynote Address at the Environmental Pollution and Small States Conference (Sept. 7, 2018).

64. In TOVALOP, the administrating body monitored participating owners’ financial capacity, ensured by a mandatory requirement to be insured against liability under the scheme; in

albeit no mandatory arbitration was provided. To our mind, these three examples show that companies may be less averse to subjecting themselves to voluntary binding obligations to address collective problems.

*(h) Criticism Eight: The Hague Rules don't address fundamental issues of inequality of arms*

Another frequent criticism of arbitration under the Hague Rules is that they do not address the issue of imbalance of arms between the potential parties, particularly when those parties are large corporations, on the one hand, and victims of human rights abuses, on the other.<sup>65</sup> These disparities between the potential parties of arbitration proceedings under the Hague Rules include, for instance, litigation funding and the loser pays principle,<sup>66</sup> burden of proof, or the lack of anti-retaliation protections in the Hague Rules.<sup>67</sup> Critics argue, in particular, that even if companies consent to arbitrate, there is a presupposition that they will ensure that any human rights dispute be adjudicated in their favour, twisting the procedure in their favour. For instance, there is a clash between the need for transparency, essential in disputes involving human rights' violations, and confidentiality, one of the main features of arbitration. This issue is regarded as particularly relevant due to the possibility for disputing parties to "opt out" of certain provisions of the Hague Rules.<sup>68</sup>

We acknowledge the essence of this criticism and note that business and human rights arbitration, particularly between businesses and victims, is almost by definition characterized by fundamental issues of inequality of arms and power imbalances between the parties that are very difficult to address. The Hague Rules have been designed to attempt to tackle such inequality of arms through procedure by offering an additional route to prevent and address the violation of corporate social responsibility duties

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CRISTAL, the administrative body held the fund, and was the counterparty to the members' contractual obligations. *Id.*

65. LISA SACHS ET AL., THE BUSINESS AND HUMAN RIGHTS ARBITRATION RULE PROJECT: FALLING SHORT OF ITS ACCESS TO JUSTICE OBJECTIVES (2019).

66. Haythornthwaite, *supra* note 51; Abhisar Vidyarthi, *Hague Rules on Business and Human Rights Arbitration: What Lies Ahead?*, AM. REV. INT'L ARB. (Sept. 28, 2020), <http://aria.law.columbia.edu/hague-rules-on-business-and-human-rights-arbitration-what-lies-ahead>; Ng Li Shan, *supra* note 46, at 58-59; Nevsun Res. Ltd., *supra* note 41.

67. Haythornthwaite, *supra* note 51.

68. *Id.*; Vidyarthi, *supra* note 66; Abraham, *supra* note 56; Maria Laura Izzo, *A Further Step Towards Business and Human Rights Arbitration – The Hague Rules*, KLUWER ARB. BLOG (Sept. 13, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/09/13/a-further-step-towards-business-and-human-rights-arbitration-the-hague-rules>; Ng Li Shan, *supra* note 46; Nevsun Res. Ltd., *supra* note 41.

and by operationalising and institutionalising a method of dispute resolution that is flexible enough to adapt to the complexity of cross-border disputes in the global supply chain. The Hague Rules encourage arbitral tribunals to proactively address issues of inequality of arms. For instance, Article 5(2) acknowledges that a party may face barriers to access to remedy—e.g., due to a lack of awareness of the mechanism, lack of adequate representation, costs, physical location, or fear of reprisal—and requires that the tribunal shall ensure that such party is given an effective opportunity to present its case in fair and efficient proceedings. Article 18(5) allows arbitral tribunals to keep a person’s identity confidential where this information may be sensitive or cause prejudice to reduce the risks of retaliation. Article 55 attempts to balance the interest of corporations to avoid frivolous claims and victims to obtain justice by allowing third-party funding but subjecting it in principle to the disclosure of the names and contact details of the funder. The Hague Rules also provide mechanisms to address urgent situations that arise before a final decision can be rendered, or even before arbitration commences, on an emergency basis. Finally, the commentary on the Hague Rules sets out clear guidance on how the authors envisaged arbitration proceedings to be carried out, clarifying, for instance, that the parties should, in principle, avoid diverging from certain mechanisms set out in view of the public interest concerns entailed in the arbitration proceedings, such as the transparency of the proceedings.

Yet, the reality is that, while the Hague Rules attempt to lower barriers to access to remedy as much as possible, they are not—and cannot be, in and for themselves—a panacea to resolve the structural inequalities that too often characterize disputes relating to the conduct of big businesses and their environmental, sustainability and governance duties. Much of their success will depend on factors that are outside of the control of their authors, including the implementation of “access to justice” measures such as funding options under national law, whether users will choose to follow the authors’ guidance when adapting the Hague Rules to their disputes, and the approach taken by arbitral tribunals and national courts in their decisions.

## CONCLUSIONS

The Hague Rules come at a time of increasingly shifting attitudes towards accountability for the human rights record of businesses, where states and companies are called upon to step up their efforts to find creative solutions to the complex problem of the transnational regulation of the impact of businesses activities on the fundamental rights of individuals and communities around the world. Responding to the UNGPs’ observation

that only “a smart mix of measures—national and international, mandatory and voluntary” may be able to “foster business respect for human rights,”<sup>69</sup> the Hague Rules position themselves as one procedural instrument that may be able to support companies, states, and individuals in the challenging task of preventing and addressing breaches of sustainability rules on the part of businesses.

Since the launch of the Hague Rules, a number of additional developments and initiatives have occurred that further contribute to strengthening regulation and accountability of the transnational activity of multinational enterprises. For instance, through the development of new national and international rules governing the operation and liabilities of multinational enterprises, and by means of decisions of national courts that pierce the corporate veil, allowing parent companies to be called to respond to the actions of their subsidiaries abroad. All these initiatives make us optimistic that times are changing and that the accountability gap that has for too long characterized the relationship between the power and the responsibilities of multinational enterprises is finally being bridged. Yet, more work remains to be done.

Having looked at the criticisms moved to this instrument, we remain convinced that arbitration under the Hague Rules will become an important element of a wider system of remedies that, taken together, can prevent and address businesses’ violations of human and environmental rights, operationalising and institutionalising a method of dispute resolution that is flexible enough to adapt to the complexity of cross-border disputes in the global supply chain. At the same time, we are fully aware that its voluntary and procedural nature means that, in itself, it is not a panacea able to address in full the economic, legal, and structural issues that have given rise to this accountability gap or address the inherent power imbalance that often characterises relationships in this field.

Much of the success of the Hague Rules will ultimately depend on a number of factors that are outside of the control of their authors, including the implementation of “access to justice” measures, such as funding options under national law; whether users will choose to follow the authors’ guidance when adapting the Hague Rules to their disputes; and on the approach taken by arbitral tribunals and national courts in their decisions. Our view (and wish) is that if businesses, individuals, and governments constructively engage with the Hague Rules, this procedural mechanism will become an effective tool to hold corporations to account for human rights abuses or effectively deter human rights breaches.

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69. Off. of the High Comm’r, *supra* note 5, at 5; Wouters & Chané, *supra* note 3, at 10.

# THE UNITED NATIONS SECURITY COUNCIL IN THE 21ST CENTURY: WHERE ARE WE NOW AND WHERE ARE WE HEADING?

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Bruce C. Rashkow\*

I. INTRODUCTION.....	430
II. THE ESTABLISHMENT OF THE INSTITUTION OF “PERMANENT MEMBERS” AND THE VETO. ....	432
III. WHERE IS THE UN IN REFORMING THE UNSC? .....	434
<i>S5 Proposal</i> .....	435
<i>G4 Proposal</i> .....	436
<i>AU Proposal</i> .....	437
<i>Uniting for Consensus Proposal (UfC)</i> .....	437
IV. WHERE IS THE UN HEADING IN REFORMING THE UNSC? .....	439
<i>Enlargement of the UNSC</i> .....	439
<i>Veto reforms</i> .....	441
CONCLUSION.....	449

## I. INTRODUCTION

In 2022, the UN will be celebrating its 77th Anniversary.<sup>1</sup> A question on the minds of many is whether the UN Security Council (UNSC) should be reformed in view of the many changes that have occurred in the world since the establishment of the UN. The principal change driving the debate

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1. The Charter was adopted at the San Francisco Conference on June 26, 1945, and came into force on October 24, 1945. *The San Francisco Conference*, U.N., <https://www.un.org/en/about-us/history-of-the-un/san-francisco-conference> (last visited Oct. 8, 2022).

has been the growth in the number of Member States in the UN over the years, from fifty-one at its inception to its current membership of 193. It also involves the persistent question of whether the original rationale for the institution of “permanent members” and their veto power continues to justify those unique aspects of the UNSC in its present form.

That said, the question of reforming the UNSC is not a new question. It has been present since the establishment of the UN.<sup>2</sup> Indeed, almost every time it comes up, the resounding answer from most of the Member States of the UN<sup>3</sup> is that it can and should be reformed to reflect the changes in the world and in UN Membership over the years. However, reforming the UNSC, apart from procedural reforms that only marginally affect the performance of its fundamental functions under the Charter, is not easily accomplished. Such more fundamental changes require an amendment to the Charter, which requires the consent of all five of the Permanent Members of the UNSC.<sup>4</sup>

Articles 108 and 109 of the Charter govern the amendment of the Charter. Article 108 provides that any amendment must be adopted by two thirds of the Member States and ratified by two-thirds “including all of the permanent members.”<sup>5</sup> Article 109 provides an alternative method for amending the Charter, through a General Conference of Member States. However, that also requires ratification by “all permanent members.”<sup>6</sup>

In the seventy-seven years of its existence, despite the many changes that the world and the UN have experienced, the Charter has only been amended three times: in 1963;<sup>7</sup> in 1965;<sup>8</sup> and in 1971.<sup>9</sup> Only one of those three amendments, the amendment of 1963, dealt with reforming the UNSC. That amendment enlarged the membership of the UNSC from its original size of eleven to fifteen Member States, and also amended the manner of voting in the UNSC.

The 1963 enlargement of the UNSC was in response to the growth of the UN from fifty-one Member States at its inception in 1945 to over 112 in 1963, due principally to the decolonization of Africa following World War

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2. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 434-36 (Bruno Simma ed., Oxford Univ. Press, 1995).

3. *Id.*

4. U.N. Charter art. 108, ¶ 1.

5. *Id.*

6. U.N. Charter art. 109, ¶ 2.

7. Amendments to art. 23, 27 and 61, adopted on Dec. 17, 1963. U.N. Charter Amend. art. 23, 27, 61, 109, ¶ 1.

8. *Id.* (Amendment to art. 109, adopted on Dec. 20, 1965).

9. *Id.* (Further amendment to art. 61, adopted Dec. 20, 1971).

II, which was encouraged and supported by the UN.<sup>10</sup> The 1963 amendment dealing with voting in the UNSC provides that such decisions on procedural matters are to be made by an affirmative vote of nine members and on all other matters by an affirmative vote of nine “including the concurring votes of the five permanent members.”<sup>11</sup>

There have been a number of proposals to reform the UNSC over the years, almost all of them on further enlarging the number of Member States on the UNSC and addressing in some manner the institution of permanent members and their veto power.<sup>12</sup> In addition, many of the more recent proposals addressed the working methods of the UNSC and the transparency of its work. This paper will address those reform proposals for enlarging the number of Member States and the institution of permanent members and the veto power. The paper will also note a fundamental new procedural reform recently adopted by the U.N. General Assembly (hereinafter UNGA) in response to the Russian invasion of Ukraine and its use of the veto to frustrate any significant action in the Security Council to resolve that conflict.

To put these issues in perspective, the paper will start with a bit of history regarding the institution of permanent members of the UNSC and the veto.

## II. THE ESTABLISHMENT OF THE INSTITUTION OF “PERMANENT MEMBERS” AND THE VETO.

The institution of permanent members of the UNSC with unrestricted veto power was opposed at the San Francisco conference and has remained an issue throughout the seventy-seven years that the UN has existed.<sup>13</sup> In response to such opposition at the San Francisco Conference, the US, the UK, Russia and China—in a joint Statement to the other delegations (designated in the joint statement as “the four sponsoring Governments”)—insisted on what was termed the “Yalta Formula” for voting in the Security Council.<sup>14</sup> The formula gives the Permanent Members the veto in regard to “decisions which involve ... taking direct measures in connection with the settlement of disputes, adjustments of situations likely to lead to disputes, determination of threats to the peace, and suppression of breaches of the

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10. See, e.g., Simma, *supra* note 2, at 14.

11. U.N. Charter, art. 27, ¶ 3.

12. See e.g., Simma, *supra* note 2, at 396-97.

13. See generally Simma, *supra* note 2.

14. U.N. Conference on International Organization San Francisco, 1945, *Statement by the Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council*, 710-714, U.N. Doc. UNIO Vol. 11-E-F, (June 8, 1945).



peace” which are “to be governed by a qualified vote—that is, the vote of seven<sup>15</sup> members.”<sup>16</sup> France, which became the fifth Permanent Member shortly following the issuance of the joint statement, separately concurred with the joint Statement.<sup>17</sup> In the Statement, the four sponsoring governments reminded other delegates to the conference, that under the Yalta formula, the Permanent Members could not act by themselves to make such decisions alone since a majority of seven—now nine—votes would be required for any such decisions. As the four sponsoring Governments further explained in their joint statement, they could not be expected in its then present condition of the world to assume the obligation to act in such serious matters as the maintenance of international peace and security in consequence of any decision in which they did not concur.<sup>18</sup>

Nonetheless, other states continued to oppose the veto at the conference. However, in the face of the determined position of the four sponsoring governments that they were not prepared to consent to the proposed UN Charter in the absence of the veto, Article 27(3) reflecting the Yalta Formula, was adopted.<sup>19</sup>

There have been proposals for reforming the UNSC in regard to the unrestricted use of the veto throughout the decades, almost from the inception of the UN.<sup>20</sup> Thus, for example, in a number of resolutions, the UNGA called upon the Permanent Members, among other measures, to “exercise the veto only when they consider the question of vital importance, taking into account the United Nations as a whole, and to state upon what ground they consider this condition present” when there is not unanimity among members of the Security Council.<sup>21</sup>

After the 1963 amendment to the Charter expanding the size of the UNSC from eleven to fifteen, the calls for reforming the Security Council with the further large growth of new Member States continued in the 1960s and 1970s. The proposals focused largely on the enlargement of the

15. A majority of the original eleven members of the Security Council.

16. See U.N. Conference on International Organization San Francisco, *supra* note 14.

17. *Id.* at 710.

18. *Id.* at 711.

19. See Simma, *supra* note 2, at 435 -36; see also EDWARD C. LUCK, UN SECURITY COUNCIL: PRACTICE AND PROMISE 14, 135 n.24 (2006).

20. See, e.g., G.A. Res. 40(1), at 64 (Dec. 13, 1946); G.A. Res. 117(II), at 23 (Nov. 21, 1947); G.A. Res 290 (IV), (Dec. 1, 1949).

21. G.A. Res. 267 (III), at 7 (April 14, 1949); see also, Manuel Tello, Ambassador, U.N. Statement at the Working Group on the Reform of the Security Council, in *passim* (Apr. 21, 1998) [hereinafter *Mexico Statement, 1998*]; see Plenary Press Release, G.A. General Assembly Opens Debate on Security Council Reform, Including Increase in Membership and Equitable Representation, U.N. Press Release G.A. 9508, (Nov. 19, 1998) (Summarizing statements of Mexico and Singapore) [hereinafter *1998 GA Press release*].

Security Council to reflect that development. Member states continued to propose the expansion of the UNSC generally, including calls to expand the number of permanent members while at the same time revisiting the issue of the unrestricted veto.<sup>22</sup>

### III. WHERE IS THE UN IN REFORMING THE UNSC?

The current initiatives to reform the UNSC began in 1979, with a decision by the UNGA to include a specific item on the subject on its provisional agenda. However, the UNGA did not actually consider that item until 1992.<sup>23</sup>

The end of the Cold War in the early 1990s saw renewed efforts to reform the Security Council, both in terms of its membership and the use of the veto. In 1993, the General Assembly established the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council (hereinafter the Open-ended WG).<sup>24</sup> Very early in this process, the UNGA, recognizing the legal difficulties of achieving any progress on these issues under the Charter, decided that any such reform would require two-thirds of the Members of the General Assembly.<sup>25</sup>

Over the following fifteen years or so, the Open-ended WG made considerable progress on issues relating to the working methods of the UNSC and transparency. However, this was not the case in regard to the issues relating to proposed reforms involving the enlargement of the UNSC or the veto.<sup>26</sup> In respect to these issues, the Open-ended WG in 2004 identified six topics that were individually considered: 1) size of an enlarged UNSC; 2) question of regional representation; 3) criteria for membership; 4) relationship between the UNGA and the UNSC; 5) accountability; and 6) the use of the veto.<sup>27</sup>

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22. Simma, *supra* note 2, at 395-97.

23. *See*, Rep. of the Open-ended Working Group on Question of Equitable Representation on and Increase in Membership of the Security Council and Other Matters related to the Security Council, Annex 1, ¶ 1 G.A. Rep. U.N. Doc. A/58/47 (July 21, 2004) [hereinafter *2004 Open-ended WG Report*].

24. *Id.* ¶ 2; G.A. Res. A/RES/48/26 ¶ 10 (Dec. 3, 1993); *see also*, *Mexico Statement, 1998*, *supra* note 21.

25. G.A. Res. A/RES/53/30, ¶ 1 (Dec. 1, 1998).

26. *2004 Open-ended WG Report supra* note 23, at Annex 1 ¶¶ 13, 15; *see* Reference paper, *Five Points Proposed for Consideration by The Informal Meeting of The Working Group*, at Annex II; *see also* Chairman's summary of discussions, at Annex IV.

27. *2004 Open-ended WG Report, supra* note 23, at ¶¶ 17-24.

In 2004, the UN's High Level Panel on Threats, Challenges and Change, originally established to prepare for the 2005 World Summit, called on the Permanent Members of the UNSC to commit voluntarily to refrain from invoking the veto in cases of genocide and large scale human rights abuses.<sup>28</sup> The High Level Panel also addressed the issue of criteria for new permanent members of any expanded UNSC, recommending that any such new permanent members should be among those states that have contributed "most to the United Nations financially, militarily, and diplomatically," particularly through contributions to the UN budget and through participation in UN peacekeeping operations.<sup>29</sup> The High Level Panel also recommended that in regard to any expansion of the UNSC, new permanent members should "represent the broader UN membership" and should not impair the "effectiveness" of the UNSC.<sup>30</sup>

In 2008, the UNGA agreed to move the long deadlocked discussions on Security Council reform from the Open-ended Working Group to the Intergovernmental Negotiations in an informal Plenary of the UNGA.<sup>31</sup> In February of 2009, the President of the UNGA presented a working paper which identified five key issues to be discussed: 1) categories of membership, 2) the question of the veto, 3) regional representation, 4) size of an enlarged Council and 5) working methods of the Council and the relationship between the Council and the UNGA.<sup>32</sup>

The discussions within the UNGA on reforming the UNSC have focused on the following major initiatives.

### *S5 Proposal*

The "S5" initiative, proposed by Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland, called for veto restraint in the face of atrocity crimes, as well as other reform measures.<sup>33</sup> Those other measures focused

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28. U.N. Secretary-General, *The Secretary-General's High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, ¶¶ 244-60, U.N. Doc. A/59/565, (Dec. 1, 2004).

29. *Id.* ¶ 249.

30. *Id.*

31. G.A. Dec. 62/557, U.N. Doc. A/62/49 (Vol. III), at 106 (Sep. 15, 2008).

32. U.N. President of the G.A., Note by the President of the General Assembly, U.N. Doc. A/63/960 (Sep. 10, 2009).

33. See Press Release, G.A. Plenary Press Release, General Assembly Resumes Debate on Security Council Reform, With Several Divergent Proposals Still Under Consideration: Background, U.N. Press Release, GA/10484 (July 10, 2006) [hereinafter *2006 GA Press Release*]; see also G.A., Submission of Permanent Missions of Switzerland, Costa Rica, Jordan, Liechtenstein and Singapore, A/60/L.49 (Mar. 17, 2006) [hereinafter *GA Submission of Permanent Missions*].

not on the enlargement of the UNSC but on its working methods in order to enhance the accountability, transparency and inclusiveness of its work with a view to strengthening its legitimacy and effectiveness.<sup>34</sup>

### *G4 Proposal*

Four Member States—Brazil, Germany, India, and Japan—put forward a proposal, calling for six new “national permanent seats” for the economically strongest and most influential countries—putting themselves and two unspecified African countries as candidates for such seats.<sup>35</sup> According to the proponents of this proposal, genuine reform of the Council can only be achieved by expanding both permanent members and non-permanent members with the new national permanent members enjoying the same right to veto as the existing permanent members.<sup>36</sup> The proposal would increase the membership of the UNSC from fifteen to twenty five by adding, in addition to the six permanent seats, four non-permanent seats. The six new permanent seats would be allocated as follows: two from Africa; two from Asia; one from Latin America and the Caribbean (GRULAC); and one from Western European and Others Group (WEOG).<sup>37</sup> The new permanent members would not be entitled to exercise the right of veto until the question of the extension of that right to new members is decided upon separately by a review conference. The four new non-permanent members would be allocated as follows: two from Africa, one from Asia, and one from GRULAC.<sup>38</sup>

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34. 2004 *Open-ended WG Report*, *supra* note 23, at ¶¶ 17-24; Rep. of the Open-ended Working Group on Question of Equitable Representation on and Increase in Membership of the Security Council and Other Matters related to the Security Council, Annex 1 Enclosure, ¶ 15 G.A. Rep. U.N. Doc. A/62/47 (Oct. 9, 2008) [hereinafter *2008 Report of Open-ended WG, Enclosure*]. Such measures included inter alia proposals for: more substantive exchanges of views among the UNSC, the G.A. and ECOSOC; the UNSC exploring ways to assess the extent to which its decisions have been implemented; subsidiary bodies of UNSC to include non-members with strong interest and relevant expertise in their work; and permanent members using their veto to explain their reason for doing so.

35. *Id.* at ¶¶ 11-12; Intervention by H.E. Mr. M.S. Puri Ambassador Acting PR of India during negotiations on “Size of an enlarged Council and working methods of the Security Council” on 7 April 2009 (Apr. 7, 2009).

36. *See* Statement by Mr. Vivek Katju, Special Secretary, International Organizations and Political issues, at the Informal GA Plenary Meeting on “Intermediate model” at the United Nations, 3 September 2009 (Sept. 3, 2009).

37. 2008 *Report of Open-ended WG, Enclosure*, *supra* note 34.

38. *Id.* at ¶¶ 11-12.

*AU Proposal*

The African Union (AU) proposed to increase the number of UNSC seats from fifteen to twenty-six. The eleven additional seats would be distributed as follows: two permanent and two non-permanent seats for Africa; two permanent and one non-permanent for Asia; one non-permanent for the Eastern European Group (EEG); one permanent seat and one non-permanent seat for the GRULAC; and one permanent seat for the WEOG. Under that proposal, new permanent members would be granted the right to veto.<sup>39</sup>

*Uniting for Consensus Proposal (UfC)*

Forty Member States, whose leaders included Italy, Pakistan, South Korea, and Colombia, proposed the Uniting for Consensus (UfC) proposal, calling for retaining the five permanent seats but increasing the number of non-permanent seats from ten to twenty members. The twenty non-permanent seats would be allocated as follows: six from Africa; five from Asia; four from the GRULAC; three from WEOG; and two from the EEG. The proposal would create a new category of non-permanent seats allocated not to states but to regional groups. Each of the five groups would decide on arrangements among its members for immediate election or rotation of its members on the seats allocated to its group.<sup>40</sup> The proposal contemplated that those five regional groups could elect their members on a rotational basis and for a period of between three to five years, without the possibility of reelection.<sup>41</sup>

Given the number and variety of proposals for reforming the UNSC before the General Assembly, little progress has been made in the General Assembly towards reaching any consensus.<sup>42</sup> During the course of the discussions of the Open-ended WG in 2008, two Permanent Members, the United Kingdom and France, issued a joint statement in that they agree the

39. *Id.* at ¶ 10.

40. *Id.* at ¶¶ 13-14.

41. Question of Equitable Representation on and Increase in the Membership of the Security Council and Related Matters, Argentina, Canada, Colombia, Costa Rica, Italy, Malta, Mexico, Pakistan, Republic of Korea, San Marino, Spain and Turkey: Draft Resolution, Reform of the Security Council, Limits to Re-election and Role of Geographical Groups, ¶ 5 U.N. Doc. A59/L.68 (July 21, 2005) [hereinafter Question of Equitable Representation Draft Resolution]; see also Press Release, G.A. Plenary Press Release, 'Uniting For Consensus' Group of States Introduces Text on Security Council Reform to General Assembly, Proposes Maintaining Permanent 5, with 20 Elected Members, U.N. Press Release GA/10371 (July 26, 2005) [hereinafter 2005 GA Press Release].

42. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at ¶ 8.

UNSC should be reformed to ensure that it better represents the world today while remaining capable to take the effective action necessary to confront today's security challenges.<sup>43</sup> They reaffirmed their support for the candidacies for permanent seats for Germany, Brazil, India, and Japan, as well as a permanent seat for Africa (the G4 proposal). They stated that they were ready to consider an intermediate solution, which might include, *inter alia*, a new category of non-permanent seats with longer terms, which might evolve into permanent seats at some future time.<sup>44</sup> The Co-Chairs of the Open-ended WG suggested that the UNGA may wish to consider a transitional or intermediary approach to reforming the UNSC, including the creation of extended non-permanent seats of various durations as a compromise for making progress on the issue of enlarging the UNSC and the veto.<sup>45</sup>

Indeed, all five Permanent Members have made statements supporting enlarging membership of the UNSC but were of one voice that any such enlargement should be based on a broad consensus and not undermine the efficiency and effectiveness of the UNSC.<sup>46</sup> The United States and Russia have stressed that only a modest expansion<sup>47</sup> will ensure the Council's continued effectiveness.<sup>48</sup>

In the end, little progress has been made on the issue of the enlargement of the UNSC and the veto. Member States seem to agree that UNSC expansion should contemplate additional seats, but not much else.<sup>49</sup>

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43. *Id.* at 13.

44. *Id.*

45. *Id.* ¶¶ 17, 25-28.

46. *Id.* ¶ 19.

47. *Id.* ¶¶ 29-31 (outlining various options on the number and category of seats proposed); *see also* 2008 Report of Open-ended WG, Enclosure, *supra* note 34; Letter Dated 20 March 2008 from Permanent Representative of Cyprus to United Nations Addressed to the President of the General Assembly, Enclosure, Annex II, G.A. Rep. U.N. Doc. A/62/47 (Oct. 9, 2008) (compilation of ideas and positions, including ideas for an intermediate approach to enlarging the UNSC, Elements for Security Council enlargement, and appeal to Permanent Members to exercise restraint on invoking the veto regarding war crimes, genocide, and crimes against humanity, "Elements for Working Methods").

48. *See, e.g.*, Press Release, G.A., Plenary Meetings Coverage, Member States Call for Removing Veto Power, Expanding Security Council to Include New Permanent Seats, as General Assembly Debates Reform Plans for 15-Member Organ, *in passim*, U.N. Press Release GA/12091 (Nov. 20, 2018) [hereinafter 2018 GA Press Release].

49. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at ¶¶ 29-31; *see also* 2008 Report of Open-ended WG, Enclosure, Letter Dated 20 March 2008 from Permanent Representative of Cyprus, *supra* note 47.

## IV. WHERE IS THE UN HEADING IN REFORMING THE UNSC?

*Enlargement of the UNSC*

Recent years have not witnessed any significant progress in the efforts to enlarge the UNSC. The principal obstacle to achieving progress lies not with the Five Permanent Members of the UNSC. They have all endorsed the enlargement of the UNSC in principle with a general caveat that any such enlargement should not undermine the efficiency and effectiveness of the UNSC to address matters under Chapter VII dealing with international peace and security.<sup>50</sup>

For many years, the United States has maintained that it supports an expansion of the UNSC, stressing, however, that it supports only “a modest expansion” of both permanent and non-permanent members in order not to undermine the efficiency and effectiveness of the UNSC to perform its vital functions.<sup>51</sup> In regard to the criteria for choosing additional permanent members of the UNSC, the US has stated that such consideration must take into account the candidates’ ability to contribute to the maintenance of international peace and security.<sup>52</sup>

The UK supports the expansion to make the UNSC more representative, but, like the US, cautions against compromising the effectiveness of the Council.<sup>53</sup> France, similarly, has stressed the need to make the UNSC more representative without compromising its effectiveness.<sup>54</sup> Russia also supported expanding the Council to make it more representative but stresses that such efforts should not undermine the UNSC’s ability to react to challenges effectively and efficiently. Russia takes the position that the maximum membership of the UNSC should not exceed the low twenties.<sup>55</sup> China has expressed support for increasing the representation of developing countries, particularly African States, on the UNSC.<sup>56</sup>

The problem essentially lies with the inability of the recognized regional groups within the UNGA to agree among themselves on how to

50. See, e.g., 1998 GA Press Release, *supra* note 21; see also 2018 GA Press Release, *supra* note 48.

51. See 2018 GA Press Release, *supra* note 48, at ¶¶ 10-11.

52. *Id.* at ¶ 11.

53. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at 8, 13; 2018 GA Press Release, *supra* note 48.

54. See 2008 Report of Open-ended WG, Enclosure, *supra* note 34; 2018 GA Press Release, *supra* note 48.

55. 1998 GA Press Release, *supra* note 21, at 6-7.

56. 2018 GA Press Release, *supra* note 48, at 2.

enlarge the membership of the UNSC. The Members of the UNGA, particularly the members of the Group of 77, which represents 132 of the 193 Member States and includes Member States from all of the regional groups except for WEOG, have not been able to agree on which of the many proposals for enlargement to support.<sup>57</sup> Even within the WEOG, there is disagreement as to whether there should be an additional permanent seat and who might occupy the seat.<sup>58</sup>

While the UK and France have long endorsed the G4 proposal, none of the other Permanent Members have done so. Nor have any of the recognized UN regional groups endorsed the proposal.

GRULAC members other than Brazil, both large and small, have different ideas as to how to reform the UNSC membership and which GRULAC member should occupy any permanent seat on the UNSC—or even whether there should be a permanent seat for an individual country versus some kind of non-permanent regional seat.<sup>59</sup> Thus, many GRULAC countries support the UfC proposal calling for regional seats to be filled for extended periods on a rotational basis.<sup>60</sup> The situation is similar in regard to other regional groups, including the WEOG.<sup>61</sup> Thus, none of the regional groups other than Africa have a proposal for enlarging the UNSC.

Additionally, the African proposal has other problems. Given the concerns raised by the Five Permanent Members that any expansion not be so large as to undermine the effectiveness and efficiency of the UNSC to perform its vital functions, it seems unlikely that the AU proposal calling for an expansion of up to twenty six members of the UNSC would succeed even if other regional groups came around to supporting the proposal. Putting aside the issue of the size of the expansion, the AU, like other regional groups, faces the issue of which of its Member States would be given the new permanent seats it has proposed—even regarding the proposed two African seats, let alone the other regional groups. While much attention has been focused on such African Member States as South Africa, Egypt, and Nigeria,<sup>62</sup> in its proposals, the AU has been careful not

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57. See Question of Equitable Representation Draft Resolution, *supra* note 41; see also 2005 GA Press Release, *supra* note 41.

58. See 2006 GA Press Release, *supra* note 33; see also GA Submission of Permanent Missions, *supra* note 33.

59. See S5 and UfP proposals discussed above and various African supporters.

60. See Press Release, U.N. General Assembly Plenary Press Release, *General Assembly Resumes Debate on Security Council Reform with Several Divergent Proposals Still Under Consideration*, ¶ 4, U.N. Doc. GA/10484 (July 20, 2006) (“Background” mentioning Argentina, Colombia, Costa Rica, and Mexico).

61. *Id.*

62. See 2008 Report of Open-ended WG, *Enclosure*, *supra* note 34.



to formally identify which Member States it proposes to occupy any new seats.

While the Asian group does not have such a proposal, the G4 proposal prominently features both Japan and India as proposed new permanent members. There is a widespread—but not universal—support to recognize the importance of Japan in the UN.<sup>63</sup> However, not unexpectedly, the proposal to elevate India to a permanent seat is not nearly as widespread, generating differences with other Asian group members large and small. Thus, many Member States within the region have supported other proposals.<sup>64</sup>

It appears that the regional groups within the UNGA are not close to resolving the many differences among them as to how much and how to expand the UNSC membership, making it unlikely that there will be any such expansion in the near future.

### *Veto reforms*

The United States and Russia oppose any tampering with the veto.<sup>65</sup> China has been coy, but has expressed skepticism of even voluntary restraints on the veto.<sup>66</sup> Only the UK and France have voiced support for restricting the use of the veto.<sup>67</sup> Consistent with their longstanding positions, the restrictions they have called for are of a voluntary nature, and do not require any Charter amendment.<sup>68</sup>

The initiative to restrict the use of the veto by the Five Permanent Members in some manner has received growing support among the Members of the UNGA. The 1979 S5 proposal calling for such reform garnered some twenty-five Member States before the S5 withdrew their proposal in 2012.<sup>69</sup> Subsequently, the sponsors of the S5 proposal continued their initiative. In 2015, Liechtenstein submitted to the Secretary General and the UNSC a proposed “Code of Conduct” regarding UNSC

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63. *Id.*

64. *Id.*

65. See G.A. Res. A/RES/53/30, *supra* note 25; 2018 GA Press Release, *supra* note 48.

66. Stuart M. Patrick, *Limiting the Security Council Veto in the Face of Mass Atrocities*, Council on Foreign Relations (Jan. 23, 2015, 1:31 PM), <https://www.cfr.org/blog/limiting-security-council-veto-face-mass-atrocities>; see generally Jean-Baptiste Jeangène Vilmer, *The Responsibility Not to Veto*, 24 GLOBAL GOVERNANCE 331 (2018).

67. See 1998 GA Press Release, *supra* note 21; See G.A. Res. A/RES/53/30, *supra* note 25; 2018 GA Press Release, *supra* note 48.

68. 2018 GA Press Release, *supra* note 48; see also Patrick, *supra* note 66; Vilmer, *supra* note 66, at 341.

69. See generally Press Release, G.A. Plenary Press Release, *supra* note 33; 2004 Open-ended WG Report, *supra* note 23; 2008 Report of Open-ended WG, *Enclosure*, *supra* note 34.

action against genocide, crimes against humanity, and war crimes.<sup>70</sup> supported by 107 Member States. The Code of Conduct is open to all Member States of the U.N.<sup>71</sup>

The Code of Conduct arose out of the work of a group of twenty-four Member States of the Accountability, Coherence and Transparency Group (ACT Group) in consultation with civil society and the Secretariat of UN.<sup>72</sup> As proposed, “[a]t its heart, the Code of Conduct contains a general and positive pledge to support Security Council action against genocide, crimes against humanity and war crimes—to prevent and put an end to these crimes.”<sup>73</sup> More specifically, the Code of Conduct calls upon the Permanent Members to not vote against credible UNSC resolutions that are aimed at preventing or ending those crimes.<sup>74</sup>

The number of Member States supporting the Code of Conduct has grown over the years. As of 2020, some 121 States supported the Code.<sup>75</sup> Notably, among the Member States supporting that ACT initiative at the time are not only the small and medium States that had previously launched the S5 reform proposal, but two of the four Member States that had made the G4 proposal (Japan and Germany), many Member States that were supporting the UfC proposal, many European, African, Latin American, and Asian Member States, as well as two of the Five Permanent Members—the UK and France.<sup>76</sup> The number of Member States supporting the Code of Conduct has grown over the years.<sup>77</sup>

Along the same lines, a joint initiative of France and Mexico calling for voluntary restraint by the Permanent Members, regarding UNSC resolutions implicating mass atrocity crimes, has been endorsed by over 100 Member States.<sup>78</sup>

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70. See U.N. Security Council, *Code of Conduct regarding Security Council Action Against Genocide, Crimes Against Humanity or War Crimes*, U.N. Doc. A/70/621-S/2015/978 (Dec. 14, 2015); see also Amb. Christian Wenaweser and Sina Alavi, *Innovating to Restrain the Use of the Veto in the United Nations Security Council*, 52 CASE W. RES. J. INT’L L. 65 (2020).

71. Wenaweser & Alavi, *supra* note 70, at 67.

72. *Id.* at 66-67.

73. U.N. Security Council, *Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary General*, U.N. Doc. A/70/621 – S/2015/978 (Dec. 14, 2015).

74. Wenaweser & Alavi, *supra* note 70, at 67.

75. *Id.* at 66-67.

76. As described by France, the Code of Conduct proposed a commitment by the Permanent Five not to exercise their right to veto in situations of serious human rights crises when their vital interests are not in play. See Vilmer, *supra* note 66, at 335.

77. See U.N. Security Council, *supra* note 70.

78. Vilmer, *supra* note 66, at 331, 334, 340.

Given the longstanding opposition of at least three of the five Permanent Members (US, Russia, and China) to any legally binding restrictions on the exercise of the veto, it is understandable that the calls within the UNGA for reforms relating to the exercise of the veto have focused on voluntary restraints or procedural reforms that do not require any Charter amendment.<sup>79</sup>

Supporters of reforming the use of the veto by voluntary restraints can take heart from the success the UNGA has had in achieving agreement on certain procedural reforms in the working methods of the UNSC.<sup>80</sup> Nonetheless, while they continue to press the case for more substantive voluntary reforms, the continuing opposition of three of the Permanent Members makes even such voluntary reforms unlikely. Perhaps, if agreement were to be reached on the subject of the expansion of the UNSC, there would be an added incentive for the three, as part of an overall package, to more favorably consider some form of voluntary restraints. Only time will tell.

In the meantime, with the recent invasion of Ukraine by Russia and its invoking of the veto to frustrate any action by the Security Council regarding the crisis, the General Assembly revived and overwhelmingly endorsed<sup>81</sup> a procedural proposal of some two years ago by Liechtenstein for the General Assembly to respond to such vetoes.<sup>82</sup> The procedural reform creates a standing mandate for the Assembly to be convened automatically within ten days every time a veto has been cast in the Council.<sup>83</sup>

The permanent member or members responsible for casting a veto would be accorded precedence in the list of speakers, essentially inviting such member or members to lead off and address the Assembly meeting convened under this resolution.<sup>84</sup>

The new resolution makes an exception to this mandate for convening a meeting to discuss a veto where the General Assembly has already

79. 2008 Report of Open-ended WG, Enclosure, *supra* note 34, at ¶¶ 17-24; 2004 Open-ended WG Report, *supra* note 23, at ¶ 15.

80. See, e.g., U.N. President of the S.C., Note by the President of the Security Council, U.N. Doc. S/2017/507 (Aug. 30, 2017) (“For a consideration and user-friendly list of recent practices and newly agreed measures which will serve as guidance for the Council’s work.”).

81. G.A. Res. 76/262 (Apr. 26, 2022); see also Ben Donaldson, *Liechtenstein’s ‘Veto Initiative’ Wins Wide Approval at the UN. Will It Deter the Major Powers?*, UNA UK (Apr. 28, 2022), <https://una.org.uk/news/liechtensteins-veto-initiative-wins-wide-approval-un-will-it-deter-major-powers>.

82. U.N. Security Council, *supra* note 70 at 69-71.

83. See Donaldson, *supra* note 81.

84. *Id.*

convened a special session on the same situation under the Uniting for Peace resolution adopted by the General Assembly in 1950, in connection with the Korean conflict.<sup>85</sup> Notably, a special emergency session under the Uniting for Peace resolution process was called for by the Security Council on 27 February 2022 to examine the situation in the Ukraine following Russia's invasion—the eleventh such emergency special session under the Uniting for Peace resolution.<sup>86</sup>

This proposal for the new procedural reform had eighty-three co-sponsors from every regional group and three Permanent members—the UK, France and the US—and was adopted by consensus.<sup>87</sup> The principal proponent for this procedural reform has suggested that the authors of this initiative “hope that the adoption of this procedural reform will spur a wider debate as to whether the Council should not only reconsider the use of the veto but open space for “innovation””<sup>88</sup>

Only time will tell how this new procedural reform will play out, especially in terms of the related Uniting for Peace resolution already in place—and already invoked for example in regard to the Ukraine situation.<sup>89</sup> Only time will tell whether the hope for further “innovation” regarding the veto will be realized.

The foregoing has examined the prospects for UNSC reform of the veto within the framework of the UNGA. However, this issue has been the subject of discussion within civil society and the academic community as well. It would be remiss in this discussion concerning the future of the UNSC during the 21st Century to fail to take account of those developments, if only briefly.

With respect to civil society, several legal professional entities have weighed in on the issue, with some advocating legally binding restraints on the exercise of the veto in situations where the UNSC is addressing atrocity crimes<sup>90</sup> and others advocating for voluntary restraints.<sup>91</sup>

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85. See GA Res. 76/262, *supra* note 81, ¶ 1; see GA Res. 377A(V) (Nov. 3, 1950) (providing that an “emergency special session” can be convened within twenty-four hours where the Security Council fails to exercise its primary responsibility for international peace and security because of a lack of unanimity of the permanent members. The resolution provides that such a session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations); see also Larry D. Johnson, “Uniting For Peace”: Does It Still See Any Useful Purpose?, 108 AJIL UNBOUND, 106-15 (2014).

86. See S.C. Res. 2623, ¶ 3 (Feb. 27, 2022); see also *Security Council vote sets up emergency UN General Assembly session on Ukraine crisis*, UN NEWS (Feb. 27, 2022), <https://news.un.org/en/story/2022/02/1112842>.

87. See Donaldson, *supra* note 81.

88. *Id.*

89. *Id.*

90. See Vilmer, *supra* note 66, at 342.

With respect to academia, there has been considerable discussion of the issue. Many of those addressing the issue have begun to advocate for mandatory, legally binding restraints on the exercise of the veto where resolutions before the UNSC implicate mass atrocity crimes.<sup>92</sup> Pursuant to that view, international law has evolved to the point where such restrictions on the use of the veto already exist as a matter of law—without any need to amend the Charter.<sup>93</sup>

These arguments build on the UNGA’s Declaration on Responsibility to Protect<sup>94</sup> and evolving international law and practice as it relates to the Genocide Convention<sup>95</sup> and the 1949 Geneva Conventions<sup>96</sup> as well as the evolving principle of *jus cogens* as they apply within the context of the Purposes and Principles of the Charter.<sup>97</sup> The thrust of these arguments is that the exercise of the veto of a UNSC resolution to prevent or punish genocide, serious war crimes, and crimes against humanity violates binding treaty obligations of Member States, including the Permanent Members of the UNSC, as well as the principle of *jus cogens*, and is contrary to purposes and principles of the UN Charter.<sup>98</sup>

Thus, proponents of that view point to the fact that the Genocide Convention contains an obligation to “prevent genocide” and the 1949 Geneva Conventions provide for states parties “to respect and ensure respect for those Conventions.”<sup>99</sup>

These ideas raise serious and complex issues of international law. While it is beyond the scope of this paper to provide an in-depth analysis of

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91. *Id.* at 335, 339. The American Bar Association recently adopted a policy urging the Permanent Members to commit “in principle” to voluntary restraint in exercising their veto power with respect to resolutions proposing measures to prevent genocide, serious war crimes, ethnic cleansing, or crimes against humanity. *Midyear Meeting 2022 - Item 606*, ABA HOUSE OF DELEGATES, Feb. 15, 2022.

92. *See e.g.*, JENNIFER TRAHAN, *EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES* (Cambridge Univ. Press 2020).

93. *Id.* at 142-247.

94. G.A. Res. 60/1 ¶ 138-9 (Oct. 24, 2005).

95. G.A. Res. 260 A (III), at 277 (Dec. 9, 1948).

96. The Geneva Conventions I, Aug. 12, 1949, 75 U.N.T.S. 31; The Geneva Conventions of 12 August 1949 II, Aug. 12, 1949, 75 U.N.T.S. 85; The Geneva Conventions of 12 August 1949 III, Aug. 12, 1949, 75 U.N.T.S. 135. The Geneva Conventions of 12 August 1949 IV, Aug. 12, 1949, 75 U.N.T.S. 287.

97. *See Trahan, supra* note 92, at 142-242.

98. *Id.*

99. *See* The Geneva Conventions, *supra* note 96 at I, III. *See also* Common Article 3 enumerating a number of “grave breaches” or war crimes and provision in Additional Protocols I and II providing for an obligation “to ensure respect.”

those issues, it is useful to identify some of those issues.<sup>100</sup> First, the inclusion of crimes against humanity raises an issue of which crimes against humanity the proponents have in mind—beyond those covered in the enumerated treaties. Initially, there is an issue of the status of crimes against humanity following the adoption by the ILC of draft articles and commentary on the subject.<sup>101</sup> The UNGA continues to consider the subject.<sup>102</sup>

Regarding the treaties identified as creating obligations to prevent mass atrocity crimes by non-signatory parties to those treaties (such as the Genocide Convention and the Geneva Conventions), the question arises as to whether every Permanent Member and non-permanent member of the UNSC is a party to those treaties. If not, there is the argument that they would not be bound by the obligations under those treaties.

More importantly, there is also the question of whether the Permanent Members (and non-permanent members) of the UNSC, when performing the functions of the UNSC, would trigger an obligation under those treaties. The Charter provides that UN Member States agree that in carrying out the functions of the UNSC, Members States are acting “on their behalf.”<sup>103</sup> Thus, under the Charter when fulfilling the functions of the UNSC, it can be argued that UNSC members are not acting in their national capacity but in their individual capacity as part of a principal organ of the UN.<sup>104</sup>

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100. Notably, these theories have been described in a recent work on the law and practice of the Security Council as “legally unconvincing.” See MICHAEL WOOD & ERAN STHOEGER, *THE UN SECURITY COUNCIL AND INTERNATIONAL LAW* 30-31 (Cambridge Univ. Press, 2022).

101. U.N. General Assembly, Draft Article on Prevention and Punishment of Crimes Against Humanity, U.N. Doc. A/74/10 (Aug. 9, 2019).

102. The issue before the GA is whether to proceed to the preparation of an international convention based on the articles or to proceed more cautiously. See U.N. General Assembly Plenary Meetings Coverage, *Adopting 29 Legal Texts, General Assembly Reaffirms Sixth Committee’s Vital Role in Progressive Development of International Law*, U.N. Doc. GA/12303 (Dec. 15, 2020); see also Sean Murphy, *Striking the Right Balance for a Draft Convention on Crimes Against Humanity*, JUST SECURITY (Sept. 17, 2021), <https://www.justsecurity.org/78257/striking-the-right-balance-for-a-draft-convention-on-crimes-against-humanity/>.

103. U.N. Charter, art. 24 ¶ 1: “In order to enhance prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

<sup>104</sup> Simma, *supra* note 2, at 404: “As an organ of the UN, the SC acts on behalf of the Organization and not on behalf nor the individual member states. Accordingly, its actions and decisions are attributed to the UN Organization as a whole and not to individual members, such as, for instance, the members of the SC.”; see also at 407 (describing discussions in the UNSC endorsing the view that Member States do not act as the agent of the individual member state when fulfilling the functions of a member of the UNSC).

On the other hand, the proponents of the view that legal limitations on the exercise of the veto already exist also argue that it doesn't matter whether the Permanent Members of the UNSC are parties to these treaties because the obligation to prevent atrocity crimes is applicable under the principle of *jus cogens*.<sup>105</sup> While the ILC adopted twenty-three draft conclusions and a draft annex together with commentaries on the subject of *jus cogens* and has transmitted the draft conclusions to Governments for comments and observations,<sup>106</sup> the UNGA continues to consider the subject.<sup>107</sup>

The argument that the principle of *jus cogens* applies to the obligations under the treaties relating to mass atrocities raises not only the issue whether that position is accepted in international law, but also the issue of the extent of a state's obligation pursuant to that principle. As even the proponents of the application of the principle acknowledge, there is uncertainty in this area of the law.<sup>108</sup> In this respect, it appears that uncertainty remains about norm conflicts between *jus cogens* prohibitions on the commission of atrocity crimes and inconsistent treaty or customary international law rules following the International Court of Justice's decision in *Jurisdictional Immunities of the State*.<sup>109</sup>

Putting aside the issue of which mass atrocity crimes may be covered by the principle of *jus cogens*, there is an added issue of the extent that the principle applies to the UN as an international organization and to the members of the UNSC acting on behalf of the organization.<sup>110</sup> The complexity of this issue has been acknowledged by those seeking to recognize legal limitations on the Permanent Members.<sup>111</sup>

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105. See Trahan, *supra* note 92.

106. See U.N. General Assembly, *Fourth Report on Peremptory Norms of General International Law (jus cogens)* by Dire Tladi, *Special Rapporteur\**, A/CN.4/727 (Jan. 31, 2019).

107. *Id.*

108. Trahan, *supra* note 92, at 156. Professor Trahan points out: "It is unclear, however, whether all 'underlying crimes' of crimes against humanity as they are formulated in the Rome Statute are protected by *jus cogens*" and "Similarly, there does not appear to be clarity regarding which war crimes have been recognized as *jus cogens*."; see also Thomas Kleinlein, *Jus Cogens Re-examined: Value Formalism in International Law*, 28 EUR. J. INT'L L. 295 (2017) (for a review of recent analyses of different approaches to *jus cogens*).

109. See *e.g.*, *Germany v. Italy*, International Court of Justice, judgement, at ¶¶ 92-97 (Feb. 3, 2012).

110. See Simma, *supra* note 2; see also U.N. General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, A/56/10 (2001). For an analysis of the application of the principle of *jus cogens* to the work of the Security Council, see Wood and Stöcker, *supra* note 100 at 78-83.

111. See, *e.g.*, Trahan, *supra* note 92, at 167 n.120.

Proponents of such existing legal limitations on the veto have argued that the Permanent Members are obligated to refrain from invoking the veto in regard to resolutions seeking to prevent mass atrocity crimes in view of the requirement that they act in accordance with the Purposes and Principles of the Charter. However, this argument also raises issues.

The Charter identifies four “Purposes” in Article 1: 1) “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, in conformity with principles of justice and international laws, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”; 2) “to develop friendly relations among nations ...”; 3) “to achieve international co-operation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights ...”; and 4) “to be a center for harmonizing the actions of nations in the attainment of these common ends.”<sup>112</sup>

Article 24 (2) of the Charter specifically calls upon Members of the UNSC to “act in accordance with the ‘Purposes and Principles of the United Nations,’” and further provides that “the specific powers granted to the Security Council for the discharge of these duties are laid down in chapters VI (Pacific Settlement of Disputes) VII (Action with Respect to Threats to the Peace and Breaches of the Peace, and Acts of Aggression), VIII (Regional Arrangements<sup>113</sup>) and XII (International Trusteeship System).”<sup>114</sup>

All the Chapters subject to the elaboration of “specific powers” under Article 24(2) deal with and specifically reference only the purpose relating to the maintenance of international peace and security. The other Chapters omitted from that enumeration, Chapters IX (International Economic and Social Co-operation), X (Economic and Social Council), and XI (Declaration Regarding Non-Self-Governing Territories) address matters other than peace and security and directly relate to the other broader Purposes and Principles enumerated in the Charter. If the requirement to act in accordance with the Principles and Purposes is to be considered in terms of the “specific powers” granted in the enumerated chapters, there is an argument that the only Purposes and Principles relevant to the exercise of

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112. U.N. Charter art. 1.

113. U.N. Charter art. 24 ¶ 2. The regional arrangements addressed in Chapter VIII are ones for dealing with international peace and security under Art. 52 of the Charter.

114. *Id.*



those specific powers relate entirely or principally to Article 1—to maintain international peace and security—and not the other paragraphs in Article 1. Thus, the only “purpose and principle” specifically referenced to be substantively applicable to the functions exercised in Chapters VI, VII and VIII is that relating to the maintenance of international peace—and security.<sup>115</sup>

The proponents of recognizing existing legal limitations on the exercise of the veto pursuant to the “Purposes and Principles,” reference in particular the language in Article 1(1) “in conformity with principles of justice and international law” to support such legal limitations on the UNSC in the exercise of the veto and, generally, all of the organs of the UN.<sup>116</sup> However, this argument raises issues. Initially, there is an issue of whether the Purposes were intended to establish legal limitations on the UNSC—or any other UN organ. According to the history of the Charter, the “Purposes” were merely designed to provide a guide for the conduct of UN organs in a fairly flexible manner . . .”<sup>117</sup> There is also an argument that the reference to “principles of justice and international law” in Article 1(1) refers specifically to the means for the adjustment of international disputes which might lead to a breach of the peace—and not to collective measures as provided in Chapter VII.<sup>118</sup>

Thus, the proponents of recognizing existing legal limitations on the exercise of the veto based on the Purposes and Principles of the UN—as set out in Article 1 and the requirement in Article 24 (2) that the UNSC act in accordance with those purposes—raises the fundamental issue of whether those Purposes and Principles were intended to establish legal limitations or policy guidelines.<sup>119</sup> As one noted Charter scholar has opined: “A restriction of the powers of the S.C. based on Article 24(2), second sentence, which in the eyes of the authors of the Charter would appear ‘legalistic,’ would run counter to the purpose of the UN Charter.”<sup>120</sup>

## CONCLUSION

The UN Security Council continues to perform a vital function for the UN and the World related to the maintenance of international peace and

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115. U.N. Charter art. 33; U.N. Charter art. 39; U.N. Charter art. 52.

116. See e.g., Trahan, *supra* note 92.

117. Simma, *supra* note 2, at 50.

118. *Id.* (Paragraph 1 of Art. 1 is composed of two parts, the first of which describes the essential “Purpose” of the Organization, namely, to maintain international peace and security, whereas the second paragraph (sic part) sets out the means designed to achieve this Purpose).

119. *Id.* at 403. See also Wood and Stthoeger, *supra* note 100.

120. *Id.*

security. No observer of the UN would question that the UNSC has not performed perfectly and, at times, has disappointed even its strongest supporters. Nor would they question that the UNSC is in need of a reform to make it more representative of the UN's universal membership. There is also widespread support for limiting the exercise of the veto in situations implicating mass atrocity crimes. Unfortunately, the prospect for achieving such reform are not good, for a variety of reasons discussed above.

That does not mean that reform is not possible. The recent adoption by the UNGA of the Liechtenstein procedural proposal calling for the automatic meeting of the UNGA to discuss any veto that occurs in the Council is an example of what can be done outside of the Council to keep the pressure on the Permanent Members for reform within the Council—even if made possible only by such an extreme event as the Russian invasion of Ukraine.

What is required for even a chance of a significant change, however, is perseverance. For those who believe the time for a reform has come, the fight continues.

# THE UNITED STATES SETTLES CLAIMS AGAINST SUDAN

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Ronald J. Bettauer\*

BACKGROUND.....	452
SETTLEMENT OF CLAIMS OF U.S. NATIONALS.....	456
SETTLEMENT OF CLAIMS OF FOREIGN NATIONALS .....	459
TERMINATION OF LITIGATION .....	462
CONCLUSION.....	463

On October 30, 2020, the United States and Sudan signed a Claims Settlement Agreement.<sup>1</sup> The Sudan Claims Settlement Agreement would settle death, injury and property claims arising out of the 1998 bombing of the U.S. embassies in Nairobi and Dar es Salaam and the 2000 attack on the U.S.S. Cole, and result in the removal of Sudan from the U.S. terrorism list<sup>2</sup> and the normalization of relations.<sup>3</sup> U.S. legislation—the Sudan Claims

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1. Press Release, Sudan Embassy in the U.S., Sudan and United States Execute Historic Bilateral Agreement (Oct. 30, 2020), <https://sudanembassy.org/press-release-sudan-and-united-states-execute-historic-bilateral-agreement/> (last visited Nov. 14, 2022); Cale Brown, *U.S.-Sudan Signing Ceremony on Bilateral Claims Agreement* (Nov. 2, 2020), U.S. DEP'T OF STATE, <https://2017-2021.state.gov/u-s-sudan-signing-ceremony-on-bilateral-claims-agreement/index.html> (last visited Nov. 14, 2022).

2. Recission of Determination Regarding Sudan, 85 Fed. Reg. 82565 (Dec. 18, 2020); Terrorism List Governments Sanctions Regulations, 86 Fed. Reg. 27273 (to be codified at 31 C.F.R. pt. 596). Further information on Sudan sanctions is available at <https://www.state.gov/sudan-sanctions/> (last visited Nov. 14, 2022).

3. See Sudan Claims Settlement Agreement *infra* note 5, preambular para. 4.

Resolution Act—to implement aspects of the Sudan Claims Settlement Agreement was enacted on December 27, 2020.<sup>4</sup> The Sudan Claims Settlement Agreement between the United States and Sudan entered into force on February 9, 2021.<sup>5</sup>

This article discusses a number of issues that arise under the complex provisions of the Sudan Claims Settlement Agreement and the Sudan Claims Resolution Act. There do not appear to have been any hearings on the Agreement or Act, nor has any detailed explanation of the settlement been released by the State Department.

## BACKGROUND

While Sudan consistently denied involvement in the Nairobi and Dar es Salaam embassy bombings and the attack on the U.S.S. Cole,<sup>6</sup> both persons who were U.S. nationals at the time and other victims brought suit in U.S. courts claiming compensation from Sudan, arguing that Sudanese government support for Bin Laden and al Qaeda was important to the execution of the two 1998 embassy bombings.<sup>7</sup> U.S. sanctions were imposed and made increasingly stringent,<sup>8</sup> with U.S. legislation in effect removing Sudan's sovereign immunity and thus unblocking legal barriers to litigation. A total of approximately \$10.2 billion in damages was awarded against Sudan, including roughly \$4.3 billion in punitive damages. The U.S. Supreme Court summarized the legislation and litigation when it upheld the punitive damages award in 2020.<sup>9</sup> The plaintiffs in this litigation could not actually hope to recover these amounts through

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4. Consolidated Appropriations Act, 2021, Pub. L. 116-260 § 1701, 134 Stat. 3291, 3291 (2020); *See also* United States Committee on Foreign Relations, *Menendez, Schumer Announce Breakthrough in Negotiations on Legislation to Protect Victims of Terrorism and Improve Relations With Sudan* (Dec. 21, 2020), <https://www.foreign.senate.gov/press/ranking/release/menendez-schumer-announce-breakthrough-in-negotiations-on-legislation-to-protect-victims-of-terrorism-and-improve-relations-with-sudan-> (last visited Nov. 14, 2022) [hereinafter *The Menendez-Schumer announcement*].

5. Claims Settlement Agreement Between the Government of the United States of America and the Government of the Republic of the Sudan, Oct. 30, 2020, T.I.A.S. No. 21-209 [hereinafter Sudan Claims Settlement Agreement].

6. *Id.* preambular para. 4.

7. *See* *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242 (2016); *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 139-146 (2011).

8. Treasury sanctions were codified at 31 C.F.R. pt. 538. For links to sources of Sudan sanctions, *see* *Sudan and Darfur Sanctions*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/sudan-and-darfur-sanctions> (last visited Nov. 14, 2022); *See also* *Sudan Sanctions*, U.S. DEP'T OF STATE, <https://www.state.gov/sudan-sanctions/> (last visited Sept. 26, 2022).

9. *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1607 (2020).

enforcement actions in the United States since no blocked assets of Sudan remained in the United States.<sup>10</sup>

Sudan's government changed in 2019 and relations with the United States dramatically improved.<sup>11</sup> In this context, the time was ripe for U.S. sanctions to be removed, for Sudan's immunity in U.S. courts to be restored, and for the negotiation of a claims settlement.

The United States often enters into lump sum claims settlements when normalizing relations, as it did, for example, with the Peoples Republic of China and the Socialist Republic of Vietnam.<sup>12</sup> While the United States established diplomatic relations with Sudan since 1956, it severed those relations in 1967; diplomatic relations were reestablished in 1972.<sup>13</sup> Embassy operations were suspended between 1996 and 2002, at which point a *chargé d'affaires* ad interim was appointed to helm the U.S. embassy.<sup>14</sup> Thus, at the time of the Sudan Claims Settlement Agreement, the United States and Sudan had diplomatic relations and the agreement to exchange ambassadors and "normalize" relations was not a case of actually restoring severed diplomatic relations. Yet in view of the extensive sanctions that were previously imposed, the dramatic change that took place in the context of the claims settlement was viewed by both parties as a normalization of relations.

An agreement between the United States and Sudan by exchange of notes on October 21, 2020, provided for the establishment of an escrow arrangement under which funds would "be placed in escrow in anticipation of Sudan providing compensation to address claims related to the bombings

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10. In 2015, there was only \$30.9 million in blocked Sudanese assets and in 2016 \$28.8 million. See Office of Foreign Assets Control, Terrorist Assets Report Calendar Year 2016: Twenty-fifth Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and International Terrorism Program Designees 14, Table 1, U.S. DEP'T TREASURY Office of Foreign Assets Control, Department of the Treasury, table 1 at page 14, available at <https://home.treasury.gov/system/files/126/tar2016.pdf> (last visited Nov. 15, 2022). In January 2017, a general license authorized all previously prohibited transactions, and as a result no blocked Sudanese assets remained. See Office of Foreign Assets Report Calendar Year 2019 13, U.S. DEP'T TREASURY, [https://home.treasury.gov/system/files/126/tar2019\\_0.pdf](https://home.treasury.gov/system/files/126/tar2019_0.pdf) (last visited Nov. 15, 2022).

11. See *U.S. Relations with Sudan, Bilateral Relations Fact Sheet, Bureau of African Affairs*, U.S. DEP'T OF STATE (Feb. 4, 2022), <https://www.state.gov/u-s-relations-with-sudan/>; see also S.C. Res. 2579 (June 3, 2021).

12. Ronald J. Bettauer, *Espousal of Claims*, ¶ 30, in MAX PLANCK ENCYCLOPEDIAS OF INT'L L., OXFORD PUB. INT'L L., <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2395.013.2395/law-mpeipro-e2395?rskey=zQCXLU&result=1&prd=MPIL> [hereinafter *Espousal Article*].

13. *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Sudan, Office of the Historian*, U.S. DEP'T OF STATE, available at <https://history.state.gov/countries/sudan> (last visited Nov. 15, 2022).

14. *Id.*

of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and the attack on the U.S.S. Cole” and released when all the relevant conditions were met.<sup>15</sup> The annex to this exchange of notes was amended on December 19, 2020.<sup>16</sup>

As noted, the Sudan Claims Settlement Agreement was signed on October 30, 2020. Article III (1) of the Agreement provides that upon entry into force the United States “confirms the enactment of legislation that Sudan may invoke, upon receipt by the United States of the funds”—the \$335 million—that would in effect restore Sudan’s sovereign immunity with respect to the claims covered by the Agreement. The Sudan Claims Resolution Act was enacted on December 27, 2020.

Section 1704 of the Sudan Claims Resolution Act provides for the removal of the exceptions to Sudan’s sovereign immunity when the Secretary of State certifies the following: that the designation of Sudan as a state sponsor of terrorism has been rescinded; that Sudan has made final payments with respect to the private settlement of the claims of the victims of the U.S.S. Cole attack; that the U.S. government has received sufficient funds for “payment of the agreed private settlement amount” for the January 1, 2008, death of a U.S. citizen who was a USAID employee for “meaningful compensation” for wrongful death or physical injury in cases arising out of the August 7, 2008, bombings of the U.S. embassies in Nairobi and Dar es Salaam; and funds for a “fair process to address compensation for terrorism-related claims of foreign nationals for death or physical injury from these bombings. On December 8, 2020, Secretary of State Pompeo rescinded Sudan’s designation as a state sponsor of terrorism.<sup>17</sup>

The Sudan Claims Settlement Agreement does not cover 9/11 claims made against Sudan.<sup>18</sup> Section 1706 of the Sudan Claims Resolution Act

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15. Agreement between the United States of America and Sudan, Sudan-U.S., Oct. 21, 2020, T.I.A.S. No. 20-1021.

16. Agreement between the United States and Sudan, entered into force December 19, 2020, T.I.A.S. No. 20-1219, available at <https://www.state.gov/wp-content/uploads/2021/04/20-1219-Sudan-Claims-Amendment-to-Agreement-re-release-of-escrow-funds-EON-12.18.20-and-12.19.20-TIMS-62737.pdf>.

17. Rescission of Determination Regarding Sudan, 85 Fed. Reg. 82565; *see also* LAUREN PLOCH BLANCHARD, CONG. RSCH. SERV., 1N11, SUDAN’S REMOVAL FROM THE STATE SPONSORS OF TERRORISM LIST (Nov. 9, 2020).

18. *The Menendez-Schumer announcement*, *supra* note 4, cites as key accomplishments of the Sudan Claims Resolution Act: “Restoration of Sudan’s sovereign immunity in the United States with the exception of the 9/11 multi-district litigation pending in federal court” and “Fully preserving and protecting the rights of 9/11 victims and families by allowing the 9/11 multi-district litigation to

excludes from Sudan's restoration of sovereign immunity claims against Sudan involving victims and family members of the September 11, 2001, terrorist attacks. The Act specifically refers to the multidistrict proceeding 03-MDL-1570 pending in the U.S. District Court for the Southern District of New York.<sup>19</sup>

Article V of the Sudan Claims Settlement Agreement<sup>20</sup> provides that the Agreement will enter into force upon completion of an exchange of notes between the United States and Sudan "confirming the completion of any internal procedures necessary for entry into force of this Agreement, which in the case of the United States, shall include enactment of the legislation described in Article III (1)." Pursuant to this provision, the Agreement was brought into force on February 9, 2021.<sup>21</sup>

On March 20, 2021, Secretary of State Anthony Blinken made the certification called for under section 1704(a)(2) of the Sudan Claims Resolution Act,<sup>22</sup> bringing into effect the reinstatement of Sudan's diplomatic immunity under the Act. On March 31, 2020, Blinken issued a press statement announcing "that the United States received the \$335 million provided by Sudan to compensate victims of the 1998 bombings of the U.S. Embassies in Kenya and Tanzania and the USS Cole in 2000 as well as the 2008 killing of USAID employee John Granville."<sup>23</sup>

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continue unharmed." Ploch, *supra* note 17, says "Compensation for victims of the embassy bombings has been contentious, and concerns raised by some victims of the September 11, 2001 (9/11) attacks have also complicated discussions on legal peace. The settlement deal does not address 9/11 claims—U.S. courts have yet to find Sudan liable for 9/11, though cases remain in litigation. If legal peace legislation passes, cases against Sudan could still be pursued under the Justice Against Sponsors of Terrorism Act (JASTA; P.L. 114-222; see particularly, Section 3 (28 U.S.C. 1605B)). Without legal peace, Sudan would remain liable for outstanding enforceable judgements related to the embassy bombings."

19. On January 8, 2021, Sudan moved to dismiss the claims against it in this litigation: after noting that Sudan was removed from the State Sponsors of Terrorism List, Sudan said the terrorist organization Al Qaeda and its leader, Osama Bin Laden, committed those heinous attacks and "Sudan categorically denies providing material support or resources for the attacks, or otherwise causing the attacks" and that moreover "all claims against Sudan must be dismissed for lack of subject-matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. *See In re Terrorist Attacks on Sept. 11, 2001*, 293 F.R.D. 539 (S.D.N.Y. 2013); *see also* Memorandum of Law in Support of Sudan's Consolidated Motion to Dismiss the Amended Complaints, 2021 WL 409071 at 7 (S.D.N.Y. 2021).

20. Sudan Claims Settlement Agreement, *supra* note 5, art. V.

21. *See id.*

22. Certification Under Section 1704(A)(2) of the Sudan Claims Resolution Act Relating to the Receipt of Funds for the Settlement of Claims Against Sudan, 86 Fed.Reg. 19080 (Apr. 12, 2021).

23. Press Release, Antony J. Blinken, Secretary of State, Receipt of Funds for Resolution of Certain Claims Against Sudan Press Statement, (Mar. 31, 2021), <https://www.state.gov/receipt-of-funds-for-resolution-of-certain-claims-against-sudan/> (last visited Nov. 15, 2022); Certification

## SETTLEMENT OF CLAIMS OF U.S. NATIONALS

Article I (2) of the Sudan Claims Settlement Agreement defines “U.S. nationals” as “natural and juridical persons who were nationals of the United States at the time their claim arose and through the date of entry into force of this Agreement.” This definition is in line with the U.S. position on the requirement for “continuous nationality” in order to espouse and settle a claim, which is stricter than the position taken by the International Law Commission in its 2006 Draft Articles of Diplomatic Protections, which would only require nationality until the time of presentation of the claim (rather than the time of settlement of the claim).<sup>24</sup>

The Sudan Claims Settlement Agreement settles the claims of U.S. nationals against Sudan “through espousal” where they arise from any terrorist act or material support of such act prior to the date of execution of the Agreement. The claims settled are defined in Article II of the Agreement as claims against Sudan or claims that implicate the responsibility of Sudan or its nationals arising from “personal injury (whether physical or non-physical, including emotional distress), death or property loss caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or detention or other terrorist act, or the provision of material support or resources for such act, outside the United States....” Interestingly, the claim must have arisen before October 30, 2020, the date of the execution of the agreement, but the U.S. nationality must have been maintained until the February 9, 2021, the date of entry into force of the Agreement.

There is ample Supreme Court precedent to show that claims of U.S. nationals against a foreign government can be espoused and settled by the U.S. government.<sup>25</sup> Notably, the Supreme Court in *Dames & Moore v. Regan*<sup>26</sup> upheld the settlement of the claims arising out of the Iran hostage crisis by executive agreement and the termination of related U.S. litigation by executive order. Thus, the legislation would not have been necessary to allow settlements of this category of claims or to terminate the litigation in the U.S. related to those claims.

It is fairly standard for a lump sum claims settlement agreement to provide that the claims covered are fully and finally discharged and that any covered claim subsequently presented by a national of one country to the

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Under Section 1704(A)(2) of the Sudan Claims Resolution Act Relating to the Receipt of Funds for Settlement of Claims Against Sudan, 86 Fed. Reg. 19080 (Apr. 12, 2021).

24. *Espousal Article*, *supra* note 12, ¶ 14.

25. *Id.* ¶¶ 23-27.

26. *Dames & Moore v. Regan*, 453 U.S. 654, 686-688 (1981).



government of the other country will be referred by the latter government to the government of the national who presented the claim.<sup>27</sup> The Sudan Claims Settlement Agreement does so in Article IV. Previous U.S. claims settlement agreements did not explicitly require that recipients of compensation for espoused claims provide a waiver, as required under Article IV of the Claims Settlement Agreement, since espousal and settlement preclude further recourse under the U.S. and international law.<sup>28</sup>

Claims settlement agreements also tend to be reciprocal. For example, the claims settlement agreement with Libya,<sup>29</sup> which to a certain extent served as a model for the Sudan Claims Settlement Agreement, was reciprocal. The Sudan Claims Settlement Agreement was not reciprocal, since its main objective was to fund compensation for the specific claimants identified in Article II and further specified in the Annex to the Agreement.<sup>30</sup>

Article IV (1) of the Claims Settlement Agreement provides the United States “shall accept” the \$335 million specified in Article III (2).<sup>31</sup> In paragraph 1 of the Annex to the Agreement, the U.S. government is charged with making distributions from those funds to claimants. The agreement of October 21, 2020, as amended on December 19, 2020,<sup>32</sup> provided for the prepositioning of the \$335 million in an escrow account established by an escrow agreement among the Central Bank of Sudan, the Federal Reserve Bank of New York, and an escrow agent. Section 1702(3)

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27. *See, e.g.*, Agreement between the U.S. and Cambodia for the Settlement of Certain Property Claims, Cambodia-U.S., art. III, Oct. 6, 1994, T.I.A.S. No. 12193; *see, e.g.*, Agreement between the Government of the United States of America and Government of the Socialist Republic of Vietnam Concerning the Settlement of Certain Property Claims, U.S.-Vietnam, art. III, Jan. 28, 1995, T.I.A.S. No. 12602. *See* BURNS H. WESTON, RICHARD B. LILICH & DAVID J. BEDERMAN, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995 (Transnational Pub. Inc.1998) (reproducing these (and other) lump sum claims settlement agreements).

28. *See generally Espousal Article, supra* note 12.

29. Agreement Between the United States of America and Libya with Annex, Libya-U.S., Aug. 14, 2008, T.I.A.S. No. 08-814.

30. The Annex makes clear that the compensation received from Sudan is to be used for three categories of claimants: (a) U.S. nationals who were claimants in *Owens v. Sudan* (D.D.C.), 01-cv-2244 (JDB), *Khaliq v. Sudan* (D.D.C.), 10-cv-356 (JDB), *Tatti v. Iran* (D.D.C.), 20-cv-1557 (RC), and *Granville v. Sudan*, Case no. 2018-28 in the Permanent Court of Arbitration; (b) payment of a private settlement related to *Mwila v. Iran* (D.C.C), 08-cv-1377 (JDB); and (c) foreign nationals covered by *Wamai v. Sudan* (D.D.C.), 08-cv-1349 (JDB), *Amduso v. Sudan* (D.D.C.), 08-cv-1361 (JDB), *Onsongo v. Sudan* (D.C.C.), 08-cv-1380 (JDB), and *Opati v. Sudan* (D.D.C.), 12-cv-1224 (JDB). *See* Sudan Claims Settlement Agreement Annex, *supra* note 5.

31. Sudan Claims Settlement Agreement Annex, *supra* note 5, art. IV.

32. *See* Agreement Between the United States of America and Sudan, *supra* note 15; *see also* Agreement Between the United States of America and Sudan Amending the Agreement of October 21, 2020, *supra* note 16.

of the Sudan Claims Resolution Act defines the escrow agreement as part of the “claims agreement,” since it specified the conditions under which a notice would be sent triggering the release of the funds to the “Recipient Account” (in the form specified in Schedule 1 of the amended agreement).

While the escrow agreement has not been made public, it is reasonable to infer that the conditions for transfer of funds from the escrow account to the U.S. government were in line with those set out in the pre-amended version of the Annex to the October 21, 2020, agreement. Those conditions presumably included rescinding Sudan’s designation as a state sponsor of terrorism, enactment of appropriate U.S. legislation,<sup>33</sup> and signing of the bilateral claims agreement. The use of such an escrow agreement to establish an escrow account for pre-positioning of funds involved in a settlement is well established by precedent. For example, such an escrow agreement was part of the Algiers Accords.<sup>34</sup>

The public documents do not specify what account the “Recipient Account” is or how the funds will be distributed. The account that is most often used to receive and channel claims settlement payments is the account under Section 2668a of title 22 of the U.S. Code, which authorizes the Secretary of State to receive and deposit in the Treasury funds from foreign governments in trust for U.S. citizens. The statute also authorizes payment to claimants in accordance with the instructions from the Secretary of State. It seems likely that this is the “Recipient Account.” However, the mechanism under the Justice for United States Victims of State Sponsored Terrorism Fund<sup>35</sup> is also implicated in payments to the U.S. nationals who are Sudan claimants. This Fund previously limited recoveries if a claimant was entitled to compensation from sources other than the Fund, but Section 1705(a) of the Sudan Claims Resolution Act amended the law to provide that payments in connection with the Sudan settlement would not be considered such other sources.<sup>36</sup> The announcement by Senators Menendez and Schumer list among the key accomplishments of the Sudan Claims Resolution Act “[e]xtending the life of the U.S. Victims of State Sponsored

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33. The original version of the Annex specified what provisions should be included in the legislation to fulfill the condition for release of funds. Section 1708 of the Sudan Claims Resolution Act makes clear that Congress objected to the executive branch specifying in an international agreement what legislation should include and insisted on the amendment to the Annex. *See Consolidated Appropriations Act, Pub. L. No. 116-260, §1708, 134 Stat. 1182, 3298 (2020).*

34. *Iran-United States: Settlement of The Hostage Crisis*, 20 I.L.M. 223, 234 (Jan. 18, 1981).

35. *See Justice for United States Victims of State Sponsored Terrorism Act*, 34 U.S.C. § 20144; *See also U.S. Victims of State Sponsored Terrorism Fund*, DEP’T JUST., <http://www.usvsst.com/index.php> (last updated Sept. 30, 2022).

36. *See Consolidated Appropriations Act § 1708 at 3298.*

Terrorism Fund (USVSSTF) from 2030 to 2039” and “[e]nsuring that claimants with judgments against Sudan are allowed to recover from the USVSSTF.”<sup>37</sup>

Since the Treasury does not usually provide interest on accounts it holds for the Department of State unless that is required by an international agreement, Article III (3) of the Sudan Claims Settlement Agreement specifies that the holding account for the funds shall be interest-bearing.

What amounts will be provided to each U.S. national claimant? Usually, when a lump sum settlement is received, the Department of State would ask the Foreign Claims Settlement Commission to allocate the funds under the authority in Section 1623(a)(1)(C) of Title 22 of the U.S. Code. This procedure was followed in the case of the Libya Claims Settlement Agreement claims.<sup>38</sup> In the Sudan case, however, it appears that the Department of State had negotiated the amounts to be paid to U.S. nationals with the claimants and would direct the payments itself, as it is authorized to do by Section 2668a. The statement of Senators Menendez and Schumer support such inference. The Menendez-Schumer announcement further indicates “the Trump administration’s deal with Sudan compensated naturalized U.S. citizen terrorism victims at a rate that was approximately ninety percent less than natural-born U.S. citizens.”<sup>39</sup> It seems that specific payment amounts were negotiated for the payment of both espoused and non-espoused claims and the amounts were shared with Senators Menendez and Schumer.

#### SETTLEMENT OF CLAIMS OF FOREIGN NATIONALS

“Foreign nationals” are defined in Article I of the Sudan Claims Settlement Agreement as “all other natural and juridical persons [i.e., persons not in the category of U.S. nationals], including those who were not nationals of the United States at the time their claims arose but have since become nationals of the United States.” These are claims that could not be

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37. *Menendez-Schumer Announcement*, *supra* note 4.

38. Letter from Hon. John Bellinger to Mauricio Tamargo, Chairman, Foreign Claims Settlement Comm’n (Dec. 11, 2008), available at [https://www.justice.gov/sites/default/files/pages/attachments/2014/06/18/december\\_11\\_referral.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2014/06/18/december_11_referral.pdf); See *Claims Against Libya, December 2008 Referral and January 2009 Referral*, DEP’T OF JUST., <https://www.justice.gov/fcsc/claims-libya-december-2008-referral-and-january-2009-referral> (last updated Oct. 23, 2018).

39. *Menendez-Schumer Announcement*, *supra* note 4; The Sudan Claims Settlement Agreement does not require that a U.S. citizen be “natural-born” to fall within the definition of U.S. citizen. Naturalized citizens are covered by the definition if they were naturalized before their claims arose. See also Claims Settlement Agreement Sudan-U.S. at 4-5, Oct. 30, 2020, T.I.A.S. No. 21-209 (entered into force Feb. 9, 2021).

settled by espousal. They are not typically covered by U.S. lump sum claims settlement agreements. Thus, legislation—the Claims Resolution Act—was needed to definitively terminate the ability of this category of claimants to litigate for compensation for covered claims. The Agreement also had to include special provisions.

Congress was not on board to treat non-espoused claims of U.S. nationals differently from those of espoused claims. The definition of “foreign national” in Section 1703(3) the Claims Resolution Act—“an individual who is not a citizen of the United States”—is inconsistent with the definition in the Sudan Claims Settlement Agreement. The latter includes persons who became U.S. citizens only after their claims arose.

Further, the Sudan Claims Resolution Act authorized an additional \$150 million, beyond the sum provided by Sudan, to ensure compensation comparable to espoused claimants for employees or contractors of the United States and their families and persons who became U.S. citizens after the date on which their claims arose.<sup>40</sup> Senators Menendez and Schumer consider “[s]ecuring \$150,000,000 for dozens of naturalized U.S. citizen victims and family members of the East Africa Embassy bombings” as a key accomplishment of the Claims Resolution Act, which was “necessary because the Trump administration’s deal with Sudan compensated naturalized U.S. citizen terrorism victims at a rate that was approximately 90 percent less than natural-born U.S. citizens.”<sup>41</sup> It appears that the \$335 million transferred pursuant to the Sudan Claims Settlement Agreement would be used for claims of the U.S. nationals, as defined by the Agreement, since the \$150 million is reserved to be used for claims of foreign nationals as defined by the Agreement. Section 1707(a)(1)(A) of the Sudan Claims Resolution Act explicitly provides that the \$150 million is for compensations for individuals covered by section (c) [sic] of the Annex to the Sudan Claims Settlement Agreement, i.e., foreign nationals as defined by that Agreement.

Since the Department of State does not have the authority to direct how claims settlement funds are distributed to foreign nationals from the Treasury and the Foreign Claims Settlement Commission does not have jurisdiction to adjudicate claims of persons who are not nationals of the United States,<sup>42</sup> the Annex to the Sudan Claims Settlement Agreement set

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40. These funds are authorized in Claims Resolution Act section 1707. The funds are appropriated in the second paragraph of Title IX of the Consolidated Appropriations Act. See Consolidated Appropriations Act § 1708, at 3295-96.

41. *Menendez-Schumer Announcement*, *supra* note 4.

42. In its first decision in the Libya claims program, the Commission recognized that, “The Claims Settlement Agreement is silent, ... as to *when* a claimant must be a United States national

up a novel system in paragraph 1(c) to cover eligible foreign nationals.<sup>43</sup> Sudan was required to establish a Commission in a mutually agreeable jurisdiction consisting of a sole commissioner to whom the United States does not object. The Commission was authorized to award \$800,000 per claim to eligible estate claims, \$400,000 per claim to eligible injury claims, and \$100,000 per claim to eligible non-beneficiary family member claims (i.e., claims for mental pain and anguish by a family member of a foreign national killed in the embassy bombings, subject to certain conditions).<sup>44</sup> The Annex establishes procedures for applications for these payments, for determination of eligibility by the Commission, for review of the determination, and for payment. It establishes time limits applicable to various steps in the process. The Annex also requires the Commission to provide a final report within twenty-five months of appointment of the sole Commissioner and provides for the termination of the Commission one month after the final report.

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in order to be eligible for compensation under the Claims Settlement Agreement. Therefore, the Commission must look to United States practice and the applicable principles of international law, justice and equity, including its own jurisprudence, to make this determination. It is a well-established principle of the law of international claims, which has been applied without exception by both this Commission and its predecessors, the War Claims Commission and the International Claims Commission, that a claim may be found compensable only if it was owned by a United States national at the time the claim arose. . . . Further, a claim may be found compensable only if it was continuously held by a United States national from the date the claim arose until the date of the claims settlement agreement.” See *Against the Great Socialist People’s Libyan Arab Jamahiriya*, LIB-I-001 5 (Dep’t of Just. July 28, 2009) (proposed decision).

43. This category includes named claimants in the cases listed in category (c), not compensated as U.S. nationals where the case is dismissed with prejudice and releases are signed. See Sudan Claims Settlement Agreement, *supra* note 5, Annex § 1(c)(3)(A). Novel means of claims settlement were also employed to resolve Holocaust claims because many of the claimants were not U.S. nationals. See, e.g., *Holocaust Issues, Archive*, U.S. DEP’T STATE, <https://1997-2001.state.gov/www/regions/eur/holocausthp.html>; Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation “Remembrance, Responsibility and the Future,” July 17, 2000, , T.I.A.S. No. 13104, 2130 (entered into force Oct. 19, 2000) [hereinafter Germany Holocaust Agreement]; Agreement between the Government of the United States of America and the Austrian Federal Government Concerning the Austrian Fund “Reconciliation, Peace and Cooperation,” Oct. 24, 2000, T.I.A.S. No. 13122, 2162 (entered into force Dec. 1, 2000) [hereinafter Austria Holocaust Executive Agreement].

44. Since the Sudan Claims Settlement Amending Agreement was signed on October 20, 2020, and the Menendez-Schumer Announcement was issued on December 21, 2020, one can infer that these amounts are 90 percent of the amounts the Agreement would provide to U.S. nationals, and that the \$150 million authorized under section 1707 the Sudan Claims Resolution Act and appropriated under title IX of the Consolidated Appropriations Act, 2021 would bring the amounts for foreign nationals, as defined in the Agreement, up to 100 percent and would be the same as for U.S. nationals. See Sudan Claims Settlement Agreement, *supra* note 5; *Menendez-Schumer Announcement*, *supra* note 4.

## TERMINATION OF LITIGATION

Article III (1) of the Sudan Claims Settlement Agreement and Section 1704 of the Sudan Claims Resolution Act provide for the restoration of Sudan's sovereign immunity in U.S. courts and seek to bar pending and future suits against Sudan on the grounds specified in Article II of the Agreement.

While barring future suits and attachments seems clear-cut, achieving termination of pending suits and existing judgments and nullification of existing attachments, particularly concerning non-espoused claims, would be more difficult. Thus, Article IV(2)(b) of the Sudan Claims Settlement Agreement envisages Sudan making "efforts" to secure the termination of U.S. legal proceedings and the nullification of attachments, and to vacate U.S. court judgements.<sup>45</sup> This provision further provides that the government of the United States "shall take action as appropriate and necessary, consistent with its constitutional structure, to help bring about the success of Sudan's efforts." The letter from then Assistant Secretary of State for African Affairs, Tibor Nagy, accompanying the Agreement from October 30, 2020, specifies that such action may include statements of interest filed pursuant to 28 U.S.C. Section 517 in a state or federal court and notes that such filings were made in support of Libya's request for dismissals of claims in connection with the 2008 Libya Claims Settlement Agreement.<sup>46</sup> Nagy explains that while the Department of State cannot guarantee in advance that the United States will appear in any particular case, it "would expect that once Sudan were to move to request dismissal of a case covered by the Agreement..., the Department of State would send a request to the Department of Justice for participation to support Sudan's request ... and that such a request by the Department of State would receive favorable consideration."<sup>47</sup>

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45. On May 10, 2021, citing the Sudan Claims Settlement Agreement and the Sudan Claims Resolution Act, Sudan moved to dismiss a claim that it had aided Hamas, which committed a terrorist act against a U.S. citizen. Motion to Dismiss, *Mark v. Sudan* (No. 20-cv-3022), 2021 WL 2818564. The claimant opposed the motion on June 17, 2021, arguing that the Agreement and Act violated plaintiffs' Fifth Amendment rights to equal protection and access to the courts. Opposition to Motion to Dismiss, *Mark v. Sudan* (No. 20-cv-3022), 2021 WL 2818569. On June 24, 2021, Sudan replied that plaintiffs' constitutional challenge was both procedurally flawed and without merit. Reply to Opposition to Motion to Dismiss, *Mark v. Sudan* (No. 20-cv-3022), 2021 WL 2818576.

46. Letter from Tibor Nagy, Assistant Sec'y of State for Afr. Aff., to Mohammed Abdalla Eltom, Ambassador, Embassy of the Republic of the Sudan (Oct. 30, 2020) (available in Claims Settlement Agreement, *supra* note 42).

47. *Id.*

Imposing the conditions under which the United States would file statements of interests can be explained by the events during the negotiation of the Holocaust settlements in 2000.<sup>48</sup> A key element of the Holocaust claims resolution was the termination of legal actions and attachments, thus, achieving “legal peace.” In Article 2(1) of the German Holocaust Executive Agreement, the United States committed to informing courts through statements of interest that “it would be in the foreign policy interests of the United States ... that dismissal of such cases would be in its foreign policy interest.”<sup>49</sup> Moreover, the Agreement in its Annex B specified in detail nine points that would be included in such statements of interest. This undertaking was highly controversial in the U.S. government. The then Solicitor General did not believe that it was appropriate to commit to a foreign government that the statements of interest would be filed and what their content would be. Consequently, White House involvement was required to obtain the agreement to these provisions.<sup>50</sup> Article 2(1) and Annex B of the Austrian Holocaust Settlement Agreement subsequently made the same commitment concerning statements of interest.<sup>51</sup>

In the case of Sudan, the Department of State was reluctant to press the Department of Justice to make a firm commitment to file statements of interest and to commit to specific points those statements would contain. In this regard, the Sudan Claims Settlement Agreement differs from the Holocaust settlement agreements. Instead, it simply agreed to take necessary and appropriate actions to support Sudan in the U.S. courts and followed that with an explanation of the interactions needed between the Departments of State and Justice.

## CONCLUSION

The Sudan Claims Settlement Agreement and the Sudan Claims Resolution Act contain several novel provisions. A recently released GAO report confirms that payments have been made to U.S. nationals.<sup>52</sup> No information had been released about the establishment of the Commission to deal with the claims of foreign nationals, the appointment of the sole Commissioner, or the processing of claims subject to its jurisdiction. While

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48. See Germany Holocaust Agreement, *supra* note 43.

49. See Germany Holocaust Agreement, *supra* note 43, art. 2.

50. See Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*, 37 VAND. J. TRANSNAT'L L. 333, 342 (2004).

51. See Austria Holocaust Executive Agreement, *supra* note 43, at art. 2.

52. See U.S. GOV'T ACCOUNTABILITY OFF., REP. TO CONGRESSIONAL COMMITTEES: SUDAN CLAIMS RESOLUTION ACT, STATE VERIFIED ELIGIBILITY, DETERMINED COMPENSATION, AND DISTRIBUTED PAYMENTS (Dec. 2022).

the Agreement and Act appeared to provide for a successful resolution of the covered claims and a path toward improvement of relations, there was a coup in Sudan on October 25, 2021.<sup>53</sup> In view of that, the United States has maintained a pause on certain assistance to Sudan<sup>54</sup> and the UN Integrated Transition Assistance Mission to Sudan (UNITAMS) is presently facilitating a political process aimed at renewing the transition to a civilian-led government.<sup>55</sup> The impact on implementation of the Agreement in Sudan is not clear.

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53. *Sudan's military detains prime minister and dissolves government in coup*, WASH. POST (Oct. 25, 2021), <https://www.washingtonpost.com/world/2021/10/25/sudan-coup-attempt-khartoum/>.

54. *U.S. Relations with Sudan*, U.S. DEP'T OF STATE (Feb. 4, 2022), <https://www.state.gov/u-s-relations-with-sudan/>.

55. *See generally* U.N. INTEGRATED TRANSITION ASSISTANCE MISSION IN SUDAN, <https://unitams.unmissions.org/en> (last visited Nov. 17, 2022). The most recent report of the Secretary General is "Situation in the Sudan and the activities of the United Nations Integrated Transition Assistance Mission in the Sudan." *See also* U.N. Secretary-General, *Situation in the Sudan and the activities of the United Nations Integrated Transition Assistance Mission in the Sudan*, U.N. Doc. S/2022/667 (Sept. 2, 2022), [https://unitams.unmissions.org/sites/default/files/sg\\_reportenglish\\_0.pdf](https://unitams.unmissions.org/sites/default/files/sg_reportenglish_0.pdf).



# WILL THE NORTH AMERICAN AUTO INDUSTRY SURVIVE BIDEN AND AMLO'S POLICIES?

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David A. Gantz\*

I.	INTRODUCTION.....	465
II.	USMCA RULES OF ORIGIN .....	468
III.	U.S. PROPOSED AND ENACTED EV SUBSIDIES .....	472
IV.	AMLO'S ANTI-BUSINESS, ANTI PRIVATE INVESTMENT POLICIES.....	477
V.	CONCLUSIONS .....	481

## I. INTRODUCTION

The highly integrated North American auto industry, which is built on duty-free, quota-free trade in autos (and other manufactured products) under the North American Free Trade Agreement (NAFTA)<sup>1</sup>—and since July 1, 2020, under the United States-Mexico-Canada Agreement (USMCA)<sup>2</sup>—is in many respects an outstanding success story for integrated North American manufacturing. With co-production between auto and auto parts producers in high wage cost countries, Canada and the United States, and lower-wage Mexico, automobiles made in North America compete economically with those made in Europe and Asia. The auto industry is also vital to the three North American economies with such trade (where a particular component may cross North American borders six to eight

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 7, 1992, 32 I.L.M. 289 [hereinafter *NAFTA*].

2. *See* Agreement between the United States of America, the United Mexican States, and Canada, July 1, 2020, U.S.T.R. [hereinafter *USMCA*].

times<sup>3</sup>) accounting for more than 20% of total manufactured goods trade<sup>4</sup> under NAFTA and the USMCA.<sup>5</sup> This integration has been achieved despite the low 2.5% U.S. Most Favored Nation (MFN) duties on imported automobiles<sup>6</sup> and sport utility vehicles and the considerable administrative costs that come with NAFTA/USMCA Rules of Origin compliance.<sup>7</sup>

According to experts, auto parts and final assembly “account for a large share of U.S. manufacturing employment: more than 900,000 jobs in 2021, with 712,000 in parts manufacturing and 188,000 in vehicle assembly.”<sup>8</sup> Some automotive components cross the Canada and/or Mexico borders as many as eight times before they are assembled into a finished automobile in one of the three NAFTA countries.<sup>9</sup> It is thus not surprising that auto industry was the focus of the NAFTA renegotiations. The elements of the USMCA that directly address the auto industry include modifications to the NAFTA Rules of Origin and related content requirements, as well as some protections for Mexico and Canada should the United States, as former President Trump threatened, impose 20-25% tariffs on U.S. auto and auto part imports (on “national security” grounds under Section 232 of the Trade Expansion Act of 1962).<sup>10</sup> Automotive trade was extensively managed under NAFTA and is dictated even more so under the USMCA. Whether these increasingly strict rules in the medium or long term will help or hurt the global competitiveness of the North American auto and auto parts industries will not be known for at least half a decade under the USMCA rules. Regardless, early indications are

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3. See Scott Tong, *When it Comes to NAFTA and Autos, the Parts Are Well Traveled*, MARKETPLACE (Mar. 24, 2017), <https://www.marketplace.org/2017/03/24/when-it-comes-nafta-autos-parts-are-well-traveled/>.

4. BILL CANIS ET AL., CONG. RESEARCH SERV., R44907, NAFTA AND MOTOR VEHICLE TRADE 10 (Jul. 28, 2017), available at <https://sgp.fas.org/crs/row/R44907.pdf>.

5. KEVIN HIMM ET AL., CENTER FOR AUTO. RESEARCH, CONTRIBUTION OF THE AUTOMOTIVE INDUSTRY TO THE ECONOMIES OF ALL FIFTY STATES AND THE UNITED STATES, vii, 1-2 (Apr. 2010).

6. HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES REVISION 2, U.S. INT’L TRADE COMM’N, CHAPTER 87: VEHICLES OTHER THAN RAILWAYS OR TRAMWAY ROLLING STOCK 87-5 (2022).

7. NAFTA, *supra* note 1, Annex 300-A.

8. M. Angeles Villarreal, Bill Canis and Lianna Wong, *USMCA: Motor Vehicle Provisions and Issues*, CONG. RESEARCH SERVICE (Oct. 14, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF11387>.

9. See KRISTIN DZICZEK ET AL., CENTER FOR AUTO. RESEARCH, NAFTA BRIEFING: TRADE BENEFITS TO THE AUTOMOTIVE INDUSTRY AND POTENTIAL CONSEQUENCES OF WITHDRAWAL FROM THE AGREEMENT 7 (Jan. 2017).

10. Such tariffs were never imposed. U.S. DEP’T OF COM., THE EFFECT OF IMPORTS OF AUTOMOBILES AND AUTOMOBILE PARTS ON THE NATIONAL SECURITY 5-6, 8-9, 11-12, 13, 14-17 (Feb. 17, 2019).

inconclusive, complicated by the gradual conversion from gasoline powered vehicles to the production of electric vehicle (EVs) and their batteries in North America and world-wide.

Can the North American auto industry survive the various U.S. federal and state subsidy policies for electric vehicles (EVs) and EV batteries? In the future, will this poster child for efficient North American integration, where annually, the U.S imports \$29.5 billion worth of car parts from Mexico, exports \$5.9 billion to Canada, exports \$11.7 billion worth of completed vehicles to Canada, and \$67.5 billion to Mexico,<sup>11</sup> continue? What would be the result if EV and EV battery producers are strongly discouraged from establishing facilities in Canada and Mexico? While the BBBA EV subsidies will never be resurrected now that a different program has been established under the Inflation Reduction Act of 2022,<sup>12</sup> both bills strongly suggest that when there are conflicts between the Biden Administration's "Buy American, Invest American, Employ Americans" focus<sup>13</sup> and the principles of the USMCA, there exists a risk that the former will prevail, to the potential detriment of North American economic integration and to other foreign suppliers of autos and auto parts, and to consumers who may ultimately pay more for their vehicles.

At the time of this writing (August 2022), the future of this integrated auto market remains uncertain. Still, three factors suggest to many observers that with the gradual shift to electric vehicles (EVs) over the next ten to fifteen years, and demand for the batteries that power them, auto and auto parts production in both Mexico and Canada will decline, with the United States reaping the lion's share of new investment and related employment. This essay discusses the three factors in the following sections: new Rules of Origin that are designed to discourage production in Mexico and, to a lesser extent, Canada, and favor investment and job creation in the United States (Part II); massive subsidies for EV and EV battery production and sales offered by the U.S. federal and state governments (Part III); and anti-capitalist, statist investment policies under the Lopez-Obrador presidency (December 1, 2018 to November 30, 2024) that are having a substantial negative impact on new investment in Mexico (Part IV). Part V provides key conclusions.

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11. M. ANGELES VILLAREAL ET AL., CONG. RESEARCH SERV., IF11387, USMCA: MOTOR VEHICLE PROVISIONS AND ISSUES 2 (Oct. 14, 2021) (citing U.S. Dept. of Com. data).

12. See Inflation Reduction Act of 2022, CONGRESS.GOV, 2021-22, <https://www.congress.gov/bill/117th-congress/house-bill/5376> (last visited Aug. 19, 2022).

13. See *Fact Sheet: Biden-Harris Administration Delivers on Made in America Commitments*, WHITEHOUSE.GOV (Mar. 4, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/04/fact-sheet-biden-harris-administration-delivers-on-made-in-america-commitments/>.

II. USMCA RULES OF ORIGIN<sup>14</sup>

NAFTA itself incorporated Rules of Origin that were designed to assure that autos and small trucks that were traded duty-free in North America would have substantial North American, not just U.S., content. Most significantly, 62.5% of the total cost of the vehicle was required to be derived from North American sources.<sup>15</sup> It was intentionally made difficult for a major component, such as a transmission, to qualify as entirely of North American origin simply because the final production or assembly took place in one of the NAFTA countries. This was accomplished by a rule that required the tracing of the individual parts for such major components.<sup>16</sup> For example, if a transmission produced in Mexico was valued at \$1,000 and it incorporated \$750 worth of North American parts and \$250 of third country parts, only \$750 of its value could be counted toward the 62.5% North American content requirement.

In assessing the new USMCA rules, the United States did *not* achieve much of what it sought in the negotiations. The United States sought to depart from the *regional* content rules used in NAFTA and other U.S. free trade agreements reached over the past twenty years. Rather than NAFTA's requirement that 62.5% of the net cost of the auto be made from North American content, the United States initially demanded that the threshold be raised to 82.5%, of which 50% must have been from the United States<sup>17</sup> (including steel and aluminum).<sup>18</sup> Due to strong opposition from Mexico during bilateral negotiations in August and September 2018, the United States was forced to compromise.<sup>19</sup> Still, by adding a \$16 per hour wage requirement to the agreement, as discussed below, the United States assured that a higher percentage of total automotive content would be produced in

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14. Portions of this section are adapted from David Gantz's work. See DAVID A. GANTZ, AN INTRODUCTION TO THE UNITED STATES-MEXICO-CANADA AGREEMENT: UNDERSTANDING THE NEW NAFTA ch. 2 (2020).

15. NAFTA, *supra* note 1, Annex 403.5.

16. *Automotive Products: Rules of Origin*, U.S. CUSTOMS & BORDER PROT. (May 29, 2014), <https://www.cbp.gov/trade/nafta/guide-customs-procedures/provisions-specific-sectors/automotive-products>.

17. DAVID A. GANTZ, BAKER INSTITUTE, THE UNITED STATES-MEXICO-CANADA AGREEMENT: TARIFFS, CUSTOMS, AND RULES OF ORIGIN 5 (2019).

18. *Exclusive – U.S. Seeks to Include Steel, Aluminum in NAFTA Autos Rules – Sources*, REUTERS (Oct. 13, 2017, 7:29 AM), <https://uk.reuters.com/article/uk-trade-nafta-steel-exclusive/exclusive-u-s-seeks-to-include-steel-aluminum-in-nafta-autos-rules-sources-idUKKBN1C11XC>.

19. GANTZ, *supra* note 17, at 3.

the United States (or Canada), given higher wages in the United States when compared to Mexico.<sup>20</sup>

The USMCA changes for the automotive industry also include raising the percentage of regional value content required for automobiles and light trucks from 62.5% to 75%.<sup>21</sup> These requirements are to be phased in over three years from July 1, 2020; certain core components such as engines, advanced batteries for electric cars and transmissions must originate in North America.<sup>22</sup> In addition, 70% of the steel used in the manufacturing of cars and small trucks must originate in USMCA countries.<sup>23</sup> The full significance of the 70% rule was clarified only by the December 10, 2019 Protocol of Amendment to the USMCA.<sup>24</sup> In a further step, designed by the Trump Administration rather than the Democratic Congress, the steel rules (but not those relating to aluminum), were further tightened. Steel automotive products such as chassis and bodies, will not count toward the 70% after a seven-year grace period unless the steel is “melted and poured” in North America.<sup>25</sup>

The USMCA Protocol also added a requirement that ten years after the USMCA enters into force, the Parties will consider the application of similar requirements to aluminum.<sup>26</sup> Mexico apparently resisted these latter changes until a seven-year grace period was added, and was reluctant to accept such rules applied to aluminum, as Mexico does not produce raw aluminum.<sup>27</sup> The full impact of the 70% rule, including regional value calculations, depends on the USMCA uniform regulations and their ultimate interpretation by the Parties, to determine, for example, whether the rule means 70% by company, brand, plant, or something else.<sup>28</sup>

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20. *Id.*

21. *Id.*

22. *USMCA*, *supra* note 2, at 4-B-1-19.

23. *Id.* at 4-B-1-25.

24. *See Protocol of Amendment to the United States-Mexico-Canada Agreement*, U.S OFF. OF THE U.S. TRADE REPRESENTATIVE (Dec. 10, 2018), <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf> [hereinafter *Protocol*].

25. *USMCA*, *supra* note 2, at 4-B-1-25.

26. *Id.*

27. *See Foreign Minister: Mexico Considering U.S. Steel Demand, With Conditions*, WORLD TRADE ONLINE (Dec. 8, 2019, 9:43 PM), <https://insidetrade.com/daily-news/foreign-minister-mexico-considering-us-steel-demand-conditions>.

28. *See Seade: Uniform regulations for USMCA auto rules under development*, WORLD TRADE ONLINE (Jan. 13, 2020, 1:21 PM), <https://insidetrade.com/daily-news/seade-uniform-regulations-usmca-auto-rules-under-development> (discussing the ongoing negotiations of uniform regulations for autos and auto parts).

Most significantly for Mexico, 40% of the materials for cars and 45% of the components for light trucks must be produced by enterprises that pay workers at least \$16 per hour.<sup>29</sup> Some employees of automotive enterprises that conduct research and development or assemble advanced components such as batteries, engines, and transmissions in Mexico would count toward up to 15% of these thresholds, if the workers are paid at this level.<sup>30</sup> These calculations are subject to complex tracing rules,<sup>31</sup> which will add to auto manufacturers' administrative costs in North America, even though some other NAFTA tracing rules for parts and components have supposedly been relaxed.<sup>32</sup> Whether these minimum pay rules will be less harmful to Mexico than the original Trump administration proposals remains to be seen.

Since typical auto industry hourly wages in Mexico have recently been approximately \$3.60-\$3.90 (a level some studies attribute in part to the lack of union support for workers),<sup>33</sup> this wage requirement means most of the materials and components counting toward the 40%-45% content rule must be produced in the United States or Canada.<sup>34</sup> It is possible that wages in Mexico will eventually increase to \$16 per hour; Mexico President Andrés Manuel López Obrador (AMLO) or his successor may eventually seek to implement policies encouraging higher wages for Mexican workers, including policies that strongly support workers' rights to organize independent unions, as required under USMCA.<sup>35</sup> However, as of mid-2022, he had not done so.

One supposedly positive change in the Rules of Origin from NAFTA was the elimination of tracing of parts in major subassemblies as noted above, in the USMCA.<sup>36</sup> However, as Bloomberg News reported on August 24, 2021, Mexican officials believed that U.S. interpretation of certain new Rules of Origin under the USMCA threatened a reduction in Mexican car

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29. At least at present, the \$16 per hour rate is not indexed to inflation, although with inflation in the United States averaging about 2% per year (\$0.32), the lack of indexing probably would not significantly help Mexico. *USMCA*, *supra* note 2, at 4-B-1-26-27.

30. *Id.*

31. *See, e.g., USMCA*, *supra* note 2, at 4-B-1-20, 4-B-1-22.

32. *Id.* at 4-B-1-20.

33. *Study Points to Large Wage Gaps for Mexican Auto Workers*, MEX. DAILY NEWS (July 2, 2014), <https://mexiconewsdaily.com/news/study-points-large-wage-gaps-mexican-auto-workers/>.

34. GANTZ, *supra* note 17, at 3.

35. *See USMCA*, *supra* note 2, at 23-A-1 ("Worker Representation in Collective Bargaining in Mexico"), 4-B-1-27.

36. *See USMCA*, *supra* note 2, at 4-B-1-20.

production and investment,<sup>37</sup> a matter that was formally referred to the USMCA dispute settlement procedures.<sup>38</sup> Mexico (and Canada) are right to be worried. The new USMCA Rules of Origin have been interpreted by both the Trump and Biden administrations in a manner that is much less favorable to Mexico (and Canada) than many believe was intended during the USMCA negotiations. The panel proceeding is ongoing at the time of this writing. And could be concluded before the end of 2022.

As I understand the U.S. position, the effect of the U.S. approach is to ban any “rounding up” or substantial transformation of major subassemblies, as with my transmission example noted earlier. Even if there is no longer any formal tracing, Mexican or Canadian production is disadvantaged if only \$750 of that \$1,000 transmission made in Canada or Mexico can be counted toward the 75% regional value content despite a substantial transformation of parts and components into a finished transmission. This, in practical effect, does not appear to differ from the NAFTA tracing requirements that were supposedly removed under the USMCA. For Mexico in particular, the non-rounding up and the \$16 per hour wage requirements combined could make Mexico less attractive as a location for autos and auto parts production even disregarding the challenges of U.S. subsidies for EV and EV battery production. (Part III, below) and Mexico’s current negative investment climate (Part IV, below).

Should the United States prevail on its interpretation of the Rules of Origin, it may be that the producers of some models of autos and SUVs in Mexico, Canada, and third countries will simply forego the benefits of the 2.5% USMCA tariff savings and pay the MFN duty because the costs of complying, including administrative costs like higher wages, are more than 2.5% of the cost of producing the vehicles. This is perfectly legal but makes a mockery of the objective behind free trade agreements.<sup>39</sup>

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37. See Maya Averbuch, *Mexico Warns of Automaker Exodus If Car Dispute Not Settled*, BLOOMBERG (Aug. 24, 2021, 5:00 PM), <https://www.bloomberg.com/news/articles/2021-08-25/mexico-warns-of-automaker-exodus-if-car-dispute-not-settled>.

38. See *Mexico Requests USMCA Panel in Auto Rules-of-Origin Dispute*, WORLD TRADE ONLINE (Jan. 6, 2022, 6:40 PM), <https://insidetrade.com/daily-news/mexico-requests-usmca-panel-auto-rules-origin-dispute> (discussing Mexican objections to the U.S. approach that resulted in the request for a panel); *Canada and Mexico Seek Panel at Proceedings in USMCA Dispute with United States Concerning Auto Rules of Origin*, WHITE AND CASE (Jan. 13, 2022), <https://www.whitecase.com/insight-alert/canada-and-mexico-seek-panel-proceedings-usmca-dispute-united-states-concerning>.

39. This approach does not work with small trucks, since the U.S. MFN tariff is 25%. Producers of small trucks for the U.S. market if located in Mexico and Canada must fully comply with the Rules of Origin or move their production of such vehicles to the United States.

### III. U.S. PROPOSED AND ENACTED EV SUBSIDIES

The Build Back Better Act (BBBA)<sup>40</sup> was a mammoth legislative package costing over \$1.8 trillion designed to address a wide range of issues ranging from childcare to climate change. Separate legislation addressing, inter alia, the rebuilding of America's roads, bridges, ports and dams, expanding the national network of EV charging stations, improving the reliability of the U.S. electrical grids, and extending the availability of high-speed internet was signed by President Biden into law on November 15, 2021.<sup>41</sup>

Without much doubt, encouraging the substitution of EVs, the “qualified plug-in electric drive motor vehicle... which is propelled to a significant extent by an electric motor which draws electricity from a battery”<sup>42</sup> for gasoline powered vehicles by American consumers is desirable. Of course, some question the availability of sufficient supply of clean energy from America's aging electrical grid within the next eight to ten years, particularly in states such as California and Texas, to assure that the shift to EVs actually results in less carbon dioxide pollution.<sup>43</sup> In 2020, coal still produced almost 20% of US electrical power demand, 40% natural gas, 20% nuclear, and 20% renewables.<sup>44</sup>

However, the BBBA EV subsidy provisions were blatantly inconsistent with the USMCA, WTO rules (discussed below), and the best interests of

40. The legislation passed by the House was effectively rejected in the Senate because West Virginia Senator Manchin objected to the cost of the proposals at a time when inflation in the United States, over 6% in recent months, was at a twenty-year high. Moreover, as discussed in this section, the “Buy American” and pro-union provisions, not surprisingly, faced broad opposition from multiple sources including various auto producers with factories in the non-union South and governors of some such states.

41. See *President Biden's Bipartisan Infrastructure Law*, THE WHITE HOUSE, <https://www.whitehouse.gov/bipartisan-infrastructure-law/> (last visited Jan. 8, 2022) (summarizing the contents of the law); See also *Infrastructure Investment and Jobs Act*, Pub. L. No. 117-58, 135 Stat. 429 (2021).

42. It is unclear the extent to which the subsidies would be available for plug-in hybrids, such as those manufactured by Toyota as well as pure electric vehicles. However, minimum battery size—7 kilowatts per hour in 2022-2023 rising to 10 kilowatts per hour after 2023—could make it difficult or impossible for plug-in hybrids to qualify over time. See *Build Back Better Act*, H.R. 5376, 117th Cong., Pt. 4—Greening the Fleet and Alternative Vehicles § 136401(36C)(e) (2021).

43. See Gavin Dillingham, *The Great Texas Blackout of 2021: How Does This Not Happen Again?*, HOUSTON ADVANCED RES. CTR. (Feb. 22, 2021), [https://harcresearch.org/news/the-great-texas-blackout-of-2021-how-does-this-not-happen-again/?gclid=Cj0KCCQiAieWOBhCYARIsANcOw0wApec0yQx1Y70l8Rlwt2WVU62jk7nMGT2EZdDRz\\_ZdQXFSHcHwJflaAuyeEALw\\_wcB](https://harcresearch.org/news/the-great-texas-blackout-of-2021-how-does-this-not-happen-again/?gclid=Cj0KCCQiAieWOBhCYARIsANcOw0wApec0yQx1Y70l8Rlwt2WVU62jk7nMGT2EZdDRz_ZdQXFSHcHwJflaAuyeEALw_wcB).

44. *Electricity Explained: Electricity in the United States*, U.S. ENERGY INFO. ADMIN. (Mar. 18, 2021), <https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php>.



American (and North American) auto producers, workers, and consumers. Also, the full subsidies would have been provided only for EVs produced in the United States with U.S. batteries, union labor and 50% U.S. content, by reducing consumer choices, seem inconsistent with another Biden administration objective, realistic or not, of EV sales of 50% of the U.S. market by 2030.<sup>45</sup>

Under the now defunct subsidy scheme specified in the draft legislation, for the first five years, EV buyers would have received a federal income tax credit of \$7,500 regardless of where the vehicle is made. For the ensuing five years, the base credit would have applied **only** to EVs produced in factories located in the United States. Otherwise, the credit would not have applied and the effective cost to the consumer would have increased. An additional \$500 tax credit would have been applicable only to the sale of any car with U.S.-made battery cells, and a further \$4,500 credit (for the entire ten-year period) only if the car had been produced in a unionized plant in the United States.<sup>46</sup> The Act would also have established “domestic content qualifications” which required that the component parts for final assembly of an EV must be of U.S. origin.<sup>47</sup> The provisions were, in theory, need based, with the subsidies reduced for taxpayers with an adjusted gross income of over \$800,000 for a joint return, \$600,000 for heads of households, and \$400,000 for all others.<sup>48</sup> This means that almost everyone with an income below the top one percent would have been eligible for the full tax credit.<sup>49</sup> Since many low income taxpayers do not purchase new cars, either because the costs are high despite subsidies, the lack of charging facilities in poor neighborhoods, or for other reasons, these subsidies, like those under the IRA, would be primarily enjoyed in practice by upper middle class and wealthier Americans.

What ultimately was much more important to the administration in the ill-fated BBBA debate than staunch opposition from Canada and Mexico was opposition from West Virginia Senator Joe Manchin—whose

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45. See David Shepardson, *U.S. Automakers to Say They Aspire to up to 50% of EV Sales by 2030*, REUTERS (Aug. 4, 2021, 6:07 PM), <https://www.reuters.com/business/autos-transportation/us-automakers-say-they-aspire-up-50-ev-sales-by-2030-sources-2021-08-04/>.

46. See Build Back Better Act, *supra* note 42, Pt. 4—Greening the Fleet and Alternative Vehicles.

47. *Id.*

48. *Id.* at Pt. 4—Greening the Fleet and Alternative Vehicles, § 36C(c)(2).

49. See Tom Kertscher, *Fact-Check: Does the Top 1% Pay 90% of Federal Income Taxes?*, AUSTIN AMERICAN-STATESMAN (Sept. 16, 2021), <https://www.statesman.com/story/news/politics/2021/09/16/examining-claims-against-aoc-tax-the-rich-dress-met-gala/8350769002/> (indicating that the earning of over \$540,009 puts a taxpayer in the top 1%).

unwillingness to support the BBBA was crucial with the Senate divided fifty-fifty—apparently in part because Toyota has a major non-unionized auto plant in West Virginia.<sup>50</sup> However, Manchin’s opposition to the BBBA, which ultimately doomed its passage, was said to be far more a result of his fears about rising inflation, debt and foreign supply chains.<sup>51</sup> In the more recent discussion of what he was willing to accept in the IRA, Senator Manchin apparently insisted on a reduced total per-buyer subsidy amount and the removal of any tie-in between the subsidies and unionized production. He was also quoted in July 2022 as emphasizing that the bill gives incentives to make new car batteries in America “and not only be able to assemble them but be able to extract the minerals that we need, critical minerals, in North America.”<sup>52</sup>

Most significantly for this article, the new subsidies regime enacted in August 2022 removes the obvious discrimination against auto and auto parts production in Canada and Mexico. The reduced subsidies, up to \$7,500 for new vehicles and \$4,000 for used EVs (an incentive for lower-income Americans to go electric), are available for vehicles and components produced anywhere in North America., with particular attention to production of the batteries with North American materials. The IRA, in addition to maintaining the current \$7,500 subsidy, lifts the 200,000-vehicle cap for manufacturers as of January 1, 2023, a significant boon for major EV producers such as Tesla and General Motors. Further, it makes the subsidies available only for individual taxpayers making up to \$150,000 and couples reporting up to \$300,000, still a boon for the auto industry since higher income Americans are those most likely to be able to afford the steep prices for EVs<sup>53</sup> (although they presumably are less likely to need the incentives offered by the subsidies)

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50. See Jameson Dow, *Sen. Manchin, Whose State was Built by Unions, Joins Toyota to Oppose Union-Made EV Credit*, ELECTREK (Nov. 11, 2021, 5:09 PM), <https://electrek.co/2021/11/11/sen-manchin-whose-state-was-built-by-unions-joins-toyota-to-oppose-union-made-ev-credit/>.

51. *Read Manchin’s Statement Announcing Opposition to Build Back Better*, THE HILL (Dec. 19, 2021, 10:32 AM) <https://thehill.com/homenews/senate/586460-read-manchins-statement-announcing-opposition-to-build-back-better>.

52. Burgess Everett and Marianne Levine, *Manchin’s Latest Shocker: a \$700 billion Deal*, POLITICO (Jul. 27, 2022), <https://www.politico.com/news/2022/07/27/manchin-schumer-senate-deal-energy-taxes-00048325>.

53. For a detailed analysis of the IRA see Beia Spiller, *Inflation Reduction Act: Electric Vehicle Subsidies for Passenger Vehicles*, RESOURCES (Aug. 11, 2022), <https://www.resources.org/common-resources/inflation-reduction-act-electric-vehicle-subsidies-for-passenger-vehicles/>; Nik Popli, *The Inflation Reduction Act Will Soon Make it Cheaper to Buy EVs—If They Have North American Batteries*, TIME (Aug. 16, 2022), <https://time.com/6206639/electric-vehicle-tax-credits-inflation-reduction-act/>.

Other limitations apply which will probably strictly limit the availability of the subsidies for most EVs sold in the United States for at least several years. The subsidies are not available for automobile purchases above \$55,000 (take that Cadillac, Lexus, Mercedes and Porsche!) but do apply to North American produced small trucks and SUVs up to a purchase price of \$80,000. Some vehicles that were previously eligible for the earlier \$7,500 subsidy thus are no longer eligible as of the signing of the law on August 16, 2022. As of August 2022, only about 15 EVs currently sold in the United States are expected to qualify for the credits.<sup>54</sup> Still, experts suggest that U.S. based automakers (regardless of ownership) with North American-centered battery supply chains and North American-based producers of battery raw materials will eventually reap significant benefits as should North America itself in terms of lower pollution.

The new law also provides subsidies of some \$2 billion in grants and \$20 billion in loans for auto and parts producers to retool for EVs, batteries and motors, conditioned on achieving higher domestic content over next several years. Other provisions would offer additional tax credits for clean technology manufacturing.<sup>55</sup> Auto and battery manufacturers (e.g., Ford, General Motors, Toyota, LG Energy Solutions, Samsung and others) have already committed billions of dollars to EV and EV battery production in Kentucky, Michigan, Tennessee among other states.<sup>56</sup> These additional subsidies provide an additional incentive to focus on investing in the United States rather than in Canada or Mexico, along with the substantial state-offered subsidies in each instance noted above to locate production in their jurisdictions.<sup>57</sup>

Under such circumstances, will the elimination of limits on consumer subsidies to US produced EVs and EV batteries in favor of North American production stem the otherwise pernicious “Buy American, invest American, employ Americans” policies of the Trump and now Biden Administrations? Certainly, the revised law is a very positive step in favor of USMCA

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54. Popli, *supra* note 53.

55. Robert Rapier, *Energy Provisions in the Inflation Reduction Act*, FORBES (Aug. 14, 2022), <https://www.forbes.com/sites/rpapier/2022/08/14/energy-provisions-in-the-inflation-reduction-act/?sh=59fe9f483422>.

56. Claire Bushey, *Subsidies Spark EV Manufacturing Race in U.S. States*, FINANCIAL POST (Feb. 4, 2022), <https://financialpost.com/commodities/energy/electric-vehicles/subsidies-spark-ev-manufacturing-race-in-u-s-states>.

57. See Diego Mendoza-Moyers, *Tax Break Program to Cost Texas \$1 Billion a Year by 2022. Tesla Will Soon be a Beneficiary*, HOUSTON CHRON. (Aug. 22, 2000, 6:33 PM), <https://www.houstonchronicle.com/business/article/Tax-break-program-to-cost-Texas-1-billion-a-year-15507765.php> (discussing state and local subsidies granted to Tesla).

integrated auto production compared to the BBBA, but it falls short of resolving Canada and Mexico's competitiveness problems.

It is notable that even if vehicles and key battery and other components produced in Canada and Mexico as well as the United States are eligible, vehicles imported from significant auto exporting nations (and key U.S. allies) such as Germany, Japan and South Korea are not. As noted earlier, eligible vehicles must be produced with battery materials from the U.S., or from a country that has a free trade agreement with the U.S., e.g., from Canada, Mexico and South Korea among others, but not Japan, The European Union or (of course) China. Some foreign officials have complained about the discrimination and charged that the subsidies specific to EV and EV battery manufacturers are a violation of the WTO's Agreement on Subsidies and Countervailing Measures if they cause injury to other producers.<sup>58</sup> (Injury is difficult in practice to demonstrate). Moreover, while Canada and Mexico have not committed resources to subsidize their EV industries, it may be that subsidies offered by Germany, Japan and South Korea to their own EV producers will undercut the practical risk of a WTO action. (In any event, since December 2019 when the WTO's Appellate Body ceased to function, the risk of trade sanctions against the US or any of the other WTO Parties has been negligible.)

Politically, one downside of the U.S. EV subsidies, even in their reduced IRA form, is that they make it more difficult for the U.S. to take the high road while criticizing China's own massive (and illegal) subsidies for EV and battery production in China (and for many other items such as AI, robotics and chips), and may effectively encourage other major producing countries, particularly Germany, Japan, and South Korea, to institute their own subsidy programs. This probably does not concern anyone except for the relatively few U.S. trade lawyers and policy makers who are skeptical of industrial policies that necessarily pick winners and losers, and/or believe the U.S. should adhere to international trade rules. One might, more logically, consider whether—from a political point of view—it makes sense for the United States to risk significantly weakening the auto industries, and thus the manufacturing economies, of its major trading partners as the EU, Korea and Japan, even if Canada and Mexico have now been given more equal treatment.

Auto and auto parts manufacturers are not likely to pull out of Mexico regardless of the interpretation of Rules of Origin or the negative

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58. See *EU Says US Electric Vehicle Tax Credit Could Break WTO Rules*, ASSOCIATED PRESS (Aug. 11, 2022), <https://federalnewsnetwork.com/world-news/2022/08/eu-says-us-electric-vehicle-tax-credit-could-break-wto-rules/> (quoting Commission spokeswoman Miriam Garcia Ferrer).

investment climate. Their billions of dollars in investments over more than thirty years and generally successful operations, as well as Mexico's lower labor costs, argue strongly against it. Ford, for example, has been producing the Mustang Mach-E in Cuautitlan, Mexico, for more than a year and apparently intends to continue to do so, although the vehicles are exported to more than twenty countries, not just to the United States.<sup>59</sup> However, it seems more probable that major new auto-related investment, coming at a time of a gradual shift from gasoline engine to battery-powered cars and to more North American-sourced steel, may take place in the United States instead.

Mexico's competitive position in North America may be further weakened by the massive U.S. subsidies to be offered to producers of chips (including those used in the auto industry), batteries, and key battery components for electric car production. Such U.S. industrial policies may further skew investment decisions as the auto industry slowly shifts from gasoline powered to electric cars. Mexican states and Canadian provinces typically do not have the resources to compete with such incentives.

Thus, when U.S. investors balance the benefits and costs of investment in Mexico, where investment in the United States means more expensive up-front purchases of robots and other automation, the various U.S. and state subsidies as well as the investment climate in Mexico must have some impact on many companies' decision-making. The advantages of doing business in Mexico include, among others, a quality, relatively low-priced labor force, proximity to the U.S. Interstate highway system, and a rules-based system under the USMCA. However, these advantages may no longer be sufficient as discussed in the next section.

#### IV. AMLO'S ANTI-BUSINESS, ANTI PRIVATE INVESTMENT POLICIES

Aside from the differences over Rules of Origin, existing and new enterprises in the auto, steel and many other industries may not be as likely to make major new investments in Mexico when the investment climate overall is perceived as strongly negative. A spillover effect is likely even though President Lopez Obrador's principal targets to date have been existing and new private investment in hydrocarbons and electricity, given his obsession with supporting the government monopolies Pemex and the Corporation Federal de Electricidad (CFE). Still, other evidence of the anti-business climate beginning with the termination of the mostly

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59. *Mustang Mach-E Celebrates One Year of Production in Mexico*, MEX. NOW (Nov. 5, 2021), <https://mexico-now.com/mustang-mach-e-celebrates-one-year-of-production-in-mexico/>.

completed Mexico City airport project at the outset of his presidency with the substitution of a different one has been widely reported.<sup>60</sup>

Thus, AMLO's anti-business, anti-private-investment policies have become an equally significant threat to the future of the Mexican auto industry and to investment in Mexico in general.

The overall rate of investment in Mexico was down 24% from 2016-2019.<sup>61</sup> The current policies, which focus on rolling back Mexico's 2013 energy reforms under President Peña Nieto to something approaching the statist, monopolistic approach of the 1970s, have already engendered several notices of intent to bring investor-state dispute settlement procedures to bear against Mexico.<sup>62</sup> While the focus of the policies have been on hydrocarbons (both exploration and distribution) and on elimination of private foreign investments in clean energy (windmills and solar arrays), other sectors are being affected.

As noted earlier, auto and auto parts manufacturers are not likely to pull out of Mexico in the foreseeable future but may be inclined to make major new investments in the United States instead, in partial response to AMLO's policies. Francisco Garza, chief of General Motors' local operation, noted in 2021 that while GM wished to continue investing in Mexico, the risks of such measures exist and "if the conditions are not in agreement with our long-term vision, then obviously Mexico will not be a destination in the short term, unfortunately."<sup>63</sup> It also seems likely that the AMLO policies favoring Pemex and CFE to the exclusion of private developers and energy importers will lead to increases in the costs of

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60. See Kendrick Foster, *Building (and Canceling) an Airport for Mexico City*, HARVARD POLITICAL REVIEW (Apr. 12, 2021), <https://harvardpolitics.com/mexico-city-airports/>; Michael Stoff, *Three Shocks Unsettle Business Confidence across Latin America*, FIN. TIMES (Nov. 29, 2021), <https://www.ft.com/content/292eef73-e585-4b8d-a4ff-e17360de93ea?shareType=nongift>; Daniel Martinez Garbuno, *Scrapping Mexico City's New Airport is Costing Over \$16 Billion*, SIMPLE FLYING (Feb. 23, 2021), <https://simpleflying.com/scrapping-mexico-citys-new-airport-cost/>.

61. *Mexico Foreign Direct Investment 1970-2022*, MACROTRENDS, <https://www.macrotrends.net/countries/MEX/mexico/foreign-direct-investment> (last visited Jan. 9, 2021).

62. See Gary McWilliams and Marianna Parraga, *U.S. Oil Service Group Seeks \$100 Million from Mexico in Arbitration Claim*, REUTERS (May 18, 2021, 11:35 AM), <https://www.reuters.com/business/energy/us-oil-service-group-seeks-100-million-mexico-arbitration-claim-2021-05-18/> (discussing Finley Resources oil services based claim); Press Release, Talos Energy, *Talos Energy Files Notice of Dispute Regarding Zama in an Effort to Achieve a Mutually Beneficial Resolution* (Sept. 3, 2021), <https://www.talosenergy.com/news/press-release-details/2021/Talos-Energy-Files-Notices-Of-Dispute-Regarding-Zama-In-An-Effort-To-Achieve-A-Mutually-Beneficial-Resolution/default.aspx> (challenging Mexico's decision to exclude Talos from joint development of an oil concession, in favor of Pemex).

63. Stoff, *supra* note 60.

petroleum and electricity, and the reduced reliability of supplies, for auto (and other) energy-intensive producers in Mexico. The lack of clean energy, even for factories that (if authorized by the government) would produce their own clean power, may be forced to use dirty Pemex fuel oil, which would make it more difficult for multinationals, including those providing financial and other cloud services, to meet their commitments to future carbon neutrality.<sup>64</sup>

In many respects, Mexico has seldom been an easy place to invest. Corruption is rampant at all levels, leading to dismal Transparency International ratings.<sup>65</sup> Despite much talk from AMLO about restraining violence in Mexico, conditions have not improved under his watch, with more than 36,000 recorded murders in 2020<sup>66</sup> and much of the country controlled by drug lords. The court system, despite some improvements over time, suffers from widespread corruption and a lack of independence.<sup>67</sup>

Although it is not discussed extensively in this paper,<sup>68</sup> the timing of AMLO's anti-private investment policies could not be much worse. Many American companies and foreign enterprises that serve the U.S. market are considering whether to relocate some or most of their export production from China and elsewhere in Asia to North America, avoiding future U.S. regulations which make importation of many goods from China more difficult, shortening long Asian supply lines, and diversifying suppliers where COVID-19 and natural disasters have exposed vulnerabilities.<sup>69</sup> For many such enterprises moving low-wage-cost production from Asia to Mexico would be a no brainer; Mexican wages are comparable to those of

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64. For example, multinational enterprises that operate in Mexico such as Netflix, Facebook, and Apple have made carbon neutrality pledges. See Briana Dodson, *These 7 Major Companies are Pledging to Go Carbon Neutral—Here's When (and How)*, BRIGHTLY (Jul. 23, 2022), <https://brightly.eco/when-big-companies-are-going-carbon-neutral/>.

65. The transparency rating in Mexico is currently 124 out of 180. See *Corruption Perceptions Index*, TRANSPARENCY INT'L (2020), <https://www.transparency.org/en/cpi/2020/index/mex> (last visited Apr. 5, 2022).

66. Associated Press, *Mexico Homicides Remained at High Levels Despite Pandemic*, U.S. NEWS (July 27, 2021), <https://www.usnews.com/news/world/articles/2021-07-27/mexico-homicides-remained-at-high-levels-despite-pandemic>.

67. See *Mexico Corruption Report*, GAIN INTEGRITY (July 2020), <https://www.gainintegrity.com/portal/country-profiles/mexico/>.

68. See, e.g., David A. Gantz, *North America's Shifting Supply Chains: the USMCA, COVID-19, and the U.S.-China Trade War*, CTR. FOR THE U.S. AND MEX.: BAKER INST. FOR PUB. POL'Y (Nov. 2020), <https://www.bakerinstitute.org/media/files/files/6ed66d98/usmx-pub-supplychains-111120.pdf>.

69. *Id.*

many Asian countries<sup>70</sup> and Mexican production benefits from easy road access to most of the United States, ample relatively low-cost labor and a language spoken by forty million Americans, among others. But the same negative factors discouraging new auto industry investment apply to other sectors. Relocation decisions once made are not likely to be reversed once AMLO leaves office in October 2024. Once a company moving operations from China bites the bullet and invests in high-tech production in the United States, it is not likely to shift to Mexico even if a more pro-private investment president takes over in late 2024. Rather, the investment and resulting new job losses are likely to continue in the long term.

In July 2022, the United States requested consultations with Mexico on Mexico's controversial energy policies.<sup>71</sup> The request for consultation addresses measures that "appear to breach Mexico's commitments under the USMCA" violations the Electric Power Industry Law, Inaction, Delays, Denials, and Revocations of Private Companies' Abilities to Operate in Mexico's Energy Sector; Postponement of Requirement to Supply Ultra-Low Sulfur Diesel for Pemex only; certain Actions Regarding the Use of Mexico's Natural Gas Transportation Service."<sup>72</sup> As a former Mexican trade negotiator noted at the time, "What we're seeing is a virtual train crash between his vision of how to develop Mexico—and the energy sector in particular—and commitments and obligations under the USMCA."<sup>73</sup> AMLO mocked the request, playing a song with the lyric, "Oh, how scary. Look at how I'm Shaking" at a news conference and branding the U.S. request as "political sanctions."<sup>74</sup> The consultation and arbitration processes are likely to require any months before the issues are resolved; even if Mexico loses, as some observers believe is very likely,<sup>75</sup> the actual application of sanctions could well take place only after AMLO leaves office in October 2024.

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70. See *Mexico vs. China Manufacturing: How the Two Countries Compare*, N. AM. PROD. SHARING, INC., <https://napsintl.com/manufacturing-in-mexico/mexico-vs-china-manufacturing-comparison/> (last updated Sept. 30, 2019) (in 2019, hourly wage costs in Mexico were \$3.95 compared to \$4.50 in China).

71. *U.S. Requests USMCA Consultations over Mexico's Energy Policies*, INSIDE US TRADE (Jul. 20, 2022), <https://insidetrade.com/daily-news/us-requests-usmca-consultations-over-mexico%E2%80%99s-energy-policies>.

72. *Id.*

73. Kenneth Smith Ramos, quoted in INSIDE US TRADE, *supra* note 71.

74. Cody Copeland, *Lopez Obrador Defends Energy Policy, Accuses US Companies of Trying to "Loot" Mexico*, COURTHOUSE NEWS SERVICE (Jul. 21, 2022), <https://www.courthousenews.com/lopez-obrador-defends-energy-policy-accuses-us-companies-of-trying-to-loot-mexico/>.

75. *Id.*



## V. CONCLUSIONS

The Mexican government and auto industry enterprises throughout North America have good reason to be worried about the future. It will take time to resolve the dispute over Rules of Origin. Countering U.S. federal and state subsidies to automotive producers is very difficult even if the consumer-oriented IRA subsidies no longer discriminate against Canada and Mexico. AMLO could immediately take steps to repair the damage caused to Mexico's investment climate during his first three and a half years. Reversing the decline in foreign investment should be a top priority for the Lopez-Obrador administration, even though more than half-way through his term any major policy change is highly unlikely as his comments quoted immediately above demonstrate, unless it is forced by trade sanctions imposed by the United States and Canada.

The new USMCA Rules of Origin have been interpreted by both the Trump and Biden administrations in a manner that is much less favorable to Mexico (and Canada) than many believe was intended during the USMCA negotiations, a disagreement that is at the early stages of binding state-to-state dispute settlement under the USMCA. Presumably, a win by Mexico and Canada would remove one of the obstacles to continued regional integration of the automotive markets, but probably not the most important one. The Biden administration and many Democrats in Congress with the heavy union backing are in lockstep with the Trump administration, as they were during the latter part of the USMCA negotiations, when it comes to creating new American jobs and investing in the auto industry in the United States.<sup>76</sup>

Perhaps most importantly in the long term given the replacement of the BBBA subsidies with the reduced and more complex ones in the IRA, along with the treatment in the IRA of North America as a single unit for the new subsidy regime there is some cause for optimism. It can be hoped that the Biden Administration will see the benefits of expanded North American economic integration as a matter essential to the competitiveness of the United States globally, in the automotive industry and elsewhere. Such a commitment would be reinforced if the United States were to abandon its questionable interpretation of key Rules of Origin instead of insisting on it through the arbitral process, even though that does not seem likely given the domestic political constraints. While the administration

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76. *See Opinion: on Electric Cars, President Biden Should Meet Mexico and Canada Halfway*, THE WASH. POST (Nov. 20, 2020, 9:00AM), <https://www.washingtonpost.com/opinions/2021/11/20/electric-cars-president-biden-should-meet-mexico-canada-halfway/>.

may seek to comply promptly with the USMCA Rules of Origin if it loses the arbitration, additional positive steps in support of North American integration even when there is a possible conflict with “Buy American” policies, would benefit industry and consumers in all three countries, in the automotive as well as other sectors, and help to ensure that the North American auto industry remains competitive with those in Europe and Asia.

# RESURGENT AUTHORITARIANISM AND THE INTERNATIONAL RULE OF LAW

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Wayne Sandholtz\*

## ABSTRACT

*Modern rule of law and post-war constitutionalism are both anchored in rights-based limitations on state authority. Rule-of-law norms and principles, at both domestic and international levels, are designed to protect the freedom and dignity of the person. Given this “thick” conception of the rule of law, authoritarian practices that remove constraints on domestic political leaders and weaken mechanisms for holding them accountable necessarily erode both domestic and international rule of law. Drawing on research on authoritarian politics, this study identifies three core elements of authoritarian political strategies: subordination of the judiciary, suppression of independent news media and freedom of expression, and restrictions on the ability of civil society groups to organize and participate in public life. Each of these three practices has become increasingly common in recent years. This study offers a composite measure of the core authoritarian practices and uses it to identify the countries that have shown the most marked increases in authoritarianism. The spread and deepening of these authoritarian practices in diverse regimes around the world diminish international rule of law, as it has developed in the post-Cold War international legal order.*

INTRODUCTION.....	484
INTERNATIONAL RULE OF LAW .....	485
HUMAN RIGHTS, THE RULE OF LAW, AND CONSTITUTIONALISM.....	487
<i>International rule of law</i> .....	488
<i>Global constitutionalism</i> .....	489

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POPULISM, AUTHORITARIANISM, AND THE EROSION OF THE RULE OF LAW .....	492
<i>Populism</i> .....	493
<i>Authoritarianism</i> .....	494
<i>Authoritarianism and the erosion of the rule of law</i> .....	496
AUTHORITARIAN ASSAULTS ON THE RULE OF LAW .....	497
<i>Judicial independence</i> .....	498
<i>Freedoms of the press and of expression</i> .....	499
<i>Civil society and NGOs</i> .....	500
MEASURING THE UPTURN IN AUTHORITARIANISM .....	500
CONCLUSIONS .....	504

## INTRODUCTION

Would the weakening or destruction of the multilateral institutions that have structured international relations for nearly seventy years amount to a decline in the international rule of law? Or, since states are still primary lawmakers in international relations, would such a turn of events simply mean that states—at least some states—are using their sovereign prerogatives to alter the rules under which they live? Another way of framing these questions is to ask if a return to the international legal order of 1913 or of 1939 would amount to a *weakening* of the international rule of law (IROL) or simply a shift to a *different* international rule of law.

Answers to the questions posed above require a definition of the international rule of law (IROL). A thin conception of IROL defines it as state conformity with existing international legal rules, whatever those happen to be. A thick conception of IROL includes the substance of the rules, particularly human rights-based legal limitations on state authority. Under the thick conception, IROL necessarily includes norms that protect individual freedom and dignity. The erosion of international law-based rights protections would, by definition, constitute a decline in the international rule of law. In this essay, I argue for a thick conception of IROL and suggest that increasing authoritarianism in a growing number of states implies a decline in the international rule of law. This article also concludes that the spread of authoritarianism is likely not only to erode the robustness of international human rights norms, but to also diminish the rule of law in additional domains (security, economics, environment), often seen as components of the post-World War II international rule-of-law system.

Anchoring the rule of law in rights-based limitations on state power enables me to identify a set of domestic practices that, as they spread and deepen, would erode the international rule of law. This article argues that the

resurgent authoritarianism visible in diverse parts of the world and among regimes of varying types—democratic, autocratic, and hybrids—undermines constraints on state power. This resurgent authoritarianism endangers the basic rights and freedoms, both domestic and international, at the heart of modern rule of law.

Scholarship has identified, with a notable degree of consensus, the core of authoritarian political strategies. That core consists of the subordination of the judiciary, suppression of independent news media and freedom of expression, and restrictions on civil society groups (including NGOs).

Finally, this article summarizes available empirical evidence of the extent to which these practices that erode the international rule of law are spreading. The assessment developed here argues that domestic rule of law is directly and integrally connected to international rule of law, through substantive values and norms that are foundational to both domestic and international legal orders. These norms and values aim for the protection of individual dignity, rights, and freedoms and consequently create boundaries to government power. The erosion of the domestic, rights-oriented rule of law therefore directly weakens international rule of law.

#### INTERNATIONAL RULE OF LAW

Though the terminology varies, three components typically define the rule of law: (1) the powers of government can only be exercised through law; (2) the law applies to the state and its officials; and (3) the law must apply equally to all.<sup>1</sup> There is less consensus in defining international rule of law. Definitions, however, tend to divide into either “thick” or “thin” conceptions.<sup>2</sup>

In the thin perspective, IROL is a political tool or an element of political strategy. For Hurd, “[l]aw is the language that states use to understand and explain their acts, goals, and desires.”<sup>3</sup> International rule of law exists to the extent that states engage in the practice of legal justification.<sup>4</sup> This is a thin conception of the rule of law because it emphasizes formal legality and related justificatory practices without tying legality to particular substantive

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1. Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 342 (2008); Ian Hurd, *Three Models of the International Rule of Law*, 23 EIDOS: REV. FILOSOFÍA 37 (2015) (Colom.).

2. A similar polarity is visible in concepts of the domestic rule of law. The classic example is the contrast between the approaches of Carl Schmitt (thin) and Hans Kelsen (thick).

3. Ian Hurd, *The International Rule of Law and the Domestic Analogy*, 4 GLOB. CONSTITUTIONALISM 365, 367 (2015).

4. *Id.*

values, like human rights.<sup>5</sup> Hurd argues that IROL cannot consist of limits on the powers of national governments because there is no international government to enforce such limitations and because states can choose which limitations on their powers to accept.<sup>6</sup> But this position immediately runs into difficulties. First, international law itself exists and functions in the absence of an international government to enforce it; thus, an international enforcement power cannot therefore be a prerequisite for international rule of law. Second, some international human rights norms have developed into customary international law, binding on all states.<sup>7</sup> Finally, even in domestic orders, fundamental legal norms—including many constitutional norms—are not and cannot be enforced in the way that Hurd expects of the international rule of law. Thus, Hurd is correct to show that legal justification is a form of power and to affirm that law “shows its power” as states seek to behave in ways that can be justified under international law.<sup>8</sup> However, this is a framework for observing the political use that states (and other actors) make of international law and for assessing the effects of that usage; it is not a theory of the international rule of law.

For theorists advancing thicker notions of international rule of law, international rule of law must be more than a system of rules that allows states to pursue their interests. Palombella argues that rule of law cannot “coincide with the mere existence of a legal order . . . in the absence of any other qualifications.”<sup>9</sup> Instead, the rule of law requires democracy “paired with fundamental rights.” Rule of law defined in these terms can be implemented “within the municipal constitutional domain or in the international sphere.”<sup>10</sup> Nardin similarly argues that the rule of law should not be confused with the existence of laws: “[t]he expression ‘rule of law’ does no intellectual work if any effective system of enacted rules must be counted as law, no matter what its moral qualities.”<sup>11</sup> And the moral qualities of the rule of law must include rights: “[t]he expression ‘rule of law’ . . . should be used only to designate a kind of legal order in which law both

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5. *Id.* at 375.

6. *Id.* at 391.

7. MALCOLM N. SHAW, *INTERNATIONAL LAW* 257 (5th ed., 2003) (“Certain human rights may now be regarded as having entered into the category of customary international law”).

8. Hurd, *supra* note 3, at 367 (2015).

9. Gianluigi Palombella, *The Rule of Law Beyond the State: Failures, Promises, and Theory*, 7 *INT’L J. CONST. L.* 442, 454 (2009).

10. *Id.* at 461.

11. Terry W. Nardin, *Theorising the International Rule of Law*, 34 *REV. INT’L STUD.* 385, 394 (2008).

constrains decision-making *and protects the moral rights of those who come within its jurisdiction.*"<sup>12</sup>

This essay adopts a substantive, rights-based conception of the international rule of law. Krieger and Nolte likewise employ a thicker conception of IROL, based on the "widely shared assumption that the process of legalization and judicialization which accelerated in the 1990s has transformed classical Charter-based international law with its emphasis on state-oriented principles and underdeveloped human rights obligations towards a more value-based order which is actually capable of protecting and serving individuals."<sup>13</sup> The international rule of law exists in "the recognition and established interpretation of universal value-based legal rules and principles."<sup>14</sup> However, instead of grounding IROL in specific systems of legal rules (the post-1990s international legal order), this essay anchors it in normative commitments that are at once more abstract and more foundational: rights-based limits on government power. The next section justifies that choice.

#### HUMAN RIGHTS, THE RULE OF LAW, AND CONSTITUTIONALISM

The definition of IROL adopted in this paper privileges human rights. Rights-based limitations on state authority are foundational to the international rule of law. One potential objection to this conception is that it is possible for relations among states to be structured and guided by international legal rules, across diverse domains, regardless of the nature of domestic regimes. Put differently, authoritarian states are capable of conforming to international legal regimes on the use of force, the conduct of war, trade, investment, refugees and migration, and the environment.

It is therefore possible, in principle, for a particular constellation of international legal rules to regulate international affairs even if a significant, or even growing, share of states in the world is authoritarian. Authoritarian governments can, and do, live by WTO rules, refrain from the illegal use of force, adhere to international environmental accords, and so on. Why would international-law-abiding authoritarian states not belong to an international rule-of-law world?

Under a thin conception of IROL, it might. But in the post-1945 world, the thin conception of the rule of law is no longer adequate. Modern theories

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12. *Id.* at 397 (emphasis added).

13. Heike Krieger & Georg Nolte, *The International Rule of Law—Rise or Decline?—Approaching Current Foundational Challenges*, in *THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE?* 12 (Heike Krieger et al. eds., 2019).

14. *Id.* at 13.

of the rule of law and of constitutionalism converge in placing human dignity, freedom, and rights at the core of all other state obligations. States should engage in rule-governed trade because it can better the well-being of their people. States should refrain from the use of force because wars destroy the rights and freedoms of people. States should protect the environment in order to safeguard the lives and opportunities of their people.

### *International rule of law*

Domestic rule-of-law concepts cannot be transplanted directly into the international field. As Hurd puts it, “[t]he international rule of law cannot simply be derived from the domestic version, because the two rest on unique historical and political foundations.”<sup>15</sup> Many others have noted that it would be inappropriate to analogize the state under international rule of law to the individual under domestic rule of law.<sup>16</sup> At the domestic level, individual rights must be protected from encroachments by the state, but it would be meaningless to theorize IROL based on the need to protect the rights of individual states from a non-existent world government.

Nevertheless, a core purpose of the domestic rule-of-law—to establish limits on the powers of government—is also central to modern international law. Modern international law sets boundaries to state powers, in the form of international human rights. Core international human rights norms have been accepted by virtually all states and seriously rejected by none (though of course, states continue to disagree about the priority to be afforded different rights or about the interpretation of universal rights in specific instances). Indeed, one of the great shifts in international law post-World War II is that sovereign prerogatives are bounded, with the consequence that how states treat people under their jurisdiction is no longer solely a matter of domestic policy. In the era of human rights law, domestic rule of law and international rule of law, thus, share the objective of building legal limits to state power so as to protect individual rights and freedoms.

Waldron has advanced a particularly forceful version of this argument. He argues that “[t]he real purpose of [international law] and, in my view, of the [rule of law] in the international realm is not the protection of sovereign states but the protection of the populations committed to their charge.”<sup>17</sup> Waldron makes the case, adopting Kant’s terminology, that states “are not

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15. Ian Hurd, *The International Rule of Law: Law and the Limit of Politics*, 28 ETHICS & INT’L AFF. 39, 40 (2014); see generally Hurd, *supra* note 3.

16. Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. L. & PUB. POL’Y 15, 21 (2006).

17. Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315, 325 (2011).



ends in themselves, but means for the nurture, protection, and freedom of those who are ends in themselves. This is acknowledged in the philosophy of municipal law, when it is said that the state exists for the sake of its citizens, not the other way around.”<sup>18</sup> The well-being of billions of people, including fundamentally their freedom and dignity, “not the well-being of sovereign nation-states, is the ultimate end of [international law].”<sup>19</sup> Waldron’s thick version of IROL begins to sound like international constitutionalism. Indeed, he offers a reoriented domestic analogy by likening the relationship of states to international law to the relationship of domestic governing institutions to constitutional law.<sup>20</sup>

### *Global constitutionalism*

The foregoing conception of IROL shares common ground with some theories of global constitutionalism. As McLachlan rightly notes:

[M]uch of the structure of contemporary international law—especially in the great multilateral conventions of near-universal application—has a constitutional character. These conventions provide a general structure for the organization and exercise of public power on the international plane. They were intended by their framers to be virtually immutable, because they establish fundamental principles of the international legal order within which states are to operate.<sup>21</sup>

Other theorists posit a rights-based constitutionalism underlying general international law of a “constitutional character.” Post-war constitutionalism sought to remedy a central defect in the traditional domestic constitutional theory, catastrophically demonstrated in the era of fascism, which was that it could accommodate majoritarian repression. Constitutions designed after World War II sought to erect legal barriers to acts of the majority that would trample or destroy the rights, freedoms, and dignity of minorities, whether those minorities are defined along ethnic, racial, religious, linguistic, political, or any other lines. Hans Kelsen provided the theoretical armature for this new generation of constitutionalism. In Kelsen’s model, constitutions do not just create and allocate the powers of the state, they also limit the powers of the state.<sup>22</sup> The state, even when backed by the will of a majority, must not act in ways that violate basic rights.

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18. Waldron, *supra* note 16, at 24.

19. Waldron, *supra* note 17, at 325.

20. *Id.* at 328.

21. Campbell McLachlan, *The Dynamic Evolution of International Law: Rise or Decline?*, 49 VICTORIA UNIV. WELLINGTON L. REV. 419, 422-23 (2018).

22. *See generally* HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (A. Javier Treviño, ed., Routledge 2005) (1949).

Modern constitutionalism, thus, incorporates supra-constitutional principles and norms, grounded in the rights, freedoms, and dignity of the individual person. These principles cannot be nullified by legislation enacted pursuant to the constitution and not even by amendment of the constitution itself. Thus, modern constitutionalism incorporates substantive norms regarding individual rights and freedoms. It features three core elements: “(1) an entrenched, written constitution, (2) a charter of fundamental rights, and (3) a mode of constitutional judicial review to protect those rights.”<sup>23</sup> Moreover, in contemporary constitutions, the charter of rights typically comes first, before the definition of the branches of government and the allocation of powers among them. The new constitutional model appeared first in post-war Western Europe and by the 1990s had spread to most of the world.<sup>24</sup> Stone Sweet observes that all of the 106 constitutions established since 1985 include a charter of rights and 101 of them include a mechanism of judicial rights review.<sup>25</sup>

How is it appropriate to carry notions of modern domestic constitutionalism to the international level? Global constitutionalism necessarily differs from the domestic model in that it does not establish a supreme authority, is not supported by the coercive apparatus of a state, and is not grounded in a particular *demos*.<sup>26</sup> But modern constitutionalism shares with modern IROL an essential core: that individual rights and freedoms set boundaries to the powers of the state. As argued above, modern international rule of law includes universal limitations on the powers of the state, not just vis-à-vis each other but also with respect to individual persons under their jurisdiction. Thus, global constitutionalism is defined by the feature that distinguishes modern domestic constitutionalism: rights-based limits on state powers. Indeed, Gardbaum views the international human rights system as a stage “in the historical development of the idea of constitutionalism.”<sup>27</sup>

The term “constitutionalism” thus applies appropriately to the global level in that, as defined here, global constitutionalism serves the same

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23. Alec Stone Sweet, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816 (Michel Rosenfeld & András Sajó eds., 2012).

24. *Id.*; David S. Law & M. Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163 (2011).

25. Sweet, *supra* note 23, at 829 n.2.

26. Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 260 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

27. Stephen Gardbaum, *Human Rights and International Constitutionalism*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 255 (Jeffrey L. Dunoff and Joel P. Trachtman eds., 2009).

essential purpose as modern domestic constitutionalism: “legal limits [on state power] are now imposed by international law.”<sup>28</sup> Furthermore, the international human rights system provides the substance of global constitutionalism by affirming that human rights norms apply to all people “as rights of human beings rather than as rights of citizens.”<sup>29</sup> To be sure, modern constitutionalism and the international human rights regime co-evolved in the decades after 1948, the year in which the new U.N. General Assembly approved the Universal Declaration of Human Rights (UDHR). Indeed, international human rights law has had a clear and demonstrable effect on the domestic constitutionalization of rights.<sup>30</sup> The rights enumerated in national constitutions overlap with the rights identified in the UDHR far more after 1948 than before.<sup>31</sup> And, the degree of overlap rose dramatically in the decades after the UDHR: the average number of UDHR rights in constitutions in 1947 was 11.5; by 2005 it reached a peak of 30.6.<sup>32</sup>

In this section, I have sought to establish foundations for the analysis that will follow. The essentials are the following:

1. Modern conceptions of the rule of law, both domestic and international, require that the powers of the state be limited by individual rights.
2. Modern conceptions of the rule of law—domestic and international—overlap substantially with modern constitutionalism, which is also grounded in universal human rights principles and norms that limit the powers of the state.

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28. *Id.*

29. *Id.* at 257.

30. Mila Versteeg, *Law versus Norms: The Impact of Human Rights Treaties on National Bills of Rights*, 171 J. INST. THEORETICAL ECON. 87, 87 (2015) (“the UDHR could protect human rights globally by shaping the behavior of governments nationally”).

31. Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L. J. 61, 77, 79, 80 (2013); Colin J. Beck, et al., *CONSTITUTIONS IN WORLD SOCIETY: A NEW MEASURE OF HUMAN RIGHTS* 10 (Cambridge Univ. Press 2017); David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 WILLIAM & MARY BILL OF RIGHTS JOURNAL 1183 (2019). What global, rights-based constitutionalism lacks, as compared with domestic constitutionalism, is a fully developed mechanism for judicial review of government acts to ensure their conformity with individual rights and freedoms. Elsewhere I have argued that a rudimentary and decentralized form of rights review is emerging at the international level in the regional human rights courts and the Human Rights Committee and visible in the judicial dialogue among them; see Wayne Sandholtz, *The Trans-Regional Construction of Human Rights*, in *CONTESTING HUMAN RIGHTS: NORMS, INSTITUTIONS AND PRACTICE* (Alison Brysk and Michael Stohl eds., 2019).

32. See generally Sloss & Sandholtz, *supra* note 31.

3. Because rights-based limitations on state power must first and primarily be given effect by domestic institutions and legal orders, IROL necessarily has domestic foundations.<sup>33</sup>

4. International rule of law implies *domestic*, rights-based, constitutional limits on state power.

5. The erosion of domestic, rights-based, constitutional limits on state power therefore implies a decline in the international rule of law.

This conception of IROL provides criteria with which to assess whether the international rule of law is rising or declining. To the extent that the behavior of governments erodes fundamental human rights, the international rule of law declines. The greater the loss of respect for rights, and the larger the number of states in which this occurs, the greater the decline in IROL. Clearly, this conception of a rights-based international rule of law entails a fundamental normative commitment to the primacy and universality of human dignity, liberty, and rights. Such a normative commitment will not be acceptable to everyone. In its defense, I would point out that it avoids the danger inherent in thin conceptions of both domestic and international rule of law, of majoritarianism, including populist, repression. The existence of law is no longer sufficient for the rule of law.

#### POPULISM, AUTHORITARIANISM, AND THE EROSION OF THE RULE OF LAW

The linkages between domestic and international rule of law imply that the decay of domestic rights-based rule of law implies a decline in rights-based international rule of law. It would be impossible to develop and assess that claim across the full panoply of human rights. Instead, I focus on mechanisms that are essential for effective, rights-based limitations on government power. Once these mechanisms are weakened or removed, governments have greater ability to violate the broader array of rights without political or legal consequences. The analysis thus centers on a set of three mechanisms that are crucial to limiting the powers of the state. Students of authoritarianism have identified these three as typical targets of authoritarian political strategies: an independent judiciary, a free press, and a civil society that is free to organize and participate in politics.<sup>34</sup> I will argue that the

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33. Waldron, *supra* note 17, at 325, 328 (going further by arguing that states are generally charged with implementing or enforcing international law and are therefore “recognized by IL as trustees for the people committed to their care”). One need not go as far as Waldron in order to accept the point that domestic regimes have primary responsibility under international law for respecting, and ensuring respect for, international rights-based limits on state power.

34. David Beetham, *Authoritarianism and Democracy: Beyond Regime Types*, 13 COMPAR. DEMOCRATIZATION 2 (2015); Marlies Glasius, *What Authoritarianism Is . . . and is Not: A*

resurgence of authoritarianism—assessed in terms of these three core mechanisms for checking government power—undermines international rule of law. My approach thus concords with Kumm’s observation that international rule of law can constrain national executives that seek to expand their own powers at the expense of constitutional democracy.<sup>35</sup>

### *Populism*

Social scientists and legal scholars alike have sought to understand the current threat to international rule of law in terms of domestic political shifts driven by “populism.” Though definitions of “populism” vary, a few key elements feature in many or most of them.

Populists generally (1) criticize “elites,” (2) demand that political power be returned to the authentic people (of whom the populists are the direct representatives), and (3) define the people in homogeneous, often primal, terms.<sup>36</sup>

There is perhaps less consensus on whether populism endangers democracy and the rule of law. Indeed, some earlier theorists argued that populism could invigorate democracy by bringing into the political arena groups and claims that had been previously excluded or marginalized. Recent work tends to reject that view,<sup>37</sup> arguing on the contrary that populism is, by its nature, destructive of democracy and the rule of law. Mudde and Rovira Kaltwasser offer a distinction, writing that although populism is *per se* neither a threat nor a corrective to democracy, it is fundamentally inimical to *liberal* democracy, which in addition to free and fair elections requires protections for basic individual rights.<sup>38</sup> As argued above, modern constitutional democracy necessarily includes rights-based limits on state power.

Populist leaders and parties identify themselves with the homogeneous, unified, genuine “people.” Anyone who opposes the populist leader and his party must therefore represent interests other than those of the true people. Political opposition is therefore, by definition, illegitimate: there cannot be

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*Practice Perspective*, 94 INT’L AFF. 515 (2018); CRISTÓBAL MUDDÉ & CAS ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION (2017).

35. Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT’L L. 25 (2003).

36. Koen Abts & Stefan Rummens, *Populism Versus Democracy*, 55 POL. STUD. 409 (2007); Jan-Werner Müller, *Parsing Populism: Who Is and Who Is Not a Populist These Days?* 22 JUNCTURE 81, 83 (2015); STÉPHAN DE SPIEGELEIRE ET AL., THE RISE OF POPULIST SOVEREIGNISM: WHAT IT IS, WHERE IT COMES FROM, AND WHAT IT MEANS FOR INTERNATIONAL SECURITY AND DEFENSE (2017).

37. Abts & Rummens, *supra* note 36, at 406-407.

38. MUDDÉ & KALTWASSER, *supra* note 34, at 79-81.

any valid political claims other than those defined by the general will of the real people.<sup>39</sup> “[A] populist regime can, therefore, only survive if it becomes authoritarian and despotic.”<sup>40</sup> As Müller argues, populists are not just anti-elitist but also anti-pluralist, and as “principled anti-pluralists, [populists] cannot accept anything like a legitimate opposition. . . . [P]opulists consistently and continuously deny the very legitimacy of their opponents (as opposed to just saying that some of their policies are misguided).”<sup>41</sup> In this view, populists are necessarily authoritarians.<sup>42</sup> As Krieger notes, once populist parties are in power, “their strategies to govern often result in a process of constitutional retrogression implying a gradual transition from democracy to authoritarian regimes.”<sup>43</sup>

For the purposes of this essay, the details of theories of populism are not essential. What matters is that the arguments surveyed here link populism to authoritarianism, which in turn directly threatens democracy and the rule of law. We can set aside the question of whether populism is inherently authoritarian or leads to authoritarianism because in the present juncture the two are combined: the populist leaders and parties that have made political gains in various countries are unmistakably authoritarian. Indeed, for Norris, the phenomenon to be explained is “authoritarian populism” or “populist authoritarianism.”<sup>44</sup>

### *Authoritarianism*

Political science research on authoritarian regimes is abundant but sometimes suffers from two deficiencies. For one, it tends to focus on the characteristics and processes of authoritarian regimes rather than on the concept of “authoritarianism” itself, leading to checklists of specific institutional features that identify different types of authoritarian regimes (personalist, military, and so on).<sup>45</sup> A second problem is that political science

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39. Abts & Rummens, *supra* note 36, at 419.

40. *Id.* at 421; *see also* Nadia Urbinati, *Democracy and Populism*, 5 *CONSTELLATIONS* 122 (1998).

41. Müller, *supra* note 36, at 85-86 (2015).

42. *But see* MUDDE & KALTWASSER, *supra* note 34, at 79-91 (analyzing populism as not inherently a threat to democracy, but a threat to *liberal* democracy, which is the only kind of democracy in play in this essay).

43. Hieke Krieger, *Populist Governments and International Law*, 30 *EUR. J. INT’L L.* 971, 975 (2019).

44. Pippa Norris, *It’s Not Just Trump. Authoritarian Populism Is Rising Across the West. Here’s Why*. *WASH. POST* (March 11, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/11/its-not-just-trump-authoritarian-populism-is-rising-across-the-west-heres-why/>.

45. Beetham, *supra* note 34; Glasius, *supra* note 34.

scholarship often defines “authoritarian” as a residual category: an authoritarian regime is one lacking free and fair elections. “Authoritarian” becomes synonymous with “non-democratic.”<sup>46</sup> A more useful set of conceptual tools for my purposes would focus not on the institutional features of authoritarian governments but on the strategies and practices of authoritarian leaders and groups.<sup>47</sup>

Beetham convincingly argues for seeing authoritarianism as a “mode of governing which is intolerant of public opposition and dissent.” Authoritarian governance occurs when “rulers see public opposition as a major threat to the extent or continuation of their power and believe that they can work to undermine it with relative impunity.”<sup>48</sup> Such an approach allows the analyst to evaluate authoritarian conduct within democracies, of particular, present importance given widespread concern about authoritarian shifts in countries that are formally and functionally democratic. Frantz and Kendall-Taylor point out that in earlier periods authoritarians often came to power through “sudden and decisive” means, often involving the suspension of democratic rules or coups d'état.<sup>49</sup> In contrast,

Contemporary autocrats are coming to power through a process of “authoritarianisation,” or the gradual erosion of democratic norms and practices. Democratic leaders, elected at the ballot box through reasonably free and fair elections, are slowly undermining institutional constraints on their power . . . in ways that make it difficult to pinpoint the moment at which the break with democratic politics occurs.<sup>50</sup>

The key point is that authoritarianism involves measures designed to remove constraints on the exercise of state power.

In other words, authoritarianism is identified by practices that aim to eliminate, or in Glasius's terms, “sabotage,” accountability.<sup>51</sup> Bovens offers a useful definition of accountability as “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.”<sup>52</sup> Beetham employs different terminology but the idea is the same, authoritarianism seeks to “render dissenters impotent by denying them access to any influence on the political process; it even goes

46. See generally Beetham, *supra* note 34.

47. See generally *Id.*; see also Glasius, *supra* note 34.

48. Beetham, *supra* note 34, at 12.

49. Erica Frantz & Andrea Kendall-Taylor, *The Evolution of Autocracy: Why Authoritarianism Is Becoming More Formidable*, 59 SURVIVAL 57, 60 (2017).

50. *Id.* at 60.

51. Glasius, *supra* note 34, at 517.

52. Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 450 (2007).

so far as to define them as nonlegitimate players in the country's affairs."<sup>53</sup> When suppression of opposition is institutionalized, an "authoritarian mode of governing" turns into "an authoritarian regime."<sup>54</sup> I now turn to the kind of measures that authoritarian leaders and groups employ to suppress opposition and eliminate accountability.

*Authoritarianism and the erosion of the rule of law*

Analysts identify three key institutions that authoritarians tend to target in order to consolidate unaccountable power: (1) judicial independence, which entails the institutional authority to review government acts for their consistency with basic rights and other constitutional rules; (2) freedom of expression, especially freedom of the press; and (3) freedom to assemble and organize, not just to contest elections, but to influence government and hold it accountable through civil society organizations.

The convergence of the rule of law on these three elements is noteworthy. Beetham, for example, declares that authoritarians can institutionalize the suppression of opposition by restricting freedom of expression (including that of the press) and freedom of association (within civil society), and by subordinating the courts to the executive.<sup>55</sup> As examples of sabotaging accountability, Glasius refers to restraints placed on journalists and NGOs.<sup>56</sup> Müller notes that populist authoritarians remake the state to enlarge and entrench their power, by exerting control over courts, intimidating or silencing critical press, and condemning or suppressing NGOs and other civil society groups that criticize the regime.<sup>57</sup> Mudde and Rovira Kaltwasser similarly point out that "[a]mong the most targeted institutions are the judiciary and the media."<sup>58</sup>

Krieger argues along the same lines, that populist governments often seek to shrink the power of the courts to act as an independent check, try to limit the freedom of the press, and "oppose civil society and tend to reject participatory processes of decision-making."<sup>59</sup> Scheppele assesses a particular kind of authoritarian, the "autocratic legalist," who uses democratic processes and legal forms to dismantle or remove the rules, institutions, or actors that "check his actions" or "hold him to account." She

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53. Beetham, *supra* note 34, at 13.

54. *Id.*

55. *Id.*

56. Glasius, *supra* note 34, at 528.

57. JAN-WERNER MÜLLER, IN THE AGE OF PERPLEXITY: RETHINKING THE WORLD WE KNEW. THE RISE AND RISE OF POPULISM? (OpenMind 2017).

58. MUDDE & KALTWASSER, *supra* note 34, at 81.

59. Krieger, *supra* note 43, at 976.



highlights as common elements of autocratic “reforms” the assertion of political control over the judiciary, the modification of electoral rules to guarantee legislative majorities or supermajorities, and reduction or elimination of independent media.<sup>60</sup> Huq and Ginsburg see “constitutional retrogression” as having eroded democracy and the rule of law in Latin America, Eastern Europe, and Asia. Prominent pathways to constitutional retrogression include the following: elimination of institutional checks, especially through independent courts; control of information and communication, including restrictions on journalists; and curtailing the activities of lawyers, NGOs, and private foundations.<sup>61</sup> In line with this striking consensus on the key targets of authoritarian policies, the analysis below focuses on recent trends in suppressing judicial independence, freedom of the press and expression, and the freedom of civil society to organize and participate in public life.

#### AUTHORITARIAN ASSAULTS ON THE RULE OF LAW

Before turning to the specific institutions and freedoms targeted by authoritarians, it might be useful to paint a broad picture of global trends in democracy and the rule of law. The most recent Freedom House report, *Freedom in the World 2021*, raises numerous alarms. The report warns that in 2020, “democracy’s defenders sustained heavy new losses in their struggle against authoritarian foes, shifting the international balance in favor of tyranny.”<sup>62</sup> The report notes that 2020 “marked the fifteenth consecutive year of decline in global freedom and that countries experiencing deterioration outnumbered those with improvements by the largest margin recorded since the negative trend began in 2006.”<sup>63</sup>

Directly relevant for this essay’s purposes, the global average for Freedom House’s rule of law score has also steadily declined over the past dozen years, as shown in Figure 1.<sup>64</sup> The figure reports the global average of

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60. Kim L. Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549 (2018).

61. Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 130-35 (2018).

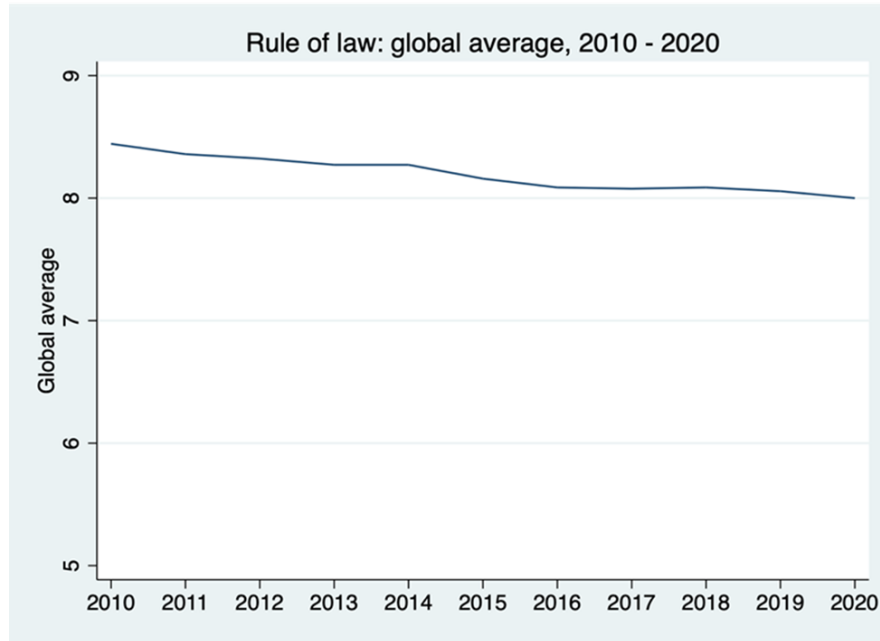
62. Sarah Repucci & Amy Slipowitz, *Freedom in the World 2021: Democracy Under Siege*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege> (last visited Mar. 29, 2022).

63. *Id.*

64. The Freedom House “Rule of Law” measure is a 16-point scale derived from questions about judicial independence; due process; protection from illegitimate use of force, including war and insurgencies; and equal treatment for all members of society. MICHAEL J. ABRAMOWITZ, FREEDOM HOUSE, *FREEDOM IN THE WORLD 2018: DEMOCRACY IN CRISIS 3* (2018), [https://freedomhouse.org/sites/default/files/2020-02/FH\\_FIW\\_Report\\_2018\\_Final.pdf](https://freedomhouse.org/sites/default/files/2020-02/FH_FIW_Report_2018_Final.pdf).

national rule of law scores. Given that some countries have maintained high levels of the rule of law and others have shown low levels for many years, the decline in the global average is striking. The rule of law indicator assesses the domestic rule of law, but as I argued above, domestic rule of law and international rule of law are directly linked by common limits on government power. The following sections address the more specific components of the rule of law.

Figure 1



### *Judicial independence*

Authoritarians seek to weaken or eliminate institutions and mechanisms that could check their power or hold them accountable. As discussed above, students of authoritarian politics consistently identify the courts as one of the first institutions targeted by authoritarians and would-be authoritarians. Independent courts can check executive power, especially in the post-war period when judicial review has diffused globally. Judicial review entails the authority to evaluate state acts for their compatibility with a constitution or a charter of rights and to nullify acts that are found incompatible. By about

2010, the number of countries with formal judicial review had reached 160.<sup>65</sup> Authoritarians seek to subordinate and control the courts. Authoritarian leaders can pursue various means of diminishing judicial independence, from court packing (appointing loyalists to the bench), to purging judges, or intimidating judges through public denunciations.

*Freedoms of the press and of expression*

The capacity of the public to hold government accountable depends on its ability to know what government actors are doing, which in turn requires that societal actors are able to report on, discuss, and criticize what political officials do. Citizens must be free to share what they know and to express disapproval. For that, the press, including broadcast and digital media, must be able to investigate and report on government policies, as well as on misdeeds or abuse of authority by officials. Freedom of expression and freedom of the press are therefore crucial bulwarks of democracy. And, as reported above, this is why students of authoritarianism have identified suppression of those freedoms as hallmarks of authoritarian politics.

Freedom House monitors restrictions on press freedoms around the world. In its 2017 report on press freedom, Freedom House declared, “[g]lobal press freedom declined to its lowest point in thirteen years in 2016 amid unprecedented threats to journalists and media outlets in major democracies and new moves by authoritarian states to control the media, including beyond their borders.”<sup>66</sup> In its latest assessment, Freedom House concludes that “media freedom has been deteriorating around the world over the past decade, with new forms of repression taking hold in open societies and authoritarian states alike.”<sup>67</sup>

Finally, for democracy to function, ordinary citizens must have the freedom to express their views, even, or especially, when these views are critical of the government. Over the past decade, freedom of expression has also suffered in an expanding list of countries. According to Freedom House data, erosion of freedom of expression and belief has been significant enough

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65. Table compiled from Coppedge et al., V-DEM VARIETIES OF DEMOCRACY, CODEBOOK 44 (March 2021) [hereinafter CODEBOOK]; see also Coppedge et al., V-DEM COUNTRY-YEAR/COUNTRY-DATE DATA (2021) [hereinafter DATE DATA].

66. Michael J. Abramowitz, *Freedom of the Press 2017: Press Freedom's Dark Horizon*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2017/press-freedoms-dark-horizon> (last visited Mar. 29, 2022).

67. Sarah Repucci, *Freedom and the Media 2019: Media Freedom: A Downward Spiral*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral> (last visited Mar. 29, 2022).

in some states to reduce the global average during the period 2012 to 2020.<sup>68</sup> Moreover, about half of the states in the world experienced a decline in Freedom of expression and belief during that period.<sup>69</sup>

### *Civil society and NGOs*

Authoritarians employ various means of stifling dissent and suppressing groups that might expose their abuses and thus motivate opposition. At the broader level, they restrict the ability of civil society actors to organize and engage in political activity. The number of states in which government has expanded its control over the ability of CSOs to participate in public life has risen dramatically in recent years. Krieger has analyzed this trend as a potential erosion of international legal norms: “On the bases of their antagonistic anti-establishment stance and their holistic identity politics, populist governments share the goal of restricting NGO activity as well as the tendency to resist the spread of global norms through civil society.”<sup>70</sup> More specifically, the authoritarian effort to reduce or eliminate the ability of civil society groups to hold government accountable has taken the form of policies that choke off international sources of financial support for NGOs, especially human rights NGOs.<sup>71</sup> Restrictions on foreign funding of pro-democracy NGOs started in Russia and China in the early 2000s.<sup>72</sup> This practice then spread. One study identified 39 out of 98 countries that had enacted restrictions on foreign funding of NGOs and 12 that prohibited it.<sup>73</sup>

### MEASURING THE UPTURN IN AUTHORITARIANISM

The individual indicators explored so far paint a picture of the breadth and diversity of the authoritarian resurgence. States of all types, and from all regions of the world, have enacted at least some parts of the authoritarian script. That script involves suppressing or eliminating potential means of exposing, criticizing, or opposing government actions. Of course, some countries might experience a decline in one or two of the indicators of authoritarian practices but hold steady or even improve in others. Have some

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68. See generally Michael J. Abramowitz, *Freedom in the World*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world> (last visited Mar. 29, 2022).

69. *Id.*

70. Krieger, *supra* note 43, at 990.

71. Krieger, *supra* note 43, at 976; Huq & Ginsburg, *supra* note 61, at 50.

72. Thomas Carothers, *The Backlash Against Democracy Promotion*, 85 FOREIGN AFF. 55, 57 (2006).

73. Darin Christensen & Jeremy Weinstein, *Defunding Dissent: Restrictions on Aid to NGOs*, 24 J. DEMOCRACY 77, 80 (2013).

states, in contrast, adopted the authoritarian playbook more completely? The preceding sections explored multiple indicators. This section seeks to offer a comprehensive measure of the spread of authoritarian practices. The indicators are produced by the Varieties of Democracy project.<sup>74</sup>

Table 1: Authoritarian strategies, V-Dem indicators

Authoritarian strategy	Indicator
Undermine judicial independence	Government attacks on the judiciary (v2jupoatck) Court packing (v2jupack)
Curtail freedom of expression	Freedom of discussion (average of v2cldiscm (men) and v2cldiscw (women)) Government censorship (v2mecenefm)
Constrain civil society	CSO entry and exit (v2cseeorgs) CSO repression (v2csreprss)

Note: V-Dem variable names in parentheses.

The following table lists the states that showed increases in at least five of the six indicators of authoritarianism. The table also indicates the direction of change in each specific indicator. To be clear, the table does not display a measure of the level of authoritarianism; it indicates movement toward increasing authoritarian practices. Some established democracies appear on the list (Brazil, India, the United States) not because they have become authoritarian or autocratic like other states on the list (like Burundi or Nicaragua). The table simply displays the worrisome indicators of shifts in an authoritarian direction.

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74. CODEBOOK, *supra* note 65; *see also* DATE DATA, *supra* note 65.

Table 2: Countries showing an increase in at least 5 of the 6 indicators of authoritarianism, 2010 – 2020

18 countries	Number of indicators showing increased authoritarianism	Individual indicators					
		Attacks on the judiciary	Court packing	Restrictions on freedom of discussion	Media censorship	Restrictions on CSO entry	CSO repression
Bangladesh	6	↑	↑	↑	↑	↑	↑
Brazil	6	↑	↑	↑	↑	↑	↑
Burundi	6	↑	↑	↑	↑	↑	↑
Czech Republic	6	↑	↑	↑	↑	↑	↑
Hungary	6	↑	↑	↑	↑	↑	↑
Mauritius	6	↑	↑	↑	↑	↑	↑
Poland	6	↑	↑	↑	↑	↑	↑
Turkey	6	↑	↑	↑	↑	↑	↑
Yemen	6	↑	↑	↑	↑	↑	↑
Benin	5	↓	↑	↑	↑	↑	↑
India	5	↓	↑	↑	↑	↑	↑
Lithuania	5	↓	↑	↑	↑	↑	↑
Nicaragua	5	↓	↓	↑	↑	↑	↑
South Africa	5	↓	↑	↑	↑	↑	↑
Suriname	5	↑	↑	↑	↑	↓	↑
Tanzania	5	↑	↓	↑	↑	↑	↑
United States of America	5	↑	↑	↑	↑	↓	↑
Zambia	5	↑	↓	↑	↑	↑	↑
Total countries with increase in specific authoritarian practice:		13	15	18	18	16	18

CSO = civil society organizations

Table 3, on the other hand, reports (in the middle column) declines in the Liberal Democracy Index over the period 2010-2020. The Liberal Democracy Index measures “the extent to which the ideal of liberal democracy is achieved.”<sup>75</sup> In other words, declines indicate the *extent* of the shift away from liberal democracy. The scale runs from 0 to 1; the scores at the top of the list therefore represent substantial moves away from democracy. The table also displays the direction of change in the six

75. CODEBOOK, *supra* note 65.

indicators of authoritarianism. Not surprisingly, the countries listed (except Mali) show shifts toward authoritarian practices in more than half of the indicators, that is, in at least four of them. Near the top of the list are two European countries that have steadily slipped toward authoritarian one-party rule (Poland and Hungary). Another pair of countries, Brazil and the United States, show the effects of elected presidents with strong authoritarian tendencies (Bolsonaro and Trump). India, long seen as an established democracy, has also moved toward increased authoritarianism. Some of the countries near the bottom of the list (for instance, Yemen and Albania) show a decline in their democracy scores from already low levels, as well as increasing authoritarian practices.

Table 3: 25 countries showing the greatest decline in the Liberal Democracy Index, 2010 - 2020

Country	Decline in Liberal Democracy Index	Number of indicators showing increased authoritarianism
Poland	-0.341	6
South Africa	-0.321	5
Hungary	-0.316	6
Turkey	-0.286	6
Brazil	-0.275	6
Serbia	-0.267	4
Benin	-0.257	5
India	-0.228	5
Mauritius	-0.226	6
Bolivia	-0.181	4
Zambia	-0.161	5
Nicaragua	-0.151	5
Comoros	-0.147	4
United States of America	-0.127	5
Mali	-0.109	3
Czech Republic	-0.107	6
Burundi	-0.107	6
Croatia	-0.089	4
Yemen	-0.088	6
Bulgaria	-0.088	4
Tanzania	-0.087	5
Bangladesh	-0.086	6
Greece	-0.077	4
Suriname	-0.064	5
Albania	-0.041	4

The data on increasing authoritarian practices and shifts away from democratic governance reinforce the need for active resistance to authoritarianism, not just in countries already affected by it, but also in historically democratic states.

#### CONCLUSIONS

I argued for a thick conception of international rule of law, grounded in legal limits on the powers of the state. This conception of the rule of law ties together both the domestic and international levels because it is both domestic constitutions and international treaties that establish limitations on state power, limitations derived from the dignity and freedom of each person. Authoritarian politics target such limitations as authoritarians seek to weaken or eliminate independent mechanisms for holding them accountable. Research on authoritarianism converges on three such mechanisms that are regularly suppressed or destroyed by authoritarian regimes: judicial independence, freedom of expression and of the press, and the freedom of association and organization in civil society.

The data—with two indicators for each accountability mechanism—demonstrates that the number of states that show erosion has increased dramatically in recent years. The undermining of accountability mechanisms has occurred in the well-known “backsliders” (Hungary, Poland, Turkey, India, Philippines, Brazil), but also in some more established democracies (the United States). Entrenched authoritarians have also strengthened their hold (Azerbaijan, Burundi, Cambodia, Egypt, Iran). In itself, the authoritarian dismantling of limitations on state power constitutes an erosion of modern international rule of law.

But authoritarian resurgence should also be seen as a threat to a more narrowly defined international rule of law. For example, Krieger and Nolte conceptualize international rule of law as the interconnected set of international legal rules regulating international affairs in the decades after 1990.<sup>76</sup> They ask whether “contemporary forms of violations [of international law] are unusual in the sense that they call basic rules, or even the functioning of the system itself, into question.”<sup>77</sup> Even on the basis of this more specific, thin definition of IROL, in the post-1990 international legal order, the implications of authoritarian resurgence are worrisome.

National support for, and compliance with, international legal rules depend on domestic compliance constituencies, whether in trade, investment, the environment, or with respect to threats to peace and to human rights.

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76. Krieger & Nolte, *supra* note 13, at 5-6.

77. *Id.* at 9.



Compliance constituencies are actors and groups that support a state's continued participation in and general compliance with international legal regimes. Such constituencies include firms that engage in international trade or investment and their workers. They include civil society organizations that favor international environmental protections, as well as firms that invest in "green" technologies and markets. They include NGOs that lobby and litigate on behalf of human rights.

Authoritarian practices degrade the ability of domestic compliance constituencies to seek to change government policies. As political accountability erodes, authoritarian governments have more leeway to disregard or undermine international legal structures without facing domestic political consequences.

In addition, authoritarian regimes are less likely than democracies to fully participate in, and comply with, the rules of international institutions. At the most fundamental level, authoritarian resurgence raises concerns about international peace and stability. One of the clearest and most stable research findings that concerns the "democratic peace" finds that democracies do not fight each other.<sup>78</sup> As the proportion of democracies in the world declines, the potential for armed conflict between other types of dyads (democracy-autocracy, autocracy-autocracy) increases. Research also shows international organizations composed mostly of democracies contribute significantly more to peaceful conflict resolution than do organizations composed of fewer democracies.<sup>79</sup> Rising authoritarianism implies a declining proportion of democracies in international organizations, which may diminish the capacity of these organizations to promote conflict resolution. Finally, there is also evidence that authoritarian regimes are generally less inclined than democracies to participate in international institutions which they are both more likely to withdraw from and less likely to join.<sup>80</sup> Along multiple dimensions, resurgent authoritarianism will erode international rule of law.

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78. J. O'Neal & B. Russett, *The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations, 1885-1992*, 52 *WORLD POL.* 1 (1999); D.S. BENNETT & A.C. STAM, *THE BEHAVIORAL ORIGINS OF WAR*, ch. 5 (2004).

79. Jon Pevehouse & Bruce Russett, *Democratic International Governmental Organizations Promote Peace*, 60 *INT'L ORG.* 969 (2006); Andreas Hasenclever & Brigitte Weiffen, *International Institutions Are the Key: A New Perspective on the Democratic Peace*, 32 *REV. INT'L STUD.* 563 (2006).

80. Edward D. Mansfield & Jon C. Pevehouse, *Democratization and International Organizations*, 60 *INT'L ORG.* 137 (2006); Edward D. Mansfield & Jon C. Pevehouse, *Democratization and the Varieties of International Organizations*, 52 *J. CONFLICT RESOL.* 269 (2008).

# THE CHALLENGES OF TEACHING PRIVATE INTERNATIONAL LAW

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David P. Stewart\*

*In Honor of Bob Lutz*

1. THE DEFINITIONAL CHALLENGE .....	507
2. THE INSTRUCTIONAL CHALLENGE .....	509
3. CONFLICTS OR CHOICE OF LAW .....	511
4. INTERNATIONAL BUSINESS LAW .....	513
5. METHODS OF TRANSNATIONAL DISPUTE SETTLEMENT .....	514
<i>a. Litigation</i> .....	514
<i>b. Arbitration</i> .....	518
<i>c. Mediation</i> .....	519
<i>d. Online Dispute Settlement</i> .....	519
6. INSTITUTIONAL DEVELOPMENTS.....	519
<i>a. UNCITRAL</i> .....	520
<i>b. UNIDROIT</i> .....	520
<i>c. The Hague Conference</i> .....	521
<i>d. Regional Organizations</i> .....	523
7. GLOBAL GROWTH AND DEVELOPMENT .....	525

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## 8. CONCLUSION ..... 528

Some of the most difficult problems—and therefore some of the most rewarding careers for problem solvers—can be found at the intersection of different disciplines or fields of professional endeavor. That is as true in the law as it is in other professions. It is also where Bob Lutz has spent much of his long and distinguished career: exploring substantive and procedural problems that arise where public and private interests meet along the border between domestic and international law and preparing his students to work in that challenging environment.

Bob has had the good fortune to work in many different capacities including being a law clerk to a federal judge, an attorney in private practice and in the federal government, a litigator and an arbitrator, an author and an editor, a government advisor, a highly respected law professor, and an expert and delegate to international conferences and meetings.

It has been my privilege to work with Bob in various contexts over the years, including the ABA Section of International Law under his leadership and through his participation in the North American Free Trade Agreement (NAFTA) Advisory Committee on Private Commercial Dispute Resolution,<sup>1</sup> the State Department’s Advisory Committee on International Law, and his contributions to the preparation of the RESTATEMENT (FOURTH), FOREIGN RELATIONS LAW OF THE UNITED STATES.<sup>2</sup>

In Bob’s honor, I offer the following thoughts and suggestions about teaching private international law, a field to which he has made many contributions, and which, in many ways, exemplifies the challenges of teaching and practicing law at the intersection of the domestic and the international.

## 1. THE DEFINITIONAL CHALLENGE

The field of private international law (PIL) continues to struggle for a broadly accepted definition, refusing to be cabined precisely because it deals with emergent issues, both substantive and procedural, at the intersection of the domestic and international legal regimes and with both public and private law. It also continues to develop rapidly. In fact, some

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1. The so-called NAFTA 2022 Committee, about which Professor Lutz has written: *see* SELMA LUSSENBURG & ROBERT E. LUTZ, NAFTA ADVISORY COMMITTEE ON PRIVATE INTERNATIONAL DISPUTES: A 15-YEAR RETROSPECTIVE (2022).

2. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 2018).

question whether PIL qualifies as a discrete subject or “field,” as opposed to a shifting compilation of practical and legal challenges encountered in international practice, which, at best, may require a particular methodological approach. Without engaging in that debate, I would note that on some elements, there is a measure of agreement.

In its loosest, if not most common, conception, PIL encompasses the legal rules that apply in private transnational transactions—and particularly to the resolution of disputes arising from such transactions—where the parties, facts, or circumstances are connected with more than one domestic legal system.<sup>3</sup> Typically, the main question for a court is likely to be “what law applies to this situation?”

One might think, for example, of a cross-border commercial transaction between private parties in different countries, say a contract for the manufacture and sale of goods and the provision of services, where a dispute has arisen about performance of the contractual obligations. If either of the parties chooses to litigate the issues, the relevant rules will be typically determined under the domestic law that applies in the court resolving the dispute.

It could be, of course, that the conflicts rules of that jurisdiction will direct the court to look to and apply a relevant foreign law.<sup>4</sup> It could also be that the parties to the contract have agreed on which law will govern; if so, the question would be whether their choice of law is valid and enforceable in the jurisdiction considering the dispute. A separate but related inquiry may concern how the court is to determine the content and meaning of that foreign law and to apply it to the parties’ dispute.

Another possibility is that each of the parties to the dispute has chosen to litigate in their respective domestic courts, resulting in “parallel” litigation. In cases with significant connections to more than one country, the relevant rules of domestic law will determine whether the courts of that country will have jurisdiction to address the dispute, whether or when one court might defer to the other jurisdiction, and where the eventual judgment(s) might, or might not, be recognized and enforced. Those issues are often complementary and are commonly designated as conflicts of jurisdiction and enforcement of judgments.

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3. See generally CHESHIRE ET AL., PRIVATE INTERNATIONAL LAW (Paul Torremans et al. eds., 15th ed. 2017). Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 1 (AM. LAW INST. 1971).

4. In some situations, the conflicts rules of the second jurisdiction may refer the court back to its own law, in a process known as *renvoi*. There may be mandatory rules of domestic law that apply no matter what the private parties have agreed, or that prevent application of the rules they have chosen.

As the world has become more interconnected and cross-border activity is more common, such questions arise with increasing frequency. While they often concern commercial contracts or other business transactions and arrangements, they may also involve issues of tort, consumer or family law, as well as an increasing amount of issues of privacy and data protection, insolvency or succession, intellectual property, and even statutory claims. The common element is the cross-border aspect of the transaction or controversy. Yet, in many respects, the relevant rules remain largely domestic and diverse, and often conflicting, which presents challenges for courts and private parties alike.

Since uniformity and consistency can provide a measure of certainty for the transacting parties and promote transactional clarity and efficiency, regional and international harmonization is generally viewed as a desirable goal and, in fact, has been achieved in a number of areas. Within the European Union, for example, private international law issues are increasingly addressed by the EU as part of its efforts to regulate the internal market and establish a “European area of justice.”<sup>5</sup> For EU member states, the scope of private international law now includes a substantial corpus of EU regulations, directives, and decisional law.

A growing body of international instruments, including treaties and conventions, also contributes to this harmonization effort at the global level, as discussed below. The academic challenge is how to find the best way to introduce students to these issues and developments and to provide them the necessary tools to effectively deal with international private law problems in practice.

## 2. THE INSTRUCTIONAL CHALLENGE

In a number of countries around the world, private international law is taught as a discreet subject, often as a required course of study. One reason is that, particularly in civil law systems, the relevant rules are likely to have been codified by the legislature and are typically clearer in their expression and more certain in their application. In many countries, the national legislature has adopted a broad (even comprehensive) national code on private international law, while in others, the approach is less centralized.

By contrast, in common law jurisdictions, the rules are more likely to be found in judicially elaborated principles, rather than in legislation. Thus, their articulation and application are more fact-dependent and challenging

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5. Cf. GEERT VAN CALSTER, *EUROPEAN PRIVATE INTERNATIONAL LAW* 17 (2d ed. 2016).

to describe in the abstract.<sup>6</sup> In the United States, much of the relevant law is found in judicial decisions and is actually a matter of state, rather than federal, law.<sup>7</sup>

Globally, however, legal systems are increasingly engaged in “domesticating” internationally agreed rules and mechanisms—as reflected, for example, in international and regional instruments such as treaties and conventions, as well as in evolving principles of customary international law and practice.

Still, private international law is infrequently taught as a discrete course in the U.S. legal curriculum, even though practitioners are increasingly likely to encounter PIL issues in a surprisingly wide range of practical contexts. Lacking an appreciation of its breadth, substance, and methodology, U.S.-trained lawyers may well find themselves at a disadvantage in dealing with foreign lawyers who are comparatively well versed in the subject. The challenge for legal educators is determining how to introduce their students to this field and to provide them with a sufficient understanding of the relevant substance and methodology, as well as the opportunity to develop the appropriate analytical and critical skills.

Several approaches to the subject can be considered: from the perspective of the rules of conflicts or choice of law, as a component of a broader consideration of transactional law, as part of the available mechanisms for international dispute settlement, by focusing on the current work of the various international institutions working on PIL issues, or in the broader context of its contributions to global approach of sustainable development.

Each of the approaches has its advantages and drawbacks. None are right or wrong. Nor are they mutually exclusive. The instructional goal should be to acquaint students with the field, in its substantive, comparative, and methodological dimensions, so they are prepared to function effectively as lawyers in what will inevitably be an increasingly transnational practice.

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6. For this reason, some commentators differentiate between private international law (referring to domestic law relevant to the particular cross-border transaction or dispute) and international private law (meaning applicable international treaties, principles, and practices). Since the international rules must generally be incorporated or “domesticated” in order to apply in a national court, the distinction does not seem particularly helpful.

7. Efforts to harmonize certain aspects of the law in the United States have, of course, been undertaken. One example is the Uniform Commercial Code, which is a product of two private entities—the Uniform Law Commission and the American Law Institute. While adopted in all fifty U.S. states, it has been modified by state legislatures in various ways and consequently is not precisely “uniform.” Neither is it a complete “code.”

### 3. CONFLICTS OR CHOICE OF LAW

For many academics, and some practitioners, the core of private international law lies in the specific rules by which domestic courts resolve conflicts-of-law issues as they arise in cross-border disputes. The focus of this approach will normally be on the rules and principles of the relevant domestic legal system, and the international issues' aspects are typically addressed as one element in that system.<sup>8</sup>

The scope and content of such courses can vary significantly. Some focus primarily on the rules by which courts decide conflicts-of-law issues under domestic law, giving relatively little attention to the international dimension and the parties' autonomy to choose the applicable law, i.e., to contract out of otherwise applicable domestic rules, to consent to having their disputes adjudicated in a specific jurisdictional venue (choice of forum), or to consent to the specific rules regarding enforcement of foreign judgments (and perhaps arbitral awards).<sup>9</sup>

Increasingly, however, national courts will give effect to the parties' clearly expressed agreements on such issues, except where doing so would violate some fundamental norm of applicable domestic law, generally characterized as a matter of public policy (*ordre public*) or mandatory norms (*lois de police*), from which no derogation is permitted. By clear agreement, the parties can have a reliable understanding about the law under which their dispute will be resolved, regardless of the forum. However, not all systems recognize the validity of such agreements to the same extent.

A comparative approach to conflicts of law issues offers the possibility of acquainting students with the differences in how foreign-trained lawyers think about such issues—for instance, why those trained in civil law systems may take an approach that seems so different from the one a U.S.-

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8. Many country-specific analyses are available. *See, e.g.*, XIAOHONG LIU ET AL., CHINESE PRIVATE INTERNATIONAL LAW (2021); ADRIANA DREYZIN DE KLOR, PRIVATE INTERNATIONAL LAW IN ARGENTINA (2021); KAZUAKI NISJOKA ET AL., JAPANESE PRIVATE INTERNATIONAL LAW (Anselmo Reyes et al. eds., 2021); STELLINA JOLLY ET AL., INDIAN PRIVATE INTERNATIONAL LAW (Anselmo Reyes et al. eds., 2021); STEPHANE-LAUREN TEXTIER, DROIT INTERNATIONAL PRIVÉ LEXIFICHE: RÈGLES GÉNÉRALES (4th ed., 2022); CHUKWUMA SAMUEL ADESINA OKOLI ET AL., PRIVATE INTERNATIONAL LAW IN NIGERIA (2020). *See generally* A GUIDE TO GLOBAL PRIVATE INTERNATIONAL LAW (Paul Beaumont & Jayne Holliday eds., 2022).

9. *See generally* DANIEL GIRSBERGER ET AL., CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS (Jonathan Harris QC et al. eds., 2021); Trevor Hartley, *Basic Principles of Jurisdiction in Private International Law: The European Union, The United States and England*, 71 INT'L & COMP. L.Q. 226 (2021); ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD (Cambridge Univ. Press, 2007).

trained lawyer would likely have. However, since different legal systems approach these domestic issues differently (and in some systems, such as the United States, there may not even be internal uniformity), the undertaking can prove difficult.

A more inclusive approach would open the possibility of acquainting students with the various regional and international efforts to *harmonize* the relevant conflicts rules (whether by treaty or soft law instruments) since for many experts, adoption of standardized conflicts of law rules lies at the heart of the PIL project.<sup>10</sup> For instance, within the EU, harmonized conflict-of-law rules for both contractual and non-contractual obligations are provided in the Rome I and II Regulations.<sup>11</sup> Consideration could also be given to various soft law instruments in this area, such as the 2015 Hague Principles on Choice of Law in International Commercial Contracts,<sup>12</sup> the 2016 UNIDROIT Principles of International Commercial Contracts<sup>13</sup> and the OAS Guide on the Law Applicable to International Commercial Contracts in the Americas.<sup>14</sup>

In the United States, the existence of the federal system can present additional challenges since state, rather than federal, law governs many PIL issues. For instance, no single federal conflict or choice of law regime exists, much less a comprehensive commercial code or set of rules.<sup>15</sup> Questions of jurisdiction in civil and commercial cases involving interstate and foreign commerce have long engaged the U.S. Supreme Court, mostly from a constitutional law perspective, but they remain fact-dependent, and the recognition and enforcement of the judgments of foreign courts in civil

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10. *See generally*, SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (2014); PETER HAY ET AL., CONFLICT OF LAWS, PRIVATE INTERNATIONAL LAW, CASES AND MATERIALS (16th ed. 2021).

11. Regulation (EC) No 593/2008 on the law applicable to contractual obligations, 2008 O.J. (L177) 6 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, 2007 O.J. (L 199) 40.

12. HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRINCIPLES ON CHOICE OF LAW IN INT'L COMM. CONTRACTS (2015).

13. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016 (INT'L INST. FOR THE UNIFICATION OF PRIVATE L., 2016) [hereinafter UNIDROIT PRINCIPLES]. *See also* Brooke Marshall, *The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law*, 66 AM. J. COMP. L. 175 (2018).

14. *See* R. STELLA CORREA PALACIO ET. AL., GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS (Inter-American Juridical Committee 2019). *See also* Inter-American Convention on the Law Applicable to Int'l Contracts, MX-U.S., March 17, 1994, O.A.S.T.S. No. 78.

15. This aspect of the federal system often poses challenges for U.S. ratification of PIL treaties and conventions, particularly when the result would be to "federalize" matters long regulated by the individual states.



and commercial matters are still primarily a matter of state law.<sup>16</sup> This distribution of authority and competence within the federal system has sometimes made ratification of PIL treaties challenging in the United States.<sup>17</sup>

#### 4. INTERNATIONAL BUSINESS LAW

The principles, instruments, and practices of private international law may also be addressed as part of a broader course on international business law, an area sometimes characterized as international business transactions (IBT) or transnational law. Such courses are typically practice-oriented and aim at introducing students to the substantive and procedural issues they are likely to encounter in the course of representing clients doing business in a globalizing world.<sup>18</sup>

Since differences in national laws and procedures governing commercial transactions often create impediments to cross-border trade, IBT courses are likely to have a comparative dimension<sup>19</sup> and to introduce students to at least some PIL efforts at international harmonization of substantive rules (for instance, the 1980 UN Convention on the International Sale of Goods<sup>20</sup>), along with a wider range of domestic and international instruments addressing such issues as trade restrictions and remedies, financing, import-export restrictions, taxation, anti-competition law, and regulation of foreign investment, perhaps even intellectual property. Most will also devote attention to mechanisms for dispute settlement within the existing international litigation and arbitration regimes.

In courses of such breadth, however, the challenge is to find a sufficient opportunity to acquaint the participants with the issues,

16. See, e.g., *Walden v. Fiore*, 134 S. Ct. 1115 (2014). See also, e.g., *J. McIntyre Machinery, Ltd. v. Nicastrò*, 131 S.Ct. 2780 (2011).

17. Wholly apart from the substance, U.S. ratification of PIL treaties can be challenging since states may not welcome federal “intrusion” into areas traditionally falling within state competence. See generally Paul R. Dubinsky, *Private International Law Treaties and Federalism: Can the United States Lead?*, 54 TEX. INT’L L.J. 39 (2018). See also Charlotte Ku et al., *Even Some International Law Is Local: Implementation of Treaties Through Subnational Mechanisms*, 60 VA. J. INT’L L. 101 (2019).

18. See, e.g., Robert E. Lutz, *Comparative Observations about Transnational Legal Education and Legal Scholarship*, 46 INT’L L. 625 (2012).

19. For general background, see CHRISTIAN TWIGG-FLESNER, FOUNDATIONS OF INTERNATIONAL COMMERCIAL LAW (2019). See also U.N. COMM’N ON INT’L TRADE L., UNCITRAL, HCCH AND UNIDROIT LEGAL GUIDE TO UNIFORM INSTRUMENTS IN THE AREA OF INT’L COMM. CONTRACTS, WITH A FOCUS ON SALES, U.N. Sales No. E.21.V.3 (2021).

20. See United Nations Convention on Contracts for the International Sale of Goods, 1489 U.N.T.S. 3 (Apr. 11, 1980).

instruments, and methodology of private international law. A common way to address this challenge is through case studies or practical exercises, where the parties to the transaction come from different legal systems or traditions.

## 5. METHODS OF TRANSNATIONAL DISPUTE SETTLEMENT

From a practical perspective, one of the most consequential decisions facing counsel for parties in cross-border transnational relationships might be determining where disputes arising from such relationship can be resolved. In addition to litigation in domestic courts, or in one of the international commercial courts, the alternatives may include arbitration, conciliation, and mediation. Each has advantages and drawbacks. In each situation, the choice can be made by contract, long before any possible dispute has arisen; in others, it can only be made afterward. In either event, an understanding of the options—and of the relevant PIL instruments—is essential.<sup>21</sup>

### *a. Litigation*

The default preference of contracting parties and their lawyers may well be to litigate such disputes in their own respective domestic courts under their own domestic law.<sup>22</sup> When neither is willing to submit to the other's home courts, they may be able to agree on recourse to the courts of a third country. In all cases, counsel must consider several important issues: whether the chosen court has, and will exercise, jurisdiction over the particular dispute, what law that court is likely to apply, where the successful party might be able to enforce its judgment effectively, and to what extent the parties may effectively address those issues in their contractual agreement. Many aspects of these issues have been addressed in PIL instruments.

Jurisdiction. The question of jurisdiction can be difficult, since each legal system sets its own rules, and as a general matter, private parties cannot, by contract, enable a domestic court to exercise jurisdiction which it

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21. For an overview of the issues arising under these instruments in domestic litigation, see DAVID P. STEWART ET AL., *RISTAU'S INTERNATIONAL JUDICIAL ASSISTANCE: A PRACTITIONER'S GUIDE TO INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION* (2d ed. Oxford Univ. Press 2021).

22. See generally TREVOR C. HARTLEY, *INTERNATIONAL COMMERCIAL LITIGATION: TEXT, CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW* (3d ed. 2020); GEERT VAN CALSTER, *EUROPEAN PRIVATE INTERNATIONAL LAW: COMMERCIAL LITIGATION IN THE EU* (3d ed. 2021); JOHN MERRILLS ET AL., *MERRILLS INTERNATIONAL DISPUTE SETTLEMENT* (7th ed. 2022).

does not otherwise have under its own law. Lack of certainty on this point can make the issue a challenging one to resolve in advance. The 2005 Hague Convention on Choice of Court Agreements<sup>23</sup> represents an effort to oblige the chosen domestic court to respect the parties' jurisdictional choice (to the exclusion of other courts) and to give effect to the resulting judgments, subject to various conditions and requirements.

Choice of Law. As indicated above, the effectiveness of a contractual stipulation of the relevant law has also been addressed in a number of PIL soft law instruments, such as the 2015 Hague Principles on Choice of Law in International Commercial Contracts, the 2016 UNIDROIT Principles of International Commercial Contracts and the OAS Guide on the Law Applicable to International Commercial Contracts in the Americas,<sup>24</sup> all of which reflect an increasing acceptance of the principle of party autonomy in this area.

Enforcement of Judgments. Knowing where the successful party to the litigation might be able to enforce a judgment in its favor is of clear practical importance and needs to be considered by counsel at the outset. In some instances, countries have concluded bilateral agreements with their neighbors incorporating such obligations (for example in judicial assistance treaties); within the EU, the subject is governed by regulation.<sup>25</sup> Globally, the 2019 Hague "Judgments Convention" aims at facilitating "the circulation of judgments" in civil and commercial disputes by establishing conditions for recognition and enforcement of judgments rendered by the courts in contracting parties, together with grounds for their refusal.<sup>26</sup>

These three sets of issues (jurisdiction, applicable law, and enforcement of judgments) are, of course, not the only areas in which PIL efforts have been undertaken to reduce the procedural obstacles parties may

23. See Convention on Choice of Court Agreements, June 30, 2005, HCCH, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>. See RONALD A. BRAND ET AL., THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENT: COMMENTARY AND DOCUMENTS (2008), for background.

24. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 12. See also UNIDROIT PRINCIPLES, *supra* note 13. See also Inter-American Convention on the Law Applicable to Int'l Contracts, *supra* note 14.

25. Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Comm. Matters, 2012 O.J. (L. 351) 1, 32.

26. See Convention on the Recognition and the Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, HCCH, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>. See also Status Table: Contracting Parties to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>.

encounter when litigating disputes with transnational dimensions. Consider the following.

Service. Different legal systems have different requirements, and rely on different methods, for notifying a litigant's opposing party of developments in the course of litigation, starting with formal notice that the proceeding has begun. U.S. practitioners are sometimes surprised to learn that, in many foreign legal systems, service of process can only be made by a government official and only by specified methods, not including personal service. Failure to observe local requirements may preclude enforcement of any resulting judgment.

To help bridge the differences, the 1965 Hague Service Convention<sup>27</sup> created an international framework for serving process outside of a home State. It applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad,"<sup>28</sup> subject to some exceptions. The United States is a party, and as a matter of U.S. law, when the Convention applies, it is both mandatory and exclusive; that is, service must be made through the channels it authorizes.<sup>29</sup>

Within the OAS, the Inter-American Convention on Letters Rogatory provides analogous methods for service of process, summons or subpoenas abroad, provided that the acts are not "acts of compulsion."<sup>30</sup> These issues have also been addressed in the Principles of Transnational Civil Procedure adopted by the American Law Institute and UNIDROIT in 2004 and subsequently modified by the European Law Institute and UNIDROIT in regard to "the particularities of specific legal systems."<sup>31</sup>

Evidence. Similarly, different legal systems have different rules for obtaining evidence in preparation for trial, and American students and

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27. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, HCCH, <https://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf>. [hereinafter Hague Service Convention].

28. *Id.* art. 1.

29. See *Soci t  Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522 (1987). The Convention does not apply, however, where the address of the person being served is not known or where service does not cross borders, or in criminal, penal, or administrative matters.

30. See Inter-American Convention on Letters Rogatory, arts. 2a, 3, Jan. 30, 1975, O.A.S.T.S. No. 43. See also Additional Protocol to the Inter American Convention on Letters Rogatory, May 8, 1979, O.A.S.T.S. No. 56.

31. See Int'l Institute for the Unification of Private Law, *ALI/UNIDROIT Principles of Transnational Civil Procedure*, UNIDROIT <https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles/> (last visited Nov. 2, 2022); and see Int'l Institute for the Unification of Private Law, *ELI/UNIDROIT Rules*, UNIDROIT, <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules/> (last visited Nov. 2, 2022).

practitioners are often surprised to find that the kind of extensive party-directed pre-trial discovery typical in U.S. courts is impermissible in many foreign jurisdictions. The 1970 Hague Evidence Convention<sup>32</sup> was designed to help bridge these differences by establishing agreed mechanisms for asking foreign authorities to carry out requests in accordance with local law. Analogous arrangements have been established within the EU<sup>33</sup> and the OAS.<sup>34</sup>

Legalization. The purpose of the 1961 Hague Apostille Convention<sup>35</sup> is to simplify the process of authenticating public documents issued in one legal system so they can be given effect in another. Such documents include birth, death, marriage, and citizenship records, graduation diplomas, certificates of incorporation, patents, and judicial documents.<sup>36</sup> The Hague Apostille Section keeps a current list of authorities designated to issue apostilles in each State Party's jurisdiction.<sup>37</sup> An electronic apostille program (e-APP) was launched in 2006.

International Commercial Courts. As an alternative to litigation in foreign domestic courts, practitioners today need to consider the possibility of litigating their disputes in one of the international commercial courts that have recently been established. Some are specialized bodies, or chambers, within domestic legal systems and others are independent, but all seek to attract commercial disputes that would otherwise be submitted to domestic litigation or international commercial arbitration.<sup>38</sup>

32. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, HCCH, <https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf> [hereinafter Hague Evidence Convention].

33. See, e.g., Council Regulation 1206/2001, of 12 December 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, arts. 1, 2, 17, 2001 O.J. (L 174) 1, 24.

34. See Inter-American Convention on Taking Evidence Abroad, Jan. 30, 1975, O.A.S.T.S. No. 44. See also Additional Protocol to the Inter-American Convention on Taking Evidence Abroad, May 24, 1984, O.A.S.T.S. No. 65.

35. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 2884 U.N.T.S., 142 [hereinafter Apostille Convention].

36. In other words, documents from a court or tribunal, administrative documents, notarial acts, or official certificates. See *Outline – HCCH 1961 Apostille Convention*, HCCH (Oct. 5, 1961), <https://assets.hcch.net/docs/80d0e86f-7da8-46f8-8164-df046285bccd.pdf>.

37. *Id.*

38. See, e.g., *Overview of the SICCC*, THE SINGAPORE INT'L COM. COURT, <https://www.sicc.gov.sg/about-the-sicc/overview-of-the-sicc> (last visited Nov. 3, 2022); *A Brief Introduction of China International Commercial Court the China International Commercial Courts*, CHINA INT'L COM. COURT, <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (last visited Mar. 14, 2022). See also *About Us*, STANDING INT'L FORUM COM. COURTS, <https://sifocc.org/about-us/> (last visited Nov. 3, 2022); Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020).

*b. Arbitration*

Alternatively, parties to international transactions may decide to forego litigation in domestic courts altogether by agreeing to submit any disputes under their contract to international commercial arbitration. While they can create their own ad hoc tribunal, it is far more common today to choose institutional or “administered” arbitration, where an existing entity (such as the International Chamber of Commerce, the Permanent Court of Arbitration, or the London Court of International Arbitration) provides not only the rules but also administrative support and assistance for the arbitration.<sup>39</sup> Some entities (such as the Stockholm Chamber of Commerce or the Singapore International Arbitration Centre) specialize on a regional basis.<sup>40</sup>

The attraction of international commercial arbitration has been strengthened by the widespread adherence of states to international agreements requiring their courts to give effect to such choices, *inter alia*, by precluding domestic suits on the same issues and enforcing the resulting arbitral awards. Among these are the New York Convention and the Inter-American Convention on International Commercial Arbitration (Panama Convention).<sup>41</sup>

Where the issues arise out of contracts that are not between private parties but between States and foreign investors, they may be eligible for arbitration according to the provisions of specialized bilateral investment treaties (BITs)<sup>42</sup> or under the rules of the International Center for the Settlement of Investment Disputes (ICSID).<sup>43</sup>

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39. See *Arbitration Rules (2021)*, ICC Blog, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration> (last visited Nov. 3, 2022). See also *About Us*, PERMANENT COURT OF ARB, <https://pca-cpa.org/en/about/> (last visited Nov. 3, 2022). See also *LCIA*, LONDON COURT INT’L ARB., [www.lcia.org](http://www.lcia.org) (last visited Nov. 3, 2022).

40. See *About the SCC*, ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COM., <https://sccinstitute.com/about-the-scc/> (last visited Nov. 3, 2022); see also *About Us*, SINGAPORE INT’L ARBITRATION CENTRE, <https://siac.org.sg/about-us/about-us> (last visited Nov. 3, 2022); see also *China Int’l Econ. and Trade Arb. Com.*, CIEAC, [www.cietac.org](http://www.cietac.org) (last visited Nov. 3, 2022).

41. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter *Foreign Arbitral Awards Convention*].

42. See *Database of Bilateral Investment Treaties*, ICSID, <https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties> (last visited Nov. 3, 2022).

43. ICSID arbitration is governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) and specialized rules and regulations. See generally *International Centre for Settlement of Investment Disputes*, WORLD BANK GROUP, <https://icsid.worldbank.org> (last visited Nov. 3, 2022).

### c. Mediation

As a recently developed alternative to arbitration, international mediation of commercial disputes appears to be gaining in popularity, particularly with the adoption of the 2018 UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention),<sup>44</sup> which provides a legal framework for recognizing and enforcing international mediation agreements. Other relevant instruments include the EU Directive on Mediation<sup>45</sup> and UNCITRAL's 2018 Model Law on International Commercial Mediation.<sup>46</sup>

### d. Online Dispute Settlement

The emergent field of online dispute resolution (ODR) may offer an attractive method for addressing disputes arising out of low-value cross-border e-commerce transactions. UNCITRAL's Technical Notes on Online Dispute Resolution describe the stages of an ODR proceeding, discussing such aspects as the appointment, powers, and functions of the neutral ODR administrator.<sup>47</sup> The EU has also established an ODR platform intended to "make online shopping safer and fairer through access to quality dispute resolution tools."<sup>48</sup>

## 6. INSTITUTIONAL DEVELOPMENTS

Still, another way to introduce students to the field of PIL is by focusing on the recent activities of the main international institutions dedicated to creating or refining relevant rules and instruments. In different areas and in different ways, these organizations work on creating harmonized rules, recommended principles, or model laws in order to facilitate private cross-border activity. Practitioners should be aware of their

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44. G.A. Res 73/198, Singapore Convention (Dec. 20, 2018). See Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 30 AM. REV. INT'L ARB. 265 (2019).

45. See, e.g., Directive 2008/52/EC, of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 52, 2008, O.J. (L. 136) 3, 8.

46. See G.A. Res. 73/199, Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law (Dec. 20, 2018).

47. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL TECHNICAL NOTES ON ONLINE DISPUTE RESOLUTION (2017).

48. Online Dispute Resolution, EUR. COMM'N, <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register> (last visited Nov. 3, 2022).

activities; for student participants in seminars, the agendas of these organizations provide a trove of potential paper or presentation topics.

*a. UNCITRAL*

The UN Commission on International Trade Law (UNCITRAL) was established in 1966 for “the promotion of the progressive harmonization and unification of the law of international trade.”<sup>49</sup> Its main activity is to prepare and promote the adoption and use of legislative and non-legislative instruments related to key parts of commercial law.

Its focus has largely been on dispute resolution, international contract practices, transport, insolvency, e-commerce, international payments, secured transactions, procurement, and the sale of goods. Two widely adopted examples are the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)<sup>50</sup> and the 1980 UN Convention on the International Sale of Goods (CISG).<sup>51</sup> Its current focus includes ISD reform and electronic commerce, among other topics.

*b. UNIDROIT*

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental institution devoted to studying the needs and methods for modernizing, harmonizing, and coordinating private law, particularly commercial law.<sup>52</sup> Over the years, it has produced a range of conventions, model laws, principles, and legal and contractual guides on a variety of PIL topics, including the Convention on International Financial Leasing in 1988 and the Convention Providing a Uniform Law on the Form of an International Will in 1973.<sup>53</sup>

One of its most interesting accomplishments is the 2001 Cape Town Convention on International Interests in Mobile Equipment.<sup>54</sup> Large-scale

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49. G.A. Res. 2205 (XI), at art. I (Dec. 17, 1966). *See generally* U.N. COMM’N ON INT’L TRADE LAW <https://uncitral.un.org/>.

50. *See* Foreign Arbitral Awards Convention, *supra* note 41.

51. U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

52. UNIDROIT, Statute Incorporating the Amendment to Article 6(1) (entered into force Mar. 26, 1993).

53. *See* UNIDROIT, [www.unidroit.org](http://www.unidroit.org) (last visited Nov. 3, 2022), for more information about these PIL instruments.

54. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 285 (separate protocols apply to aircraft, rail, and space equipment and equipment specific to mining, agricultural, and construction equipment).



mobile equipment, such as aircraft, railroad rolling stock, satellites, and construction vehicles, is costly to build, use, and maintain; it is therefore often leased rather than purchased outright. Moreover, it frequently crosses national borders: not surprisingly, the laws concerning secured interests differ from jurisdiction to jurisdiction. The Convention creates an international interest that all contracting States must recognize; to provide notice of security interests, the Convention also provides for an electronic register.<sup>55</sup>

*c. The Hague Conference*

The Hague Conference on Private International Law (HCCH) works for the progressive unification of the rules of private international law.<sup>56</sup> Its membership and its reach are global. Its goal is to contribute to “a world in which, despite the differences between legal systems, persons—individuals as well as companies—can enjoy a high degree of legal security.”<sup>57</sup>

Some of the most widely ratified Hague conventions, and, as mentioned above, some of the most useful to international practitioners, involve legalization of foreign public documents through the use of apostilles,<sup>58</sup> the rules and methods for cross-border service of legal process,<sup>59</sup> the mechanisms for obtaining evidence from abroad,<sup>60</sup> and, most recently, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.<sup>61</sup>

Another particular focus of the HCCH’s activities has been international family law, an increasingly important area of transnational practice. Here, three multilateral treaties (to all of which the United States is a party) provide important mechanisms for international cooperation:

Child Support. The 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, together with its Protocol on the Law Applicable to Maintenance Obligations, are aimed at

55. INT’L REGISTRY OF MOBILE ASSETS, <https://www.internationalregistry.aero/ir-web> (last visited Nov. 3, 2022).

56. Statute of the Hague Conference on Private International Law, Oct. 31, 1951, 220 U.N.T.S. 121.

57. *See About HCCH*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/about> (last visited Nov. 3, 2022).

58. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 2884 U.N.T.S., 142 (“Apostille Convention”).

59. *See* Hague Service Convention, *supra* note 27.

60. *See* Hague Evidence Convention, *supra* note 32.

61. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, HCCH, <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf> [hereinafter Hague Judgments Convention].

establishing a functional system for the cross-border recovery of child support and other forms of family maintenance.<sup>62</sup> The United States became a party to this Convention in 2016; it is given domestic effect by the 2008 Uniform Interstate Family Support Act (UIFSA).<sup>63</sup>

Child Abduction. The 1980 Convention on the Civil Aspects of International Child Abduction is intended to deter the illegal removal of children (under sixteen years of age) across borders, to ensure their prompt return, and to establish reciprocal mechanisms for enforcing custodial rights in Contracting States.<sup>64</sup> In the United States, the Convention is implemented by the International Child Abduction Remedies Act (ICARA).<sup>65</sup> The Office of Children's Issues in the U.S. Department of State's Bureau of Consular Affairs serves as the U.S. Central Authority.

Intercountry Adoption. The 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>66</sup> is aimed at protecting children, and their families, against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. Contracting Parties must establish a central authority to deal with cross-border child adoption issues; as long as an adoption is made in accordance with the procedures outlined in the Convention, all other Contracting Parties must recognize the adoption "by operation of law."<sup>67</sup> In U.S. law, the Convention is implemented by the Intercountry Adoption Act of 2000 (IAA).<sup>68</sup>

Other on-going Hague efforts concern access to justice, reciprocal recognition of divorces, protection of international tourists and visitors, cross-border recognition, and enforcement of agreements in family matters involving children, legal parentage of children, and surrogacy, the form of testamentary dispositions, and recognition and enforcement of foreign civil protection orders.

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62. Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, HCCH, <https://assets.hcch.net/docs/14e71887-0090-47a3-9c49-d438eb601b47.pdf>; Protocol on the Law Applicable to Maintenance Obligations, Nov. 23, 2007, HCCH, <https://assets.hcch.net/docs/d5f89587-f5f1-4c86-aa40-70472892cf11.pdf>.

63. See UNIF. INTERSTATE FAMILY SUPPORT ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2008).

64. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, HCCH, <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>.

65. See 22 U.S.C. § 9001 *et seq.* (2021). A substantial body of U.S. case law has emerged under this statute. See, e.g., *Monasky v. Taglieri*, 140 S.Ct. 719 (2020).

66. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, HCCH, <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf>.

67. *Id.* art. 23.

68. See Pub. L. No. 106-279 (Oct. 6, 2000) (codified at 42 U.S.C.A. §§ 14901 *et seq.* (2021)).

#### d. Regional Organizations

The European Union has been active in adopting community-wide codifications of law on various private law topics, including contracts, torts, family law, and insolvency as well as jurisdiction, choice of law, and judgments.<sup>69</sup> In practice, those rules also have considerable influence over activities and transactions affecting private parties outside the EU, especially if they do business within the EU or with EU partners. The corpus and influence of EU private law instruments and initiatives is extensive and is often addressed as a separate course.

Another important regional contributor to the development of private international law is the Organization of American States (OAS).<sup>70</sup> While it does not have the same mandate with respect to political or economic integration as the EU, the OAS has nonetheless adopted many important PIL instruments, beginning with the Bustamante Code in 1928.<sup>71</sup> More recently, it promulgated the 1979 Inter-American Convention on General Rules of Private International Law, the 1975 Inter-American Convention on International Commercial Arbitration, and the 1994 Convention on the Law Applicable to International Contracts.<sup>72</sup> It has also adopted a number of important non-binding PIL instruments, such as the Principles for Electronic Warehouse Receipts for Agricultural Products, intended to highlight the importance of pursuing legislative reform as a means of promoting economic development in the agricultural sector;<sup>73</sup> the Model Law on the Simplified Corporation, aimed at encouraging States to enact legislation permitting an alternative to complicated formal requirements for

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69. See generally MICHAEL BOGDAN & MARTA PERTEGÁS SENDER, *CONCISE INTRODUCTION OF EU PRIVATE INTERNATIONAL LAW* (4th ed. 2019); FELIX WILKE, *A CONCEPTUAL ANALYSIS OF EUROPEAN PRIVATE INTERNATIONAL LAW: THE GENERAL ISSUES IN THE EU AND ITS MEMBER STATES* (2019); HOW EUROPEAN IS EUROPEAN PRIVATE INTERNATIONAL LAW? (Jan van Hein et al., eds., 2019). See also *International Law*, EUR. E-JUSTICE PORTAL, [https://e-justice.europa.eu/content\\_international\\_law-10-en.do](https://e-justice.europa.eu/content_international_law-10-en.do) (last visited Nov. 3, 2022); *EUPILLAR (European Union Private International Law: Legal Application in Reality)*, UNIV. OF ABERDEEN, <https://www.abdn.ac.uk/law/research/eupillar/.ph> (last visited Nov. 3, 2022).

70. See generally *Department of International Law: Private International Law*, OAS [http://www.oas.org/en/sla/dil/private\\_international\\_law.asp](http://www.oas.org/en/sla/dil/private_international_law.asp) (last visited Nov. 3, 2022).

71. Convention on Private International Law, Feb. 20, 1928, O.A.S.T.S. No. 23.

72. Inter-American Convention on General Rules of Private International Law, art. 2, May 8, 1979, O.A.S.T.S. No. 54; Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, O.A.S.T.S. No. 78; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42.

73. Inter-American Juridical Comm., *Report on Electronic Warehouse Receipts for Agricultural Products*, CJI/doc. 505/16 rev. 2 (Sept. 27, 2016); cf. O.A.S. Gen. Ass. Res. on International Law, AG/RES. 2926 (XLVIII-O/18) (June 5, 2018).

incorporation;<sup>74</sup> and a Guide on the Law Applicable to International Commercial Contracts in the Americas.<sup>75</sup>

In Africa, several regional bodies deal with private international law. The Organization for the Harmonization of African Business Law in Africa (OHADA) works to “harmonize business Law in Africa in order to guarantee legal and judicial security for investors and companies in its Member states.”<sup>76</sup> In 2015, OHADA created a Common Court of Justice and Arbitration (CCJA), based in Abidjan, Côte d’Ivoire, with three functions: judicial, advisory, and arbitration.<sup>77</sup> In 2012, the Southern African Development Community (SADC) created a model Bilateral Investment Treaty. Although it is non-binding and aimed primarily at adoption by States, this treaty can serve to help resolve disputes over the rights and obligations of private international investors.<sup>78</sup> The Common Market for Eastern and Southern Africa (COMESA) Treaty also includes provisions on private investment.<sup>79</sup>

The Asia-Pacific Economic Cooperation (APEC) has been active in a number of PIL areas, including cross-border privacy issues, investment law, and on-line dispute resolution.<sup>80</sup> In East and Southeast Asia, scholars from 10 different countries recently created the Asian Principles of Private International Law (APPIL), a project aimed at harmonizing the region’s PIL rules and principles.<sup>81</sup> Although APPIL activities remain soft law—

74. See OEA Secretary-General, Model Law on the Simplified Corporation: Status of Reforms in the Region, DDI/doc. 3/21 rev. 1 (June 14, 2021).

75. See *Department of International Law*, OAS, [http://www.oas.org/en/sla/dil/publications\\_Guide\\_Law\\_Applicable\\_International\\_Commercial\\_Contracts\\_Americas\\_2019.asp](http://www.oas.org/en/sla/dil/publications_Guide_Law_Applicable_International_Commercial_Contracts_Americas_2019.asp) (last visited Nov. 3, 2022), for access to the Guide.

76. See *General Overview*, OHADA, <https://www.ohada.org/index.php/en/ohada-in-a-nutshell/general-overview> (last visited Nov. 3, 2022).

77. See *Bibliothèque Numérique de L’OHADA: Actualités*, OHADA, [http://biblio.ohada.org/pmb/opac\\_css/index.php](http://biblio.ohada.org/pmb/opac_css/index.php) (last visited Nov. 3, 2022) (for reports of CCJA cases in French only).

78. See SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY (2012), <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

79. See Treaty Establishing the Common Market for Eastern and Southern Africa, art. 158, Nov. 5, 1993, COMESA, <https://www.comesa.int/wp-content/uploads/2020/07/Comesa-Treaty.pdf>.

80. See generally, *About APEC*, ASIAN-PACIFIC ECON. COOPERATION, <https://www.apec.org/About-Us/About-APEC> (last visited Nov. 3, 2022).

81. See generally Weizuo Chen & Gerald Goldstein, *The Asian Principles of Private International Law: Objectives, Contents, Structure, and Selected Topics on Choice of Law*, 13 J. PRIV. INT’L L. 411 (2017); Uematsu Mao, *APPIL (Asian Principles of Private International Law) and its Perspective Regarding International Jurisdiction*, 37 RITSUMEIKAN L. REV. 35 (2019); CONVERGENCE AND DIVERGENCE OF PRIVATE LAW IN ASIA (Gary Low ed., Cambridge Univ. Press) (2021).

nothing APPIL creates is binding on any State—its activities and instruments are persuasive and may function as models for various domestic jurisdictions.<sup>82</sup>

## 7. GLOBAL GROWTH AND DEVELOPMENT

Finally, a different approach (but one well suited for law school seminars and practicums is to consider private international law from the perspective of the roles it can play in (and more precisely, the contributions it can make to) global economic growth and development. This is an understudied but increasingly important area, with great potential for introducing students to the broader implications of the field.<sup>83</sup>

A useful point of reference for such an approach is offered by the UN Sustainable Development Goals (SDGs), first adopted in 2000 and revised in 2015.<sup>84</sup> The seventeen goals at the core of Agenda 2030 constitute a suggested blueprint for achieving global economic progress in a manner consistent with social justice and the planet’s environmental limits. Many of its recommendations and objectives implicate PIL issues, directly or indirectly.

These implications have recently been explored in a remarkable anthology entitled *THE PRIVATE SIDE OF TRANSFORMING OUR WORLD—UN SUSTAINABLE DEVELOPMENT GOALS 2030 AND THE ROLE OF PRIVATE INTERNATIONAL LAW*, edited by Ralf Michaels, Verónica Ruiz Abou-Nigm, and Hans van Loon.<sup>85</sup> In their introductory chapter, the editors observe that, while the SDG’s have attracted world-wide support and constitute “the most authoritative and comprehensive global guide humanity has ever had,” they give scant attention to the role private international law can—and should—play in achieving them.<sup>86</sup>

Most transactions, most investments, most destruction of our environment, happen not through public but through private action, and are governed not exclusively by public law but also, perhaps predominantly, by private

82. Chen & Goldstein, *supra* note 81, at 433.

83. See generally David P. Stewart, *Private International Law, the Rule of Law, and Economic Development*, 56 VILL. L. REV. 607 (2011).

84. See G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Sept. 25, 2015).

85. *THE PRIVATE SIDE OF TRANSFORMING OUR WORLD* (Ralf Michaels et al., eds. 2021) (hereinafter *THE PRIVATE SIDE*) (the contributions were presented at a conference organized by the Max Planck Institute for Comparative and Private International Law).

86. *Id.* at 9 (“The SDGs are ambitious, and it will take enormous efforts on multiple levels to achieve them. It is therefore striking, given the multilevel governance model, that nearly all instruments and institutions mentioned throughout the targets belong to the realm of public international law”).

law. Private law, therefore, has an important role to play in the quest for sustainability, and this is increasingly being recognized ....

We see an important, constructive role for private international law as an indispensable part of the global legal architecture. It is needed to turn the SDGs into reality, to reduce the tension between development and sustainability, and to reinforce the human rights component of the SDGs in cross-border situations, in short: to do its part to strengthen the SDGs' plan of action.<sup>87</sup>

The overall focus of the volume is on the role and specific application of PIL instruments, doctrines, and techniques with recommendations for reform. Each of the substantive chapters explores a specific SDG from that perspective, addressing in turn issues of poverty, hunger, health and well-being, education, gender equality, clean water and sanitation, energy, work and economic growth, innovation and infrastructure, inequality, sustainable cities and communities, consumption and production, climate, life on land and below water, peace and justice, and “partnership for the goals.” Such partnership signifies the “interplay between multi-stakeholder partnerships and private international law” and indicates “how transformative and innovative partnering initiatives can shape the implementation” of the SDG's.<sup>88</sup>

An overarching theme is that insufficient use has been made of private international law in the SDGs and more generally in international governance instruments. Among the book's objectives is to address this “underutilization” by making “the implicit role of private international law explicit and to demonstrate concretely in what ways private international law already exists with regard to the SDGs.”<sup>89</sup> To accomplish that goal, the editors contend that some “rethinking, re-conceptualizing and re-configuring” will be necessary in order for private international law to contribute to the accomplishment of these goals.<sup>90</sup>

In that regard, the editors distinguish between PIL's “regulating” and “enabling” functions: on the one hand, how it contributes to protecting the vulnerable or weaker parties in a transactional situation and, on the other, how it facilitates cross-border relations and transactions by enabling parties to transcend the boundaries of their legal orders and systems. Party autonomy is an example of how private international law can enable the

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87. *Id.*

88. Fabricio B. Pasquot Polido, *Partnership for the Goals*, in *THE PRIVATE SIDE OF TRANSFORMING OUR WORLD* 541, 543 (Ralf Michaels et al., eds. 2021).

89. *THE PRIVATE SIDE*, *supra* note 85, at 11.

90. *Id.* at 26.

parties to choose a competent court or arbitral tribunal.<sup>91</sup> The editors note that most, if not all, of the multilateral treaties adopted by the Hague Conference, UNIDROIT, and UNCITRAL do in fact serve one or more purposes of the SDG's.

On the other hand, they observe that “traditional private international law approaches offer little integration of sustainability concerns.”<sup>92</sup> For example, they point in particular to the absence of harmonization efforts in relation to environmental damage, both at the global level in the context of the Hague Conference and, with the exception of the EU, at the regional level. Consideration of SDG 15 should accordingly “provoke a reconceptualization of how regulatory private international law rules on jurisdiction, applicable law and enforcement of judgments could play a greater governance role ‘geared at environmental protection and sustainability... rather than its apparently neutral basis, commonly undergirded in a trade context by deference to party autonomy.’”<sup>93</sup>

The volume identifies a number of areas where PIL may be seen as underutilized or even disregarded—and where it might accordingly play a more constructive role in overcoming the “public/private divide,” including, *inter alia*, questions related to labor contracts and labor market issues, cross-border migration, tort issues resulting from medical malpractice in healthcare, and contractual freedom and dispute resolution facilitated by digitization and other developments resulting from international flows of information.

In particular, a number of chapters discuss how the private sector can and should engage more effectively with issues of responsible business conduct in the context of the various global, regional and national initiatives aimed at reinforcing corporate responsibility for human rights violations and damage to the environment. As the editors note, “this reinforcement of corporate social responsibility (CSR) has many implications for private international law: it affects rules on jurisdiction, the law applicable to contracts and torts (including the correcting mechanisms of overriding mandatory rules and public policy), and the enforcement of judgments, all of which may need to be revisited to see whether they are still ‘fit for purpose.’”<sup>94</sup>

In short, the volume articulates an important constructive role for private international law as an indispensable part of the global legal architecture. The most pressing challenge for PIL is to provide greater

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91. *Id.* at 14.

92. *Id.* at 22.

93. *Id.*

94. *Id.* at 21.

clarity, security, and protection to the weaker parties in relationships, whether contractual or not. The volume underscores the need for private international lawyers to be aware of, and to engage with, the larger political, social, economic, cultural, and public international law context of their daily work when dealing with cross-border private law relationships and transactions.<sup>95</sup> This perspective and exhortation make the volume particularly relevant for those engaged in preparing law students for an internationally oriented career.

#### 8. CONCLUSION

Introducing our law students to the issues, methodology, and challenges of private international law must be an important component of preparing them to practice in an increasingly internationalized society. As an homage to Bob Lutz's creative approach to training the next generations of international practitioners, this essay has outlined several possible approaches to introducing them to the substantive and procedural problems that arise where public and private interests meet along the border between domestic and international law.

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95. *Id.* at 27.



# INTELLECTUAL PROPERTY IN PLANT MATERIAL IN THE ASEAN COUNTRIES

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1.	INTRODUCTION: INTELLECTUAL PROPERTY IN PLANT MATERIAL AND REGIONAL GROUPINGS .....	529
2.	INTELLECTUAL PROPERTY IN PLANT MATERIAL IN SMALL AND HIGH-INCOME COUNTRIES: SINGAPORE AND BRUNEI DARUSSALAM .....	532
3.	UPPER-MIDDLE-INCOME COUNTRIES WITH AMBITIONS IN BIOTECHNOLOGY: MALAYSIA AND THAILAND.....	534
4.	LOWER MIDDLE-INCOME COUNTRIES WITH VARYING APPROACHES TOWARDS <i>SUI GENERIS</i> PLANT VARIETY PROTECTION: INDONESIA, THE PHILIPPINES AND VIETNAM .....	539
5.	INTELLECTUAL PROPERTY IN PLANT MATERIAL IN ASEAN'S LOW-INCOME ECONOMIES: CAMBODIA, LAO PDR AND MYANMAR .....	545
6.	CONCLUSION: THE FUTURE OF INTELLECTUAL PROPERTY RIGHTS IN PLANT MATERIAL IN THE ASEAN COUNTRIES.....	547

1. INTRODUCTION: INTELLECTUAL PROPERTY IN PLANT MATERIAL AND REGIONAL GROUPINGS

Because of its importance for food security and food sovereignty,<sup>1</sup> the topic of intellectual property rights in agriculture has remained controversial. While proponents of intellectual property rights in agriculture point to the particularly strong needs for protection of commercial plant

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1. For the differences between these concepts, *see generally* NORA MCKEON, FOOD SECURITY GOVERNANCE: EMPOWERING COMMUNITIES, REGULATING CORPORATIONS (2015).

breeders due to the ease with which new varieties can be replicated,<sup>2</sup> others express concerns about the loss of crop genetic biodiversity<sup>3</sup> and the impact of intellectual property rights on traditional farming practices, including the saving and replanting of seeds.<sup>4</sup> But while concerns about agricultural biodiversity and the quality and safety of food are universal, they are accompanied in developing countries by further environmental and social justice concerns due to the much larger share of agriculture in the national economy, a much larger rural population and the continuing importance of small scale and subsistence forms of agriculture in food supply.<sup>5</sup>

Therefore, it is hardly surprising that developing countries, with very few exceptions prior to the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS), were not providing intellectual property protection for plant material and excluded plants from patent protection.<sup>6</sup> Article 27.3.b. of the TRIPS Agreement changed this situation dramatically. It required WTO members to “provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.” Although this left considerable freedom to member states to design their own systems, the vast majority of developing countries adopted a system that closely follows the models provided by UPOV, the French acronym for the International Convention for the Protection of New Varieties of Plants.<sup>7</sup> Further, although adoption of UPOV style plant variety protection rights did not require countries to become members of UPOV, many did join the Convention, whose membership expanded significantly after WTO TRIPS.<sup>8</sup>

The Association of Southeast Asian Nations (ASEAN), a regional association of high-income, developing, and least-developed countries, has experienced these pressures, due to its diverse membership, in different ways. The WTO TRIPS Agreement stipulates different transition periods for developing and least-developed countries with regard to their

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2. MARK D. JANIS ET AL., *INTELLECTUAL PROPERTY LAW OF PLANTS* 2 (2014).

3. KEITH AOKI, *SEED WARS: CONTROVERSIES AND CASES ON PLANT GENETIC RESOURCES AND INTELLECTUAL PROPERTY* 4 (2008).

4. *Cf.* the sources in JANIS ET AL., *supra* note 2, at 3 n.8.

5. According to MCKEON, *supra* note 1, at 3, small-scale producers are responsible for producing some 70 per cent of the food consumed in the world.

6. Christoph Antons, *Intellectual Property in Plant Material and FTAs in Asia*, in *THE FUTURE OF ASIAN TRADE DEALS AND IP* 229, 234 (Kung-Chung Liu & Julien Chaisse eds., 2019).

7. Antons, *supra* note 6, at 236. For reasons, *see* 236-237.

8. *Id.* at 237.

obligations.<sup>9</sup> But while the WTO provides a list of least developed countries,<sup>10</sup> it allows for self-identification as “developing” or “developed” country.<sup>11</sup> This has led to controversies over the status of ASEAN countries Singapore and Brunei Darussalam, classified as “high income countries” by the World Bank,<sup>12</sup> but remaining as “developing countries” in WTO terms.<sup>13</sup> ASEAN is equally diverse when it comes to the importance of agriculture. According to World Bank data, the share of agriculture, forestry and fishing in national GDP of ASEAN members ranges from 0% and 1.2% in the high-income economies of Singapore and Brunei Darussalam to 22% and 22.4% in the least-developed countries Myanmar and Cambodia.<sup>14</sup> In spite of this diversity of interests, ASEAN as a regional group has concluded numerous Free Trade Agreements (FTAs) with regional partners, which include provisions on intellectual property, including plant variety protection.<sup>15</sup>

This article will explore this dynamic of overlapping national and regional initiatives and obligations. It will suggest that legislative changes are in accordance with the different income levels and economic structures of the countries, which follow development policy models that assume an inverse relationship between a nation’s per capita income and the size of its

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9. Agreement on Trade-Related Aspects of Intellectual Property Rights, arts. 65-66, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

10. *Least-developed Countries*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm) (last visited Nov. 18, 2022).

11. *Who are the Developing Countries in the WTO?* WTO, [https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited Nov. 18, 2022).

12. *World Bank Country and Lending Groups*, WBG <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (last visited Oct. 19, 2022).

13. Charissa Yong, *Singapore Does not Exploit WTO Provisions for Developing Nations*, THE NATION THAI. (July 29, 2019), <https://www.nationthailand.com/international/30373791>.

14. *Agriculture, Forestry, and Fishing, Value Added (% of GDP)*, WBG <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS> (last visited Oct. 19, 2022) [hereinafter *WBG Value Added*].

15. The Asia Regional Integration Center of the Asian Development Bank lists 12 FTAs as “signed and in effect,” “negotiations launched,” or “proposed/under consultation and study.” See *Free Trade Agreements*, ASIA REG’L INTEGRATION CTR., <https://aric.adb.org/fta-group> (last visited Nov. 2, 2022). Not surprisingly, most FTAs “signed and in effect” were concluded with ASEAN’s most important regional trading partners: Australia, New Zealand, India, Japan, the People’s Republic of China and the Republic of Korea, a group referred to as ASEAN+6, in addition to an agreement with Hong Kong, China. For a detailed analysis see Thitapha Wattanapruttipaisan, *The Topology of ASEAN FTAs, with Special Reference to IP-Related Provisions*, in INTELL. PROP. AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION 109-152 (Christoph Antons & Reto M. Hilty eds., 2015).

rural population.<sup>16</sup> It will adopt the current World Bank classification of ASEAN countries into high-income, upper and lower middle-income and low-income economies. It will demonstrate that in relation to agriculture and food security, countries do not always adopt policies and laws in accordance with their position in the pecking order of standard development models, but that local socio-economic and political concerns remain important and can lead to different results. It will also suggest that the development of a local seed and agro-chemical industry, which is usually stated as the policy goal behind legislative changes, will require more than simply adopting industry-friendly laws in fields such as intellectual property law. It will also involve trade-offs with environmental and social concerns, which countries may find impossible to ignore.

## 2. INTELLECTUAL PROPERTY IN PLANT MATERIAL IN SMALL AND HIGH-INCOME COUNTRIES: SINGAPORE AND BRUNEI DARUSSALAM

Apart from being small and prosperous and being situated in a region of Malay-speaking sultanates, the city state of Singapore and the Islamic monarchy of Brunei Darussalam, at first sight, seem to have little in common. While Singapore is lauded as one of the world's most competitive economies and strong in financial services, manufacturing and transportation,<sup>17</sup> Brunei Darussalam relies on the oil and gas sector for over 50% of its GDP and imports nearly all of its manufactured products and about 80% of its food requirements.<sup>18</sup> Reliance on food imports is even stronger in Singapore, where over 90% of the consumed food is imported.<sup>19</sup> As a result, agriculture plays a minor role in the economy, contributing 1.2% to the national GDP of Brunei Darussalam and 0% to that of Singapore.<sup>20</sup> Both countries' interest in supporting and attracting research into agricultural input material rather than in conducting agriculture is reflected in the choice of their intellectual property tools for plant material. Double protection for such material under both patent and plant variety

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16. JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 331 (1997).

17. *The World Bank In Singapore – Overview*, WBG <https://www.worldbank.org/en/country/singapore/overview#1> (last visited Oct. 19, 2022).

18. *Insights, Brunei Darussalam*, DFAT, <https://www.dfat.gov.au/sites/default/files/brunei-darussalam-market-insight.pdf> (last visited Oct. 19, 2022).

19. *Food and Agribusiness to Singapore*, DFAT, <https://www.austrade.gov.au/australian/export/export-markets/countries/singapore/industries/food-and-agribusiness-to-singapore#:~:text=Singapore%20imports%20over%2090%25%20of,brands%20to> (last visited Oct. 19, 2022).

20. *Cf. WBG Value Added, supra* note 14.

laws has been allowed for UPOV members since a revision of the UPOV Convention in 1991 and in the industrialised countries these different intellectual property rights typically co-exist.<sup>21</sup> A similar trend towards double protection under patents and plant variety legislation began in some developing countries in Asia, Africa and Latin America, after they concluded Free Trade Agreements with the United States, which either eliminated the choice of Article 27.3.b. TRIPS to impose a straightforward obligation to introduce patents or asked countries to “endeavour” to do so.<sup>22</sup> The US-Singapore FTA of 2004 is one example of such an elimination of choice,<sup>23</sup> although it merely consolidated an existing position in Singaporean patent law at that time.<sup>24</sup> As a consequence of such developments and in accordance with the structures of their economies and their economic interests, both Singapore and Brunei Darussalam offer patent protection for plant material. This protection has been available in Singapore since 1994<sup>25</sup> and in Brunei Darussalam since the Patents Order of 2011.<sup>26</sup>

Important differences in agricultural policies also become visible in the attitude of governments towards membership in UPOV. UPOV style plant variety rights had long been regarded as more farmer-friendly because of the so-called “farmers’ privilege” to save and reuse seeds from a protected variety.<sup>27</sup> However, the 1991 revision of the UPOV Convention narrowed this privilege to the saving of seeds “within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder.”<sup>28</sup> It limited it to

21. Christoph Antons, *Article 27(3)(b) TRIPS and Plant Variety Protection in Developing Countries*, in *TRIPS PLUS 20: FROM TRADE RULES TO MARKET PRINCIPLES* 389, 395 (Hanns Ullrich et al., eds., 2016).

22. *Id.* at 394-395.

23. Rajeswari Kanniah & Christoph Antons, *Plant Variety Protection and Traditional Agricultural Knowledge in Southeast Asia*, 13 *AUSTL. J. ASIAN L.* 1, 3 (2012). Singapore was among the first countries to enter into negotiations with the United States on what became known as “TRIPS-Plus” standards. See Robert E. Lutz, *Linking Trade, Intellectual Property and Investment in the Globalizing Economy: The Interrelated Roles of FTAs, IP and the United States*, in *INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION*, 155, 166 (Christoph Antons & Reto M. Hilty, eds., 2015).

24. Wee Loon Ng-Loy, *IP and FTAs of Singapore: Ten Years On*, in *INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION* 337, 343, 347 (Christoph Antons & Reto M. Hilty, eds., 2015).

25. *Id.* at 343.

26. CONSTITUTION OF BRUNEI DARUSSALAM, PATENTS ORDER, 2011, Oct. 17, 2011, BRUNEI DARUSSALAM GOVERNMENT GAZETTE No. S 57.

27. Aoki explains that the “farmers’ exemption” of the 1978 version of the UPOV Convention was implicit, because art. 5(1) limited the rights of plant breeders to only preventing the commercial exploitation of their varieties, see AOKI, *supra* note 3, at 65 n.24.

28. Int’l Union for the Prot. of New Varieties of Plants [UPOV], *International Convention for the Protection of New Varieties of Plants*, art. 15 (2), UPOV Publication no: 221(E) (Mar. 19,

use of the saved seeds “for propagating purposes, on their own holdings” and declared it an “optional” exception.<sup>29</sup> The 1991 version of the UPOV Convention further extended protection to “essentially derived” varieties<sup>30</sup> and required new UPOV members to extend protection to fifteen plant genera or species immediately and to all plant genera and species within ten years.<sup>31</sup>

Singapore is a member of the 1991 version of the UPOV Convention (hereinafter, UPOV 1991). Brunei Darussalam is not yet a member but is one of four ASEAN member states that have signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), concluded in 2018.<sup>32</sup> As such, it is required under Article 18.7(2) to join UPOV once it ratifies the CPTPP. According to Jefferson,<sup>33</sup> the UPOV Council reviewed the Brunei legislation in 2017 and found it in compliance with UPOV 1991. Indeed, both plant variety laws of Brunei and Singapore exceed the initial membership requirements of UPOV by immediately extending protection to all genera and species.<sup>34</sup> Further, both restrict the seed saving privilege of Article 15 of UPOV 1991 by tying it to an express exemption of the genera or species within which the protected variety is classified.<sup>35</sup>

### 3. UPPER-MIDDLE-INCOME COUNTRIES WITH AMBITIONS IN BIOTECHNOLOGY: MALAYSIA AND THAILAND

Malaysia and Thailand are classified by the World Bank as upper middle-income economies, and this is reflected in the quite similar share of agriculture in national GDP of these two countries. With 8.2% in the case of Malaysia and 8.6% in the case of Thailand, it is significantly higher than that of Singapore and Brunei, but lower than the double-digit figures in the

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1991), [https://www.upov.int/edocs/pubdocs/en/upov\\_pub\\_221.pdf](https://www.upov.int/edocs/pubdocs/en/upov_pub_221.pdf) [hereinafter 1991 UPOV Convention].

29. JANIS ET AL., *supra* note 2, at 86-87.

30. LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 383 (2011).

31. 1991 UPOV Convention, *supra* note 28, art. 3.

32. The other ASEAN members of the CPTPP are Malaysia, Singapore and Vietnam. Of these countries, Singapore and Vietnam have meanwhile ratified the CPTPP. See D. J. Jefferson, *Plant Breeders' Rights Proliferate in Asia: The Spread of the UPOV Convention Model*, in INTELLECTUAL PROPERTY LAW AND PLANT PROTECTION: CHALLENGES AND DEVELOPMENTS IN ASIA 12, 21 (K. Adhikari & D. J. Jefferson eds., 2020).

33. Jefferson, *supra* note 32, at 18.

34. Plant Varieties Protection Act, 2004, art. 4 (Sing.); Plant Varieties Protection Order, 2015, art. 4 (Brunei).

35. Plant Varieties Protection Act, art. 31(2); Plant Varieties Protection Order, art. 30(2).

rest of ASEAN.<sup>36</sup> Both countries have ambitions in biotechnology research,<sup>37</sup> with Thailand also envisaging a transition to “smart farming.”<sup>38</sup> However, while investment promotion material stresses the industry friendly policies of the governments, an examination of the intellectual property laws related to plant material shows that there is still considerable concern about the traditional and small-scale farming sector. In their attempt to provide for the interests of emerging industries as well as traditional farmers, they are in fact more similar to the laws in the older lower-middle-income countries of Indonesia and the Philippines, which will be discussed in the subsequent section of this article, than to those in the high-income countries discussed in the previous section. In particular, all of these countries continue to exclude plants and animals, essentially biological processes for the production of plants and animals and plant and animal varieties from patentability.<sup>39</sup> In addition, Thailand also excludes extracts from animals or plants.<sup>40</sup>

Rather than offering double protection under patent and plant variety protection laws as Singapore and Brunei Darussalam, all the other ASEAN countries have chosen the *sui generis* option of Article 27.3.b. TRIPS, as the following analysis will show. India’s Protection of Plant Varieties and Farmers’ Rights Act of 2001 has been often discussed in the literature as a model for other middle-income economies, which struggle to balance industrial ambitions with social and environmental concerns.<sup>41</sup> Laws of this type usually create a two-tier registration system for local and new varieties with benefit-sharing funds and forms of compensation for the former. The state centred and relatively limited role of communities in such laws has been criticised,<sup>42</sup> and it has been pointed out that the benefit sharing

36. Cf. WBG *Value Added*, *supra* note 14.

37. See *Biotechnology Industry in Malaysia*, MIDA, <https://www.mida.gov.my/biotechnology-industry-in-malaysia/> (last visited Oct. 19, 2022).

38. *Thailand is Emerging as Southeast Asia’s Prime Destination for Biotechnology Development*, THAI BOARD OF INVESTMENT, [https://www.boi.go.th/upload/content/Thailand%20as%20prime%20destination%20for%20biotech%20business%20Final\\_36306.pdf](https://www.boi.go.th/upload/content/Thailand%20as%20prime%20destination%20for%20biotech%20business%20Final_36306.pdf) (last visited Oct. 19, 2022).

39. Christoph Antons & Michael Blakeney, *Intellectual Property, Farmers’ Rights and Agriculture*, in *INTELLECTUAL PROPERTY LAW IN SOUTHEAST ASIA* (Christoph Antons & Michael Blakeney eds., 2023).

40. Patent Act B.E. 2522, 1979, section 9(1) (Thai.).

41. See N. S. Gopalakrishnan, *Protection of Traditional Knowledge: The Need for a Sui Generis Law in India*, 5 J. WORLD INTELL. PROP. 725, 730 (2002); Christoph Antons, *Sui Generis Protection for Plant Varieties and Traditional Agricultural Knowledge: The Example of India*, 29 EUR. INTELL. PROP. REP. 480, 480 (2007).

42. See Gopalakrishnan, *supra* note 41, at 730; Antons, *supra* note 41, at 484-485.

mechanisms of the Indian legislation do not seem to work.<sup>43</sup> The tweaking of otherwise UPOV style plant variety protection principles in the interest of the traditional farming sector usually also means that such a legislation is no longer in conformity with UPOV 1991. UPOV reviewed the Malaysian Protection of New Plant Varieties Act 2004 in 2005 and recommended revisions of some provisions, if Malaysia wanted to join UPOV.<sup>44</sup> If Malaysia ratifies the CPTPP, it will be required to join UPOV and, therefore, must revise its plant variety legislation.

While the Malaysian legislation is said to be inspired by the Indian model,<sup>45</sup> it goes further and provides different registration requirements for local varieties. While new varieties must be “distinct, uniform and stable,” local varieties “bred or discovered by a farmer, local community or indigenous people” only need to be “new, distinct and identifiable.”<sup>46</sup> The wording of this provision also shows that Malaysia is the only country in ASEAN to include indigenous people in national plant variety legislation. This is an important recognition of upland swidden forms of agriculture, which otherwise in government discourse, are too often described as destructive and separated from mainstream agriculture.<sup>47</sup> Further, the Malaysian legislation is more generous than UPOV 1991 in defining the limits of the seed saving privilege. It allows “small farmers” not just the propagation by using the harvested material of a protected variety on their own holdings,<sup>48</sup> and the exchange of “reasonable amounts” of propagating material, but also the sale of farm-saved seed, where small farmers cannot make use of it on their own holdings due to natural disaster or emergency or any other factor beyond their control, provided that not more seed material is sold than what is required on their own holdings.<sup>49</sup>

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43. Karine Peschard, *Seeds Wars and Farmers' Rights: Comparative Perspectives from Brazil and India*, 44 J. PEASANT STUD. 144, 154 (2016).

44. See Kanniah & Antons, *supra* note 23, at 10; Rajeswari Kanniah, *Implementation of the Plant Variety Protection Laws of Indonesia, Malaysia and the Philippines: Trends and Future Prospects*, in INTELLECTUAL PROPERTY LAW AND PLANT PROTECTION: CHALLENGES AND DEVELOPMENTS IN ASIA 62, 71 (K. Adhikari & D. J. Jefferson eds., 2020).

45. Ida Madiha bt. Abdul Ghani Azmi, *The Protection of Plant Varieties in Malaysia*, 7 J. WORLD INTELL. PROP. 877, 889 (2004).

46. Protection of New Plant Varieties Act, 2004, section 14 (Malay.).

47. See discussion in ROBERT A. CRAMB, LAND AND LONGHOUSE: AGRARIAN TRANSFORMATION IN THE UPLANDS OF SARAWAK 28 (2007); AMY A. DOOLITTLE, PROPERTY AND POLITICS IN SABAH, MALAYSIA: NATIVE STRUGGLES OVER LAND RIGHTS 62 (2005).

48. *Cf.* Protection of New Plant Varieties Act, 2004, section 31(1)(d).

49. *Id.* section 31(1)(f).



The register of new varieties<sup>50</sup> at the Malaysian Ministry of Agriculture shows that the vast majority of new variety registrations is held by foreign companies, followed by Malaysian public research institutes and universities and, finally, a few local companies and private individuals. The picture is different in the National Plant Varieties Register.<sup>51</sup> According to Kanniah, this list constitutes an inventory established under Section 4(g) of the Act of *in situ* genetic resources “to award recognition to the breeder of the variety. To enable official identification of the sources of the country’s genetic resources, and to bolster the country’s genetic resource pool.”<sup>52</sup> In the Register, there are farmers, local companies, universities, and government research institutions.<sup>53</sup>

As Malaysia did, in 1999, Thailand also introduced a Plant Varieties Protection Act designed to accommodate not just commercial plant breeders, but also the concerns of farmers and conservationists.<sup>54</sup> It also introduced a two-tier protection system with a second-tier protection for “local domestic plant varieties.”<sup>55</sup> The Thai legislation has attracted much attention in the academic literature over the years.<sup>56</sup> It appears, however, that regulations on the application and profit-sharing necessary to implement the “protection of local domestic plant varieties” have never been issued.<sup>57</sup> As a consequence, there have been no registrations of local domestic plant varieties.<sup>58</sup> The law also relies on an outdated and essentialising concept of “community” for the registration process by a *sui juris* person that is “commonly inheriting and passing over culture continually” and taking part in the conservation and development of the

50. *Plant Variety Protection Malaysia – Register of New Plant Varieties*, JABATAN PERTANIAN, <http://pvpbkkt.doa.gov.my/> (last visited Nov. 18, 2022).

51. *Plant Variety Protection Malaysia–National Plant Varieties*, JABATAN PERTANIAN, <http://pvpbkkt.doa.gov.my/> (last visited Nov. 18, 2022).

52. Kanniah, *supra* note 44, at 82.

53. *Id.*

54. *See generally* Plant Variety Protection Act B.E. 2542, 1999 (Thai).

55. *Id.* ch. IV.

56. DANIEL ROBINSON, CONFRONTING BIOPIRACY: CHALLENGES, CASES AND INTERNATIONAL DEBATES 147-149 (2010); Kanniah & Antons, *supra* note 23, at 17; Gabrielle Gagné & Chutima Ratanasatien, *Commentary on Thailand’s Plant Variety Protection Act, in FARMERS’ CROP VARIETIES AND FARMERS’ RIGHTS: CHALLENGES IN TAXONOMY AND LAW* 310 (Michael Halewood, ed. 2016); Pawarit Lertdhamtewe & David J. Jefferson, *A Fresh Look at the Protection of ‘Domestic’ and ‘Wild’ Plant Varieties in Thailand*, in INTELLECTUAL PROPERTY LAW AND PLANT PROTECTION: CHALLENGES AND DEVELOPMENTS IN ASIA 143-160 (K. Adhikari & D. J. Jefferson eds., 2020).

57. *See* Gagné & Ratanasatien, *supra* note 56, at 314.

58. Lertdhamtewe & Jefferson, *supra* note 56, at 155; Gagné & Ratanasatien, *supra* note 56, at 315.

variety.<sup>59</sup> The registration requires, among other matters, names of the members of the community and a description of the landscape with a concise map showing the boundary of the community and adjacent areas. The variety can only be registered if it exists exclusively “in a particular locality within the Kingdom.”<sup>60</sup> Expectations of such rigid delineations contradict the fluidity of ethnic and geographic boundaries,<sup>61</sup> the political nature and negotiating processes regarding ethnic identity,<sup>62</sup> and the difficulties to neatly distinguish between forest-conserving tribal people in the uplands and biodiversity conserving farmers in the lowlands.<sup>63</sup>

Even if a community was successful in registering a local domestic plant variety, it would need (for benefit sharing agreements with certain commercial users) the approval of the Plant Variety Protection Commission.<sup>64</sup> The seed saving privilege is also modified in the case of government promoted new plant varieties—only three times the amount obtained from the harvest may be used in such cases.<sup>65</sup> Analysts have further pointed out that a Plant Variety Protection Fund set up subsequent to a Government Regulation in 2011 has received only “modest income” from benefit sharing related to commercial use of “general domestic plant varieties” and “wild plant varieties.”<sup>66</sup> As late as 2016, Gagné and Ratanasatien concluded that “there is still no money in the fund,”<sup>67</sup> while Lertdhamtewe and Jefferson found in 2020 that “the extent to which disbursements from the Plant Varieties Protection Fund have actually benefitted farmers is unclear.”<sup>68</sup> Although it appears that there has been no serious implementation of the *sui generis* aspects of the Thai Plant Variety Protection Act, the government has prepared a draft amendment legislation that, if enacted, will aim at harmonization with UPOV standards.<sup>69</sup>

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59. Plant Varieties Protection Act, B.E. 2542, 1999, section 44 (Thai.).

60. *Id.* Section 3.

61. See generally THONGCHAI WINICHAKUL, *SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION* (1994).

62. Anna Lowenhaupt Tsing, *Becoming a Tribal Elder and other Green Development Fantasies*, in *ENVIRONMENTAL ANTHROPOLOGY: A HISTORICAL READER* 393-422 (Michael R. Dove & Carol Carpenter, eds., 2008).

63. TIM FORSYTH & ANDREW WALKER, *FOREST GUARDIANS, FOREST DESTROYERS: THE POLITICS OF ENVIRONMENTAL KNOWLEDGE IN NORTHERN THAILAND* 60-63, 222 (2008).

64. Plant Varieties Protection Act, section. 48 (Thai.).

65. *Id.* section 33.

66. Gagné & Ratanasatien, *supra* note 56, at 312, 315.

67. *Id.* at 315.

68. Lertdhamtewe & Jefferson, *supra* note 56, at 159.

69. *Id.* at 151-152; Noppanun Supasiripongchai, *The Legal Protection of Breeder's Rights for New plant varieties in Thailand: The Need for Law Reform Considering the International*

4. LOWER MIDDLE-INCOME COUNTRIES WITH VARYING APPROACHES  
TOWARDS *SUI GENERIS* PLANT VARIETY PROTECTION: INDONESIA, THE  
PHILIPPINES AND VIETNAM

ASEAN's lower-middle-income countries are the most populous countries in the region. Significant clusters of industry around cities with very high urban density exist side-by-side with rural and densely forested areas. The share of agriculture in national GDP is again higher than in the countries discussed in the previous sections and accounts for 10.2% in the Philippines, 13.7% in Indonesia and 14.9% in Vietnam.<sup>70</sup> Despite the similarities in the statistical data, there are important differences in history and development models between the ASEAN founding members Indonesia and the Philippines and the “socialist market economy” of Vietnam, which became the seventh ASEAN member in 1995. Indonesia and the Philippines are also founding members of the WTO, whereas Vietnam became a member in 2007 after several years of access negotiations, which included the submission of an action plan for the implementation of the WTO TRIPS Agreement.<sup>71</sup> In the field of intellectual property protection for plant material, the lower middle-income country of Vietnam joined UPOV in 2006, as the only other ASEAN country besides high-income Singapore.<sup>72</sup> Indonesia and the Philippines have so far not taken this step, but UPOV is influential in both countries providing technical advice and promoting the UPOV model of plant breeders' rights protection.<sup>73</sup> Both countries are also under pressure from provisions in Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs) to either join UPOV or apply UPOV 1991 standards or modified standards.<sup>74</sup>

This pressure to join UPOV or apply UPOV standards stems in the case of Indonesia from the Japan-Indonesia EPA. It requires Indonesia only

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*Convention for the Protection of New Varieties of Plants 1991*, 1 J. WORLD INTELL. PROP. 1-26 (2020).

70. Cf. WBG *Value Added*, *supra* note 14.

71. Accession of Viet Nam, *Action Plan for the Implementation of the TRIPS Agreement*, WTO Doc. WT/ACC/VNM/21 (Dec. 5, 2001).

72. MEMBERS OF THE INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS, INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS STATUS ON NOVEMBER 3, 2021, [https://www.upov.int/edocs/pubdocs/en/upov\\_pub\\_423.pdf](https://www.upov.int/edocs/pubdocs/en/upov_pub_423.pdf). (last visited Oct. 19, 2022).

73. Kanniah & Antons, *supra* note 23, at 8-12; Rajeswari Kanniah & Christoph Antons, *The Regulation of Innovation in Agriculture and Sustainable Development in India and Southeast Asia*, in THE ROUTLEDGE HANDBOOK OF ASIAN LAW 287, 295 (Christoph Antons, ed., 2017).

74. Antons, *supra* note 6, at 248-250.

to “endeavour” to become a UPOV member,<sup>75</sup> but, significantly, adds in Article 116 an obligation to introduce UPOV 1991 standards.<sup>76</sup> The same obligation was more recently included in the Comprehensive Economic Partnership Agreement (CEPA) between Indonesia and the European Free Trade Association (EFTA) with its member countries Iceland, Norway, Liechtenstein, and Switzerland. In this agreement, concluded in 2018,<sup>77</sup> the parties agree to comply with the substantive provisions of the 1991 UPOV Act. The obligation is modified, however, by a footnote reserving the rights of Indonesia to protect its local plant varieties.<sup>78</sup> This reservation concerns Article 7 of the Indonesian Plant Variety Protection Act of 2000, which provides that “local varieties owned by the community shall be under the control of the state.”<sup>79</sup> An implementing Government Regulation of 2004<sup>80</sup> makes it plain that the purpose of the provision is the protection of Indonesia’s agricultural heritage and genetic resources rather than the establishment of community intellectual property rights. The Government Regulation empowers the Governor of a province, Mayor of a city or, where a variety is spread over several provinces, the Plant Variety Registration Office in the Ministry of Agriculture to represent the community and register the variety on its behalf. Potential users of such a local variety, who want to produce an essentially derived variety, then have to come to an agreement with these authorities. Compensation for the community “can” be included in such agreements.<sup>81</sup> If it is included, authorities have a broad discretion to use it for broadly worded purposes of raising the prosperity of the community, conservation of the local variety and conservation of genetic resources in the locality.<sup>82</sup>

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75. Agreement Between Japan and The Republic of Indonesia for an Economic Partnership, Japan-Indon., art. 106(3)(c), Aug. 20, 2007, 2780 U.N.T.S. 133, <https://www.mofa.go.jp/region/asia-paci/indonesia/epa0708/agreement.pdf>.

76. *Id.* art. 116.

77. *Indonesia*, EFTA, <https://www.efta.int/free-trade/Free-Trade-Agreement/Indonesia> (last visited Oct. 19, 2022).

78. Comprehensive Economic Partnership Agreement Between The Republic of Indonesia and The EFTA States, Annex XVII, art. 2(2), Dec. 16, 2018, EFTA, <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/indonesia/fta-indonesia-annex17-intellectual-property-rights.pdf>.

79. Kanniah & Antons, *supra* note 23, at 16 (pointing out that the Indonesian term “*milik masyarakat*” is subject to interpretation and can refer to “community property” as well as “public ownership”).

80. Government Regulation No. 13/2004, The Naming, Registration and Use of Original Varieties for Producing Essential Derivative Varieties, (Mar. 17, 2004) (Indon.) [hereinafter Government Regulation of 2004].

81. *Id.* art. 9(4) and (10).

82. *Id.* art. 10; see also Christoph Antons, *Legal and Cultural Landscapes: Cultural and Intellectual Property Concepts, and the ‘Safeguarding’ of Intangible Cultural Heritage in*

Besides “local varieties” (*varietas lokal*), Indonesian law also regulates “varieties resulting from plant breeding” (*varietas hasil pemuliaan*).<sup>83</sup> Different from the community-owned local varieties, these are varieties that have been developed by private or public breeders. They are also different from “new varieties” under Indonesia’s Plant Variety Protection Act and do not meet the criteria for registration, but they can nevertheless be useful for propagating purposes in the development of new varieties.<sup>84</sup> The Plant Variety Protection Centre maintains a separate list of these “varieties resulting from plant breeding.”<sup>85</sup> Users of this material for further breeding are expected to conclude an agreement with the registered owners, which, again, “can” include compensation.<sup>86</sup> Most prominent on this list are government research centres, followed by private domestic and foreign companies as well as universities and university departments.

Among the major aims of the plant variety protection legislation, according to the preamble, are the development of new and superior seed varieties,<sup>87</sup> encouragement of the growth of the seed industry<sup>88</sup> and compliance with international conventions.<sup>89</sup> With regards to the latter, the main concern at the time of introducing the legislation was to meet the WTO TRIPS deadline for compliance with that agreement. However, the government’s explanatory memorandum accompanying the preamble also mentions the UN Convention on Biological Diversity and the UPOV Convention.<sup>90</sup> The mentioning of UPOV already at this stage is surprising, given that TRIPS does not require UPOV membership or UPOV conforming legislation. It confirms the model character of the various alternatives under the UPOV Convention. The development of superior seed varieties prior to the plant variety legislation would have been a matter for public research institutions and universities. More recently, the plant variety protection office has been celebrating the success of the new legislation by pointing to 506 registrations, the second highest number in

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*Southeast Asia*, in THE ROUTLEDGE HANDBOOK OF ASIAN LAW 250, 257 (Christoph Antons, ed., 2017).

83. Government Regulation of 2004, *supra* note 80, art. 1 No. 8 and Chapter IV.

84. *Id.* Elucidation on art. 16 (1) (2004).

85. *Id.* arts. 13, 14.

86. *Id.* art. 16.

87. Plant Variety Protection Act, No. 29 of 2000, Preamble (b), (c), and (d), Gov’t Gazette of the Rep. of Indon. 4043 (Indon.) [hereinafter PVP].

88. *See id.* under (c).

89. *See id.* under (e).

90. *See id.* Government Explanation of the Plant Variety Protection Act, under I. General.

ASEAN after Vietnam.<sup>91</sup> As Kanniah has pointed out, however, the high number of private domestic companies among the registrants could be explained by the fact that “in Indonesia, many international companies have domestic subsidiaries or local joint venture partners.”<sup>92</sup> This is indeed easy to follow in the case of companies on the register, which are clearly subsidiaries of a foreign multinational<sup>93</sup> or which publicise their ownership and group structures on their websites.<sup>94</sup> In other cases, it is more difficult, but research shows a strong presence of foreign invested companies on the register,<sup>95</sup> with domestic companies and government research institutes not far behind, as well as some universities and private individuals. Horticultural varieties are regulated separately and have their own register. Law No. 13 of 2010 on Horticulture includes some controversial restrictions on foreign ownership in the domestic horticulture market.<sup>96</sup> A World Bank funded study of 2017 found that foreign multinationals accounted for 70% of the seed sale in this sector in Indonesia; it also pointed out, however, that this domination did not apply universally and that in some commodities, a domestic company was dominant.<sup>97</sup>

The Indonesian Plant Variety Protection Act includes a broadly worded seed privilege in Article 10(1) allowing for the use of a portion of the harvest if it is not for commercial purposes. This is narrowed in the government explanatory memorandum to the provision as referring to “the individual activities particularly those of small farmers for their own needs.”<sup>98</sup> Not included is further distribution for the benefit of a group. A

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91. *Kementan: 506 Varietas Tanaman Sudah Dapatkan Hak PVT*, MEDCOM.ID (Apr. 9, 2021, 8:30 AM), <https://www.medcom.id/ekonomi/bisnis/GNGWdQpN-kementan-506-varietas-tanaman-sudah-dapatkan-hak-pvt>.

92. Kanniah, *supra* note 44, at 79.

93. *See, e.g., Global Locations*, DUPONT, <https://www.dupont.com/locations.html> (last visited Oct. 19, 2022).

94. *See Ownership Structure*, PT BISI INTERNATIONAL TBK, <https://bisi.co.id/en/index.php/2015/10/17/ownership-structure/> (last visited Oct. 19, 2022); *see also Group Structure*, PT BISI INTERNATIONAL TBK, <https://bisi.co.id/en/index.php/2015/10/17/group-structure/> (last visited Oct. 19, 2022).

95. Antons & Blakeney, *supra* note 39.

96. Kanniah, *supra* note 44, at 80.

97. ARIEF DARYANTO, ET AL., FDI RESTRICTIONS IN THE INDONESIAN HORTICULTURE SECTOR: IMPLICATIONS OF HORTICULTURE LAW No.13, 2010, THE WORLD BANK 13 (2017), <https://documents1.worldbank.org/curated/en/856711540798662861/pdf/131404-WP-PUBLIC-2017-Daryanto-et-al-Horticulture-law-report.pdf>.

98. Elucidation of the PVP Act, *supra* note 90, Art. 10 (1)(a).

revision of the plant variety protection legislation is currently being debated in the Indonesian parliament.<sup>99</sup>

The Philippines is not a member of the CPTPP and has largely avoided stringent obligations regarding intellectual property in plant material in its FTAs and EPAs. An exception is the agreement concluded with the EFTA countries in 2016.<sup>100</sup> In an annex on intellectual property protection, it gives parties the choice to join UPOV or comply with a list of specified standards, which, with some modifications, are the UPOV 1991 standards. The willingness of the Philippines to agree to such standards is unsurprising. Already in 2007, UPOV had examined the Philippines Plant Variety Protection Act of 2002 and found it largely in conformity with UPOV 1991.<sup>101</sup> One important exception to this conformity is a broadly worded seed saving privilege, which allows also for the sale of the material for reproduction and replanting in farmers' own land, unless a sale is for reproduction under a commercial marketing agreement.<sup>102</sup>

Similar to Thailand, the Philippines legislation introduced a Gene Trust Fund "to be administered by the Board, for the benefit of bona fide organizations or institutions managing and operating an accredited gene bank."<sup>103</sup> The NGO SEARICE (Southeast Asia Regional Initiatives for Community Empowerment) had helped farmer organisations to establish community seeds banks and registries, which are encouraged under Section 72 of the legislation. The NGO regarded the Gene Trust Fund, however, as "a radical departure from the original concept of community gene/seed banks" finding it limited to supporting "the gene banks of the International Rice Research Institute (IRRI), the Philippine Rice Research Institute (PhilRice), other public research institutions and private entities that operate accredited gene banks."<sup>104</sup> Kanniah concluded in her survey of the major users of the system that "the Filipino PVP system has been used prolifically

99. *RUU tentang Perubahan atas Undang-Undang Nomor 29 Tahun 2000 tentang Perlindungan Varietas Tanaman*, DEWAN PERWAKILAN RAKYAT REPUBLIK INDONESIA, <https://www.dpr.go.id/uu/detail/id/97> (last visited Oct. 19, 2022).

100. *Philippines*, EFTA, <https://www.efta.int/free-trade/Free-Trade-Agreement/Philippines> (last visited Oct. 19, 2022).

101. Kanniah & Antons, *supra* note 23, at 10.

102. An Act to Provide Protection to New Plant Varieties, Establishing a National Plant Variety Protection Board and for other Purposes, Rep. Act No. 9168, Section 43(d) (June 7, 2002) (Phil.), [https://www.lawphil.net/statutes/repacts/ra2002/ra\\_9168\\_2002.html](https://www.lawphil.net/statutes/repacts/ra2002/ra_9168_2002.html); *see also* Kanniah, *supra* note 44, at 74.

103. *See* An Act to Provide Protection to New Plant Varieties, Section 71; *see also* Kanniah, *supra* note 44, at 75.

104. *Recognition and Protection of Farmers' Rights: An Initial Critique on the Plant Variety Protection Act of 2002*, SEARICE (July 2002), <https://drive.google.com/file/d/16gRTsPuCZfEgvJEYOidrXwmrXw9kn26C/view>.

by private domestic and foreign companies,” with Pioneer Hi-Bred, for example, controlling a significant portion of the seed market for corn.<sup>105</sup>

Vietnam is among the four ASEAN country members of the CPTPP, which came into force in Vietnam in January 2019. As a consequence, it most recently amended its Law on Intellectual Property of 2005, which includes the protection of plant varieties in Part Four,<sup>106</sup> to bring the legislation into accordance with its obligations under the CPTPP.<sup>107</sup> However, the plant variety part required no changes. Vietnam’s plant variety legislation with a narrow seed saving privilege, confined to “individual households for self-propagation and cultivation in the next season on their own land areas”<sup>108</sup> has conformed to UPOV 1991 for a long time and Vietnam became a UPOV member in 2006. Given the efforts of UPOV to extend its model to other ASEAN countries<sup>109</sup> and the strong interest of the seed industry in the ASEAN market, it is unsurprising that Vietnam has become a model for those advocating stronger plant variety protection systems and a subject for heated debates about Vietnam’s experience with NGOs focusing on the ecological effects of commercial farming and the plight of small-scale farmers. A UPOV initiated and funded study points to a steep increase in the number of applications and plant breeders’ rights titles issued, the strong performance of domestic breeders in this context and the shift from the public to the private sector.<sup>110</sup> It attributes increased yield and productivity, increased income of farmers and the overall economic performance of Vietnam to the country’s UPOV membership. Claims in such studies are critically analysed in a research paper published by the NGO SEARICE,<sup>111</sup> which regards the “complex interaction of various interventions by the government which evolved over time” rather than the plant variety protection law as crucial for Vietnam’s

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105. Kanniah, *supra* note 44, at 83.

106. Intellectual Property Law, No. 50/2005/QH11, Part Four: Rights to Plant Varieties (Nov. 29, 2005).

107. Council for Trade-Related Aspects of Intellectual Prop. Rights, *Viet Nam: Law No. 42/2019/QH14 Dated 14 June 2019—Amendments to Some Articles of Law on Insurance Business and Law on Intellectual Property*, WTO Doc. IP/N/1/VNM/14, IP/N/1/VNM/C/5, IP/N/1/VNM/I/12, IP/N/1/VNM/E/11, IP/N/1/NVM/O/19 (Apr. 7, 2021).

108. Intellectual Property Law, *supra* note 106, article 190(1)(d).

109. Kanniah & Antons, *supra* note 23, at 8-11.

110. STEFFEN NOLEPPA, THE SOCIO-ECONOMIC BENEFITS OF UPOV MEMBERSHIP IN VIET NAM: AN EX-POST ASSESSMENT ON PLANT BREEDING AND AGRICULTURAL PRODUCTIVITY AFTER TEN YEARS 38-40 (2017), <https://hffa-research.com/projects-publications/agriculture/plant-breeding/socio-economic-benefits-upov-membership-viet-nam/>.

111. CID RYAN P. MANALO & NORMITA G. IGNACIO, PLANT VARIETY PROTECTION IN PRACTICE IN VIETNAM: THE PAINS IN THE GAINS ACHIEVED (Ines Vivian D. Domingo ed., 2021), [https://www.apbrebes.org/sites/default/files/2021-03/PVP%20TPGA\\_Fin\\_compressed.pdf](https://www.apbrebes.org/sites/default/files/2021-03/PVP%20TPGA_Fin_compressed.pdf).



agricultural development.<sup>112</sup> The shift from the public to the private sector is due to public R&D institutions being mandated to apply for PVP certificates and seek private funding, thereby facilitating technology transfer to seed companies.<sup>113</sup> The dominance of local applicants is confined to rice, while foreign applications dominate with regards to other crops.<sup>114</sup> In comparison with foreign applications, almost twice as many domestic ones are subsequently cancelled.<sup>115</sup> The heavy focus on rice could threaten R&D on other crops in Vietnam.<sup>116</sup>

##### 5. INTELLECTUAL PROPERTY IN PLANT MATERIAL IN ASEAN'S LOW-INCOME ECONOMIES: CAMBODIA, LAO PDR AND MYANMAR

ASEAN's low-income countries are the association's most recent members, with the Lao PDR and Myanmar joining in 1997 and Cambodia in 1999. They are also classified as least-developed countries (LDCs) by the United Nations and the WTO.<sup>117</sup> As LDCs, they are exempted from applying the provisions of the TRIPS Agreement other than Articles 3, 4 and 5.<sup>118</sup> This exemption was originally for a transitional period of ten years, but the TRIPS Council was authorised in Article 66 of TRIPS to grant extensions to this period. In June 2021, WTO members agreed to extend the transitional period for LDCs for a third time to July 1, 2034.<sup>119</sup> While Myanmar is a WTO founding member, Cambodia and the Lao PDR joined more recently, in 2004 and 2013 respectively. The share of agriculture, forestry, and fishing in the national economy in these low-income economies is again higher than in the lower middle-income group discussed in the previous section. It reaches from 16.2% of GDP in the Lao PDR to 22% and 22.4% in Myanmar and Cambodia respectively.

Although not obliged to exercise the choice of Article 27.3.b. of TRIPS due to their LDC status, all three countries have introduced *sui generis* plant variety legislation and excluded plant material from patentability. In their exclusion provisions, Cambodia and the Lao PDR rely on the TRIPS baseline of "plants and animals other than micro-organisms, and essentially

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112. *Id.* at ix.

113. See *id.* at 40.

114. *Id.* at 31-34.

115. *Id.* at 36-37.

116. *Id.* at ix.

117. *Least-developed Countries*, *supra* note 10.

118. TRIPS Agreement, *supra* note 9, art. 66.

119. *WTO Members Agree to Extend TRIPS Transition Period for LDCs Until 1 July 2034*, WORLD TRADE ORGANIZATION (June 29, 2021), [https://www.wto.org/english/news\\_e/news21\\_e/trip\\_30jun21\\_e.htm](https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm).

biological processes for the production of plants or animals other than non-biological and microbiological processes.”<sup>120</sup> The Lao PDR intellectual property law excludes in addition also “living organisms or parts of living organisms that exist in nature.”<sup>121</sup> Myanmar enacted a Patents Act in 2019 with a different and rather detailed provision excluding besides “biological production processes mainly used for growing plants or rearing animals, except non-biological and microbiological production processes” also “plants and organisms which include all organism and plant species, DNA—including complementary DNA sequences, cells, cell lines, cell cultures and seeds, including whole or part of organisms and biological materials found in nature, with the exception of man-made microbiological organisms.”<sup>122</sup>

While all three countries have opted for plant variety protection laws, their form and level of UPOV compliance differs. The Lao PDR protects plant varieties as part of a general intellectual property law<sup>123</sup> and Cambodia combines plant breeders’ rights protection with seed management.<sup>124</sup> Myanmar enacted a Plant Variety Protection Act in 2016, which had been assessed as conforming to UPOV standards.<sup>125</sup> It was replaced in 2019 by a new Act meant to further integrate the legislation with the UPOV 1991 system.<sup>126</sup> This is evident from references to other “members of UPOV” in parts of the new legislation.<sup>127</sup> The Lao PDR and Cambodia introduced plant variety protection laws earlier, partly as a result of WTO accession negotiations, which founding member Myanmar did not have to go through.<sup>128</sup> Although largely modelled on UPOV 1991,<sup>129</sup> both laws include provisions on the seed saving privilege, which refer for details to implementing regulations by the Ministry of Science and Technology in

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120. TRIPS Agreement, *supra* note 9, art. 27(3)(b); *see also* Law on the Patents, Utility Model Certificates and Industrial Designs, NS/RKM/0103/005, art. 4, (Jan. 22, 2003) (Cambodia), <https://wipolex.wipo.int/es/text/223116>; Law on Intellectual Property, No. 38/NA, art. 21 No. 4, (Nov. 15, 2017) (Lao PDR).

121. Law on Intellectual Property, *supra* note 120, art. 21 No. 1.

122. Patent Law, No. 7, section 14(a) under (d) and (e), (Mar. 11, 2019) (Myan.).

123. Law on Intellectual Property, *supra* note 120, Part IV.

124. Law on the Seed Management and Plant Breeder’s Rights (Jan. 7, 2009) (Cambodia).

125. *See* Jefferson, *supra* note 32, at 27.

126. *New Plant Variety Protection Law: To Help the Growth of Agricultural Sector by Generating and Cultivating New Improved Varieties*, MYANMAR DIGITAL NEWS (May 30, 2019), <http://www.mdn.gov.mm/en/new-plant-variety-protection-law-help-growth-agricultural-sector-generating-and-cultivating-new>.

127. The New Plant Variety Protection law, No. 29, section 12(a)(ii), (v) (Mar. 11, 2019) (Myan.).

128. *Cf.* Jefferson, *supra* note 32, at 28-29.

129. *Id.* at 29-30.

the case of the Lao PDR<sup>130</sup> and to joint regulations by the Ministry of Industry, Mines and Energy and the Ministry of Agriculture, Forestry and Fishery in the case of Cambodia.<sup>131</sup> It seems doubtful that UPOV would accept the regulation of this important exception in administrative regulations, if the two countries would seek to join UPOV. The Lao PDR also maintains its flexibility with regards to the genera and species to which the law applies, which the government will notify separately.<sup>132</sup>

## 6. CONCLUSION: THE FUTURE OF INTELLECTUAL PROPERTY RIGHTS IN PLANT MATERIAL IN THE ASEAN COUNTRIES

The expansion of intellectual property rights in plant material in the ASEAN countries started over two decades ago, when those countries that were WTO members at the time were exercising their choices under Article 27.3(b) of TRIPS with regard to patent protection and *sui generis* plant variety legislation. Other factors pushing all ASEAN members further in this direction since then have been obligations under Free Trade and Economic Partnership Agreements, the accession negotiations for latecomers to the WTO as well as ambitions to establish domestic seed industries and to shift some of the agricultural R&D from the public to the private sector and attract foreign investment in this context. Although there has been a general pattern of expansion,<sup>133</sup> it has been uneven and at different paces, depending on the socio-economic conditions of each country and the balance it seeks to find in the encouragement of R&D between private sector R&D, public research institutions and farmers as consumers of the resulting technologies, but also in their traditional role as plant breeders in their own rights.<sup>134</sup> At the same time as governments have been pondering such questions, there has also been much activism opposed to intellectual property rights in seeds and other agricultural input material.<sup>135</sup> The activism influenced the adoption by the UN General Assembly of the United Nations Declaration on the Rights of Peasants and

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130. Law on Intellectual Property, *supra* note 120, art. 86.

131. Law on the Seed Management and Plant Breeder's Rights, *supra* note 124, art. 16.

132. Law on Intellectual Property, *supra* note 120, art. 68.

133. See e.g., Kanniah & Antons, *supra* note 23; Kanniah & Antons, *supra* note 73; Antons, *supra* note 6; Kanniah, *supra* note 44; Jefferson, *supra* note 32.

134. Christoph Antons, et al., *Farmer-plant-breeders and the Law on Java, Indonesia*, 52 CRITICAL ASIAN STUDIES 589-609 (2020). See also the contributions in BISA DÈWEK: KISAH PERJUANGAN PETANI PEMULIA TANAMAN DI INDRAMAYU (Yunita T. Winarto, ed., 2011).

135. See Jack Kloppenburg, *Re-Purposing the Master's Tools: The Open Source Seed Initiative and the Struggle for Seed Sovereignty*, 41 J. PEASANT STUD. 1225, 1233 (2014) (discussing opposition to intellectual property rights in seeds and their policy positions).

other people working in rural areas.<sup>136</sup> It also successfully initiated a debate on “food sovereignty” rather than “food security,”<sup>137</sup> opposing industry and yield focused policies from a human rights, environmental and consumer protection perspective.

While such debates may be less relevant for a small and wealthy high-tech focused country such as Singapore, they are relevant to the balancing acts in most of the other countries between high-tech and industry ambitions and the need to provide for still rather large rural populations. The disruption of agricultural supply chains due to the COVID-19 crisis has led to great hardship for the urban poor and for farmers, in particular in developing countries.<sup>138</sup> Developing countries have also been unimpressed with the lack of support from leading pharmaceutical producer countries for a proposal by India and South Africa for a waiver of the obligation of WTO members to implement certain sections of the TRIPS Agreement in relation to prevention, containment or treatment of COVID-19<sup>139</sup> and, more generally, the refusal to share vaccines and vaccine technology more widely and effectively.<sup>140</sup> Renewed concerns about local research and manufacturing capacity in the pharmaceutical sector<sup>141</sup> may influence debates about local capacity related to agricultural technology and input material.

Some twenty years after the introduction of intellectual property rights in plant material the registries show that the range of owners in many countries include multinational as well as emerging domestic companies, besides public sector research agencies, universities, and some individuals. Several countries are currently reviewing their plant variety protection laws.

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136. See Human Rights Council, *Draft United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, U.N. Doc. A/HRC/WG.15/5/3 (Sept. 10, 2018).

137. MCKEON, *supra* note 1, at 73-81.

138. Abdi Latif Dahir, *‘Instead of Coronavirus, the Hunger Will Kill Us’*. *A Global Food Crisis Looms*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2020/04/22/world/africa/coronavirus-hunger-crisis.html>; Raymond Zhong, *This Chemical Is in Short Supply, and the Whole World Feels It*, N.Y. TIMES (Dec. 8, 2021), <https://www.nytimes.com/2021/12/06/business/urea-fertilizer-food-prices.html>.

139. Christoph Antons, *Intellectual Property Policies and Vaccine Diplomacy in Asia*, in THE REALM OF CORONA NORMATIVIITES II: THE PERMANENCE OF THE EXCEPTION 369, 374-375 (Werner Gephart & Jure Leko, eds., 2022).

140. *A Dose of Reality: How Rich Countries and Pharmaceutical Corporations are Breaking Their Vaccine Promises*, UNAIDS (Oct. 21, 2021), [https://www.unaids.org/en/resources/presscentre/featurestories/2021/october/20211021\\_dose-of-reality](https://www.unaids.org/en/resources/presscentre/featurestories/2021/october/20211021_dose-of-reality).

141. Stephanie Nolen, *Here’s Why Developing Countries Can Make mRNA Covid Vaccines*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/interactive/2021/10/22/science/developing-country-covid-vaccines.html>.

In Indonesia, legislative proposals submitted during the previous sitting period of the Indonesian parliament show the continuing attempts to develop a local plant breeding industry and to accommodate the interests of farmers and local environmental conditions at the same time.<sup>142</sup> A detailed legislative proposal of the Regional Representative Council (*Dewan Perwakilan Daerah*)<sup>143</sup> mentions in the elucidation as one of the reasons for the proposed amendments that the current law adopts the UPOV provisions with too little consideration for the conditions in Indonesia. It foresees a strong role of the government at various levels in the implementation of the law and in the administration of local varieties. The draft law also contains a provision on the seed saving privilege, to allow for research and plant breeding activities and use by various levels of government for food and medicine supply, provided the economic interests of the right holder are taken into account.<sup>144</sup> The provision is placed, somewhat confusingly, in the chapter on criminal sanctions, thus possibly restricting its impact to that of a defence against criminal charges only. Legislative proposals like the one in Indonesia show, however, the concern about local environmental conditions, the remaining role of public sector research and the plight of farmers. This balancing act between public interest and private industry considerations is common to most ASEAN countries and it may slow down, for the time being, the further expansion of UPOV 1991 conform laws in the region, in spite of the pressures from bilateral and regional FTAs and EPAs.

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142. *RUU tentang Perubahan atas Undang-Undang Nomor 29 Tahun 2000 tentang Perlindungan Varietas Tanaman*, *supra* note 99.

143. Decision of the Regional Representative Council of the Republic of Indonesia No. 25/DPD RI/II/2016-2017 Concerning the Draft of a Law on the Protection of Plant Varieties, <https://jdih.go.id/files/489/KEPUTUSAN%20DPD%20RI%20NO.%2025%20TAHUN%202016.pdf>.

144. *Id.* art. 34.

# WHO USES THE U.S.? LAW FIRMS, GLOBALIZATION, AND APPROACHES TO PRESENCE IN THE U.S.

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INTRODUCTION.....	550
I. IDENTITIES OF GLOBAL LAW FIRMS PRESENT IN THE UNITED STATES .....	554
<i>A. Search strategies, methods, and limitations</i> .....	556
<i>B. Law firm essentials</i> .....	559
II. OPERATIONALIZING PRESENCE—HERE AND THERE.....	563
<i>A. The notion of foreign-ness</i> .....	564
<i>B. What is presence?</i> .....	568
III. THEORETICAL IMPLICATIONS OF GLOBALIZATION AND PRESENCE .....	571
IV. CONCLUSION.....	587

## INTRODUCTION

Disruptions relating to and preceding the COVID-19 pandemic have led to predictions about the “end of globalization.”<sup>1</sup> In the context of legal

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1. Andrew Ross Sorkin, Jason Karaian, Stephen Gandel, Michael J. de la Merced, Lauren Hirsch and Ephrat Livni, *Wall Street Warns About the End of Globalization*, NEW YORK TIMES (March 24, 2022), <https://www.nytimes.com/2022/03/24/business/dealbook/globalization-fink-marks.html>; Pascal Lamy and Nicolas Kohler-Suzuki, *Deglobalization Is Not Inevitable*, FOREIGN AFFAIRS (June 9, 2022), [https://www.foreignaffairs.com/articles/world/2022-06-09/deglobalization-not-inevitable?check\\_logged\\_in=1](https://www.foreignaffairs.com/articles/world/2022-06-09/deglobalization-not-inevitable?check_logged_in=1).

services, globalization's end could have significant implications for those who have been on its mainstage, including the United States. Global legal services remain robust from the perspective of the United States: exports of legal services accounted for over \$16.3 billion dollars in 2021, while imports exceeded \$5 billion that same year.<sup>2</sup> Still, shifts in the forces of globalization, it is suggested, are likely to pivot away from an American orientation towards one that reflects greater diversity in centers of influence and power.<sup>3</sup> If this prediction holds sway, it raises a question in the context of legal services about whether and how an increasingly diverse set of actors will perceive the U.S. as an important site for pursuing their global agendas.

This question is related to an issue that has hounded debates around international trade in legal services regarding the impact of state regulation on foreign law firms<sup>4</sup> interested in setting up shop in the U.S.: that is, what, if any, trade barriers arise as a result of state regulation of lawyers and their services, and how do these affect the ways in which the U.S. is used as a site of global legal services?

To answer these questions, it would be useful to consult data about the foreign law firms that have established offices in the U.S. The home countries of such firms, their approaches to staffing in the U.S., the kinds of clients served and services provided, as well as office size and where in the U.S. they chose to locate are important indicators in predicting the ways that

2. Table 2.2 of *International Transactions, International Services, and International Investment Position Tables*, BUREAU OF ECON. ANALYSIS, <https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=9&isuri=1&6210=4#> (follow Table 2.2 hyperlink and select "Other business services" and legal services is nested within this). Imports increased each year since 2011, and overall have increased more than four times the amount imported in 2006, when legal services were first reported separately by the Bureau of Economic Analysis. Exports grew each year since 2012, and overall have increased more than four times since first reported separately in 2006. Table 2.1 of *International Transactions, International Services, and International Investment Position Tables*, BUREAU OF ECON. ANALYSIS, <https://apps.bea.gov/iTable/iTable.cfm?reqid=62&step=9&isuri=1&6210=4#>.

3. Wang Huiyao, *Globalization isn't Dead, It's Just Not American Anymore*, THE WASH. POST (May 7, 2022), [https://www.washingtonpost.com/business/globalization-isnt-dead-its-just-not-american-anymore/2022/05/06/d36f8908-cda1-11ec-b7ee-74f09d827ca6\\_story.html](https://www.washingtonpost.com/business/globalization-isnt-dead-its-just-not-american-anymore/2022/05/06/d36f8908-cda1-11ec-b7ee-74f09d827ca6_story.html).

4. Like trade law generally, there is a particular language used by regulators and commentators to highlight the various relationships inherent in these issues regarding trade in legal services. This includes identifying home country (country of origin), host country (the country to which a foreign host-country firm is expanding internationally), and the term "foreign" instead of "international," to indicate that an organization or person is foreign as to a particular host jurisdiction. See Laurel S. Terry, Carole Silver, Ellyn Rosen, Jennifer Haworth McCandless, Carol A. Needham, Robert E. Lutz and Peter D. Ehrenhaft, *Transnational Legal Practice*, 43 THE INT'L LAW. 943 (2009). This article will utilize the same terminology. The term "foreign law firm" is the term used in regulation of legal services to refer to law firms based outside of a particular home jurisdiction. For purposes of this article, "foreign law firm" refers to a law firm based outside of the United States; "international law firm" is used interchangeably. For a discussion of "based" see *infra* note 30.

changes in global actors could impact perceptions about the importance of the U.S. as a site for global legal services and in establishing a baseline for perceiving change to those global actors. Comparative data would deepen the explanatory power, as well.

Unfortunately, such data have not been available until now. Regulations do not require firms to disclose their presence, and the role of the U.S. as a site of competition for global legal services has not figured prominently in past research. Rather, most research on globalization and legal services has focused on exploring the power of U.S.-based organizations in this competition through the lens of their global strategies, which are generally outward facing.<sup>5</sup> But if predictions about power shifts in globalization come to fruition, the actors determining global strategies will not necessarily be based in the United States; indeed, they may not intersect with the U.S. at all unless that is seen as an asset.

This issue of the role of the U.S. in the strategies of global legal services actors is at the heart of this article. It pursues this question by describing and drawing on a unique data set developed to learn about foreign law firms with U.S. offices. Using these data, the article addresses three questions: First, what are the essential characteristics of firms that pursue global growth through a U.S. office? While the data include firms long active in the global legal services market—particularly the largest firms (in terms of headcount) that represent global commercial and banking clients—they go beyond this; also included are firms focused on practice areas typically excluded from the conversation on global legal services, and firms that are much smaller than the mega-firms typically highlighted in press reports on global firms. Second, how does presence get operationalized by these firms? Physical presence no longer has the same urgency in many industries since the pandemic began, but even for firms that support a physical office in the U.S.,

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5. See, e.g., Bryant G. Garth, *Corporate Lawyers in Emerging Markets*, 12 ANN. REV. L. & SOC. SCI. (2016) (U.S.-based corporate law firms as models of global law firms); Carole Silver, *Globalization and the U.S. Market in Legal Services - Shifting Identities*, 31 L. AND POL'Y IN INT'L BUS., 1093 (2000) (global expansion strategies and activities of U.S.-based law firms); Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994) (global strategies); but see Ji Li, *Meeting Law's Demand: Chinese Multinationals as Consumers of U.S. Legal Services*, 46 YALE J. INT'L L. ONLINE 72 (2021) (analyzing Chinese law firms and their international reach in serving Chinese clients). Research on global legal education, on the other hand, has emphasized the U.S.'s role in receiving international students; see, e.g., Carole Silver and Swetha S. Ballakrishnen, *Sticky Floors, Springboards, Stairways & Slow Escalators: Mobility Pathways and Preferences of International Students in U.S. Law Schools*, 3 U.C. IRVINE J. OF INT'L TRANSNAT'L AND COMPAR. L. 39 (2018); See also Carole Silver, *States Side Story: Career Paths of International LL.M. Students, or "I Like to Be in America,"* 80 FORDHAM L. REV. 2383 (2012); See also Carole Silver, *Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers*, 45 VA. J. OF INT'L L. 897 (2005).



differences in where these are located and who populates them implicate both the kind of work being done there and state-level regulations of individual lawyers. Last, what theoretical implications can be drawn from analyzing the characteristics of firms that have invested in a U.S. presence, and what does this suggest for the prediction of shifting global dynamics?

These questions relate to Professor Robert Lutz's work on international trade in legal services and lawyer regulation in an international practice context,<sup>6</sup> as well as to his involvement in the American Bar Association's activities on international law and practice. I was fortunate to become acquainted with Bob early in my effort to become involved in the ABA. Bob epitomizes the warm welcome that anyone wishes for when starting out with a new organization. He offered helpful information, introductions, and insight from his long and diverse tenure within the ABA. We overlapped in several contexts within the ABA, including the Section of International Law (which Bob chaired), its Transnational Legal Practice Committee, the ABA's Standing Committee on International Trade in Legal Services (ITILS, which Bob chaired from 2006-2009), and the Ethics 20/20 Commission. This list is neither exhaustive nor especially descriptive, as Bob's involvement included creating, developing, and leading initiatives. For example, Bob organized numerous fascinating discussions with leaders of global law firms and regulators of major foreign legal markets, as well as those heading regulatory efforts within the U.S.; these informed policy positions and enabled the development of new relationships that could address ongoing challenges. His work illuminated practical implications of the factors shaping competition for a central role in the globalization of legal services. Indeed, it was during these discussions that it became clear that the data described in this article had not been developed and were central to questions about the role of the U.S. in the global agendas of participants in the global legal services market. It is to these data that the article turns next in Section I, below.

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6. Robert E. Lutz, *The Regulation of the Transnational Legal Profession in the United States*, 50 THE INT'L LAW. 445 (2017); Laurel S. Terry, Carole Silver, Ellyn Rosen, Jennifer Haworth McCandless, Carol A. Needham, Robert E. Lutz and Peter D Ehrenhaft, *Transnational Legal Practice*, 45 THE INT'L LAW. 943 (2009); Laurel S. Terry, Carole Silver, Ellyn Rosen, Carol A. Needhama, Robert E. Lutz and Peter D. Ehrenhaft, *Transnational Legal Practice: 2006-07 Year-in-Review*, 42 THE INT'L LAW. 833 (2008); Robert E. Lutz, Philip T. von Mehren, Laurel S. Terry, Peter Ehrenhaft, Carole Silver, Clifford J. Hendel, Jonathan Goldsmith, and Masahiro Shimojo, *Transnational Legal Practice Developments*, 39 THE INT'L LAW. 619 (2005); Robert E. Lutz, Philip T. von Mehren, Laurel S. Terry, Peter Ehrenhaft, and Carole Silver, *Transnational Legal Practice: Cross-Border Legal Services: 2002 Year-in-Review*, 37 THE INT'L LAW. 987 (2003).

## I. IDENTITIES OF GLOBAL LAW FIRMS PRESENT IN THE UNITED STATES

The topic of this article—the role of the U.S. in global legal services agendas as operationalized through U.S. practice sites—arose during discussions ITILS facilitated about regulation of the legal profession in the context of trade in legal services. Focusing on the United States’s role as a *receiving* country emphasizes inbound legal services—the lesser of the two trade numbers referred to above. How inbound flows of legal services contribute to globalization forces involves exploring notions about what presence in the United States looks like and who is pursuing it. Further, patterns of presence in the U.S. are explored as a first step towards filling gaps in existing research.

Being international through straddling multiple jurisdictions has generally been seen as an asset in the context of legal services, as in myriad other circumstances, and is one way that law firms<sup>7</sup> can distinguish themselves from their competition.<sup>8</sup>

It signals convenience and investment, where physical presence supports the development of local relationships while simultaneously investing in learning about local culture and language; its symbolic value suggests a capability to reach and serve differently-situated clients and to offer broader expertise that spans from the transnational to the local. An international presence conveys a cosmopolitanism that may contribute to a higher status within local and national hierarchies in the legal profession.<sup>9</sup> Unsurprisingly, law firms have touted their international characteristics by developing

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7. *Lawyers Go Global*, THE ECONOMIST, Feb. 26, 2000, at 79 (“[F]or the biggest and richest law firms ... [b]eing big at home is no longer good enough.”), <https://www.economist.com/business-special/2000/02/24/the-battle-of-the-atlantic>; See also Bruce A. Green & Carole Silver, *Technocapital@BigLaw.com*, 18 NW. J. TECH. AND INT. PROP. 265 nn.8 & 91 (2021); See also Silver, *supra* note 5 (This idea reflects not only the economic understanding of assets, but also the sociological understanding.); See also Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923, 941 n.59 (2002), (citations omitted), (“Professional assets accrue from a combination of human capital, social capital, and cultural capital and are the ‘stuff’ from which advancement occurs. Human capital is operationalized as the specific lawyering skills acquired through both legal education and practice experience. Social capital consists of individuals’ ability to draw on relationship networks for establishing support. Although this network may initially consist of other lawyers in the firm, it may then expand to lawyers in the community and, in turn, expand to the acquisition of clients. Theorists such as Bourdieu suggest that success in careers results from the accumulation of these forms of capital.”).

8. For a discussion of other types of capital seen as valuable by law firms, see Green & Silver, *supra* note 7, at 265 (discussing technology).

9. Yves Dezalay & Bryant G. Garth, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1998) (discussing the value of cosmopolitanism in international commercial arbitration).

international offices, hiring lawyers with international experience and credentials, attracting international clients, and highlighting when disputes and deals contain international connections or implications. This has been especially important for certain law firms that otherwise lack connections to global matters and actors.<sup>10</sup>

But while internationality is attractive to law firms and lawyers, it can also be crucial to the jurisdictions *receiving* international firms, lawyers, and law students. There is a competition of sorts among jurisdictions over degrees of being international. One element of this competition reflects how welcoming a jurisdiction is to law firms wishing to establish an international presence, which reflects, in part, the jurisdiction's regulatory approach to foreign law firms and lawyers.

Regulation of legal services in the U.S. is addressed by individual states, typically through rules governing individual lawyers and their qualification to practice in that state.<sup>11</sup> Such regulation may give rise to states having data relating to the number of foreign-educated lawyers who have passed their bar exam or obtained a limited license to practice, such as the foreign legal consultant or in-house counsel license.<sup>12</sup> Missing from this, however, is

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10. Jing Li, *All roads lead to Rome: Internationalization strategies of Chinese law firms*, J. OF PROF. & ORG. 156, 175 (2019) (“As such, internationalization often carries symbolic value and works as ‘cosmetics’ for these periphery firms to enhance their professional image in front of the clients.”).

11. Lawyer licensing, like occupational regulation generally, is often seen as an example of “‘private interest theory’ [which] sees “rules [as] created in order to protect the interests of lawyers. This is an application of the capture theory of regulation, which holds that regulation is typically ‘acquired’ by the regulated group, and ‘designed and operated primarily for its benefit’ . . . [T]he dual nature of professional self-interest . . . has a pecuniary aspect (professionals’ desire for market-control or market-shelter to enrich themselves), but it also manifests itself in their desire to set themselves above and apart from other workers and service providers.” Noel Semple, Russell G. Pearce, and Renee Newman Knake, *A Taxonomy of Lawyer Regulation*, 16 LEGAL ETHICS 258, 261-264 (2014).

12. In earlier works, I have written about foreign lawyers’ access to particular statuses of qualification, whether through a bar examination or licensing as a foreign legal consultant. See Carole Silver, *Regulating International Lawyers: The Legal Consultant Rules*, 27 HOUSTON J. OF INT’L L. 527 (2005). The ABA’s Model Rules take the approach that lawyers licensed outside of the United States must requalify if they intend to practice in the United States on an ongoing basis (See MODEL RULES OF PRO. CONDUCT r. 5.5 (emphasizing Model Rule on Temporary Practice by Foreign Lawyers); for temporary practice a separate license is not required. *Id.* While states differ in their adaptation of these model rules and not all states have adopted each (or any) of the rules, these regulatory approaches typically leave law firms outside of direct regulation. See ABA Comm. on Multijurisdictional Prac., *Charts on State Adoption of MJP Recommendations* (emphasizing charts on In-House Corporate Counsel Registration Rules (2021), Foreign Legal Consultants (2015), and Temporary Practice by Foreign Lawyers (2015)), available at [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/comm\\_ission-on-multijurisdictional-practice/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/comm_ission-on-multijurisdictional-practice/). Consequently, there is no regulatory element of governance of the legal profession that yields a list of foreign firms present in the United States. Like other organizations, law firms are subject to regulations stemming from their entity status.

information about the presence of foreign law *firms* because state regulation of legal services typically does not address law firms.<sup>13</sup>

Moreover, while many firms promote their international-ness as capital, others may perceive a U.S. presence differently and seek to mask this expansion. A U.S. presence might be perceived as competitive with organizations that have been a source of referrals or implicate political repercussions from a home country government or client. These influences may dissuade a law firm from broadcasting their U.S. presence. Other foreign law firms may see disclosure of a U.S. presence as problematic if they are uncertain about compliance with the applicable regulatory strictures of state licensing regimes. This may be reflected in ambiguities around staffing or the permanence of presence, among other things.

This article aims to take a first step at filling that void by exploring the “who” and “how” of foreign law firms’ presence in the United States. Because regulation does not trigger a registration or notification requirement, there is no obvious way to develop a list of relevant firms. In subpart A, we address our strategy for compiling data, followed by an analysis of the characteristics of these firms.

#### *A. Search strategies, methods, and limitations*

Without data derived from regulatory filings, the search for global firms with U.S. offices necessarily relies in part on self-disclosure by the firms. Many law firms promote their global footprints through their websites and other media.<sup>14</sup> But this promotion does not necessarily guarantee detection of foreign firms in a search for those with a U.S. presence, because the conception of a global firm may reflect a preference for the U.S. version of globalization and inadvertently exclude other models.<sup>15</sup> At the same time, as noted above, U.S. presence is not universally perceived as an asset to be flaunted.

Nevertheless, public listings provided a starting point for compiling data about foreign firms with U.S. offices. We reviewed the lists compiled by

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This could require filing if a firm is organized as an LLP or LLC, for example, as well as to satisfy IRS requirements. However, none of these filing regimes gives rise to a searchable database by type of service provided. *But see* ILL. STATE CT. R. 721, 2 (requiring registration of law firms). Instead, a different strategy is necessary to identify those firms.

13. *But see* ILL. STATE CT. R. 721, *id.*; N.J. CT. R. 1:2-9 <https://www.njcourts.gov/attorneys/assets/rules/r1-21.pdf> (addressing particular kinds of law firm organizations, such as professional service corporations, limited liability companies and registered limited liability partnerships, among others).

14. *See generally infra* notes 36, 38, 39, 47, 53, 54, 65, 67, 68, 69, 73, 76, 82, 84, 85, 87, 107, 125, 139.

15. *See, e.g.* Garth, *supra* note 5.

publications like *The American Lawyer* that focus on identifying the largest firms by revenue and headcount,<sup>16</sup> and investigated each firm through its website to identify its home office, origins, and office locations. This approach yielded names of firms that were pioneers in internationalizing the legal profession, such as the British Magic Circle, as well as other law firms that are well known both within and beyond their home countries.

To gather additional information about firms that might be regional leaders but not make it onto these lists, we also targeted law firms based in particular jurisdictions that exhibited one of three internationalizing movements: foreign direct investment into the United States,<sup>17</sup> sending significant immigrant populations to the United States,<sup>18</sup> and sending international students to the United States.<sup>19</sup> We hypothesized that each of these factors could generate the need for legal services that might support expansion of a law firm from the home country of the investors, immigrants, or students. Using these forces as a guide for selecting jurisdictions to focus the search, we used the Chambers and Partners Global Guide to identify

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16. See Roberto Jiménez, *The 2021 Global 200: Ranked by Gross Revenue*, THE AM. LAW. (Sept. 21, 2021, 3:00 AM), <https://www.law.com/international-edition/2021/09/21/the-2021-global-200-ranked-by-gross-revenue/>.

17. These particular jurisdictions include the United Kingdom, Japan, Canada, Germany, Ireland, France, Switzerland, The Netherlands, Singapore, Spain, China, Belgium, Israel, Australia, and Sweden.

See Michael Cortez, *Foreign Direct Investment in the United States*, ESA Issue Brief No. 06-17, U.S. DEPT. OF COM. (2017),

<https://www.commerce.gov/sites/default/files/migrated/reports/FDIUS2017update.pdf>; Besides these leading countries, Thailand, Argentina, Chile, Brazil, Turkey, Greece, South Korea and Denmark are the countries with the fastest-growing FDI. See also *Foreign Direct Investment (FDI): United States fact sheet*, SELECT USA, <https://www.selectusa.gov/FDI-global-market> (select download to display fact sheet).

18. See *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065, Chapter 5: U.S. Foreign-Born Population Trends*, PEW RESEARCH CENTER (Sept. 28, 2015), <http://www.pewhispanic.org/2015/09/28/chapter-5-u-s-foreign-born-population-trends/> (explaining that the specific countries leading the foreign-born population in the United States have shifted from Ireland, Germany, the U.K., Canada, and France in 1850, to include Sweden, Russia, Italy, Poland, Mexico, China, Philippines, Cuba, India, and Vietnam since then to 2013).

19. Of the places of origin of international students in the United States from 2015 to 2016, China, India, South Korea, Saudi Arabia, Canada, Vietnam, Taiwan, Japan, Mexico, Brazil, Iran, Nigeria, Nepal, United Kingdom, Turkey, Germany, Kuwait, France, Indonesia, and Venezuela are among the top 20. See *Top 25 Places of Origin of International Students, 2015-16*, THE CHRONICLE OF HIGHER EDUCATION (Aug. 13, 2017), <https://www.chronicle.com/article/top-25-places-of-origin-of-international-students-at-u-s-colleges-2015-16/>.

leading law firms based in these jurisdictions.<sup>20</sup> Eventually, we searched through Chambers' listings for 195 countries and regions.<sup>21</sup>

Not wanting the search to be constrained by Chambers' strategy and limitations, we also reached out to organizations and individuals who were knowledgeable about global actors in the legal profession, including those participating in this world. ITILS was helpful in this search, as were contacts from the ABA generally; in addition, we consulted with experts from the Law Societies of England and Wales and Hong Kong, the International Section of the New York Bar Association, and international law students.<sup>22</sup> The search included contacting embassy and consulate websites for law firms recommended to represent foreign nationals in legal matters in the United States. In addition, we consulted other sources focused on firms that were internationally active: Legal 500,<sup>23</sup> HG.org, International Law Office Directory, Martindale-Hubbell and Uniworld's online research platform.<sup>24</sup>

Further, to try to assess the comprehensiveness of our data, we consulted lists of the largest firms in particular countries, including the top sixty in the United Kingdom ranked by revenue.<sup>25</sup> These searches resulted in no additional firms being added to the list.

Finally, we consulted published lists of international lawyers who had qualified as Foreign Legal Consultants in jurisdictions where their names were made publicly available, and, working through Google and LinkedIn,

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20. Chambers utilizes fields of practice as a sorting mechanism; we initially focused on fields we considered most relevant in light of the industries leading in foreign direct investment in the U.S. during the period from 1980 through 2016, but eventually expanded to a comprehensive search of practice areas. *See generally Chambers Global*, CHAMBERS AND PARTNERS (2022), <https://www.chambersandpartners.com/guide/global/2>.

21. We excluded U.S. territories from the search.

22. We considered working through lists of foreign-licensed lawyers working in the U.S. to identify their employers, thinking this would bring to light some foreign-based law firms, among other employers. While certain states publish lists of lawyers licensed as Foreign Legal Consultants, this is not universally available for all states with such a licensing category. Moreover, because all internationally-licensed lawyers are not registered in the state where they are practicing, this approach was of only limited utility.

23. As useful as they are for identifying organizations service elite clients, directories such as Legal 500 and Chambers are not comprehensive. *See generally THELEGAL 500*, <http://www.legal500.com/> (last visited Oct. 27, 2022).

24. *See generally* UNIWORLD ONLINE, <https://uniworldonline.com/> (last visited Oct. 27, 2022).

25. In addition to reviewing the sixty largest firms on this list, we also investigated ten firms ranked below the sixty largest firms. Locations for each firm were found in its website, listed either under "offices" or "contact." *See The Lawyer's Top 200 UK law firms revealed*, THE LAW. (Jan. 1, 2021), <https://www.thelawyer.com/top-200-uk-law-firms/>.

identified their employers; we then explored whether these employers were foreign firms with U.S. offices.<sup>26</sup>

We began the work described here in the fall of 2017; the search went through multiple waves through the spring of 2020, when we finalized what we considered a comprehensive database. But to ensure that the data was not overinclusive, they were updated in the winter of 2022 to cull firms that no longer had a U.S. presence. No new firms have been added since 2020.

### *B. Law firm essentials*

The search for law firms with a United States presence uncovered a substantial variety of organizational breadth, from global firms with thousands of lawyers and offices covering the globe to solo practices. Further, differences in the connections among locations within particular organizations—each presented as a firm—also became salient; this included characterizations of single firms, networks, affiliates and liaison offices. In addition, the nature of the expertise offered by these organizations came into focus in the search; firms that are multidisciplinary, such as the law arms of the Big Four accounting firms, can be perceived and represented as engaged in legal practice outside of the U.S., but regulations in most U.S. jurisdictions limit lawyers to practice within lawyer-owned organizations, resulting in these being viewed as something other than law firms in the U.S.<sup>27</sup> These and related issues are considered in this subsection.

Global growth was pursued by many elite U.S.-based law firms through the establishment of a web of overseas offices aimed at serving clients based in the U.S. Sidley, originally a Chicago-based law firm, provides an example. By the time the firm opened an office in Singapore in 1982, it already had gone through the process of opening overseas offices in Brussels and London. It tapped longtime Sidley partner, George McBurney, to create the

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26. The three states making this information available were California, Texas, and Florida. We searched the name of each certified FLC in these three states and were able to find eleven foreign firms with U.S. presence from the California list, seven from the Texas list and one from the Florida list. Using information from the FLC list and LinkedIn, we searched where the FLCs are working or had worked before. See *Foreign Legal Consultant List*, STATE BAR OF CAL., <https://www.calbar.ca.gov/Admissions/Special-Admissions/Foreign-Legal-Consultants-FLC/Foreign-Legal-Consultants-List> (last visited Nov. 17, 2022); See also *Foreign Legal Consultant Certification*, STATE BAR OF TEX., [https://www.texasbar.com/AM/Template.cfm?Section=Foreign\\_Legal\\_Consultants1&Template=/CM/HTMLDisplay.cfm&ContentID=34463](https://www.texasbar.com/AM/Template.cfm?Section=Foreign_Legal_Consultants1&Template=/CM/HTMLDisplay.cfm&ContentID=34463) (last visited Nov. 17, 2022); See also *Certified Foreign Legal Consultants*, FLA. STATE BAR, <https://www.floridabar.org/directories/find-aflc/> (last visited Nov. 17, 2022).

27. See MODEL RULES OF PROF. CONDUCT r. 5.4(a) (prohibiting fee-splitting with non-lawyers); See also W. Bradley Wendel, *Making Sense of the Fee-Splitting Rule*, JOTWELL, (Feb. 27, 2018), <https://legalpro.jotwell.com/making-sense-fee-splitting-rule/>.

Singapore office, with the intention that the office would serve as a regional base for the firm's U.S.-based clients that had operations in Singapore and the Asia-Pacific region. The firm identified a trusted partner as its proxy, and he began to develop relationships not only with clients active in the region but also with the legal profession present in Singapore, including both other foreign law firms with Singaporean offices, Singaporean law firms and local and foreign lawyers. The foreignness of Sidley's operation in Singapore was emphasized by the American-ness of its lawyers and their expertise in U.S. law—they had no particular tie to the region, much less the country.<sup>28</sup> While Singaporean regulations prohibited them from advising on local law or hiring locally-licensed lawyers to do so, Sidley's approach was also common to other law firms during the early period of foreign expansion.<sup>29</sup>

Similar characteristics are apparent in many of the firms identified in our data, including Loyens & Loeff, a firm based in the Netherlands with an office in New York. Loyens limits its work in New York to advising on “Dutch and Luxembourg tax, corporate, fund and finance law who provide expertise in these areas to the North American market, with a specific focus on the U.S. The office does not provide advice on matters of U.S. law.”<sup>30</sup> None of the firm's New York office lawyers have studied law in the United States, and none are admitted in New York. The closest connection to U.S. law identified in these lawyers' profiles is having studied U.S. tax law through a program unaffiliated with a U.S.-based law school or organization.<sup>31</sup>

While this approach was common for the firms identified through our search, it was not exclusive, and other organizational forms also allowed firms to claim a U.S. presence. For example, LATAXNET and WTS Global are networks of seemingly independent law firms focused on tax advising. LATAXNET is a network of tax and legal firms in Latin America.<sup>32</sup> It also is related to WTS Global, the member firms of which are also focused on

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28. In full disclosure, the same approach of staffing with lawyers who had neither local ties nor local expertise carried on through the mid-1980s when my husband was the office managing partner.

29. See Silver, *Shifting Identities*, *supra* note 5, at 1145 (“Foreign offices were staffed exclusively with lawyers trained in the firm's home office, which ensured quality control and supported the connection between the foreign and home offices.”).

30. *New York*, LOYENS & LOEFF, <https://www.loyensloeff.com/en/en/about-us/offices/new-york/> (last visited Oct. 27, 2022).

31. See, e.g., *Frank van Kuijk*, LOYENS & LOEFF, <https://www.loyensloeff.com/en/en/our-people/frank-van-kuijk-en-p10796/> (last visited Oct. 27, 2022) (referencing profile for Attorney, Frank van Kuijk).

32. See *What makes us unique*, LATAXNET, <https://lataxnet.net/what-makes-us-unique/> (last visited Oct. 27, 2022) (“LATAXNET is a tax network of highly specialized Latin American professional firms covering 19 countries running all the way from Mexico to Argentina.”).



providing tax advice. Three U.S.-based law firms are part of WTS Global.<sup>33</sup> Law firm networks have been studied as a mechanism for global expansion by professional service firms.<sup>34</sup> In this research, the various ways in which networks promote and facilitate global spread is founded on the organizational integrity of member firms, as distinct from their networks. Overall, our research uncovered six law firms that described their approach to having a U.S. presence as affiliating with a U.S.-based firm, whether separately or as a member of a law firm network.<sup>35</sup> The six firms were different from one another in terms of home country<sup>36</sup> and the nature of their affiliate or network relationship. Two of these law firm networks and affiliations of firms<sup>37</sup> were characterized by ambiguity in the description of the relationships, which made it difficult to determine whether a firm was part of the same organization or independently owned.<sup>38</sup>

A different challenge to an ideal-type of foreign law firm with a U.S. presence is raised by organizations that offered multidisciplinary services like EY Law, ILC Legal (the law firm of PricewaterhouseCoopers) and German-based Rödl & Partner. The multidisciplinary nature of these firms complicates their status in the United States because state regulation in most U.S. jurisdictions limit the practice of law to organizations owned solely by

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33. See *WTS in USA*, WTS GLOBAL, <https://wts.com/global/locations/united-states~location?language=en> (last visited Oct. 27, 2022).

34. See Rany Salvoldi and David M. Brock, *Opening the black box of PSF network internationalization: An exploration of law firm networks*, 6 J. OF PRO. AND ORG. 1 (2019).

35. For information on law firm networks, see *id.*

36. The six firms were from China, Israel, Portugal, Spain, Uruguay and Venezuela.

37. In some sense, firms that are organized as vereins raise a similar issue about the nature of their organization. These are explored in the context of the question of their being foreign firms.

38. This is the case, for example, with Miranda Alliance, a Portuguese organization that itself is a network or alliance of independent law firms. The U.S. office is identified as a “liaison office” rather than “member,” and the difference between these is not clearly explained. *Liaison Offices*, MIRANDA LAW FIRM, <https://www.mirandalawfirm.com/en/alliance/firms/offices/houston-usa>. Similarly, the website of the S&P Law Firm from China describes its relationship with U.S. law firms as facilitating its global reach—suggesting that there is no U.S. office of the firm itself: *About*, S&P LAW FIRM, <https://www.splf.com.cn/EN/0201.aspx> (“S&P has... established long-term and stable strategic cooperative relationship with some law firms in the major cities in China as well as those in the USA, UK, Canada, Australia and Hong Kong.”). But on LinkedIn, the firm describes itself as “a general practice US law firm located in the San Francisco Bay Area and is the US branch office of one of China’s prestigious large-scale law firms, Beijing S&P Law Firm. S&P offers professional legal services to multinational corporations from US and Asia.” S&P Law, LINKEDIN, <https://www.linkedin.com/company/s&p-law-llp/about/>.

lawyers.<sup>39</sup> Nevertheless, it is undeniable that these firms are competitive in the war for talent and clients in the United States as well as elsewhere.<sup>40</sup>

Solo practices also present a challenge to the ideal of a foreign law firm supporting different office locations with distinct lawyers attached to each. Solo practices are, by definition, representations of a single individual, who cannot themselves be present in multiple locations at once and thus challenges the idea of being foreign. Nevertheless, solo practices can present themselves as multi-office international firms. On one hand, the difference between a firm with two lawyers and one with a single lawyer may not seem particularly significant; on the other hand, if presence is the key ingredient to being foreign, how can a single-lawyer firm qualify, at least on an ongoing basis?

An example is useful in explaining the dilemma. The Markou Global Legal Group (MGLG) describes itself as having three office locations: New York, Cyprus, and Athens.<sup>41</sup> Maria Markou is the sole lawyer associated with MGLG. The firm's website describes her as "born in Athens, Greece and . . . licensed to practice law in both Greece and New York."<sup>42</sup> Her practice areas include real estate transactions and immigration in the United States, Greece, and Cyprus, among other fields. Markou's presence in the United States reflects the sorts of international characteristics that are relevant in any study of international lawyers and legal careers, including U.S. legal education (an LLM from St Mary's University School of Law in Markou's case) and New York's determination that this qualified for bar eligibility purposes.<sup>43</sup>

However, in considering how a solo practice fits into the conceptual framework of a law firm, research on professional service firms tilts away from inclusion. Scholars define professional service firms—including law firms—in terms of several characteristics that assume multiple owners and

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39. *But see* Karen E. Rubin, *Non-Lawyer Ownership of Law Firms is Trending – But is it a Good Idea?* OHIO LAW. (Mar. 22, 2021), <https://www.ohioabar.org/member-tools-benefits/practice-resources/practice-library-search/practice-library/2021-ohio-lawyer/non-lawyer-ownership-of-law-firms-is-trending--but-is-it-a-good-idea/> (describing loosening of barriers around multidisciplinary practice).

40. David B. Wilkins and Maria J. Esteban Ferrer, *The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market*, 43 L. & SOC. INQUIRY 981, 1006 (2018); *See also* Bryant G. Garth and Carole Silver, *The MDP Challenge in the Context of Globalization*, 52 CASE W. RESV. L. REV. 903 (2002) (analyzing the pre-Enron period of expansion of the Big Four).

41. *See Contact Us*, MARKOU GLOBAL LEGAL GROUP, <https://www.markoulegallyvirtual.com/contact-us/> (last visited Oct. 27, 2022) (each of the locations is shown with an icon indicating location, but none are live links; the non-U.S. locations do not provide addresses).

42. *Maria Markou*, MARKOU GLOBAL LAW GROUP, <https://www.markoulegallyvirtual.com/attorney/maria-markou/> (last visited Oct. 27, 2022).

43. *See* N.Y. Ct. R. 520.6, *available at* <https://www.nycourts.gov/ctapps/520rules10.htm>.

professionals populating a firm.<sup>44</sup> Firms involve relationships, which in turn require more than one person. The focus on organizational characteristics also serves to distinguish individual professionals from firms. At the same time, solo practice remains the norm in many countries, and communications technology expands the possibilities of practicing in multiple countries simultaneously for sole practitioners. This is even more significant today, after the experience of the COVID pandemic when remote work became the norm for many lawyers.<sup>45</sup>

In the ways described above—from networks and affiliates to solo practices and multidisciplinary firms—the ideal type of law firm is challenged. At the same time, however, each of these variations offers an alternative approach to developing a United States presence underlying a claim of spanning boundaries. In this way, their differences provide insight into the ways in which legal services are crossing borders, and the kinds of organizations that perceive claiming a U.S. presence as beneficial.

## II. OPERATIONALIZING PRESENCE—HERE AND THERE

At first glance, the idea of presence seems straightforward: firms open offices by acquiring space and allocating staff. But to determine which firms to include in these data, firms must first be categorized into those that are foreign and those that are domestic. These terms carry ambiguity on top of the issues raised above. For example, how do law firm mergers unifying into a single organization from home and abroad get coded into bifurcated categories of foreign and domestic? Relatedly, as alternatives to the historical model of presence are developed—particularly in the aftermath of the pandemic—they complicate our understanding of both where firms are based, and how they might be present in the United States. These questions are addressed below.

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44. See Empson, L., Muzio, D. Broschak, J., & Hinings, B., *Researching Professional Service Firms: An Introduction and Overview*, THE OXFORD HANDBOOK OF PRO. SERV. FIRMS, Aug. 2015; See also Andrew von Nordenflycht, *What Is a Professional Service Firm?*, 35 THE ACAD. OF MGMT. REV. 155 (2010).

45. Moreover, remote work appears to be the trend going forward for at least some elite firms. See, e.g., Dan Packel, *More Large Law Firms Are Embracing Remote Associate Hires*, THE AM. LAW. (May 10, 2021), <https://www.law.com/americanlawyer/2021/05/10/more-large-law-firms-are-embracing-remote-associate-hires/>; see also David Thomas, *Quinn Emanuel tells U.S. lawyers they can work from anywhere, forever*, REUTERS (Dec. 20, 2021), <https://www.reuters.com/legal/legalindustry/quinn-emanuel-tells-us-lawyers-they-can-work-anywhere-forever-2021-12-20/>.

A. *The notion of foreign-ness*

One challenge implicit in this research relates to the quality of being foreign. Foreignness implies a relationship to multiple locations where one location is primary. Determining the primary location—or home base—might reflect a firm’s origin, but other factors also might be relevant, including how a firm identifies itself or where most of its lawyers work, for example.<sup>46</sup>

Our assessment of a firm’s home country generally reflected its origin, and in most cases, this was neither contentious nor difficult to determine. The Canadian law firm Stikeman Elliott, for example, describes its origin in Montreal as the partnership of Heward Stikeman and Fraser Elliott.<sup>47</sup> It was the first Canadian firm to open an office in London and later, in New York. The firm’s description on its website clearly establishes its Canadian identity as foundational.

For certain firms, however, ascertaining a home location was complicated, and this was particularly the case for law firms that resulted from cross-border mergers. Mergers might involve relatively equal players—such as the combination of the U.S. firm Hogan & Hartson and U.K. firm Lovells—so that the resulting firm is more or less weighted in several jurisdictions at once. Alternatively, mergers might be more lopsided in terms of size—such as the merger of UK-based HFW (with London as its largest office, supporting over 250 lawyers<sup>48</sup>) with a seventeen-lawyer Texas law firm—leading to a foreign law firm with what might be seen as a U.S. outpost, clearly smaller in size than the non-U.S. offices of the firm.<sup>49</sup> In between these extremes are many other combinations.

Our research identified fourteen firms resulting from mergers between foreign- and U.S.-based firms (Table 1). These merged firms challenge the notion of home country because the identity of the merger partners vies for different directions in determining “home.” Indeed, in its ranking of the highest revenue-generating law firms, *The American Lawyer* has relinquished the idea of home jurisdiction in favor of characterizations of “national” and “global” in circumstances reflecting mergers, among others.

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46. Baker McKenzie, for example, has more lawyers based outside of the United States than in U.S. offices. But Baker’s origin was as a U.S. law firm.

47. *See Our History*, STIKEMAN ELLIOTT, <https://www.stikeman.com/en-ca/firm/firm/history> (last visited Oct. 27, 2022).

48. *See HFW in the UK*, HFW, <https://www.hfw.com/London> (last visited Oct. 27, 2022).

49. *See HFW Merges With US Firm Legge Farrow In Major Strategic Drive Into US Energy And Marine Markets*, HFW, <http://www.hfw.com/HFW-merges-with-US-firm-Legge-Farrow> (last visited Oct. 27, 2022).

Relatedly, firms organized as vereins, such as DLA Piper<sup>50</sup> and Dentons,<sup>51</sup> have grown through merging with existing law firms. But while these firms are not easily categorized according to a home country, they nevertheless provide competition for firms that expand through greenfield investment,<sup>52</sup> like Stikeman Elliott.

**Table 1: Merged firms and firms involved in mergers**

Home country	Firm name
Argentina	Cabanellas, Etchebarne & Kelly <sup>53</sup>
Argentina	Rattagan Macchiavello Arocena <sup>54</sup>
Italy	Santa Maria Studio Legale Associato <sup>55</sup>
UK	Bryan Cave Leighton Paisner <sup>56</sup>
UK	Clifford Chance <sup>57</sup>
UK	Dentons <sup>58</sup>
UK	DLA Piper <sup>59</sup>

50. *Legal Notices*, DLA PIPER, <https://www.dlapiper.com/en/us/legalnoticespage/#:~:text=DLA%20Piper%20International%20LP%20and,legal%20or%20other%20client%20services> (last visited Oct. 27, 2022).

51. *Legal Notices*, Dentons, <https://www.dentons.com/en/legal-notices> (last visited Oct. 27, 2022).

52. Greenfield investment refers to organic growth through creating an office and staffing it through moving lawyers already working for the firm to the new office supplemented by incremental hiring of new lawyers, as opposed to growth through acquisition of an existing firm as a means of expansion.

53. Now part of DLA Piper.

54. Now part of Dentons.

55. Now part of Greenberg Traurig.

56. Berwin Leighton Paisner merged with U.S.-based Bryan Cave in 2018. See Lisa Mayhew, *Merger creates new global law firm, 'Bryan Cave Leighton Paisner'*, BRYAN CAVE LEIGHTON PAISNER (Feb. 26, 2018), <https://www.bclplaw.com/en-US/news-events/merger-creates-new-global-law-firm-bryan-cave-leighton-paisner-llp.html>.

57. UK-based firm Clifford Chance merged with NY-based firm Rogers & Wells in 2000. *Who we are and how we work*, CLIFFORD CHANCE, [https://www.cliffordchance.com/about\\_us/who-we-are-and-how-we-work/our-story.html](https://www.cliffordchance.com/about_us/who-we-are-and-how-we-work/our-story.html) (last visited Mar. 12, 2022).

58. See Xiumei Dong, *How Dentons' US Ambition Is Driving Some Partners Away*, LAW 360 (Aug. 4, 2021), <https://www.law360.com/pulse/articles/1409658/how-dentons-us-ambition-is-driving-some-partners-away>.

59. DLA Piper began as a merger in January 2005 of UK-based DLA and two U.S.-based firms, Gray Cary Ware & Freidenrich and Piper Rudnick. *The DLA Piper story*, DLA PIPER, <https://timeline.dlapiper.com/> (last visited Oct. 27, 2022) (“JANUARY, 2005: DLA Piper

UK	Eversheds Sutherland <sup>60</sup>
UK	Hogan Lovells <sup>61</sup>
UK	Holman Fenwick Willan <sup>62</sup>
UK	Kennedys <sup>63</sup>
UK	Norton Rose Fulbright <sup>64</sup>
UK	Withersworldwide <sup>65</sup>
UK	Womble Bond Dickinson <sup>66</sup>

Fundamentally, the very possibility of combining through merger is one way to assess regulatory consequences. Ownership conditions requiring citizenship or other local ties, for example—which are characteristic of the approach certain countries<sup>67</sup>—often are not found in U.S. regulations, although local licensing rules (focused on individual lawyers) nevertheless demand attention in mandating that partners must be licensed as lawyers; at the same time, qualifications outside of the United States have sufficed.<sup>68</sup> As

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Rudnick Gray Cary is born as the result of the largest merger in the history of the legal profession.”)

60. Debra Cassens, *Weiss, Sutherland and Eversheds agree to merger*, ABA J. (Dec. 16, 2016), [https://www.abajournal.com/news/article/sutherland\\_and\\_eversheds\\_agree\\_to\\_merger](https://www.abajournal.com/news/article/sutherland_and_eversheds_agree_to_merger) (noting the merger was announced in late 2016).

61. *Our History*, HOGAN LOVELLS, <https://www.hoganlovells.com/en/about-us/our-history> (last visited Oct. 27, 2022) (“Hogan Lovells became a top 10 global legal services provider on 1 May 2010 through an unprecedented combination of two firms with international credentials, U.S.-based firm Hogan & Hartson and European-based firm Lovells.”).

62. *See* Dong, *supra* note 58.

63. *Where we are*, KENNEDYS LAW, <https://kennedyslaw.com/where-we-are/north-america/united-states/> (last visited Oct. 27, 2022) (“Kennedys was established in the United States in June 2017 by the merger with US-based insurance firm Carroll McNulty & Kull.”).

64. UK-based Norton Rose merged with U.S.-based Fulbright & Jaworski in 2013, and with U.S.-based Chadbourne & Parke in 2017. *Our history*, NORTON ROSE FULBRIGHT, <https://www.nortonrosefulbright.com/en/global-statement/history> (last visited Oct. 27, 2022).

65. *See Building Broad Expertise: An Interview with Stephen Liss and Deidre O’Byrne, Partners, Withers Bergman, LLP*, LEADERS ONLINE (Jan. 1, 2010), [https://www.leadersmag.com/issues/2010.1\\_jan/rob/liss-obyrne.html](https://www.leadersmag.com/issues/2010.1_jan/rob/liss-obyrne.html).

66. Merged with firms in Washington, DC and in Atlanta.

67. For example, Mexican regulation of the profession requires a “favourable resolution from the Foreign Investment National Commission” if foreign participation in a law firm exceeds 49%. International Bar Association, *Mexico International Trade in Legal Services*, INT’L BAR ASS’N, [https://www.ibanet.org/PPID/Constituent/Bar\\_Issues\\_Commission/ITILS\\_Mexico](https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_Mexico) (last visited Oct. 27, 2022).

68. *See* Dave Bohrer, *Fee Sharing with Foreign Lawyers*, GREENFIELD (Feb. 15, 2010), <https://www.flatfeeipblog.com/2010/02/articles/fee-sharing/fee-sharing-with-foreign-lawyers/> (describing state ethics opinions on this issue).

a result, a merger with a U.S.-based firm that has U.S.-licensed lawyers produces a ready-made U.S. office.

But while merged firms may seem distinct from greenfield growth because of blurring the notion of foreign-ness, it is difficult to distinguish the consequences of other means of growth that do not involve technical mergers. For example, it is common for firms to hire teams of lawyers to develop or grow a new office. UK-based Clyde & Co used this strategy in several U.S. office locations. As the firm described:

in the back of office launches in Washington D.C., Chicago and Los Angeles during 2017, last December the firm took on a team of 15 partners from collapsed U.S. firm Sedgwick . . . . The hires increased the size of Clydes' U.S. partnership by about a third and were closely followed by a ten-strong hire in Miami, including a further two litigation and commercial focused partners.<sup>69</sup>

While our focus on organizations rather than lawyers supports perceiving differences in these two growth mechanisms, the similarity in outcome in terms of immediate growth or presence suggests this distinction may be more form than substance.

On the other end of the spectrum from merged firms is the case of solo practices. Here, too, determining foreign-ness is problematic, but the problem lies in the blurred distinction between organization and individual. Identifying the home country of a solo practice raises the question of whether the individual lawyer can be considered distinct from the firm. On one hand, solo practices may morph into small firms, a transition highlighted in research on lawyers' careers.<sup>70</sup> On the other hand, in the case of a single-person organization, can the firm's home country differ from the individual's? The MGLG firm, featured above, described its primary location only in terms of its individual lawyer.<sup>71</sup> Thus, the jurisdiction that was home to the lawyer also serves as home to the firm.

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69. *A Laser-like Focus- How Clyde & Co Transformed Its US Presence In Little Over A Year*, LAW.COM (May 9, 2018), <https://www.law.com/international-edition/2018/05/09/a-laser-like-focus-how-clyde-co-transformed-its-us-presence-in-18-months/>.

70. Bryant Garth & Joyce Sterling, *Rethinking the Solo Practitioner*, AFTER THE JD (Jan. 5, 2021) (unpublished manuscript) (on file with authors).

71. See *Maria Markou*, MARKOU GLOBAL LAW GROUP, <https://www.markoulegallyvirtual.com/attorney/maria-markou/> (last visited Oct. 27, 2022) ("Location: 85 Broad Street, 16<sup>th</sup> Floor," runner at the top of the website provides the same address); but see *Contact Us*, MARKOU GLOBAL LAW GROUP, <https://www.markoulegallyvirtual.com/contact-us/> (last visited Oct. 27, 2022) (showing icons for locations in New York, Cyprus and Athens, Greece).

Another solo practice identified in our research was the Law Office of Stephan Grynwajc (LOSG).<sup>72</sup> The LOSG website uses the internet address “transatlantic-lawyer.com” which nicely tees up the questions of the firm versus lawyer and international presence. Grynwajc describes being “a French lawyer (Avocat), a UK lawyer (Solicitor), and a lawyer in Canada and the U.S.”<sup>73</sup> LOSG’s website advances the notion of the practice as a firm, using the word “firm” to describe the practice and the title “Managing Partner” to describe Grynwajc. The firm identifies a network of other lawyers it works with in particular jurisdictions.<sup>74</sup> It describes its services as involving qualifications to practice law in more than one jurisdiction as follows:

Our dual qualification as lawyers in the EU, the U.S., and Canada, combined with our many years of professional experience in France, the UK and the U.S., allows us to be ideally positioned to understand the needs of both European companies looking to establish themselves or expand in North America, and of U.S. and Canadian companies interested in doing business in Europe.<sup>75</sup>

But in terms of physical presence, the firm lists just one office, located in New York. In this sense, despite the cross-border qualification and services provided, the firm itself does not satisfy the condition of being *foreign*.

The search for firms based outside of the United States implicitly assumes that they share particular characteristics that give rise to their identification of one home country. But, as the discussion above reveals, this is overly simplistic, and various organizations that elude such a characterization nevertheless participate in offering services in the United States that implicate global presence.

### B. *What is presence?*

The idea of presence has become more complicated during the Covid-19 pandemic. The development of the article’s research design regarding the way U.S. jurisdictions regulate legal practice takes physical presence as a foundational concept.<sup>76</sup> Our strategy targeted and identified firms with a

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72. LAW OFFICE OF S. GRYNWAJC, <https://www.transatlantic-lawyer.com/> (last visited Oct. 27, 2022).

73. *Id.*

74. *Id.* (referencing the “Our Network” section of the website).

75. *Id.* (referencing the “Services” section of the website).

76. See Laurie Webb Daniel & Philip George, *Twin ABA Ethics Opinions Cover What You Need to Know about Remotely Practicing Law*, AM. BAR ASSOC. (May 15, 2021), <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/practice/2021/twin-aba-ethics-opinions-cover-what-you-need-to-know-about-remotely-practicing-law/>.



physical office in a particular location in the United States, where one or more lawyers would work more or less permanently. But firms may signal a connection to services offered in the United States through an ambiguous description of physical presence, through ad hoc or temporary visits, as well as through means that stand apart from the traditional approach of lawyers-on-the-ground.

One twist on ways of being present in the United States involves firms that describe having a U.S. office but do not identify a particular address. For instance, China-based Jingshi uses a map to show its global branches, including a location in the United States. The U.S. link leads to a phone number, fax, and email address, but a specific location address is not provided.<sup>77</sup> Elsewhere on the website, the firm explains that “[o]verseas branches in Germany, Poland, Singapore, Cambodia, and Toronto have already established and in New York, Washington, London, Sydney, and Warsaw will be in operation soon.”<sup>78</sup> Through these means, the firm claimed the United States, even if it is temporarily being served through an office in Canada.

A second way of signaling a U.S. presence involves using a U.S. post office (P.O.) box address. Websites of nine law firms, each based either in the Dominican Republic or Venezuela, listed a U.S. P.O. box rather than a street address; some of these firms also provided a U.S. telephone number. Email communications with lawyers in several of these firms explained that offering a U.S. address was intended to circumvent unreliable communications services in their home country. At the same time, lawyers explained how challenges at home led to their client’s increasing mobility, and thus they were drawn to certain areas in the United States.<sup>79</sup> Consequently, the U.S. contact information offers a signal by these firms that might be particularly meaningful to some clients that are attempting to neutralize the uncertainty inherent in their home country’s political and economic environments. The firm’s use of a U.S. address acts as a code, of sorts, as well as a practical opportunity.

A third approach to claiming capability extending to the U.S. is through the designation of U.S. experts as the mechanism for a global reach. Sometimes described as a “U.S. desk,” firms following this approach did not provide a physical presence in the United States, yet still claimed something equivalent in its reach. An example of this is the Italian firm BLB Studio Legale. BLB describes its U.S. desk as “allow[ing] BLB to operate on the

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77. *Branch Global*, JINGSHI, <http://en.jingshi.com/Branch/Index> (last visited Oct. 27, 2022).

78. *About Us*, JINGSHI, <http://en.jingshi.com/About/Index.html> (last visited Oct. 27, 2022).

79. The firms in this category are not identified here, in order to prevent this research from jeopardizing their positions at home.

international level thus enabling investors and entrepreneurs coming from USA, Europe and Asia to be assisted with the highest competence and without language or cultural barrier.”<sup>80</sup> Similarly, the Winheller firm, based in Germany, describes its U.S. desk as “composed of U.S. and German qualified counsel that will help you plan, and prepare, execute and manage all the legal requirements to start your business in the U.S by providing you with the advice and tools you will need to succeed.”<sup>81</sup> One of the lawyers staffing this desk is Paul Bess, described as “admitted to the State Bar of Florida as an Attorney and Counselor of Law. With his center of life in Germany, he works as a U.S. Attorney at Law in Germany and provides legal counsel and representation in all U.S. business, contracting, and corporate legal matters.”<sup>82</sup>

A U.S. desk can be used to distinguish a firm among its home country competitors, as was done by Austrian firm Alix Frank—and in this way it functions much as a physical office, albeit with distinctly different regulatory consequences. The U.S. desk is set out in the context of practice areas on the firm’s website. Alix Frank clearly promotes this, writing there that “[v]ery few other Austrian law firms have more experience in doing business in the USA than we do.”<sup>83</sup> Overall, each of these firms uses the U.S. law expertise of their lawyers to aim at the same audience that would be clients for a U.S. office of the firms. In this way, the firms signal the importance of the U.S. legal market without investing in a physical operation.

In addition to these examples, our research uncovered additional ambiguities related to presence. These included instances where a physical location in the United States was identified but it was not clear whether lawyers were working in that location,<sup>84</sup> as well as firms that identified a U.S. city as the site of their office but provided no specific address. In these instances, the firms present U.S. offices as part of their portfolios, suggesting that the value of claiming an office might overcome any risks associated with doing so in a way that was ambiguous.

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80. *USA Desk*, BENEDETTI LORUSSO BENEDETTI, <https://www.blblex.it/page.php?id=5&grp=5&lang=en> (last visited Oct. 27, 2022).

81. *U.S. Legal and Tax Advice in Germany*, WINHELLER, <https://www.winheller.com/en/business-law/international-business-law/us-desk.html> (last visited Oct. 27, 2022).

82. *Paul Bess*, WINHELLER, <https://www.winheller.com/en/about-us/attorneys/paul-bess.html> (last visited Oct. 27, 2022).

83. *US Desk*, ALIX FRANK, <https://www.alix-frank.com/en/practice-areas/us-desk> (last visited Oct. 27, 2022).

84. See Rachel Stern & Su Li, *The Outpost Office: How International Law Firms Approach the China Market*, 41 LAW & SOC. INQ. 184 (2016) (describing similar phenomena in China-based offices of foreign law firms).

### III. THEORETICAL IMPLICATIONS OF GLOBALIZATION AND PRESENCE

The discussion above highlighted the variety of ways that firms claim a U.S. presence, as well as ambiguities inherent in the notions of firms and foreignness. This diversity is significant both to understanding when and to whom a claim to U.S. capabilities is perceived as valuable, as well as to regulators interested in learning about the myriad ways that firms approach the U.S. legal services market. Another goal of this research is to provide some overview of the home countries of firms present in the United States. The relationship of these characteristics to theories of globalization might help explain these patterns of presence. To that end, this Part III focuses on a subset of the firms identified in the research: those with an identifiable home jurisdiction, focused exclusively on legal services, and with an identifiable U.S. location indicating physical presence. In other words, the focus here is on firms that reflect the characteristics of the ideal-type foreign firm with a U.S. office, described earlier. In all, ninety-seven such firms were identified; here they are referred to as the “core foreign firms” or CFFs.

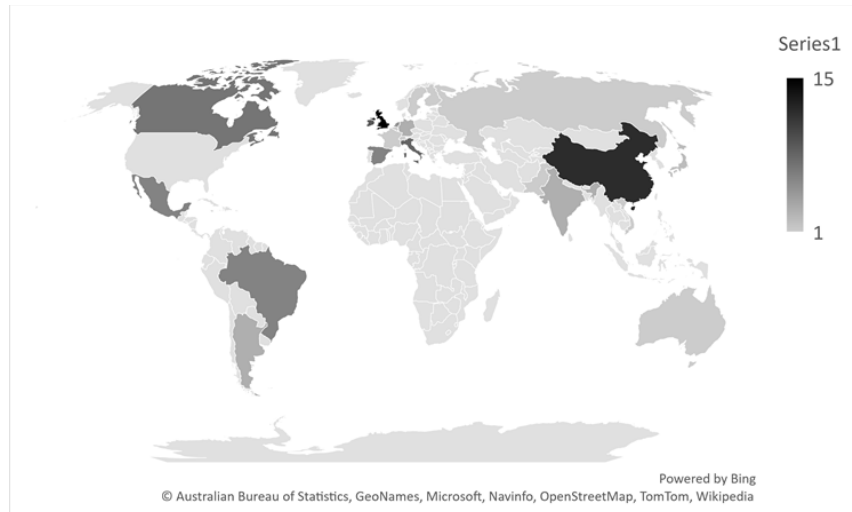
This group of CFFs are characterized by impermanence—change is as typical as stability for this group. For example, more than 15% of the CFFs identified in the spring of 2020 had either closed their U.S. office or merged with a U.S.-based law firm by the winter of 2022. The pandemic likely explains some of these changes but opening and closing overseas offices has been common for firms regardless of their home country or the location of their overseas office, too.<sup>85</sup> These changes might be stealth: closures, for example, are not necessarily announced; they were confirmed through analysis of the firms’ websites as well as media reporting and other sources such as LinkedIn. This article, then, speaks only as of a particular moment to illustrate what expansion into the U.S. looks like for foreign law firms.

The CFFs are based in twenty-five different home countries that provide the historical foundation for the firms and can frame the primary clients of a firm, its competitors and the ways in which it measures status, firm structure, and culture, and, in turn, expectations about avenues of global growth. One might expect that home country would influence the way a firm perceives the value of having a U.S. presence as well as the shape of that presence.

The largest group of CFFs is from the U.K., which is home to more than 15% of the firms. China is the second most common home country with slightly over 12% of firms based there. The firms’ home countries are reflected in Figure 1, below, which depicts higher concentrations with increasingly dark hues.

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85. *See Id.*

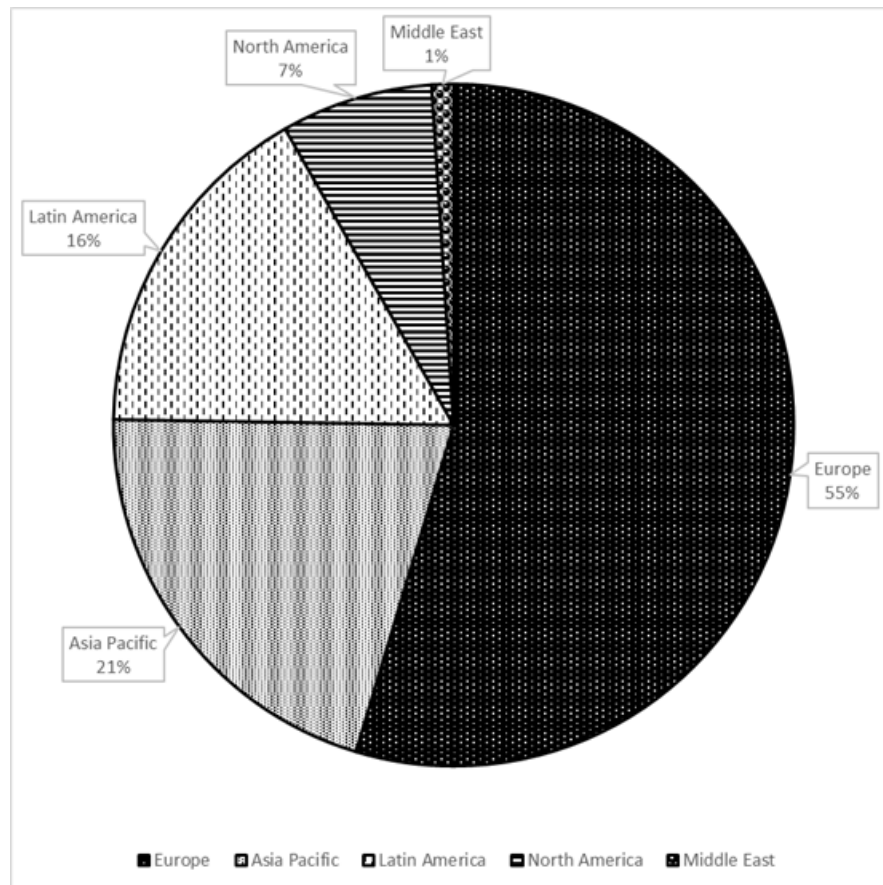
**Figure 1: Home countries of the CFFs**

While the CFFs as a group hail from twenty-five sending countries, just over half of these—thirteen countries—account for more than 85% of the CFFs. These jurisdictions are home to between two and fifteen CFFs each.<sup>86</sup> Twelve countries are each home to a single CFF.<sup>87</sup>

To provide more of an overview of where these firms originated, Figure 2 depicts the sending regions of the CFFs. Europe is the largest sending region, accounting for a majority of the firms. In this group, the UK and Ireland dominate, together sending approximately 45% of the European firms and nearly one-quarter of all of the CFFs. As Figure 2 depicts, firms from Asia Pacific and Latin America also figure importantly in the mix of CFFs.

86. The thirteen countries are the UK, China, Ireland, Italy, Canada, Brazil, Mexico, Spain, Netherlands, Argentina, Germany, India, Japan (in order of the number of firms with U.S. offices in each jurisdiction).

87. The twelve countries are Australia, Belgium, Finland, France, Israel, Jamaica, Luxembourg, Pakistan, Russia, Sweden, Switzerland, Vietnam.

**Figure 2: Home regions of the CFFs**

One theory of global growth suggests that firms expand to jurisdictions that have familiar characteristics, such as shared language or legal system.<sup>88</sup> Research suggests that this relationship between cultural distance and international expansion is complex, and that differences related to the mechanism of establishment, among other things, may point in different directions regarding the importance of distance.<sup>89</sup> Using this idea of cultural distance to explain the firms choosing to expand into the United States, just

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88. Sjoerd Beugelsdijk, Tatiana Kostova, Vincent E. Kunst, Ettore Spadafora & Marc van Essen, *Cultural Distance and Firm Internationalization: A Meta-Analytical Review and Theoretical Implications*, 44 J. OF MGMT. 89, 93 (2018).

89. *See id.* at 96-97.

under 40% of the firms are based in eight common law or mixed-common law jurisdictions. These include the U.K., Ireland, and Canada, which together account for approximately 32% of the CFFs overall and are among the top five sending jurisdictions in terms of number of firms. English is an official or common language in each of the common law countries.<sup>90</sup> Overall, then, thirty-eight of the CFFs are based in countries that share these fundamental commonalities with the United States. These characteristics might simplify a move for lawyers from the firm's home office to the United States, as well as facilitate gaining access by enabling them to take a bar examination in certain of the most significant U.S. legal markets, where regulations recognize legal education in an English-speaking common law jurisdiction as an advantage for bar eligibility purposes.<sup>91</sup>

Another theory explaining global growth is that expansion reflects investment, meaning that one would expect law firms from countries leading in investment into the United States to expand in order to support the investors from their home countries at the site of their investment.<sup>92</sup> The largest sources of foreign direct investment during the period when these data were collected were United Kingdom, Japan, Canada, and Germany.<sup>93</sup> Today, these same four countries are among the top five in terms of inbound FDI, although the rank order has shifted somewhat and Netherlands has joined the group.<sup>94</sup> Together, these five jurisdictions are home to approximately one-third of the CFFs.

One also might consider how competition among global law firms shapes expansion. For example, there could be a relationship between

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90. See generally *Languages World Factbook*, CIA, <https://www.cia.gov/the-world-factbook/field/languages/> (last visited Oct. 27, 2022) (showing individual country listings that describe English as the official language for five jurisdictions, stating "most commonly used foreign language" for one of the jurisdictions, as a "subsidiary official" language in one, and as the most commonly spoken in another). For Canadian firms, the website of each firm was reviewed to determine whether they were based in Quebec or in another Canadian province. All were based outside of Quebec. Home location was determined either by reference to the firm's history, or if that was not available, through the order of office listing unless listed in alphabetical order.

91. See Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 J. OF INT'L L. & BUS. 487, 519 (2003) (analyzing rules governing admission of foreign law graduates).

92. Ji Li, *supra* note 5; James Faulconbridge, *Professional Service Firms as Agents of Economic Globalization: A Political Perspective*, 6 J. PROF. AND ORG. 72, 74 (2018); Michael Hit, Leonard Bierman, Klaus Uhlenbruck & Katsuhiko Shimizu, *The Importance of Resources in the Internationalization of Professional Service Firms: The Good, The Bad, and The Ugly*, 49 ACAD. OF MGMT. J. 1137 (2006).

93. Cortez, *supra* note 17, at 2.

94. *Direct Investment by Country and Industry, 2020*, BUREAU OF ECON. ANALYSIS (July 22, 2021), <https://www.bea.gov/news/2021/direct-investment-country-and-industry-2020>.

jurisdictions that have been the site of investment by U.S.-based law firms, and those sending firms into the United States. These firms would have become accustomed to interacting through competition for talent and clients, for example, as well as the development of particular practice expertise.<sup>95</sup> Thus, considering where U.S.-based law firms have focused their overseas expansion might shed light on which jurisdictions are home to law firms expanding into the U.S.

U.S.-based law firms have pursued global growth through foreign offices in fits and starts, with a group establishing offices in Europe as early as the 1960s, and several firms expanding internally well before that.<sup>96</sup> By the 1970s, it became even more common to support an office overseas, with London being the target for a group of elite U.S.-based firms.<sup>97</sup> Waves of office openings in other global cities followed, particularly in the Asia-Pacific region and elsewhere in Europe.<sup>98</sup> An analysis of U.S.-based law firms included in the American Lawyer 200 and NLJ 350 (referred in this article as “AmLaw-NLJ firms”) reveals that these firms support more than 600 offices in sixty-six jurisdictions outside of the United States.<sup>99</sup> Table 2 sets out the relationship between sites of significant U.S. firm interest, taken from the sites of overseas offices of U.S. firms on the AmLaw-NLJ list, and the home countries of the CFFs. The proportions of all AmLaw-NLJ firms with offices in a particular country, and the proportion of all CFFs from that country, are reported in Table 2, below.

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95. See Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 LAW & SOC. REV. 771 (2008).

96. See Silver, *supra* note 5, at 1110.

97. *Id.* at 1113.

98. *Id.* at 1114-1115.

99. Daniella Isaacson, *Going Global: Where in the World are Top U.S. Law Firms Located?*, LAW.COM (Sept. 29, 2016, 10:43 AM), <https://www.law.com/sites/ali/2016/09/29/going-global-where-in-the-world-are-top-u-s-law-firms-located/>.

**Table 2: Comparison of interest in particular jurisdictions: foreign office locations of U.S. AmLaw-NLJ firms and home country of CFFs**

Target jurisdiction	% of all AmLaw-NLJ firms with offices in the Target jurisdiction <sup>100</sup>	% CFFs from Target jurisdiction
<b>UK</b>	42.0%	15.5%
<b>China</b>	37.5%	12.4%
<b>Germany</b>	20.5%	3.1%
<b>Belgium</b>	19.5%	1.0%
<b>France</b>	17.5%	1.0%
<b>Japan</b>	17.0%	2.1%
<b>Singapore</b>	12.5%	--
<b>UAE</b>	12.5%	--
<b>Russia</b>	10.5%	1.0%
<b>Brazil</b>	8.5%	6.2%
<b>Mexico</b>	8.5%	6.2%
<b>South Korea</b>	8.5%	--
<b>Italy</b>	8.0%	8.2%
<b>Australia</b>	6.5%	1.0%
<b>Poland</b>	5.5%	--
<b>Canada</b>	5.0%	7.2%
<b>Saudi Arabia</b>	5.0%	--
<b>Spain</b>	4.0%	6.2%
<b>Netherlands</b>	3.0%	5.2%
<b>Vietnam</b>	2.0%	1.0%
<b>Argentina</b>	1.5%	3.1%
<b>Ireland</b>	0.5%	9.3%
<b>India</b>	0.5%	3.1%
<b>Israel</b>	0.5%	1.0%

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100. This column does not sum to 100%; figures reflect the percentage of all AmLaw-NLJ firms with offices in each of the target jurisdictions.



Notably, the UK and China are both important sending jurisdictions for firms expanding into the United States, and sites of U.S.-based firms' expansion. Overall, nearly 80% of the jurisdictions that are sites of substantial investment by U.S.-based firms also serve as home-base for one or more CFFs. These CFFs may be vying with U.S.-based firms for clients as well as talent in their home jurisdictions as well as in the United States and perhaps elsewhere. They also may be serving the same clients, albeit from different perspectives in terms of legal expertise. More generally, this overlap suggests that in locations where business interests attract U.S. elite law firms, signals of being international are seen as valuable for law firms in the local legal market, as well.

Law firm growth requires access to talent. Expansion into the United States might reflect this by following the supply of home country lawyers with U.S.-practice capabilities, including having a license to practice. Such lawyers could help firms bridge cultural distance, among other things.<sup>101</sup> As a practical matter, lawyer licensing generally requires some U.S. legal education in the United States as a prerequisite to take a state bar exam.<sup>102</sup> Consequently, there may be a relationship between countries sending substantial numbers of students to the United States for legal education, and the home countries of foreign law firms supporting U.S. offices—perhaps staffed by lawyers who have earned a U.S. law degree and passed a U.S. bar exam. Research about the career aspirations of international law graduates, particularly those who have earned an LL.M, found widespread interest in practicing in the United States for at least some period of time. Foreign law firms could capitalize on this talent to staff their U.S. offices.

To gain insight for this purpose into the home countries of international law students, reference is made to visa data for the period 2008-2012 for students who enrolled in U.S. law schools. Table 3 reports on the top sending countries during the period of 2008-2012 for students studying law in the United States, either in an J.D. or LL.M program. This is matched in the Table below with information on the number of CFFs from each sending country.

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101. Beugelsdijk et al., *supra* note 88.

102. See National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements, Chart 4: Foreign Legal Education*, NCBE, <https://reports.ncbex.org/comp-guide/charts/chart-4/> (last visited Oct. 27, 2022).

**Table 3: Comparison of home countries of CFFs and students pursuing master's and J.D. programs in U.S. law schools**

Home country	% of CFFs	% of visas for master's program students	% of visas for J.D. students
<b>U.K.</b>	15.5%	1.2%	2.4%
<b>China</b>	12.4%	22.7%	19.3%
<b>Italy</b>	8.2%	1.8%	1.6%
<b>Ireland</b>	9.3%	0.5%	0.4%
<b>Canada</b>	7.2%	2.3%	25.0%
<b>Spain</b>	6.2%	1.2%	1.3%
<b>Brazil</b>	6.2%	4.2%	2.3%
<b>Argentina</b>	3.1%	0.8%	0.2%
<b>Mexico</b>	6.2%	2.4%	0.6%
<b>India</b>	3.1%	4.2%	2.4%
<b>Netherlands</b>	5.2%	0.6%	0.2%
<b>Germany</b>	3.1%	3.6%	0.8%
<b>Australia</b>	1.0%	1.1%	0.7%
<b>France</b>	1.0%	3.5%	2.2%
<b>Israel</b>	1.0%	2.2%	0.7%
<b>Japan</b>	2.1%	6.8%	1.2%
<b>Vietnam</b>	1.0%	0.2%	0.2%
<b>Belgium</b>	1.0%	0.7%	0.1%
<b>Finland</b>	1.0%	0.2%	0.1%
<b>Jamaica</b>	1.0%	<0.1%	0.7%
<b>Luxemburg</b>	1.0%	0.1%	--
<b>Pakistan</b>	1.0%	0.3%	0.5%
<b>Russia</b>	1.0%	1.1%	0.5%
<b>Sweden</b>	1.0%	0.4%	0.4%
<b>Switzerland</b>	1.0%	1.6%	0.1%

While proportions are not aligned for many of these countries across categories of firms and students, nearly all of the home countries of the CFFs are represented in the home countries of international law students. The ready supply of home country law graduates can support growth for CFFs by

serving as a source for hiring that combines home country knowledge and expertise, including language fluency where relevant, with exposure to the U.S. legal system.<sup>103</sup>

An additional theory to explain global expansion suggests that international offices can contribute to the image of firms that otherwise are on the periphery,<sup>104</sup> whether that vulnerability arises because of the economic position of their home country or the status of their firm within their home country market for lawyers, or other reasons. For these firms, being international can provide the sort of signal that boosts their competitiveness, almost without regard to the financial results of the operations overseas.<sup>105</sup> Seven of the CFFs' home countries are within the Global South, accounting for approximately 27% of the firms. It may be more uncommon for firms based in these countries to support a U.S. office, for example, so that the symbolic capital of the presence is magnified. Presence may enable firms to compete at home, touting their U.S. presence as a way to attract clients and signal that the firm is international. Relatedly, the regulation of the home country legal market also may lead to greater value placed on a firm being international. India's regulatory barrier for international law firms,<sup>106</sup> for example, may relate to greater competitive advantage within India for a reputation as international, which can be achieved through foreign offices.

The discussion above does not suggest homogeneity within home country groups. There are indications of important variation among CFFs from the same home jurisdiction. For example, of the Indian CFFs, the location of their U.S. offices—Chicago, Florida, New York, and Silicon Valley—suggests different purposes to their expansion. Difference also is clear in the credentials of lawyers present in the U.S. offices of firms from the same home jurisdiction. For example, two Canadian firms, McCarthy Tétrault and Osler, Hoskin & Harcourt, have approached staffing from different angles. McCarthy describes the services in its New York office as limited to Canadian law. The firm's profiles of its New York office lawyers stress their Canadian experience and credentials, although the managing

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103. See Carole Silver, *Educating Lawyers for the Global Economy: National Challenges*, KYUNG HEE UNIV. L. REV. 1, 8 (2009); Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM J. OF INT'L L. 1039, 1042 (2001).

104. Jing Li, *supra* note 10.

105. See generally Dezalay & Garth, *supra* note 9 (explaining the reputational benefit from international activities).

106. Swethaa Ballakrishnen, *India's Legal Profession: Present and Future, A Revised Sociological Portrait*, in LAWYERS IN 21ST CENTURY SOC'Y, 713 (Richard L. Abel, Ole Hammerslev, Hilary Sommerlad & Ulrike Schultz, eds.) (2020).

partner of the office is admitted in New York in addition to Ontario.<sup>107</sup> Both of the New York lawyers focus on M&A and related practices. Osler, in contrast, staffs its New York office with a similarly small group of just four lawyers, but each is admitted in the United States.<sup>108</sup> More significant is that the profiles of two of their lawyers describes their practices as involving advising on U.S. law in addition to Canadian law.<sup>109</sup> This distinction puts Osler in a position of competitor with others staking a claim to U.S. law expertise, in contrast to McCarthy. In this difference, it is obvious that the ways in which a U.S. office adds value to a firm are not universal, even for firms from the same home country.

Further insight into the types of capital that may arise from a U.S. office can be gained from analyzing where CFFs situate their U.S. offices. Nearly three-quarters (73.2%) of the CFFs support only one office in the United States; approximately 65% of the single-office CFFs have chosen New York as their U.S. location. Each of the CFFs from Canada and Argentina, for example, support just one U.S. office and have sited it in New York.<sup>110</sup> At the same time, there are some notable exceptions to New York-centricity: five of the Mexican firms support a single U.S. office but not one of these is in New York, nor are the U.S. offices of the other Mexican CFFs; each of the Mexican CFFs chose Texas or Southern California locations instead.<sup>111</sup> Similarly, the two Indian law firms with single U.S. offices chose sites in

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107. See *Matthew Cumming*, MCCARTHY TÉTRAULT, <https://www.mccarthy.ca/en/people/matthew-cumming> (last visited Oct. 27, 2022); See also *Firuz Rahimi*, MCCARTHY TÉTRAULT, <https://www.mccarthy.ca/en/people/firuz-rahimi> (last visited Oct. 27, 2022).

108. *Gawain Chan*, OSLER, <https://www.osler.com/en/team/gawain-chan> (last visited Oct. 27, 2022); *Jason Comerford*, OSLER, <https://www.osler.com/en/team/jason-comerford> (last visited Oct. 27, 2022); *Terence W. Doherty*, OSLER, <https://www.osler.com/en/team/terence-w-doherty> (last visited Oct. 27, 2022); *Rob Lando*, OSLER, <https://www.osler.com/en/team/rob-lando> (last visited Oct. 27, 2022).

109. *Rob Lando*, OSLER, <https://www.osler.com/en/team/rob-lando> (last visited Oct. 27, 2022) (“He provides concurrent advice on both the U.S. and Canadian law aspects of structuring, planning and executing public and private cross-border corporate finance and M&A transactions.”); *Jason Comerford*, OSLER, <https://www.osler.com/en/team/jason-comerford> (last visited Oct. 27, 2022) (“Jason’s primary emphasis is on assisting Canadian and U.S. clients with U.S. corporate finance and mergers and acquisitions transactions. . . . Jason advises clients on U.S. corporate governance matters, assists public companies with their periodic reporting obligations under the U.S. Securities Exchange Act of 1934 and compliance with New York Stock Exchange and NASDAQ regulations.”).

110. The Canadian CFFs are Bennett Jones; Blake, Cassels & Graydon; Davies Ward Phillips & Vineberg; McCarthy Tétrault; Osler, Hoskin & Harcourt; Stikeman Elliott; Torys. The Argentinian CFFs are Alfaro-Abogados; Marval, O’Farrell & Mairal; Pérez Alati, Grondona, Benites, Arntsen & Martínez de Hoz.

111. The Mexican CFFs are SMPS Legal; F. Pena Gama & Associates; J.A. Treviño Abogados; Pickoff Attorneys; Martin-Sanchez; Cacheaux, Cavazos & Newton.

Chicago and Florida, instead of New York;<sup>112</sup> the third Indian CFF lists two locations in the United States, one in New York and the other in Silicon Valley.<sup>113</sup> The variation in U.S. office location highlights differences in firm clientele as well as their goals for the U.S. practices, but also may reflect the personal circumstances of their lawyers. These U.S. outposts, after all, offer individual lawyers a valuable form of capital that helps in building a global career, but firms also develop their footprints around the personal preferences of their lawyers. Table 4 sets out the locations for all U.S. offices of CFFs supporting only one U.S. office.

**Table 4: U.S. Locations for Firms with a Single U.S. Office (n=66)**

<b>U.S. Location</b>	<b>% of single-office CFFs in this location</b>	<b># of single office CFFs in this location</b>
<b>New York</b>	56.9%	41
<b>California(including Southern California (5), Northern California (6))</b>	15.3%	11
<b>Texas (Houston (4), Austin (1), Dallas (1))</b>	8.3%	6
<b>Florida (Miami (2))</b>	4.2%	3
<b>Washington D.C.</b>	4.2%	3
<b>IL (Chicago (2))</b>	2.8%	2

All but two of the CFFs with more than one U.S. office support a New York location.<sup>114</sup> The second most common location for this set of twenty-six law firms is California; while the firms tilt towards Silicon Valley as their preference, Southern California is a close second. Because firms may have multiple offices in a single state—or even region within the state—there are more offices in California than in any other U.S. jurisdiction for these

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112. *Offices*, KOCCHAR & CO., <https://kochhar.com/offices/> (last visited Oct. 27, 2022); *Contact Us*, LAW QUEST INT'L, <https://www.lawquestinternational.com/contact/#1588341019938-1c21f4f0-1832> (last visited Oct. 27, 2022).

113. NISHITH DESAI, <https://www.nishithdesai.com/> (last visited Oct. 27, 2022).

114. One firm, Banjoko Law, based in Kingston, Jamaica, supports two New York offices, one of which is in Brooklyn. *Contact Us*, BANJOKO LAW, <https://banjokolaw.com/index.aspx?TypeContent=CONTACTUS> (last visited Oct. 27, 2022).

multiple-office CFFs. Table 5 describes the U.S. office locations of these multi-office CFFs.

**Table 5: U.S. Office Locations for CFFs with More Than One Office in the U.S.**

State/City	% of offices of multi-office CFFs in this location	# of offices of multi-office CFFs in this location
<b>California (Southern California (5), Northern California (21))</b>	40.8%	29
<b>New York</b>	35.2%	25
<b>Washington D.C.</b>	9.9%	7
<b>Texas</b>	7.0%	5
<b>Seattle</b>	2.8%	2
<b>Atlanta</b>	1.4%	1
<b>Chicago</b>	1.4%	1
<b>Denver</b>	1.4%	1
<b>Kansas City</b>	1.4%	1
<b>Las Vegas</b>	1.4%	1
<b>Miami</b>	1.4%	1
<b>New Jersey</b>	1.4%	1
<b>Phoenix</b>	1.4%	1

The significant investment in California for these firms is an obvious difference compared to single-office firms, for which New York is the dominant location. More specifically, firms with multiple offices in the United States trend towards the Silicon Valley area for their California offices; six firms supported offices in Silicon Valley, including firms with multiple offices in the area.<sup>115</sup> Establishing offices in California suggests that

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115. *U.S. Locations*, OSBORNE CLARKE, <https://www.osborneclarke.com/locations/usa> (last visited Oct. 27, 2022); *Offices*, A&L GOODBODY, <https://www.algoodbody.com/offices> (last visited Oct. 27, 2022); *Contact Us*, MATHESON, <https://www.matheson.com/contact-us>.

firms are aiming to serve the particular clients based there – including those in tech industries, and likely also reflects the rise of private equity, since California has received the largest share of private equity investment in recent years.<sup>116</sup>

Overall, the offices of these multi-office firms are concentrated in just five U.S. locations: California, New York, Washington D.C., Texas, and Washington (Seattle). Other locations on Table 6 reflect offices of just one law firm, Clyde & Co. from the UK, which specializes in shipping matters (contentious and transactional), among other areas.<sup>117</sup> It is also the only CFF with more than five U.S. offices.

While noted above, the variation among firms from the same country is characteristic of much of these data, yet notable differences raise questions for future research. For example, each of the firms from the Netherlands supports a New York office, whether as a sole office or one of two. Irish law firms are focused on New York and California: eight of the nine have an office in New York, while six have an office in Northern California, either alone (1) or along with their New York location. Ten of the twelve China-based CFFs support a New York-based office; six support a California office, but no CFF has focused exclusively on California. New York remains the center of activity for most CFFs. The relationship of these U.S. preferences to strategies that are U.S.-centered or firm-wide, and to office size and role within the firm, might be areas for future research.

Practice areas and the credentials of lawyers practicing in U.S. offices offer additional insight into what these firms are gaining from their U.S. presence, but neither of these is available across all of the CFFs. There is not sufficient detail about either lawyers or practice areas to provide a granular analysis of what the CFFs are doing in particular locations, but general observations are possible. Mergers and acquisitions and corporate transactions generally comprise the mainstay of practice for these firms in their U.S. offices. This is the case for both firms with large U.S. offices like UK-based Freshfields,<sup>118</sup> those with smaller offices such as the eight-

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(last visited Oct. 27, 2022); *Contact Us*, WILLIAM FRY, <https://www.williamfry.com/contact-us/overview>, (last visited Oct. 27, 2022) (noting each firm listed above also had offices in both the Palo Alto area and San Francisco).

116. *Top States & Districts*, AM. INV. COUNCIL, <https://www.investmentcouncil.org/topstates> (last visited Oct. 27, 2022).

117. *Department Profile Clyde & Co LLP*, CHAMBERS & PARTNERS, <https://chambers.com/department/clyde-co-llp-shipping-litigation-global-2:329:20987:1:85> (last visited Oct. 27, 2022); *see Expertise*, CLYDE & CO, <https://www.clydeco.com/en/expertise> (last visited Oct. 27, 2022) (noting areas of practice in the Americas).

118. *See Our Professionals*, FRESHFIELDS, <https://www.freshfields.us/contacts/find-a-lawyer/?Name=&t=&Service=&Role=&Location=&Office=8504&Industry=> (last visited Oct. 27, 2022).

lawyer New York office of France's Gide Loyrette Nouel,<sup>119</sup> and firms with just a single lawyer in the United States, such as Brazil's Machado Meyer.<sup>120</sup> Other common areas of practice for these firms include intellectual property and general corporate and commercial matters.<sup>121</sup> Firms also offer litigation and dispute resolution advice,<sup>122</sup> and several specialize in immigration law.<sup>123</sup> As described earlier, certain CFFs focus exclusively on the law of their home jurisdictions or regions,<sup>124</sup> while others offer U.S. law advice.<sup>125</sup> Client type also differs substantially: individuals are the focus of German firm, Heming & Heming, for example, which describes its main areas of practice as including estates, tax, child abduction, and family matters.<sup>126</sup> But a focus on business clients is more common for the CFFs. As Irish firm Matheson describes on its website, it provides legal services to "internationally focused companies and financial institutions doing business in and from Ireland."<sup>127</sup>

Practice areas reflect the credentials of lawyers in the firms' U.S. offices, but firm websites do not always provide clear descriptions of either credentials or admission status of the lawyers. For example, Dillon Eustace,

119. *Where We Work*, GIDE LOYRETTE NOUEL, <https://www.gide.com/en/regions/the-united-states> (last visited Oct. 27, 2022).

120. *Thales Saito*, MACHADO MEYER, <https://www.machadomeyer.com.br/en/lawyers/thales-saito> (last visited Oct. 27, 2022).

121. Russin is a Vietnamese law firm. *See International Presence*, RUSSIN & VECCHI, <https://www.russinvecchi.com.vn/about/international-presence> (last visited Oct. 27, 2022).

122. *Appleton Luff – Washington D.C. Office*, APPLETON LUFF INT'L LAWYERS, <https://www.appletonluff.com/locations/washington-dc> (last visited Oct. 27, 2022); *U.S. Offices*, CLYDE & CO, <https://www.clydeco.com/en/locations/us> (last visited Oct. 27, 2022).

123. Australia's Da Gama Pereira And Associates Pty Ltd, for example. *About Us*, DAGAMA PEREIRA, <https://dagamapereira.com.au/about-us/> (last visited Oct. 27, 2022); Immigration is also among the practice areas offered by Jamaican firm Banjoko Law. *Carmelita Riley, Consultant*, BANJOKO Law, [https://banjokolaw.com/lawyer/Carmelita-Riley,-Consultant\\_cp10961.htm](https://banjokolaw.com/lawyer/Carmelita-Riley,-Consultant_cp10961.htm) (last visited Oct. 27, 2022).

124. *See* Loyens & Loeff from the Netherlands, which advises only on Dutch and Luxembourg law. *Our People*, LOYENS & LOEFF, <https://www.loyensloeff.com/en/en/our-people/?offices=new%20york> (last visited Oct. 27, 2022).

125. *United States*, ALLEN & OVERY, [https://www.allenovery.com/en-gb/global/global\\_coverage/north\\_america\\_and\\_canada/united\\_states](https://www.allenovery.com/en-gb/global/global_coverage/north_america_and_canada/united_states) (last visited Oct. 27, 2022) ("Our Boston, Los Angeles, New York, Silicon Valley and Washington, D.C. offices are the core of the global U.S. practice with 225 of our U.S. qualified lawyers based there. . . . As more than 74% of our work involves more than two countries, our U.S. practice is fully integrated with our offices in Europe, Asia, South America, Australia and Africa to provide our international and domestic clients with seamless solutions and a global reach that is unmatched by any other U.S. firm.")

126. *Team*, HEMING & HEMING, <https://www.hemming-law.com/en/team/> (last visited Oct. 27, 2022).

127. *About Us*, MATHESON, <https://www.matheson.com/about-us> (last visited Oct. 27, 2022).



an international financial services law firm based in Dublin, Ireland,<sup>128</sup> supports a one-lawyer office in New York where David Walsh is the resident lawyer and partner in the firm.<sup>129</sup> Walsh's profile does not list admission to the New York Bar, and his name does not come arise in a New York registered attorney search.<sup>130</sup> His profile also does not indicate that he is a registered special legal consultant. According to Walsh's profile, he "works closely with colleagues in the Dillon Eustace Dublin and Cayman offices to keep clients up to date on key legal, regulatory and industry developments in the U[nited States]."<sup>131</sup> Walsh earned an LL.M. from the University of College Dublin and he is a member of the Law Society of Ireland.<sup>132</sup>

Certain firms claim a long-term commitment to the U.S. market and experience in the United States. One example is Brazilian firm TozziniFreire, where Marcio Mello Silva Baptista is the sole lawyer in the firm's New York office.<sup>133</sup> Silva Baptista has been a partner at TozziniFreire since 1998. His U.S. credentials include an LL.M from New York University earned in 1997, and a specialized degree in Comparative Law from the University of Wisconsin in 1989.<sup>134</sup> He is admitted to the New York State Bar<sup>135</sup> and is involved with U.S.-based professional groups, including serving as the Vice-Chair of the Latin America & Caribbean Committee of the American Bar Association and on the board of the Brazilian American Chamber of Commerce in New York.<sup>136</sup> Before joining TozziniFreire, he practiced with three notable U.S. firms, Cleary Gottlieb, Morrison & Foerster, and Morgan Lewis.<sup>137</sup>

Among those CFFs that describe these details about their lawyers, home country legal education and admission is the norm for many, but it also was

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128. DILLON EUSTACE, <https://www.dilloneustace.com/> (last visited Oct. 27, 2022).

129. *David Walsh*, DILLON EUSTACE, <https://www.dilloneustace.com/people/david-walsh> (last visited Oct 27, 2022).

130. *Attorney Online Services – Search*, N.Y. STATE UNIFIED CT. SYS., <https://iapps.courts.state.ny.us/attorneyservices/search?7&tab=attorney> (search "David" for first name and search "Walsh" for last name).

131. *David Walsh*, *supra* note 129.

132. *See David Walsh*, LINKEDIN, <https://www.linkedin.com/in/david-walsh-6b416514b/> (last visited Oct. 27, 2022).

133. *See Marcio Mello Silva Baptista*, TOZZINIFREIRE, <https://tozzinifreire.com.br/en/advogados/marcio-mello-silva-baptista> (last visited Oct 27, 2020).

134. *Id.*

135. *Attorney Online Services – Search Marcio Mello Silva Baptista*, N.Y. STATE UNIFIED CT. SYS., <https://iapps.courts.state.ny.us/attorneyservices/wicket/page/DetailsPage?6> (last visited Oct. 12, 2022).

136. *Marcio Mello Silva Baptista*, *supra* note 133.

137. *Id.*

common for these U.S. offices of firms to be staffed with lawyers who had earned a U.S. LLM and been admitted to practice (either through full admission or a limited foreign legal consultant license). While it was relatively unusual for these offices to be staffed with lawyers with no ties to the firm's home country, there were exceptions, particularly in offices with larger headcounts. Freshfields is illustrative, and the U.S. managing partner, Sarah Solum, is one of many Freshfield lawyers with no obvious tie to the U.K.<sup>138</sup> But U.K. credentials do turn up in Freshfields' U.S. offices, such as in the managing partner of the Silicon Valley office who received his education outside of the United States.<sup>139</sup>

The information on longevity of these offices is not always available. French firm Gide Loyrette touts its long commitment to the United States on its website: "Gide has been present in New York for over three decades, having established its New York office in 1984."<sup>140</sup> Irish firm Dillon Eustace opened in New York in 2009, almost a decade after establishing its first international office in Tokyo.<sup>141</sup> Japanese firm TMI Associates opened its Silicon Valley office in 2014,<sup>142</sup> where the lawyers specialize in M&A, healthcare and patent law. Because our search did not seek to expand the list of CFFs during the period of the pandemic, it is not possible to offer insight into whether foreign firms established new U.S. offices during the last two years.

The analysis in this Part suggests that multiple theories of globalization are consistent with patterns of presence for the CFFs. These include the influence of countries leading in foreign direct investment into the United States (which reflects approximately one-third of the CFFs), and relatedly the connection of English-speaking common law jurisdictions that may facilitate establishing and operating an office here (which reflects approximately 39%

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138. See *People - Sarah K. Solum*, FRESHFIELDS, <https://www.freshfields.us/contacts/find-a-lawyer/s/solum-sarah/#qualifications> (last visited Oct. 27, 2022) (describing credentials as including an LLM and JD from Duke University School of Law, and undergraduate degree from St. Olaf College; admission in New York and California).

139. This managing partner, Alan Mason, is admitted to practice in California. *Alan Mason*, The State Bar of California, <https://apps.calbar.ca.gov/attorney/Licensee/Detail/338217> (last visited Oct. 27, 2022); Alan Mason is also licensed to practice in France, England and Wales. *Alan Mason*, FRESHFIELDS, <https://www.freshfields.us/contacts/find-a-lawyer/m/mason-alan/> (last visited Oct. 27, 2022).

140. *The U.S.*, GIDE LOYRETTE NOUEL, <https://www.gide.com/en/regions/the-united-states> (last visited Oct. 27, 2022).

141. *About*, DILLON EUSTACE, <https://www.dilloneustace.com/about> (last visited Oct. 27, 2022).

142. *Firm Profile: TMI Associates*, THE LEGAL 500, <https://www.legal500.com/firms/31196-tmi-associates/30501-tokyo-japan/#:~:text=TMI's%20overseas%20presence%20enables%20the,and%20international%20venture%20capital%20and> (last visited Oct. 27, 2022).

of CFFs, and overlaps with FDI to some extent). A third approach builds on difference to posit that firms from the Global South may see more value in a U.S. presence, which is relevant for approximately one-quarter of CFFs.

In addition to considering home country, differences in the work being done by firms in the United States seem important and perhaps less obvious in terms of pattern. Additionally, more insight could be gained if the history regarding office openings were available, including considerations like timing, organizational strategy and the influence of individual opportunity in shaping these decisions. At the same time, practice areas, clients and home country parallels could also figure deeply in understanding patterns of the presence of the CFFs. Still, these sorts of materials might not explain future approaches, since plans when offices are opened are not static.

#### IV. CONCLUSION

The goal of this article is to explore the role of the United States in the strategies of global legal services actors by considering the essential characteristics of firms that pursue global growth through a U.S. office. But without a registration requirement for foreign law firms, the conceptual contests described in this paper around recognizing firms, foreignness and presence may frustrate attempts to gain insight into how the U.S. figures in the range of actors likely to drive global legal services in the future.<sup>143</sup>

Much work is left to be done to fully understand this landscape. This includes gathering and analyzing data regarding the establishment and growth of offices of the firms, as well as addressing the question of whether these steps were pursued as part of a strategy of growth or as a byproduct of accommodation and opportunistic behavior towards their lawyers. This will help understand differences regarding choices around U.S. locations, investments in practice specialties and approaches to staffing.

But an assumption underlying this research, including questions for future scholars, is its U.S.-focus. It is not clear that globalization's future will reflect the U.S. context as paramount. Rather, perhaps the focus of firms in their overseas expansion is more on competition at home. How does

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143. Of course, to the extent the states are curious about presence, or considering regulating law firms, they will be operating in the dark. See Steven McKoen, *Law Firm Regulation: What's It All About?*, 76 THE ADVOCATE (VANCOUVER) 379, 381 (2018) (the Law Society of British Columbia found that "In order to regulate law firms, [it] must of course know who the law firms are. Accordingly, all firms (which by definition, will also include sole practitioners but will not . . . include government law departments or in-house counsel) will be required to register with the Law Society through a simple registration process in which the name of the firm, the firm's business address(es) and the names of the lawyers practicing through the firm will be confirmed.").

having a U.S. office affect hiring? Could a U.S. office serve as a reward of sorts for lawyers who stick with the firm for a certain period – that is, does the opportunity to live in the U.S. serve as a meaningful asset for firms? Is the ability to attract particular kinds of clients within the home jurisdiction, and to gain traction in building a reputation for certain legal expertise there, buffeted by the signal of a U.S. office? These questions may not specifically highlight the role of regulation in expansion decisions, but they nevertheless can contribute to understanding the ways in which the United States is valued by outsiders who perceive the potential for gain from a presence here.

# THE ROLE OF THE ABA’S “SUMMITS” IN FACILITATING GLOBAL NETWORKS AND INTERNATIONAL CROSS-BORDER LEGAL PRACTICE

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Laurel Terry\*

## Abstract

*This Article is written for a Symposium honoring recently-retired Professor Bob Lutz. It describes fourteen gatherings that were organized by either the ABA Section of International Law’s Transnational Legal Practice Committee or by the predecessor entities to the ABA Standing Committee on International Trade in Legal Services. Professor Lutz was a driving force behind these gatherings, which were held between 2004 and 2014, and were referred to by the organizers as “Summits.” This Article examines the impact of these Summits and explains why they played a critical role in helping establish global legal profession networks and why they have left a lasting legacy.*

I. INTRODUCTION.....	590
II. THE IMPORTANCE OF NETWORKS .....	591
III. HOW THE ABA’S SUMMITS FACILITATED GLOBAL LEGAL PROFESSION NETWORKS AND INTERNATIONAL CROSS-BORDER LEGAL PRACTICE .....	592
A. <i>Prior Publications about the ABA’s TLP Summits</i> .....	594
B. <i>An Overview of the ABA’s TLP Summits</i> .....	597

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C. Details about the ABA's TLP Summits.....	599
IV. THE LASTING IMPACT OF THE ABA'S SUMMITS .....	632

## I. INTRODUCTION

I am pleased to contribute this Article honoring my friend and colleague, Professor Bob Lutz, upon his retirement from Southwestern University School of Law after more than forty years. Although one might choose to write about topics related to Professor's Lutz's wide-ranging teaching<sup>1</sup> or scholarship,<sup>2</sup> this Article honors Professor Lutz's external service by examining the role of the American Bar Association (ABA) transnational legal practice (TLP) "Summits" in facilitating global legal profession networks and international cross-border legal practice.

This Article proceeds as follows. Section II sets the stage by reviewing the importance of networks, including global legal profession networks. Section III provides information about the ABA's *Summits*, including Professor Lutz's role in organizing these *Summits*. Section IV examines the lasting impact of these *Summits* and explains how they helped build the global legal profession networks that contribute to international cross-border legal practice developments.

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1. See, e.g., Southwestern Law School, Robert E. Lutz, <https://perma.cc/UW97-EVNU> (In addition to teaching J.D. students at Southwestern Law School for more than forty years, Professor Lutz "taught regularly in the Summer Law Consortium program in Guanajuato, Mexico, and in Southwestern's Buenos Aires program. He organized and directed the first ABA-accredited law study program in China, and was instrumental in establishing Southwestern's General LL.M. program.").

2. Professor Lutz's scholarship has focused on a broad range of issues, including international trade in legal services (ITILS) issues. See generally Lutz, *supra* note 1 (citing numerous books, book chapters, articles, and book reviews). Professor Lutz's ITILS scholarship over the past twenty-five years has documented important issues and developments and the invitation to author book chapters and book reviews, as well as articles, reflects Professor Lutz's leadership in the field and the 10,000-foot perspective he can bring to the issues. See, e.g., Robert E. Lutz, *The Regulation of the Transnational Legal Profession in the United States*, 50 INT'L LAW. 445 (2017); Robert E. Lutz, *Reforming Approaches to Educating Transnational Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449 (2012); Robert E. Lutz, *An Essay Concerning the Changing International Legal Profession*, 18 SW. J. INT'L L. 215 (2011); Robert E. Lutz, *Law, Procedure and Culture in Mexico Under the NAFTA: The Perspective of a NAFTA Panelist*, 3 SW. J. L. & TRADE AM. 391 (1996). Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53 (1992).

## II. THE IMPORTANCE OF NETWORKS

Networks are powerful.<sup>3</sup> Even if an individual does not fully understand network science,<sup>4</sup> “most individuals will intuitively understand the power of networks. They understand that the value of certain physical objects they own may depend on the size of the network to which those objects are attached.”<sup>5</sup> For example, in the early days of the telephone, individuals who used one telephone provider, such as AT&T, were not able to contact individuals who used a phone owned by a different provider.<sup>6</sup> Although individuals in 2022 who use one type of telephone, such as an iPhone, can contact individuals who use a different kind of telephone, such as an Android phone, providers continue to rely on the power of their networks to sell their product, as a recent article about green versus blue “text bubbles” illustrates.<sup>7</sup>

The power of networks is not limited to physical objects. One can examine social networks, information networks, biological networks, and technology and computer networks to see other contexts in which networks play a critically important role.<sup>8</sup> The COVID-19 pandemic, which was still occurring at the time this article was written, is an example of a biological network; it forcefully illustrates the power of networks and connections.

The study of social networks has included legal profession networks.<sup>9</sup> Scholars have examined legal profession networks that occur within specific geographic areas (most notably Chicago), as well as network connections and interactions among lawyers in elite law firms, political lawyers, public interest lawyers, conservative lawyers, corporate lawyers, and criminal justice lawyers, among others.<sup>10</sup> This Symposium provides an opportunity to highlight the important role of the ABA’s TLP *Summits* in

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3. See generally Laurel S. Terry, *Global Networks and the Legal Profession*, 53 AKRON L. REV. 137, 175 (2019) [hereinafter Terry, *Global Legal Profession Networks*] (discussing legal profession networks in general).

4. See Terry, *Global Legal Profession Networks*, *supra* note 3, at 154 n.92 and accompanying text (noting the topics included in the table of contents of a leading 2018 textbook, *Networks ix* by Mark Newman).

5. *Id.* at 155 (footnotes omitted).

6. *Id.*

7. See, e.g., Tim Higgins, *Why Apple’s iMessage Is Winning: Teens Dread the Green Text Bubble*, (Jan. 8, 2022, 12:00 AM), <https://perma.cc/A826-KMPJ> (noting the impact on teenagers of seeing a blue iPhone text bubble versus a green Android phone text bubble).

8. See Terry, *Global Legal Profession Networks*, *supra* note 3, at 154 (footnotes omitted).

9. *Id.* at 153.

10. *Id.* at 158-159 (footnotes omitted); John P. Heinz, *Lawyers’ Professional and political Networks Compared: Core and Periphery*, 53 ARIZ. L. REV. 455, 482 (2011) (Table 1 summarized the networks analyzed by Professor Heinz, who was a co-author of the famous “Chicago Lawyers” studies).

facilitating global legal profession networks.<sup>11</sup> In the author's view, these TLP *Summits* played a critical role in helping develop the global networks that facilitate international cross-border legal practice and have had a lasting impact.

### III. HOW THE ABA'S *SUMMITS* FACILITATED GLOBAL LEGAL PROFESSION NETWORKS AND INTERNATIONAL CROSS-BORDER LEGAL PRACTICE

This Article examines fourteen gatherings that were held between 2004 and 2014 that were organized in whole or in part by the ABA Section of International Law's Transnational Legal Practice (TLP) Committee or by the ABA Standing Committee on International Trade in Legal Services (ITILS) or ITILS' predecessor entities.<sup>12</sup> This Article refers to these fourteen gatherings as "*Summits*" or "*TLP or ABA Summits*," even though the gathering might have had a different formal name, such as a *Roundtable*, and even though the gathering was organized by a subgroup within the ABA.<sup>13</sup> For the sake of simplicity, unless the context requires otherwise, both the ABA ITILS Standing Committee and its predecessor entities will be referred to as "ITILS," and all individuals who were listed on an ITILS roster will be referred to as "ITILS members," regardless of whether they served as a member, liaison, advisor, or former member during a particular year.<sup>14</sup>

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11. One of my prior articles examined the networks that exist among lawyer regulation stakeholders, but did not single out the way in which the ABA's *Summits* have contributed to the development of these networks. See generally Laurel S. Terry, *Lawyer Regulation Stakeholder Networks and the Global Diffusion of Ideas*, 33 GEO. J. LEGAL ETHICS 1069 (2020) [hereinafter Terry, *Lawyer Regulation Stakeholder Networks*].

12. Unless the context requires otherwise, this Article will refer to the ABA Section of International Law. However, during some of the time period covered by this Article, the Section's name was the Section of International Law and Practice. Documents in the author's files show that Professor Lutz held numerous positions in the ABA Section of International Law. He was Editor-in-Chief of *The International Lawyer* from 1984-1987. He served as Chair of the ABA Section of International Law and Practice in 2001-02. During 2002-04, he served as Co-Chair of the ABA Section of International Law and Practice's Transnational Legal Practice Committee. In 2004-05 and 2005-06, Professor Lutz joined the ITILS Committee as a liaison from the ABA Section of International Law. Professor Lutz served as Chair of ITILS during 2006-07, 2007-08, and 2008-09, and thereafter served as either a member of ITILS or as a former member or liaison. Professor Lutz also served as a member of, or liaison to, ABA groups whose mandate included TLP-related issues, such as the ABA Commission on Ethics 20/20 and the Special International Committee of the ABA Section of Legal Education and Admissions to the Bar.

13. Compare *infra* note 58 (citing the 2005 US-EU *Summit* Invitation Letter), with note 153 (citing the 2013 EU-US Legal Services Roundtable agenda).

14. This footnote sets forth the names of the predecessor entities to the ABA Standing Committee on International Trade in Legal Services [ITILS]. This footnote also explains the different ways in which individuals were listed on the ITILS Rosters since the changes in



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categories reflects ITILS' expanding scope and network. The author has personal knowledge of the contents of the ITILS Rosters from 2003-04 through 2021-22 and the information contained in this paragraph. This brief history of ITILS is set forth on its webpage:

The Task Force on GATT Negotiations Regarding Trade and Services Applicable to the Legal Profession (later referred to as the Task Force on GATS Legal Services Negotiations) was created by the [ABA] Board of Governors in 2003, to be composed of six presidentially-appointed members, four of whom were to be designated representatives from the following ABA entities: Section of Administrative Law and Regulatory Practice; Section of Business Law; Section of International Law; and Section of Litigation. The other two positions were for at-large members. In August 2003, the Board increased the size of the Task Force from six members to eight members, in order to "to ensure that appropriate diversity is created and maintained among the current entity membership." In February 2007, the Board approved changing the name to the Task Force on International Trade in Legal Services (ITILS), to more accurately reflect the range of issues and initiatives that the Task Force was being asked to address in relation to multilateral and bilateral trade negotiations that impact the U.S. legal profession. In June 2009, the Board approved then President-Elect Carolyn Lamm's request to revise the jurisdictional statement of the Task Force to increase its membership from eight members to twelve members. The additional seats were designated for the president of the National Conference of Bar Presidents, a liaison to the Commission on Ethics 20/20, and two state bar association presidents. This constitutes the current structure of the Task Force. In addition, because of the global professional ethics and regulatory issues inherent in the matters under study by the Task Force, the Center for Professional Responsibility has been and continues to be an invaluable partner in the work of the Task Force. In 2016, the Task Force became a Standing Committee.

ABA Standing Comm. on Int'l Trade in Legal Services, *About the Standing Committee: History*, (last visited Oct. 10, 2022), <https://perma.cc/AX3H-W2YN>.

The 2003-04 ITILS Roster was entitled "Task Force on GATT Trade & Services Agreement Negotiations"; this Roster contained three columns and listed, for each individual on the Roster, their name, contact information, and section representation. Some individuals, such as the author, were listed as liaisons. (In my case, I was one of two liaisons from the ABA Center for Professional Responsibility.)

Consistent with the history noted above, the 2004-05 Roster was entitled "American Bar Association Task Force on GATS Negotiations Involving Legal Services"; it had separate sections that listed the Task Force "Members," the Task Force "Liaisons," and Staff. The 2005-06 and 2006-07 ITILS Rosters simplified the name of the group to American Bar Association Task Force on GATS Legal Services Negotiations. These Rosters had one section that listed "Members," but the title of the next section had expanded from "Liaisons" to "Liaisons and Advisors."

Starting in 2007-08 through 2015-16, the name that appeared at the top each of these Rosters was the American Bar Association Task Force on International Trade in Legal Services and the Rosters listed the ITILS Task Force members, followed by the ITILS Liaisons and Advisors. Starting with 2016-17 through the current year, the group name at the top of the roster is the American Bar Association Standing Committee on Trade in Legal Services. For additional information about the group's conversion to a Standing Committee, see Terry, Vol. 51, *infra* note 16, at 545, n.27 and accompanying text; ABA 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://perma.cc/DSM8-YLW7> and [https://www.americanbar.org/content/dam/aba/directories/policy/annual-2016/2016\\_hod\\_annual\\_11-7.docx](https://www.americanbar.org/content/dam/aba/directories/policy/annual-2016/2016_hod_annual_11-7.docx) [hereinafter Resolution Converting ITILS to a Standing Comm.].

During 2016-17, which was its first year as a Standing Committee, the ITILS Roster listed members on the one hand, and Liaisons & Advisors on the other hand. Starting in 2017-18, however, the ITILS Roster began listing Members on the one hand, and Former Members, Liaisons & Advisors, on the other hand. This information has been included because it conveys the "Hotel California-like" nature of ITILS where you can check-in, but you can never leave. The group is an inclusive one and so long as an individual is interested in continued participation, their

Section III(A) explains where published information about these *Summits* can be found. Section III(B) provides a brief chronologic and thematic overview of the *Summits*. Section III(C) is a lengthy section that contains detailed information about each of the *Summits*, many of which Professor Lutz helped organize and all of which he participated in.

#### A. *Prior Publications about the ABA's TLP Summits*

Notwithstanding this Article's thesis about the importance of the ABA's *Summits*, there is relatively little discussion about these *Summits* in the existing literature.<sup>15</sup> The documentation that *does* exist is primarily found in the *Transnational Legal Practice* articles found in the *International Lawyer's* annual "Year-in-Review" issue.<sup>16</sup> (These will be

name is retained on the roster. As a result, the list of Liaisons, Advisors, & Former Members has grown significantly over the years of ITILS' existence. Moreover, unless the context requires otherwise, when this Article refers to "ITILS Members," it is referring to anyone who is listed on the ITILS Roster, regardless of whether that person is a member, liaison, advisor, or former member.

As noted above, all of the ITILS Rosters have listed the ABA lawyers who staff the committee. From its inception to the present, Kristi Gaines, Esq. from the ABA Office of Legislative Affairs, has served as ITILS Staff. *See generally* ITILS Rosters, *supra* note 14. Starting in 2005-06 and continuing through the present, the ITILS Rosters have also listed as ITILS staff Elyn Rosen, Esq., from the ABA Center for Professional Responsibility. *Id.* Starting in 2005-06 and continuing through 2011-12, Becky Stretch, Esq., was also listed as ITILS Staff. During her first two years as ITILS Staff, Ms. Stretch was Associate Director of the ABA Center for Professional Responsibility. Thereafter, she was identified as Assistant Consultant for the ABA Section of Legal Education and Admissions to the Bar.

15. The ABA Summits usually were mentioned in the *Transnational Legal Practice* [TLP] articles found in the *International Lawyer's* annual "Year-in-Review" issue. *See generally infra* note 16, which cites multiple TLP *Year-in-Review* articles, and nn.25-196 and accompanying text of this Article, which cite these TLP *Year-in-Review* articles where appropriate. Other than the TLP *Year-in-Review* articles, the only articles I could find that discuss the ABA Summits are: Laurel S. Terry, *The Impact of Global Developments on U.S. Legal Ethics During the Past Thirty Years*, 30 GEO. J. LEGAL ETHICS 365, 379 (2017); Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUDIES L. REV. 463, 509-10 (2005) and the two short Bar Examiner articles cited *infra* in notes 35 and 73. In 2018, Professors Leslie Levin, Lynn Mather, and Leny de Groot-van Leeuwen wrote an interesting article comparing the ABA, the International Bar Association, and the Council of Bars and Law Societies of Europe [CCBE] in which they noted the overlapping relationships of individuals but did not cite the *Summits* specifically. Leslie Levin et al., *The Impact of International Lawyer Organizations on Lawyer Regulation*, 42 FORDHAM INT'L L.J. 407, 466 (2018) (footnotes omitted) ("Third, overlapping memberships and networks, including at the very top of the organizations, further convergence. The organizations' leaders have a long history of working together and some occupy key roles in two or more organizations.").

16. Listed in chronological order of publication, the TLP *Year-in-Review* articles that appeared between 1997 and 2017 are the following: Donald H. Rivkin & Michael D. Sandler, *Transnational Legal Practice*, 31 INT'L LAW. 519 (1997) (regarding events in 1996) [hereinafter Rivkin & Sandler, *Vol.* 31]; Donald H. Rivkin, *Transnational Legal Practice*, 32 INT'L LAW. 423

referred to as the *TLP Year-in-Review* articles]. At the time they were published, these *TLP Year-in-Review* articles provided useful transparency about the activities of the ABA's TLP and ITILS Committees, as well as other TLP-related developments.

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(1998) (regarding events in 1997) [hereinafter Rivkin, *Vol.* 32]; Donald H. Rivkin, *Transnational Legal Practice*, 33 INT'L LAW. 825 (1999) (regarding events in 1998) [hereinafter Rivkin, *Vol.* 33]; Ellen H. Clark, *Transnational Legal Practice*, 36 INT'L LAW. 955 (2002) (regarding 2001 developments; developments in 1999 and 2000 were not addressed) [hereinafter Clark, *Vol.* 36]; Robert E. Lutz et al., *Transnational Legal Practice: Cross-Border Legal Services: 2002 Year-in-Review*, 37 INT'L LAW. 987 (2003) (regarding 2002 developments) [hereinafter Lutz et al., *Vol.* 37]; Robert E. Lutz et al., *Transnational Legal Practice Developments*, 39 INT'L LAW. 619 (2005) (discussing selected developments in 2003 and 2004) [hereinafter Lutz et al. *Vol.* 39]; Laurel S. Terry et al., *Transnational Legal Practice* 42 INT'L LAW. 833 (2008) (discussing selected developments between 2005 and 2007) [hereinafter Terry et al., *Vol.* 42]; Laurel S. Terry et al., *Transnational Legal Practice*, 43 INT'L LAW. 943 (2009) (discussing 2008 developments) [hereinafter Terry et al., *Vol.* 43]; Laurel S. Terry et al., *Transnational Legal Practice 2009*, 44 INT'L LAW. 563 (2010) (discussing 2009 developments) [hereinafter Terry et al., *Vol.* 44].

The *TLP Year-in-Review* articles that were published between 2012 and 2017 were included in the ABA's new *Year-in-Review* annual publication, rather than in the *International Lawyer*. However, as notes 20-21, *infra*, and accompanying text explain, some sources, such as HeinOnline, refer to the *International Lawyer* when citing these *TLP Year-in-Review* articles. For this reason, this footnote provides both the *International Lawyer* Bluebook citation and the *Year-in-Review new series* (n.s.) citation when citing the *TLP Year-in-Review* articles that appeared between 2013 and 2017. These six *TLP Year-in-Review* articles are: Laurel S. Terry, *Transnational Legal Practice (International)*, 47 INT'L LAW. 485 (2013) also cited as 47 ABA/SIL YIR 485 (n.s.) (2013) (discussing internationally-focused developments that primarily occurred during 2010-2012) [hereinafter Terry, *Vol.* 47 (International)]; Laurel S. Terry, *Transnational Legal Practice (United States)*, 47 INT'L LAW. 499 (2013) also cited as 47 ABA/SIL YIR 499 (n.s.) (2013) (discussing U.S.-focused developments that primarily occurred during 2009-2012) [hereinafter Terry, *Vol.* 47 (U.S.)]; Mark E. Wojcik, *Transnational Legal Practice*, 48 INT'L LAW. 513 (2014), also cited as 48 ABA/SIL YIR 513 (n.s.) (2014) (focused exclusively on whether undocumented aliens could practice law and discussed recent 2013 cases and legislation on this topic) [hereinafter Wojcik, *Vol.* 48]; Laurel S. Terry & Carole Silver, *Transnational Legal Practice*, 49 INT'L LAW. 413 (2015) also cited as 49 ABA/SIL YIR (n.s.) 413 (2015) (focusing on developments in 2013 and 2014) [hereinafter Terry & Silver, *Vol.* 49]; Laurel S. Terry, *Transnational Legal Practice*, 50 INT'L LAW. 531 (2016) also cited as 50 ABA/SIL YIR (n.s.) 531 (2016) (discussing 2015 developments) [hereinafter Terry, *Vol.* 50]; Laurel S. Terry, *Transnational Legal Practice*, 51 INT'L LAW. 539 (2017) also cited as 51 ABA/SIL YIR (n.s.) 539 (2017) (discussing 2016 developments) [hereinafter Terry, *Vol.* 51]. To see which of these *TLP Year-in-Review* articles discussed the ABA *Summits* and what they said, *See infra* notes 31-196 and accompanying text.

As this string cite list shows, the first *TLP Year-in-Review* article was published in 1997 in Volume 31. The last *TLP Year-in-Review* article was published twenty years later, in Volume 51, which was published in 2017. In 2016, the ABA Section of International Law disbanded its *Transnational Legal Practice Committee*. *See* Terry, *Vol.* 51, at 539 (explaining that at the end of the ABA's 2015-16 year, the TLP Committee and another Section of International Law Committee merged to form a new ABA Section of International Law Transnational Practice Management Committee). The author has personal knowledge that although the *TLP Year-in-Review* articles were not published every year between 1997 and 2017, the authors tried to ensure that if they skipped a publication year, the events from that year would be included in the following year's article.

Professor Lutz is one of reasons why this transparency exists. In 1997, Professor Lutz initiated the *International Lawyer's* tradition of having an annual *Year-in-Review* issue that summarized international developments in multiple areas of law.<sup>17</sup> In the author's experience, the *TLP Year-in-Review* articles not only provided useful transparency, but they encouraged participation in TLP-issues and helped promote the development of a global network of TLP stakeholders.<sup>18</sup>

Although the *TLP Year-in-Review* articles are useful, they can be extremely confusing to work with, and I therefore decided to elevate the information in this paragraph from a footnote to the text. The first reason why the *TLP Year-in-Review* articles are confusing is because many of them have the identical title and start on similar page number in the same publication—the *International Lawyer*.<sup>19</sup> In addition to the confusion that arises from having identical journal titles, confusion exists because of disagreements about how to cite the publications in which these *Transnational Legal Practice* articles appear. This journal name confusion exists because the ABA decided to launch a new annual publication in 2012—i.e., a new series or “n.s.”—in which it would publish its *Year-in-Review* articles, rather than including the *Year-in-Review* articles in an issue of the *International Lawyer* as it previously had done.<sup>20</sup> Although the ABA recommends a Bluebook citation form of ABA/YIR (n.s.) for its 2012 and

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17. See, e.g., Robert E. Lutz, *Introduction, International Legal Developments in Review*, 31 INT'L LAW. 233 (1997) (explaining the reasoning behind the *Year-in-Review* initiative). See also [Robert E. Lutz], *Editor's Preface, International Legal Developments in Review: 1996*, 31 INT'L LAW. 231 (1997) (“The history of the ABA Section of International Law and Practice records many ‘noble experiments.’ Some, such as *The International Lawyer*, have withstood the test of time. It is hoped that the “*International Legal Developments in Review: 1996*” will follow in that tradition.”).

18. Compare *TLP Year-in-Review* volumes cited *supra* note 16, with the unpublished report entitled Memorandum: Report on the Activities of the Committee to Members of the Council, Section of International Law and Practice from Steven C. Nelson, Chair, Committee on Transnational Legal Practice (April 11, 1992) (unpublished summary of the TLP Committee's work; on file with author). Although the author had been interested in TLP issues since 1987, it was Rivkin and Sandler, *Vol. 31, supra* note 16, that prompted her involvement in the TLP Committee.

19. Compare Terry et al., *Vol. 42, supra* note 16 (article entitled “Transnational Legal Practice” was published in 2008 and started on page 842), with Terry et al., *Vol. 43, supra* note 16 (article entitled “Transnational Legal Practice” covered activities in 2008 and started on page 961). The author has personal knowledge that the *TLP Year-in-Review* authors sometimes attempted to distinguish the article titles by including a date after the *Transnational Legal Practice* title, but these additions often were removed during the editorial process.

20. See, e.g., ABA Section Int'l L., *The Year in Review*, <https://perma.cc/4X38-USAT> (“The Year in Review, previously included as an issue of *The International Lawyer*, is now its own annual publication of the American Bar Association's International Law Section. It has had a place as a prestigious ABA publication since 1966 and has called SMU Dedman School of Law its home since 1986. ... Preferred Citation: Vol. No. ABA/ILS YIR (n.s.) page no. (year).”).

later *Year-in-Review* articles, authorities such as HeinOnline continue to use the *International Lawyer* journal name when recommending the proper Bluebook citation form.<sup>21</sup> The third source of confusion comes from the shorthand footnote references that appear within the *TLP Year-in-Review* articles. For example, some *TLP Year-in-Review* article footnotes have used a shorthand reference that includes the title of the article *Transnational Legal Practice* and the activity year(s) discussed in the article, even though the activity year did not appear in the cited article's official title and even though someone reading the footnote without checking the original "*supra*" citation might think the cited article was the identically titled article that was **published** in the year listed.<sup>22</sup> To avoid this type of confusion, this Article lists in a single footnote all twenty years of the *TLP Year-in-Review* articles and thereafter cites these articles by volume number.<sup>23</sup>

### B. An Overview of the ABA's TLP Summits

This Article focuses on fourteen *Summits* that were held between 2004 and 2014. Although one might argue that the ABA held TLP *Summits* before 2004,<sup>24</sup> this Article used 2004 as the starting date because that was the first time the ABA TLP or ITILS organized a meeting that it referred to formally or informally as a *Summit*. The fourteen *Summits* that are

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21. Compare *id.*, with copies of the *TLP Year-in-Review* articles published in Volumes 47-51 and downloaded from HeinOnline; these PDFs list as the recommended Bluebook Citation the volume number followed by Int'l. Law., rather than the volume number followed by ABA/SIL YIR (n.s.) (on file with author).

22. See, e.g., Terry et al., *Vol. 42, supra* note 16, at 835 n.10, 858 n.152 (using a shorthand reference of "Lutz et al., 2004 Developments" to refer to the *International Lawyer Year-in-Review* volume published in 2005); Terry et al., *Vol. 44, supra* note 16, at 565 n.10 (using a shorthand reference of "2008 Year-in-Review" to refer to the *Transnational Legal Practice* article published in 2009 in Terry et al., *Vol. 43*, rather than the *Transnational Legal Practice* article that was published in 2008 in Terry et al., *Vol. 42*).

23. See *supra* note 16 (listing all *TLP Year-in-Review* articles).

24. Cf. Lutz et al., *Vol. 37, supra* note 16, at 992-95 (discussing, *inter alia*, gatherings hosted by the ABA Commission on Multijurisdictional Practice [MJP], whose mandate included examining transnational MJP issues; Professor Lutz served as the primary editor of this *TLP Year-in-Review* volume and was a liaison to the ABA MJP Commission); Rivkin, *Vol. 33, supra* note 16, at 825 (describing the 1998 [Paris] Forum on Transnational Practice for the Legal Profession); Laurel S. Terry, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICKINSON J. INT'L L. 1 (1999). Both the ABA MJP Commission and the earlier ABA Commission on Multidisciplinary Practice [MDP] heard written and oral testimony from foreign lawyers and lawyer organizations. See, e.g., Lutz et al., *Vol. 37, supra* note 16 (describing the work of the MJP Commission); Terry, *Coming of Age, supra* note 15, at 489-91 (describing global participation in the work of the ABA MDP Commission). Although ITILS arranged a meeting in November 2003 between USTR officials and ITILS members, in the author's view, the limited scale of this meeting did not rise to the level of the *Summits* described in this article.

discussed in this Article are listed below, along with the name of the gathering as it appeared on the agenda:

- Aug. 2004: CCBE-U.S. State Bar Leaders Roundtable
- Nov. 2004: Domestic Roundtable with USTR and State Regulators (Washington, D.C.)
- Aug 2005: CCBE-ABA Summit II (Chicago)
- Aug. 2006: European-US Bar Leader Summit (Honolulu)
- Aug. 2006: Asian Summit on Legal Services (Honolulu)
- Aug. 2007: 2<sup>nd</sup> Asian Summit of Bar Leaders on Legal Services (San Francisco)
- Aug. 2007: 4<sup>th</sup> Annual US-EU Summit of Bar Leaders on Legal Services
- Aug. 2008: Korea-US Summit
- Aug. 2008: India-US Summit (New York)
- Aug. 2008: Large Law Firm Summit
- March 2009: Cancelled Domestic Summit but see the [substitute] May 2009 CCJ Conference
- May 2009: ABA CPR Conference for the Conference of Chief Justices (Chicago)
- Aug. 2013: CCBE-US Roundtable (San Francisco)
- Aug. 2013: Trans-Pacific Bar Leaders' Summit (San Francisco)
- Aug. 2014: EU-US Legal Services Roundtable (Boston)

As this list shows, the ABA's TLP-related *Summits* can be divided into five categories. The ABA held multiple *Summits* that focused on the U.S.-European relationship.<sup>25</sup> It also held several *Summits* that focused on the relationships among the legal professions in Asia and the United States.<sup>26</sup> A third set of *Summits* focused on a single country, such as India or Korea.<sup>27</sup> Fourth, there were *TLP Summits* designed for U.S. policymakers.<sup>28</sup> Fifth, there were *Summits* designed to facilitate communication with U.S. law firms engaged in the export of legal

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25. See generally *infra* notes 32-43 and 167-186 and accompanying text for a discussion of the 2004-2007 and 2012-2013 EU-US *Summits*).

26. See, e.g., *infra* notes 86-93 (2006 Asian Summit), 102-103 and 114-24 (2007 Asian Summit), and 156-167 (2013 Trans-Pacific Bar Leaders' Summit) and accompanying text. See also *infra* note 27 (citing the 2008 Korea and India *Summits*).

27. See *infra* notes 128-134 and accompanying text (describing the 2008 Korea-US *Summit* and the India-US *Summit*).

28. See *infra* notes 45-55 and 141-146 and accompanying text (describing the 2004 Domestic Roundtable and the May 2009 CPR conference for the CCJ).

services.<sup>29</sup> Information about each of the *Summits* can be found in the next Section.

### C. Details about the ABA's TLP Summits

Some details about the fourteen *ABA Summits* can be found in the published *TLP Year-in-Review* reports, but many other details reside in the files of the ITILS participants, such as Professor Lutz and the author.<sup>30</sup> Where possible, this Section identifies the topics in the *Summit* agendas, the materials circulated in advance of, or during, the *Summits*, the scope of the *Summit* conversations, and how the *Summits* created follow-up activity. These items help demonstrate why the *Summits* created momentum for increased global conversations that facilitated cross-border legal practice.

One aspect of the *Summits* that is not apparent from the published reports is the fact that all but three of the ABA's TLP *Summits* occurred when Professor Lutz served as a Co-Chair of the ABA TLP Committee or when he served as Chair of the ABA Task Force on International Trade in Legal Services, which was one of the predecessor entities of the current ITILS.<sup>31</sup> Professor Lutz's leadership was a critical component of the initial *Summits* and his continued involvement in ITILS was part of the reason why later *Summits* happened.

The ABA held its first TLP-related *Summit* in August 2004 during the ABA Annual Meeting.<sup>32</sup> The primary U.S. sponsor for this *Summit* was the ABA Section of International Law's Transnational Legal Practice committee which Professor Lutz co-chaired with Philip von Mehren.<sup>33</sup>

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29. See *infra* notes 138-140 and accompanying text (describing the 2008 large law firm *Summit*).

30. Since its creation in 2003, I have been a member or liaison of ITILS, or a former member who was listed on the ITILS Rosters and therefore received the Committee's materials. See *supra* note 14.

As explained *supra* in note 12, in 2003-04, 2004-05, and 2005-06, Professor Lutz served as Chair of the ABA Section of International Law and Practice's Transnational Legal Practice Committee. During 2004-05 and 2005-06, Professor Lutz was a TLP Committee liaison to ITILS. See *ITILS Rosters*, *supra* note 14. During 2006-07, 2007-08, 2008-09, and 2009-2010, Professor Lutz served as Chair of ITILS. *Id.*

31. See *id.* (Professor Lutz's leadership positions and a note about the TLP and ITILS abbreviations used in this Article).

32. See *infra* notes 34-40 for a discussion of the 2004 *Summit*. See also *supra* notes 12 and 14 (explaining that Professor Lutz served as Co-Chair of the ABA SIL's Transnational Legal Practice Committee during 2003-04 and 2004-05 and that August 2004 was the conclusion of the ABA ITILS Committee's first year of existence).

33. The author has personal knowledge of this fact. See also *infra* note 36 (citing Lutz & Mehren, 2004 *Summit Invitation Letter*).

Professor Lutz was the lead editor for Volume 39 of the *International Lawyer*, which contains this report about the August 2004 *Summit*:

Since the last Year-in-Review report about the GATS, three developments should facilitate communication between the U.S. legal profession and the USTR regarding MJP of legal services. First, the ABA reconstituted the ABA Task Force on GATS Legal Services Negotiations [by renaming it and increasing its members]; second, a “Summit Meeting” was convened at the 2004 Annual Meeting of the ABA in Atlanta to bring together U.S. representatives from fourteen states, various U.S. legal organizations, the Law Society of England and Wales, and the Council of Bars and Law Societies of Europe (CCBE), which is the umbrella organization of the European Union’s (EU) bar associations and represents over 700,000 lawyers; [the third item was the November 2004 *Summit* described below].<sup>34</sup>

The National Conference of Bar Examiners’ *Bar Examiner* magazine published an article that provides this additional detail about the August 2004 *Summit*:

The [August 2004] Atlanta Summit brought together representatives from 14 U.S. states, various U.S. legal organizations, the Law Society of England and Wales, and the CCBE, which is the European Union’s bar association that represents over 700,000 lawyers. More than fifty people attended the Atlanta Summit, including state bar presidents, state international law section chairs, state bar executive directors, state disciplinary counsel, and representatives from the ABA, the ABA Center for Professional Responsibility, the National Organization of Bar Counsel, and the Conference of Chief Justices. The agenda topics included: the present status of the GATS, the EU offer on legal services for the current GATS round, the “request” and “offer” of the New York State Bar Association, and a discussion of ways in which the jurisdictions present could further liberalize transnational legal services.<sup>35</sup>

Documents on file with the author provide additional detail about the August 2004 *Summit*. The invitation letter was sent by Professor Lutz and his fellow co-chair of the ABA’s Transnational Legal Practice Committee.<sup>36</sup> The invitation letter included the agenda for the meeting, showing that one of the primary goals of the meeting was for the U.S. and European representatives to introduce themselves and their systems to one

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34. Lutz et al., *Vol. 39, supra* note 16, at 622 (footnotes omitted).

35. Laurel S. Terry, *The GATS and Legal Services: The Resumed GATS Negotiations Trigger Additional U.S. and Other Activity*, 75 THE BAR EXAMINER 43, 44 (2005) (footnotes omitted) [hereinafter Terry, *Bar Examiner* 2005].

36. Letter from Robert E. Lutz & Philip T. von Mehren, Co-Chairs, Transnational Legal Practice Committee, to Distribution List (June 15, 2004) (on file with author) [hereinafter Lutz & Mehren, *2004 Summit Invitation Letter*].



another, and to review TLP issues.<sup>37</sup> The *Summit* was scheduled to last two hours.<sup>38</sup> Before the meeting, the participants were sent a list of the attendees, as well as the agenda and background material.<sup>39</sup> The CCBE attendees included individuals with whom ABA members continue to interact.<sup>40</sup>

In addition to helping establish relationships among the U.S. and EU representatives, the 2004 *Summit* led to follow-up action. For example, after the August 2004 *Summit*, State Bar of Georgia General Counsel and NOBC member Bill Smith, who had attended the *Summit* as an observer from Georgia, renewed a request to NOBC members to submit contact information for their state that could be shared with the Office of the U.S. Trade Representative. He obtained contact information for all but three states and in late August 2004, an ABA Center for Professional Responsibility staff member forwarded to the USTR three contact lists: one from the Conference of Chief Justices, one from the National Organization or Bar Counsel, and another from the ABA Division of Bar Services that

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37. *Id.* at 1-2 (stating that although some US and EU *Summit* attendees were familiar with each other and with each other's systems, the TLP issues were new for some of the attendees, especially those who were invited because of their position as a State Bar President). *See generally* Lutz & Mehren, *2004 Summit Invitation Letter*, *supra* note 36. (stating that the agenda for the *Summit* would include six bulleted topics; 1) an introduction of the various parties and the organizations they represent; 2) an overview of the present rules governing the free movement of European lawyers within the European Union ("EU"); 3) present status of World Trade Organization's General Agreement on Trade in Services ("GATS") as it relates to transnational legal practice; 4) the EU offer on legal services for the current GATS round; 5) the "request" and "offer" of the New York State Bar Association; and 6) a discussion of ways in which the jurisdictions present could further liberalize the regulation of transnational legal services to benefit lawyers from those jurisdictions).

38. *See* E-mail from Brenda McLaughlin, Assistant to Philip von Mehren, to *Summit* Attendees (July 22, 2004) (on file with author) (transmitting a list of *Summit* attendees and noting that the meeting had rescheduled to 4:00-6:00pm on Aug. 6, 2004).

39. *See, e.g.*, E-mail from Brenda McLaughlin, Assistant to Philip von Mehren, to *Summit* Attendees, *supra* note 38 (stating that "[n]ext week, we will be distributing an agenda and background materials") (author was not able to locate follow-up e-mail) (on file with author). *See also* E-mail from Brenda McLaughlin, Assistant to Philip von Mehren, to author, Professor Lutz, and others (July 22, 2004) (noting that the ABA was awaiting the CCBE's materials, but the materials the ABA proposed to send included excerpts of Recommendations 8 & 9 from the Report of the [ABA MJP] Commission; Table 2, which compared different sections of the ABA's Model [FLC] Rule; a Summary of the U.S.'s Proposed Reference Paper on Legal Services which the ABA had received from the USTR and was posted on its ABA GATS webpage; and information about the ABA Center for Professional Responsibility Joint Committee on Lawyer Regulation).

40. *See* Summit Meeting Attendees (July 25, 2004) (on file with author). This document lists as the CCBE attendees Dr. Hans-Jürgen Hellwig, CCBE President; Alison Hook, The Law Society [of England & Wales]; Louis-Bernard Buchman; and Jonathan Goldsmith, CCBE Secretary General. *Id.*

included state bar contacts.<sup>41</sup> By October 28, 2004, the ABA Center for Professional Responsibility had created a listserv that included ITILS members and included the individuals on the three separate contact lists that the ABA Center had previously forwarded to the USTR.<sup>42</sup>

The second *Summit* the ABA sponsored during 2004 was held in November 2004 at the Washington, D.C. office of the U.S. Trade Representative [USTR].<sup>43</sup> (The USTR is a cabinet-level official whose department is primarily responsible for handling U.S. trade negotiations.)<sup>44</sup> Volume 39 of the *International Lawyer* described this *Summit* in a single sentence that said, “a meeting of USTR representatives and state representatives and others was held at the Office of the USTR in November 2004 in order to engage in a dialogue with the USTR about market access for the legal profession.”<sup>45</sup> The *Bar Examiner* article cited previously provides this additional detail about the November 2004 USTR *Summit*:

The third recent event of importance was the November 16, 2004, meeting held at the Office of the U.S. Trade Representative (USTR). This meeting was intended as a follow-up to the August 2004 Atlanta Summit. The purpose of the November 2004 USTR Meeting was to give state representatives and others the opportunity to engage in a dialogue with the USTR and vice versa. This meeting was the first time that representatives

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41. See, e.g., E-mail from Bill Smith, to NOBC Listserv (Aug. 18, 2004) (requesting contact information for the proposed USTR listserv) (on file with author); three E-mails from Sue Campbell, ABA Staff, to Chris Melly, Office of the USTR (Aug. 27, 2004) (on file with author) (transmitting contact information for CCJ members, NOBC members, and state bar and ITILS members).

42. See, e.g., E-mail from Susan Campbell, ABA Staff, to CPR-GATSCONTACTSUSTR Listserv (Oct. 28, 2004) [hereinafter “Welcome to GATS Listserv Message”]. The “Welcome to GATS Listserv Message” stated:

Welcome to this listserv on GATS, the General Agreement on Trade in Services. The listserv was created by the ABA Center for Professional Responsibility in conjunction with the ABA Taskforce on GATS and the ABA Section of International Law and Practice. The listserv includes state representatives from bar associations, disciplinary organizations and the judiciary. It permits those interested in the GATS negotiations related to legal services to discuss the effect and direction of the negotiations. The listserv also provides a mechanism for the United States Trade Representative’s office to communicate information about the GATS negotiations and to request feedback. Representatives of the USTR are not currently members of the listserv but can request that information be posted on their behalf at any time.

*Id.* See also E-mail from Charlotte “Becky” Stretch, ABA Staff, to CPR-GATSCONTACTSUSTR Listserv (June 10, 2005) (on file with author) (attaching a consolidated roster of listserv members) [hereinafter GATSCONTACTSUSTR Listserv]. At the time this message was sent, Professor Lutz was a Co-Chair of the ABA TLP Committee and a liaison to the ABA ITILS Committee from the ABA Section of International Law. See *supra* note 12.

43. Lutz et al., *Vol. 39, supra* note 16, at 622.

44. See generally Off. of the U.S. Trade Representative, *History of the United States Trade Representative*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <https://perma.cc/GV2M-ESW6>.

45. Lutz et al., *Vol. 39, supra* note 16, at 622 (footnotes omitted).

of the USTR had met, simultaneously, with a large number of representatives of the legal profession. The USTR officials attending the meeting included Christine Bliss, Deputy Assistant Trade Representative for Services, and Christopher Melly, Director, Services Trade Negotiations. Unlike the Atlanta Summit, conference call facilities were available for the November USTR meeting. Almost thirty people attended the USTR meeting in person, with approximately a dozen individuals participating by conference call. Those attending included representatives from California, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Maryland, Michigan, New Jersey, New York, Texas, and Virginia, together with representatives from the American Bar Association, the Conference of Chief Justices, the National Organization of Bar Counsel, and the Coalition of Service Industries. The 2½ hour meeting included eight agenda items: (1) welcoming remarks and the goals of the meeting; (2) the status of the GATS negotiations; (3) the U.S. legal services' GATS request; (4) state liberalization efforts; (5) the Conference of Chief Justices and GATS; (6) the regulation of foreign lawyers by states; (7) ITAC and CSI and the campaign to expand U.S. services trade; and (8) a general discussion of how to coordinate efforts and whether the U.S. can get its house in order.<sup>46</sup>

As the description above illustrates, the November 2004 *Summit* had as its focus an *intra-U.S.* conversation among the USTR and U.S. stakeholders, as opposed to the U.S.-foreign conversation was a key part of the August 2004 *Summit*. The November 2004 *Summit* was an opportunity to bring to the USTR stakeholders interested in both “*inbound*” and “*outbound*” legal services issues. “Outbound” legal services from the United States are those in which U.S. lawyers (or firms) provide legal services to clients in other countries. *Outbound* legal services are also referred to as U.S. legal services “exports.” *Inbound* legal services is an expression that is used to refer to the situation in which a foreign lawyer (or firm) comes into the United States to provide legal services. Inbound legal services are also referred to as U.S. legal services “imports.”

In the author’s experience, U.S. legal services regulators tend to care more about foreign legal services inbound to the United States, as opposed to U.S. lawyers who provide outbound U.S. legal services to clients in other countries. Private practice lawyers in the ABA Section of International Law, on the other hand, tend to care more about opportunities for outbound U.S. legal services compared to inbound (foreign) legal services.

The November 2004 *Summit* was noteworthy because it gave the USTR the opportunity to hear from the ABA with respect to both inbound and outbound perspectives. (During the negotiations that led to the signing

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46. Terry, *Bar Examiner* 2005, *supra* note 35, at 44-45 (footnotes omitted).

of the NAFTA and the WTO GATS agreements, the USTR's primary interactions regarding legal services were with representatives from the ABA Section of International Law or organizations that were primarily interested in "*outbound*" issues.<sup>47</sup>) The 2003 creation of the ABA GATS Task Force was an effort to reach out to *all* interested stakeholders and promote better communication and coordination *within* the ABA and with external stakeholders.<sup>48</sup> (The 2000-2002 work of the ABA Commission on Multijurisdictional Practice had heightened awareness within the ABA of *inbound* TLP issues.)<sup>49</sup>

There were several different ways in which the November 2004 *Summit* advanced the ABA's goal of promoting better communication among the USTR and *inbound* and *outbound* U.S. legal services stakeholders. The materials distributed at the *November 2004 Summit*

47. See, e.g., Karen Dillon, *Unfair Trade?*, AM. L., at 54-57 (Apr. 1994) (discussing the WTO GATS legal services negotiations); Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VANDERBILT J. TRANSNAT'L L. 989, 1089 (2001) as revised 35 VANDERBILT J. TRANSNAT'L L. 1387 (2002):

To date, virtually all U.S. experts in the law of lawyering have been unfamiliar with the GATS and have not participated in the development of GATS policy. ... [I believe that all U.S. regulators and lawyers] should recognize that the GATS has the potential to directly affect regulations of foreign lawyers in the United States and the potential to indirectly affect U.S. regulation of U.S. lawyers. Accordingly, even lawyers and regulators without a global practice should be aware of the GATS and should monitor the ongoing developments in GATS 2000.

48. See, e.g., Minutes of the Task Force on GATS Legal Services Negotiations (Sept. 4, 2003) (in a section on Task Force mission and Goals, the minutes note that the group agreed that there was work to be done "internally within the ABA and also related organizations such as the National Conference of Bar Presidents and the Conference of Chief Justices, among others. One mission of the task force is to promote information sharing, cooperation and coordination within the ABA, and between the ABA and outside entities.") (on file with author).

It is worth noting that the mission of the ABA Commission on Multijurisdictional Practice (MJP), which was active from 2001-2003, included issues related to transnational practice. See Clark, Vol. 36, *supra* note 16, at 955 ("As a threshold matter, [TLP] committee members were instrumental in successfully asking the ABA Board of Governors to revise the mission of the ABA MJP Commission so that it explicitly included consideration of MJP issues with respect to international law practitioners.") The MJP Commission's TLP recommendations focused on foreign lawyers who were *inbound* to the United States, rather than model rules focused on U.S. lawyers who were *outbound* to foreign countries. See generally ABA, *Commission on Multijurisdictional Practice*, <https://perma.cc/9JDB-WDL8> (contains all of the MJP Commission's adopted reports, including 201G and 201H, which involve inbound foreign lawyers).

49. Lutz et al., Vol. 37, *supra* note 16, at 993 ("Although the main focus of the MJP Report was on the states' regulation of inter-state practice of law, the MJP Report explicitly addressed two issues related to international cross-border legal services."); Clark, Vol. 36, *supra* note 16, at 956 (citing the TLP Committee's June 1, 2001 Supplemental Written Testimony, and its June 30, 2001 responses to the MJP Commission's questions, which Professor Lutz presented to the Commission), at 955 ("[TLP] committee members were instrumental in successfully asking the ABA Board of Governors to revise the mission of the ABA MJP Commission so that it explicitly included consideration of MJP issues with respect to international law practitioners.").

included items related to foreign legal services *inbound* to the United States, as well as items related to U.S. legal services *outbound* to other countries.<sup>50</sup>

The *Summit* speakers included individuals who were knowledgeable about legal services trade negotiations, individuals knowledgeable about *inbound* perspectives, and individuals who were knowledgeable about *outbound* perspectives, all of whom were able to communicate effectively with their respective groups. For example, Chris Melly, who was Director of Services Trade Negotiations at the USTR, spoke about agenda item #2 in the *Bar Examiner* excerpt quoted above, which was the status of legal services in the ongoing GATS negotiations.<sup>51</sup> Edward O'Connell, who was Senior Counsel with the National Center for State Courts, addressed Agenda item #5 regarding "the Conference of Chief Justices and GATS."<sup>52</sup> Bill Smith, who was General Counsel of the State Bar of Georgia and chair of the NOBC's recently-formed "International Cooperation Committee," handled Agenda Item #6 on "the regulation of foreign lawyers by states."<sup>53</sup> The two speakers who addressed the *outbound* legal services perspective were: 1) Peter Ehrenhaft, a lawyer in private practice, a member of the ABA Commission on Multijurisdictional Practice, and the ABA's representative to the "services" ITAC, which is a statutorily-required Industry Trade Advisory Committee that advises the government regarding trade negotiations; and 2) Bob Vastine, the President of CSI and Chair of the Industry Trade Advisory committee in Services.<sup>54</sup>

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50. See *Index of Documents for Meeting at USTR, Among USTR, ABA, U.S. Bar Leaders, Conference of Chief Justices, National Organization of Bar Counsel, ITAC and CSI* (Nov. 16, 2004) (on file with author) (listing the ABA GATS Webpage; Legal Services, Draft Reference Paper of the United States (submitted to GATS Members as a Guide to Market Access Commitments for Legal Services); Implementation of ABA Multijurisdictional Practice (MJP) Recommendation #8 [regarding state foreign legal consultant rules] (Draft 10-22-04); Implementation of ABA Multijurisdictional Practice (MJP) Recommendation #9 [regarding temporary practice by foreign lawyers] (Draft 10-22-04); Excerpts of Recommendations 8 & 9 from the Report of the Commission on Multijurisdictional Practice; ABA Table summarizing status on implementation of Recommendation 8 (legal consultants) and 9 (temporary practice); Table on Comparison of Sections 4(a)-(f), 5 and 6 of the ABA Model Rule for the Licensing of Legal Consultants with State FLC Rules; Cross-Border Legal Practice in International Legal Centers as viewed from New York; US offer on Legal Services; EU offer on Legal Services; Japanese offer on Legal Services; Canadian offer on Legal Services; Australian offer of Legal Services; and the text of the GATS).

51. See Agenda for Meeting at USTR, Nov. 16, 2004 (on file with author) [hereinafter Nov. 2004 *Summit* Agenda].

52. *Id.*

53. *Id.*

54. *Id.* See generally Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 884 (2010) [hereinafter *From GATS to APEC*].

As the *Bar Examiner's* published account of the November 2004 *Summit* noted, one of the questions posed for general discussion was “how can we better coordinate our efforts?”<sup>55</sup> The November 2004 *Summit* was an important step in facilitating better communication and coordination. In addition to the state contact listservs that the ABA shared with the USTR in October 2004, after the 2004 Summits, it became much more common for the ABA, the CCJ, the NOBC, and inbound and outbound U.S. legal services stakeholders to interact with one another.<sup>56</sup>

The next summit was held in August 2005 and was a follow-up to the August 2004 US-EU *Summit*. Although there is no published report about the 2005 EU-US *Summit II*,<sup>57</sup> documents in the author's files show that the 2005 *Summit* was similar in many respects to the 2004 EU-US *Summit*. In June 2005, Professor Lutz and his TLP Committee Co-Chair sent a letter of invitation to individuals from California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, and the District of Columbia.<sup>58</sup> The letter offered the following explanation of the EU-US 2005 *Summit*:

The purpose of this meeting is to continue the dialogue among bar and law society leaders initiated last year at the meeting we organized, nicknamed “Summit I,” during the ABA Annual Meeting in Atlanta. More specifically, we want to update you about global developments regarding

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55. See Nov. 2004 *Summit* Agenda, *supra* note 51.

56. See, e.g., GATSCONCONTACTSUSTR Listserv, *supra* note 42.

57. See also Terry et al., *Vol. 42, supra* note 16, at 842 (the *Transnational Legal Practice* report published in 2008 documented selected activities that happened in 2005-07, including four Summits that took place during 2006 and 2007, but it did not refer to the August 2005 *Summit*). See generally 40 INT'L LAW. 143 (2006) (International Legal Developments issue did not include a *Transnational Legal Practice Year-in-Review* report); 41 INT'L LAW. 135 (2007) (same).

58. See E-mail from Robert Lutz, to author and others (June 29, 2005) (transmitting embedded invitation and referring to the attached invitation); Letter from Robert E. Lutz and Philip von Mehren, Co-Chairs of the ABA Section of Int'l L. Transnat'l Legal Prac. Comm., to The Individuals Listed on the Attached Distribution List (June 27, 2005) (on file with author) [hereinafter Lutz and Mehren, *2005 Summit Invitation Letter*].

With respect to the Letter of Invitation's reference to CCJ attendees, the informal minutes from the 2005 *Summit* show that one of the attendees was Dick Van Duizend, who worked for the National Center for State Courts as Principal Court Management Consultant and was the main staff contact for the Conference of Chief Justices on TLP-related issues. See ABA Section of International Law, Transnational l Legal Practice committee “Summit II” (Aug. 5, 2005) (on file with author) [hereinafter Informal Minutes, 2005 *Summit*].

There may have been additional CCJ representatives because the Hon. Elizabeth Lacy of the Supreme Court of Virginia was an ITILS member or liaison from its inception in 2003-04 through 2013-14. See ITILS Rosters, *supra* note 14. In 2008-09, which was the fourth year in which Professor Lutz chaired the ABA ITILS committee, Chief Justices Jerry VandeWalle and Shirley Abrahamson joined the committee as a member and as the CCJ liaison, respectively. *Id.*

the GATS and related lawyer regulatory issues. We will also highlight recent U.S.-European requests and offers and explore areas of possible future initiative and cooperation.<sup>59</sup>

The 2005 Letter of Invitation expressed Professor Lutz's hope that the attendees would include "representatives from the CCBE, various foreign country lawyer organizations, and U.S. national and state bar leaders. We are also hopeful that members of the Conference of State Chief Justices will attend."<sup>60</sup>

During the 2005 *Summit's* introductory session, Professor Lutz explained the *Summit's* structure to the attendees, noting that:

[F]our issues had been identified as preeminent for this group to discuss and make up the agenda. There will be two speakers to address each issue and they will have five minutes each for their presentation, with ten minutes of open discussion to follow.<sup>61</sup>

The first of the four issues Professor Lutz had referred to was "discussion of data regarding the traffic in legal services (inbound and outbound) between the U.S. and the EU" and the speakers were Professor Carole Silver and Alison Hook.<sup>62</sup> The second issue was "[d]iscussion of major U.S., European and GATS developments (in the past year) and future multi-jurisdictional practice ("MJP") prospects" and the speakers were Peter Ehrenhaft and Hans-Jurgen Hellwig.<sup>63</sup> The third issue was "[d]iscussion of issues raised regarding U.S.-state and EU-European country relationships in the GATS process" and the speakers were Mark Sandstrom and Jonathan Goldsmith. The fourth issue was "[d]iscussion regarding U.S.-European efforts to develop international reciprocal discipline protocols" and the speakers were Bill Smith and Jonathan Goldsmith. As they had for the first US-EU *Summit*, the organizers of the

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59. Lutz & Mehren, *2005 Summit Invitation Letter*, *supra* note 58.

60. *Id.* The Distribution List attached to the Lutz & Mehren, *2005 Summit Invitation Letter*, *supra* note 58, was nine pages long and included many of the individuals who had been included on the CPR-GATS Contact list prepared for the USTR and discussed *supra* notes 41-42. The author does not have a list of attendees, as opposed to invitees, but informal minutes of the *Summit* list a number of attendees by name and cite the affiliation information for individuals affiliated with the CCJ and NOBC. Informal Minutes, ABA Sec. Int'l Law, Transnational Legal Practice Committee "Summit II," Chicago, IL (Aug. 5, 2004) (on file with author).

61. Informal Minutes, 2005 *Summit*, *supra* note 60, at 1. *See also* E-mail from Robert E. Lutz, to author (July 6, 2005) (on file with author), for a draft agenda listing these same four issues as the issues to be discussed at the August 2005 *Summit*.

62. Informal Minutes, 2005 *Summit*, *supra* note 60, at 1-2.

63. *Id.* at 3.

2005 *Summit* circulated materials to the attendees in advance of the 2005 *Summit*.<sup>64</sup>

After the 2005 *Summit* concluded, ITILS representatives made a concerted effort to involve more formally in ITILS the kinds of stakeholders that had attended the *Summit*. ITILS members agreed to add an official National Organization of Bar Counsel liaison to ITILS, to invite Erica Moeser, who was the President of the National Conference of Bar Examiners, to join the group, and to invite Dick Van Duizend, who was one of the National Center for State Court officials who worked most closely with the Conference of Chief Justices.<sup>65</sup>

Another outcome of the 2005 *Summit* was a renewed effort by ITILS members to better understand the *Schedule of Specific Commitments* document the United States filed with the World Trade Organization and the options for revising that document in the required ongoing “market access” WTO negotiations.<sup>66</sup> To that end, in February 2006, the ABA convened the so-called “Experts Meeting” where it invited leading trade experts to speak about WTO negotiations and legal services commitments with the types of U.S. stakeholders who had been invited to the 2005 *Summit*.<sup>67</sup>

The expanded connections that happened during the 2005 *Summit* proved useful when ITILS was asked by the USTR to help organize a May 2006 meeting between U.S. and Australian representatives pursuant to the Professional Services Annex found in the 2004 U.S.-Australia Free Trade Agreement.<sup>68</sup> ITILS helped coordinate the attendance of representatives from the CCJ, NOBC, and NCBE, as well as various ABA entities and state

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64. Cf. E-mail from Robert Lutz, to author (July 6, 2005) (on file with author) (“I would like your input on what materials we should make available to the *Summit* invitees in advance of the meeting on Aug. 5. It was my intention to follow up the RSVPs with some background information about 7 to 10 days in advance of the *Summit*.”).

65. See Task Force on GATS Legal Services Negotiations Meeting Minutes (Dec. 15, 2005) (on file with author).

66. Laurel S. Terry, *The Revised Handbook about the GATS for International Bar Association Member Bars* 1, 29-33 (rev. ed. 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2339553](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2339553). See *From GATS to APEC*, *supra* note 54, at 940-52, for information about the required market access negotiations.

67. See Agenda for the Experts Meeting of the ABA Task Force on GATS Legal Services Negotiations (Feb. 7, 2006) (on file with author).

68. See *From GATS to APEC*, *supra* note 54, at 888-89 (describing the structure and goals of the US-Australia FTA’s Annex on Professional Services, as well as the May 2006 meeting). See *also id.* at 928-30 (noting that Professional Services Annexes are used in all but one of the U.S. free trade agreements the U.S. had entered into, and noting the similarities and differences among them).



bar members.<sup>69</sup> Australian and U.S. attendees prepared briefing papers regarding their lawyer qualification rules and their rules governing foreign lawyers; productive conversations ensued.<sup>70</sup>

Several months after the May 2006 U.S.-Australian FTA meeting, ITILS sponsored two additional *Summits*. Volume 42 of the *International Lawyer* contains a brief description of the 2006 *US-EU Summit* and the 2006 *US-Asia Summit*:

Since the last Year-in-Review, the [ABA International Trade in Legal Services or] ITILS Task Force, in cooperation with the ABA Section of International Law's Transnational Legal Practice Committee, convened several Summit Meetings with foreign bar leaders from various regions to discuss differences in legal services regulation and to identify areas of agreement and disagreement about goals and approaches. At the 2006 and 2007 ABA Annual Meetings, the E.U.-U.S. Legal Services Summits were co-hosted by the Council of the Bars and Law Societies of Europe (CCBE), and the Asia-U.S. Legal Services Summits included lawyers and bar leaders from Australia, China, India, Indonesia, Japan, Korea, Singapore, and Vietnam.<sup>71</sup>

The paragraph quoted above constitutes the entire description of the 2006 US-EU *Summit*, but Volume 42 contains additional information about the 2006 Asia *Summit*:

At the Asian *Summit* meetings, Korean bar representatives claimed that Korea would follow the path taken by Japan in liberalizing access to the local market (including full rights of partnership with and employment of or by local lawyers) within a fraction of the nearly twenty-five years these reforms took in Japan.<sup>72</sup>

A *Bar Examiner* article published in February 2007 included this short summary of issues addressed at the August 2006 *Summits*:

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69. *Id.* at 888; Terry et al., *Vol. 42, supra* note 16, at 848 n.88 ("Each side prepared briefing papers for the other regarding lawyer qualification rules and rules governing foreign lawyers. This event was the first and only FTA-related legal services meeting involving representatives of the relevant legal profession bodies from each country.").

70. Terry et al., *Vol. 42, supra* note 16, at 848 n.88 (noting that each side prepared briefing papers regarding their lawyer qualification rules and rules governing foreign lawyers and that it was the first FTA-related legal services meeting involving representatives of the relevant legal profession bodies).

71. *Id.* at 824.

72. *Id.* at 848. Approximately ten years after the *Summit* that this quote describes, Korea's laws regulating the relationships among foreign and domestic lawyers remained an issue of concern to U.S. lawyers and law firms. *See, e.g.*, Letter from Thomas Susman, Director, ABA Governmental Affairs Office, to Ministry of Justice of the Republic of Korea (Apr. 11, 2016), <https://perma.cc/65D2-DJSF>.

During its August 2006 Annual Meeting, the ABA coordinated an Asian Summit and a third summit with the CCBE. These summits addressed a wide range of topics, including lawyer discipline cooperation, possible mutual recognition initiatives, and other issues related to global multijurisdictional practice. Those attending the summits included representatives from the ABA, state bars, the CCJ, the NOBC, NCBE, and other law-related organizations.<sup>73</sup>

The Letter of Invitation for the 2006 US-EU *Summit* contained additional information beyond that contained in the published reports quoted above. The 2006 US-EU *Summit* was scheduled for two-hours and was held on August 5, 2006, during the ABA's Annual Meeting in Honolulu. Professor Lutz's invitation letter explained that the *Summit* would "build on the prior two very successful *Summits* with the Europeans" and that the "purpose of this meeting will be to continue the dialogue," but noted that "at this *Summit* we also intend to press beyond information exchange to identify common ground from which we might explore possible future prospects for agreement."<sup>74</sup> The Agenda items mentioned in the 2006 US-EU *Summit* invitation letter were:

- Introductions of the various parties and organizations represented (brief);
- The EU and US Offers: clarifications and common ground;
- Reciprocal Discipline Protocol: progress and prospects;
- The IBA Resolution on Home Law and Skills Transfer; and
- Other Areas of Mutual Recognition: consideration of FLC, Admissions, In-house Counsel MRAs.<sup>75</sup>

The distribution list for the 2006 US-EU *Summit* was five pages long and much broader than the invitee list for the 2005 US-EU *Summit*.<sup>76</sup> The invitation letter explained that "we are also extending invitations to U.S. national and state bar leaders, as well as to leaders of relevant organizations (see attached list)."<sup>77</sup> The invitees included representatives from twelve U.S. jurisdictions, three Chief Justices and Dick Van Duizend from the

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73. Laurel S. Terry, *Current Developments Regarding the GATS and Legal Services: The Suspension of the Doha Round, "Disciplines" Developments, and Other Issues*, 76 THE BAR EXAMINER 27, 29 (2007) [hereinafter Terry, *Bar Examiner 2007*].

74. E-mail from ABA International and Bob Lutz to Distribution List (July 19, 2006) (on file with author) [hereinafter Lutz, *2006 EU-US Summit Invitation Letter*].

75. *Id.*

76. See Distribution List, Invited Participants for European – U.S. Bar Leader Summit (Aug. 5, 2006) (on file with author) [hereinafter *2006 EU-US Summit Invited Participants*].

77. Lutz, *2006 EU-US Summit Invitation Letter*, *supra* note 74, at 2-3.

National Center for State Courts, USTR and Department of Commerce employees, representatives from the NCBE, NOBC, National Association of Bar Executives, and the Coalition of Service Industries, as well as numerous ABA groups.<sup>78</sup> On the European side, the invited participants included three individuals from the CCBE and representatives from fifteen European countries, as well as representatives from the International Bar Association and Union Internationale des Avocats.<sup>79</sup> The invitation letter noted that “[s]ome of the invitees will take the lead on addressing and commenting on these topics, but we anticipate a discussion of these focused topics by all invited participants.” The distribution list included email addresses for the invitees, which undoubtedly raised consciousness of TLP issues and facilitated later communication, even for invitees who were not able to attend.

In a post-*Summit* report to the ITILS Committee, Professor Lutz, who became Chair of ITILS in August 2006, noted that one goal of the 2006 EU *Summit* was “to focus on more specific discussions and initiatives.”<sup>80</sup> Professor Lutz observed that there were still “significant differences” regarding the EU and US offers in the ongoing WTO market access negotiations.<sup>81</sup> On a more positive note, Bill Smith reported that by the next summit, he expected to have a rough draft of an international reciprocal discipline protocol that all could agree on and that the ball was currently in the CCBE’s court.<sup>82</sup> Bill Smith also reported that the NOBC had had discussions on this issue with Australian bar representatives and that the Australians were also interested as in discipline cooperation.<sup>83</sup> (After many months of back and forth CCBE-ABA conversations on this topic, the CCBE began communicating directly with the CCJ; in 2009, the CCJ adopted two resolutions regarding regulatory cooperation with the CCBE and with the Law Council of Australia.<sup>84</sup> In 2013, the ABA adopted a

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78. See *2006 EU-US Summit Invited Participants*, *supra* note 76, at 3-4 (the twelve states listed were California, New York, Illinois, Texas, Florida, D.C., Michigan, Georgia, Pennsylvania, Virginia, Maryland, and Connecticut—listed in that order). The author speculates that this included those states in which the CCBE was particularly interested, as well as states that had attended prior *Summits*).

79. *Id.* at 1-3, 5.

80. See Minutes, ABA Task Force on GATS Legal Services Negotiations 3 (Aug. 22, 2006) (on file with author).

81. *Id.*

82. *Id.*

83. *Id.*

84. Conference of Chief Justices, RESOL. 2, *In Support of Cooperation Among United States and European Disciplinary Bodies* (Jan. 2009), <https://perma.cc/8HPF-7392>; Conference of Chief Justices, RESOL. 13, *In Support of Cooperation Among United States and Australian Bar Admission and Lawyer Disciplinary Bodies* (Aug. 2009), <https://perma.cc/CG93-84TA>.

resolution endorsing *Guidelines for an International Lawyer Regulatory Information Exchange*.<sup>85</sup>)

On August 4, 2006, which was the day before the US-EU *Summit*, ITILS held its first *Asian Summit on Legal Services*.<sup>86</sup> Similar to the US-EU Summit, this meeting was scheduled for two hours. The letter of invitation, which Professor Lutz co-authored, described the purpose of the 2006 Asian Summit as follows:

The purpose of this Summit is to provide a roundtable discussion about MJP issues between U.S. and Asian bar leaders and practitioners. Past “MJP Summits” have been conducted successfully with bar leaders from Europe and Latin America, increasing the knowledge and understanding among leaders of our legal profession about what can be achieved through an open discussion of the issues. At this Summit, we expect to exchange views on the status of the GATS negotiations and ongoing bilateral negotiations concerning legal services and reciprocal disciplinary agreements. We also will discuss other U.S.-Asian lawyer regulatory issues, and try to identify areas for possible future cooperation.<sup>87</sup>

One or more individuals in the following foreign jurisdictions received an invitation to attend the 2006 Asian *Summit*: Australia, China, Hong Kong, India, Japan, Korea, and New Zealand, as well as representatives of the

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For additional information about these CCJ Resolutions, see Terry et al., *Vol. 42, supra* note 16, at 850 (discussing the ABA’s early efforts to promote conversations with the CCBE and Australian representatives regarding lawyer discipline cooperation); Terry et al., *Vol. 43, supra* note 16, at 955-56 (discussing CCBE-CCJ discipline cooperation developments, including the CCJ’s 2009 resolution); Terry et al., *Vol. 44, supra* note 16, at 570 n.42 and accompanying text (discussing both the Jan 2009 CCJ-CCBE resolution and the August 2009 CCJ-Australia resolution, as well as additional related documents). *See also* ABA ITILS Minutes (Oct. 24, 2006) (noting that ITILS staff counsel Ellyn Rosen had received a draft back from the CCBE on a reciprocal discipline protocol based on Rule 22, was currently analyzing the draft, and would continue the dialogue with the CCBE); ABA ITILS Minutes (June 17, 2008) (stating that the CCJ liaison had reported that they were waiting to hear back from the CCBE on a new draft of a reciprocal discipline protocol).

85. *See* American Bar Association, RESOL. 104, *Regarding Guidelines for International Lawyer Regulatory Information Exchange 2* (Aug. 12, 2013), <https://perma.cc/4MT2-5H8H>; *see also* Conference of Chief Justices, RESOL. 9, *In support of the proposed ABA Guidelines for an International Regulatory Information Exchange* (July 2013), <https://perma.cc/S8GB-L55N>; *see* Int’l Bar Ass’n, IBA Guidelines for an International Regulatory Information Exchange Regarding Disciplinary Sanctions against Lawyers (May 2017) (illustrates the global interactions) <https://perma.cc/BGY4-WKRX>.

86. *See* Letter from Kenneth B. Reisenfeld, Chair, ABA Task Force on GATS Legal Services Negotiations, and Robert E. Lutz, Co-Chair, Transnational Legal Practice Committee, to Individuals Listed on the Attached Distribution List (July 14, 2006) (on file with author) [hereinafter Reisenfeld & Lutz, *2006 Asian Summit Invitation Letter*].

87. *Id.*

Inter-Pacific Bar Association and International Bar Association.<sup>88</sup> (Interestingly, there were a few differences in the U.S. recipients who received the 2006 Asian Summit invitation compared to the 2006 US-EU *Summit* invitation.)<sup>89</sup> The proposed (and actual) agenda items for the 2006 Asian *Summit* were similar, but not identical, to the agenda items listed in the 2006 US-EU Letter of Invitation.<sup>90</sup>

At an ITILS meeting held the month after the 2006 *Summits*, former ITILS Chair Ken Reisenfeld reported that the Asian Legal Services *Summit* had been a success and that it “was useful to recognize that there are models of success and gave Japan as an example of what might be expected in other Asian markets.”<sup>91</sup> He noted that the *Summit* was “well-attended by members of the Japanese bar and that they spoke of the benefits that liberalization has provided to Japan.”<sup>92</sup> He also explained that the *Summit* was also useful for identifying, from a practical perspective, countries that

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88. See Invited Participants for Asian Summit on Legal Services 1 (Aug. 4, 2006) (on file with author) [hereinafter 2006 Asian *Summit* Invited Participants].

89. Compare *id.* at 2-3 with 2006 EU-US *Summit Invited Participants*, *supra* note 76.

90. Compare Lutz, 2006 EU-US *Summit Invitation Letter*, *supra* note 74 with Reisenfeld & Lutz, 2006 Asian *Summit Invitation Letter*, *supra* note 86, at 2. (the five agenda items listed in the 2006 Asian Summit Invitation Letter included the following: 1) Introductions of the various parties and organizations represented; 2) an exchange of Asian and U.S. perspectives on: a) Significant U.S., Asian, MJP and GATS developments and future prospects (including GATS requests, offers, plurilateral and bilateral negotiations, disciplines), b) market access barriers faced by U.S. lawyers practicing in Asian countries, c) market access barriers faced by Asian lawyers practicing in the U.S.; 3) discussion of bilateral mutual recognition agreements for the legal profession; 4) discussion of reciprocal disciplinary agreements; and 5) future areas of cooperation). *Id.* The letter of invitation invited the recipients to “identify any additional agenda items that you believe should be addressed” and said that additional information about the agenda topics would be provided in advance of the meeting. *Id.* at 1.

The topics listed in the 2006 Asian Summit Invitation Letter were consistent with the 2006 Asian *Summit* Agenda itself. Compare *id.* with Agenda, Asian *Summit on Legal Services* (Aug. 4, 2006) (on file with author) [hereinafter 2006 Asian Summit Agenda]. The 2006 Asian Summit Agenda listed seventeen speakers who would cover the topics of introductions, handle introductions, an overview (including Professor Lutz’s overview of issues for discussion during the Roundtable, perspectives from Japan, Hong Kong, China, Australia, India, Korea, and Singapore. *Id.* The third agenda item was a roundtable discussion with bar leaders, in which comparative perspectives would be solicited on five topics: 1) Nature of National and International Legal Services Markets – Recent Legal Services Liberalizations; 2) Market Access Barriers to Practice in Asian Countries; 3) Market Access Barriers to Practice in the United States; 4) GATS or Bilateral Positions or Developments; and 5) Prospects for Bilateral Mutual Recognition Agreements For Bar Qualification, Admission or Reciprocal Discipline. *Id.* The last agenda item was “Future Areas of Cooperation.” *Id.*

91. See Minutes, ABA Task Force on GATS Legal Services Negotiations 3 (Aug. 22, 2006), *supra* note 80, at 2 (Mr. Reisenfeld was the immediate past chair of ITILS and was co-author, with Professor Lutz, of the letter of invitation).

92. *Id.*

should be priorities for liberalization,” and indicated that “next steps will be identified in the near future.”<sup>93</sup>

Although the ITILS Committee has not consistently circulated minutes of its meetings, this practice was more common during the early years of its existence, including the time period when Professor Lutz served as ITILS Chair.<sup>94</sup> The existing minutes show that there was a flurry of activity during 2006-07, much of which built upon issues discussed in the 2006 *Summits*. For example, on September 12, 2006, the ABA GATS Task Force, as ITILS was then known, held a roundtable meeting at the U.S. Department of Commerce to discuss topics that included both outbound and inbound TLP issues.<sup>95</sup> During the October 24, 2006 ITILS meeting, Chair Lutz solicited (and received) volunteers for subcommittees that would address the topics of the U.S. Offer and Schedule for the ongoing WTO negotiations; GATS Disciplines issues; bilateral negotiations and mutual recognition agreements (MRAs); state implementation of ABA MJP Commission Recommendations 8 & 9 regarding foreign legal consultant (FLC) and temporary practice (FIFO) rules; and a research committee which included NCBE President Erica Moeser and Professor Carole Silver.<sup>96</sup> By February 2007, these subcommittees had expanded to include a “thinking outside of the box” committee, a model Mutual Recognition Agreement committee, and an immigration committee.<sup>97</sup>

During the same October 2006 meeting, Professor Lutz reported that he had sent a letter to Chief Judge Bell, who was President of the Conference of Chief Justices, to thank the CCJ for its July 2006 adoption of a resolution endorsing state adoption of the ABA’s *Model Rule on Foreign*

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93. *Id.*

94. *See supra* note 12 (noting that Professor Lutz was Chair of ITILS during 2006-07, 2007-08, and 2008-09).

95. Agenda, Roundtable with Ana Guevara, Deputy Assistant Secretary of Commerce, and ABA GATS Task Force (Sept. 12, 2006) (the topics for discussion included: 1) enlisting DOC in Identifying and Removing Access Barriers in Countries the US Legal Profession Wants to Liberalize; and 2) Outreach to U.S. States to Encourage Adoption of Rules Permitting FLCs and FIFO by Foreign Lawyers).

96. *See generally* Minutes, ABA Task Force on GATS Legal Services Negotiation (Oct. 24, 2006) (on file with author) (listing these committees). During the prior year, Chair Ken Reisenfeld had established working groups to address issues such as issues related to the “Schedule” that the United States would file in the ongoing GATS negotiations, the issue of GATS disciplines, immigration, and bilateral trade agreements and Mutual Recognition Agreements); *see, e.g.*, Minutes, ABA Task Force on GATS Legal Services Negotiations 2-4 (Feb. 10, 2006) (on file with author).

97. *See* Minutes, ABA Task Force on International Trade in Legal Services 5 (Feb. 10, 2007) (on file with author).

*Legal Consultants*.<sup>98</sup> (Chief Judge Bell had been one of the invitees to the 2006 *Summits*.)<sup>99</sup> Professor Lutz also reported on meetings he participated in during October 2006 with staff from the USTR, Department of Commerce, and CSI.<sup>100</sup> During the February 2007 ITILS meeting, Tom Edmonds, who was the ITILS liaison from the National Association of Bar Executives [NABE] and was a 2006 *Summit* invitee, reported that Professor Lutz had been invited to speak at the NABE business meeting at the 2007 ABA Midyear Meeting and was well-received by the group; he also noted that there was a realization that the bar must work with the courts and that there is a general need for education on TLP issues.<sup>101</sup>

The following summer, in August 2007, the ABA held two more summits. As noted above, Volume 42 of the *International Lawyer* provided the same description for all four summits held in 2006 and 2007;<sup>102</sup> it stated that the 2006 and 2007 US-EU and Asian Legal Services *Summits* were convened “to discuss differences in legal services regulation and to identify areas of agreement and disagreement about goals and approaches.”<sup>103</sup> Although the reported descriptions of the 2007 *Summits* is sparse, additional information is available.

Unlike the invitations to the prior *Summits*, the letter of invitation to the 2007 4<sup>th</sup> Annual US-EU *Summit* was signed by both EU and ABA representatives.<sup>104</sup> The invitation letter indicated that the August 11, 2007 *Summit* would be two hours long and would be held in connection with the

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98. See Minutes, ABA Task Force on GATS Legal Services Negotiation (Oct. 24, 2006), *supra* note 96, at 1; see also Conference of Chief Justices, RESOL. 4, *Regarding Adoption of Rules on the Licensing and Practice of Foreign Legal Consultants* (Aug. 2, 2006), <https://perma.cc/3ZHQ-Y3SA>; Terry et al., *Vol. 43, supra* note 16, at 963 (reporting the CCJ’s adoption of this resolution).

99. See 2006 EU-US Summit Invited Participants, *supra* note 76, at 4; 2006 Asian *Summit* Invited Participants, *supra* note 88, at 2.

100. See Oct. 24, 2006 Minutes, ABA Task Force on GATS Legal Services Negotiations, *supra* note 96, at 1 (stating “Chair Lutz reported on a series of meetings he participated in with staff of the Department of Commerce, USTR and the Coalition of Services Industries in Washington D.C. during the first week of October”).

101. See Feb. 10, 2007 Minutes, ABA Task Force on International Trade in Legal Services, *supra* note 97, at 1 (including the comments listed in Article text. Mr. Edmonds also stated that he would like to send out the packet of materials that Bob [Lutz] provided for his remarks to the NABE listserv and Justice Lacy “requested a copy of the advocacy pieces and asked that the NABE materials be provided to the entire task force.”); see also 2006 EU-US Summit Invited Participants, *supra* note 76, at 4 (showing that Thomas G. Edmonds was an invitee to the 2006 *Summits*).

102. Terry et al., *Vol. 42, supra* note 16, at 842.

103. *Id.*

104. Letter from Robert E. Lutz, Chair, ABA ITILS, and Jonathan Goldsmith, CCBE Secretary General, to Bar Leader (July 12, 2007) (on file with author) [hereinafter Lutz and Goldsmith, 2007 US-EU Invitation Letter].

ABA's Annual Meeting in San Francisco.<sup>105</sup> The invitees were substantially similar to the invitees to the 2006 US-EU *Summit*.<sup>106</sup>

The content of the 2007 US-EU *Summit* letter of invitation was similar to the content from the prior year.<sup>107</sup> It noted that the purpose of the *Summit* was "to continue the valuable dialogue that has taken place in prior *Summits*" and also noted that *Summit* would "continue to explore areas of current and possible future initiatives and cooperation."<sup>108</sup> The agenda items listed in the invitation letter were substantially similar to the agenda items from the prior meeting, but included a few new items, such as "free trade agreements as a future vehicle for legal services liberalization" and a reference to "discussion of the Proposed Reciprocal Disciplinary Protocol."<sup>109</sup>

The agenda distributed at the 2007 US-EU *Summit* was much more detailed than the proposed agenda contained in the 2007 letter of invitation. It listed five "Roundtable Discussion Issues" and identified both U.S. and European speakers for each issue.<sup>110</sup> The 2007 US-EU *Summit* was the first time that the meeting agenda listed "Future Plans" as an explicit topic; Bob Lutz and Jonathan Goldsmith were assigned to lead this discussion.<sup>111</sup>

The materials for the 2007 US-EU *Summit* included, *inter alia*, a document prepared by Professor Carole Silver entitled "US Exports of Legal Services" that presented the results of empirical TLP research she

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105. *Id.*

106. Compare 2006 EU-US Summit Invited Participants, *supra* note 76, with Invited Participants for Asian Summit on Legal Services and US-EU Summit on Legal Service (Aug. 10, 2007) (on file with author) [hereinafter Invited Participants for the 2007 EU and Asia Summits].

107. See Lutz & Goldsmith, 2007 US-EU Invitation Letter, *supra* note 104.

108. *Id.*

109. *Id.* (listing in the Invitation Letter these seven bulleted agenda items: 1) Introductions of various parties and organizations represented; 2) Discussion of the Proposed Reciprocal Disciplinary Protocol; 3) Discussion of the idea of a Mutual Recognition Agreement (MRA); 4) Intra-U.S. and EU multijurisdictional practice experiences; 5) Inter-U.S./EU MJP experiences; 6) Free Trade Agreements as a future vehicle for legal services liberalization; and 7) Plans for next meeting) Compare *id.* (listing 2007 agenda topics, with Lutz, 2006 EU-US Summit Invitation Letter, *supra* note 74 (identifying the 2006 agenda topics).

110. Agenda, Fourth Annual EU-US Summit on Legal Services (Aug. 11, 2007) (on file with author) [hereinafter 2007 EU-US Summit Agenda]. The first topic listed on the distributed Agenda was intra-U.S. and intra-EU MJP experiences and the speakers were Peter Ehrenhaft and Hans Luehn. The second topic was inter-US-EU MJP experiences and the speakers were Carole Silver, Carol Needham, Steve Krane, and Jonathan Goldsmith. The third topic was reciprocal disciplinary protocol and the speakers were Bill Smith and Colin Tyre. The fourth topic was various tools for liberalization legal services—mutual recognition agreements and other possible devices and the speakers were Laurel Terry, Erica Moeser, and Peter Köves. The final discussion issue was liberalization via free trade agreements and other agreements and the speakers were Hans-Juergen Hellwig and Bob Lutz. *Id.*

111. *Id.* at 2.



had conducted.<sup>112</sup> Professor Silver's six page handout began with a short section that contained general data about U.S. and EU imports and exports of legal services, and was followed by narrative and graphic presentation of empirical data she collected about U.S. law firms with offices in the EU. Professor Silver's handout noted that she had studied 48 large U.S. law firms that had a total of 129 offices in twenty-three EU cities and fourteen countries. The document she shared included practice areas of the lawyers in these offices and the legal education and admission characteristics of the lawyers working in these foreign offices. The final page of this document (other than a one-page appendix) noted that nearly every EU office included a combination of US educated and non-US educated lawyers, and US licensed and non-US licensed lawyers; it also posed a series of policy issues that the *Summit* participants might want to consider.<sup>113</sup>

The August 10, 2007 Asian *Summit* on Legal Services was, in many respects, similar to the 2007 US-EU Legal Services *Summit* that took place one day later, on August 11, 2007. Professor Lutz issued the letter of invitation which noted that the *Summit* offered a "unique opportunity for leaders of the profession from Asian countries and the United States to discuss issues of mutual interest related to transnational law practice."<sup>114</sup> The invitation noted that "we will invite those from U.S. states we believe have current or potential interests in transnational legal practice regulatory issues, especially related to Asia."<sup>115</sup> The agenda in the letter of invitation differed in a few respects from the agenda for the US-EU *Summit* and indicated that part of the discussion would focus on barriers to practice in Asian countries and barriers to practice in the United States.<sup>116</sup> The invited participants included one or more individuals from Australia, Hong Kong,

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112. Carole Silver, *Fourth Annual US-EU Summit of Bar Leaders on Legal Services, US Exports of Legal Services* (Aug. 2007) (on file with author). Other materials that appear to have been distributed include Professor Carol Needham's 2007 law review article entitled *Practicing Non-U.S. Law in the United States: Multijurisdictional Practice, Foreign Legal Consultants, and Other Aspects of Cross-Border Legal Practice*, 14 MICH. ST. J. INT'L L. 605 (2007).

113. *Id.* at 5. Some of the data that Professor Silver shared eventually made its way into her articles entitled Carole Silver et al., *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, 22 GEO. J. LEGAL ETHICS 1431 (2009) and Carole Silver, *Local Matters: Internationalizing Strategies for U.S. Law Firms*, 14 IND. U. J. GLOBAL LEGAL STUD. 67 (2007).

114. Letter from Robert E. Lutz, Chair, ABA Task Force on International Trade in Legal Services (ITILS) to Bar Leaders (July 12, 2007) (on file with author) [hereinafter Lutz, 2007 *Asian Summit Invitation Letter*].

115. *Id.*

116. *Id.* (the five bulleted agenda topics were: 1) Discussion of major U.S., Asian country, GATS developments, and future MJP prospects; 2) Discussion of barriers to Asian countries faced by U.S. lawyers; 3) Discussion of barriers to the U.S. faced by lawyers from various Asian countries; 4) Discussion of prospects for reciprocal disciplinary and bilateral mutual recognition agreements for the legal profession; and 5) Future areas of cooperation). *Id.*

India, Indonesia, Japan, Korea, People's Republic of China, and Thailand, as well as the Inter-Pacific Bar Association and various international bar associations, such as the IBA and UIA.<sup>117</sup>

The informal minutes of the 2007 *Asian Summit* show that Professor Lutz chaired the meeting and that the topics of discussion included: 1) Baseline Data on U.S. Outbound Legal Services, led by Professor Carol Silver; 2) Baseline Date on U.S. Inbound Legal Services, led by Professor Carol Needham; 4) GATS and Bilateral Negotiations and Agreements, led by Tim Brightbill, who was the ABA's current representative to the statutorily-required U.S. Industry Advisory Committee on Services; and 5) Significant Country Developments and Perspectives, with reports about Japan, Australia, Korea, India, China, Vietnam, and Indonesia.<sup>118</sup>

Similar to the 2007 US-EU *Summit*, the materials for the 2007 *Asian Summit* included a document Professor Carole Silver prepared that summarized the results of her empirical research about the foreign offices of large U.S. law firms; the 2007 *Asian Summit* document covered thirty-three U.S. law firms that had seventy-six offices located in nine cities in Asia-Pacific.<sup>119</sup> The data was presented in narrative and graphic form and was similar in format to the document Professor Silver had prepared for the 2007 US-EU *Summit* regarding U.S. law firms in Europe. Professor Silver's conclusion for Asia-Pacific was similar to her conclusion for Europe—"nearly every A-P [Asia-Pacific] office for each firm studied includes a combination of U.S. and non-U.S. lawyers, both in terms of education and licensing."<sup>120</sup> Similar to the EU document she prepared, Professor Silver's handout about A-P firms posed a series of policy questions after presenting the data.<sup>121</sup> The additional materials distributed at the 2007 Asia-Pacific

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117. See Invited Participants for the 2007 EU and Asia *Summits*, *supra* note 106, at 1. It is unclear how many of the invited participants attended the 2007 Asia Summit. An undated document (on file with the author) entitled "2007 *Asian Summit* RSVPs" listed positive RSVPs for attendees from China, Hong Kong/China, India, Japan, Korea, the Philippines, and the United States. It appears likely, however, that more countries were represented than was reflected in the RSVPs. The informal minutes, *infra* note 118, show that the 2007 *Asian Summit* included reports about Australia, China, Indonesia, and Vietnam.

118. *Asian Summit* on Legal Services, Aug. 10, 2007 [undated informal minutes] (received by the author from ITILS staff Kristi Gaines) (on file with author) [hereinafter Informal Minutes, 2007 *Asian Summit*].

119. Carole Silver, *Second Annual Asian Summit of Bar Leaders on Legal Services, US Exports of Legal Services* (Aug. 2007) (on file with author).

120. *Id.* at 5.

121. *Id.* at 5-6.

*Summit* include a summary of U.S. rules regarding inbound foreign lawyers.<sup>122</sup>

In a Committee meeting held after the *Summit*, ITILS Chair Lutz “reported on the success of the second annual Asian *Summit* on Legal Services” noting that he hoped to continue the summits and “pursue other efforts to engage in a dialogue with foreign bar leaders on transnational legal practice issues.”<sup>123</sup> The meeting minutes pointed out that “the Australian Law Council is having considerable success at consulting directly with various states and the group would like to hear from them regarding the current status of their efforts.”<sup>124</sup>

There were numerous kinds of follow-up activities that occurred after the 2007 *Summits*. At the meeting held immediately after the Asian *Summit*, ITILS members discussed additional representatives that could be added to ITILS, including a liaison from the Conference of Chief Justices.<sup>125</sup> The ABA sent two letters to USTR officials about WTO negotiations<sup>126</sup> and there were ongoing negotiations among the ABA and others regarding discipline cooperation.<sup>127</sup> Additional activities included meetings between and among representatives of groups attending the *Summits*, including CCBE and Australian interaction with the CCJ, conversations among New York delegations and the Law Society of England and Wales and Japan, and a new India-U.S. Joint Working Group on Legal Services, as well as the regular updates by, and outreach to, the liaison groups and other stakeholders.<sup>128</sup>

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122. See Informal Minutes, 2007 Asian *Summit*, *supra* note 118 (listing this fact in the handwritten notes the author wrote on these informal minutes).

123. Minutes, ABA Task Force on International Trade in Legal Services 1 (Aug. 11, 2007) (on file with author).

124. *Id.*

125. *Id.* For example, one of the follow-up items was adding a liaison to ITILS from the CCJ [Conference of Justices]. *Id.* at 3. This was accomplished. See, e.g., 2007-08 ITILS Roster, *supra* note 14, at 4 (A roster sent as an attachment with the Feb. 9, 2008 ITILS agenda listed Chief Judge Shirley Abrahamson as a liaison from the CCJ, as well as Dick Van Duizend, whose position was described *supra* note 58).

126. Minutes, ABA Task Force on International Trade in Legal Services Meeting Agenda, and attachments (Mar. 19, 2008) (on file with author).

127. See, e.g., Minutes, ABA ITILS, August 8, 2008, Business Meeting (on file with author) (containing a report from Elyn Rosen regarding ongoing discussions with the Australians and Canadians on the reciprocal discipline protocol); ABA ITILS, Meeting Agenda (Feb. 9, 2008) (listing as an agenda item “Status of Draft Model Rule on International Reciprocal Disciplinary Enforcement”) (on file with author). See also *supra* notes 84-85 for articles providing additional information about the history of the discipline cooperation issue.

128. See, e.g., Meeting Agenda, ABA Task Force on International Trade in Legal Services (Nov. 13, 2007) (on file with author) and Meeting Agenda, ABA Task Force on International Trade in Legal Services (Dec. 11, 2007) (on file with author) (the agenda issues included bilateral initiatives involving the EU, India, and Korea, future *Summits*, and the items noted in the text).

In 2008, ITILS was involved in three *Summits* held during the ABA Annual Meeting, rather than the single summit held in 2004 and 2005 or the two summits held during each of 2006 and 2007. The three 2008 *Summits* included a *Summit* with representatives from India, a *Summit* with representatives from Korea, and a meeting with representatives of U.S. law firms with multiple foreign offices. The *TLP Year-in-Review* article for 2008 contained very little detail about these three *Summits*.<sup>129</sup> Volume 43 summarized the India and Korea *Summits* very briefly, noting that “participants discussed the issues and concerns related to transnational practice.”<sup>130</sup> With respect to the *Summit* involving large U.S. law firms, Volume 43 stated that its purpose was “to explore the issues facing these law firms.”<sup>131</sup> (Volume 43 also reported that although there had not been a 2008 US-EU *Summit*, ABA leaders “had ongoing discussions CCBE leaders.”)<sup>132</sup>

Although the *International Lawyer’s* summary of the 2008 *Summits* was abbreviated, additional information is available. For example, an emailed invitation for the Indo-US Roundtable on Legal Services stated that the general topics for discussion would include “a) Regulatory Framework for Legal Services in India and the United States; (b) Forthcoming Events and Activities of Interest to Lawyers in India, and (c) Proposals for Continuing the Conversation,” and indicated that “your suggestions for subjects to be taken up” would be most welcome.<sup>133</sup> The contact information included with the invitation meant that participants could easily communicate with one another afterwards and this type of follow-up communication occurred.<sup>134</sup> Unfortunately, the author could not locate any

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129. Terry et al., *Vol. 43, supra* note 16, at 962.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See, e.g.*, Invitation to “Roundtable on India—U.S. Legal Services” (Aug. 10, 2008) (on file with author) [hereinafter 2008 India *Summit* Letter of Invitation]; Email from Gene Theroux, Senior Counsel, Baker & McKenzie LLP, Co-Chair, U.S. Panel, US-India Bilateral Working Group on Legal Services to Participants, ABA Indo-US Roundtable on Legal Services (Aug. 10, 2008) (on file with author) (including the list of participants, with contact information and indicating that it was from Mr. Theroux, Professor Lutz, and Ashish Prasad, Partner, Mayer Brown, Co-Chair, U.S. Panel, US-India Bilateral Working Group on Legal Services).

134. Following the *Summit*, I emailed the participants several attachments, including ABA and other bar association opinions that found that U.S. and foreign lawyers can be partners, even though, at the time, all jurisdictions except D.C. had an ethics rule that prohibited fee sharing with nonlawyers and a law review article by Mark Harrison on this topic, as well as links to several items that had been mentioned during the *Summit*, including the ABA/NCBE Comprehensive Guide to Bar Admissions, and ABA CPR webpages that showed the implementation status of the ABA’s MJP policies. Email from author to *Summit* Attendees (Aug. 12, 2008) (on file with author).

additional details about the 2008 Korea *Summit*, but it is worth noting that in 2007, Korea and the United States signed a free trade agreement in which Korea had agreed to open up its market to legal services, and thus the conversation likely included this topic.<sup>135</sup>

As noted above, the third *Summit* in 2008 was for large U.S. law firms. The minutes of the August 2008 ITILS Business Meeting provide greater detail about the conversations that occurred during this large law firm *Summit*.<sup>136</sup> For example, the minutes explain that the participants commented on “the difficulties in bringing foreign lawyers into the firms’ U.S. offices,” identified the countries that were their outbound areas of priority, and noted ongoing issues of association and mobility in the EU.<sup>137</sup> There was consensus that the document on barriers to legal services produced by the Coalition of Service Industries should be updated and the attendees agreed to help with that effort.<sup>138</sup>

Some of ITILS’ activities during 2008-2009 were related to topics that came up during these three 2008 *Summits*. For example, ITILS members were involved in several follow-up activities concerning the U.S. and India; ITILS considered whether and how to update the CSI Legal Services Barriers Chart; and ITILS began actively monitoring, and later participating in, the Asia Pacific Economic Cooperation [APEC] Legal Services Initiative.<sup>139</sup> During the December 2008 ITILS meeting, two USTR officials joined the ITILS monthly conference call to “give an update on the proposed APEC Legal Services initiatives.”<sup>140</sup> ITILS members were also

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135. See, e.g., James Lim, *News: Korea to Open Legal Services Market to Foreign Lawyers as Part of Trade Deal*, 23 ABA/BNA Law. MAN. PROF’L CONDUCT 391 (July 25, 2007). See also *From GATS to APEC*, *supra* note 54, at 939-40 (table compares the provisions of the pending Korea-U.S. Free Trade Agreement that are relevant to legal services to the provisions in other U.S. FTA agreements).

136. See Minutes, ABA ITILS, August 8, 2008, Business Meeting, *supra* note 127.

137. *Id.* at 2.

138. *Id.* Although the author is not sure what happened with the CSI Barriers project, it is worth noting that the Office of the U.S. Trade Representatives produces an annual report entitled “National Trade Estimate Report on Foreign Trade Barriers.” The author has knowledge that ITILS works with the USTR to gather legal-services related information to include in this report and regularly publishes on the ITILS webpage the current version of the report. See, e.g., USTR, 2021 NAT’L TRADE ESTIMATE REP. ON FOREIGN TRADE BARRIERS, <https://perma.cc/YD4M-9BWQ>; ABA, STANDING COMMITTEE ON INTERNATIONAL TRADE IN LEGAL SERVICES, <https://perma.cc/S3K2-8KF9> (showing that on Oct. 22, 2022, the ITILS homepage had a link to the 550+ page USTR document entitled *2021 National Trade Estimate Report on Foreign Trade Barriers* and a five-page excerpt that noted some of the legal services barriers included in that report).

139. See generally Agenda, 2008-09 ABA Task Force on International Trade in Legal Services (Dec. 10, 2008) (on file with author).

140. Minutes, ABA Task Force on International Trade in Legal Services (Dec. 10, 2008) (on file with author).

involved in, and reported back about, the newly-formed Special International Committee of the ABA Section of Legal Education and Admissions to the Bar, as well as numerous other activities.<sup>141</sup>

Volume 43 of the *International Lawyer*, which published the short report referenced above about the three 2008 *Summits*, included a sentence in which it referred to an upcoming 2009 “*Domestic Summit*.”<sup>142</sup> Although there was significant discussion during ITILS meetings about a *Domestic Summit* that would be held during the 2008-09 ABA year, this *Summit* did not go forward.<sup>143</sup> Nor were there any other gatherings hosted by ITILS that were directly or indirectly referred to as a *Summit*.

On the other hand, despite the lack of any 2009 gatherings labeled as a *Summit*, there were numerous places where “summit-like” TLP legal services conversations happened during 2009 and 2010 and many of these involved ITILS members. Many of these opportunities were described in Volume 44 of the *International Lawyer*.<sup>144</sup> For example, Professor Lutz attended an APEC Legal Services Initiative workshop in Singapore during July 2009 and exchanged information and perspectives with representatives from other countries.<sup>145</sup> There were conversations among global actors that

141. See, e.g., Memorandum on Global Legal Profession Initiatives from Author to ABA CPR/SOC Joint Committee on Ethics and Professionalism (Feb. 2, 2009) (on file with author) (“The ABA Section of Legal Education and Admission to the Bar has formed a new international committee to make recommendations to its Council regarding what the Section should be doing in the international arena. The Committee will have its first in-person meeting during the 2009 ABA Midyear Meeting.”). Chief Justice VandeWalle, Justice Lacy, Professors Lutz and Silver, and the author were ITILS members who served on this Committee, which issued a report in July 2009. See A.B.A. Sec. of Legal Ed. & Admissions to the Bar, *Report of the Special Committee on International Issues* 5 (July 2009), <https://perma.cc/X27X-YGM8>.

142. Terry et al., *Vol. 43, supra* note 16, at 954 (stating that the upcoming “*Domestic Summit*, described below, may contribute to further developments in this area.”).

143. Telephone Interview with Kristi Gaines, Senior Legislative Counsel, Governmental Affairs Office, American Bar Association (Dec. 17, 2021) (stating that although the ABA initially planned to hold a “domestic summit” in March 2009 in connection with the ABA’s annual Bar Leaders’ Institute conference, that summit was cancelled. It initially was rescheduled for July 31, 2009, during the ABA’s Annual Meeting, but it did not go forward).

144. See, e.g., Terry et al., *Vol. 44, supra* note 16, at 571, 575-76 (identifying the ABA Commission on Ethics 20/20 and the APEC Legal Services Initiative as settings where global TLP-related conversations occurred).

145. See, e.g., *id.*, at 575 n.86 and accompanying text (providing a cite to the Singapore Workshop materials); Robert E. Lutz, *The Role of Commercial Lawyers in the Profession* (APEC Legal Services Initiative Workshop, Doc. No. 2009/SOM2/GOS/WKSP/004, 2009), <https://perma.cc/H69A-MRAV> (Professor Lutz’s presentation notes from Singapore conference). APEC is the acronym for the Asia-Pacific Economic Cooperation. *Id.* at 575; see generally Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken*, 43 HOFSTRA L. REV. 95 (2014) (showing additional information about the globalization mandate of the ABA Commission in Ethics 20/20); see also

took place at the ABA Section of International Law Spring 2009 meeting, at the National Conference of Bar Examiners' 2009 Bar Admissions Conference, and during meetings of the ABA Commission on Ethics 20/20, which was created to study whether any changes to the ABA Model Rules of Professional Conduct were required because of increased technology and globalization.<sup>146</sup>

Perhaps most significantly, however, during May 2009, the ABA Center for Professional Responsibility, with the assistance of many ITILS members, devoted significant resources to sponsoring a summit-like, invitation-only meeting for the members of the Conference of Chief Justices (CCJ) (or their delegates), in order to brief them on recent international TLP developments that could affect their regulation of the legal profession.<sup>147</sup> Volume 44 of the *International Lawyer* contains this description of the May 2009 conference for the CCJ, which members of ITILS helped plan:<sup>148</sup>

[I]n May 2009, the [2007 UK Legal Services Act or] LSA was a primary focus of a conference organized for the Conference of Chief Justices by the ABA Standing Committee on Professional Discipline, the ABA Center for Professional Responsibility, and the Georgetown Law Center for the Study of the Legal Profession. The overall purpose of the conference was to extend to the Chief Justices conversations about globalization's influence on the profession, including how the LSA affects activities and actors outside of the United Kingdom.<sup>149</sup>

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From *GATS to APEC*, *supra* note 54, at 891-99, 983 (identifying additional information regarding the APEC Legal Services Initiative).

146. Terry et al., *Vol. 44, supra* note 16, at 570-71; *see generally* Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken*, 43 *HOFSTRA L. REV.* 95 (2014) [hereinafter Terry, *Ethics 20/20 Reflections*] (detailing additional information about the globalization mandate of the ABA Commission on Ethics 20/20).

147. *See* ABA, *Global Legal Practice*, <https://perma.cc/VK5Y-RZNW> (referring, *inter alia*, to the May 2009 CCJ Conference); *see also* ABA & The Bureau of Nat'l Affs., *Chief Justices, Others, Consider Ideas on Regulating Lawyers in Global Setting*, 25 *LAW. MAN. PROF. CONDUCT* 300 (June 10, 2009), <https://perma.cc/VK5Y-RZNW>; ABA., *The Future Is Here: Globalization and the Regulation of the Legal Profession Recent Global Legal Practice Developments Impacting State Supreme Courts' Regulatory Authority Over the U.S. Legal Profession*, (May 26-27, 2009) (listing the conference materials for the American Bar Association Center for Professional Responsibility and Standing Committee on Professional Discipline & Georgetown Center for the Study for the Legal Profession Present), <https://perma.cc/H2E3-DUN4>; *see also* Laurel S. Terry, Slide Presentation at The Future Is Here Conference: Introduction: Recent Global Developments (May 27, 2009), <https://perma.cc/5K9P-5PEX>.

148. The author has personal knowledge that she and ITILS Staff Counsel Elyn Rosen were among those who participated in planning this conference.

149. Terry et al., *Vol. 44, supra* note 16, at 565 (footnotes omitted).

At the time this Article was written, the ABA Center for Professional Responsibility continued to maintain on its website information about this CPR/CCJ conference, along with the extensive materials that were prepared for the conference and a news article about the conference.<sup>150</sup> Thus, although the ABA did not sponsor any *Summits* in 2009, during 2009 global TLP conversations occurred in multiple settings.<sup>151</sup>

Similar to the situation in 2009, during the years 2010-2012, the ABA ITILS did not organize any meetings that it denominated as a *Summit*. On the other hand, as two articles in Volume 47 of the *International Lawyer* demonstrate, there were numerous global TLP conversations that occurred during 2010, 2011, and 2012, including sessions at a Conference of Chief Justices' meeting and at events hosted by the ABA's Commission on Ethics 20/20, whose mission included evaluating whether, as a result of globalization, the ABA should recommend changes to the ABA Model Rules of Professional Conduct.<sup>152</sup> Many of these conversations took place among individuals who had met each other at the *Summits* or deepened their relationships there.

After going five years without a meeting designated as a *Summit*, the ABA ITILS decided in 2013 that it would host two *Summit* meetings. Accordingly, during the August 2013 ABA Annual Meeting in San Francisco, U.S. and European stakeholders met for a fourth US-EU *Summit*, which they also referred to as a 2013 CCBE-ITILS Roundtable.<sup>153</sup> (This 2013 *Summit* was also referred to as the *Transatlantic Trade and Investment Partnership [TTIP] Summit* because of the US-EU TTIP free trade agreement negotiations that were underway.<sup>154</sup>) The second summit held during the 2013 ABA Annual Meeting was a Trans-Pacific Bar Leaders Roundtable.<sup>155</sup> At the time of the 2013 Trans-Pacific *Summit*, the U.S. was engaged in negotiations regarding the proposed Trans-Pacific Partnership [TPP] agreement.<sup>156</sup>

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150. See ABA, *Global Legal Practice*, *supra* note 147.

151. See generally Terry et al., *Vol. 44*, *supra* note 16.

152. See generally *id.*; see also Terry, *Ethics 20/20 Reflections*, *supra* note 146, at 96-101 (summarizing the transnational legal practice aspects of the ABA's Ethics 20/20 Commission).

153. See CCBE-ITILS, Roundtable Agenda (Aug. 10, 2013) (on file with author) [hereinafter 2013 CCBE-ITILS Agenda].

154. Compare Terry & Silver, *Vol. 49*, *supra* note 16, at 424 (referring to the 2013 US-EU Summit as one of two "Transatlantic Trade and Investment Partnership [TTIP] Summits" with 2013 CCBE-ITILS Agenda, *supra* note 153 (using as the Agenda title "CCBE-ITILS Roundtable").

155. Terry & Silver, *Vol. 49*, *supra* note 16, at 420, 424 (mentions the Trans-Pacific Bar Leaders' Summit held in San Francisco on Aug. 10, 2013).

156. See, e.g., U.S. Trade Representative, *Overview of the Trans-Pacific Partnership*, <https://perma.cc/L2J8-NL88>.



Volume 49 of the *International Lawyer*, which was published in 2015, contains a summary of these two 2013 *Summits*, as well as a 2014 *Summit*.<sup>157</sup> Its summary was brief and consists of the following:

The ABA ITILS also has been a key factor in generating information, facilitating discussions and negotiations, and drafting model regulatory proposals related to TLP. It convened three summit meetings in the last two years—the Trans-Pacific Partnership Summit, held in August 2013, and the Transatlantic Trade and Investment Partnership Summits held in August 2013 and 2014—each of which was designed to bring together legal profession stakeholders from the countries involved in these trade negotiations in order to facilitate communication among these groups.<sup>158</sup>

Although the published account of the 2013 and 2014 *Summits* is thin, the materials prepared for the *Summit* show that these were useful opportunities for stakeholders to engage with one another. For example, the agenda for the 2013 Transpacific Bar Leaders' *Summit* was detailed and included a discussion about engagement and cooperation of bar associations.<sup>159</sup> The Agenda's second topic anticipated that the TPP negotiators might suggest the use of a Professional Services Annex similar to those found in other trade agreements and asked this series of questions about the shape a Professional Services Annex should take:<sup>160</sup>

The TPP, and potentially other trade agreements, likely will contain a provision to encourage relevant bodies in member countries to consider issues regarding transnational legal practice and regulation of foreign lawyers. Is this the right model? Are they asking the right questions and including the right topics? Potential topics may relate to means of service delivery, scope of practice and other issues, such as:

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157. See Terry and Silver, *Vol. 49, supra* note 16, at 421, 424; cf. Wojcik, *Vol. 48, supra* note 16 (the TLP article reviewing 2013 activities focused on whether "undocumented aliens" could be admitted to the bar; it did not refer to the 2013 Summit). Volume 49's TLP Year-in-Review article introduced and analyzed the concept of domestic and international "TLP-Nets." Although these TLP-Nets provided the framework for the article's discussion, the article referred to events and developments that had taken place in 2013 and 2014.

158. Terry & Silver, *Vol. 49, supra* note 16, at 424.

159. Trans-Pacific Bar Leaders *Summit*, Agenda (Aug. 10, 2013) (on file with author) [hereinafter 2013 TPP *Summit* Agenda].

160. For information about the use of Professional Services Annexes in trade agreements, see *From GATS to APEC, supra* note 54, at 888-89, 933-40 (citing the Professional Services Annex in the US-Australia FTA that gave rise to the May 2006 meeting and listing the portions of other trade agreements that contained this type of Annex). The issue of Professional Services Annex remains timely. For example, the author recommended the use of one in the event that the U.S. and UK sign a bilateral trade agreement after BREXIT. See Laurel S. Terry, *Introduction to Legal Services Roundtable*, US-UK Trade and Investment Working Group, at 18-19 (Washington, D.C. Nov. 6, 2018), <https://perma.cc/45QL-T47J>. As of Feb. 15, 2022, these slides were linked from the ABA ITILS homepage, *supra* note 138.

1. whether a foreign law firm may open an office in the jurisdiction;
2. provide services to clients through temporary entry (fly-in/fly-out);
3. the conditions, if any (including residency), under which a foreign lawyer may provide services on to clients more frequently than on a “temporary” basis;
4. the permitted scope of practice for a foreign lawyer;
5. the manner in which a foreign lawyer may associate with a local lawyer, including the possibility of fee sharing, employment and partnership;
6. the law firm name under which the foreign lawyer may practice; and
7. the ethics, discipline and regulatory rules to which a foreign lawyer should be subject.<sup>161</sup>

Professor Lutz provided the introductory remarks at the 2013 Trans-Pacific *Summit* and began by noting that “we are trying to build bridges.”<sup>162</sup> One of the questions he posed during his introduction was “whether there is someone or someplace in your jurisdiction that we can turn to when questions arise.”<sup>163</sup> The jurisdictions that had attendees present included the United States, Australia, Japan, Mexico, and Singapore, but the one of the attendees also served as President of the Law Associations for Asia and the Pacific. (LAWASIA).<sup>164</sup> The 2013 Trans-Pacific *Summit* participants exchanged contact information to facilitate future communication.<sup>165</sup> As the subsequent ITILS agendas show, the ABA ITILS continued to follow TPP developments and found the *Summit* helpful for understanding the perspectives and issues of the other attendees and for participating in developments related to the TPP and other initiatives in the Asia-Pacific region.<sup>166</sup>

Similar to the 2013 Trans-Pacific *Summit*, the 2013 US-EU *Summit* was held in San Francisco during the August 2013 ABA Annual

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161. 2013 TPP *Summit* Agenda, *supra* note 159, at 1-2.

162. The author has personal knowledge regarding this statement.

163. *Id.*

164. *Id.*

165. *Id.*

166. The author has personal knowledge about the helpfulness of the *Summit*. See also Terry et al., *Vol. 44, supra* note 16, at 575 n. 86 (regarding Professor Lutz’s attendance at a Singapore workshop regarding the APEC Legal Services Initiative); Email from Todd Nissen, Off. of the USTR, to Kristi Gaines, Staff, ABA (Dec. 3, 2013, 12:27 PM) (on file with author) (inviting the ABA to provide additional information about state measures for the upcoming 2013 APEC Legal Services Initiative report).

Meeting.<sup>167</sup> The agenda for the 2013 US-EU *Summit* was shorter than the agenda for the Trans-Pacific *Summit*, but the language quoted below shows that, in comparison to the Trans-Pacific *Summit*, the participants had reached a much deeper level of understanding and engagement. The proposed agenda shows the degree to which the ongoing Transatlantic Trade and Investment Partnership (TTIP) trade negotiations provided the framework for the *Summit* conversations:

- I. Welcome and Introductions
- II. Background on TTIP countries and legal services regulation
  - A. Overall objectives of the negotiations; desired roles of parties.
  - B. Current status of access (e.g., does access go beyond WTO commitments and if so, should that be memorialized in an FTA).
- III. Exchange of views and information on the TTIP negotiations.
  - A. Will legal services be a priority or objective of either side?
  - B. What process will each side use to consult with legal profession?
- IV. Challenges presented by lack of central regulatory authority on both sides and diverse constituencies that need to be consulted
  - A. State-based regulation in the U.S.
  - B. Country-based regulation in the EU
- V. Procedures for going forward—is it possible to structure some process by which we agree to communicate and consult, and then to relay that to the negotiators on both sides?<sup>168</sup>

The exchange of information among the attendees continued after the 2013 EU-US *Summit*. For example, there was a follow-up meeting between ABA and CCBE representatives on October 10, 2013 during the IBA Annual Meeting in Boston; before this meeting, the CCBE circulated to ABA ITILS and CCJ representatives a confidential draft document that attempted to categorize the TLP rules in EU Member States and U.S. jurisdictions.<sup>169</sup> The left hand column of this document listed the

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167. See 2013 CCBE-ITILS Agenda, *supra* note 153.

168. *Id.*

169. See Email from Peter McNamee, CCBE Staff, to Kristi Gaines, Senior Legislative Counsel, ABA Government Affairs Office, and others (Oct. 1, 2013, 1:02 PM) (on file with author) (transmitting, before the 2013 CCBE-ITILS Roundtable, two draft documents prepared by Alison Hook; one was the Word document described *infra* in n.170; that used red and green boxes to evaluate the access granted by various US and EU foreign lawyer rules; the other document

jurisdiction and the next nine columns represented various TLP-questions.<sup>170</sup> The table was based on data contained in the not-yet-final 2014 IBA Global Legal Services Report.<sup>171</sup> Because ITILS thought some of the data about the United States was inaccurate, especially with respect to the issue of “association” between foreign and domestic lawyers, the conversations continued long after the 2013 *Summit*.<sup>172</sup>

An especially significant follow-up event occurred in January 2014 at the Conference of Chief Justices’ 2014 Midyear Meeting. The CCJ program included a session entitled “Regulating the Practice of Law in a Global Arena” that included CCBE, USTR, ABA, and CCJ speakers.<sup>173</sup> By the end of that January 2014 meeting, the CCJ had adopted a resolution encouraging states to consider using the TLP “State Toolkit” that was developed by the State Bar of Georgia and adapted by ITILS.<sup>174</sup>

was an Excel chart that contained narrative information from the not-yet-final IBA Report, cited *infra* in note 171. The Word document is the document referred to in the Article’s text.).

170. See Alison Hook, *Summary of EU-US Mutual Access in Legal Services* (on file with author) [hereinafter EU-US Mutual Access] (noting that it would also be sent to two CCJ representatives). The nine columns in this table were: 1) whether the U.S. jurisdiction had a limited license rule (Y/N); 2) if so, whether the FLC rule included the practice of international law; 3) whether the FLC rule included home country law; 4) whether partnership foreign lawyers could partner with local [US] lawyers; 5) whether foreign lawyers could employ local [US] lawyers; 6) whether the state had a temporary practice FIFO rule; 7) whether the state had a pro hac vice rule that applied to foreign lawyers; 8) whether the state had a nationality requirement for fully-licensed lawyers; and 9) whether the state allowed requalification, described as recognition for bar exam or equivalent access procedure. See also Email from Kristi Gaines, ABA Staff, to ABA ITILS Members (Oct. 25, 2013) (on file with author) (the email accompanying the ITILS meeting agenda and attachments stated with respect to the EU-US Mutual Access document that “PLEASE NOTE THAT THE ATTACHED DOCUMENTS ON EU-US RULES SHOULD NOT BE SHARED OR DISTRIBUTED FURTHER AT THIS TIME.”).

171. See Int’l Bar Ass’n, *IBA Global Regulation and Trade in Legal Services Report 2014* (2014), <https://perma.cc/Y57R-V46K>. The author has personal knowledge that the data in the two draft documents referenced *supra* in note 169 drew upon the work that Alison Hook was doing for this IBA report.)

172. The author has personal knowledge of this fact.

173. See CCJ, *Midyear Meeting January 25-29, 2014, Regulation of the Practice of Law: Education Program* (on file with author) (program speakers were Jonathan Goldsmith, Secretary-General of the Council of Bars and Law Societies of Europe [the CCBE], Thomas Fine, Director for Services Trade Negotiations, Office of the U.S Trade Representative, the author, and moderator Jonathan Lippman, Chief Judge of the New York State Unified Court System); see also *Table of Contents of Materials for the CCJ Conference Jan. 28, 2014*, <https://perma.cc/UB5M-CW4P> (submitted materials include many ITILS items). The author has personal knowledge that because of issues that had been raised about the CCBE documents cited *supra* note 169, and ongoing US-verification efforts, the CCBE decided not to circulate these documents as part of the materials for the January 2014 CCJ program.

174. CCJ, *Resolution 11 In Support of The Framework Created By The State Bar Of Georgia And The Georgia Supreme Court To Address Issues Arising From Legal Market Globalization And Cross-Border Legal Practice* (Jan. 2014), <https://perma.cc/UTV2-N8Z9>. See also Terry, Vol. 47 (U.S.), *supra* note 16, at 107 (regarding the toolkit and Bill Smith’s role). See also

ITILS sponsored one last *Summit* during 2014—the US-EU *Summit* that was held in Boston on Aug. 9, 2014.<sup>175</sup> Although the published report of this *Summit* does not contain any additional information beyond the date and the fact that there was an agenda,<sup>176</sup> there is quite a bit of information available about this *Summit*. The agenda distributed at the meeting was two pages long and included the topics for discussion, speaker names, and time allotments.<sup>177</sup> This two-page agenda also contained the CCBE's TTIP trade requests to the United States, as well as the ABA's TLP policies and trade requests.<sup>178</sup> ITILS Chair Steven Younger provided the welcoming remarks at the *Summit*; Professor Lutz served as one of the introductory speakers and covered the topic of discussion format and issues.<sup>179</sup> The *Summit* “brought together more than forty-five bar leaders and other lawyers from the US and the EU to discuss the current status of the [TTIP] negotiations and issues relating to market access and cross-border practice in each of the jurisdictions.”<sup>180</sup>

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*International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience*, ABA, <https://perma.cc/FJ96-LZH7> (Feb. 2012, Updated Mar. 2021).

175. See Terry and Silver, *Vol. 49, supra* note 16, at 421 n.47.

176. *Id.* at 421 n.47, 424.

177. *EU-US Legal Services Roundtable, Agenda and Supporting Materials* (Aug. 9, 2014) (on file with author) [hereinafter 2014 EU-US *Summit* Agenda]. The supporting materials referred to in the agenda title were 2 pages of information, presented under the headings “EU/CCBE REQUESTS TO THE US” and “US REQUESTS to the EU/CCBE and RELEVANT ABA POLICIES.”

In addition to this two-page *Agenda and Supporting Materials*, the attendees received 17-pages of additional “Attendee Materials” that included a TTIP fact sheet, CCBE slides, the CCBE’s TTIP “requests” to the U.S.; the U.S. “requests” to the EU/CCBE and RELEVANT ABA POLICIES, a chart prepared by the author that had a colored map of the United States that showed foreign lawyer practice rights in each state, and an amended version, limited to EU countries, of the red/green colored Word document that the CCBE had first circulated at the 2013 *Summit*. These 2014 *Summit* supporting materials were assembled in a pdf entitled Attendee Materials [hereinafter 2014 *Summit* Attendee Materials]. The 2014 Agenda and Attendee Materials were emailed to the US and EU *Summit* leaders before the *Summit* by ITILS Staff Kristi Gaines. Email from Kristi Gaines, ITILS Staff, to *Summit* Attendees (Aug. 7, 2014) (on file with author).

178. 2014 EU-US *Summit* Agenda, *supra* note 177. TTIP is the abbreviation for the Transatlantic Trade and Investment Partnership (TTIP), which was a set of trade negotiations between the United States and the European Union. See generally *Attendee Materials, infra* note 182 (discussing TTIP). These negotiations were sometimes referred to as T-TIP, rather than TTIP. See, e.g., USTR, Transatlantic Trade and Investment Partnership (T-TIP), <https://perma.cc/JJ8E-ADWZ> (archived page) and Terry, *Vol. 50, supra* note 16, at 535-539 (using the T-TIP acronym). For the sake of consistency, unless a quote is involved, this Article refers to these negotiations as TTIP not T-TIP.

179. See generally 2014 EU-US *Summit* Agenda, *supra* note 177. (The author has personal knowledge that Professor Lutz covered this part of the Agenda).

180. ABA ITILS, Conference Call Minutes 1 (Sept. 24, 2014) (on file with author).

The 2014 US-EU *Summit* attendees received extensive additional material during the *Summit*.<sup>181</sup> These “Attendee Materials” included a fact sheet about the TTIP negotiations prepared by the USTR, a one-page document entitled “CCBE request to the United States in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations” that had been adopted Feb. 27, 2014; CCBE slides that provided background information and elaborated upon its TTIP requests; a one-page document entitled “US Requests To the EU/CCBE and Relevant ABA Policies;” a document prepared by the author entitled “Summary of State Foreign Lawyer Practice Rules (8/1/14) that included a table showing state adoption of the so-called foreign lawyer cluster of rules and a U.S. map that included colors and symbols illustrating the data in the table; and the EU portion of the EU/US red and green colored table that originally had been circulated by the CCBE in 2013.<sup>182</sup>

The detail in these documents provided the basis for the discussions at the August 2014 *Summit*, as well as ongoing discussions among the ABA, the CCBE, the CCJ, state regulators, and other stakeholders. For example, after the 2014 *Summit*, the ABA received an Excel chart prepared by the Law Society of England and Wales that had data about U.S. law firms in London, UK law firms in the United States, and the number of solicitors licensed in each U.S. state.<sup>183</sup> In November 2014, the ABA President

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181. See 2014 Summit Attendee Materials, *supra* note 177. See also Email from Kristi Gaines, ABA Staff to ABA ITILS Members (Sept. 24, 2014) (includes an attachment called “Attendee Materials” and explained that “For those of you who were unable to attend the “EU-US Legal Services Roundtable” hosted by the task force at the 2014 Annual Meeting in Boston, I am recirculating the materials that we provided to the participants and audience.” (on file with author).

182. See EU-US *Summit* 2014 Attendee Materials, *supra* note 177.

The Attendee Materials included documents intended to capture the TLP status quo in both the United States and European Union using documents prepared by each side. Compare *id.* at 16-17 (2014 EU table in the Attendee Materials listed only EU Member States) with the CCBE 2013 Tables, *supra* note 170 (containing Yes/No and green/red notations in multiple categories for both the EU Member States and US jurisdictions). The author prepared the U.S. summary using data from the ABA Center for Professional Responsibility. See Attendee Materials, *supra* note 177, at pp. 14-15. The US-summary was an update of a document that the author originally prepared for a presentation at a 2014 CCJ meeting. See Table of Contents, CCJ Meeting Materials, *supra* note 173. Because of the popularity of this colored map and chart, I have periodically updated it and posted it on my webpage. See, e.g., Laurel S. Terry, *US State Implementation of 5 Methods of Foreign Lawyer Practice in the United States*, [https://works.bepress.com/laurel\\_terry/80/](https://works.bepress.com/laurel_terry/80/) (June 5, 2018) <https://perma.cc/8G69-NNPJ>.

183. See, e.g., Email from Charlotte Ford, Law Society of England and Wales Staff, to author (Sept. 3, 2014) (explanatory cover email explaining and transmitting an excel document with solicitor and firm data) (on file with author). See also Silver, *2007 Handout on US Firms in the EU*, *supra* note 112; Laurel S. Terry, *Law Firms Located in U.S. States That Have At Least One Foreign Office [Based on data provided by General Counsel Metrics, LLC]* (Apr. 9, 2015), <https://perma.cc/G4ZL-SHPN>.

formally responded to CCBE regarding its TTIP “requests,” noting that ABA policy was consistent with all of the CCBE’s TTIP “requests.”<sup>184</sup> Other follow-up activity included CLE sessions and ongoing conversations,<sup>185</sup> as well as a January 2015 resolution by the Conference of Chief Justices urging state courts to consider adopting each of the ABA’s policies about inbound foreign lawyers.<sup>186</sup>

The 2014 EU-US *Summit* is the last official meeting that the ABA ITILS designated as a *Summit*. Despite the lack of additional *Summits*, the final two *TLP Year-in-Review* articles show a continuation of the type of international and ITILS-related conversations that the *Summits* began.<sup>187</sup> For example, Volume 50 notes that “[d]uring 2015, the ABA, the National Conference of Bar Presidents, and the Conference of Chief Justices (CCJ) all participated in discussions about the TTIP with the Council of Bars and Law Societies of Europe (CCBE).”<sup>188</sup> Volume 50 also reported on 2015 conversations and activities that took place among CCJ members and representatives from Australia and Canada, the establishment of National Organization of Bar Counsel committees that included international members who were responsible for preparing items for a Global Resources webpage, and international conversations at the National Conference of Bar Examiners’ annual bar admissions conference, as well as state-based activities such as those in Colorado, the District of Columbia, and New York.<sup>189</sup> Volume 51 similarly cited *Summit*-like global conversations,

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184. Letter from William C. Hubbard, ABA President, to Aldo Bulgarelli, President, Council of Bars and Law Societies of Europe [CCBE] (Nov. 19, 2014), <https://perma.cc/498A-ZCCB>. Because ABA policy is generally aligned with the CCBE’s requests, the ABA has worked with the CCBE to help it identify state policies that are not consistent with ABA policy and identify opportunities and individuals where the CCBE can communicate with the states.

185. See, e.g., ABA, *It’s a Small World After All: Global Tour of Transnational Regulatory Changes Affecting You!* (July 31, 2015) (CLE flyer circulated to ITILS) (on file with author). The speakers at this complimentary CLE held during the ABA Annual Meeting were Professor Robert Lutz, Hon. Jonathan Lippman, Chief Judge of the State of New York and Chair of CCJ committee responsible for TLP issues; Professor Carole Silver, Stephen Denyer, Law Society of England and Wales, and David Tang, K&L Gates and current Chair of ABA ITILS. *Id.* At the time of this program, the U.K. had not yet voted on Brexit and therefore was included in the TTIP negotiations.

186. CCJ, *Resolution 2, In Support of Regulations Permitting Limited Practice by Foreign Lawyers in the United States to Address Issues Arising from Legal Market Globalization and Cross-Border Legal Practice* (Jan. 2015), <https://perma.cc/G7HH-LXFR>. See also Terry, *Vol. 50, supra* note 16, at 534-35 (reporting on the adoption of this resolution and noting the way in which it responded to the TTIP trade negotiation “requests” that the CCBE had submitted to the ABA and the CCJ).

187. See *supra* note 16 (explaining why Volume 51 of the *International Lawyer*, which was published in 2017, was the last TLP Year-in-Review article).

188. Terry, *Vol. 50, supra* note 16, at 532.

189. *Id.* at 535-537.

including conversations among CCJ and CCBE representatives,<sup>190</sup> a second networking breakfast for U.S. and Canadian regulators held during the ABA's annual ethics conference,<sup>191</sup> the second and third global workshops on proactive management-based regulation,<sup>192</sup> a global conversation and materials on the topic of "Association" during the 2016 ABA Annual Meeting,<sup>193</sup> and the annual International Conference of Legal Regulators meeting, which was hosted in September 2016 by the DC Office of Disciplinary Counsel.<sup>194</sup> The examples listed above are taken from Volumes 50 and 51 of the *International Lawyer*, but there have been many TLP-related interactions over the years that were never documented in the pages of the *International Lawyer* or that occurred after Volume 51 was published.<sup>195</sup> The Section that follows elaborates upon this point and explains why I chose to write about the ABA's *Summits* for this Symposium honoring Professor Lutz.

#### IV. THE LASTING IMPACT OF THE ABA'S *SUMMITS*

At the beginning of his last year as Chair of what was then the ABA Task Force on International Trade in Legal Services,<sup>196</sup> Professor Lutz told the ITILS Task Force members that "one measure of success is the establishment of relationships with U.S. and international stakeholder groups and that the task force will continue to pursue such

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190. Terry, *Vol. 51, supra* note 16, at 541-42.

191. *Id.* at 544. See also Professor Terry Participates in 2021 Can-Am Regulators' Roundtable, <https://perma.cc/UH7C-FWG8> (providing a history of the Can-Am networking breakfasts).

192. *Id.* at 544. For links to the 2016 and prior PMBR workshops, see Laurel S. Terry, *Materials for VIRTUAL REALITY: PMBR Past, Present and Future, 2021 NOBC Midyear Meeting 3* (Feb. 12, 2021) <https://perma.cc/EY3D-NBYX>; ABA Cntr. Prof'l Resp., PMBR Articles, <https://perma.cc/J4NM-VB9S>.

193. Going Global: Association between Local and Foreign Lawyers and Law Firms (Aug. 6, 2016), <https://perma.cc/9HD7-6Q2H>.

194. Terry, *Vol. 51, supra* note 16, at 545.

195. See, e.g., Email from Becky Stretch, ABA Staff, to author (July 11, 2014) (concerns a visit to the United States by a Korean delegation that was interested in, inter alia, statistics about the number of foreign legal consultants working in the United States and the number of lawyers working in the United States for foreign firms) (on file with author). This visit, which occurred after the 2013 Trans-Pacific Summit and the 2009 Korea-U.S. Summit is one of many TLP interactions that might have been cited.

196. See *supra* note 12 (explaining that Professor Lutz was Chair of ITILS during 2006-07, 2007-08, and 2008-09) and see also *supra* note 14 (explaining the history of ITILS, including its conversion to an ABA Standing Committee, and noting that in this Article, the term "ITILS" is used to refer to this group in all of its iterations and the word "member" includes all those listed on the ITILS roster, regardless of whether they were designated as a member, liaison, or former member).



opportunities.”<sup>197</sup> This goal is now part of the mission of ITILS, which was converted to an ABA Standing Committee in 2016.<sup>198</sup>

I agree with Professor Lutz that the establishment of relationships is an important way to measure the success of ITILS.<sup>199</sup> In my view, ITILS has been extremely successful in this regard and the *Summits* that are the subject of this Article played an indispensable role in helping create these relationships and networks.

The *Summits* that are the subject of this Article promoted conversations among a wide variety of stakeholders. For example, some of the *Summits* focused on Europe, whereas other *Summits* focused on India, Korea, or the Asia-Pacific region more broadly.<sup>200</sup> Some of the *Summits* focused on U.S. lawyers and firms engaged in “outbound” U.S. legal services, also known as legal services exports,<sup>201</sup> whereas other *Summits* included discussion of issues related to foreign lawyers and legal services “inbound” to the United

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197. Minutes, ABA ITILS, August 8, 2008, Business Meeting, *supra* note 127.

198. See *supra* note 14 (citing the Resolution that converted ITILS to a Standing Committee and the pertinent portion of the discussion in Terry, *Vol. 50, supra* note 16); Resolution Converting ITILS to a Standing Committee, *supra* note 14, at 1, which stated that the ITILS Standing Committee shall:

1) monitor the negotiations of international trade agreements that involve the United States and the provision of legal services; 2) coordinate the Association’s positions on issues relating to the access by U.S. lawyers to the legal services markets of other countries and access by lawyers from foreign jurisdictions to the U.S. legal services market; 3) advise the U.S. Government of existing Association policies relating to these issues and of the Association’s position on relevant aspects of the negotiations; 4) develop policy recommendations for adoption by the House of Delegates; 5) assist other Association entities in the implementation of current Association policies relating to these issues; and 6) educate and engage in outreach to interested internal and external entities relating to the status of international trade agreement negotiations relevant to legal services and provide those entities with a mechanism to provide their input for consideration and study.

*Id.*

199. In the original outline of this Article, I planned to identify some of the TLP “deliverables” that occurred during the past twenty years. I ultimately decided that it would be cruel to double the length of this Article, but it is worth noting that there were important TLP developments, not just conversations, that occurred during the past twenty years. These include, but are not limited to, ABA and CCJ resolutions, changes in state rules regulating foreign lawyers, education initiatives and resources, mechanisms that institutionalized collaboration and communication among stakeholders.

200. See *supra* notes 24-25 and accompanying text for a list of the *Summits* discussed in this Article; see generally *supra* notes 32-186 and accompanying text for details about these *Summits*. It is perhaps worth noting that some of the *TLP Year-in-Review* articles refer to Latin American Roundtables, as do some of the ITILS agendas. These Latin American Roundtables have not been included in this Article because neither ITILS nor the TLP Committee assumed the primary responsibility for organizing these gatherings or were substantially involved.

201. See, e.g., *supra* notes 136-38 and accompanying text (describing the law firm *Summits*).

States,<sup>202</sup> and some *Summits* addressed both inbound and outbound issues.<sup>203</sup>

The TLP *Summits* that Professor Lutz helped organize included U.S. practicing lawyers, state bar leaders, academics, regulators, and others. The *Summits* attendees included both “day job” admissions regulators who belonged to the National Conference of Bar Examiners, as well as policymakers who were active in the Council of the ABA Section of Legal Education and Admissions to the Bar. At the other end of the lawyer regulatory spectrum, the TLP *Summits* included regulators whose “day job” was disciplining lawyers, and senior policymakers who belonged to the National Organization of Bar Counsel. The *Summits* drew upon the expertise of U.S. government officials such as those in the Office of the U.S. Trade Representative and the U.S. Department of Commerce, which led to additional meetings and interactions with these officials.<sup>204</sup> Some of the *Summit* conversations included Chief Justices (and other Justices) from the state high courts that regulate the legal profession. Moreover, even if some of the CCJ members of ITILS did not attend a particular *Summit*, the ITILS meetings made them aware of the planning, the materials, and the aftermath of these *Summits*.<sup>205</sup> And this list is just the U.S. participants! In short, under Professor Lutz’s co-leadership of the *Summits* and afterwards, the ITILS *Summits* sought to engage a variety of stakeholders in person.

Despite all of this, one might wonder whether the *Summits* are a suitable subject for this Symposium because the last Summit was held in 2014. Some individuals might consider it a mistake for the ABA not to have scheduled additional *Summits*, especially in years in which foreign

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202. See *supra* notes 34-35 and accompanying text (describing the attendees at the August 2004 *Summit*); *supra* note 147 and accompanying text (describing the May 2009 Conference for the CCJ).

203. See *supra* notes 153-158, 167-186 and accompanying text (describing the 2013 and 2014 EU-US *Summits*).

204. See, e.g., *supra* notes 41-42, 50-51, 166 and accompanying text (documenting interactions among USTR officials and ITILS). There were additional interactions this Article has not included such as ITILS’ participation in a U.S. Department of Commerce Conference on trade statistics that USTR helped facilitate. U.S. Dep’t of Commerce, *Measuring and Enhancing Services Trade Data and Information Conference: Better Data in Support of the National Export Initiative* (Sept. 14, 2010) (on file with author). See also Terry, *Vol. 47* (U.S.), *supra* note 16, at 510 (noting that the USTR had consulted with ITILS about the Trans-Pacific Partnership trade negotiations); Terry, *Vol. 49*, *supra* note 16, at 416 (describing relationships among the USTR, CCJ, NOBC, ITILS and others). USTR officials periodically provided reports at ITILS meetings. See, e.g., Minutes, ABA ITILS Meeting (Dec. 8, 2008) (on file with author).

205. See, e.g., *supra* notes 35 and 78 and accompanying text (describing the attendees at the 2004 *Summit* and invited participants for the 2005 *Summit*, which included three Chief Justices and CCJ staff Dick Van Duizend). See also *infra* notes 209-210 and accompanying text (describing the addition of CCJ representatives to ITILS and IGPAC).

individuals came to the United States for an ABA Annual Meeting.<sup>206</sup> While the author believes that there is a benefit from having regularly scheduled meetings, and supports trade agreements that include provisions that require a meeting, if not an outcome, such as the U.S.-Australia FTA Professional Services Annex, it is possible to view the lack of follow-up *Summits* as a measure of their *success*, rather than a failure.

This perspective relies on the fact that the *Summits* were much more than a “one-off” meeting. For example, during 2006-2007, which was his first year as Chair of ITILS, Professor Lutz added “liaison reports” as a standard agenda item at the beginning of each ITILS meeting and this practice has continued. The liaison reports have helped reinforce the connections that had been made or deepened at the *Summits*. The liaisons who report typically include the ABA’s ITAC representative,<sup>207</sup> the President of the National Conference of Bar Examiners, and representatives from the NOBC, the National Conference of Bar Presidents, the ABA Section of International Law, the ABA Section of Legal Education and Admissions to the Bar, the ABA Center for Professional Responsibility, and the ABA Section of Litigation, among others.<sup>208</sup> Although the USTR is not an official liaison to ITILS, it is not uncommon for a USTR representative to attend the ITILS meeting and provide a report. In short, the prior *Summits* helped establish the relationships that have made ITILS a vibrant group.

Another significant development that arguably can be attributed to the *Summits* is the expansion of the ITILS liaisons and those who are included on the ITILS roster. During 2007-08, which was the second year in which Professor Lutz served as ITILS Chair, ITILS expanded its list of liaisons to include a Chief Justice and a senior staff member from the National Center for State Courts. This practice has continued to this day and most ITILS meetings have a report from either a CCJ member or the CCJ staff liaison.<sup>209</sup> Moreover, as a result of the interactions between the

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206. The author has heard this comment from others. These individuals may be pleased to know that during the October 17, 2022 ITILS meeting, the attendees—including Professor Lutz—discussed the possibility of hosting another *Summit*. (The author has personal knowledge of this conversation).

207. *See supra* note 54 and accompanying text (explaining in the text that ITAC is the statutory-required private sector body that advises government trade negotiators).

208. *See generally supra* note 14 (ITILS Rosters).

209. The author has personal knowledge of the facts in this sentence. *See also* ABA Task Force on International Trade in Legal Services, 2007-08 (listing as CCJ liaisons Wisconsin Chief Justice Shirley Abrahamson and Richard Van Duizend). After her initial appointment in 2007-08, Chief Justice Abrahamson remained as a member or CCJ liaison through 2019-2020; *see generally* ITILS Rosters, *supra* note 14. Mr. Van Duizend remained as a CCJ liaison through 2011-12. *Id.* In 2012-13, Judge Gregory E. Mize replaced Mr. Van Duizend as the CCJ liaison

CCJ and the USTR that the ABA helped facilitate, the federal government added a CCJ/National Center for State Courts representative to IGPAC, which is its Intergovernmental Policy Advisory Committee that advises federal trade negotiators.<sup>210</sup>

Many ITILS members have used the *Summits* to establish or deepen their global connections, as well as their domestic network. ABA Staff members Kristi Gaines and Ellyn Rosen regularly interact with, and provide information to, counterparts in other countries. ITILS members have assumed leadership positions in the International Bar Association<sup>211</sup> and the International Conference of Legal Regulators.<sup>212</sup> One of the current ITILS members, who is the Deputy General Counsel of the State Bar of Georgia, helped arrange an invitation to a CCBE staff member to speak to a Georgia committee considering what type of anti-money laundering rules to develop.<sup>213</sup> One of the CCJ liaisons to ITILS regularly wrote a series of memos advising the relevant CCJ committee of important international lawyer regulatory developments.<sup>214</sup> The immediate past chair of ITILS is a lawyer in private practice who previously chaired an important District of Columbia Bar international committee and helped organize a recent panel on the impact of COVID on international cross-border practice; information about this free on-demand CLE has been shared with international audiences.<sup>215</sup> The list could go on and on, but the examples listed above

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from the National Center for State Courts staff and has remained on the roster since that time, although Keith Fisher also joined as a CCJ liaison in 2019-20. *Id.* In 2009-2010, North Dakota Chief Justice Gerald VandeWalle joined ITILS as a member and has remained as a member or a liaison since that date. *Id.* Virginia Justice Liz Lacy had been a member since the Committee was created, representing the ABA Section of Legal Education and Admissions to the Bar, and remained on the roster through 2011-12. New York Chief Judge Jonathan Lippman was never listed on the ITILS Rosters, *supra* note 14, but served as Chair of the CCJ Committee (thereafter a Working Group) that addressed TLP issues and frequently interacted with ITILS members and liaisons.

210. *See, e.g.*, Off. of the U.S. Trade Representative, Intergovernmental Policy Advisory Committee (IGPAC), <https://perma.cc/STA8-6DSY>. The author has personal knowledge that Chief Justice Shirley Abrahamson was the first CCJ/National Center for State Courts representative to IGPAC. The position is currently held by Judge Greg Mize.

211. *See, e.g.*, ITILS Staff Ellyn Rosen (who is Chair of the IBA BIC Regul. Comm.), <https://perma.cc/XN4C-9Z88>.

212. The author has personal knowledge that CCBE Senior Legal Advisor Peter McNamee spoke to the Georgia ITILS Committee on Feb. 22, 2018.

213. The author has personal knowledge of this.

214. *See generally* Gregory E. Mize, Judicial Fellow, National Center for State Courts, *Update on Issues Raised by Cross Border Legal Practice* (July 2015), <https://perma.cc/X8TL-U3FB>.

215. The author has personal knowledge that ITILS Immediate Past Chair Darrel Mottley organized at COVID-ITILS CLE session that remains available on demand, that information about this CLE has been shared with International Bar Association Committees, and that Darrel

should provide a flavor of the deep global connections that exist and that the *Summits* helped facilitate.

These kinds of connections are one reason why I believe that the global networks that the *Summits* helped establish will have a lasting impact. In a recent article, I offered the following observation about global legal profession networks:

In sum, global networks have affected and will continue to affect lawyers around the world. These networks affect the topics of discussion inside and outside the United States, who participates in the discussions, and ensure that ideas do not remain within the physical confines or borders of a particular jurisdiction. Despite the global trend towards nationalism and changes in the way that globalization is sometimes discussed, I believe that globalization—and global networks—are a crucial part of the contemporary legal services landscape and that it is in the best interests of lawyers—and the clients they serve—to be aware of, and take advantage of the opportunities these global networks provide.<sup>216</sup>

Although the ABA has not held an in-person *TLP Summit* since 2014,<sup>217</sup> I do not believe that continued in-person *Summits* are necessary for the global networks they helped create to thrive. A companion article to the one cited above focused on a subset of legal profession networks, namely the networks involving lawyer regulation stakeholders. In that article, I identified ten categories of lawyer regulation stakeholders<sup>218</sup> and discussed

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Mottley chaired an influential District of Columbia committee that issued a report about international practice. See ABA, *Remote Border Crossing: COVID-19, Changes in Lawyer Mobility and International Trade in Legal Service*, <https://perma.cc/2NPQ-HXKA>. At the time this Article was written, this CLE remained a featured resource on the ITILS webpage, *supra* note 14, at <https://perma.cc/S3K2-8KF9>.

216. Terry, *Global Legal Profession Networks*, *supra* note 3, at 175.

217. See *supra* note 206 (noting that one of the topics of discussion during the ITILS October 17, 2022 meeting was whether the ITILS should sponsor one or more *Summits* during the upcoming year).

218. *Lawyer Regulation Stakeholder Networks*, *supra* note 11, at 1074-75. The ten categories of stakeholders set forth in this article were: 1) those on whose behalf regulations are adopted; 2) traditional U.S. lawyer regulators; 3) groups that represent, and are primarily comprised of, traditional U.S. lawyer regulators; 4) groups that purport to offer expert balanced advice to traditional U.S. lawyer regulators; 5) other U.S. regulators whose actions directly affect lawyer regulation; 6) those who do not have “hard law” regulatory authority over lawyers, but interact with lawyers and may be able to enforce regulatory-like rules or compliance; 7) those who are directly affected by lawyer regulation provisions (but are not the population for whose benefit lawyer regulations are adopted); 8) additional individuals or entities within the United States that may be affected by, or care about, U.S. lawyer regulation issues; 9) foreign governments, intergovernmental organizations, and international dispute resolution bodies that have adopted policies or rules that may directly or indirectly affect U.S. lawyer regulation; and 10) additional individuals or entities outside the United States that may be affected by, or care about, U.S. lawyer regulation. See also *id.* at 1076-82 (*Table 1: U.S. Lawyer Regulation Stakeholders* provided examples and explanations of the ten categories the Article identified).

five ways in which these lawyer regulation stakeholders could participate directly or indirectly in global networks:

1. Through in-person meetings or conferences;
2. Through virtual meetings or conferences;
3. Through law reform initiatives;
4. as a result of reading literature; and
5. as part of the information that is delivered by the “domestic” affiliation groups to which the U.S. lawyer regulation stakeholder belongs.<sup>219</sup>

The ITILS *Summits* were an example of the first method of creating networks—through in-person meetings or conferences. In my view, the *Summits* laid the groundwork for the other kinds of interactions listed in items 2-5, above. The network connections or nodes have continued to expand since the fourteen *Summits* described in this article, as individuals who participated in the *Summits* have expanded their connections, interest, and knowledge. In other words, the *Summits* had a significant “spillover” effect and there are now many more connections among lawyer stakeholders in the United States and those located elsewhere in the world. The connections that began or were deepened through one or more of the fourteen in-person *Summit* meetings have created an environment in which there are now opportunities for global stakeholders to engage with one another in virtual settings,<sup>220</sup> through participating in, or monitoring law

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219. *Id.* at 1082-1104, 1110.

220. *See, e.g.,* Terry, *Lawyer Regulation Stakeholder Networks*; *supra* note 11, at 1088, which described the virtual attendance at a State Bar of Georgia ITILS committee meeting of a CCBE staff lawyer, who shared with the Georgia committee the EU experience with antimoney laundering issues:

The State Bar of Georgia’s International Trade in Legal Services (“ITILS”) Committee further illustrates how virtual meetings promote global connections and networks. This Committee conducts regular in-person meetings, but it also offers a telephone conference option. During one of its meetings, the Committee invited a representative from the Council of Bars and Law Societies of Europe to make a lengthy telephone presentation to the Committee members regarding anti-money laundering regulations in Europe.<sup>82</sup> As a result of the representative’s “virtual,” rather than in-person participation, Georgia lawyers from large and small firms and from in-house and government practice settings heard about the EU’s experiences.<sup>83</sup> After this conversation and additional discussions, the Georgia ITILS Committee recommended an ethics rule change that would, in essence, add an anti-money laundering due diligence obligation to Georgia’s ethics rules.

*Id.* Connections between the State Bar of Georgia and the CCBE date back to, and were reinforced by, the earliest *Summits* and have continued even as the lawyers who staff the Georgia committee changed. *See Resolution Issued by The American Bar Association Standing Committee on International Trade in Legal Services* [Regarding Bill Smith] (Dec. 7, 2016) (on file with author).

reform efforts,<sup>221</sup> by reading literature from one another,<sup>222</sup> and by dispersing global perspectives through seemingly domestic channels.<sup>223</sup>

In sum, the *Summits* played a critical role, but a rarely acknowledged role, in helping establish and deepen the relationships that allow global lawyer regulation stakeholder networks to flourish. The fourteen *Summits* that were held from 2004-2014 were important events that have had a lasting impact. This Symposium provides the opportunity to recognize the work that Professor Lutz did to make these *Summits* happen and to thank him for his efforts.

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221. See, e.g., IAALS, Unlocking Legal Regulation Knowledge Center, <https://perma.cc/634Q-R93G> (includes international lawyer regulation reform initiatives, as well as U.S. law reform initiatives, on this page monitoring current developments); see also Laurel S. Terry, *Regulatory Developments Related to Innovation, Technology, and the Practice of Law*, Law Soc’y of Ontario Special Lectures Conference Paper (2019-2020), [https://works.bepress.com/laurel\\_terry/99/](https://works.bepress.com/laurel_terry/99/) (explaining how lawyer regulatory initiatives in California, Arizona, and Utah relied on developments that had occurred in Australia and England and Wales).

222. See, e.g., Robert E. Lutz, *The Regulation of the Transnational Legal Profession in the United States*, 50 INT’L LAW. 445 (2017) (sharing the U.S. perspective in a Symposium issue); Robert E. Lutz, *An Essay concerning the Changing International Legal Profession*, 18 SW. J. INT’L L. 215 (2011); Robert E. Lutz, *Reforming Approaches to Educating Transnational Lawyers: Observations from America*, 61 J. LEGAL EDUC. 449 (2012).

223. See, e.g., *Lawyer Regulation Stakeholder Networks*, *supra* note 11, at 1087-88 (noting that “Because the documents [the NOBC committees] produced were posted on the NOBC’s “Global Resources” public webpage for a number of years and are still available in the members only section, the information this global network assembled was broadly dispersed among U.S. lawyer regulation stakeholders.” Although these documents are no longer available, they illustrate the ways in which connections that were created or deepened in the *Summits* continue to be important. For example, Alison Hook attended the first EU-US *Summit* and also served as an NOBC Committee member.).

# HUMAN RIGHTS DEROGATIONS IN NATIONAL EMERGENCIES: LESSONS FROM AFRICA

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Aaron Fellmeth\*

I.	INTRODUCTION.....	641
II.	AFRICAN CONSTITUTIONAL PRACTICE .....	645
	A. <i>Background: African Constitutions and Human Rights</i> .....	645
	B. <i>Survey of African State Constitutions Authorizing         Emergency Derogation</i> .....	646
	C. <i>Constitutional Delegation and Human Rights Derogations ...</i>	650
III.	PRACTICE OF AFRICAN STATES DURING DECLARED EMERGENCIES .....	651
	A. <i>The COVID-19 Pandemic and States of Emergency, 2020-         21</i> .....	652
	B. <i>African State Practice, 1976-2019</i> .....	659
	Algeria, 1988-2011 .....	661
	Burkina Faso, 2014-present .....	664
	Cameroon, 1984-1992.....	666
	Chad, 2006-2019.....	668
	Egypt, 1967-present .....	671
IV.	CONCLUSIONS .....	674
	APPENDIX - CONSTITUTIONAL PROVISIONS ON STATES OF EMERGENCY .....	679

It is a privilege to pay respects to the career of a man so admirable both as a person and as a scholar. Actually, Bob Lutz is more than a scholar: he is an institution. His expertise in international law is so broad that it seems a

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shame to honor him with a topic covering fewer than a half dozen fields of the subject. Few international lawyers can boast of anything approaching Bob's range, which includes everything from international trade law to human rights, international commercial arbitration to law of the sea, U.S. foreign relations law to comparative law. To honor him properly would require a multivolume treatise. My contribution to this celebratory issue is lamentably, if inevitably, narrow, but it does aspire to emulate Bob in being original and instructive.

## I. INTRODUCTION

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) allows states to derogate from most human rights during a "public emergency which threatens the life of the nation."<sup>1</sup> This provision imposes certain procedural and substantive requirements on states, most prominently by requiring prior proclamation of the emergency and limiting the use of derogation to the extent "strictly required by the exigencies of the situation" and ensuring that derogation does not involve discrimination solely on prohibited grounds such as race or sex.<sup>2</sup> These criteria are known as the requirements of necessity, proportionality, and nondiscrimination. Among the major regional human rights treaties, both the Pact of San José<sup>3</sup> and the European Convention on Human Rights<sup>4</sup> include similar, though not identical, provisions for derogation in time of emergency.<sup>5</sup>

Consistent with the phrasing of the derogation provision, the Human Rights Committee views ICCPR Article 4 as an *ultima ratio*, to be used only in the most dire and exceptional situations and for as limited a time as possible.<sup>6</sup> Yet, states have historically invoked derogations under ICCPR Article 4 and its regional cognates regularly, and frequently those invocations were based on circumstances that appeared concerning to the

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1. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR].

2. *Id.* For the Human Rights Committee's interpretation of the provisions of Article 4, see Hum. Rts. Comm., ICCPR General Comment No. 29, at para. 5, UN Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter HRC, GC No. 29].

3. American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123.

4. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 221.

5. Three African states are parties to the 1994 Arab Charter on Human Rights: Libya, Syria, and Tunisia. Article 4 of the Charter permits derogations in time of emergency. *See Arab Charter on Human Rights 2004*, in 24 BOS. UNIV. INT'L L.J. 147, 151-52 (2006) (Mohammed Amin Al-Midani & Mathilde Cabanettes trans., 2006).

6. *See* HRC, GC No. 29, *supra* note 2, paras. 2-3.

Committee.<sup>7</sup> Derogation provisions have thus earned a reputation as susceptible to abuse. More fundamentally, the need for derogation clauses is dubious, not because emergencies may not require limitations on human rights, but because the normal mechanism for reconciling human rights with the public interest, if properly interpreted, is sufficiently adaptable to apply to any situation.<sup>8</sup>

These observations might be thought to explain why the African Charter of Human and Peoples' Rights (the "Banjul Charter") departs from older treaties by including no derogation provision for emergencies. For its part, the African Commission on Human and Peoples' Rights (the "Commission") has written that it considers this omission intentional and justified. According to the Commission, the normal exercise of human rights does not present any danger to a democratic state that would justify extraordinary limitations on those rights.<sup>9</sup> Similarly, in *Commission Nationale des Droits de l'Homme et Libertés v. Chad*, the Commission noted: "even with a civil war in Chad [derogation] cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter."<sup>10</sup> Thus, the Commission position appears to flatly reject the legality of derogation by African states during emergencies or even civil wars.<sup>11</sup>

Professor Laurent Sermet agrees, arguing that the absence of a derogation clause in the Banjul Charter creates a "flagrant contradiction" between it and the ICCPR, and that "the legal standard most favourable for the protection of human rights" should prevail.<sup>12</sup> There is a difference, however, between divergent texts and contradiction between those texts. The texts of the ICCPR and Banjul Charter would contradict one another if compliance with both were impossible. Yet compliance with both is not impossible; a state party to both instruments violates neither by refraining

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7. On this point, see the sources cited in HRC, GC No. 29, *supra* note 2, n.1.

8. On these principles, see generally Mohamed Elewa Badar, *Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments*, 7 INT'L J. OF HUM. RTS. 63 (2003).

9. Amnesty Int'l v. Sudan, Communication 48/90-50/91-52/91-89/93, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], paras. 79-80 (Nov. 15, 1999), <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/11>.

10. Comm'n Nat'le des Droits de l'Homme et des Libertés v. Chad, Communication 74/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], para. 21 (Oct. 11, 1995), [https://www.achpr.org/public/Document/file/English/achpr18\\_74\\_92\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr18_74_92_eng.pdf).

11. *See id.*; Sudan Hum. Rts. Org. v. Sudan, Communication 279/03-296/05, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], para. 167 (May 27, 2009), <https://www.achpr.org/sessions/descions?id=190>.

12. Laurent Sermet, *The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion*, 7 AFR. HUM. RTS. L.J. 142, 144-45 (2007).

from derogating from human rights during a state of emergency. Moreover, it is entirely possible to declare an emergency and derogate from human rights consistent with general principles of human rights limitation.

As for inconsistency, Sermet's proposed principle of "most favorable for human rights" is one possible approach to resolving it. His ideas find confirmation not only in the African Commission, but in the Economic Community of West African States (ECOWAS) Community Court of Justice. Although that court has jurisdiction *ratione personae* over ECOWAS member states only, its jurisdiction *ratione materiae* encompasses alleged human rights violations.<sup>13</sup> Like the African Commission, it has taken the position that derogations from human rights are impermissible by state parties to the Banjul Charter even during national emergencies.<sup>14</sup>

And yet, other jurisprudence and a great preponderance of African state practice support another approach. Specifically, the African system permits some limitations on human rights and thus opens the door to some limited forms of derogation during states of emergency, to the extent consistent with the ICCPR. Specifically, although the Banjul Charter does not contain a general clause expressly authorizing state parties to limit human rights proportionately in pursuit of legitimate aims, such as the protection of human health and welfare or the human rights of others, it does provide for individual duties in Article 27(2): "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."<sup>15</sup> Under the customary principle of treaty interpretation known as *effet utile*,<sup>16</sup> a less literal interpretation of Article 27 may be justified. Article 27 could be read as implicitly authorizing states to limit human rights whenever necessary—and solely to the extent necessary—to protect the listed societal and individual interests.

This interpretation has been adopted in the general jurisprudence of both the Commission and the African Court on Human and Peoples' Rights (the "Arusha Court"). Consistent with the jurisprudence of other

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13. Revised Treaty of the Economic Community of West African States art. 15, July 24, 1993, 2373 U.N.T.S. 233 [hereinafter ECOWAS]; Protocol on Democracy and Good Governance art. 1(h), 39, Dec. 21, 2001, ECOWAS Doc. A/SP1/12/01.

14. *Gbagbo v. Côte d'Ivoire*, ECW/CCJ/JUD/03/13, Court of Justice of the Economic Community of States of West Africa [ECOWAS Ct. Just.], paras. 70-71 (Feb. 22, 2013), <https://ihrda.uwazi.io/en/document/b3bqf8k4suja961ptccui8uxr?page=1>.

15. African Charter on Human and Peoples' Rights art. 27(2), June 27, 1981, 1520 U.N.T.S. 217 [hereinafter Banjul Charter].

16. See, e.g., *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, para. 50 (Oct. 12, 2005), 16 ICSID Rep. 210 (2012).

international human rights authorities, the Commission and Arusha Court have repeatedly upheld state restrictions on human rights when such restrictions “are prescribed by law, serve a legitimate purpose and are necessary and proportional as may be expected in a democratic society.”<sup>17</sup> Indeed, in several cases, the Commission has specifically characterized ICCPR Article 27(2) as the basis by which state parties to the Banjul Charter may limit human rights.<sup>18</sup> And, more importantly, state parties to the Banjul Charter prefer this interpretation. Derogations are quite common among these states and are often authorized by their constitutions, as will be discussed. Therefore, it is safe to conclude that African states may derogate from human rights, at a minimum when consistent with other bases for limitations on human rights, in a manner proportionate to the need for limitation.

If the disjunction between the ICCPR and Banjul Charter is idiosyncratic to the African human rights system, the study of African practice in derogating from human rights in times of emergency is not. At the moment, the world is suffering through a pandemic of extraordinary scope and severity, having caused more than 6.5 million deaths since 2020.<sup>19</sup> Many states around the world—including many in Africa—have responded by implementing emergency measures that derogate from human rights, particularly the rights to freedom of assembly, freedom of movement, health care, family life, and privacy.<sup>20</sup> As international human rights law undergoes this unusual stress test, it is instructive to draw lessons from past practice on a continent where derogations have been common for many decades.

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17. *Umuhoza v. Rwanda*, No. 003/2014, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], paras. 133-34 (Nov. 24, 2017), <https://africanlii.org/afu/judgment/african-court/2017/21>; *Konaté v. Burkina Faso*, No. 003/2014, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], paras. 145-66 (Dec. 5, 2014); *Media Rts. Agenda & Const. Rts. Project v. Nigeria*, Communication 105/93-128/94-130/94-152/96, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], paras. 68-69 (Oct. 31, 1998), <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2021/08/Media-Rights-Agenda-v.-Nigeria.pdf>; African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], *General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4)* para. 10, (Dec. 12, 2015), <https://www.achpr.org/legalinstruments/detail?id=10>.

18. See *Media Rts. Agenda v. Nigeria*, 105/93-128/94-130/94-152/96, paras. 41-42; *Amnesty Int’l v. Sudan*, Communication 48/90-50/91-52/91-89/93, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], para. 80 (Nov. 15, 1999), <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/11>.

19. *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last visited Oct. 23, 2022).

20. Audrey Le Bret, *COVID-19 Pandemic and Derogation to Human Rights*, J.L. & BIOSCIENCES, May 4, 2020, at 1.

## II. AFRICAN CONSTITUTIONAL PRACTICE

### A. *Background: African Constitutions and Human Rights*

African state practice in derogations during states of emergency has two separate but related elements. The first is municipal law, specifically, constitutional provisions and legislation that authorize derogation of human rights in time of emergency. The second element is state practice in declaring emergencies that derogate from human rights in specific cases. The two elements are related by the fact that, in theory, municipal law should implement the international obligations of states. However, it is possible for municipal law to authorize derogations that are never put into practice. Conversely, it is possible for governments to derogate from human rights contrary to municipal law. In Africa, both kinds of disjunction have been common since the ICCPR entered into force.

The relevant constitutional provisions will be discussed here in Part II, and state practice will be addressed in Part III. Because the African continent contains at least fifty-four sovereign states,<sup>21</sup> a comprehensive survey of both would require a book-length treatment. Some compression is required. This part will summarize the trends in constitutional provisions in Africa among the forty most influential African states, with a list of the relevant constitutional articles in the Appendix for those who wish to review their wording.

Before discussing the relevant constitutional provisions, some background will be helpful. In terms of treaty adherence, of the forty African states analyzed here, all but Morocco are parties to the Banjul Charter,<sup>22</sup> and all but Comoros are parties to the ICCPR.<sup>23</sup> Every state includes a list of human rights in its national constitution. Some lists are more complete than others. For example, the constitution of Mauritania only mentions a few rights in vague terms,<sup>24</sup> while the constitution of South Africa contains an extensive and detailed list of guaranteed human rights.<sup>25</sup>

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21. The African Union counts fifty-five member states, but this number includes the Sahrawi Arab Democratic Republic. *See Member States*, AFR. UNION, [https://au.int/en/member\\_states/countryprofiles2](https://au.int/en/member_states/countryprofiles2) (last visited Dec. 28, 2021). The Sahrawi Republic is not currently recognized as a state by the United Nations or Arab League.

22. *See Parties to the African Charter on Human and Peoples' Rights*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f&clang=_en).

23. *See Parties to the ICCPR*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=_en) (last visited Nov. 3, 2022).

24. Constitution of the Islamic Republic of Mauritania, July 20, 1991, art. 3, 13-15, 19-22.

25. S. AFR. CONST., 1996, §§ 7-35.

None of them incorporate every human right guaranteed by the ICCPR, ICESCR, and Banjul Charter. The fact that no African state constitution surveyed here includes a comprehensive list of human rights has no bearing on whether the states are obligated by international law to protect all human rights. Treaty obligations bind states regardless of whether and how the state chooses to implement those obligations through domestic law.<sup>26</sup> Moreover, to the extent a human right has entered the *corpus* of customary international law, the state is bound to observe the right regardless of whether it is party to a treaty guaranteeing that right.

*B. Survey of African State Constitutions Authorizing Emergency Derogation*

Thirty-nine of the forty African constitutions surveyed here expressly authorize declarations of a state of emergency, state of siege, state of war, or martial law (henceforth referred to collectively as “state of emergency”). The sole exception is Libya, which proposed a new draft constitution in 2017 that would authorize the president to declare states of emergency without parliamentary approval.<sup>27</sup>

In most cases, declarations of states of emergency may last only for limited periods of time—usually for a period between fourteen and twenty-one days—without legislative approval.<sup>28</sup> The period varies quite a lot, however, sometimes longer and occasionally shorter. Only a handful of constitutions, such as Tunisia’s,<sup>29</sup> authorize the president to declare a national emergency and invoke very broad powers without legislative consent.

By their plain terms, four of the forty constitutions either do not authorize, or actually prohibit, any derogation of human rights even during states of emergency. Except for Malawi, each of these four countries has in fact derogated from human rights during declared states of emergency, as will be discussed in Part III. This furnishes an illustration of the point made earlier, that state practice does not uniformly comply with municipal law.

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26. See Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

27. See Zaid Al-Ali, *Libya’s Final Draft Constitution: A Contextual Analysis*, 3, 10 (2020).

28. In some cases, such as Equatorial Guinea, the president may declare a state of emergency lasting for several months without legislative approval. See, e.g., *The Fundamental Law of the Republic of Equatorial Guinea*, [CONSTITUTION] Nov. 17, 1991, art. 43. In others, the declaration can only last a very short time without parliamentary approval, as in Mozambique (five days when the Assembly is in session) or Nigeria (two days when the National Assembly is in session). See *Constitution of the Republic of Mozambique*, Dec. 21, 2004, art. 285; *Constitution of Nigeria* (1999), § 305(6)(b).

29. *Constitution of the Tunisian Republic*, Jan. 26, 2014, art. 80.

Nineteen of the forty constitutions provide unambiguously for the derogation of at least some human rights in case of a state of emergency. In most cases, the rights that may be derogated are specifically listed. These constitutional provisions will be discussed in more detail below.

The remaining seventeen constitutions are unclear in varying degrees about whether a state of emergency justifies derogation of human rights, or else provide that the conditions of the emergency are provided by legislation. This leaves uncertain whether such legislation may derogate from constitutionally protected human rights. The legal consequences of relying on emergency legislation without constitutional limitations will be addressed in Part II.C. For now, two important points should be made. First, during a national emergency, constitutions that are unclear about whether human rights may be derogated will tend to result in *de facto* derogations, because initiative rests with the government. In the absence of a clear prohibition on derogations, the government may rely on the concept of “state of emergency” as a sufficient justification for interpreting vague language in the constitution to authorize whatever measures seem necessary for national security or public order.

Second, some of the unclear constitutions do list a few nonderogable rights (examples include the constitutions of Botswana, the Democratic Republic of Congo, Nigeria, and Zimbabwe), which implies by the principle of *expressio unius est exclusio alterius* that other rights are derogable during a state of emergency.<sup>30</sup> However, it is far from satisfactory for a constitution to authorize the derogation of human rights by implication, particularly when, as in all such cases surveyed, the list of nonderogable rights is too meager to comply with Article 4 of the ICCPR.

A table summarizing how the forty constitutions deal with derogations from human rights in states of emergency will be helpful:

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30. See Constitution of Botswana Sep. 30, 1966 (as amended in 2016), § 16(1); Constitution of the Democratic Republic of Congo Dec. 2005, § 61; Constitution of Nigeria (1999), § 45; Constitution of Zimbabwe Amendment No. 20, § 86(3).

<b>Constitutions</b>	
<b>Authorizes derogation (19)</b>	Algeria, Angola, Cape Verde, Chad, Equatorial Guinea, Eritrea, Ethiopia, Ghana, Kenya, Liberia, Malawi, Mozambique, Namibia, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, Zambia
<b>No authorization (4)</b>	Central African Republic, Egypt, Republic of Guinea, Morocco
<b>Unclear (17)</b>	Botswana, Burkina Faso, Cameroon, Comoros, Congo (Democratic Republic), Congo (Republic), Côte d'Ivoire, Gabon, Libya, Madagascar, Mauritania, Morocco, Niger, Nigeria, Senegal, Tunisia, Zimbabwe

Of the nineteen states whose constitutions provide for derogation of human rights, not one includes a full list of nonderogable rights as provided by ICCPR Article 4, at least as the UN Human Rights Committee has interpreted that provision. However, three of these constitutions—those of Malawi, Namibia and South Africa—prohibit any derogations that would violate international law in general or ICCPR Article 4 specifically,<sup>31</sup> and therefore may comply with international law by reference.

For example, sections 16 and 17 of the constitution of Botswana include derogation provisions for states of war and emergency.<sup>32</sup> The constitution is not clear on what derogation measures the government may take during either situation. However, section 16 of the constitution specifies that the right against arbitrary deprivation of liberty (section 5) and the right to protection from discrimination on grounds of race, tribe, place of origin, political opinion, color or creed (section 15) are unenforceable during the state of war or emergency if a derogation measure is authorized by a law “reasonably justifiable for the purpose of dealing with the situation that exists.”<sup>33</sup>

Again, applying *expressio unius est exclusio alterius*, it appears that these are the only two human rights listed in Chapter II for which derogation is permissible. Although this provision is technically consistent with most of ICCPR Article 4, it does fail to make race-based or sex-based

31. See Constitution of Malawi, May 16, 1994, § 45; Constitution of Namibia, Feb. 09, 1990, art. 96; S. AFR. CONST., 1996, § 37.

32. See Constitution of Botswana Sep. 30, 1966 (as amended in 2016), §§ 16, 17.

33. *Id.* § 16.



discrimination nonderogable and is inconsistent with the Human Rights Committee's expansion of the list of nonderogable rights in General Comment No. 29 on article 4.<sup>34</sup>

Very few African constitutions that list nonderogable rights include the full list incorporated in ICCPR Article 4, and none include all those considered by the Human Rights Committee to be nonderogable.<sup>35</sup> For example, the constitutions of Eritrea, Ethiopia, and Kenya fail to identify the human right to life as nonderogable.<sup>36</sup> This creates a considerable danger of extrajudicial killings by government forces during declared states of emergency. Also contrary to Article 4, the constitutions of Kenya and Mozambique fail to specify that the human right against discrimination is nonderogable.<sup>37</sup>

In very few African countries are the human rights considered nonderogable under international law explicitly made derogable by the constitution. One exception is Zambia. Article 25 of Zambia's constitution specifies nine articles that may be derogated during a declared public emergency or war "to the extent that it is shown that the law in question authorises . . . measures for the purpose of dealing with any situation existing or arising during that period." No person acting under the authority of that law may be held liable for violating the constitution.<sup>38</sup> These derogable articles include the human right to freedom of conscience and religion (Article 19) and to the protection of children from trafficking (Article 24(3)). Neither derogation is compatible with ICCPR Article 4.<sup>39</sup>

In summary, on a plain textual reading, although all forty constitutions guarantee at least some human rights, only seven of them require the state fully to make any derogation conform to its obligations under international human rights law. Moreover, if one rejects the argument that the Banjul

34. HRC, GC No. 29, *supra* note 2, para. 13.

35. *Id.*

36. See Constitution of Eritrea May 23, 1997, art. 27; Constitution of Ethiopia Aug. 21, 1995, art. 93; Constitution art. 25 (2010) (Kenya).

37. See Constitution art. 25 (2010) (Kenya); Constitution of Mozambique Dec. 21, 2004, art. 286.

38. Const. of Zambia (1991) § 25.

39. Article 4 prohibits derogation of ICCPR article 18 (freedom of thought, conscience, and religion). HRC, GC No. 29, *supra* note 2, para. 7. As for child trafficking, the Human Rights Committee has observed that, for some rights not listed in article 4, "there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4," such as the prohibition on abductions and forcible transfers of populations. *See id.* para. 13(b)(d). Both prohibitions are implicated by child trafficking. Moreover, the Committee has pointed out that the Convention on the Rights of the Child (CRC), which prohibits child trafficking in article 35 and child exploitation in article 36, is applicable in states of emergency under CRC article 38. *See* Convention on the Rights of the Child art. 35-36, 38, Nov. 20, 1989, 1577 U.N.T.S. 3. The CRC contains no derogation clause. HRC, GC No. 29, *supra* note 2, n.5.

Charter implicitly authorizes derogation during emergencies, then the number is reduced to the four states that do not on a plain reading authorize any derogation whatsoever.

The Human Rights Committee has several times expressed its concern with municipal laws that appear to allow derogations in a manner incompatible with ICCPR Article 4.<sup>40</sup> However, as noted, text is not practice, and although the implementation of international law in the municipal legal order is desirable, the ultimate test for compliance with international law is not the law's inclusion in the state's constitution or legislation, but the state's actual compliance with or violation of international law. That subject will be addressed in Part III.

### C. *Constitutional Delegation and Human Rights Derogations*

As noted, many African constitutions that do not clearly specify whether derogations are permissible leave the elaboration of government powers to legislation. Those that do not specify that legislation will define the scope of emergency powers necessarily leave the question of derogation to the government or the courts, as applicable under each state's respective municipal law. None of the constitutions that delegate emergency powers to legislation provide that such legislation may derogate from human rights protected by the constitution or international law. The constitutions of Gabon, Madagascar, and Senegal, for example, are unclear as to whether they permit derogation of human rights during states of emergency.<sup>41</sup> They stipulate that the government's powers during an emergency will be defined by legislation with no additional limitations.

This arrangement is fundamentally problematical. The constitution is the government's source of political and legal authority. Indeed, constitutions commonly declare themselves the supreme law of the land.<sup>42</sup> When a supreme authority such as a constitution guarantees enumerated human rights, lesser legislation cannot logically derogate from those rights without superseding the constitution itself. In other words, only the constitution itself can authorize the derogation of constitutional rights, because there is no higher authority. Unless the constitution were explicitly to delegate to the legislature an authority to derogate from constitutional rights by legislation during states of emergency—and no African

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40. See HRC, GC No. 29, *supra* note 2, para. 3.

41. See Constitution of Gabon, Feb. 21, 1961, as reviewed in 2011, art. 25; Constitution of Madagascar, Nov. 17, 2010, art. 61; Constitution of Senegal, Jan. 22, 2001, as amended through 2016, art. 69.

42. *E.g.*, Constitution art. 2 (2010) (Kenya); S. Afr. Const., 1996, art. 2; Const. of Zambia (1991) § 1.

constitution does so—it follows that such legislation cannot logically suspend human rights guaranteed by that same constitution. A legislature has no power to supersede the constitution except by constitutional amendment through procedures specified, again, in the constitution itself.

If the legislature has no general authority to permit derogations from human rights (or any other constitutional provision), it seems that laws governing the declaration of a state of emergency can only authorize the suspension or alteration of other legislation. To the extent that human rights are guaranteed by legislation instead of the constitution itself, this presents no doctrinal problem. But, as noted, all forty African states surveyed here expressly protect at least some human rights in their constitutions.

One possible solution to this conundrum would be to infer an authorization to derogate from human rights by relying on the constitution's grant of authority to the legislature to legislate in states of emergency. There is no logical objection to such an inference, but it would set a dangerous precedent. If the legislature can implicitly derogate from constitutionally guaranteed human rights without a clear grant of authority, there is no reason why it should not implicitly derogate from any other provision of the constitution, including the provisions for holding elections or, by a process of involution, the very provision limiting its authorization to declare states of emergency in the first place. The better interpretation, then, is that a grant of legislative authority to provide for states of emergency does not authorize derogations of human rights. That interpretation is not universally accepted by African states, however.

### III. PRACTICE OF AFRICAN STATES DURING DECLARED EMERGENCIES

As noted, constitutions and laws are not the only way that a state may comply with its obligations under international law. State practice is paramount. A constitution drafted to comply assiduously with international law means nothing if the state's government does not comply with its own constitutional obligations. This part will show that, in African human rights practice, the unfortunate trend is to interpret constitutional derogation provisions and legislation in a way that puts the state in violation of its obligations under international human rights law.

The basis for this Part is a comprehensive survey of state practice in all forty African states from 1976 (when the ICCPR entered into force) to the present day. Rather than presenting the study's findings in detail, this part will summarize the survey of African practice using case studies from six states to illustrate its general conclusions. It will begin, however, with a discussion of recent African practice in responding to the COVID-19

pandemic, which has resulted in the suspension of select human rights in nearly all African states.

A. *The COVID-19 Pandemic and States of Emergency, 2020-21*

By the summer of 2020, twenty-eight African states had declared a state of emergency in response to the COVID-19 pandemic. Of these, twenty declared states of emergency or national disaster<sup>43</sup> and eight more declared public health emergencies,<sup>44</sup> albeit to the same general effect.<sup>45</sup> Interestingly, robust democracies in Africa were more likely to declare emergencies than weak democracies, and much more likely to do so than authoritarian governments.<sup>46</sup> Regardless, by 2021, like most countries around the world, nearly all African states had declared emergencies or disasters.<sup>47</sup> Very few of these states notified the United Nations of intended derogations to human rights as required by Article 4(3) of the ICCPR.<sup>48</sup>

As might be expected given the highly communicable nature of COVID-19, the most immediate human rights limitations were on the freedom of movement and assembly. At least twenty-two African countries fully prohibited public gatherings and another fifteen prohibited selected forms of gatherings by, for example, limiting the number of persons in a gathering.<sup>49</sup> Thirty-seven countries imposed curfews, and forty imposed lockdowns in both 2020 and 2021.<sup>50</sup>

According to the World Health Organization, between its introduction in early 2019 and the end of 2021, COVID-19 had infected at least 276 million persons and killed 5.37 million of them.<sup>51</sup> There is no question that, during a pandemic involving an exceptionally communicable and deadly disease with multiple variants, states are justified in suspending rights to

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43. Angola, Botswana, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Eswatini (Swaziland), Ethiopia, Gabon, Gambia, Guinea, Guinea Bissau, Lesotho, Liberia, Malawi, Mozambique, Namibia, Senegal, Sierra Leone, South Africa, and Zimbabwe. *African Government Responses to COVID-19*, INT'L CTR. FOR NOT-FOR PROFIT L., <https://www.icnl.org/post/analysis/african-government-response-to-covid-19> (last visited Oct. 23, 2022).

44. Burkina Faso, Republic of Congo, Kenya, Liberia, Madagascar, Niger, Sudan, and Togo. Botswana and Gambia declared both public health emergencies and states of emergency. *Id.*

45. *Id.*

46. *Taking Stock of Reg'l Democratic Trends in Africa and Middle East Before and During the COVID-19 Pandemic*, INT'L IDEA (Jan. 2021) at 10, Figure A3.2, <https://www.idea.int/regional-democratic-trends-africa-and-middle-east-during-covid19>.

47. See INT'L CTR. FOR NONPROFIT L., *supra* note 43.

48. See ICCPR, *supra* note 1, art. 21.

49. See INT'L CTR. FOR NONPROFIT L., *supra* note 43.

50. *Id.*

51. See WORLD HEALTH ORG., *supra* note 19.

freedom of assembly<sup>52</sup> and freedom of movement<sup>53</sup> to a reasonable degree in order to restrict public gatherings that risk spreading the virus. Some states also suspended in-person court procedures and prison visits to the plaudits of the African Commission on Human and Peoples' Rights ("African Commission").<sup>54</sup>

In addition, freedom of expression has been restricted in some African states. From the earliest days of COVID-19, multiple persons and organizations worked diligently to spread misinformation about the disease and vaccines. People and organizations spread misinformation out of ignorance, with an intent to attract attention or money, or to further political or economic agendas.<sup>55</sup> Such efforts have proliferated the virus and contributed to its death toll. Many African governments have imposed regulatory or criminal prohibitions on the spreading of false information relating to the pandemic.<sup>56</sup> Criminal prosecutions in Cameroon, Eswatini, Egypt, Kenya, Somalia, and Zimbabwe have been criticized by some as disproportionate,<sup>57</sup> but criminal prohibitions to counter potentially lethal propaganda fit comfortably within the derogation provisions of the ICCPR if narrowly tailored to messages that pose a significant danger of harm to the public.

Not all African states have restricted their human rights derogations to such laudable policies, however. The High Commissioner for Human Rights has warned against using emergency derogations during the

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52. See ICCPR, *supra* note 1, art. 21; Banjul Charter, *supra* note 15, art. 11.

53. See ICCPR, *supra* note 1, art. 12; Banjul Charter, *supra* note 15, art. 12.

54. See African Comm'n on Hum. and Peoples' Rts. [Afr. Comm'n H.P.R.], *449 Resolution on Human and Peoples' Rights as Central Pillar of Successful Response to COVID-19 and Recovery From its Socio-political Impacts*, at pmb., ACHPR/Res. 449 (LXVI) (Aug. 7, 2020), <https://www.achpr.org/sessions/resolutions?id=480>.

55. See, e.g., Neia Prata Menezes et al., *What is Driving COVID-19 Vaccine Hesitancy in Sub-Saharan Africa?*, WORLD BANK BLOGS (Aug. 11, 2021), <https://blogs.worldbank.org/african/what-driving-covid-19-vaccine-hesitancy-sub-saharan-africa>; Tim Nguyen & Sergio Cecchini, *Countering COVID-19 Misinformation in Africa*, THINK GLOB. HEALTH (July 23, 2021), <https://www.thinkglobalhealth.org/article/countering-covid-19-misinformation-africa>. See generally Aengus Bridgman et al., *Infodemic Pathways: Evaluating the Role that Traditional and Social Media Play in Cross-National Information Transfer*, FRONTIERS IN POLI. SCI. (Mar. 29, 2021); Sheera Frenkel, *The Most Influential Spreader of Coronavirus Misinformation Online*, N.Y. TIMES (July 24, 2021), <https://www.nytimes.com/2021/07/24/technology/joseph-mercola-coronavirus-misinformation-online.html>; Jeff Tollefson, *The Race to Curb the Spread of COVID Vaccine Disinformation*, NATURE (Apr. 16, 2021), <https://www.nature.com/articles/d41586-021-00997-x>.

56. See INT'L CTR. FOR NONPROFIT L., *supra* note 43 (last visited Oct. 23, 2022) (Botswana, Ethiopia, The Gambia, Kenya, Lesotho, Mali, Mauritius, Namibia, Nigeria, South Africa, Tanzania, and Zimbabwe).

57. See, e.g., INT'L IDEA, *supra* note 46, at 11.

COVID-19 pandemic in a disproportionate or illegitimate manner.<sup>58</sup> However, some states have taken advantage of the crisis to unnecessarily limit freedom of expression and the press. For example, in Tanzania, where the government initially adopted a policy of declaring the country COVID-free while infections were growing exponentially, a television station that reported facts on COVID-19 infections was banned for nearly a year.<sup>59</sup> More generally, several countries, including Egypt, Kenya, Morocco, Nigeria, South Africa, and Uganda, have responded to COVID-19 with legislation or other measures that raise troubling human rights concerns.<sup>60</sup> The African Commission expressed alarm as early as summer 2020 at

high incidents of violations of human rights resulting from the highly securitized approach that have been used in many States Parties during the COVID-19 pandemic and subsequent State of Emergencies, that has led to non-compliance by the police with basic human rights standards in the execution of their duties, including excessive use of disproportionate force, extrajudicial killings and summary executions, assault and bodily injury, including sexual violence, arbitrary and illegal arrest or deprivation of liberty, torture, inhumane and degrading treatment, extortion and highly intrusive communication and online surveillance and cyber policing, affecting disproportionately the poor, women, journalists, human rights activists and members of opposition political parties.<sup>61</sup>

There have also been credible allegations that some states have repressed, arbitrarily arrested, or attacked human rights advocates who have criticized the government's response to the pandemic.<sup>62</sup> For example, soon after imposing a dusk-to-dawn curfew to slow the spread of COVID-19, Kenyan security forces began enforcing the curfew with indiscriminate violence, beating and tear-gassing those who appeared to be disobeying the

58. See Office of the High Comm'r for Hum. Rts., *COVID-19 Guidance*, OHCHR, <https://www.ohchr.org/en/covid-19/covid-19-guidance> (last visited Nov. 5, 2022).

59. See, e.g., *Tanzania bans Kwanza Online TV for 11 months citing 'misleading' Instagram post on COVID-19*, COMM. TO PROTECT JOURNALISTS (July 9, 2020), <https://cpj.org/2020/07/tanzania-bans-kwanza-online-tv-for-11-months-citing-misleading-instagram-post-on-covid-19>; Abdi Latif Dahir, *Tanzania's President Says Country is Virus Free. Others Warn of Disaster.*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/world/africa/tanzanias-coronavirus-president.html>.

60. See *UN Raises Alarm About Police Brutality in COVID-19 Lockdowns*, ALJAZEERA, (Apr. 28, 2020), <https://www.aljazeera.com/news/2020/04/raises-alarm-police-brutality-covid-19-lockdowns-200428070216771.html>; Isaac Mugabi, *COVID-19: Security forces in Africa brutalizing civilians under lockdown*, DEUTSCHE WELLE, (Apr. 20, 2020), <https://p.dw.com/p/3bBi7>.

61. See African Comm'n on Hum. and Peoples' Rts, *supra* note 54.

62. See *id.* p.mbl.

order.<sup>63</sup> On March 30, 2020, a thirteen-year-old boy was shot on his balcony in Nairobi by police who were supposedly enforcing the curfew.<sup>64</sup> Many were arrested and refused release except upon payment of a fine or bribe.<sup>65</sup> President Kenyatta has formally apologized for the behavior of the police, but the government failed to promptly investigate these incidents of excessive use of force and failed to discipline human rights violators.<sup>66</sup>

Similarly, although Morocco's constitution does not formally permit the derogation of human rights, Morocco passed a law in March 2020 declaring a state of health emergency and broadly imposing criminal fines and one to three months of imprisonment on anyone violating "orders and decisions taken by public authorities" or "obstructing" those decisions with "writings, publications, photos, or discs."<sup>67</sup> The Moroccan government has used this law to shut down newspapers for months<sup>68</sup> and to prosecute both human rights activists and journalists who have criticized the government's handling of the pandemic.<sup>69</sup> Such uses of derogation lack any basis in the Moroccan constitution, and therefore violate the human rights of those prosecuted, because they are not prescribed by valid legislation under Morocco's own municipal laws. They further violate Morocco's obligations under the ICCPR, which allows derogations only to the extent strictly required to address a state of emergency that "threatens the life of

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63. See Max Bearak & Rael Ombuor, *Kenya's coronavirus curfew begins with wave of police crackdowns*, WASH. POST (Mar. 28, 2020), [https://www.washingtonpost.com/world/africa/kenyas-coronavirus-curfew-begins-with-wave-of-police-crackdowns/2020/03/28/358327aa-7064-11ea-a156-0048b62cdb51\\_story.html](https://www.washingtonpost.com/world/africa/kenyas-coronavirus-curfew-begins-with-wave-of-police-crackdowns/2020/03/28/358327aa-7064-11ea-a156-0048b62cdb51_story.html); Otsieno Namwaya, *Kenya Police Abuses Could Undermine Coronavirus Fight*, HUM. RTS. WATCH (Mar. 31, 2020), <https://www.hrw.org/news/2020/03/31/kenya-police-abuses-could-undermine-coronavirus-fight>.

64. See Georja Calvin-Smith, *Probe Ordered into Fatal Shooting of Kenyan Teenager During Virus Curfew*, FRANCE24 (Mar. 31, 2020), <https://www.france24.com/en/africa/20200331-coronavirus-kenya-shooting>.

65. Abdi Latif Dahir, *Kenya's Held for Weeks in Quarantine Were Told to Pay to Get Out*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/world/africa/kenya-coronavirus-quarantine.html>.

66. See Georja Calvin-Smith, *Kenya's President Apologises for Police "Excesses" Amid Coronavirus Curfew*, FRANCE24 (Apr. 2, 2020), <https://www.france24.com/en/africa/20200402-eye-africa-kenya-s-president-apologises-for-police-excesses-amid-coronavirus-curfew>.

67. Decret-loi no. 2-220-292 du 23 mars 2020 édictant des dispositions particulières à l'état d'urgence sanitaire et les mesures de sa déclaration art. 4, 6870 Bull. Off. 506 (Morocco) (author's translation).

68. See Elhafad Nouini, *Impact of Covid-19 on Freedom of Expression in Morocco and Tunisia*, ROWAQ ARABI, 2020, 33, 41.

69. See *Morocco and Western Sahara: End Prosecution of Activists Under New Health Emergency Law*, AMNESTY INT'L (June 9, 2020), <https://www.amnesty.org/en/latest/news/2020/06/morocco-and-western-sahara-end-prosecution-of-activists-under-new-health-emergency-law/>.

the nation.” Criticism of government measures cannot threaten the life of a nation.

Other countries, such as Egypt and Nigeria, have also censored the media, imprisoned critics of government health policy, and used excessive force against citizens who violate curfews or lockdowns.<sup>70</sup> The African Commission has been active in trying to steer African governmental responses to COVID-19 into paths compatible with international human rights law. In August 2020, the Commission issued a press release condemning excessive uses of force and cruel, inhuman, and degrading treatment in prisons “in some African States” in response to the COVID-19 pandemic, without, however, naming any specific offender.<sup>71</sup> More generally, the African Commission has recognized the lack of formal resolutions providing guidance on derogations during states of emergency and expressed its interest in prioritizing the development of more specific norms.<sup>72</sup>

At the same time, the Commission issued a general statement on human rights derogations during the pandemic.<sup>73</sup> Recommended measures include ensuring that the state of emergency is not used to enforce the law with unnecessary or disproportionate force; preventing law enforcement officers from engaging in torture and other cruel, inhuman or degrading treatment; adopting procedures to prevent arbitrary arrests and detention; preventing discrimination against vulnerable groups such as women, non-nationals, and refugees; and ensuring that human rights defenders are not persecuted.<sup>74</sup>

The issue of elections during the pandemic has occasioned more international controversy than most derogated human rights because elections have been postponed in many African states.<sup>75</sup> Because the costs

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70. See, e.g., *Nigeria: Authorities Must Uphold Human Rights in Fight to Curb COVID-19*, AMNESTY INT’L (Apr. 1, 2020), <https://www.amnesty.org/en/latest/news/2020/04/nigeria-covid-19/>; *Egypt: World Bank Funds Health but Neglects Jailed Doctors*, HUM. RTS. WATCH (Dec. 8, 2020), <https://www.hrw.org/news/2020/12/08/egypt-world-bank-funds-health-neglects-jailed-doctors>.

71. See African Comm’n on Hum. and Peoples’ Rts. [Afr. Comm’n H.P.R.], *Press Release of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa on Reports of Excessive use of Force by the Police during the COVID-19 Pandemic* (Apr. 17, 2020), <https://www.achpr.org/pressrelease/detail?id=491>.

72. See African Comm’n on Hum. and Peoples’ Rts. [Afr. Comm’n H.P.R.], *447 Resolution on Upholding Human Rights During Situations of Emergency and in Other Exceptional Circumstances*, ACHPR/Res. 447 (LXVI) (Aug. 7, 2020), <https://www.achpr.org/sessions/resolutions?id=478>.

73. See African Comm’n on Hum. and Peoples’ Rts., *supra* note 54.

74. See *id.* paras. 2, 5.

75. See INT’L IDEA, *supra* note 46, at 910.



of secure, remote voting by mail or computer are high relative to the per capita gross domestic product of nearly all African states, elections in Africa generally require in-person voting. Delays in elections may help slow the spread of the pandemic, but at a cost to the human rights to vote and participate in government, and the right of all peoples to self-determination.<sup>76</sup> Several African states, including Burundi, Cameroon, Côte d'Ivoire, Ghana, Egypt, Mali, and Tanzania, held elections in 2020.<sup>77</sup> Yet, several states, such as South Africa and Uganda, postponed elections for a fixed period. Chad, Ethiopia, Gabon, and Nigeria postponed elections indefinitely.<sup>78</sup> The African Commission issued a statement in mid-2020 recognizing the risks of in-person elections, expressing concern about the possibility of unnecessary or excessive postponements, and proposing guidance to minimize disruptions in the democratic process without compromising public safety.<sup>79</sup> The Commission did not, however, identify any specific states as having struck a balance with too little regard for human rights.

The following year, the African Court on Human and Peoples' Rights ("Arusha Court") rendered an advisory opinion to the Pan African Lawyers Union (PALU) on the right to participate in government in the context of elections held during the COVID-19 pandemic.<sup>80</sup> The three substantive questions presented asked: (1) what are the "applicable obligations" of African Union (AU) member states for ensuring the right to participate in elections during a public health emergency such as the COVID-19 pandemic; (2) what laws apply to the states that choose to conduct elections as opposed to those that postpone elections; and (3) what laws apply to states that are unable to conduct elections during the pandemic?<sup>81</sup> The three questions put to the court are really one broad question: What are AU member state obligations under international treaties and customary law

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76. See ICCPR, *supra* note 1, art. 1, 25; Banjul Charter, *supra* note 15, art. 13. See generally African Charter on Democracy, Elections and Governance, Jan. 30, 2007, <https://au.int/en/treaties/african-charter-democracy-elections-and-governance> [hereinafter ACDEG].

77. INT'L IDEA, *supra* note 46, at 9.

78. *Id.* at 8-9.

79. See African Comm'n on Hum. and Peoples' Rts. [Afr. Comm'n H.P.R.], *Statement of the African Commission on Human and Peoples' Rights on Elections in Africa during the COVID-19 Pandemic* (July 22, 2020), <https://www.achpr.org/pressrelease/detail?id=522>.

80. Advisory Opinion on Request No. 001/2020 by the Pan African Lawyers Union (PALU) on the Right to Participate in the Government of One's Country in the Context of an Election Held During a Public Health Emergency or a Pandemic, Such as the COVID-19 Crisis, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (July 16, 2021) [hereinafter Advisory Opinion on Request No. 001/2020], <https://www.african-court.org/cpmt/details-advisory/0012020>.

81. *Id.* para. 8.

with regard to preparing for, holding, and postponing elections during the pandemic? Although that question would appear too broad to be justiciable, the African Court decided to attempt an answer without discussing the situation of any specific state.<sup>82</sup>

The court began by affirming that states have the option of conducting elections during the pandemic, but that they equally possess the authority under the Banjul Charter, as supplemented by the African Charter on Democracy, Elections and Governance (ACDEG), to exercise their judgment to postpone elections.<sup>83</sup> Article 13(1) of the Banjul Charter recognizes the right of every citizen to participate directly in government or to vote for representatives “in accordance with the provisions of the law.”<sup>84</sup> The court later elaborated that the frequency of elections was a matter “not directly regulated by the Charter and the ACDEG.”<sup>85</sup> Although technically accurate, these statements potentially sanction legislation that undermines the relevant human right by indefinite postponements provided by law.

Fortunately, the court clarified later in its opinion that such legislation must comply with the conditions applicable to all limitations on human rights. Specifically, it observed that, although the Banjul Charter does not include an explicit provision for the derogation of human rights “even in emergency situations,” African Union member states may limit human rights under Article 27(2) of the Charter to ensure the rights of others, collective security, morality and the common interest through measures that are provided by law, proportionate to the aims discussed (here, specifically “to protect the health and life of persons” in the electoral context), and that do not “undermine the essential content of rights.”<sup>86</sup> These conditions apply to the postponement of elections to the same extent as restrictions on normal electoral procedures.<sup>87</sup>

The court did not offer more specific guidance, concluding that, “as a judicial body, it is not its role to develop policy guidelines for States on how to conduct elections in a situation of emergency.”<sup>88</sup> However, the court did emphasize the need to obtain the consent of “the majority of political actors” before postponing elections in the near term, in accordance with the

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82. *Id.* para. 45.

83. *Id.* paras. 51-52 (first citing Banjul Charter, *supra* note 15 art. 13(1); then quoting African Charter on Democracy, Elections and Governance art. 2, 3, June 27, 2019, <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>).

84. Banjul Charter, *supra* note 15, art. 13(1).

85. *Id.* para. 96.

86. *Id.* paras. 73, 76-77.

87. *See id.* paras. 98-103.

88. *Id.* para. 71.

ECOWAS Protocol on Democracy and Elections (*sic*: Good Governance).<sup>89</sup> Neither the ECOWAS Protocol nor the court's opinion define the universe of political actors to which this principle applies, and the court's opinion did not discuss the circumstances under which postponements would be compatible with the human right to participate in government.

As for compatibility, the court noted that pandemic-related measures should not entirely suppress the critical elements of the right of citizens to participate in elections, including campaigning, free and fair access to media, the monitoring of the electoral process, secret ballots, transparency in vote counting, and the possibility of contesting the results.<sup>90</sup> Absolute prohibitions on voting, the freedom of movement, or the use of online media would therefore violate the state's human rights obligations because legitimate state aims could be accomplished with less extreme measures, such as social distancing, the use of masks, and sanitation procedures.<sup>91</sup>

The court thus provided sound general guidance on how elections may be limited or postponed in response to the pandemic without commenting on specific restrictions adopted by any African Union member state. The court's guidance was consistent with both the ICCPR and African regional instruments, and balanced, albeit vaguely, public health concerns with preservation of the human right to participate in government. But the most interesting aspect of the case was the court's implied recognition that the absence of a derogation provision in the Banjul Charter had no appreciable effect on the ability of African Union member states to limit the human right to participate in government in response to a state of emergency.

#### B. *African State Practice, 1976-2019*

Many African states have suspended internationally protected human rights during states of emergency in the decades between the ICCPR's taking effect (1976) and the COVID-19 pandemic in 2020. Without undertaking a comprehensive discussion of state practice in the forty countries surveyed here, this part will summarize the findings of the state practice survey during the relevant period. The summary will focus on three aspects of that practice: (1) the circumstances under which states of emergency have been declared; (2) state compliance with procedural obligations under the ICCPR and the state constitutions discussed in Part

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89. *Id.* para. 55. The ECOWAS Protocol on Democracy and Good Governance, Dec. 2001, Doc. A/SP1/12/1, forbids in article 2 any "substantial modification . . . to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of political actors."

90. Advisory Opinion on Request No. 001/2020, *supra* note 80, paras. 80-81.

91. *Id.* paras. 82-83.

III.A above; and (3) the range of human rights derogated during the emergency and the extent to which these derogations were adequately justified by the circumstances.

Before the COVID-19 pandemic, African countries declared states of emergency during the relevant period in response to a limited range of events. In nearly all cases, the basis for the declarations were the following:

- political protests;
- large scale public riots;
- civil wars and rebellions, including inter-ethnic violence; and
- attempted *coup d'état*.

In only rare cases before 2019 were emergencies declared in response to other conditions, such as disease epidemics or natural disasters.<sup>92</sup> Some of the categories most often invoked overlap in specific instances. Political protests can turn into riots, and a failed *coup d'état* attempt can spark inter-ethnic violence. But what most declared emergencies have in common is a need to respond to organized violence.

The noteworthy exception is the first—political protest—which may be either peaceful or violent. A peaceful protest, regardless of size, cannot fulfill the ICCPR's conditions for invoking a state of emergency with accompanying derogation of human rights, because peaceful protests by their nature do not “threaten the life of the nation.”<sup>93</sup> Nonetheless, as will be discussed, there are instances in which African governments have responded to peaceful protests by declaring a state of emergency and derogating from human rights in violation of international law.

Five case study summaries will illustrate the circumstances under which states of emergency were used by African governments after 1976. Although these studies as a group are approximately representative of African practice, a few are outliers from the general trend. That trend, and its relationship to the case studies, will be discussed in Part IV.

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92. One example is Eswatini, which temporarily declared a national emergency in 2004 in response to a serious increase in HIV infections and a series of severe storms that disrupted food supplies. See *National Disaster Declared*, NEW HUMANITARIAN (Feb. 19, 2004), <https://www.thenewhumanitarian.org/news/2004/02/19/national-disaster-declared>; Subheading Entitled “Eswatini,” *CrisisWatch*, INT’L CRISIS GRP. (Feb. 2004), <https://www.crisisgroup.org/crisiswatch/february-2004#eswatini>; see also Michael Wines & Sharon Lafraniere, *Hut by Hut, AIDS Steals Life in a Southern Africa Town*, N.Y. TIMES (Nov. 28, 2004), <https://www.nytimes.com/2004/11/28/world/africa/hut-by-hut-aids-steals-life-in-a-southern-africa-town.html?searchResultPositios=2> (describing the severity of the AIDs epidemic in the region).

93. ICCPR, *supra* note 1, art. 4.

## Algeria, 1988-2011

Between 1988 and 2011, the Algerian government declared a state of emergency or state of siege several times. The 1988 declaration responded to public riots that originated in perceptions of government corruption, political repression, and economic stagnation.<sup>94</sup> The riots included attacks on government buildings, the burning of automobiles, and the looting of shops.<sup>95</sup> At the time, Algeria had not yet ratified the ICCPR, and therefore no notification to the UN Secretary-General was made.<sup>96</sup> However, Algeria had ratified the Banjul Charter the year before, in March 1987.<sup>97</sup> Algeria's constitution did not prohibit the suspension of human rights, and therefore both internal and international procedures were followed.

The riots in Algeria may have justified the declaration of a state of emergency, but the human rights derogations chosen by the government were excessive, unnecessary, and often in violation of international law including *ius cogens*. The government implemented martial law, silencing the press (which was already heavily censored at the time), imposed a curfew, and arbitrarily detained journalists. The government also deployed the army to quell the riots with excessive force, causing significant civilian casualties, estimated at 500 to 600 deaths and at least 1000 wounded.<sup>98</sup> The Algerian government arrested several thousand persons and reportedly engaged in the widespread torture of detainees, including beating, clubbing, knifing, electric shock, forcing detainees to crawl nude across glass, sexual violence, sodomization, burning with cigarettes, and forced swallowing of

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94. See Yasmina Allouche, *Why Algeria's 'Black October' in 1988 Defined its Role in the Arab Spring*, MIDDLE EAST MONITOR (Oct. 6, 2016, 4:30 PM), <https://www.middleeastmonitor.com/20161006-why-algerias-black-october-in-1988-defined-its-role-in-the-arab-spring/>; Paul Delaney, *Toll is Put at 200 in Algerian Riots*, N.Y. TIMES, Oct. 10, 1988, at A1 <https://www.nytimes.com/1988/10/10/world/toll-is-put-at-200-in-algerian-riots.html>; Hana Hassain, *Remembering Algeria's Black October*, MIDDLE EAST MONITOR (Oct. 5, 2018, 8:45 AM), <https://www.middleeastmonitor.com/20181005-remembering-algerias-black-october/>; Christina Okello, *Algeria Marks Black October Riots Amid Ongoing Protests*, RADIO FRANCE INTERNATIONALE (May 10, 2019, 8:44 AM), <https://www.rfi.fr/en/africa/20191004-algeria-mark-black-october-riots-amid-ongoing-protests>.

95. See Delaney, *supra* note 94.

96. Parties to the ICCPR, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=_en) (last visited Oct. 23, 2022).

97. Parties to the Banjul Charter, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f&clang=_en) (last visited Oct. 23, 2022).

98. See Delaney, *supra* note 94; Hassain, *supra*, note 94; U.S. DEP'T OF STATE BUREAU OF HUM. RTS., DEMOCRACY, AND LAB., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988 1277 (1989) [hereinafter U.S. Dep't of State 1988 Algeria Report].

noxious liquids.<sup>99</sup> No member of the military or police was ever prosecuted for these acts, despite the government having acknowledged their occurrence in 1993.<sup>100</sup> Most rioting appears to have ended within a week, and the state of emergency was lifted almost immediately.<sup>101</sup>

On June 4, 1991, the Algerian government declared a state of siege in response to attacks on government buildings by Muslim fundamentalists who sought to overthrow the government and to install an Islamic state.<sup>102</sup> By this time, Algeria was bound by the ICCPR. Algeria followed both internal and international procedures, notifying the United Nations of the declaration and suspending no human rights except for some judicial procedures and a six-month delay in the elections originally scheduled for that month.<sup>103</sup> The 1991 declaration was thus consistent with both the ICCPR and Banjul Charter.

However, to forestall further fundamentalist attacks on the government, the Army staged a *coup d'état* January 1992, canceled elections and appointed a new president, who immediately declared yet another state of emergency immediately.<sup>104</sup> The 1992 declaration was to last twelve months and would apply to the entire territory of Algeria.<sup>105</sup> Algeria promptly notified the UN Secretary-General of the declaration. However, in June 1992, Islamic extremists assassinated the president, causing the Army to arrest and detain thousands of members of the Islamic Salvation Front (FIS)

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99. U.S. Dep't of State 1988 Algeria Report, *supra* note 98, at 1278; HUMAN RIGHTS WATCH, WORLD REPORT 1993: ALGERIA, 288-94 (1993) [hereinafter 1993 Human Rights Watch World Report].

100. See U.S. Dep't of State 1988 Algeria Report, *supra* note 98, at 1278.

101. Paul Delaney, *Algeria to Lift State of Emergency as Unrest Ebbs in Riot-Torn Cities*, N.Y. TIMES, Oct. 12, 1988, at A12 <https://www.nytimes.com/1988/10/12/world/algeria-to-lift-state-of-emergency-as-unrest-ebbs-in-riot-torn-cities.html>; Hassain, *supra* note 94; Immigration and Refugee Board of Canada [IRB], *Algeria: Riots of October 1988*, Pub. No. DZA2017 (Sept. 1, 1989), <https://www.refworld.org/docid/3ae6aba95c.html> [hereinafter *Algeria: Riots of October 1988*].

102. 1993 Human Rights Watch World Report, *supra* note 99, at 289.

103. See Canadian Security Intelligence Service, *Commentary No. 65: Insurgency, Legitimacy and Intervention in Algeria*, FED'N OF AM. SCIENTISTS INTEL. RES. PROGRAM (Jan. 1996), <https://fas.org/irp/world/para/docs/com65e.htm> [hereinafter CSIS Comment No. 65]; see also 1993 Human Rights Watch Report, *supra* note 99; HUM. RTS. WATCH, HUMAN RIGHTS IN ALGERIA SINCE THE HALT OF THE ELECTORAL PROCESS (1992), <https://www.hrw.org/report/1992/02/27/human-rights-algeria-halt-electoral-process>; Associated Press, *Army Sends Tanks to Algerian Capital After Day of Rioting*, N.Y. TIMES, June 26, 1991, <https://www.nytimes.com/1991/06/26/world/army-sends-tanks-to-algerian-capital-after-day-of-rioting.html>.

104. CSIS Comment No. 65, *supra* note 103.

105. See Presidential Decree No. 92-44 of Feb. 9, 1992 [hereinafter Presidential Decree No. 92-44], <https://www.refworld.org/docid/3fbc20364.html>.

in prison camps.<sup>106</sup> FIS terrorists responded with assassinations of intellectuals, journalists, and doctors, and attacks on government buildings and airports.

The 1992 emergency decree gave the Minister of Interior sweeping powers, including the authority to ban public gatherings, dissolve municipal governments, and detain for an unspecified period any adult “whose activity is shown to endanger the public order, public security, or the proper functioning of public services.”<sup>107</sup> A long military struggle ensued and anti-Islamic militias formed. In 1997 and 1998, these militias elevated the violence by arbitrarily slaughtering, kidnapping, raping, and mutilating dozens or hundreds of men, women and children in pro-Islamic villages.

The state of emergency declaration did little to restore peace, but it did suspend a wide range of human rights. Civilians charged with offenses against state security could be tried by military courts.<sup>108</sup> Extrajudicial killing became common during the emergency, with lethal armed attacks against even peaceful pro-Islamic demonstrators.<sup>109</sup> Reports indicate that tens of thousands of civilians were killed in the war.<sup>110</sup> The president suspended the right of appeal in criminal trials involving accusations of terrorism, including capital cases.<sup>111</sup>

Arrests were indiscriminate and due process frequently denied. Detainees “were not informed of the reasons for their detention, the length of the ordered detention, or the criteria for determining when they would be released.”<sup>112</sup> Firsthand observers reported a significant number of detainees tortured or abused in custody.<sup>113</sup> Elections were suspended for many years, and the government censored press reports critical of the government. Threats and attacks on journalists, editors, and human rights activists also became common.<sup>114</sup>

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106. 1993 Human Rights Watch Report, *supra* note 99, at 288.

107. Youssef M. Ibrahim, *In Algeria Now, No Appeal in Terrorist Cases*, N.Y. TIMES, Oct. 15, 1992, at A11, <https://www.nytimes.com/1992/10/15/world/in-algeria-now-no-appeal-in-terrorist-cases.html?searchResultPosition=1>; Presidential Decree No. 92-44, *supra* note 105, art. 2, 4, 5, 7, 9.

108. See 1993 Human Rights Watch World Report, *supra* note 99, at 289.

109. *Id.*

110. See Jon Henley, ‘I Saw Algerian Soldiers Massacre Civilians’, THE GUARDIAN (Feb. 13, 2001, 21:32 EST), <https://www.theguardian.com/world/2001/feb/14/jonhenley>.

111. Ibrahim, *supra* note 107.

112. *Id.*

113. *Id.*; Yasmine Ryan, *Uncovering Algeria’s Civil War*, AL-JAZEERA (Nov. 18, 2010), <https://www.aljazeera.com/indepth/2010/11/201011812224407570.html>; AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 1993, 49-52 (1993); Henley, *supra* note 110.

114. *Algeria Lifts 1992 Emergency Decree, State News Agency Says*, CABLE NEWS NETWORK (Feb. 22, 2011), <http://www.cnn.com/2011/WORLD/africa/02/22/algeria.emergency/index.html>.

The declaration was extended even after the civil war tapered off following ceasefire negotiations in 1997. The war formally ended in 2005,<sup>115</sup> but the emergency declaration remained in effect until 2011, when protests forced the president to rescind it. During the entire period (1992 until 2011), no national elections were held in Algeria.

#### Burkina Faso, 2014-present

Until 2015, Burkina Faso was not a country in which human rights were generally respected. In 1987, former deputy Blaise Compaoré came into power following a *coup* he orchestrated with two other politicians, whom he soon had arrested and executed in order to achieve a dictatorship.<sup>116</sup> He kept himself in power through fraudulent elections for the next twenty-seven years. Burkina Faso acceded to the ICCPR in 1999.<sup>117</sup> In 2014, Compaoré tried to amend the constitution to extend his term of office beyond twenty-seven years, which caused a popular revolt.<sup>118</sup>

The uprising began with violent street parades and riots by tens of thousands of democratic protesters from January 2014.<sup>119</sup> In the face of continued protests, including the firebombing of parliament, Compaoré dissolved parliament and declared a nationwide state of emergency on October 30, 2014, in hopes of retaining power.<sup>120</sup> Burkina Faso's government failed to notify the UN Secretary-General of this declaration. It is unclear what effect the declaration *per se* had on human rights, because Compaoré's government had not respected human rights significantly even before the declaration.

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115. See World Peace Foundation, *Algeria: Civil War*, MASS ATROCITY ENDINGS (Aug. 7, 2015), <https://sites.tufts.edu/atrocityendings/2015/08/07/72/>.

116. Declan Walsh, *Ex-Leader of Burkina Faso Convicted in Killing of Thomas Sankara, His Predecessor*, N.Y. TIMES (Apr. 6, 2022), <https://www.nytimes.com/2022/04/06/world/africa/burkina-faso-blaise-compaore-thomas-sankara.html>.

117. Parties to the ICCPR, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5&clang=_en) (last visited Oct. 23, 2022).

118. David Smith, *Burkina Faso: Violent Clashes Over Plans to Extend President's Rule*, THE GUARDIAN (Oct. 31, 2014), <https://www.theguardian.com/world/2014/oct/30/protesters-storm-burkina-faso-parliament-constitution-vote-president-blaise-compaore>.

119. Naila Salihu, *Burkina Faso*, ACCORD (Oct. 23, 2015), <https://www.accord.org.za/conflict-trends/burkina-faso/>.

120. FREEDOM HOUSE, FREEDOM IN THE WORLD IN 2015 113-116 (Arch Puddington et al. eds., 2015); *As it Happened: Burkina Faso Unrest*, BRIT. BROAD. NEWS (Oct. 30, 2014), <https://www.bbc.com/news/live/world-africa-29831591>; Emma Farge & Bate Felix, *Beyond Burkina Faso, Africa's 'Black Spring' Hopes May Be Premature*, REUTERS (Nov. 6, 2014), <https://www.reuters.com/article/us-burkina-politics-africa-analysis/beyond-burkina-faso-africas-black-spring-hopes-may-be-premature-idUSKBN0IQ1ZE20141106>.



Within approximately two weeks, Compaoré was forced to flee the country, and a transitional government was set up, but negotiations between political and military leaders continued to delay elections until, in November 2015, elections temporarily put an end to the state of emergency.<sup>121</sup> The new government under President Kaboré slowly began a process of improving human rights compliance, but an Islamist insurgency and hundreds of terrorist attacks on schools, police stations, and army barracks caused the government to declare another state of emergency on December 31, 2018, with respect to fourteen provinces. The legislature<sup>122</sup> ratified this declaration and it continues to the present day.<sup>123</sup> The United Nations was notified of the emergency belatedly, on April 17, 2019.<sup>124</sup>

The Islamist violence to which the declaration of emergency responds is extreme. It has caused multiple deaths, much property destruction, mass displacements of civilians, and high food insecurity.<sup>125</sup> Aside from the suspension of the right to privacy (searches without warrants), the declaration appears to have not imposed other systematic effects on human rights.<sup>126</sup> However, Burkinabe military and security forces appear to have committed some sporadic but serious human rights violations, including the summary execution of one-to-two-hundred civilians between April 2018 and January 2019, under the alleged belief that they were Islamist

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121. Salihi, *supra* note 119.

122. Act No. 001-2019/AN (Jan. 11, 2019) (Burk. Faso); *Burkina Faso Declares State of Emergency in North Following Attacks*, REUTERS (Dec. 31, 2018, 5:52 AM), <https://www.reuters.com/article/us-burkina-security/burkina-faso-declares-state-of-emergency-in-north-following-attacks-idUSKCN1OU00V>; *Burkina Faso Declares State of Emergency in 6 Provinces*, AFRICA TIMES (Dec. 31, 2018, 7:34 PM), <https://africatimes.com/2018/12/31/burkina-faso-declares-state-of-emergency-in-6-provinces/>; *Éprouvé par le terrorisme, le Burkina Faso instaure l'Etat d'urgence dans six de ses régions*, L'AGENCE D'INFORMATION DU BURKINA (Dec 13, 2018), [https://www.aib.media/2018/12/31/eprouve-par-le-terrorisme-le-burkina-faso-instaure-letat-durgence-dans-six-de-ses-regions/?fbclid=IwAR1TdOUO6MiCUmn0ifz7joJoBIZaajQLL0s-fhfoHhcYeErMejRJC\\_KN2-Y](https://www.aib.media/2018/12/31/eprouve-par-le-terrorisme-le-burkina-faso-instaure-letat-durgence-dans-six-de-ses-regions/?fbclid=IwAR1TdOUO6MiCUmn0ifz7joJoBIZaajQLL0s-fhfoHhcYeErMejRJC_KN2-Y); *Tackling Burkina Faso's Insurgencies and Unrest*, INT'L CRISIS GRP. (Jan. 28, 2019), <https://www.crisisgroup.org/africa/sahel/burkina-faso/tackling-burkina-fasos-insurgencies-and-unrest>.

123. *Burkina Faso Travel Advisory*, U.S. STATE DEP'T (Apr. 18, 2022), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/burkina-faso-travel-advisory.html>.

124. Depository Notification, Sec'y Gen., Burkina Faso: Notification Under Article 4(3), U.N. Depository Notification C.N.148.2019.TREATIES-IV-4 (Apr. 29, 2019).

125. *Burkina Faso Declares State of Emergency in North Following Attacks*, REUTERS (Dec. 31, 2018, 5:52 AM), <https://www.reuters.com/article/us-burkina-security/burkina-faso-declares-state-of-emergency-in-north-following-attacks-idUSKCN1OU00V>; *Burkina Faso Executions Prompt Broad Call for Inquiry*, HUM. RTS. WATCH (Sept. 16, 2020, 2:41 PM), <https://www.hrw.org/news/2020/09/16/burkina-faso-executions-prompt-broad-call-inquiry>.

126. Daily Press Briefing, Office of the Spokesperson for the Secretary-General, UN Press (Dec. 11, 2019).

militants.<sup>127</sup> This does not appear to be part of a government policy or program, and Burkinabe authorities did acknowledge the charges and stated an intention to investigate them.<sup>128</sup> However, the Burkina Faso government does not appear to have made any progress in conducting significant investigations of government human rights violations in the ensuing years, despite pressure from the United Nations and United States.<sup>129</sup>

#### Cameroon, 1984-1992

Following Cameroon's independence in 1961, its government recurrently declared states of emergency to abuse human rights, censor the press, and eliminate political opposition.<sup>130</sup> Cameroon acceded to the ICCPR effective September 27, 1984, which in theory should have deterred its abuses of emergency declarations.<sup>131</sup> In fact, very little changed. Between 1984 and 1986, the government declared a state of emergency every five to six months, belatedly informing the United Nations in most cases but without clearly explaining the derogations intended.<sup>132</sup> The first state of emergency was declared on April 18, 1984, in the Yaounde region after a failed *coup d'état* and before Cameroon was bound by the Convention.<sup>133</sup> Fighting resulted in both military and civilian casualties estimated at around 200 to 1,000 deaths, and 1,205 detentions.<sup>134</sup> The emergency was eventually expanded to the entire country to counter "banditry" and other crimes, and to suppress attempts to reestablish the long-banned Union des Populations Camerounaises.<sup>135</sup>

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127. John Campbell, *Security Service Human Rights Violations in Burkina Faso*, COUNCIL ON FOREIGN RELATIONS (Mar. 27, 2019), <https://www.cfr.org/blog/security-service-human-rights-violations-burkina-faso>.

128. *Id.*

129. *Burkina Faso Executions Prompt Broad Call for Inquiry*, HUM. RTS. WATCH (Sept. 16, 2020, 2:41 PM), <https://www.hrw.org/news/2020/09/16/burkina-faso-executions-prompt-broad-call-inquiry>.

130. Charles Manga Fombad, *Cameroon's Emergency Powers: A Recipe for (Un)constitutional Dictatorship?*, 48 J.AFR. L. 62, 64 (2004).

131. Parties to the ICCPR, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5> (last visited Oct. 23, 2022).

132. Fombad, *supra* note 130, at 71.

133. Clifford D. May, *Cameroon Reported to Execute Plotters After Trials in Secret*, N.Y. TIMES, May 10, 1984, at A1; U.S. DEP'T OF STATE: CAMEROON, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984 49 (1984) [hereinafter Dep't of State 1984 Cameroon Report]; Gerard Emmanuel Kamdem Kamga, *The Origin and Development of Emergency Regimes in Cameroon*, 21 FUNDAMINA 289, 307 (2015).

134. Dep't of State 1984 Cameroon Report, *supra* note 133, at 49.

135. 1988 U.N.Y.B. 110, U.N. Sales No. E.92.XIV.2; Dep't of State 1984 Cameroon Report, *supra* note 133, at 49, 51.

The initial declaration may have been justified by the violence and crime following the coup attempt. Courts were reportedly unbiased and free from government interference at the beginning,<sup>136</sup> but the state of emergency was renewed repeatedly until 1991, and the objectivity of courts reportedly deteriorated as the state of emergency lengthened. Between 1984 and 1991, the government formed a new party (the Cameroon People's Democratic Movement, or CPDM) to consolidate power, and human rights violations increased in frequency and severity. There were reports of torture of detained persons during police interrogations and in prison. Moreover, between forty-five and 120 defendants were executed after trial and at least three were convicted of capital offenses *in absentia*.<sup>137</sup> In one case, the U.N. Human Rights Committee specifically found a journalist to have been subjected to cruel, inhuman, and degrading treatment while in prison.<sup>138</sup>

In 1990, Cameroon adopted a new and very broad state of emergency law that encompassed any "series of disturbances undermining public order or the security of the state."<sup>139</sup> Although the legislation provided for only limited extensions of time, this limitation was routinely disregarded.<sup>140</sup> By 1991, the Cameroon government had established strict press censorship, restricted the right of assembly, and limited women's human rights and labor rights.<sup>141</sup> Cameroon security forces were attacking peaceful pro-democracy protests, and regularly committing torture and extrajudicial killings with impunity. These acts of violence were especially directed at opposition political candidates before the 1992 election.<sup>142</sup> In 1991 alone, there were over 100 documented instances of extrajudicial killing by Cameroon security forces, and arbitrary detentions are believed to have exceeded 10,000.<sup>143</sup>

The first presidential election in Cameroon to offer more than one candidate was held on October 11, 1992, with incumbent Paul Biya reportedly winning by a plurality vote of 40%. Because Biya had failed to

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136. Dep't of State 1984 Cameroon Report, *supra* note 133, at 52.

137. *Id.* at 50-52.

138. Mukong v. Cameroon, Views Hum. Rts. Comm., Communication No. 458/1991, U.N. Doc. CCPR/51/D/458/1991 (July 21, 1994).

139. Fombad, *supra* note 130, at 69, 73.

140. *Id.* at 71.

141. HUM. RTS. WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1992 41, 43, 46 (1992) [hereinafter 1992 Human Rights Watch World Report].

142. U.S. DEP'T OF STATE: CAMEROON, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991 42-45 (1992) [hereinafter Dep't of State 1991 Cameroon Report]; 1992 Human Rights Watch World Report, *supra* note 141, at 42-44.

143. Dep't of State 1991 Cameroon Report, *supra* note 142, at 43, 45.

obtain a majority and the Cameroon constitution had no procedures for a second election in such cases, the opposition disputed the result. Biya declared another state of emergency on October 27, 1992, limited to the North West Province, where opposition protests were being held.<sup>144</sup> The government failed to notify the United Nations of this declaration.<sup>145</sup> Biya accused the provincial government of orchestrating electoral fraud in the parliamentary election, and for three months, hundreds of opposition supporters and journalists were arbitrarily detained for long periods, while others were beaten or murdered by security forces.<sup>146</sup> The declaration expired before the end of 1992, when the government succeeded in suppressing opposition to the election and consolidation of power. In 1996, the Parliament amended the constitution to make the President's power all but absolute during states of emergency,<sup>147</sup> a situation only partially rectified by new amendments in 2008. The ultimate result was the decimation of Cameroon's nascent democracy and the deepening of corruption, which has continued to the present.<sup>148</sup> As of this publication, the CPDM has remained in power for thirty-seven consecutive years, and Biya remains president after forty years in office, largely due to the damage inflicted on democracy during states of emergency.

#### Chad, 2006-2019

Chad acceded to the ICCPR on June 9, 1995. Between 2006 and 2019, Chad experienced a massive influx of internally displaced persons and refugees from Sudan who were fleeing ethnic cleansing by the Janjaweed militias, as well as direct attacks by the Janjaweed and other armed militias on towns within Chad.<sup>149</sup> Within Chad as well as southern Sudan, these militias engaged in mass rapes, murders, and abductions, and recruited children into their ranks.<sup>150</sup> In the meantime, the national government of

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144. ARTICLE 19, CAMEROON—A TRANSITION IN CRISIS 10 (1997).

145. Gerard Emmanuel Kamdem Kamga, *Emergency Regimes in Cameroon: Derogations or Failures of Law?*, 25 AFR. J. INT'L & COMP. L. 519, 531 (2017).

146. See *supra* note 144, at 23; Kamga, *supra* note 145, at 531; 3 U.S. DEP'T OF STATE, *Department Statements: Human Rights Situation in Cameroon*, in 3 U.S. DEP'T OF STATE DISPATCH 845 (1992); Laura-Stella Eposi Enonchong, *Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship*, 5 AFR. J. LEGAL STUD. 313, 327 (2012).

147. Fombad, *supra* note 130, at 68.

148. U.S. STATE DEP'T, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CAMEROON 32-36 (2021).

149. U.N. Human Rights Couns., Nat'l Rep. Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Couns. Resol. 5/1 - Chad, U.N. Doc. A/HRC/WG.6/5/TCD/1 (2009) [hereinafter UNHRC – Chad Report 2009].

150. *Id.*

President Idriss Déby Itno began holding fraudulent elections, leading to multiple *coup d'état* attempts and a boycott of elections by the political opposition.<sup>151</sup>

In response, the Déby government declared three separate national emergencies between 2006 and 2008. The first, in November 2006, lasted for twelve days, but was extended for an additional six months (to May 2007). It was used to censor the press and to suppress political opposition in order to ensure Déby's reelection.<sup>152</sup> No notice was filed with the United Nations, in violation of ICCPR Article 4(3).

In October 2007, rebellions and political opposition led Déby to declare another state of emergency, limited to two eastern regions and the northern region.<sup>153</sup> It is unclear how long the declaration lasted. The third declaration was made in February 2008, in response to rebel attacks on the capital, N'Djamena, and applied to the entire country. It allowed for government control of the news media, authorized home searches without a warrant, banned most meetings, and established a nightly curfew.<sup>154</sup> Government forces demolished almost 2000 homes to make room for construction projects unrelated to the conflict, rendering an estimated 10,000 citizens homeless.<sup>155</sup> It is unclear how long the 2008 restrictions stayed in force.

Fighting between rival ethnic groups and aggression by Islamic militants caused Chad to declare new states of emergency in 2015 and again in 2019. The first applied only to the Lake Chad region bordering Nigeria and responded to a double attack launched by Boko Haram that claimed five lives in Ngouboua village.<sup>156</sup> The emergency legislation gave authorities the option to ban gatherings, the movement of people, and

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151. LAUREN PLOCH, CRS REPORT FOR CONG.: INSTABILITY IN CHAD 2 (Jan. 30, 2008).

152. *Id.*; *Chad Profile – Timeline*, BRIT. BROAD. CO. (May 8, 2018), <https://www.bbc.com/news/world-africa-13164690>.

153. *State of Emergency Imposed Even as Peace Talks Conclude*, THE NEW HUMANITARIAN (Oct. 16, 2007), <https://www.thenewhumanitarian.org/news/2007/10/16/state-emergency-imposed-even-peace-talks-conclude>.

154. Stephanie Hancock, *Chad Imposes State of Emergency to Combat Rebels*, REUTERS (Feb. 14, 2008, 2:37 PM), <https://www.reuters.com/article/us-chad-rebels-deby/chad-imposes-state-of-emergency-to-combat-rebels-idUSL1471790020080214>; *Aid Work Continues Despite State of Emergency*, THE NEW HUMANITARIAN (Feb. 18, 2008), <https://www.thenewhumanitarian.org/news/2008/02/18/aid-work-continues-despite-state-emergency>; *Chad President Declares State of Emergency*, FRANCE24 (Feb. 15, 2008), <https://www.france24.com/en/20080215-chad-president-declares-state-emergency-chad>; *Chad Declares State of Emergency*, ALJAZEERA, (Feb. 14, 2008), <https://www.aljazeera.com/news/2008/2/14/chad-declares-state-of-emergency-2>.

155. *See* KY LUU, CHAD - COMPLEX EMERGENCY 1 (2008).

156. *Boko Haram: State of Emergency Declared Around Lake Chad*, BRIT. BROAD. CO. (Nov. 9, 2015), <https://www.bbc.com/news/world-africa-34771128>.

vehicles in the area.<sup>157</sup> The legislation also allowed for the search of homes. In addition, the formerly abolished death penalty was reinstated, and ten Boko Haram militants were tried, sentenced to death, and executed.<sup>158</sup> In March 2016, Chad's government issued a blanket ban on all protests and the use of national radio (leaving broadcast news in the hands of the state-owned Telestchad, the only television station in Chad).<sup>159</sup> The National Assembly extended the state of emergency for four months,<sup>160</sup> although there does not appear to have been any need for an extension. The 2015 parliamentary elections were delayed until 2020 as well.<sup>161</sup>

In August 2019, another state of emergency was declared. This declaration was limited to three regions bordering Niger and Sudan where inter-ethnic violence had been occurring since May.<sup>162</sup> It was extended for four months as well.<sup>163</sup> The ostensible goal of the declaration was the mass disarmament of civilians through home searches and confiscations of weapons,<sup>164</sup> but the government response appears to have included several limitations and violations of human rights. According to Amnesty International:

Several cases of excessive use of force by defense and security forces were reported. Defense and security forces opened fire on a group of women, wounding 10 of them, during a protest on 23 February in Abéché. They were students protesting against the decision to remove the head of a school complex in disobedience of an earlier court ruling. On 12 September, police in N'Djamena shot a man in the leg, on the pretext that he had walked in a restricted area.

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157. *Id.*

158. See UN Human Rights Office 'Deeply Regrets' Resumption of Executions in Chad, UNITED NATIONS NEWS (Sept. 1, 2015), <https://news.un.org/en/story/2015/09/507782-un-human-rights-office-deeply-regrets-resumption-executions-chad>; see also Amnesty Int'l, *Chad: Crackdown on Fundamental Freedoms*, at 5, AI Index AFR 20/8653/2018 (June 1, 2018).

159. Front Line Defenders, *UPR Submission- Chad 2018*, (Apr. 1, 2018).

160. Matthew M. Bigg, *Chad Extends State of Emergency Over Boko Haram Attacks*, REUTERS (Nov. 19, 2015), <https://news.trust.org/item/20151119023508-ds6gi/>.

161. Amnesty Int'l, *Human Rights in Africa, Review of 2019: Chad*, at 29, AI Index AFR 01/1352/2020 (Apr. 8, 2020).

162. *Chad Extends State of Emergency in 3 Provinces by 4 Months*, REUTERS (Sept. 10, 2019, 4:32 PM), [https://www.voanews.com/a/africa\\_chad-extends-state-emergency-3-provinces-4-months/6175541.html](https://www.voanews.com/a/africa_chad-extends-state-emergency-3-provinces-4-months/6175541.html).

163. *Id.*

164. See *State of Emergency Lifted in North and Eastern Chad*, THE NATIONAL (Jan. 25, 2020), <https://www.thenationalnews.com/world/state-of-emergency-lifted-in-north-and-eastern-chad-1.969430>.

Also, in N'Djamena, Bonheur Mateyan Manaye was riding a motorcycle on 4 November when he was shot by the police escort of the Speaker of the National Assembly. He later died of his injuries.<sup>165</sup>

Additionally, police and military forces conducted arbitrary arrests and detention, controlled freedom of movement, interfered in commerce, and limited freedom of assembly by banning peaceful protests and arresting or tear gassing protesters, opposition politicians, and their supporters.<sup>166</sup> In an attempt to solve the intercommunal violence through government violence, villagers were subjected to intimidation, in some cases through torture, assault, and other cruel, inhuman, or degrading treatment.<sup>167</sup>

During none of these national emergencies did the government of Chad submit an Article 4(3) notification to the United Nations. More importantly, the fact that the emergencies were confined to specific regions suggests that they were not of a nature to threaten the life of the nation, and therefore did not qualify as emergencies justifying the derogation of human rights under the ICCPR Article 4. Instead, most derogations were extreme responses to sometimes serious but limited disorder that could have been controlled merely by the normal exercise of policing or army deployments. The fact that these measures targeted peaceful protesters in particular indicates an illegitimate purpose, because, as noted, peaceful protest itself can under no circumstances threaten the life of a nation.

#### Egypt, 1967-present

The Egyptian constitution is one of the few to include no authorization for the government to derogate from human rights. Regardless, Egypt has proven the most relentless abuser of state of emergency declarations and accompanying derogations of human rights, not only in Africa, but worldwide. In fact, Egypt has the most enduring state of emergency declaration in the history of the concept. Egypt declared a state of emergency in 1967 during the Arab-Israeli War and has maintained it

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165. Amnesty Int'l, *Human Rights in Africa, Review of 2019: Chad*, at 29, AI Index AFR 01/1352/2020 (Apr. 8, 2020).

166. *Id.*; See also Int'l Crisis Group, *Avoiding the Resurgence of Intercommunal Violence in Eastern Chad*, Report No. 284 (Dec. 30, 2019), <https://www.crisisgroup.org/africa/central-africa/chad/284-eviter-la-reprise-des-violences-communautaires-lest-du-tchad>.

167. See CHADIAN LEAGUE OF HUM. RTS., 2018 RAPPORT SUR LA SITUATION DES DROITS DE L'HOMME AU TCHAD (2018), [http://www.laltdh.org/pdf/rapport\\_dh\\_2018.pdf](http://www.laltdh.org/pdf/rapport_dh_2018.pdf); see also U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., 2019 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHAD (2020).

effectively without interruption since then.<sup>168</sup> Although it was allowed to lapse briefly between 1979 and 1980, it has remained in force since the assassination of President Anwar Sadat in 1981.<sup>169</sup> With only trivial interruptions, Egypt has been in a continuous state of emergency for fifty-five years and counting.

During those decades, the Egyptian government's record of respecting human rights has been extremely disappointing. The Egyptian government is highly authoritarian. Political opponents, human rights advocates, and journalists are routinely censored, arrested on false charges, and imprisoned for criticizing the government.<sup>170</sup> Police have violently dispersed peaceful protests, in one case killing hundreds of people.<sup>171</sup> The unchecked power of the president has resulted in forced disappearances, arbitrary executions, torture of prisoners (and many deaths in custody), and violations of the right to privacy.<sup>172</sup>

Like states of emergency in other countries, the law regulating states of emergency in Egypt (No. 162 of 1958, as amended) allows the suspension of the rights to freedom of assembly, freedom of speech and the press, the right to privacy of communications, and the right to a prompt and fair trial.<sup>173</sup> But Egyptian practice also derogates from a wide variety of other human rights. Stores may be closed and business firms may be seized without a warrant.<sup>174</sup> Detained persons may be forced to perform hard labor without trial for up to six months, and they may be subjected to burdensome fines.<sup>175</sup> From the 1980s to the 2000s, the Egyptian government kept thousands of accused persons in jails at a time, without charge or trial, in

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168. See United Nations Human Rights Council, ICJ Submission to the Universal Periodic Review of Egypt, (2009), <https://www.icj.org/wp-content/uploads/2009/09/Egypt-ICJ-submission-UPR-non-judicial-submission-2009.pdf>;

169. *Id.*

170. See U.S DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT (2021).

171. See Kareen Fahim & Mayy el Sheikh, *Memory of a Mass Killing Becomes Another Casualty of Egyptian Protests*, N. Y. TIMES, Nov. 13, 2013, at A12.

172. See Marwa Al-A'asar, *EOHR Calls for Investigating 900 Torture Cases*, DAILY NEWS EGYPT (June 22, 2011), <http://www.dailynewsegypt.com/2011/06/22/eohr-calls-for-investigating-900-torture-cases/>; Cairo Inst. for Hum. Rts. Stud., *Egypt: Human Rights Council: Countries Should Take Bold Action*, (Feb. 9, 2021), <https://cihrs.org/egypt-human-rights-council-countries-should-take-bold-action/?lang=en>; *States Break Silence to Condemn Egypt's Abuses at UN Rights Body*, AMNESTY INT'L (Mar. 12, 2021), <https://www.amnesty.org/en/latest/news/2021/03/states-break-silence-to-condemn-egypts-abuses-at-un-rights-body/>.

173. Law No. 162 of 1958 (Law on the State of Emergency), *al-Jarīdah al-Rasmīyah*, 27 September 1958, art. 3 (Egypt).

174. *Id.*

175. *Id.* art. 5.



some cases for more than a decade.<sup>176</sup> The president is authorized to perform warrantless searches and to charge civilians in military tribunals for nonmilitary crimes.<sup>177</sup> These tribunals are composed of members who are appointed by the president, and who do not have lifetime tenure.<sup>178</sup> The accused do not enjoy a right to appeal in these tribunals.

Human rights authorities have periodically commented on this use of the ongoing state of emergency to derogate from human rights. For example, in November 2002, the Human Rights Committee declared itself “disturbed by the fact that the state of emergency proclaimed by Egypt in 1981 is still in effect, meaning that the State party has been in a semi-permanent state of emergency ever since.”<sup>179</sup> It recommended lifting the emergency but lacked the authority to do more.<sup>180</sup> Similarly, many Human Rights Council member states have expressed concern about the ongoing state of emergency and urged Egypt to lift its state of emergency during Universal Periodic Reviews, but (as is typical of the UPR process) they have not openly condemned Egypt’s abuses.<sup>181</sup>

Just before election to the UN Human Rights Council in May 2007, Egypt pledged to lift the state of emergency upon “adoption of new anti-terrorism legislation.”<sup>182</sup> Yet, on May 26, 2008, the majority in Parliament again extended the state of emergency.<sup>183</sup> It was continually extended every three years between 1981 and 2012, and was partially lifted in January 2012.<sup>184</sup> President Mohamed Morsi introduced a new emergency

176. See Suzanne Trimel, *As State of Emergency is Lifted, Egypt Must Make ‘Clean Break’ from Abusive Past and Return to Rule of Law*, AMNESTY INT’L (June 1, 2012), <https://www.amnestyusa.org/press-releases/as-state-of-emergency-is-lifted-egypt-must-make-clean-break-from-abusive-past-and-return-to-rule-of-law/>.

177. See Law No. 162 of 1958 (Law on the State of Emergency), *al-Jarīdah al-Rasmīyah*, 27 September 1958, art. 3, 4, 6 (Egypt).

178. See *id.* art. 8, 12.

179. Hum. Rts. Comm., Concluding Observations of the Hum. Rts. Comm. on Its Seventy-Sixth Session, U.N. Doc CCPR/CO/76/EGY, para. 6 (Nov. 28, 2002).

180. *Id.* para. 7.

181. *E.g.*, Hum. Rts. Council, Rep. of the Working Grp. on the Universal Periodic Rev. on Its Fourteenth Session, UN Doc. A/HRC/14/17, paras. 50 (Spain), 59 (Can.), 63 (Mex.), 75 (Swed.), 89 (Jap.) (Mar. 26, 2010).

182. *Id.* para. 14.

183. *Egypt Extends ‘State of Emergency,’* AL JAZEERA (May 27, 2008), <https://www.aljazeera.com/news/2008/5/27/egypt-extends-state-of-emergency#:~:text=Egypt%20extends%20%E2%80%98state%20of%20emergency%E2%80%99%20Decision%20is%20being,%27Muslim%20Brotherhood%27%20%5BAFP%5D%2027%20May%202008%20%E2%80%98Rights%20violations%E2>

184. See *Egypt to Lift 25-Year-Old Emergency Laws*, DAILY NEWS EGYPT (Mar. 24, 2006), <https://dailynewsegypt.com/2006/03/24/egypt-to-lift-25-year-old-emergency-laws/>; Dashiell Bennett, *Morsi’s Emergency Law Makes Matters Worse in Egypt*, THE ATL. (Jan. 28, 2013),

law in January 2013, however, to suppress unrest.<sup>185</sup> After a military coup deposed Morsi, acting president Adly Mansour reimposed the state of emergency in August 2013 in response to destructive acts of sabotage and killing by supporters of deposed president Morsi, as well as killings by the security forces opposing these supporters.<sup>186</sup>

Between late 2013 and 2017, Egypt had its longest period without a nationwide state of emergency since 1967.<sup>187</sup> There was only one exceptional declaration during this period, in October 2014, in the northern Sinai after a terrorist attack killed thirty-three Egyptian police and military personnel. In April 2017, following bomb attacks on Coptic churches by Muslim terrorists that killed forty-five people in northern Egypt, the state of emergency was declared yet again, and has been continually renewed in three-month increments since that time.<sup>188</sup> Most recently, the emergency declaration has been used to violently suppress dissent and consolidate the power of the new president, Abdel Fattah al-Sisi.<sup>189</sup>

#### IV. CONCLUSIONS

Very few African states with relatively satisfactory human rights practices used declarations of emergency before the COVID-19 pandemic for any purpose. Ghana, Namibia, and post-Apartheid South Africa, for example, all have respectable human rights records,<sup>190</sup> and none issued a declaration of emergency to derogate from human rights before 2019. In stark contrast, those African states that have most declared states of emergency, such as Chad, Democratic Republic of Congo, Egypt, and

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<https://www.theatlantic.com/international/archive/2013/01/emergency-law-only-makes-matters-worse-egypt/319000/>.

185. Bennett, *supra* note 184.

186. Rana Muhammad Taha, *State of Emergency and Curfew Imposed*, DAILY NEWS EGYPT (Aug. 14, 2013), <https://dailynewsegypt.com/2013/08/14/state-of-emergency-and-curfew-imposed/>.

187. *Egypt Declares State of Emergency in Sinai After Checkpoint Bombing*, THE GUARDIAN (Oct. 24, 2014, 10:56 PM), <https://www.theguardian.com/world/2014/oct/25/egypt-declares-state-of-emergency-in-sinai-after-checkpoint-bombing>.

188. *Egypt Extends State of Emergency for Seventh Time Since Terror Attacks*, DAILY SABAH (Jan. 13, 2019, 12:00 AM), <https://www.dailysabah.com/mideast/2019/01/13/egypt-extends-state-of-emergency-for-seventh-time-since-terror-attacks>.

189. See HUM. RTS. WATCH, WORLD REPORT 2021: EVENTS OF 2020 207 (2021), <https://www.hrw.org/world-report/2021/country-chapters/egypt#>.

190. Freedom House rates these countries as “free” in the global scores (80 for Ghana, 79 for South Africa, 77 for Namibia). *Countries and Territories*, FREEDOM HOUSE (2021), <https://freedomhouse.org/countries/freedom-world/scores?sort=desc&order=Total%20Score%20and%20Status>.

Ethiopia, rank among the lowest on the Human Freedom Index.<sup>191</sup> And, when invoking states of emergency, the governments of these countries have unsurprisingly continued or aggravated their human rights violations.

Although a government with an established reputation for violating human rights obviously does not require a declaration of emergency to violate human rights, the declaration does usually assist an authoritarian government in persecuting the news media and human rights defenders, suspending constitutional processes (such as they are), deterring any impulse toward judicial independence, arresting any political opponents, and using armed force to intimidate any sectors of the public who might consider organizing protests. By establishing martial law and other restrictions on civil society, the declaration facilitates more extreme and systematic human rights violations than those that occur in ordinary times.

Some such governments have declared states of emergency multiple times in their turbulent histories. Tunisia and Zambia have each declared emergencies at least three times between 1976 and 2019.<sup>192</sup> But the length of the states of emergency is as telling as the frequency. The Human Rights Committee has observed that measures derogating from the ICCPR under Article 4 “must be of an exceptional and temporary nature.”<sup>193</sup> Emergencies are nearly always temporary by nature because only in extraordinary cases are states unable to adjust to radically changed circumstances. Declared states of emergency in Africa are often another matter. Most states of emergency declared in Africa last less than a year, sometimes only a few weeks, but others have endured several years or decades. In such cases, the declaration was usually part of a program of government repression or unconstitutional bids to maintain power, as in Burkina Faso (2014 to present), Chad (2006-2019), The Gambia (2017),<sup>194</sup> Tunisia (2015 to present)<sup>195</sup> and Zambia (1964 to 1991 and again in

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191. *Id.* (all rated as “not free”—15 for Chad, 19 for the DRC, 18 for Egypt, 23 for Ethiopia).

192. See *Tunisia Repressive State of Emergency Bill a Threat to Human Rights*, AMNESTY INT’L (Mar. 15, 2019), <https://www.amnesty.org/en/latest/press-release/2019/03/tunisia-repressive-state-of-emergency-bill-a-threat-to-human-rights/>; see also Anthony Mukwita, *Zambia-Politics: State of Emergency Lifted*, INTER PRESS SERV. (MAR. 20, 1998), <https://www.ipsnews.net/1998/03/zambia-politics-state-of-emergency-lifted/#more-65480>.

193. HRC, GC No. 29, *supra* note 2, para. 2.

194. *Gambia: State of Emergency No License for Repression*, AMNESTY INT’L (Jan. 18, 2017), <https://www.amnesty.org/en/latest/news/2017/01/gambia-state-of-emergency-no-license-for-repression/>; *The Gambia’s President Declares State of Emergency*, BRIT. BROAD. CO. (Jan. 17, 2017), <https://www.bbc.com/news/world-africa-38652939>; Jaime Yaya Barry & Dionne Searcey, *President’s Term Running Out, Gambia Shudders as He Refuses to Quit*, N.Y. TIMES, Jan 19, 2017, at A4.

195. See *Tunisia: Repressive State of Emergency Bill a Threat to Human Rights*, AMNESTY INT’L (Mar. 15, 2019), <https://www.amnesty.org/en/latest/news/2019/03/tunisia-repressive-state->

2017).<sup>196</sup> Egypt in particular stands out as a chronic abuser of states of emergency, to the point that the term has lost all meaning.

Even African states with less severe human rights problems have frequently declared states of emergency under conditions that do not satisfy Article 4(1) of the ICCPR. Declarations have been used to quell both peaceful protests and riots which, under even a charitable interpretation of the facts, could not be construed as “threaten[ing] the life of the nation.” In some cases, the declarations have been entirely justified by the circumstances. Often in those cases, human rights have been derogated no more than strictly necessary to address the emergency. Much more often, the declarations are unnecessary, disproportionate, or both.

As a procedural matter, compliance with the ICCPR Article 4 notification requirement in African practice has been disappointing as well. Even African states with good human rights records have rarely notified the United Nations of their declarations of emergency. However, when they do send notice to the United Nations, they almost never specify which human rights they intend to derogate and attempt to justify those derogations with reference to the relevant circumstances, as required by Article 4(3).

Obviously, those African states that have notified the UN Secretary-General of their intention to derogate specific human rights have not made a practice of explicitly declaring an intention to derogate from rights listed as nonderogable under Article 4. In practice, African states have frequently violated nonderogable rights during states of emergency, including the rights to life and personal security; the right to freedom from torture and other cruel, inhuman and degrading treatment; the right to protection from retroactive criminal laws; the rights to freedom of thought, conscience, and religion; and the right to freedom from discrimination.

As for derogable rights, even when a declaration of emergency was justified by the facts, African states have frequently violated Article 4(1) by suspending these rights in a manner not necessary to address the emergency. The case studies summarized in Part III.B exemplify this trend,

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of-emergency-bill-a-threat-to-human-rights/; Human Rights Committee, Human Rights Committee Asks Tunisia about State of Emergency and Torture, Urges Human Rights Protection in Counter-Terrorism, (Mar. 4, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25657&LangID=E>.

196. See Chiponde Mushingeh, *The Evolution of One-Party Rule in Zambia, 1964-1972*, 22 TRANSAFRICAN J. OF HIST. 100, 110 (1993); *State of Emergency Declared in Zambia*, INDEP. ONLINE (July 6, 2017), <https://www.iol.co.za/news/africa/state-of-emergency-declared-in-zambia-10159360>; Ernest Chanda, *How to Gut a Democracy in Two Years*, FOREIGN POL’Y (Aug. 3, 2017), <https://foreignpolicy.com/2017/08/03/how-to-gut-a-democracy-in-two-years-zambia-state-of-emergency-lungu/>; *Zambia Suspends Pro-Opposition TV News Channel*, EYEWITNESS NEWS (Mar. 9, 2019, 8:55 PM), <https://ewn.co.za/2019/03/04/zambia-suspends-pro-opposition-tv-news-channel>.

as do many declarations of emergency not mentioned there. For example, the government of Gabon declared a state of siege on May 25, 1990 after political rioters attacked government buildings and private business firms,<sup>197</sup> but it continued the declaration in effect for months after the riots dissipated, probably to facilitate undermining the integrity of the first multiparty election in September 1990.<sup>198</sup> Similarly, although the government of The Gambia justifiably declared a state of emergency in 1981 in response to an attempted *coup d'état* while the president was out of the country, it left the state of emergency, along with its derogations of the rights to freedom of movement, freedom from arbitrary detention, and a fair trial, in place for almost four years after the attempt was foiled.<sup>199</sup> Similar examples include the Republic of Congo in 1993,<sup>200</sup> Ivory Coast in 2000,<sup>201</sup> and Ethiopia from 2015 until 2018.<sup>202</sup>

In summarizing the lessons of African law and practice, it is important not to allow the general trend to prejudice the judgment of individual cases. Some have argued that derogations present a rational policy option in unpredictable situations,<sup>203</sup> and African states have sometimes used derogations moderately, in a manner entirely consistent with ICCPR Article 4. But any close analysis of the actual trends in Africa paints a discouraging portrait of Article 4. Precious few African constitutions are

197. *See Troops Sent into Gabon's Port Gentil to Calm Unrest*, ASSOCIATED PRESS NEWS (May 28, 1990), <https://apnews.com/article/ffd3ef6d6c1f036ad5cb55f1a378eb86>; *Protesters in Gabon Battle for an Oil Depot*, N.Y. TIMES, May 30, 1990, at A15; John Hatchard, *States of Siege/Emergency in Africa*, 37 J. AFR. L. 104, 106 (1993).

198. *Irate Voters in Gabon Attack Poll Aides and Ballot Boxes*, N.Y. TIMES, Sept. 17, 1990, at A8.

199. *See* ARNOLD HUGHES & DAVID PERFECT, *Electoral Politics, 1981-94*, in A POLITICAL HISTORY OF THE GAMBIA, 1816-1994, 221, 221 (2006); Hatchard, *supra* note 197, at 106; Tijan M. Sallah, *Economics and Politics in the Gambia*, 28 J. MODERN AFR. STUD. 621 (1990).

200. *Emergency Declared in Congo*, N.Y. TIMES, July 17, 1993, at A5; U.S. DEP'T OF STATE, *U.S. Department of State Country Report on Human Rights Practices 1993 - Congo*, REFWORLD (Jan. 30, 1994), <https://www.refworld.org/docid/3ae6aa4bc.html>.

201. *See* U.S. DEP'T OF STATE, *Cote D'Ivoire*, in 25 ANNUAL HUMAN RIGHTS REPORTS SUBMITTED TO CONGRESS 166 (2000), <https://heinonline.org/HOL/P?h=hein.intyb/huhelsnk0025&i=200&a=YXN1LmVkdQ>; *see also* HUM. RTS. WATCH, *CÔTE D'IVOIRE: THE NEW RACISM 7* (2001); *see also* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. AND LAB., 2001 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: COTE D'IVOIRE (Mar. 4, 2002), [https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/07/hrp01cote\\_divoire.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/07/hrp01cote_divoire.pdf); *see also* HUM. RTS. WATCH, *CÔTE D'IVOIRE: THE NEW RACISM 7* (2001).

202. *See, e.g., Ethiopia Rights Body: 'More than 600 Protest Deaths'*, BRIT. BROAD. CO. (Apr. 18, 2017), <https://www.bbc.com/news/world-africa-39619979>; Amnesty Int'l, *Human Rights in Africa, Review of 2019: Ethiopia*, AI Index AFR 01/1352/2020 (Apr. 8, 2020).

203. Laurence R. Helfer, Emilie M. Hafner-Burton & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 INT'L ORG. 673-707 (2011).

fully consistent with ICCPR Article 4, and among those that are superficially consistent, the state's actual practice may violate the derogation provision regardless.

As noted, derogations are used much more readily and for much longer periods by authoritarian governments with poor human rights records than by governments that generally respect human rights. When derogations are invoked, the notification procedure of Article 4 is rarely observed. The scope and purpose of derogations very rarely comply either with the conditions of necessity and proportionality required by Article 4, nor are nonderogable rights consistently respected. The notable exception is the response of African states to the COVID-19 pandemic. The African governments that have used states of emergency to respond to COVID-19 in a manner consistent with Article 4 greatly outnumber those that have opportunistically abused the pandemic to undermine human rights.

Nonetheless, it is far from clear that a formal procedure for derogating from human rights during states of emergency has advanced any important policy, other than requiring (without consistently achieving) some measure of transparency during states of emergency. The absence of an explicit authorization for derogations in the Banjul Charter has not resulted in a general belief among African states or the Arusha Court that suspending human rights in an emergency *ipso facto* violates the Charter, despite a position to the contrary sometimes taken by the African Commission and ECOWAS Community Court. This suggests that the ordinary principles justifying limitations of human rights suffice in emergency situations quite as well as they do in normal life. That is not surprising, given that the usual test for limitations—that any limitation be prescribed by law, necessary for a legitimate government aim, and proportional to that aim<sup>204</sup>—could reasonably be viewed as no more and no less exacting than Article 4's requirements for derogation. In light of the technical superfluity of a derogation provision, the lessons of Africa strongly suggest that the main function of ICCPR Article 4 in practice is to provide political cover for violations of civil and political rights on an exceptional scale, rather than to provide any leeway to respond to emergencies that international human rights law would normally deny to states.

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204. See *supra* sources cited in note 17; Badar, *supra* note 8, at 63.

## APPENDIX - CONSTITUTIONAL PROVISIONS ON STATES OF EMERGENCY

## ALGERIA, Constitution of Nov. 1, 2020

- Article 112 (state of emergency or state of siege)
- Article 113 (state of emergency or siege is defined by legislation)
- Article 114 (“state of exception”)
- Article 117 (suspends constitution during state of war and makes president dictator)

## ANGOLA, Constitution of Jan. 21, 2010

- Article 58 (limitation or suspension of human rights during state of emergency)

## BOTSWANA, Constitution of Sept. 30, 1966 (rev. Feb. 5, 2016)

- Article 16 (authorizes derogation of human rights)
- Article 17 (state of emergency)

## BOTSWANA, Constitution of Sept. 30, 1966 (rev. Feb. 5, 2016)

- Article 16 (human rights derogation)
- Article 17 (state of emergency declaration)

## BURKINA FASO, Constitution of June 11, 1991 (rev. Nov. 5, 2015)

- Article 58 (state of emergency or state of siege)
- Article 59 (state of emergency declaration by President)
- Article 101 (state of siege and state of urgency are defined by legislation)
- Article 106 (Parliament’s “plain right” in state of siege)

## CAMEROON, Constitution of June 2, 1972 (rev. April 14, 2008)

- Article 9 (state of emergency or state of siege declaration by President)
- Article 45 (ratified treaties override national laws)

## CAPE VERDE, Constitution of Sept. 14, 1981 (rev. May 3, 2010)

- Article 25 (suspension of human rights during state of emergency or martial law)
- Article 297 (non-derogable rights and statuses during state of emergency or martial law)

CENTRAL AFRICAN REPUBLIC, Constitution of Nov. 26, 1964 (rev. Mar. 27, 2016)

- Article 31 (President's declaration of state of emergency; and Parliament's ongoing role and "plain right" in its continuation)
- Article 32 (state of emergency or state of siege declaration by President)
- Article 66 (state of emergency or state of siege are defined by legislation)

CHAD, Constitution of Mar. 31, 1996 (rev. May 4, 2018)

- Article 87 (state of emergency declaration and non-derogable rights during state of emergency)

COMOROS, Constitution of Dec. 23, 2001 (rev. July 30, 2018)

- Article 19 (suspension of human rights during state of emergency)
- Article 55 (state of emergency declaration by President)

DEMOCRATIC REPUBLIC OF CONGO, Constitution of June 30, 1960 (rev. Oct. 25, 2015)

- Article 61 (non-derogable human rights during state of emergency)
- Article 85 (state of emergency declaration by President; and state of emergency of state of siege are defined by legislation)
- Art. 157 (state of emergency declaration by President; and state of emergency of state of siege are defined by legislation)

CÔTE D'IVOIRE, Constitution of Sept. 30, 1966 (rev. Feb. 5, 2016)

- Article 101 (state of emergency and state of siege are defined by legislation)

EGYPT, Constitution of Feb. 10, 1953 (rev. April 16, 2019)

- Article 92 (prohibition on suspension or limitation of human rights)
- Article 17 (state of emergency declaration by President)

EQUATORIAL GUINEA, Constitution of Nov. 17, 1991 (rev. Feb. 5, 2016)

- Article 43 (suspension of human rights during state of emergency)

ERITREA, Constitution of May 23, 1997

- Article 26 (suspension or limitation of human rights during state of emergency)



- Article 27 (state of emergency declaration by the President; and National Assembly's powers during state of emergency)
- Article 28 (prohibition on laws that infringe on fundamental rights and freedoms conferred by the Constitution)

ETHIOPIA, Constitution of Dec. 8, 1994

- Article 55 (state of emergency declaration)
- Article 77 (state of emergency declaration by Council of Ministers)
- Article 93 (suspension or limitation of human rights during state of emergency)

GABON, Constitution of March 26, 1991 (rev. Jan. 12, 2011)

- Article 16 (state of emergency)
- Article 17 (state of emergency declaration by President)

GHANA, Constitution of April 28, 1992 (rev. Dec. 16, 1996)

- Article 31 (state of emergency declaration by President)

REPUBLIC OF GUINEA, Constitution of Dec. 23, 1990 (rev. May 7, 2010)

- Article 6 (non-derogable human rights)
- Article 90 (state of emergency declaration by President)

KENYA, Constitution of Aug. 27, 2010

- Article 24 (limitations on human rights by law)
- Article 25 (non-derogable human rights)
- Article 58 (state of emergency)
- Article 132 (state of emergency declaration by President)

LIBERIA, Constitution of Jan. 6, 1986

- Article 86 (state of emergency declaration by President)
- Article 87 (limitations on powers conferred during state of emergency)
- Article 88 (Legislature's approval of state of emergency)

MADAGASCAR, Constitution of Aug. 19, 1992 (rev. Dec. 11, 2010)

- Article 61 (state of exception or state of emergency)
- Article 17 (state of emergency declaration)

MALAWI, Constitution of May 16, 1994 (rev. Feb. 14, 2017)

- Article 45 (non-derogable rights during state of emergency declared by President)

MALI, Constitution of Jan. 12, 1992

- Article 49 (state of emergency declaration by President)
- Article 50 (state of emergency powers)
- Article 72 (state of emergency and state of siege are defined by legislation)

MAURITANIA, Constitution of July 12, 1991

- Article 39 (state of emergency declaration by President; and respective limitations on powers)
- Article 71 (state of emergency and state of siege are defined by legislation)

MOROCCO, Constitution of July 29, 2011

- Article 59 (state of exception declaration by King; and fundamental freedoms and rights must still be guaranteed during state of exception)
- Article 74 (state of siege)

MOZAMBIQUE, Constitution of Dec. 21, 2004 (rev. Jan. 14, 2004)

- Article 56 (limitations on human rights and freedoms)
- Article 72 (state of emergency declaration)
- Article 282 (state of emergency of state of siege)
- Article 283 (state of emergency declaration in situations of a “less serious nature”)
- Article 284 (duration of state of emergency or state of siege)
- Article 285 (approval of state of emergency by Assembly of the Republic)
- Article 286 (non-derogable rights during state of emergency or state of siege)
- Article 287 (permitted limitations on human rights and freedoms during state of emergency or state of siege)

NAMIBIA, Constitution of Feb. 9, 1990 (rev. Sep. 19, 2014)

- Article 24 (non-derogable human rights during state of emergency)
- Article 26 (state of emergency declaration by President; and limitations on human rights and freedoms during state of emergency)

NIGER, Constitution of Nov. 25, 2010 (rev. June 8, 2017)

- Article 67 (state of emergency declaration)
- Article 68 (state of emergency is defined by legislation)

NIGERIA, Constitution of May 29, 1999 (rev. March 3, 2011)

- Article 45 (limitations on suspending or restricting human rights and freedoms during state of emergency)
- Article 305 (state of emergency declaration or request thereof by President or Governor)

SENEGAL, Constitution of Jan. 7, 2001 (rev. March 20, 2016)

- Article 69 (state of emergency or state of siege; and state of emergency and state of siege are defined by legislation)
- Article 70 (during time of war, invasion, or attack, human rights must be governed by organic law)

SIERRA LEONE, Constitution of Jan. 10, 1991 (rev. Sep. 30, 2013)

- Article 29 (state of emergency and its declaration)

SOUTH AFRICA, Constitution of Dec. 4, 1996 (rev. Nov. 20, 2012)

- Article 37 (state of emergency; and non-derogable human rights during state of emergency)

SUDAN, Constitution of Aug. 4, 2019

- Article 48 (prohibition on derogation from rights and freedoms guaranteed in Bill)
- Article 210 (state of emergency declaration)
- Article 211 (non-derogable human rights and freedoms during state of emergency)
- Article 212 (state of emergency duration)

TANZANIA, Constitution of April 26, 1977 (rev. Sep. 30, 2005)

- Article 30 (limitations on human rights and freedoms)
- Article 31 (National Assembly limitations in enacting legislation during state of emergency)
- Article 32 (state of emergency declaration by President)

UGANDA, Constitution of Oct. 8, 1995 (rev. Dec. 20, 2017)

- Article 44 (non-derogable human rights and freedoms)
- Article 46 (laws and their effects during state of emergency)

- Article 110 (state of emergency declaration by President)

TUNISIA, Constitution of Jan. 26, 2014

- Article 49 (limitations on human rights and freedoms)
- Article 80 (state of emergency)

ZAMBIA, Constitution of Aug. 31, 1991 (rev. Jan. 5, 2016)

- Article 25 (limitations on human rights derogation)
- Article 30 (state of emergency declaration by President)
- Article 31 (state of emergency)

ZIMBABWE, Constitution of May 22, 2013 (rev. July 25, 2017)

- Article 86 (limitations on human rights)
- Article 87 (limitations or suspensions of human rights during state of emergency)
- Article 113 (state of emergency declaration)

# DISCLAIMING WARRANTIES THAT WERE NEVER IMPLIED: THE IRRELEVANCE OF UCC SECTION 2-316 FOR ARTICLE 35 OF THE CISG

William P. Johnson \*

1.	INTRODUCTION.....	686
2.	IDENTIFYING THE PROBLEM.....	691
	A. <i>U.S. Case Law and UCC Bias</i> .....	691
	B. <i>U.S. Courts Applying the CISG</i> .....	694
3.	UNDERSTANDING THE BODIES OF LAW .....	696
	A. <i>Implied Warranties Under Article 2 of the UCC</i> .....	696
	B. <i>Seller's Obligations Under Article 35 of the CISG</i> .....	699
4.	THE PRINCIPLE OF VALIDITY AND REQUIREMENTS AS TO FORM..	700
	A. <i>Validity and its Scope under the CISG</i> .....	701
	B. <i>Validity and the Article 4 Exception</i> .....	702
	C. <i>Validity Does Not Include Requirements as to Form</i> .....	702
	D. <i>The UCC and Freedom of Contract</i> .....	704
	E. <i>UCC Section 2-316 Creates Requirements as to Form</i> .....	706
5.	THE NARROW APPLICATION OF UCC SECTION 2-316 .....	708
	A. <i>The CISG Preempts Article 2 of the UCC</i> .....	708
	B. <i>UCC Section 2-316 Applies Only to UCC Implied Warranties</i> .....	710

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6.	CONTINUING RELEVANCE OF PRINCIPLES OF VALIDITY .....	712
7.	HOW SHOULD THE ANALYSIS PROCEED? .....	713
8.	CONCLUSION .....	714

## 1. INTRODUCTION

Standard terms and conditions of sale and standard terms and conditions of purchase—fine print in often tiny script that a commercial party uses to attempt to define and control the governing legal terms of a contract—are ubiquitous in United States trade and commerce. Pre-printed standard terms and conditions, or their electronic equivalent, appear on purchase order documents, order acknowledgment forms, and invoices; are included with quotes and bids; and are often attached as exhibits to negotiated supply agreements, equipment purchase agreements, and other sales contracts.

Well-drafted U.S. style terms and conditions of sale, which the seller's counsel drafts primarily to protect the interests of her client, the seller, usually include some limited express warranty on the goods being offered for sale. That express warranty is likely to consist of a promise by the seller to the buyer that the goods will be of a certain kind and quality, will be free from defects in material and workmanship, or will conform to certain specifications, and so on. Any such express warranty will almost invariably be followed by a disclaimer of implied warranties. That disclaimer will look something like the following clause:

**ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTY OF MERCHANTABILITY, ANY IMPLIED WARRANTIES OF FITNESS FOR ANY PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE, ARE HEREBY EXCLUDED AND DISCLAIMED.<sup>1</sup>**

The purpose of the disclaimer is to avoid application of gap-filler provisions under Article 2 of the Uniform Commercial Code (UCC) that would otherwise create default obligations binding on the seller with respect to the goods sold.<sup>2</sup> Including such a warranty disclaimer reflects the reality for many sellers that the price for the goods has been determined in

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1. This sample disclaimer language is adapted from a variety of sample terms and conditions of sale and written sell-side sales agreements on file with the author.

2. See U.C.C. § 2-314, 1A U.L.A. 497 (2012); U.C.C. § 2-315, 1B U.L.A. 10 (2012).

part by the predicted cost to the seller of warranty claims under its standard express warranty, and reflects an expectation of no additional potential warranty cost that might result from warranty claims outside the scope of the express warranty.<sup>3</sup>

The seller is likely to take the view that the express warranty offers adequate protection to the buyer insofar as it is a promise that the goods will conform to those product requirements on which the parties have expressly agreed and that are reflected in the price. If the seller's standard express warranty is deemed by the buyer to be inadequate, then the seller might agree to negotiate an expanded version of the express warranty, together with a corresponding increase in the price, but will continue to resist inclusion in the parties' bargain of any implied warranties. Including the disclaimer helps the seller avoid the risk of breach-of-warranty claims made by disappointed buyers when the goods are as expressly promised but are nevertheless not precisely what the buyer ultimately realizes the buyer wanted or needed because of the buyer's idiosyncratic circumstances. Breach-of-warranty claims that arise outside the scope of the express warranty are more difficult to predict and, therefore, can be more difficult to account for in the price of the goods.

In the author's experience, the express warranty and related limitation-on-liability provisions of a written, sale-of-goods contract are usually negotiated, at least when the buyer and the seller are sophisticated commercial parties and take the time to enter into a written agreement. The more robust the express warranty is, the more likely it is that the buyer will agree to a disclaimer of implied warranties. This is especially true when the seller has also agreed to reasonable indemnification obligations,<sup>4</sup> thereby giving the buyer more clearly defined protection against certain identified risks associated with purchase and use of the goods, without opening the door to vaguer notions of "merchantability."<sup>5</sup>

Although the provisions of the express warranty and other commercial terms of the agreement may be highly negotiated, the form of the disclaimer

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3. "Sellers should be expected to factor that obligation [to provide conforming goods] into the price they charge for the goods." CLAYTON P. GILLETTE, *ADVANCED INTRODUCTION TO INTERNATIONAL SALES LAW* 83 (2016).

4. For example, the seller might agree to indemnify the buyer from and against third-party infringement claims that could arise if the goods produced by the seller are alleged to infringe upon third-party intellectual property rights, at least when the seller is in the better position to bear such risk.

5. The term "merchantability" as used in the U.C.C. is defined in a way that is open-ended and arguably leaves a great deal of room for argument. "Subsection (2) [of U.C.C. Section 2-314] does not purport to exhaust the meaning of 'merchantable' ... and [instead] the intention is to leave open other possible attributes of merchantability." U.C.C. § 2-314 cmt. 6, 1A U.L.A. 497 (2012).

itself is quite uniform across terms and conditions of sale, as well as negotiated sales agreements. Such uniformity in form is unsurprising because there is a statutory basis for the form of the disclaimer, as it appears above.<sup>6</sup> It is drafted to satisfy formal statutory requirements in three related but distinct ways.<sup>7</sup> Specifically, first, the disclaimer is in writing.<sup>8</sup> Second, there is express inclusion of the term “merchantability.”<sup>9</sup> Third, the text of the disclaimer is in capital letters, equal to or greater than the surrounding text, and is in boldface type, making it conspicuous.<sup>10</sup> Experienced U.S. lawyers who regularly draft and negotiate sales contracts almost reflexively include this sort of warranty disclaimer when representing the seller, and intentionally do so in the manner prescribed by UCC Section 2-316(2) to satisfy the formal requirements of that statute.<sup>11</sup>

However, not all sales of goods are governed by Article 2 of the UCC. Many sales—including sales involving U.S. buyers and sellers—are governed by an international treaty called the United Nations Convention on Contracts for the International Sale of Goods, or CISG.<sup>12</sup> When it

6. See U.C.C. § 2-316(2), 1B U.L.A. 149 (2012).

7. Under Article 2 of the U.C.C., which governs transactions in goods, U.C.C. § 2-102, certain formalities must be observed when attempting to exclude or modify U.C.C. implied warranties:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

U.C.C. § 2-316(2), 1B U.L.A. 149 (2012).

8. To effectively exclude an implied warranty of fitness under Subsection (2) of Section 2-316, the disclaimer “must be by a writing.” *Id.*

9. To effectively exclude the implied warranty of merchantability under Subsection (2) of Section 2-316, whether the disclaimer is oral or in writing, the disclaimer “must mention merchantability.” *Id.*

10. To effectively exclude an implied warranty of fitness under Subsection (2) of Section 2-316, the disclaimer must not only be in writing, but also be “conspicuous,” and when the implied warranty of merchantability is disclaimed in writing, any such “writing must be conspicuous.” *Id.* The formal requirement that a writing be “conspicuous” can be satisfied in different ways, including when “a heading [is] in capital letters equal to or greater in size than the surrounding text,” and when language in the body of a record or display [is] . . . in contrasting type.” U.C.C. § 1-201(b)(10) (amend. 2001), 1 U.L.A. 24 (2012).

11. U.C.C. § 2-316(2), 1B U.L.A. 150 (2012).

12. See U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]. Subject to certain exclusions, the CISG governs contracts for the sale of goods between parties whose places of business are in different countries when the countries are “Contracting States” (that is, parties to the CISG). *Id.* art. 1(1)(a). “This Convention applies to contracts of sale of goods between parties whose place of business are in different States: (a) when the States are Contracting States.” *Id.* In the typical cross-border sale of goods transaction, unless it is excluded by the parties, the CISG will usually govern the transaction if the



applies to a sales contract, the CISG, rather than Article 2 of the UCC or other domestic sales law, governs the rights and obligations of the seller and the buyer.<sup>13</sup> In those sovereign states that are parties to the CISG and that have not made a declaration under Article 92(1) of the CISG (which is the vast majority of parties), the CISG also governs contract formation.<sup>14</sup>

Like Article 2 of the UCC, the CISG contains a provision, Article 35, that establishes default obligations binding on the seller with respect to the goods sold.<sup>15</sup> For many U.S. lawyers and commentators, Article 35 and its default obligations look quite similar to many of the warranty obligations of Article 2 of the UCC. Indeed, there are seemingly parallel provisions between the UCC and the CISG, as has often been noted by courts and commentators alike.<sup>16</sup> Nevertheless, the obligations are created by two distinct bodies of law. Failure to recognize that the UCC and the CISG are two distinct bodies of law—a simple truth that all too often is ignored or forgotten—has at times led to sloppy analysis and incorrect outcomes.<sup>17</sup>

One example of a recurring imprecise and improper approach to the CISG that has resulted from “UCC bias” is a tendency to view Article 35 of the CISG as essentially the same as UCC Sections 2-313, 2-314, and 2-315.<sup>18</sup> That has undoubtedly contributed to incorrect conclusions regarding

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parties’ respective places of business that are most directly involved with the transaction are in countries that have ratified the CISG. *Id.* art. 1(2), 10(a). There are currently ninety-five parties to the CISG, including the United States and most of its major trading partners. *United Nations. Convention on Contracts for the International Sale of Goods, Status of Treaties*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=X-10&chapter=10&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=X-10&chapter=10&clang=_en) (last visited Oct. 23, 2022) [hereinafter CISG Status].

13. CISG, *supra* note 12, art. 4.

14. *Id.*

15. *Id.* art. 35.

16. *See, e.g.,* Schmitz-Werke GmbH & Co. v. Rockland Indus., Inc., 37 F. Appx. 687, 691 (4th Cir. 2002); Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995); Sunrise Foods Int’l Inc. v. Ryan Hinton Inc., No. 1:17-CV-00457-CWD, 2019 WL 3755499, at \*4 (D. Idaho Aug. 8, 2019); Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011); Raw Materials, Inc. v. Manfred Forberich GmbH & Co., No. 03 C 1154, 2004 WL 1535839, at \*3-4 (N.D. Ill. July 7, 2004); *see also* Letter of Submittal from George P. Schultz, U.S. Sec’y of State, to Ronald Reagan, President of the United States of Am. (Aug. 30, 1983), in S. Treaty Doc. No. 98-9, at vi (1983) (“It will be noted that the Convention embodies the substance of many of the important provisions of the UCC and is generally consistent with its approach and outlook.”) *Id.*

17. For one example of analysis of failure to properly distinguish the U.C.C. and the CISG, *see* William P. Johnson, *The Hierarchy That Wasn’t There: Elevating “Usage” to its Rightful Position for Contracts Governed by the CISG*, 32 NW. J. INT’L L. & BUS. 263, 269-75 (2012).

18. *See, e.g.,* Norfolk Southern Ry. Co. v. Power Source Supply, Inc., Civ. Action No. 06-58 J., 2008 WL 2884102, at \*5 (W.D. Pa. July 25, 2008) (reasoning that the seller in the dispute before the court has conceded that “although the CISG does not specifically include the implied warranties of fitness and merchantability, CISG art. 35 may properly be read to suggest them”); *see also* CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND

what is required to exclude or modify sellers' obligations that would otherwise become part of the parties' agreement under Article 35 of the CISG.

Some U.S. commentators and courts have taken the view that a written disclaimer in a sale-of-goods contract that is governed by the CISG must satisfy the requirements of UCC Section 2-316 to effectively exclude seller's obligations implied under Article 35 when U.S. law provides the applicable domestic sales law that supplements the CISG.<sup>19</sup> As one highly respected CISG scholar has presented the matter, "some domestic legislation, applicable to commercial transactions, restricts the effectiveness of contract provisions that 'disclaim' implied obligations ('warranties') as to quality of the goods. Is this legislation applicable to sales that are subject to the Convention?"<sup>20</sup>

However, it simply is not the case that the formal requirements of UCC Section 2-316 must be satisfied to modify or exclude CISG Article 35 obligations, as this article seeks to demonstrate. That view of the presumed relevance of UCC Section 2-316 for exclusion or modification of Article 35 obligations misunderstands both (i) the exceptions to the scope of validity under Article 4 of the CISG and (ii) the narrow focus and limited reach of UCC Section 2-316. That misunderstanding undermines predictability, which in turn undermines the goal of the CISG to provide "uniform rules which govern contracts for the international sale of goods" and to "contribute to the removal of legal barriers in international trade and promote the development of international trade."<sup>21</sup>

This article argues that UCC Section 2-316 has no relevance for Article 35 of the CISG, including for purposes of determining the proper means to exclude or to modify obligations that arise under Article 35. This article proposes an understanding of the scope of the validity exception under Article 4 of the CISG which does not reach the formal requirements established by UCC Section 2-316. This article also demonstrates that even

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INTERNATIONAL 372 (3d ed. 2016) (stating that Article 35 creates seller obligations "in a manner that is consistent with many of the characteristics of UCC implied warranties"); JOHN A. SPANOGLE & PETER WINSHIP, *INTERNATIONAL SALES LAW: A PROBLEM-ORIENTED CASEBOOK* 204 (2d ed. 2012) (comparing UCC implied warranty obligations with Article 35 of the CISG and concluding that the CISG "uses different terminology but yields the same results").

19. See, e.g., *Norfolk Southern Ry. Co.*, 2008 WL 2884102, at \*5; see also Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 *YALE J. INT'L L.* 1, 85-86 (1993); see generally Laura E. Longobardi, *Disclaimers of Implied Warranties: The 1980 United Nations Convention on Contracts for the International Sale of Goods*, 53 *FORDHAM L. REV.* 863 (1985).

20. JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* ¶ 230, at 256-57 (1982).

21. CISG, *supra* note 12, pmb1.

if the validity exception under Article 4 should be understood to reach the sort of requirements established by UCC Section 2-316, it ultimately matters not because UCC Section 2-316 itself applies only to the relevant provisions of Article 2 of the UCC and not to other bodies of sales law. Finally, this article proposes a better way to approach exclusion or modification of default obligations that arise under Article 35 of the CISG.

## 2. IDENTIFYING THE PROBLEM

### A. U.S. Case Law and UCC Bias

The various approaches that U.S. courts take when analyzing Article 35 of the CISG are mixed—some engaging in careful analysis of the CISG, recognizing that it is a distinct body of law;<sup>22</sup> some leaping too quickly to the conclusion that analysis of seemingly analogous UCC provisions is applicable to the corresponding provisions in the CISG;<sup>23</sup> and some engaging in very little analysis of the CISG at all.<sup>24</sup>

The *Dingxi Longhai Dairy, Ltd.* decision involved a dispute that arose out of a sale of inulin by Dingxi Longhai Dairy, Ltd. (“Dingxi”), a Chinese seller, to Becwood Technology Group LLC, a Minnesota buyer (“Becwood”).<sup>25</sup> The CISG governed the contract between the parties, which the court recognized.<sup>26</sup> Nevertheless, in analyzing the buyer’s claims pled in “warranty,” the court jumped directly to a UCC analysis, citing another decision by a U.S. court for the proposition that “caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code may inform court when applying CISG.”<sup>27</sup> The court then proceeded with its analysis, largely ignoring the relevant provisions of the CISG.<sup>28</sup>

Such UCC bias frequently creeps into U.S. courts’ analysis with respect to various provisions of the CISG that are before the court. With respect to Article 35, *Norfolk Southern Ry. Co. v. Power Source Supply, Inc.* is the primary U.S. case making an incorrect blanket statement

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22. See, e.g., *Electrocraft Arkansas, Inc. v. Super Elec. Motors, Ltd.*, No. 4:09cv00318 SWW, 2009 WL 5181854, at 4 (E.D. Ark. Dec. 23, 2009).

23. See, e.g., *Norfolk Southern Ry. Co. v. Power Source Supply, Inc.*, Civ. Action No. 06-58 J., 2008 WL 2884102 (W.D. Pa. July 25, 2008).

24. See, e.g., *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group, L.L.C.*, 718 F. Supp. 2d 1019, 1021 (D. Minn. 2010).

25. See *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group, L.L.C.*, 718 F. Supp. 2d 1019, 1021 (D. Minn. 2010).

26. *Id.* at 1022.

27. *Id.* at 1025 (citing *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 898 (7th Cir. 2005)).

28. *Id.*

regarding the need to satisfy the requirements of UCC Section 2-316 to disclaim Article 35 obligations.<sup>29</sup>

That case involved the sale of locomotives by a U.S. seller to a Canadian buyer.<sup>30</sup> The sales contract was governed by the CISG.<sup>31</sup> The seller's written bill of sale, which was executed by the buyer, included an express disclaimer, in all-capital letters, of "any implied warranty of merchantability or fitness for a particular purpose."<sup>32</sup> In considering that disclaimer, the court stated that "[t]he validity of the disclaimer cannot be determined by reference to the CISG itself."<sup>33</sup> The court's reasoning was based on Article 4 of the CISG, which generally excludes principles of validity from the scope of the CISG.<sup>34</sup>

That is a seductive claim. Such an approach to analysis of Article 4 of the CISG simplifies that Article and the analysis it requires. Article 4 does indeed provide that the CISG "is not concerned with . . . the validity of the contract or any of its provisions," after all.<sup>35</sup> However, the court's approach fails to recognize that Article 4 is not an absolute statement on the scope of validity within the CISG, insofar as Article 4 also qualifies the exclusion of validity with the clause, "except as otherwise expressly provided in" the CISG.<sup>36</sup> The court's approach also fails to wrestle with the actual scope of the principle of validity to determine whether its meaning should reach the formal requirements established by UCC Section 2-316.

With no reasoning or analysis, the court concluded that it was "necessary to turn to" choice-of-law rules.<sup>37</sup> The court cited three cases to support its conclusion but without analysis or further explanation for its conclusion, instead turning its focus to analysis of formalistic requirements for disclaiming UCC implied warranties.<sup>38</sup> Yet, none of the three cases cited by the court engaged in any analysis of the validity exception of the CISG or the relationship between Article 35 of the CISG and UCC Section 2-316.

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29. *See* Norfolk Southern Ry. Co. v. Power Source Supply, Inc., Civ. Action No. 06-58 J., 2008 WL 2884102 (W.D. Pa. July 25, 2008).

30. *Id.* at \*1.

31. *Id.* at \*2.

32. *Id.* at \*5.

33. *Id.* (citing CISG, art. 4(a)).

34. *Id.*

35. CISG, *supra* note 12, art. 4.

36. *Id.*

37. Norfolk Southern Ry. Co. v. Power Source Supply, Inc., Civ. Action No. 06-58 J., 2008 WL 2884102, at \*5 (W.D. Pa. July 25, 2008).

38. *Id.* at \*5 (citing Geneva Pharm. Tech. Corp. v. Barr Labs., 201 F. Supp. 2d 236, 282-83 (S.D.N.Y. 2002) *rev'd on other grounds*, 97 F.3d 1, 12-13 (2d Cir. 1996)).

The *Geneva Pharmaceuticals Technology Corp.* decision, which was relied on by the court in *Norfolk Southern Railway Company*, involved a complex case with numerous parties and complicated antitrust claims.<sup>39</sup> One of the plaintiffs, a New Jersey company, alleged a breach-of-contract claim against one of the defendants, a Canadian company, in connection with the supply of clathrate, a substance used in the production of certain pharmaceutical products.<sup>40</sup> The Canadian company challenged the formation of the contract and its validity.<sup>41</sup> In considering the validity argument, the court reasoned that, “[u]nder the CISG, the validity of an alleged contract is decided under domestic law.”<sup>42</sup> The court continued by stating that the term “validity,” as used in the CISG, “refers to any issue by which the ‘domestic law would render the contract void, voidable, or unenforceable.’”<sup>43</sup> The court then considered the Canadian company’s position that the alleged contract failed for lack of consideration and concluded that the contract was supported by consideration.<sup>44</sup> There is no further analysis of the meaning or scope of the concept of validity, as that term is used in the CISG.<sup>45</sup> There is no analysis of Article 35 of the CISG.<sup>46</sup>

In short, the court’s statement in *Norfolk Southern Railway Company*, that “[t]he validity of the disclaimer [in the seller’s bill of sale] cannot be determined by reference to the CISG itself,” is unsupported either by relevant authority, or by careful analysis.<sup>47</sup> After citing *Geneva Pharmaceuticals Technology Corp.*, the court in *Norfolk Southern Railway Company* concluded that Pennsylvania law was the appropriate domestic law to supplement the CISG, and it stated that “Pennsylvania law requires that the disclaimer be ‘conspicuous’ and, if the warranty of merchantability is being disclaimed or modified, the ‘mention’ of the word ‘merchantability.’”<sup>48</sup>

That statement was an incorrect statement of law as applied to the facts of the case. While Pennsylvania law might very well require a disclaimer of UCC implied warranties to satisfy the UCC Section 2-316(2) requirements

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39. See *Geneva Pharm. Tech. Corp. v. Barr Labs.*, 201 F. Supp. 2d 236 (S.D.N.Y. 2002) *rev’d on other grounds*, 386 F.3d 485 (2d Cir. 2004).

40. *Id.* at 281.

41. *Id.*

42. *Id.* at 282.

43. *Id.* at 282 (citing Hartnell, *supra* note 19, at 45).

44. *Id.* at 283-84.

45. *Id.*

46. *Id.*

47. *Norfolk S. Ry. Co. v. Power Source Supply, Inc.*, No. CIV.A. 06-58 J, 2008 WL 2884102, at \*5 (W.D. Pa. July 25, 2008).

48. *Id.* at \*6.

identified by the court, UCC implied warranties were not part of the sale-of-goods contract that was at issue before the court. That contract was governed by the CISG, and the CISG preempts Article 2 of the UCC, as explained more fully in Section 5 of this article.

Similarly, in *Berry v. Ken M. Spooner Farms, Inc.* the court asserted with virtually no analysis that “[t]he CISG does not govern the enforceability of the exclusionary clause pursuant to an express provision in the CISG,” while also citing the *Geneva Pharmaceuticals* decision.<sup>49</sup> The *Berry* decision was reversed on other grounds but has contributed to misunderstanding of the relationship between the CISG and Article 2 of the UCC with respect to disclaimers of warranty and warranty-like obligations.<sup>50</sup>

While respectful disagreement with the courts’ failure to engage in careful, robust analysis of the CISG and its distinctive provisions is arguably appropriate, these two courts are hardly alone. U.S. courts routinely engage in analysis that reflects UCC bias.<sup>51</sup> Moreover, the issue of the scope and meaning of validity under the CISG and its relevance, if any, for the relationship between Article 35 of the CISG and UCC Section 2-316 has not been squarely addressed by careful analysis of any U.S. court. Finally, the commentary by U.S. scholars on the issue is also mixed.<sup>52</sup>

#### B. U.S. Courts Applying the CISG

Some U.S. courts have recognized that when the CISG governs a sales contract, it preempts state contract law to the extent that such law falls within the scope of the CISG. Some have specifically recognized that the CISG preempts UCC Article 2 implied warranties.<sup>53</sup>

In the *Electrocraft Arkansas, Inc.* decision, Electrocraft Arkansas, Inc., a Delaware corporation doing business in Arkansas (“Electrocraft”), was in the business of supplying electric refrigerator motors to refrigerator

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49. *Berry v. Ken M. Spooner Farms, Inc.*, No. C05-5538FDB, 2006 WL 1009299, at \*1-2 (W.D. Wash. Apr. 13, 2006), *rev'd on other grounds*, 254 F. Appx. 646 (9th Cir. 2007).

50. *See, e.g.*, Susan J. Martin-Davidson, *Selling Goods Internationally: Scope of the U.N. Convention on Contracts for the International Sale of Goods*, 17 MICH. ST. U. COLL. L. J. INT'L L. 657, 686 (2008) (citing *Berry v. Ken M. Spooner Farms Inc.*, No. C05-5538FDB, 2006 WL 1009299 (W.D. Wash. Apr. 13, 2006) for the position that contracting parties should comply with requirements of the UCC even when the contract is governed by the CISG).

51. *See, e.g.*, Johnson, *supra* note 17, at 273-75.

52. *See generally* HONNOLD, *supra* note 20; *cf.* E. Allan Farnsworth, *Review of Standard Forms or Terms Under the Vienna Convention*, 21 CORNELL INT'L L.J. 439, 444 (1988); *see also* Hartnell, *supra* note 19, at 85-86.

53. *Electrocraft Arkansas, Inc. v. Super Elec. Motors, Ltd.*, No. 4:09cv00318 SWW, 2009 WL 5181854, at 4 (E.D. Ark. Dec. 23, 2009).

manufacturers.<sup>54</sup> Super Electric Motors, LTD, a Hong Kong company with a manufacturing facility in China (“Super Electric”), produced refrigerator motors, which it sold to Electrocraft from time to time.<sup>55</sup> Electrocraft asserted that Super Electric motors began to fail at an unacceptable rate due to manufacturing defects and claimed to possess approximately 300,000 defective motors supplied by Super Electric.<sup>56</sup>

Electrocraft brought an action against Super Electric, claiming violations of Article 35 of the CISG and Article 2 of the Uniform Commercial Code.<sup>57</sup> Super Electric argued that the CISG preempted Electrocraft’s breach-of-warranty claims under Article 2 of the UCC, and the court agreed, reasoning that “[s]tate law causes of action that fall within the scope of federal law are preempted.”<sup>58</sup> Application of the CISG would therefore preempt the buyer’s claims under Article 2 of the UCC, which is state law, when “such claims fall within the scope of the CISG.”<sup>59</sup>

Similarly, in *Alpha Prime Dev. Corp.* concerning an equipment purchase agreement, a motion for partial summary judgment brought by the buyer and a motion to strike brought by the seller were before the court.<sup>60</sup> The claim was brought by Alpha Prime Development Corporation (“Alpha Prime”), the buyer of a refurbished piece of coal mining equipment, specifically a Holland 610 Loader, against the seller, Holland Loader Company, LLC (“HLC”).<sup>61</sup> Alpha Prime sought summary judgment based on HLC’s failure to deliver the equipment and HLC’s refusal to refund Alpha Prime’s money.<sup>62</sup> The court denied the motion for summary judgment.<sup>63</sup>

The parties agreed the claim was governed by the CISG.<sup>64</sup> Applying the CISG, the court concluded that under the CISG, when there is a writing between the parties, that writing is evidence of the parties’ agreement, but

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54. *Id.* at \*1.

55. *Id.*

56. *Id.*

57. *Id.* at \*1, \*4.

58. *Id.* at \*4.

59. *Id.* at \*4 (citing *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151–52 (N.D. Cal. 2001); *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting GmbH*, No. 1:05–CV–00702, 2006 WL 2924779, \*1, \*3 (S.D. Ohio Oct. 10, 2006)).

60. *Alpha Prime Development Corp. v. Holland Loader Co., LLC*, Civil Action No. 09–cv–01763–WYD–KMT, 2010 WL 2691774, \*1, \*1 (D. Colo. July 6, 2010).

61. *Id.*

62. *Id.*

63. *Id.* at \*7.

64. *Id.* at \*4.

the writing is not dispositive.<sup>65</sup> In support, the court cited Article 11 and Article 8 of the CISG.<sup>66</sup>

In this case, the buyer's motion for partial summary judgment was based, in part, on obligations arising under Article 35 of the CISG.<sup>67</sup> The court quoted relevant parts of Article 35 and concluded genuine issues of material fact existed and, accordingly, denied the motion.<sup>68</sup> In reaching its conclusion, the court made no reference to Article 2 of the UCC, nor did it rely on the statutory text of the UCC to interpret or to apply any provision of the CISG. Rather, the court laudably used the text of the CISG itself, together with other relevant sources, for understanding its meaning and thereby successfully resisted any temptation to leap to a UCC analysis.<sup>69</sup>

As more U.S. courts wrestle with the CISG text and resist the urge to import UCC understanding into CISG analysis, better understanding of the CISG is likely to follow. As other courts continue to jump to a UCC analysis of CISG provisions, lack of uniformity and corresponding uncertainty will continue.

### 3. UNDERSTANDING THE BODIES OF LAW

The careful analysis necessary to avoid importing UCC bias into CISG analysis requires understanding the law. A threshold understanding of UCC Article 2 and the CISG is likely to lead to recognition that there are similarities. A deeper understanding will lead to recognition that the two bodies of law are in fact distinct.

#### A. *Implied Warranties Under Article 2 of the UCC*

The Uniform Commercial Code (UCC) is a model U.S. law that, once adopted by the applicable legislative body of an individual U.S. state or territory, becomes part of the law of that state or territory. The UCC consists of eleven articles; Article 2 of the UCC governs "transactions in goods."<sup>70</sup> Article 2 of the UCC has been adopted by every U.S. state except Louisiana, and it has been adopted by the District of Columbia and certain

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65. *Id.*

66. *Id.* at \*4-5.

67. *Id.* at \*5.

68. *Id.* at \*5, \*7.

69. *See generally* RICHARD HYLAND, CISGAC OPINION NO. 3, PAROL EVIDENCE RULE, PLAIN MEANING RULE, CONTRACTUAL MERGER CLAUSE AND THE CISG § 2.2 (2004); Official Commentary to 1978 Draft of CISG, art. 33, ¶ 8, reprinted at 2 Guide to the Int'l Sale of Goods Convention 20-240 (West 2009); Alpha Prime Development Corp. v. Holland Loader Co., LLC, Civil Action No. 09-cv-01763-WYD-KMT, 2010 WL 2691774, \*1, \*4-6 (D. Colo. July 6, 2010).

70. U.C.C. § 2-102, 1B U.L.A. 149 (2012).



U.S. territories as well.<sup>71</sup> It is therefore broadly applicable to domestic sale-of-goods transactions in the United States (excluding those governed by the internal laws of Louisiana).<sup>72</sup>

Several sections within Article 2 of the UCC establish warranties that are made by a seller to a buyer in a sale-of-goods transaction.<sup>73</sup> One purpose of warranties “is to determine what it is that the seller has in essence agreed to sell.”<sup>74</sup> Article 2 warranties include the warranty of good title,<sup>75</sup> the warranty against infringement,<sup>76</sup> various express warranties,<sup>77</sup> the implied warranty of merchantability,<sup>78</sup> implied warranties arising from course of dealing or usage of trade,<sup>79</sup> and implied warranties of fitness for particular purpose.<sup>80</sup>

Especially relevant for this Article are the UCC implied warranties contained in UCC Sections 2-314 and 2-315. The implied warranty of merchantability is created by UCC Section 2-314(1): “Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”<sup>81</sup> Subsection (2) then provides a non-exhaustive list of minimum requirements that must be satisfied for goods to be considered merchantable.<sup>82</sup> To be merchantable, goods must satisfy each of the following:

“(a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promise or affirmation of fact made on the container or label if any.”<sup>83</sup>

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71. U.C.C. Article 2, Sales, *Map*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=403dd218-8f13-42e2-97b8-d630cd775eba> (last visited Oct. 24, 2022).

72. See U.C.C. § 1-301 (b)(10) (amend. 2001), 1 U.L.A. 57 (2012).

73. See U.C.C. §§ 2-312, 2-313, 2-314, 1A U.L.A. 281, 301, 497 (2012); U.C.C. § 2-315, 1B U.L.A. 10 (2012).

74. U.C.C. § 2-313 cmt. 4, 1A U.L.A. 302 (2012).

75. U.C.C. § 2-312(1), 1A U.L.A. 281 (2012).

76. U.C.C. § 2-312(3), 1A U.L.A. 281 (2012).

77. U.C.C. § 2-313, 1A U.L.A. 301 (2012).

78. U.C.C. § 2-314(1), 1A U.L.A. 497 (2012).

79. U.C.C. § 2-314(3), 1A U.L.A. 497 (2012).

80. U.C.C. § 2-315, 1B U.L.A. 10 (2012).

81. U.C.C. § 2-314(1), 1A U.L.A. 497 (2012).

82. U.C.C. § 2-314(2), 1A U.L.A. 497 (2012).

83. *Id.*

Implied warranties of fitness for particular purpose arise under UCC Section 2-315: “Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”<sup>84</sup> UCC implied warranties can also be created as a result of course of dealing or usage of trade: “[u]nless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.”<sup>85</sup>

Under Article 2, once made, express warranties cannot then be effectively disclaimed (assuming the express warranty can be established by the buyer, overcoming any hurdles such as the parol evidence rule of UCC Section 2-202).<sup>86</sup> By way of contrast, implied warranties can be modified or excluded, but only when the requirements of UCC Section 2-316 are satisfied:

“Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that ‘There are no warranties which extend beyond the description on the face hereof.’”<sup>87</sup>

Subsection (3) of UCC Section 2-316 provides additional, narrow ways that the implied warranties could be excluded or modified.<sup>88</sup> Consistent with the UCC’s general respect for freedom of contract,<sup>89</sup> the parties therefore can exclude or modify Article 2 implied warranties; the modification or exclusion simply must satisfy the applicable formal requirements of UCC Section 2-316 to be effective.<sup>90</sup> If an attempted disclaimer has not been made in the specific form required by the relevant

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84. U.C.C. § 2-315, 1B U.L.A. 10 (2012).

85. U.C.C. § 2-314(3), 1A U.L.A. 497 (2012).

86. U.C.C. § 2-316(1), 1B U.L.A. 149-50 (2012) (“Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the [parol evidence rule] negation or limitation is inoperative to the extent that such construction is unreasonable”). *Id.*

87. U.C.C. § 2-316(2), 1B U.L.A. 150 (2012).

88. U.C.C. § 2-316(3), 1B U.L.A. 150 (2012).

89. U.C.C. § 1-302(a), (b)(10) (amend. 2001), 1 U.L.A. 71 (2012) (“Except as otherwise provided . . . the effect of provisions of the [Uniform Commercial Code] may be varied by agreement”). *Id.*

90. U.C.C. § 2-316(2), 1B U.L.A. 150 (2012).

provision of UCC Section 2-316, then the applicable UCC implied warranty has not been effectively disclaimed.<sup>91</sup>

*B. Seller's Obligations Under Article 35 of the CISG*

When the CISG governs the sale of goods, Article 35(1) of the CISG requires the seller to deliver goods that conform to certain specific requirements of the contract: "The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract."<sup>92</sup> In addition, Article 35(2) creates default obligations binding on the seller with respect to conformity of the goods, even when not expressly required by the contract itself:

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.<sup>93</sup>

Thus, Article 35(2) causes the obligations listed in that article to become implied terms of the parties' agreement that are binding on the seller. In addition, however, Article 35(3) creates a default carveout when certain circumstances exist: "The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity."<sup>94</sup>

There are obvious parallels between Article 35 of the CISG and the warranty provisions of Article 2 of the UCC. For example, Article 35(2)(a) looks quite similar to UCC Section 2-314(2)(c), using similar, though not precisely the same, terminology with respect to the requirement that the

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91. U.C.C. § 2-316 cmt. 3 & 4, 1B U.L.A. 150 (2012).

92. CISG, *supra* note 12, art. 35(1), 16 I.L.M. 12, 1489 U.N.T.S. 11.

93. CISG, *supra* note 12, art. 35(2), 16 I.L.M. 12, 1489 U.N.T.S. 11.

94. CISG, *supra* note 12, art. 35(3), 16 I.L.M. 12, 1489 U.N.T.S. 11.

goods be fit for ordinary purposes.<sup>95</sup> Similarly, Article 35(2)(c), which provides that goods do not conform unless they “possess the qualities of goods which the seller has held out to the buyer as a sample or model,” is seemingly analogous to the Article 2 express warranty created under UCC Section 2-313(1)(c) when a sample or model “is made part of the basis of the bargain.”<sup>96</sup> Indeed, commentators have noted the striking similarities between the obligations imposed on the buyer under Article 35 of the CISG and UCC Article 2 warranty provisions.<sup>97</sup>

Yet, to properly understand and apply the CISG, it is essential to acknowledge that the two sources of law are distinct and should not be conflated. Notably, Article 35 does not use the term warranty, nor does it make any mention of merchantable or merchantability.<sup>98</sup> It is the failure to recognize the differences that has often led to confused or mistaken analysis.<sup>99</sup> As Franco Ferrari has argued, it is both “impermissible and dangerous to assert that the concepts of the CISG and the UCC are analogous.”<sup>100</sup> In Section 5 below, this article explains how that applies to this analysis.

#### 4. THE PRINCIPLE OF VALIDITY AND REQUIREMENTS AS TO FORM

Some misapplication of UCC Section 2-316 to analysis of modification or exclusion of obligations arising under Article 35 of the CISG is due to Article 4 of the CISG and its exclusion of principles of validity from the scope of the CISG. Article 4 provides, in relevant part, that “except as otherwise expressly provided in” the CISG, the CISG “is not concerned with . . . the validity of the contract or of any of [the contract’s] provisions.”<sup>101</sup>

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95. Compare CISG, *supra* note 12, art. 35(2)(a), 16 I.L.M. 12, 1489 U.N.T.S. 11, with U.C.C. § 2-314(2)(c) 1B U.L.A. 150 (2012).

96. Compare CISG, *supra* note 12, art. 35(2)(c), 16 I.L.M. 12, 1489 U.N.T.S. 11, with U.C.C. § 2-313(1)(c) 1B U.L.A. 150 (2012).

97. See, e.g., Susan J. Martin-Davidson, *Selling Goods Internationally: Scope of the U.N. Convention on Contracts for the International Sale of Goods*, 17 MICH. ST. J. INT’L L. 657, 684 (2008).

98. CISG, *supra* note 12, art. 35, 16 I.L.M. 12, 1489 U.N.T.S. 11.

99. See generally Johnson, *supra* note 17, at 270.

100. Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1023 (1996).

101. CISG, *supra* note 12, art. 4, 16 I.L.M. 2-3, 1489 U.N.T.S. 2.

A. *Validity and its Scope under the CISG*

The line of reasoning that has led to the conclusion that an attempted exclusion of Article 35 obligations must satisfy the formal requirements of UCC Section 2-316 relies on Article 4 of the CISG and its reservation of principles of validity.<sup>102</sup> The basic thrust of the argument is that because the fundamental question that is the focus of a disclaimer analysis is the validity of that disclaimer as a means of effectively eliminating obligations that would otherwise arise under applicable law, the CISG cannot be the source of law that a court should use to analyze an apparent disclaimer of the seller's obligations under Article 35. Instead, questions of validity should be answered by applicable domestic law that supplements the CISG.

For instance, one scholar asserted that the CISG “does not address the validity of warranty disclaimers... [and] [a]s a result, their validity is determined by applicable domestic law.”<sup>103</sup> The scholar concluded that an attempt to disclaim those obligations that arise under Article 35 of the CISG may have to comply with requirements under Section 2-316 of the UCC.<sup>104</sup>

Ultimately, the issue has been largely presented as a choice between viewing UCC Section 2-316 as a rule of validity on the one hand, or as a rule of interpretation on the other.<sup>105</sup> Under that approach, commentators have concluded that if the issue presents a question of validity, then the requirements of UCC Section 2-316 must be satisfied in order to disclaim Article 35 obligations, whereas if the issue presents a question of interpretation, such requirements need not be satisfied.<sup>106</sup> However, approaching the analysis in this way creates a false binary choice and is misleading. It is a false choice because that approach ignores the express limitation on the scope of the validity exception, that is, that validity is outside the scope of the CISG, “except as otherwise expressly provided in” the CISG.<sup>107</sup> Thus, even if it is the case that UCC Section 2-316 is better viewed as a rule of validity, it is a rule of validity that is not within the scope of Article 4(a). This is so because requirements as to form are expressly within the CISG by virtue of CISG Article 11, the requirements of UCC Section 2-316 are fundamentally requirements as to form, and the

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102. *See, e.g.*, Hartnell, *supra* note 19, at 85-86.

103. STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL: CASES, PROBLEMS, AND MATERIALS 284 (2014).

104. *See id.* at 285-86.

105. *See id.* at 284; *see also* HONNOLD, *supra* note 20, at 258-59; CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 377-78 (3d ed. 2016).

106. *See, e.g.*, Hartnell, *supra* note 19, at 85-86.

107. CISG, *supra* note 12, art. 4, 16 I.L.M. 2-3, 1489 U.N.T.S. 2.

requirements of UCC Section 2-316 are therefore preempted by Article 11 of the CISG.

*B. Validity and the Article 4 Exception*

The CISG is a treaty. To understand the meaning of the term validity as used in the CISG, applicable international law governing treaty interpretation requires beginning with the text of the treaty itself.<sup>108</sup> However, the term validity is not specifically defined within the CISG. The term appears in only one location anywhere in the CISG: Article 4.<sup>109</sup> Commentators have observed that because validity is undefined by the CISG there is debate regarding its meaning and scope.<sup>110</sup>

Section 4 of this article does not seek to determine a comprehensive definition of the term validity as used in the CISG or to determine the scope of that concept. Determining a comprehensive definition for the concept of validity under the CISG would be a significant undertaking indeed.<sup>111</sup> It is not necessary to do so for purposes of this, article, however, as it is enough to demonstrate that the formal requirements of UCC Section 2-316 are not within the meaning of validity as used in the CISG. To that end, this article focuses on the clause in Article 4 of the CISG that provides, “except as otherwise expressly provided in” the CISG.<sup>112</sup>

*C. Validity Does Not Include Requirements as to Form*

One distinguished CISG scholar has described as “unassailable” a U.S. court’s “premise that applicable domestic law governs the validity of a clause disclaiming” Article 35 obligations.<sup>113</sup> He then concluded that the requirement of UCC Section 2-316(2) that an effective disclaimer must expressly mention the term merchantability “appears to state a rule of

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108. Vienna Convention on the L. of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. While the United States is not a party to the Vienna Convention, the Vienna Convention is widely recognized as a codification of customary international law governing treaties. *See, e.g.*, Restatement (Fourth) of the Foreign Rel. L. of the U.S. § 301, Reporter’s Note 1 (Am. L. Inst. 2018). To the extent the Vienna Convention is a codification of customary international law, it is generally binding as a matter of international law even on those states that are not parties to the Vienna Convention. *See, e.g.*, Statute of the Int’l Ct. of Just. art. 38(1)(b), Oct. 24, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

109. CISG, *supra* note 12, art. 4.

110. *See, e.g.*, Hartnell, *supra* note 19, at 19-21; Martin-Davidson, *supra* note 97, at 680-81

111. For a thorough and thoughtful analysis of the validity exception, *see generally* Hartnell, *supra* note 19.

112. CISG, *supra* note 12, art. 4.

113. Harry M. Flechtner, *Selected Issues Relating to the CISG’s Scope of Application*, 13 VINDOBONA J. INT’L COM. L. & ARB. 91, 97 (2009).

‘validity’ within the (autonomous) meaning of Article 4(a) CISG.”<sup>114</sup> That claim requires a more careful look, however, because of the carveout contained in Article 4. As acknowledged by Flechtner, principles of validity are outside the scope of the CISG, “*except as otherwise expressly provided*” in the CISG.<sup>115</sup>

As is clear from the introductory clause of Article 35(2), Article 35 establishes default obligations only; the parties can agree to derogate from those default obligations or to exclude them altogether.<sup>116</sup> This is consistent with the general principle of party autonomy, or freedom of contract, that is contained in Article 6 of the CISG and reflected throughout the CISG.<sup>117</sup> If the introductory clause of Article 35(2) were to merely restate the party autonomy principle established under Article 6 of the CISG, then the introductory clause would be superfluous and unnecessary for the parties to have the ability to modify or to exclude Article 35 or any part of it. It is therefore noteworthy that the right to agree otherwise is expressly included in Article 35. It is further noteworthy that Article 35 lacks any requirement as to how the parties should manifest their agreement. All that is required under Article 35 for the parties to vary the obligations for conformity contained in that article, is that the parties so agree.<sup>118</sup> This is arguably an instance when the CISG “otherwise expressly provide[s]” in the sense of Article 4,<sup>119</sup> and a domestic principle of validity relating to how the parties “have agreed otherwise”<sup>120</sup> should not render the parties’ agreement unenforceable.

This is consistent with and supported by other provisions of the CISG that reject requirements as to form for effectiveness.<sup>121</sup> The principle has its strongest general statement in Article 11, which explicitly rejects a writing requirement or any other requirement as to form for the formation of an enforceable contract: “A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.”<sup>122</sup> Similarly, Article 29(1) provides “[a] contract may be modified or terminated by the mere agreement of the parties.”<sup>123</sup> Part II of the CISG,

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114. *Id.*

115. *Id.* at 92 (quoting CISG, *supra* note 12, art. 4).

116. CISG, *supra* note 12, art. 35(2).

117. “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” *Id.* art. 6.

118. *See id.* art. 35(2); *see also id.* art. 11.

119. *Id.* art. 4(a).

120. *Id.* art. 35(2).

121. *See id.* art. 11.

122. *Id.*

123. *Id.* art. 29(1).

which establishes principles relating to formation of the contract for sale, contains numerous provisions that contemplate contract formation occurring by means not requiring the observation of formalities.<sup>124</sup>

Article 96 allows states to qualify the application of Article 11 by entering a declaration that the state will retain applicable domestic requirements for a writing as a condition to enforcement of a contract.<sup>125</sup> Such a declaration could conceivably have the effect of requiring an Article 35 disclaimer to be in writing, at least if the domestic requirement were that specific. However, very few states have made an Article 96 declaration; the United States specifically has not.<sup>126</sup>

Article 11 of the CISG is focused, in part, on rejecting any writing requirement, such as that contained in the UCC's statute of frauds, as Flechtner noted in his article.<sup>127</sup> But Article 11 is not limited to a rejection of a writing requirement; it goes on to provide that a contract "is not subject to *any* ... requirement as to form."<sup>128</sup> This is an instance when the CISG "otherwise expressly provide[s]" in the sense of Article 4, with respect to any domestic principle of validity, when that apparent principle of validity is essentially a requirement as to form. That includes statutes of frauds or other requirements that a contract be in writing to be enforceable, as noted by Flechtner.<sup>129</sup> It is not limited to statutes of frauds, or there was no reason to include the second part of Article 11. The combination of the introductory clause in Article 35(2) and Article 11 is arguably enough to obviate any need to satisfy the formalities of UCC Section 2-316 by placing UCC Section 2-316 requirements within the carveout created by Article 4.

#### D. *The UCC and Freedom of Contract*

The UCC generally establishes a broad freedom of contract.<sup>130</sup> Additionally, Article 2 of the UCC rejects formal requirements with respect to formation of a contract.<sup>131</sup> Other provisions of Article 2 further reflect the realities of day-to-day commercial practice of buyers and sellers and,

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124. *E.g.*, *id.* art. 18(1) ("A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance.")

125. *Id.* art. 96.

126. CISG Status, *supra* note 12.

127. Flechtner, *supra* note 113, at 92-93.

128. CISG, *supra* note 12, art. 11, 16 I.L.M. 671, 1489 U.N.T.S. 3. (emphasis added).

129. Flechtner, *supra* note 113, at 93.

130. U.C.C. § 1-302(a), 1 U.L.A. 71 (2012).

131. U.C.C. § 2-204(1), 1 U.L.A. 667 (2012).



accordingly, do not establish strict requirements as to form for the parties to reach agreement.<sup>132</sup>

There are some notable exceptions whereby Article 2 establishes limited formalistic requirements. These include the statute of frauds,<sup>133</sup> firm offers,<sup>134</sup> and disclaimers of implied warranties.<sup>135</sup> In those instances, Article 2 requires some formal requirements to be satisfied for an agreement to be enforceable. For example, in the case of the statute of frauds, UCC Section 2-201 provides that, with some specific exceptions, “a contract for the sale of goods for the price of \$500 or more is not enforceable,” unless there is some writing that satisfies the discrete requirements of that section.<sup>136</sup> There are three such requirements for the writing that are “definite and invariable.”<sup>137</sup> Those requirements are that the writing evidence a contract was made; that it be signed; and that it specify a quantity.<sup>138</sup>

In each case, the foregoing statutory requirements as to form help to prevent unfair surprise. But none of those statutory provisions or requirements is focused on the substantive fairness of the bargain that was struck.

Other provisions of the UCC police the parties’ bargain for fairness, though such exceptions are quite limited.<sup>139</sup> The most notable is the doctrine of unconscionability.<sup>140</sup> In addition, there are limits on the ability of the parties to limit potential liability, when such limitation on potential liability would cause a remedy to “fail of its essential purpose.”<sup>141</sup> If the remedy would fail of its essential purpose, then the purported limitation on liability is not enforceable, nor is an attempted exclusion of consequential damages that is unconscionable.<sup>142</sup> None of these statutory provisions is focused primarily on requirements as to a form that must be satisfied; rather, each is focused on one way or another on fairness of the terms of the bargain.

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132. See, e.g., U.C.C. § 2-201, 1 U.L.A. 533 (2012) (providing for a contract to form through a battle of the forms).

133. U.C.C. § 2-201, 1 U.L.A. 533 (2012).

134. U.C.C. § 2-205, 1 U.L.A. 712 (2012).

135. U.C.C. § 2-316, 1B U.L.A. 149-50 (2012).

136. U.C.C. § 2-201(1) (amend. 2002), 1 U.L.A. 533 (2012).

137. U.C.C. § 2-201, cmt. 1 (amend. 2002), 1 U.L.A. 534 (2012).

138. U.C.C. § 2-201(1) (amend. 2002), 1 U.L.A. 533 (2012); U.C.C. § 2-201, cmt. 1 (amend. 2002), 1 U.L.A. 534 (2012).

139. U.C.C. § 2-302, 1A U.L.A. 155 (2012).

140. *Id.*

141. U.C.C. § 2-719.

142. *Id.*

*E. UCC Section 2-316 Creates Requirements as to Form*

UCC Section 2-316 and its requirements are more like those statutory provisions that create writing requirements and other requirements as to form than those provisions focused on fairness. One purpose of UCC Section 2-316 is to seek “to protect a buyer from unexpected and unbargained language of disclaimer . . . .”<sup>143</sup> Some commentators have focused on that purpose of UCC Section 2-316 when concluding that it is a rule of validity, similar to the doctrine of unconscionability.<sup>144</sup> But one stated purpose of UCC Section 2-316 does not alter its nature as a series of requirements as to form. In that sense, UCC Section 2-316 is much more like the statute of frauds than it is like the concept of unconscionability.

Seller’s counsel must draft a disclaimer of UCC implied warranties specifically to satisfy formal statutory requirements in three related but distinct ways for that disclaimer to be effective.<sup>145</sup> Specifically, first, the disclaimer must be in writing.<sup>146</sup> Second, the disclaimer must expressly include the term “merchantability.”<sup>147</sup> Third, the text of the disclaimer must be conspicuous.<sup>148</sup> Each of those requirements is a requirement as to form.

In contrast, the concept of unconscionability is not focused on satisfaction (or lack thereof) of formal requirements under the statute.<sup>149</sup> Rather, the “basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the

143. U.C.C. § 2-316, cmt. 1 (amend. 2002), 1B U.L.A. 149 (2012).

144. *See, e.g.*, Hartnell, *supra* note 19, at 86.

145. Under Article 2 of the U.C.C., which governs transactions in goods, certain formalities must be observed when attempting to exclude or modify U.C.C. implied warranties:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

U.C.C. § 2-316(2), 1B U.L.A. 149 (2012).

146. To effectively exclude an implied warranty of fitness under Subsection (2) of Section 2-316, the disclaimer “must be by a writing.” *Id.*

147. To effectively exclude the implied warranty of merchantability under Subsection (2) of Section 2-316, whether the disclaimer is oral or in writing, the disclaimer “must mention merchantability.” *Id.*

148. To effectively exclude an implied warranty of fitness under Subsection (2) of Section 2-316, the disclaimer must not only be in writing, but also be “conspicuous,” and when the implied warranty of merchantability is disclaimed in writing, any such “writing must be conspicuous.” *Id.* The formal requirement that a writing be “conspicuous” can be satisfied in different ways, including when “a heading [is] in capital letters equal to or greater in size than the surrounding text,” and when language in the body of a record or display [is] . . . in contrasting type.” U.C.C. § 1-201(b)(10) (amend. 2001), 1 U.L.A. 24 (2012).

149. *See* U.C.C. § 2-302 (amend. 2002), 1A U.L.A. 155 (2012).

clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”<sup>150</sup> The doctrine of unconscionability under the UCC is therefore focused on fairness. It is a flexible tool, available to the court to refuse to enforce an otherwise enforceable clause. In that sense, there is a strong argument that the concept of unconscionability is a principle of validity in the meaning of Article 4 of the CISG.<sup>151</sup> The statute of frauds contained in UCC Section 2-201, on the other hand, is a writing requirement and is outside the scope of the CISG.<sup>152</sup>

Thus, it does not matter whether UCC Section 2-316 is viewed as a rule of validity or as a rule of interpretation; either approach leads to the same conclusion, because the concept of validity, as used in the CISG, does not include requirements as to form within its scope. Relevant for this analysis, that includes requirements as to form with respect to how parties agree to modify or to exclude Article 35 obligations. The requirements of UCC Section 2-316 for effective disclaimer of UCC implied warranties are requirements as to form.<sup>153</sup>

In other words, Article 4 of the CISG generally excludes questions of validity from its scope.<sup>154</sup> However, Article 4 also includes an express carveout for any validity question that is “otherwise expressly provided” in the CISG.<sup>155</sup> Article 11 expressly rejects writing requirements, such as a statute of frauds, for a contract to be valid, and it also expressly rejects any requirement as to form.<sup>156</sup> UCC Section 2-316 is more like the statute of frauds than unconscionability and, in any event, is a statute setting forth requirements as to form. By operation of the carveout in Article 4, and the provision of Article 11 of the CISG, the requirements under UCC Section 2-316 are therefore outside the scope of the validity exception of Article 4. This is bolstered by the introductory clause of Article 35(2), which expressly contemplates exclusion or modification of the obligations under that article by agreement of the parties, without imposing requirements as to the form of that party agreement. This understanding of Article 35(2) also

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150. U.C.C. § 2-302, cmt. 1 (amend. 2002), 1A U.L.A. 156 (2012).

151. Hartnell, *supra* note 19, at 80-84 (“The prevailing view is that domestic rules permitting courts to exercise control over . . . unconscionable contracts constitute rules of validity and thus apply to contracts for the international sale of goods pursuant to article 4(a).”). *Id.*

152. See HONNOLD, *supra* note 20, at 152-53.

153. For example, for a disclaimer of the U.C.C. implied warranty of merchantability to be effective, the disclaimer “must mention merchantability” and, in case of a writing, “must be conspicuous.” U.C.C. § 2-316(2) (amend. 2002), 1B U.L.A. 149 (2012).

154. CISG, *supra* note 12, art. 4, 16 I.L.M. 671, 1489 U.N.T.S. 3.

155. *Id.*

156. *Id.* art. 11.

gives the introductory clause meaning that is independent of Article 6 of the CISG.

#### 5. THE NARROW APPLICATION OF UCC SECTION 2-316

The foregoing analysis identifies a third way of looking at UCC Section 2-316 and demonstrates that that section is irrelevant for Article 35 of the CISG. However, it is ultimately unnecessary to analyze whether UCC Section 2-316 is within or outside the scope of CISG Article 4 validity for purpose of analysis of a disclaimer of seller's obligations under Article 35. It is unnecessary, because UCC Section 2-316 applies only to UCC implied warranties, and not to CISG obligations. Indeed, the tension identified in the preceding section is borne in large part out of a reluctance to accept that if the CISG governs a contract, then Article 2 of the UCC is not the governing body of law.

The argument advanced by some commentators is that even though the CISG displaces Article 2 of the UCC, the validity exception of Article 4 of the CISG causes UCC Section 2-316 to survive and remain applicable. That approach fails to recognize that the analysis never reaches UCC Section 2-316, because UCC Section 2-316 applies only to the UCC implied warranties, and the UCC implied warranties have quite clearly been preempted. The question therefore is not whether UCC Section 2-316 is excluded by the carveout in Article 4 or remains within its scope; the question is simply whether Article 2 of the UCC has been preempted by the CISG, thereby rendering the implied warranty provisions of the UCC entirely inapplicable in the first instance. In that case, the analysis never reaches UCC Section 2-316 because that section applies only to UCC implied warranties, which do not form part of a sale-of-goods contract governed by the CISG.

##### *A. The CISG Preempts Article 2 of the UCC*

The CISG preempts Article 2 of the UCC, both as a matter of U.S. constitutional law and as a matter of international law.

The CISG is a treaty that was signed by the executive on behalf of the United States and was ratified by the U.S. Senate in accordance with Article II of the U.S. Constitution.<sup>157</sup> The CISG is therefore a treaty that was made under the authority of the United States. The U.S. Constitution makes it

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157. U.S. CONST. ART. II, § 2, CL. 2. Article II establishes the treaty power: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” *Id.*

clear that all treaties made under the authority of the United States are the supreme law of the land.<sup>158</sup> The CISG is therefore part of the supreme law of the United States. Additionally, the CISG is a self-executing treaty.<sup>159</sup> Because it is self-executing, the CISG requires no implementing legislation to become law within the United States; it automatically became law within the United States (and part of the supreme law of the land) upon its entry into force.<sup>160</sup>

This uncontroversial proposition has been recognized by U.S. courts. In reversing a district court's grant of summary judgment, the Ninth Circuit stated that, "because the President submitted the [CISG] to the Senate, which ratified it ... there is no doubt that the [CISG] is valid and binding federal law."<sup>161</sup> As part of the supreme law of the land, treaties made under

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158. See U.S. CONST. ART. VI. Article VI provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. ART. VI, § 1, CL. 2.

159. See Letter of Submittal from George P. Schultz, U.S. Secretary of State, to Ronald Reagan, President of the United States of America (Aug. 30, 1983), *reprinted in* U.S. Treaty Doc. No. 98-9, at vi (stating "the Convention is subject to ratification by signatory states (Article 91(2)), but is self-executing and thus requires no federal implementing legislation to come into force throughout the United States.") [hereinafter Letter of Submittal]; see also *Chicago Prime Packers, Inc. v. Northam Food Trading Co.*, 408 F.3d 894, 897 (7th Cir. 2005) (describing the CISG as "a self-executing agreement between the United States and other signatories"); *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1027 (2d Cir. 1995) (Describing CISG as a self-executing agreement between the United States and other signatories); Several U.S. District courts have also recognized that the CISG is a self-executing treaty. See, e.g., *Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09cv00318 SWW, 2009 WL 5181854, at \*5 (E.D. Ark. Dec. 23, 2009); *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Group, L.L.C.*, Civ. No. 08-762 (DSD/SRN), 2008 WL 2690287, at \*1 n.1 (D. Minn. July 1, 2008); see also *Forestal Guarani, S.A. v. Daros Int'l, Inc.*, Civ. Action No. 03-4821 (JAG), 2008 WL 4560701, at \*2, n.4 (D.N.J. Oct. 8, 2008); *Sky Cast, Inc. v. Global Direct Distribution, LLC*, Civ. Action No. 07-161-JBT, 2008 WL 754734, at \*4 (E.D. Ky. Mar. 18, 2008); *Am. Mint LLC v. GOSoftware, Inc.*, No. Civ.A. 1:05-CV-650, 2006 WL 42090, at \*3 (M.D. Pa. Jan. 6, 2006); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 2d 1229, 1237 (S.D.N.Y. 1992).

160. See Letter of Submittal, *supra* note 159, at vi; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster & Elam v. Neilson*, 27 U.S. 253, 314 (1829); Restatement (Third) of the Foreign Relations Law of the United States § 111(3).

161. *Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003) (citing Public Notice 1004, U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, reprinted in 15 U.S.C. App.; Letter of Transmittal from President Reagan to the Senate of the United States (Sept. 21, 1983), reprinted in 15 U.S.C. App.); see also *Valero Marketing & Supply Co. v. Greeni OY*, 373 F. Supp. 2d 475, 479 n.7 (D.N.J. 2005), *rev'd on other grounds*, 242 Fed. App'x 840, 845 (3d Cir. 2007).

the authority of the United States are binding on individual states.<sup>162</sup> Such treaties preempt state law.<sup>163</sup>

Numerous U.S. courts have recognized that the CISG preempts Article 2 of the UCC.<sup>164</sup> Some courts have reached that conclusion specifically with respect to Article 2 warranty provisions.<sup>165</sup>

#### *B. UCC Section 2-316 Applies Only to UCC Implied Warranties*

Article 2 itself makes it clear that UCC Section 2-316 is limited to the implied warranties created by Sections 2-314 and 2-315. The warranty of title and the warranty against infringement created by UCC Sections 2-312(1) and 2-312(3), respectively, are purposefully not designated as “implied warranties,” even though the warranty of title and warranty against infringement are also plainly not express warranties.<sup>166</sup> They are warranties that are created by operation of law, without requiring either party to do anything affirmatively for either warranty to exist. In that sense, those warranties are in fact implied terms of the contract for sale. Yet, neither is designated as an “implied warranty” under Article 2 of the UCC.<sup>167</sup> Consequently, UCC Section 2-316 is not applicable with respect to disclaimer of the warranty of title or disclaimer of the warranty against infringement. Indeed, official comment 6 to UCC Section 2-312 makes this

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162. *See* *Ware v. Hylton*, 3 U.S. 199, 236 (1795) (holding that a treaty cannot be the supreme law of the land if any act of a state legislature stands in its way); *see also* *Skiriotes v. State of Fla.*, 313 U.S. 69, 72-73 (1941) (citing *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900), and (holding that “international law is a part of our law and as such is the law of all States of the Union, but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties”), *reh’g denied*, 313 U.S. 599).

163. *Asakura v. City of Seattle*, 265 U.S. 332 (1924); *see also* Restatement (Third) of the Foreign Rels. L. of the U.S. § 111(1), § 111 cmt. d.

164. *MCF Liquidation, LLC v. Int’l Suntrade, Inc.*, No. 4:13-CV-00514-HCA, at 6 (S.D. Iowa Nov. 16, 2015) (concluding that the CISG “preempts state law causes of action arising from the formation of a contract of sale and the rights and obligations of the Seller and Buyer”); *Forestal Guarani, S.A. v. Daros Int’l, Inc.*, Civ. Action No. 03-4821 (JAG), 2008 WL 4560701, at \*2, n. 4 (D.N.J. Oct. 8, 2008) (“[T]he CISG, a treaty of the United States, preempts state contract law and common law, to the extent that those causes of action fall within the scope of the CISG.”); *see also* *Valero Marketing & Supply Co.*, 373 F. Supp. 2d at 479, n.7; *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002); *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1151-52 (N.D. Cal. 2001).

165. *Electrocraft Arkansas, Inc. v. Super Elec. Motors, LTD*, No. 4:09cv00318 SWW, 2009 WL 5181854, at \*4 (E.D. Ark. Dec. 23, 2009) (concluding that the buyer’s warranty claims under Article 2 of the UCC were “preempted and subsumed by the CISG”).

166. *See* U.C.C. § 2-312, 1A U.L.A. 281 (2012).

167. *Id.*

explicit: “The warranty of subsection (1) is not designated as an ‘implied’ warranty, and hence is not subject to Section 2-316(3).”<sup>168</sup>

John Honnold addressed this point as follows: “Section 2-316 [of the UCC] was explicitly designed to fit with Section 2-314 that established the implied warranty of ‘merchantable quality,’ and with Section 2-315, that established the implied warranty of fitness for purpose.”<sup>169</sup> Harry Flechtner has made a similar observation: “the UCC requirements [of Section 2-316(2)] are simply inapplicable as a matter of U.S. domestic law: those requirements apply only in transactions governed by Art. 2 UCC, not in transactions governed by the CISG.”<sup>170</sup>

Some U.S. commentators and decision makers naturally instinctively cling to those UCC concepts they know well. That is not the approach contemplated by the CISG, and it undermines the CISG’s purpose to promote uniformity. It confuses the distinctive nature of the CISG and its provisions, creating a risk of inappropriately lumping together the two distinct bodies of law. For example, one scholar indicates that “[u]nder both the UCC and the CISG, sellers of goods are free to disclaim the implied warranties of merchantability and fitness in their contracts with buyers.”<sup>171</sup> That is imprecise, insofar as it suggests that implied warranties of merchantability and fitness arise under the CISG. While there are analogous provisions in Article 35 of the CISG, those provisions are distinct from the UCC implied warranties.

Article 35 does not resurrect UCC Sections 2-313, 2-314 and 2-315 just because they appear to be analogous in certain respects. On the contrary, Article 35 preempts those UCC sections and the UCC warranties they create. Failing to recognize that the CISG is a distinct source of law, separate from and independent of Article 2 of the UCC, will continue to undermine the very purposes for which the CISG was created, namely, “the adoption of uniform rules which govern contracts for the international sale of goods.”<sup>172</sup> That is undesirable from a rule-of-law perspective insofar as it

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168. See U.C.C. § 2-312, cmt. 6., 1A U.L.A. 282 (2012).

169. HONNOLD, *supra* note 20, at 258. Honnold continues: “UCC 2-314 and 2-315 would of course, be supplanted by Article 35(2) of the Convention. It would be awkward to require a contract to ‘mention merchantability’ in order to disclaim an implied obligation under Article 35(2)(a) that is somewhat different from UCC 2-314 and does not itself refer to ‘merchantability.’” *Id.*

170. Flechtner, *supra* note 113, at 97.

171. Bryan D. Hull, *UNITED STATES AND INTERNATIONAL SALES, LEASE, AND LICENSING LAW: CASES AND PROBLEMS* 83 (2d ed. 2012). Notably, however, Hull also acknowledges that “[t]he CISG has no specific technical requirements for disclaimers of [seller’s obligations under Article 35 that are analogous to] warranties.” *Id.*

172. CISG, *supra* note 12, pmb1.

can, and often does, lead to the misapplication of applicable law. It is also undesirable insofar as it can hinder, rather than facilitate, engagement by U.S. companies in international trade and commerce: "The expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws . . . [w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."<sup>173</sup>

If the CISG applies by its terms, and it has not been excluded by the parties, then the CISG preempts Article 2 of the UCC. Consequently, Article 2 does not apply with respect to any matter that is addressed by the CISG or by the principles on which the CISG is based. Article 35 of the CISG therefore preempts UCC Sections 2-313, 2-314, and 2-315. UCC Section 2-316 is concerned with effectiveness of disclaimers of warranties otherwise arising specifically by operation of UCC Sections 2-314 and 2-315. Because those warranty provisions are preempted by Article 35 (and Article 9) of the CISG, no warranties arise under Article 2 of the UCC, and the parties and the decision maker should never get to UCC Section 2-316.

Even to the extent that UCC Section 2-316 may be properly characterized as a rule of validity (as opposed to fundamentally a requirement as to form), it is a section concerned only with the validity of disclaimers of those obligations arising under UCC Sections 2-314 and 2-315 specifically, and not as a matter of any other body of law. On its face, UCC Section 2-316 simply does not apply to, or have anything to do with, Article 35 of the CISG.

## 6. CONTINUING RELEVANCE OF PRINCIPLES OF VALIDITY

This article does not argue that no principles of validity are relevant for analysis of effectiveness of a disclaimer of obligations under Article 35 of the CISG. It is certainly possible that an attempted disclaimer could be ineffective because it is invalid under an applicable domestic principle of invalidity, such as coercion or duress (or their equivalent), when that principle of invalidity is not primarily concerned with requirements as to form and is not focused solely on specific obligations arising under domestic law, as is the case with UCC Section 2-316. There are non-U.S. decisions reaching that conclusion.<sup>174</sup> When U.S. law supplements the CISG, it is theoretically possible that a provision of a contract purporting to

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173. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

174. *See, e.g.*, Oberlandesgericht Köln 22 [Cologne Higher Regional Court] May 21, 1996, 22 U 4/96 (Ger.)



modify or to exclude Article 35 obligations could be found to be unconscionable, for example. As a matter of U.S. law, that is quite unlikely in a transaction between merchants, but the CISG itself would not preclude that possibility.

#### 7. HOW SHOULD THE ANALYSIS PROCEED?

In a sale of goods governed by the CISG, Article 35 creates default obligations that are binding on the seller with respect to the seller's performance and the goods sold.<sup>175</sup> Sophisticated sellers will usually attempt to modify or exclude some or all those default obligations. Article 35(2), Article 6, Article 11, and Article 8 of the CISG are the applicable articles for appropriate analysis of a claim that a seller's obligations implied at law under Article 35 have been disclaimed.

Article 35(1) of the CISG obligates the seller to deliver goods that "are of the quantity, quality and description required by the contract."<sup>176</sup> Article 35(2) provides that goods that fail to satisfy certain requirements established by Article 35 are nonconforming.<sup>177</sup> Specifically, "goods do not conform with the contract unless they" satisfy each of the applicable requirements set forth in paragraphs (a) through (d) of Article 35(2).<sup>178</sup>

Under Article 6, the parties are free to derogate from, or vary the effect of, any of the provisions of the CISG, subject only to the limited limitations imposed by Article 12 of the CISG.<sup>179</sup> Article 12 does not apply to Article 35.<sup>180</sup> Therefore, Article 6 provides a starting point that the parties are free to derogate from Article 35, and they are free to vary the effect of Article 35. Article 6 identifies no form that must be adopted and no requirements that must be satisfied to derogate from or vary the effect of any of the provisions of the CISG.<sup>181</sup>

Article 35 itself expressly establishes the right of the parties to opt out of the obligations implied as a matter of Article 35.<sup>182</sup> Article 35(2) provides that goods that fail to satisfy certain requirements established by Article 35 are nonconforming.<sup>183</sup> However, under the introductory proviso of Article 35(2), the implied obligations only arise when the parties have

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175. CISG, *supra* note 12, art. 35.

176. *Id.* art. 35(1).

177. *Id.* art. 35(2).

178. *Id.*

179. *Id.* art. 6.

180. *Id.* art. 12.

181. *Id.* art. 6.

182. *Id.* art. 35(2).

183. *Id.*

not “agreed otherwise.”<sup>184</sup> And Article 35 does not identify any means by which the parties must agree otherwise, nor does it impose any requirements as to the form of such agreement. It is enough under Article 35(2) for the parties simply to agree.

That agreement may be manifested in a clear, written form—as in a written disclaimer of Article 35 obligations included in a written agreement signed by both parties. But the agreement does not have to take that form. Instead, the language of Article 35 simply requires party agreement.<sup>185</sup>

To discern the parties’ intent regarding their agreement, Article 8 of the CISG requires a court to give due consideration “to all relevant circumstances of the case,” including but not limited to the negotiation history, the parties’ established practices, and the conduct of the parties after formation of the contract, when determining party intent.<sup>186</sup> Article 8 gives primacy to actual intent, as opposed to a contrary objective intent, when the actual intent of the parties can be established.<sup>187</sup>

The question therefore is not whether formalistic requirements established by Section 2-316 have been satisfied in an agreement governed by the CISG for the obligations implied under Article 35 to be disclaimed; the question is simply, did the parties agree that those obligations should be disclaimed? The CISG requires—indeed, it allows—nothing more than that.

## 8. CONCLUSION

The CISG is an important effort to provide a uniform framework that is available to lawyers and their clients engaging in sales transactions in jurisdictions all around the world. Each jurisdiction presents its own distinctive bodies of law, and those laws present different, and often unexpected, gap fillers, remedies, rules, default allocations of risk and responsibility, and so on, which must be navigated each time a new jurisdiction is encountered. The navigation required can be fraught with unexpected twists and turns. That creates transaction costs with respect to learning about those laws, and it creates risk with respect to missing an important aspect of the same. The swirling mix of various domestic laws that could apply creates uncertainty for those contracting parties unfamiliar with them.

The CISG can help reduce those costs and that uncertainty, but it is only helpful if lawyers understand it and courts apply it uniformly and in

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184. *Id.*

185. *Id.*

186. *Id.* art. 8.

187. *Id.*

ways that reflect its actual distinctive nature. It is counterproductive when, by contrast, bias favoring the UCC—or any other body of preempted domestic sales law—creeps in and distorts understanding. In the case of the CISG Article 35 obligations, the contortions engaged in to make sense of the assumed relationship between its implied obligations and the formalistic requirements of UCC Section 2-316 can be avoided altogether by simple recognition that UCC Section 2-316 is irrelevant to analysis of the parties' agreement to exclude or modify Article 35 of the CISG.

# RETHINKING THE WTO – A TRIBUTE TO BOB LUTZ

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Paul B. Stephan\*

<i>The GATT and the WTO</i> .....	717
<i>The Challenges</i> .....	720
<i>The WTO's Appellate Body</i> .....	721
<i>National Security</i> .....	721
<i>The Fate of the WTO</i> .....	727
<i>The Virtues of Smallball in International Law</i> .....	729

Over the last thirty years, almost every time I stepped out of my narrow academic path to do something that, I hoped, was for the greater public good, I encountered Bob Lutz. When I worked with the American Bar Association (ABA) to encourage the engagement of its members with first the Soviet Union, and then Russia, Bob was there as a leader in its Section on International Law. A few years later, when I served in the State Department's Office of the Legal Adviser, Bob came to Foggy Bottom to represent the interests of the ABA. A decade after that, when I worked on the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States, Bob served as liaison to the ABA as well as a member of the project's Members Consultative Group. At each stage, he acted as a bridge between the academic community, government, and bar associations by devoting time, energy, and mind space to involve all sides of the legal profession and striving to improve international law.

Having devoted his career to this field, Bob must have some concerns about the direction the world seems to be heading today. At the beginning of this century, the commitment to the international rule of law seemed widespread and deep. Since then, national populists have upended politics in the rich world, including the United States. Revisionist states

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elsewhere—China and Russia in particular, Argentina, Brazil, India, South Africa, and Turkey—have used their growing influence to challenge the existing order. Today, defenders of international law seem to find themselves back on their heels in the face of onslaughts from all directions.

This essay focuses on one area where Bob has worked for much of his career. As a scholar and practitioner, Bob was a fixture in international economic law, particularly in the law of the World Trade Organization (WTO). Today, that legal regime faces great challenges. Within the United States, a rising tide of anti-globalization in both political parties has sidelined the liberal internationalist policies that motivated the United States from the end of World War II until the Great Recession of 2007-09. Other countries, with less of a commitment to the WTO, have resisted its rules with creative legal theories, a strategy that the U.S. has also adopted. Today, we face a world where the WTO has been robbed of much of its legal bite.

These challenges rest on long-term economic and political trends and must be taken seriously. Supporters of the status quo mostly struggle to grapple with the critiques. Many others, however, have come to believe that the existing system, even if it is good in theory, fails to meet the needs of significant portions of the world's population.

I argue that the WTO still has an important role to play in guiding the world economy, but less as a law enforcer. Without an international consensus about the WTO's purposes and methods, we should not expect it to do much as a third-party arbiter of disputes. Instead, it can function as a symposium, where states with divergent economic interests can educate themselves and others about potential conflicts and solutions. It can support the elaboration and refinement of international economic law without serving as the world's sheriff.<sup>1</sup>

### *The GATT and the WTO*

Liberalizing international trade had been a core project for the rich world since the end of World War II. The General Agreement on Tariffs and Trade (GATT) began as a road map for reducing state-imposed barriers to international trade in goods. States originally conceived the GATT as part of a full-blown international organization like the International Monetary Fund (IMF) and the World Bank. The 1948 Havana Charter sought to establish the International Trade Organization (ITO) which would

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1. Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49 (2000).

have had the same structural form as the United Nations, the IMF, and the World Bank.<sup>2</sup>

Instead, the United States pivoted toward hegemonic leadership of its bloc at the outset of the Cold War. The Marshall and Dodge Plans largely supplanted the World Bank, although the World Bank stayed in business. The ITO, on the other hand, never got off the ground. Instead, the GATT became a treaty (only provisionally applicable, not ratified) with substantive rather than institutional commitments.<sup>3</sup> The project relied on a tiny staff borrowed from the United Nations' Geneva resources and initially had no grandiose stand-alone headquarters.

As conceived, the GATT was meant to ward off the kind of retaliatory tariff hikes that had fed the Great Depression, the global economic crisis of the early 1930s that aided Hitler's rise to power and greased the path to World War II. The GATT served as a site for multilateral negotiations on lowering tariffs, battled against workarounds that could substitute for protective tariffs, and offered dispute settlement services through ad hoc arbitration to the parties to the Agreement. This exclusive focus on tariff reduction meant lower barriers for physical goods, the only commodities subject to this form of border taxation. Other projects for liberalizing the world economy came later.

By the 1980s, the GATT had become a flourishing international institution, astride a crucial and burgeoning economic sector that it managed with a soft touch and increasingly legalized pronouncements. Even a few "socialist" countries—Hungary, Poland, Romania, and Yugoslavia—joined during the 1960s and 1970s. It achieved its narrow but critical purpose: keeping trade barriers down on a wide range of goods, mostly those made in the developed world.

When the world changed with the collapse of the Soviet Union and the end of the Cold War, the GATT remade itself as the WTO, the kind of full-blown international institution that the postwar visionaries had hoped for in the ITO. The 1994 Uruguay Round Agreements created an organization, founded a permanent appellate court to ride herd over its dispute resolution business, and added new economic sectors to its jurisdiction.<sup>4</sup> By first

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2. Here and in the remainder of this article, I reference Chapters 3 and 11 of my forthcoming book. A reader wishing more detailed discussion of these events and appropriate references should look there. See PAUL B. STEPHAN, *THE WORLD CRISIS AND INTERNATIONAL LAW – THE KNOWLEDGE ECONOMY, SYSTEM SHOCKS, NATIONAL POPULISM, AND THE BATTLE FOR THE FUTURE* (Cambridge Univ. Press 2023) (forthcoming Mar. 2023).

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIII, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

4. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

terminating the GATT, the rich countries that dominated these negotiations made an offer that the rest of the world could not refuse: join the new regime or live with legal anarchy in international economic relations. The formerly socialist countries queued up for membership. By the end of 2000, the WTO had 140 members, up from 84 in 1989. Today 160 of the 193 states that belong to the United Nations are members of the WTO.

The Uruguay Round Agreements, each bundled into the new WTO regime, reflected the Washington consensus of the day.<sup>5</sup> Recognizing that tariff reduction had gone about as far as it could, the framers of these agreements promoted the freeing up of cross-border trade in services, unifying health and safety standards through committees of international experts, and strengthening the legal protection of intellectual property and, to a lesser extent, of capital mobility.<sup>6</sup> As services had assumed a larger role in the world economy, promoting international competition in these sectors became more important to those who thought more competition meant greater prosperity. Making intellectual property mandatory, rather than a local option for states, would, in theory, bolster innovation everywhere. In the short term, however, it would increase royalty payments from poor countries to rich ones, where most intellectual property then originated. Likewise, insisting that health and safety standards conform to international scientific standards (a measure intended to suppress covert trade barriers) helped rich world producers who had the greatest knowledge about and influence over those standards.

Not only did the WTO expand in size and scope, but it upgraded its institutional bite. In its early days, the GATT relied on diplomats to mediate trade disputes, employing pragmatic bargaining more than legal formalism. During the 1950s and 1960s, trade lawyers, especially veterans of government ministries, took over dispute resolution. The GATT sponsored arbitration panels, formed from a list of state-nominated trade law specialists. These panels would offer their views, often in elaborate legal opinions. The disputants, however, had no formal obligation to comply. A panel opinion took effect only if a consensus of the GATT parties adopted

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5. See John G. Williamson, *Lowest Common Denominator or Neoliberal Manifesto? The Polemics of the Washington Consensus* in CHALLENGING THE ORTHODOXIES 13 (Richard M. Auty & John Toye eds., 1996) (discussing the history and meaning of the Washington consensus).

6. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement, Annex 1B, 1869 U.N.T.S. 183; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1867 U.N.T.S. 493; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 186.

it. This meant that a dissatisfied state could veto any and all panel decisions that did not go its way. The panel opinions instead served as a focal point for settlements.<sup>7</sup>

Under the WTO, the arbitral panels remained in place, but dissatisfied states could appeal to the WTO Appellate Body, a permanent working court. The seven members of the court, chosen by the members and acting through three-person tribunals, could affirm, reject, or revise panel decisions. States that disagreed with an Appellate-Body decision could appeal to the membership as a whole, but unless a consensus of the members (including the state that had prevailed in the appeal) held otherwise, the appellate decision would stand.<sup>8</sup> The Appellate Body soon developed an extensive body of case law, on which a growing industry of civil society and academic specialists fed.<sup>9</sup>

The WTO Appellate Body represented a distillation of the ideas that flourished after the end of the Cold War. The existing consensus held that promoting competition and markets was the desired end and that legal commitments enforced by expert and disinterested third parties were the preferred instrument. Accordingly, trade law specialists, not economists or diplomats, should have the last say on what an increasingly ambitious international regulatory regime means.

### *The Challenges*

Two developments challenged the resilience of WTO law. First, the last three U.S. administrations opposed the Appellate Body and ultimately neutralized it. As a result, the WTO now lacks an independent judicial body and can adopt legal decisions only by consent of the entire membership. Second, several states, including the United States, have seized on the national-security exception found in all the Uruguay Round agreements as a tool for negating legal commitments at will. The issue, put baldly, is whether these developments have robbed WTO law of any force. Can we imagine a future where the WTO, lacking an independent court and avoiding almost all obligations by way of an exception that creates an all-encompassing loophole, continues to carry out useful work?

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7. *Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance*, L/4907 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.), at 210 (1989).

8. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement, Annex 2, 1869 U.N.T.S. 401.

9. *Dispute Settlement*, WTO (Mar. 28, 2022), [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).



### *The WTO's Appellate Body*

Under the Uruguay Round Agreements, the Appellate Body has the final say in resolving legal disputes among the members. Only a consensus of the membership, including the state that prevailed in its decision, can reverse it. However, for the Appellate Body to function, people must have valid appointments to it. When fully staffed, it has up to seven members who serve staggered four-year terms and sit in three-person panels.

Beginning with the Obama administration, the United States blocked the replacement of any new member of the Appellate Body as terms expired. The Body lost a quorum to convene a panel in 2019 and has had no members since the end of 2020. For Obama's team, this was a warning signal indicating dissatisfaction with how the Body had performed and it intended to provoke reform. For the Trump administration, blocking new appointments was a means to another end, the undoing of international supervision of trade law. The Biden administration, as of this writing, has remained on this course.

Once the Appellate Body lost its quorum, China and the European Union established an alternative appellate body to function as long as the official one remained out of commission.<sup>10</sup> This mechanism has no bearing on the United States or the other states that did not join their agreement. It has heard one case, a dispute between Turkey and the EU, but its decision was not made on behalf of the WTO.<sup>11</sup> For the indefinite future, then, we no longer have a multilateral dispute settlement process for trade issues just at a time when the government of the world's largest economy wields a legal theory allowing it to disregard any WTO obligation it chooses.

### *National Security*

In recent years, states, including the United States, have weaponized the national security exception to negate their GATT obligations. The

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10. Request for Circulation of Interim Appeal Arbitration Arrangement by the Panel, *Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020).

11. See Award of the Arbitrators, Arbitration under article 25 of the DSU, *Turkey – Certain Measures Concern the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/ARB25 (Jul. 25, 2022); see also Communication from Türkiye, *Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, WTO Doc. WT/DS583/15 (Aug. 22, 2022). According to press accounts, the European Union is about to commence a proceeding challenging China's retaliation against Lithuania for its recognition of the Republic of China. If it gets under way, that matter might eventually wind up in the new appellate mechanism. See Request for Consultations by the European Union, *China – Measures Concerning Trade in Goods and Services*, WTO Doc. WT/DS610/1 (Jan. 31, 2022).

GATT's Article XXI(b) suspends a state's obligations under the GATT system when:

taking any action *which it considers* necessary for the protection of its essential security interests . . . (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations . . .<sup>12</sup>

The important legal question is the scope of the "it considers" modifier. Does this language leave any room for WTO adjudication of disputes once the exception is invoked?<sup>13</sup>

At least three plausible interpretations present themselves. First, the WTO, acting through its dispute-resolution organs, might address only the question of whether a state does "consider" the otherwise unlawful measure necessary for its national security interests. Second, the WTO might decide whether it believes that, as an objective matter, the measure is connected in some way to military procurement or is taken in the context of an emergency in international relations. Third, the WTO might consider whether a state's claim as to the measures the state considers necessary is made in good faith, allowing the WTO to make an independent assessment of necessity with respect to either procurement or a crisis.<sup>14</sup>

These three approaches represent points along a continuum running from easy invocation, meaning effortless unilateral avoidance of WTO obligations, to rigorous scrutiny of a state's motivations and the real basis of its concerns, meaning third-party oversight playing a dominant role in a wide range of trade disputes. A prior issue, however, is whether the "it considers" language permits any third-party review.

A state might plausibly argue that all WTO supervisory jurisdiction disappears when it invokes its essential security interests. Efforts by the WTO to argue otherwise must then be considered illegitimate. In technical language, the "it considers" language denies the WTO the capacity,

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12. GATT, *supra* note 3, art. XXI(b); TRIPS Agreement, *supra* note 6, art. 73(b). GATT's article XXI(b) is identical to the TRIPS Agreement's Article 73(b) where both address disputes over the enforcement of intellectual property rights.

13. Paul B. Stephan, *Sovereignty and the World Economy*, 17 U. ST. THOMAS L.J. 649, 666 (2021).

14. On reading a good faith requirement into essential security provisions in treaties generally, see William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 376–81 (2008) (arguing for implicit good faith limitation on self-judging national security clauses in investment treaties).

definitively and authoritatively, to determine its jurisdiction—what in Europe is known as *kompetenz kompetenz*.<sup>15</sup>

If this argument has any bite, the WTO has a problem. Without third-party enforcement, the WTO rules do not function as law so much as desiderata. As such, rule compliance drops out of the system. Instead, more general and hard-to-pin-down qualities such as a state's tendency toward cooperativeness or disruption do all the work. Robustly resorting to a national security exception, when this choice easily and perhaps automatically ousts formal dispute settlement, prevents states from pursuing a greater good and undermines the WTO as a rules-based system.<sup>16</sup>

For the first twenty years of the WTO, no one sought to test the dispute settlement system by invoking Article XXI(b). Commentators suggested that the logic of mutually assured destruction applied. The risk of creating an easy out from formal dispute settlement, and thus undermining the WTO agreements as a legal system, was thought to deter states from opening up the national security Pandora's box. Even before the Trump administration, however, other WTO states went down this path. In 2014, Russia imposed trade sanctions on Ukraine to discourage it from upgrading its economic ties with the European Union. In 2017, Saudi Arabia formed a coalition to boycott Qatar for its supposed support of revisionist populist movements inspired by the Arab Spring. In both cases, the parties targeted by the sanctions sought a ruling from the WTO that the measures violate the Uruguay Round Agreements. Russia and Saudi Arabia both invoked Article XXI as a defense.<sup>17</sup>

In the Russian case, an arbitral panel formed by the WTO ruled that it had jurisdiction to decide whether the elements of a national security defense exist—whether the measures advance a national security interest arising out of a crisis in international relations—and thus rejected self-judging by the respondent state. It explained that an implied

obligation of good faith . . . applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their

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15. See, e.g., RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION § 2.8 cmt. a (AM. L. INST., Proposed Final Draft 2019) (*kompetenz kompetenz* in arbitration); J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L. J. 411, 413 (1996) (judicial *kompetenz kompetenz*).

16. Tania Voon, *Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era*, 113 AM. J. INT'L L. UNBOUND 45, 47–48 (2019).

17. Tania Voon, *World Trade Organization — General Agreement on Tariffs and Trade 1994 — Security Exception — Freedom of Transit — Russia's Accession Protocol*, 114 AM. J. INT'L L. 96, 102 (2020).

connection with the measures at issue. Thus, . . . this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests . . .<sup>18</sup>

The panel, having asserted its right to review the factual basis of Russia's national security claim, then found Russia's account satisfactory.<sup>19</sup>

A later panel went further. It rejected Saudi Arabia's claim that a measure was necessary to meet a conceded national security interest. As part of its boycott of Qatar, the Saudi government refused to take action against a private broadcaster operating in its territory whose programming included copyrighted programs belonging to a Qatari firm. The panel concluded that the enforcement of copyright laws against a pirate within Saudi territory would not require the Saudi authorities to interact with Qatari nationals in any way that might create a risk of subversion. Thus, although the government's inaction arose out of an "emergency in international relations" within the terms of Article XXI(b)(iii), it was not necessary within the terms of that article, even if Saudi Arabia asserted otherwise. Notwithstanding the "which it considers" language of Article XXI(b)(iii), this judgment, the panel asserted, was for the panel to make, not the Saudi government.<sup>20</sup>

Meanwhile Turkey, joined with a number of other WTO members, has a case pending against the United States. It challenges special duties on imports of aluminum and steel products levied by the Trump administration on national security grounds. Given the role of the United States in the world economy, the case has profound significance for the meaning of Article XXI and, consequently, of GATT commitments themselves.

Under U.S. trade law, the president may restrict imports of particular goods through higher duties or other barriers, such as a quota or ban, if the imports present a threat to the country's national security. The provision bestowing this authority, Section 232, was a central part of the Kennedy administration's principal legislative initiative, the Trade Expansion Act of 1962.<sup>21</sup> President Ford invoked it in 1975 to impose licensing fees on oil imports, a measure that won the Supreme Court's blessing after an importer's legal challenge. The Court took a generous view of the president's discretion to determine what constitutes a national security

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18. Panel Report, *Russia – Measures Concerning Traffic in Transit*, ¶ 7.138, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019).

19. *Id.*

20. Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (adopted Jun. 16, 2020).

21. Trade Expansion Act of 1962, Pub. L. No. 87-794, Title II, § 232, 1962, 76 Stat. 877 (codified at 19 U.S.C. § 1862).

threat and what measures will suffice to abate it. The case serves as a classic example of the reluctance of the U.S. judiciary to constrain a president's intervention in international trade, no matter how amorphous the national security claim, on the basis of an open-ended legislative delegation.<sup>22</sup>

No president took greater advantage of this authority than Donald Trump. His administration launched eight investigations by the Department of Commerce, six of which resulted in positive findings of a national security threat and five of which he accepted. His approach was transactional rather than interventionist. He used the positive findings as starting points for negotiations with other countries. These sought to induce exporting states to reduce what they sold into the U.S. market, rather than putting the burden on the United States to impose trade barriers.<sup>23</sup>

In the case of steel and aluminum, Trump imposed special duties, with certain exceptions for countries in preexisting trade agreements with the United States. When negotiations failed, as they did with Turkey, the administration increased duties above the baseline in the original notice. Importers litigated whether the increased duties fit within the statute's time limits. The one federal court with appellate jurisdiction over these duties upheld them.<sup>24</sup>

Since coming to office, the Biden administration has left these measures in place and launched new Section 232 investigations of other imports. It did negotiate a special deal with the European Union, adhering to Trump's transactional model, that substitutes export-state-imposed controls for U.S. import barriers.<sup>25</sup> It later replaced the tariffs on Japanese steel with a quota on imports.<sup>26</sup> It otherwise remains committed to the same basic strategy of unilateral trade measures resting on dubious national security claims that Trump pioneered.

Section 232 measures, however lawful under domestic law, call the U.S. relationship with the WTO into question. Under WTO rules, a state "binds" itself to a schedule of duties (tariff) from which it can deviate

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22. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-70 (1976).

23. RACHEL F. FEFER, CONG. RESEARCH SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2021).

24. *Transpacific Steel L.L.C. v. United States*, 4 F.4th 1306, 1310 (Fed. Cir. 2021).

25. *See Announcement of Actions on EU Imports Under Sections 232*, Oct. 31, 2021, <https://www.commerce.gov/sites/default/files/2021-10/US%20232%20EU%20Statement.pdf>; *see generally* Steel and Aluminum U.S.-EU Joint Statement, U.S.-E.U., Oct. 31, 2021, <https://www.commerce.gov/sites/default/files/2021-10/US%20232%20EU%20Statement.pdf>.

26. *See Announcement of Actions on Japanese Imports of Steels under Section 232*, U.S. DEP'T OF COM. (Feb. 7, 2022), <https://www.commerce.gov/sites/default/files/2022-02/US-Statement-on-Japan-232.pdf>.

downwards but not exceed.<sup>27</sup> The WTO also provides for exceptions to this rule. It permits a state to impose temporary trade barriers called “safeguards” to address sudden surges of imports to the detriment of its domestic producers.<sup>28</sup> Safeguards must comply with other WTO rules, in particular a requirement of equal application of the measure to all members (most-favored-nation treatment), and other states may retaliate with proportional increases in their duties on the goods exported by the safeguard imposer. States can also impose extra duties, called anti-dumping duties and countervailing duties, that negate benefits that the exporter derives from specified anticompetitive practices or proscribed state subsidies. Elaborate rules apply to the imposition of both these kinds of fairness-based penalties.<sup>29</sup>

The United States does not rely on any of these exceptions for its new measures. Instead, it relies on the most problematic of WTO exceptions, that for the protection of national security. This particular exception is not problematic because it allows states to take their national security into account; such rules are pervasive in trade and investment agreements and seem unavoidable in a world where states must attend to their security. Rather, the provision sets up a conundrum because it allows a state to decide for itself what it can do under the national security umbrella.

At Turkey’s request, the WTO convened an arbitration panel to address the dispute. The United States informed the WTO that, because it regards the dispute as a political matter not subject to WTO review, it would not participate in the proceedings. The panel has postponed releasing its report multiple times, citing the COVID quarantine as the reason.<sup>30</sup>

The U.S. case tests the meaning of Article XXI to a much greater extent than the Russian or Saudi disputes. Russia was not merely worried about Ukraine, but at the time it imposed its sanctions it was effectively at war. Similarly, the members of the Saudi-led coalition faced what they

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27. GATT, *supra* note 3, art. II, ¶1.

28. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 154.

29. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 14; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 201.

30. Request for Consultations by Turkey, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/1 (Aug. 20, 2018); Communication from the United States, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/9 to WT/DS564/11 (Oct. 15, 2018). The most recent postponement stated that no report could be expected sooner than the last quarter of 2022. Communication from the Panel, *United States – Certain Measures on Steel and Aluminum Products*, WTO Doc. WT/DS564/20 (Jun. 30, 2022).

viewed as serious and violent domestic opposition to which, they believed, Qatar gave aid and comfort. In both situations, people died and more casualties were expected. By contrast, the U.S. measures invoke no specific threat from any adversary, but rather a general sense that existing trade patterns weaken the country.

Shoe-horning the U.S. argument into the language of Article XXI is a reach. If anything less than unrestrained self-judging applies, the claim should fail. Indeed, a bloody-minded observer could interpret the U.S. position as a deliberate provocation, meant to expose the disconnect between the formal rules that the WTO applies and the actual balance of interests that sustains the multilateral trade regime.

From the WTO's perspective, the absence of a functional Appellate Body means that it lacks a way to reach a definitive legal resolution of these questions. A plausible interpretation of the WTO rules gives no legal effect to a panel's decision when a dissatisfied state has a right of appeal, even though that right is meaningless because of the absence of a working appellate mechanism.<sup>31</sup> As a result, current panel decisions, including those on Article XXI, live in a kind of limbo. Every state that has invoked the national-security exception to call off its WTO obligations can fairly argue that the WTO has yet to decide against it authoritatively. Panels may disagree, but without the Appellate Body in place, none of their decisions will bind any member, including the United States.

### *The Fate of the WTO*

Unwinding the free trade commitments that the Uruguay Round agreements meant to entrench remains high on the agenda of populist movements throughout the West. While deploring the style of its predecessor's approach to diplomacy and international law, the Biden administration has done very little to undo Trump's most consequential attacks on the WTO regime. It also has given at least soft support to supply chain onshoring as a means of reducing its dependency on China. Implementing this policy cannot be done consistently with WTO obligations, unless the United States chooses to invoke the national security exception repeatedly.

As of this writing, the Biden administration has neither indicated a pathway toward restoring the WTO's Appellate Body nor backed away from a theory of the national security exception that provides a blanket loophole for nearly every WTO obligation. Reshoring supply chains will

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31. Communication from the United States, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/12 (Apr. 22, 2020).

make the United States even more dependent on that exception. At least for the near term, we must expect the United States, and probably other economically significant states, to make decisions about trade in the absence of any compulsion to comply with WTO law.

However, eviscerating the WTO as a formal legal system does not have to mean throwing out the organization and its values altogether. Imagine what might happen as long as no Appellate Body exists and states increasingly invoke national security to suspend their WTO obligations. In this world, the WTO functions not as a lawmaker, but as a proposer of compromises and a venue for negotiations. States will remain free to reject its interventions. A strong and consistent pattern of such rejections would indicate that it no longer serves much purpose. But its fate need not be irrelevance.

The GATT system that preceded the WTO had no permanent court and yet seemed to do important work. It offered *ad hoc* arbitration to states with trade disputes, but the resulting arbitral awards bound no one until adopted by consensus to become law. It also had a national security exception that seemed to rely on self-judging, or at least the United States so asserted.<sup>32</sup> Yet ultimately, no state relied solely on that exception to defend a trade measure.

The pre-1994 system had its shortcomings: it did little for the global South and excluded China and Russia. Nonetheless, it kept trade disputes from going off the rails and contributed to the West's economic ascendancy. That system may persist, rather than collapse into deadlock and impotence.

A recent action by the Biden administration, while not reversing any of the significant steps undertaken by the Trump administration, represents a small gesture that might point the way. In late 2021, the Biden team allowed a case, *Antidumping and Countervailing Duties on Ripe Olives from Spain*, to take effect even though it did not agree with the outcome.<sup>33</sup> The dispute involved retaliatory duties imposed by the United States on imported olives to offset advantages that the producers enjoyed from unfair conditions in their home market. The panel ruled that the United States had failed to prove that one particular benefit that the European Union provided to olive producers affected the export product. As a result, this one countervailing duty imposed by the United States failed to comply with WTO law.

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32. Report of the Panel, *United States – Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13, 1986).

33. Panel Report, *United States – Anti Dumping and Countervailing Duties on Ripe Olives From Spain*, WT Doc. WT/DS577/R (Nov. 19, 2021).



The United States provided an explanation for its decision not to block the panel decision from taking effect. The panel had rejected most of the European Union's arguments and thus had preserved U.S. authority to retaliate against what it regarded as unfair support for exports. The United States objected to one of the panel's conclusions. It interpreted that particular part of the decision, however, to be specific to the facts of the case and therefore not an obstacle to undertaking similar trade measures in the future. As the United States could live with the decision, it would do nothing to obstruct it.<sup>34</sup>

No one should make too much out of a single incident. The dispute involved an industry—large-scale agriculture—that represents the past more than the future, and the protection of which has, in the view of many observers, held back the European Union from becoming a platform for economic dynamism. We need to see a lot more before proclaiming a hopeful trend toward international cooperation.

Rather, the case provides an example of how important states can accommodate themselves to the technocratic and legalistic advice of the WTO without surrendering control over trade issues. It works if the participants find accommodation preferable to blowing up the system. This preference can survive as long as the pretensions of the system do not become intolerable.

#### *The Virtues of Smallball in International Law*

This meditation on the WTO suggests a larger point about the international legal system that Bob has worked in throughout his career. People sometimes used the metaphor of a shark to describe international trade law. Sharks, folk wisdom maintains, must keep moving forward to survive. So, pundits explained, the legal regime for the world trading system had to keep making progress, or it would die. If true, this perspective implies that the WTO is now in a death spiral, and it can be saved only by reversing the trends of the last few years.

However, the WTO regime is in fact capable of pragmatic adaption based on reduced ambition. My larger point is that people who work in international law generally, not just trade lawyers, need to meet the mounting challenges around the world not by doubling down and treating

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34. Statements by the United States at the Meeting of the WTO Dispute Settlement Body, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives From Spain*, at 9-10, (Dec. 20, 2021), [https://uploads.mwp.mprod.getusinfo.com/uploads/sites/25/2021/12/Dec20.DSB\\_.Stmt\\_.as\\_.deliv\\_.fin\\_.pdf](https://uploads.mwp.mprod.getusinfo.com/uploads/sites/25/2021/12/Dec20.DSB_.Stmt_.as_.deliv_.fin_.pdf).

any backtracking as an existential threat. Rather, they need to play smallball. They must find areas where international cooperation makes sense and where expressing that cooperation with legal formality can clarify expectations. Repeated often enough, these episodes of cooperation framed by legal arguments can bolster international law despite seemingly overwhelming threats.

Approaching international law through a smallball approach, rather than grand theory, captures what Bob's vocation has been all about. He represents a style of lawyering that the contemporary academy does not celebrate often enough. Practical reasoning in search of workable solutions can do much good in this world. Bob's career proves that.

# DEAD OR ALIVE? THE FOREIGN INVESTMENT PROTECTION IN THE EU AFTER THE EXPIRY OF THE INTRA-EU BITS.

Aleksander Gubrynowicz\* & Marek Wierzbowski\*\*

PART I.....	732
PART II.....	738
PART III.....	741
PART IV.....	744
CONCLUSIONS.....	745

When we began to think about the content of this contribution, the legal framework surrounding intra-EU investment seemed to have been fragile but still predictable. After the Court of Justice of the European Union (CJEU) landmark decisions in *Achmea*,<sup>1</sup> *Komstroy*,<sup>2</sup> *Republiek Polen*<sup>3</sup> and, more importantly, the termination of almost all Intra EU Bilateral Investment Treaties (BITs) through the May 5, 2020 Termination

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1. Case C-284/16, *Slovakische Republik v. Achmea B.V.*, ECLI:EU:C:2018:158 (Mar. 6, 2018).

2. Case C-741/19, *République de Moldavie v. Komstroy L.L.C.*, ECLI:EU:C:2021:655 (Sep. 2, 2021).

3. Case C-109/20, *Republiken Polen v. P.L. Holdings Sàrl*, ECLI:EU:C:2021:875 (Oct. 26, 2021).

Agreement (TA),<sup>4</sup> we are inclined to believe that with these radical steps, the EU indeed brought an era to its end. Nonetheless, the article argues that by leaving the EU, investors were left without other protections than the one granted by EU law. Thus, the EU organs produced other problems that sooner or later will have to be resolved. However, the willingness of the EU organs to address the concerns is not certain at the present moment. Despite these uncertainties, we are convinced that the current *status quo* is untenable.

This contribution is divided into four parts. The first part restates the critical milestones of the persisting conflict between the EU organs and the world of investment arbitration based on the Intra-EU BITs. The second part discusses the legacy of the landmark *Achmea* decision that examines the provisions of the Termination Agreement to assess the current legal status of the EU investment made by the EU investors in EU countries other than the country of registration or citizenship. The third part explores the major problems of the current situation, and our assessment of it from the international investment law perspective. The fourth and last part is the discussion of potential solutions that could improve the current legal status, which principally leaves EU investors without any protections offered by the IIAs whenever they invest their capital within the EU borders. That part expresses our support for the European Investment Court concept as the only viable alternative, keeping in mind the current situation in Europe and elsewhere.

To conclude, we reassume our findings and restate our argument on a European Investment Court as an improvement or even the best solution to existing or emerging problems in the foreseeable future. At the same time, we concede that such an institution (having all characteristics of a Permanent Court) also has drawbacks. Of course, the ultimate model or set of solutions adopted at the EU level will remain to be seen.

## PART I

The origins of the conflict of norms arising from the CJEU and investment arbitration tribunals diverging interpretations have been previously thoroughly examined.<sup>5</sup> Without going into detail, the essence of

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4. Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 2020, O.J. (L 169) 1 [hereinafter Termination Agreement].

5. The robust literature that has developed during the last fifteen years includes: Marek Wierzbowski and Aleksander Gubrynowicz, *Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF CHRISTOPH SCHEUER 544 (Christina Binder et al. eds., 2009); Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is EC Law*

the problem boils down to two points. Firstly, although some standards granted to investors by BITs are expressly recognized by EU law, not all of them are directly mirrored therein. Further, although the prohibition of expropriation without compensation is mentioned in Article 17 of the EU Charter of Fundamental Rights, its enforcement in practice is usually strictly dependent upon the scope of property protection in Member States' domestic laws, rather than in EU law.<sup>6</sup> Secondly, the legal bases, the structure of the CJEU, and investment arbitration tribunals are not the same. Thus, their tasks and competencies partially encroach upon each other.

These complex relations necessarily have some potential of jurisdictional conflict. Still, during the last fifteen years, neither legal practitioners nor academics could offer a constructive solution. Although the problems arising from interpretation discrepancies were more painful for the EU than for the *ad hoc* tribunals (composed of arbitrators settling only one dispute submitted to them) the EU authorities waived the issue. Over many years, the EU Commission failed to address the increasing tensions. The breakthrough started with the *Achmea* case<sup>7</sup> when the Grand Chamber of the CJEU unequivocally declared the Slovakian-Dutch BIT Arbitration Clause in conflict with Article 267 and 344 of TFEU.<sup>8</sup>

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*an Obstacle?*, 58 INT'L & COMPAR. L. Q. 297 (2009); Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 COMMON MKT. L. REV. 383 (2009); Markus Burgstaller, *The Future of Bilateral Investment Treaties of EU Members States*, in *International Investment Law and EU Law*, EUR. Y.B. INT'L ECON. L. 76-77 (Marc Bungenburg et al. eds., Springer-Verlag, Berlin, Heidelberg 2011); August Reinisch, *Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 39 LEGAL ISSUES ECON. INTEGRATION 157 (2012); Panos Koutrakos, *The Relevance of EU Law for Arbitral Tribunals – (Not) Managing the Lingering Tension*, 17 J. WORLD INV. & TRADE 873 (2016); Paschalidis Paschalis, *Case C-567/14 Genetech: EU Law Confronted with International Arbitration*, 5 EUR. INT'L ARB. REV. 59 (2016); Nikos Lavranos, *Black Tuesday: the end of intra-EU BITs*, THOMSON REUTERS PRAC. L. ARB. BLOG (Mar. 7, 2018) <http://arbitrationblog.practicallaw.com/black-tuesday-the-end-of-intra-eu-bits/>; Steffen Hindelang, *The Limited Immediate Effects of CJEU's Achmea Judgement*, VERFASSUNGSBLOG (Mar. 9, 2018) <https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/>; Steffen Hindelang, *Circumventing Primacy of EU Law Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-Se Treaties: The Case of Intra-EU Investment Arbitration*, 39 L. ISSUES ECON. INTEGRATION 179 (2012).

6. The differences amongst the property regimes in the Member States are explainable by the limited competencies of the EU in this area. Compare Article 345 of TFEU, which states that "the Treaties shall in no way prejudice the rules in the Member States governing the system of property ownership." Consolidated Version of the Treaty of the Functioning of the European Union art. 345, Oct. 26, 2012, O.J. (C 326) 55.

7. Case C-284/16, *Slovakische Republik v. Achmea B.V.*, ECLI:EU:C:2018:158 (Mar. 6, 2018).

8. Consolidated Version of the Treaty of the Functioning of the European Union, *supra* note 6, art. 267 (determining the procedures of questions for preliminary rulings, which, dependent on the case, can be or must be submitted by the Member States domestic courts); *Id.* art. 344

CJEU addressed the issue of compatibility of the BIT Investor-State Dispute Settlement (ISDS) with the Founding Treaties in its analysis and final ruling. The problem of substantial guarantees usually granted to investors in BITs (e.g., FET, NT, or MFN clauses) exceeded the scope of the analysis in *Achmea*. Nonetheless, some Member States interpret this landmark case as a clear signal that the era of Intra-EU BITs came to an end. Even before the judgment was handed down, they began to denounce or terminate upon mutual agreements all BITs to which they were Parties.<sup>9</sup> And as it becomes clear today—they were not wrong. On January 15, 2019, the Declaration of twenty-two Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union was adopted.<sup>10</sup> Its Signatories announced that, “[i]n light of the *Achmea* judgment, Member States would terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognized as more expedient, bilaterally.”<sup>11</sup>

Nonetheless, *Achmea* failed to address many specific concerns—notably, the problem of pending proceedings before investment arbitration tribunals also was not adequately examined.<sup>12</sup> Therefore, as the EU Member States could not agree on a concerted action, the negotiations on the Agreement mentioned in the 2019 Declaration lasted until May 5, 2020, when twenty-three of twenty-eight EU Members signed the Termination Agreement quoted above. Its most important provisions can be summarized as follows:

- 1) Upon the date of entry into force of the Termination Agreement’s provisions, the Intra-EU BITs that are still legally binding are deemed to have expired (art. 1 (1));<sup>13</sup>

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(excluding the possibility to submit disputes falling within the scope of the treaties, reserving the monopoly of the EU judiciary organs to interpret and apply the EU Founding Treaties).

9. This trend concerns, inter alia, Poland. Cf. Marcin Orecki, *Bye Bye BITs? Poland Reviews Its Investment Policy*, KLUWER ARB. BLOG (Jan. 31, 2017) <http://arbitrationblog.kluwerarbitration.com/2017/01/31/bye-bye-bits-poland-reviews-investment-policy/>.

10. Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union, Jan. 15, 2019, I.L.M. [hereinafter 2019 Declaration].

11. *Id.*

12. For more on this topic, see Łukasz Kułaga, *Implementing Achmea: The Quest for Fundamental Change in International Investment Law*, POLISH Y.B. INT’L L. 227, 236 (2019).

13. One of the Preamble motives to the Agreement states that the Parties to it “agree that this Agreement is without prejudice to the question of compatibility with the EU Treaties of substantive provisions of intra-EU bilateral investment treaties.” Nonetheless, it does not seem possible to limit the legal effect of the TA to the Intra-EU BITs Arbitration Clauses only because

2) The entry into force of the Termination Agreement effectively nullifies all legal effects that sunset clauses could eventually produce (art. art 2(2) and (3)). More precisely, from the perspective of this Agreement, the issue of whether the sunset clause was in operation at the moment of the Termination Agreement's entry into force or not—is irrelevant. In any case, States Parties to the Agreement are under the duty to remove any legal effects that a sunset clause laid down in their Intra-EU BITs may eventually produce;

3) In line with the primary goal of Member States Parties to the Termination Agreement being implementation of the *Achmea* case, art. 4 clearly states that there's an irreconcilable contradiction between the Arbitration Clauses laid down by the Intra-EU BITs and the TFEU provisions. Therefore, all proceedings launched before investment arbitration tribunals are divided into three groups, and the date of March 6, 2018 (when the CJEU handed down the *Achmea* judgment) plays the decisive role as the division criterion:

a) The proceedings initiated after this date (so-called “New Arbitration Proceedings” (*cf.* art. 1(6)) are considered in flagrant contradiction with art. 5 of the Termination Agreement. As they are presumably based on the expired Arbitration Clauses, they should be deemed null and void *ab initio*;

b) “Concluded Arbitration Proceedings” means any Arbitration Proceedings which ended with a settlement agreement or with a final award issued before March 6, 2018 (art. 1(4)).<sup>14</sup> The results of these proceedings (notably the effects of executed awards) remain unaffected by the Termination Agreement's provisions;

c) Pending Arbitration Proceedings means any Arbitration Proceedings initiated before March 6, 2018, that do not qualify as Concluded Arbitration Proceedings, regardless of their stage on the date of the entry into force of this Agreement

4) From all kinds of proceedings mentioned under 3), most of the other Termination Agreement's provisions concern pending proceedings. Their purpose aims at quickly quashing all proceedings pending before investment arbitration tribunals. The means to achieve this goal are different: sometimes they are addressed to the States-Parties to the

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Article 2 and 3 are drafted in a very categorical manner. Further, provisions and the titles of its Annexes A and B read together with other Preamble's motives unequivocally supporting the claim that the actual purpose of the TA was to strip off all Intra-EU BIT from any legal effects they eventually could still produce as quickly as it is possible.

14. Termination Agreement, *supra* note 4, art. 1(4)(a)-(b) (stating further that “(a) the award was duly executed prior to 6 March 2018, even where a related claim for legal costs has not been executed or enforced, and no challenge, review, set-aside, annulment, enforcement, revision or other similar proceedings in relation to such final award was pending on 6 March 2018, or (b) the award was set aside or annulled before the date of entry into force of this Agreement”).

Agreement;<sup>15</sup> on other occasions, they seek to get investors inclined to withdraw their claims in return, offering alternative dispute settlement procedures.<sup>16</sup> Notwithstanding what kind of ISDS is to be applied, the central tenet of these provisions is the same, that is, to preclude the existing BITs from producing any other legal effects and terminate the ongoing proceedings as soon as possible.

Against this backdrop, it is worth noting that more recently, *Achmea*'s dicta (whose central tenets were meticulously elaborated in the Termination Agreement) have been further developed. Thus, the position of the EU became even stricter. On October 26, 2021, the Luxembourg Tribunal Grand Chamber once again handled the issue concerning the Intra-EU dimension of the international investment law.<sup>17</sup> This time, the dispute centered around the legality of the *ad hoc* arbitration agreement concluded between Member State and investor containing the arbitration clause, whose content is identical to the one laid down in the expired BIT. This case does not clarify everything, and its potential impact remains to be seen. Nonetheless, as such agreements are concluded to continue the same pending proceedings, but on a different legal basis, such clauses are not compatible with the TFEU.<sup>18</sup>

Another landmark judgment handed down fairly recently in *Komstroy*. This case and the CJEU's settlement should be considered as a new stage of the EU anti-Intra-EU IIAs crusade, as the dispute arose under the European Energy Charter. Even though the factual background did not fall within the

15. *Cf. id.* art. 7 (imposing the formal duty to inform the arbitrators about the legal consequences of the *Achmea* judgement as laid down in Article 4 mentioned above).

16. *Cf. id.* art. 9(1)-10 (stipulating that former conditions of extra-arbitration settlement between investors and States Parties to the TA and the TA directs the pending dispute into the channels of the domestic judiciary).

17. The court openly stated:

To allow a Member State, which is a party to a dispute which may concern the application and interpretation of EU law, to submit that dispute to an arbitral body with the same characteristics as the body referred to in an invalid arbitration clause contained in an international agreement such as the one referred to in paragraph 44 above, by concluding an *ad hoc* arbitration agreement with the same content as that clause, would in fact entail a circumvention of the obligations arising for that Member State under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158).

Case C-109/20, *Republiken Polen v. P.L. Holdings Sàrl*, ECLI:EU:C:2021:875 (Oct. 26, 2021).

18. The CJEU correctly noticed that—having regard that the *Achmea*'s aim was to terminate all legal effects of the existing Intra EU BITs—the acceptance of the *ad hoc* arbitration agreements as a valid ground for their continuation would mean the acceptance of *praeter legem*. (*cf.* point 54 of this judgment). The question whether the case under consideration should be read more generally (that is, as a signal that the CJEU is not ready to tolerate any investment tribunals based on *ad hoc* agreements) seems to be left unanswered. Still, keeping in mind the current trends in the EU policy, the answer in the affirmative appears to be not probable.



scope of the international investment law and there was no connection between the litigants and the EU,<sup>19</sup> the Paris court that was supposed to execute the award took the occasion to ask the CJEU for their preliminary ruling. Although the Justices' answer is not unequivocal, it still contains the strong implication that from the perspective of the EU Treaties, the Arbitration Clause laid down in Article 26 of the Charter is very problematic. To be sure, it is a bit premature to posit that the current ISDS laid down in the EEC is as dead as the case of ISDSs based upon provisions of expired Intra-EU BITs. Nonetheless, it can be taken for granted that the future case law will also address the problem of the compatibility of this article with the EU primary law.<sup>20</sup> Regarding the opinions formulated at the margins of the main proceedings in *Komstroy*, one should not be surprised if the Intra-EU dimension of the ISDS mechanism will be analyzed through the same (or at least very similar) lens as these used in *Achmea* or *Polen Republiek*.<sup>21</sup>

Although on May 5, 2020, twenty-three Member States signed the Termination Agreement, Austria, Finland, Sweden, and Ireland still have not acceded to this instrument. It is also true that, aside from Ireland's specific case,<sup>22</sup> Austria, Sweden, and Finland did not terminate their Intra-EU BITs.<sup>23</sup> Moreover, these agreements still remain in force.<sup>24</sup> The

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19. At the heart of *Komstroy* was the contract to supply energy between Moldova and one Ukrainian company, that allegedly was not fulfilled by the defendant in this case. See Case C-741/19, *République de Moldavie v. Komstroy L.L.C.*, ECLI:EU:C:2021:655 (Sep. 2, 2021).

20. As early as 2019, acting under Article 218(11) of TFEU, Belgium requested CJEU opinion in this matter. See *Request for an Opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU* (Opinion C-1/20), Feb. 15, 2021, O.J. (C 53/18). As of now, the question has not been answered yet.

21. *République de Moldavie v. Komstroy L.L.C.*, ECLI:EU:C:2021:655, ¶ 50, 52, 62, 64. Further, the court openly states:

It follows that, although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also Contracting Parties to that treaty as regards investments made by the latter in those Member States, preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves. In light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.

See also *Id.* ¶ 65.

22. CZECH REPUBLIC—IRELAND BIT (1996), INTERNATIONAL INVESTMENT AGREEMENTS NAVIGATOR, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1192/czech-republic---ireland-bit-1996-> (last visited Nov. 10, 2022).

23. Julian Scheu, *Note on Intra-EU BITs Not Covered by the Termination Agreement*, UNIV. OF COLOGNE INT'L INV. L. CTR. COLOGNE (2020), [https://iilcc.uni-koeln.de/sites/iilcc/user\\_upload/IILCC\\_Note\\_on\\_Intra-EU\\_BITs\\_NOT\\_Covered\\_by\\_the\\_Termination\\_Agreement\\_05\\_2020.pdf](https://iilcc.uni-koeln.de/sites/iilcc/user_upload/IILCC_Note_on_Intra-EU_BITs_NOT_Covered_by_the_Termination_Agreement_05_2020.pdf).

European Commission is not inclined to tolerate such a dissent, unless there is a lack or partial implementation of the TA by the Member States-Parties to it.<sup>25</sup> Against this backdrop, it is somewhat reasonable to assume that, on the one hand, the mere refusal to sign the Termination Agreement does not protect the Member State from eventual infringement proceedings based upon Article 258 of the TFEU. On the other hand, the European Commission seems to be politically determined to eradicate all Intra-EU BITs' legal effects as soon as possible. Moreover, it does not hesitate to use the instruments it has at its disposal to speed up the day when this process is effectively completed.<sup>26</sup>

## PART II

In the eyes of EU institutions, there is no doubt that the key argument against the prolongation of the existing *status quo* has been the threat that the *ad hoc* tribunals constituted the autonomy of the European legal order and its effectiveness in general.<sup>27</sup> The term *autonomy* has never been anchored in the text of the Founding Treaties; the Court of Justice's jurisprudence developed and defended the concept. Perhaps these origins

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24. *International Investment Agreements Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> (last visited Nov. 10, 2022).

25. As early as on May 14, 2020, EU Commission initiated infringement proceedings against Finland and UK for failing to remove all legal effects of the Intra EU-BITs to which both states are parties. The Commission urges Finland and the United Kingdom to terminate their Bilateral Investment Treaties with other EU Member States. *May Infringements Package: Key Decisions*, EUR. COMM'N. (May 14, 2020), [https://ec.europa.eu/commission/presscorner/detail/EN/INF\\_20\\_859](https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_859). On December 2, 2021, through formal letters, the EU Commission officially initiated infringement proceedings. *Commission urges Austria, Sweden, Belgium, Luxemburg, Portugalia Romania and Italy to terminate Bilateral Investment Treaties (BITs) with other EU Member States. December Infringements Package: Key Decisions*, EUR. COMM'N. (Dec. 2, 2021), [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_6201](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201).

26. The EU Commission's determination goes so far that when Spain executed the award for the compensation to the Luxemburg-based company in July 2021, Brussels launched a formal investigation against Madrid alleging the breach of TFEU art. 108 (2) prohibiting the state aid. *See Procedures Relating to the Implementation of the Competition Policy*, 2021 O.J. (C 450) 5.

27. *See* Case C-284/16, *Slowakische Republik v. Achmea BV*, ECLI:EU:C:2017:699, ¶¶ 42, 45, 56 (Sep. 19, 2017); Case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2017:699, ¶¶ 42, 44, 52, 62 (Sep. 2, 2021). The origins of the concept of autonomy of the European legal order can be found in such milestones of the EU jurisprudence. *See, e.g.*, Case C-26/62, *Van Gend en Loos v. Administratie der Belastingen*, [1963] E.C.R. 1; Case 6/64, *Costa v. ENEL*, [1964] E.C.R. 585, 593. Notably in the latter the court famously stated that by contrast with ordinary international treaties, the EEC Treaty has created its own legal system. On the concept of Autonomy of the EU legal order, see RENE BARENTS, *THE AUTONOMY OF COMMUNITY LAW* 172 (2004); Marcus Klamert, *The Autonomy of the EU (and of EU Law): Through the Kaleidoscope*, EUR. L. REV. 42, 815 (2017).

allow a better understanding of why the CJEU clung to its specific and unique role of the EU law chief interpreter for whom the last word in all disputes on European law is strictly reserved.<sup>28</sup> In this sense, the case law discussed above should be seen as a continuation of the previous trend in the CJEU jurisprudence seeking to protect the Court's competencies (with the approval of the Member States and other EU institutions), which the Court deemed its own. While discussing *Achmea*, the Justices referred back to their previous Opinion 2/13, which effectively buried any hopes for the EU's quick accession to the European Court of Human Rights (ECHR).<sup>29</sup> As it is generally well known, they declared such a step as *liable adversely to affect the specific characteristics of EU law and its autonomy*.<sup>30</sup> They also expressed concern that even a mere hypothesis that another international judiciary organ than the CJEU may decide the division of powers between the EU and its Member States is sufficient ground to block the initiative.<sup>31</sup>

In hindsight, it seems that the CJEU created insurmountable barriers for *ad hoc* tribunals based on Intra-EU BIT arbitration clauses. Since Opinion 2/13 rejected the idea of establishing a stable framework of cooperation with the ECtHR that had all specifics of a permanent international court, it was rather clear that any cooperation with *ad hoc* investment tribunals is out of the question for the same reasons. If the former is stable (and more predictable in its jurisprudence), and the latter are not (and their jurisprudence is less predictable than the case law of a judiciary organ) then, *a fortiori* the CJEU was less inclined to tolerate the existing *status quo*. Moreover, *ad hoc tribunals* could not have been subdued to any form of judicial control performed by the EU judiciary.<sup>32</sup>

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28. Case Opinion 1/91, Opinion Pursuant to Article 228 of the EEC Treaty, 1991 E.C.R. I-6079, ¶ 46, 71.

29. Case C-284/16, *Slowakische Republik v. Achmea BV*, ECLI:EU:C:2017:699, ¶ 32 (Sep. 19, 2017).

30. Case Opinion 2/13, Opinion Pursuant to Article 218(11) TFEU, ECLI:EU:C:2014:2454, ¶ 200 (Dec. 18, 2014).

31. The Court provides that:

Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law.

*Id.* ¶ 221.

32. *Ad hoc* investment arbitration tribunals do not meet the conditions of a court in the meaning of the TFEU Article 267. *Cf.* Case C-407/98, *Katarina Abrahamsson, Leif Anderson v. Elisabet Fogelqvist*, 2000 E.C.R. I-5562. It is rather indisputable that they may not send any questions to the CJEU for preliminary rulings. For more on the contradiction between TFEU art. 267 and Intra EU BITs, see Case C-284/16, *Slowakische Republik v. Achmea BV*,

Therefore, the EU institutions logically concluded that the sole solution to bring the ongoing tensions between the Intra-EU BITs as applied by investment arbitration and the EU itself is to terminate these agreements, and this time for good.<sup>33</sup>

A discussion regarding the fundamental issue whether such an attitude of the CJEU defending the autonomy of the EU legal order is doctrinally correct exceeds this note's scope.<sup>34</sup> However, we note that even the radical critics of the Luxemburg Tribunal case law discussed above do not fail to admit that the rationale is comprehensible. The ongoing discussion is not about the principle of the autonomy of the EU legal order, but rather the proportionality. Thus, what is criticized is not the principle but the way the CJEU interprets it, notably that it interprets it at the expense of the EU Member States' rights and obligations flowing out from international law, not European law.<sup>35</sup> Further, we note that, regardless of the merits of these critiques, they were able to influence neither the CJEU case law nor the EU foreign investment policy.

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ECLI:EU:C:2017:699, ¶¶ 49, 58-60 (Sep. 19, 2017); Case C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2017:699, ¶ 53 (Sep. 2, 2021).

33. *But see* Dimitry Vladimirovich Kochenov & Nikos Lavranos, *Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union*, HAGUE J. ON RULE L. (Mar. 17, 2021) (arguing that it was possible to allow the institution of questions for preliminary rulings in the proceedings performed by the Intra-EU BIT *ad hoc* tribunals).

34. The literature on this topic is already robust. Amidst ongoing discussions about the CJEU's attitude towards IIAs, it seems that all substantial theoretical *pros* and *cons* have been examined. *See, e.g.*, Cristina Contartese, *The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again*, 54 COMMON MKT. L. REV. 1627 (2017); Marja-Liisa Öberg, *Autonomy of the EU Legal Order: A Concept in Need of Revision?* 26 EUR. PUB. L. 705 (2020) (arguing that "[c]losely connected to the expansion of the EU's normative influence globally and in its neighbourhood is the necessity to set up effective institutional and procedural frameworks, including judicial protection mechanisms. The keen protection of the autonomy of the EU legal order in such instances conflicts sharply with the Union's interests and foreign policy strategies and may well warrant a review of the current paradigm of the autonomy of the EU legal order."); JED ODERMATT, *INTERNATIONAL LAW AND THE EUROPEAN UNION* 176 (2016). *See* Daniel Halberstam, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, in MICH. L., PUB. L. & LEGAL THEORY RES. PAPER SERIES (2015), for defense of the CJEU's stance.

35. *See, e.g.*, Kochenov & Lavranos, *supra* note 33, at 5 ("while it may be understandable from the point of view of the Court to protect its turf and its authority as being the highest judge as far as the interpretation and application of EU law is concerned, this attitude at the same time undermines the coherence of international law"); Öberg, *supra* note 34, at 737 (noting that, "[t]he CJEU's restrictive stance is well justified in the light of its role in the EU legal order as an authoritative interpreter and engine for the development of legal doctrines, despite occasional challenges from the Member States.... A more lenient approach to autonomy would enable the Union to more efficiently build partnerships, set up international organizations and bodies as well as to participate in their activities").

On the contrary, during the last eighteen months, we witnessed unprecedented but very coherent actions orchestrated by the CJEU and other institutions that target the very existence of Intra-EU BITs and pose a genuine threat to the ISDS under ECT. After *Komstroy*, it seems that any hope that the case law discussed in this article will become more inclined to seriously take these criticisms into consideration are erroneous. As the CJEU turned its deaf ear to those who demanded a more flexible stance on the autonomy principle, we need to accept this position and look at what could (and should) be done within the legal framework imposed on investors by the EU.

### PART III

At first glance, although the existing Intra-EU BITs are about to expire (or have already expired), they may still produce legal effects. The purpose of Article 2(2) and 3 of the TA is to extinguish any effects of the sunset clauses. Some scholars and practitioners opine that both provisions, once in force, will produce the retroactive effect and should be ignored.<sup>36</sup> This proposition (if accepted by the *ad hoc* tribunals) can result in situations where the arbitrators will settle a dispute submitted to them according to the previous BIT provisions. According to the same line of reasoning, the awards would contradict the TA and thus would be non-enforceable within the EU Member States jurisdictions; nonetheless, the investors are not foreclosed from seeking their enforcement in some third countries (including the UK).<sup>37</sup> Therefore, if one assumes these claims are theoretically correct, the EU anti-EU BIT policy can produce only limited effects. For once, it is probable that *ad hoc* investment tribunals, while settling the disputes in the ongoing proceedings arising from the Intra-EU BITs, will partially gloss over the TA provisions. Secondly, while the EU can effectively prevent its Member States' domestic courts from executing these awards, it is powerless against the decisions of the US, UK, or Australian judiciary organs. Nonetheless, this vision of the future

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36. Kochenov & Lavranos, *supra* note 33, at 9.

37. *Id.* at 18. See, *accord, e.g.*, Debin Bray & Surya Kapoor, *Agreement on the Termination of Intra-EU BITs: Sunset in Stone?* KLUWER ARBITRATION BLOG (Nov. 4, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-bits-sunset-in-stone/>; Laura Halonen, *Termination of Intra-EU BITs: Commission and Most Member States Testing the Principle of Good Faith under International Law*, KLUWER ARBITRATION BLOG (May 13, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/05/13/termination-of-intra-eu-bits-commission-and-most-member-states-testing-the-principle-of-good-faith-under-international-law/>.

relationships between the EU and the Arbitration world has at least two drawbacks: one theoretical and one practical.

The commentators fingering the contradiction between the TA and CJEU case law on one side and international law on the other usually base their arguments on the provision VCLTs.<sup>38</sup> They emphasize Article 26 (good faith), Article 28 (prohibition of retroactivity), and Article 70, which is usually quoted as allegedly stating that “the termination of a treaty under its provisions or in accordance with the present Convention...does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.” But this reading of the VCLTs is not free of controversy. One should not forget that the 1969 Vienna Convention concerns the treaties, which are legally binding documents creating rights and duties for sovereign subjects of international law. Therefore, Article 26 and 28 should be understood as legal bases creating some rights and obligations for states rather than individuals. Secondly, Article 70 (1) begins with the following words, “unless the treaty otherwise provides or the parties otherwise agree.” It follows that the VCLT indeed creates a presumption that rights and duties acquired in the wake of the execution of provisions in an agreement are not affected. Still, this presumption can be rebutted through another agreement,<sup>39</sup> and this is what the EU Member States did. They concluded that the TA effectively terminated Intra-EU BITs, sunset clauses included. Thus, without denying that retroactivity is, as a matter of principle, forbidden under international law, it is nonetheless clear that the VCLT provisions provided some exceptions. Therefore, setting aside the issue, what actually will be the reaction of *ad hoc* arbitration tribunals confronted with art. 2(2) and 3 of the TA,<sup>40</sup> with this interpretation suggesting that ignoring these provisions is not based on solid theoretical ground.

Moreover, the scenario where *ad hoc* tribunal awards are enforceable everywhere but in the EU is not optimal for the EU or its investors and Member States. This situation unnecessarily elongates the conflict with EU institutions without bringing any profits to any stakeholders. If the ultimate

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38. Cf. Kochenov & Lavranos, *supra* note 33, at 13.

39. See MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 871 (2009).

40. As it is generally acknowledged, in *Magyar Farming Company*, the arbitrators rejected Hungary’s argument that in the wake of the *Achmea* judgment, the jurisdiction of the investment tribunal may be determined exclusively by the European, not international, law. Case *Magyar Farming Company Ltd., Kintyre Kft, and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, ¶ 207, 210 (Nov. 13, 2019). At this moment, there are no reliable information on how these tribunals interpret the Termination Agreement; therefore, we must still wait for the jurisprudence to come.

goal of this *business-as-usual* scenario were some concessions from the CJEU or the EC, perhaps the tactics based upon disregarding what the EU does would be recommendable. However, such a tactic cannot make EU institutions' stance on the Intra-EU BITs more flexible, let alone influence their attitude more substantially. The strategy based on the TA's ignorance will probably cost more and be more counterproductive in the long term.

For now, the problem is that the EU appears to be sincerely convinced that the denial of arbitration is not particularly harmful to its investors. This conviction seems to hinge upon two premises. First, all standards provided for in BITs are reflected in EU law. Second, domestic courts can enforce them without any particular problems because of their sufficient European anchorage. Against this conviction, it must be admitted that the EU's current path seems risky and unpromising. As Kochenov and Lavranos diligently demonstrated, these prerequisites are problematic or even flawed theoretically and practically. In particular, we subscribe to their view that Intra-EU BITs contain specific clauses (e.g., MFN or expropriation clauses) that are not directly mirrored within EU law.<sup>41</sup> It is also true that the CJEU's conviction that Member States domestic courts are still ready to act upon following the mutual trust principle to the extent necessary to enforce investors' rights efficiently does not find sufficient support in empirical data.<sup>42</sup> It is allowed to think the ongoing anti-Intra-EU policy partially echoes the arguments that test conventional wisdom by suggesting a strong link between the development of democratic standards and BITs.<sup>43</sup> The Court is nonetheless naïve to believe that the mere extinction of *ad hoc* tribunals will automatically make business circles ready or more inclined to

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41. Kochenov & Lavranos, *supra* note 33, at 10, 18.

42. Kochenov and Lavranos emphasize that the court fails to mention that in the context of the deterioration of the independence of the judiciary and the quality of the rule of law in a number of EU Member States, the Union does not boast too many ways to actually ensure the substantive good functioning of the judiciaries and state machineries in question. *See id.* at 18; *see also id.* at 10, 15-16. In their opinion, previous experiences suggest that the EC Commission is not hurried to use the measures which are at its disposal to enforce investor rights, when Member States domestic organs failed to execute them. *Id.* at 15. Still, there are some other fundamental issues that make the CJEU attitude problematic. Notably, we are not persuaded that under current circumstances, domestic judiciaries in Europe are sufficiently prepared to settle technically complex disputes between the foreign investors and host states. This issue should have been much better examined before the EU embarked upon the eradication policy targeting existing Intra-EU BITs.

43. *Cf.* Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy*, 31 EUR. J. INT'L. L. 289, 312 (2020).

settle their disputes in standard channels of domestic judiciaries.<sup>44</sup> Keeping all these circumstances in mind, we must consider feasible alternatives to the current *status quo*.

#### PART IV

A close look at the European Commission documents concerning the current and future status of the Intra-EU foreign investment reveals they are not entirely coherent. On the one hand, Brussels declares that EU law offers appropriate substantial and procedural guaranties to EU investors. On the other hand, it admits openly that some modifications advantageous to EU investors could be necessary or recommendable.<sup>45</sup> Despite some pessimistic voices, it seems that room for negotiations on the future model of Intra-EU investment protection still exists.

To be sure: this room is determined by EU legislation and the CJEU's case law. Therefore, some innovations discussed previously are simply out of the question.<sup>46</sup> Furthermore, although the mechanisms under discussion are numerous,<sup>47</sup> the institution that the EU dramatically lacks in the face of expiring Intra-EU BITs is a dispute settlement body or another ISDS system viable for all stakeholders. Against this backdrop, we take note of Opinion 1/17,<sup>48</sup> where the CJEU accepted—as a matter of principle—the ISDS system supervised by the First Instance Tribunal and Appeal Tribunal established by CETA. It is not easy to see why this system could not be a reference point for a future Intra-EU ISDS. After all, if the Court, which was previously so keen not to jeopardize the autonomy of the EU legal order, conceded slightly on this point in relations with a non-Member State, why could it not accept the same logic regarding the EU investors?

We cannot see any valid grounds for such a differentiation. Moreover, we believe that at least two causes strongly advocate for the concept of a

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44. The reasons why it would be naïve are exactly the same reasons mentioned in Mark E. Villiger's Commentary on the 1969 Vienna Convention on the Law of Treaties. See VILLIGER, *supra* note 39.

45. Cf. Inception Impact Assessment on Investment protection and facilitation framework (EC) No. 2716046 of 26 May 2020, at 3-4.

46. This remark concerns these mechanisms, which could have been engrafted upon the existing structure of the Intra-EU BITs., notably preliminary questions. As these agreements expired (or are about to expire), it is highly unlikely that the Luxemburg Tribunal will answer a question submitted by a body whose legal bases are, in its own opinion, non-existing. Therefore, any continuation of debate on the acceptability of *ad hoc* tribunals' questions for preliminary ruling addressed to the CJEU is pointless.

47. Kochenov & Lavranos, *supra* note 33, at 15.

48. Case Opinion 1/17, Opinion Pursuant to Article 218(11) TFEU, ECLI:EU:C:2019:341 (Apr. 30, 2019).



European Investment Court (EIC). First, the immediate effect of Intra-EU BIT expiration is the reverse discrimination of the EU investors against their competitors registered in non-Member States. Even though reverse discrimination is hardly ever a breach of international law, it is detrimental to EU investors. It should not be tolerated in the medium, let alone long-term. Ironically, the fact remains that under the current status quo, a U.S. investor who invested in one of the Central or East EU Member States may claim damages before *ad hoc* investment tribunals, while the investor from Germany or France may not.

Second, it is not a secret that, as of now, none of the FTA Agreements between the EU and non-Member States is fully operational (at least not in regard to their ISDS systems). It could be interesting to set up within the EU an institution that could serve as a model demonstration to all potential stakeholders. Further, such a European Investment Court could gather experiences or lessons before the EU embarks upon more advanced ISDS projects (such as the Multilateral Investment Court).

Keeping in mind that this presumed European Investment Court would be an institution linked with the rest of the EU institutional regime, it seems rather evident that, once it is established and set in motion, it could send questions mentioned in Article 267 of TFEU, although its relation with the CJEU should be further explored. Nonetheless, investors probably won't accept such subordination if they are not assured that the future EIC is genuinely able to settle their disputes according to most of the standards they are familiar with, specifically, those developed by the *ad hoc* investment tribunals. Still, the question of how to strike the proper balance between the conflicting interests of investors and EU Member States (potential respondents) is a question that falls out of the scope of the present analysis.

## CONCLUSIONS

Even though some *ad hoc* tribunals are still working to settle the pending disputes as quickly as possible, the previous system based on the Intra-EU BITs is on the verge of total collapse. Undoubtedly, the direct cause of this dramatic change was the dogmatic EU policy that, by pushing forward the principle of autonomy of the European legal order, made the Intra-EU BITs extinct just within three years. Although some arbitrators may ignore the developments discussed above, it does not seem to be a valid and attractive option in the longer term. Therefore, the concept of an EIC is the most viable one in current circumstances because it appears to be the sole concept upon which all stakeholders eventually could find a compromise.

While we support the EIC, we are aware that the concept also brings some inconveniences to investors. Some of them have already been discussed in the literature on Tribunals to be established under the FTA, concluded by the EU with some third states.<sup>49</sup> The same problems will likely arise when the EU tries to implement the EIC concept into practice. Under current circumstances, however, no other alternative seems to be on the negotiating table. Understandably, the EU policy is shocking to some commentators and practitioners. The possibility of appointing its arbitrator has never been attractive to many investors. However, for the reasons discussed in this article, we cannot guarantee that the EU policy will shift back. The world of *ad hoc* tribunals established upon classic BITs becomes European history. Therefore, we are looking ahead and advocating for a solution that will not please stakeholders entirely, but should be palatable enough for the majority to accept.

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49. Jin Woo Kim & Lucy M. Winnington-Ingram, *Investment Court System Under EU Trade and Investment Agreements: Addressing Criticisms of ISDS and Creating New Challenges* 16 GLOB. TRADE & CUST. J. 181, 182 (2021) (mentioning the problems of relation between these treaties and the 1965 Washington Convention further drawing the attention to another problem, “a potential for increases in the cost and/or duration of proceedings arising out of the appeal mechanism. Stakeholders have also raised concerns around the caliber and practical experience of potential arbitrators willing to be appointed to the ICS”).

# THE CHALLENGE OF CREATING A CONCEPT OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT IN THE MEXICAN CONSTITUTION ACCORDING TO INTERNATIONAL LAW

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## Abstract

This article examines the concept of sustainable development, a human right that is subject to reference in the Mexican Constitution and in international treaties to which Mexico is a party. It provides the general definition of sustainable development and describes the challenges of formally incorporating the concept into the Mexican Constitution. This article also examines the Mexican Supreme Court's interpretation of sustainable development and finds that the term must be developed. As a concept, sustainable development must be developed not only under constitutional reform, but also at the level of secondary legal norms that derive from the Mexican Constitution. This article demonstrates that despite the country's international obligations, the rationale of sustainability as a human right is far from accomplished under the current norms that the Mexican Constitution presents.

## Key words

Sustainability, Mexico, Constitution, treaties, environment.

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I.	INTRODUCTION .....	748
II.	THE MONIST THEORY OF LAW IN THE MEXICAN CONSTITUTION .....	749
III.	THE NATURE OF INTERNATIONAL LAW IN MEXICO .....	752
IV.	THE INTERNATIONAL TREATY PROCESS IN THE MEXICAN CONSTITUTION.....	753
V.	SUPREMACY CLAUSE IN THE MEXICAN CONSTITUTION .....	755
VI.	PRINCIPAL TREATIES REGARDING SUSTAINABLE DEVELOPMENT SIGNED BY MEXICO.....	757
VII.	SUSTAINABLE DEVELOPMENT IN THE MEXICAN CONSTITUTION AS A HUMAN RIGHT .....	761
VIII.	THE MEXICAN SUPREME COURT AND THE INTERPRETATION OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT.....	764
IX.	THE PROBLEM OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT IN THE MEXICAN CONSTITUTION .....	766
X.	CONCLUSION.....	767

## I. INTRODUCTION

This article discusses environmental constitutionalism in relation to international law, specifically what is known as “international sustainable development law.” This article seeks to identify the external elements that allow for the establishment of sustainable development norms from the Mexican Constitution. It tries to identify those elements by using a comparative method: it identifies the differences and similarities between the text of the Mexican Constitution (“*law in the book*”) and those external elements that are present in international law at a given time (“*law in action*”). These external elements reflect the values and interests of the international community and pressure the Mexican Constitution to either change or add new concepts to the existing constitutional norms.

Article 4° of the Mexican Constitution is one of the established constitutional norms that refers to the human right of sustainable development.<sup>1</sup> Moreover, there are other articles in the Constitution which refer to sustainability, but they only mention the concept without defining it. Perhaps this is because many international actors (e.g., international

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1. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

corporations, international intergovernmental organizations, etc.) have used the concept in various ways. Therefore, to have an idea about the existing meaning of “sustainable development,” it is necessary to look at the decisions of the Mexican Supreme Court.

Currently, a normative concept of “sustainable development” does not formally exist in the Mexican Constitution, whether in the main norm, which is Article 4<sup>o</sup>, or in the other constitutional norms that use the terms “sustainable development” and “sustainability.” Article 4<sup>o</sup> refers to sustainable development in a very poor way, as if this right is not important. Therefore, the main purpose of this research is to propose guidelines to create a normative concept of this right according to international environmental agreements to which Mexico is a party.

This article poses two principal questions: Why did the Mexican Constitution establish the concept of sustainable development in such a poor way? Was it on purpose or was it a failure of the legal system as a whole? To answer these questions, this article uses the documentary and comparative methodologies.

The hypothesis of this article is that sustainable development is very difficult to achieve in a country where poverty is one of the main problems for the government in addition to the problems related to environmental protection. Therefore, the establishment of a better normative concept of sustainable development could help to achieve environmental protection without putting the economic development of Mexico at risk.

Scholars around the world have advocated for the protection of the environment at the national level as a form of achieving global environmental justice, in other words, as a way of defending a common future. “Scholars and activists have, for years, advocated the constitutionalization of environmental protection at the national level, whether via judicial interpretation of existing constitutional provisions or via formal amendment.”<sup>2</sup> In Mexico, this is a challenge.

## II. THE MONIST THEORY OF LAW IN THE MEXICAN CONSTITUTION

In the 21<sup>st</sup> century, the protection of the environment through sustainable development is crucial, considering that “environmental law [means] that certain needs and interests of present and future generations, the global community, and other forms of life can be given foundational legal importance, in such a way that the ensuing costs and benefits that are

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2. Douglas A. Kysar, *Global Environmental Constitutionalism: Getting There from Here*, 1 *TRANSNAT’L ENVTL. L.* 83, 84 (2012).

observed by economists will reflect a prior determination by the political community to pursue environmental sustainability.”<sup>3</sup>

In Mexico, since the constitutional reforms of June 2011, “[i]nternational law has moved from the periphery to the center of public debate in the course of only a few years.”<sup>4</sup> The significance of international law has increased considerably.<sup>5</sup>

The modification of Article 1° of the Constitution established that human rights in the Mexican Constitution and the nation’s treaties are equivalent. Both share equal footing in the legal hierarchy because Article 1° considers the rights in treaties as an addition to those that the Mexican Constitution has already established.

The importance of these international agreements is enormous in Mexico because they represent a new set of rights that apply in the Mexican territory. Rights that are both constitutional and international constitute a “bloc of constitutionality” because they stand on the same hierarchical level. In other words, there is no difference between the rights that the Constitution established and that international treaties created.

The legal doctrine that supports this point of view is Hans Kelsen’s pure theory of law. It is a normative science with a monist construction of law, in which there is only one legal system consisting of international and national law.<sup>6</sup> Under this monist construction, all international treaties, including the human rights treaties, are part of the Mexican body of law. They are part of the Mexican legal system. Therefore, there is not a separable set of international norms. This is an approach that differs from those countries that emphasize a dualist model of law.<sup>7</sup>

Kelsen expressed that “two norm complexes may form a single system of norms [such that] both orders are coordinated, that is, that their spheres of validity are delimited against each other.”<sup>8</sup> In this context, Mexico, through a reform that occurred in June 2011, modified Article 1° of the

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3. *Id.* at 88.

4. Oona A. Hathaway & Ariel N. Layinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1404 (2006).

5. Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45, 69 (2011).

6. HANS KELSEN, *PURE THEORY OF LAW*, 333 (Max Knight ed., Lawbook Exchange 2005).

7. The passage states:

Kelsen and many modern theorists insist that, like municipal law, international law possesses and indeed must possess a “basic norm,” or what we have termed a rule of recognition, by reference to which the validity of the other rules of the system is assessed, and in virtue of which the rules constitute a single system. The opposed view is that this analogy of structure is false: international law simply consists of a set of separate primary rules of obligation which are not united in this manner.

HERBERT L. HART, *THE CONCEPT OF LAW* 233 (3d ed. Oxford University Press 2012).

8. KELSEN, *supra* note 6, at 332.

Constitution and added the equal recognition of both the human rights established in the Constitution and those established in international treaties.

Both human rights, constitutional and international, are part of the same body of laws: a monistic version of law, without a real difference between them. They complement each other as a complete set of rules regarding human rights. Kelsen developed this theory in his previous work, *General Theory of Law*, in which he considered that “analysis of international law has shown that most of its norms are incomplete norms which receive their completion from the norms of national law.”<sup>9</sup>

To systematize his theory and establish the relationship between international and constitutional (national) laws, Kelsen used what he called the normative science method, which scholar Malcolm N. Shaw explains as being:

normative science, that is, consisting of rules which lay down patterns of behavior. Such rules, or norms, depend for their legal validity on a prior norm and this process continues until one reaches what is termed the basic norm of the whole system. This basic norm is the foundation of the legal edifice, because rules which can be related back to it therefore become legal rules.<sup>10</sup>

In this regard, the Mexican State makes both international and constitutional laws. Both are positive laws. The Mexican legal system incorporates the human right of sustainable development into the Mexican Constitution because Mexico created the right by entering into treaties such as the Rio Declaration. In other words, “Kelsen’s normativism is the result of a long historical commitment to the identification of law as legal rules, especially those rules stemming from the recognized sources of state law.”<sup>11</sup>

Of course, in Mexican legal practice, it takes time to give effect to the human rights in treaties, and that includes sustainable development. Nevertheless, these rights are valid and can serve as sources of law. Yet, a better concept of sustainable development in the Mexican Constitution, as this academic article proposes, would help to create a complete set of rules, national and international, regarding sustainable development. But it is worth considering that:

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9. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE*, 363 (Harvard University Press ed. 1949).

10. MALCOLM N. SHAW, *INTERNATIONAL LAW* 50 (6<sup>th</sup> ed., Cambridge University Press 2008).

11. Halperin, *supra* note 5, at 47.

the process of the implementation of international conventional rules in national legal orders, either in a monist or a dualist system, is based upon the circulation of legal statements (which are contained in treaties or international case law) and how they are received as new meanings (through “domestic” interpretation) within national legal orders.<sup>12</sup>

In Mexico, because of the constitutional reform of 2011, human rights incorporated in treaties are received in a very comprehensive manner. They are an expansion of the human rights already contained in the Constitution.

### III. THE NATURE OF INTERNATIONAL LAW IN MEXICO

In accordance with paragraph one of Article 1° and Article 133, international law is part of the Mexican legal system from a monist theory perspective, as discussed above. Nevertheless, there is a big difference between these constitutional articles. Article 133 establishes the theory of constitutional supremacy; it means that the Constitution controls all treaties such that they cannot be against the Constitution. This article grants the judiciary power to control treaties by the Constitution. Treaties are only valid if they do not contradict or go beyond the terms of the Constitution.

According to Article 133, treaties are part of the Mexican legal system because they fall under the Constitution. Mainly, international law in Mexico represents treaties that Mexico makes with other States or international intergovernmental organizations under the Vienna Convention on the Law of Treaties. Once the President of Mexico signs a treaty and the Senate ratifies it, it becomes part of the Mexican legal system. The treaty then imposes duties and governs relations among Mexico’s own nationals or persons having a legal relationship with the country.

However, the constitutional reform of June 2011 modified Article 1°, which now contradicts Article 133. Article 1° states that Mexico recognizes the human rights expressed in both “this constitution and [in] treaties.”<sup>13</sup> Therefore, there is no constitutional control on treaties because Article 1° puts the rights of treaties on the same level as constitutional rights. Article 1° means that treaties can grant new human rights to Mexicans, or even go beyond the Constitution in extending the catalog of human rights.

Mexico faces a new approach to international law. Because of the constitutional reform, the country has incorporated human rights from treaties directly into its legal system. As a result, specialized international law areas influence domestic law and drive reforms in many national

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12. *Id.* at 70.

13. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).



statutes. One of these new areas is international sustainable development law, which creates the human right of personal development in a sustainable environment. At first, this human right of sustainable development was an environmental right. Due to the growth of international law, it is now its own specialized area of international law.

Treaties, being effective in Mexico, are based on consent, will, and acceptance under Article 11 of the Vienna Convention on the Law of Treaties. Article 11 points out that: “the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”<sup>14</sup>

Once Mexico expresses consent to a treaty, it is bound to that treaty according to international law. Article 26 of the Vienna Convention on the Law of Treaties establishes the principle of *pacta sunt servanda*, which is another theory that Hans Kelsen, among others, developed. Article 26 incorporates the theory by providing that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>15</sup>

Treaties, according to Article 38 of the Statute of the International Court of Justice, are one of the sources of international law. Paragraph 1, subsection 1.a of Article 38 establishes the principle as follows:

Article 38.- The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.<sup>16</sup>

This highlights the importance of treaties in the Mexican context. Treaties, and the human rights that derive from them, are part of the Mexican legal system. The human rights that derive from Mexico’s treaties are incorporated directly into the text of the Mexican Constitution, following the guidelines that those treaties set out.

#### IV. THE INTERNATIONAL TREATY PROCESS IN THE MEXICAN CONSTITUTION

The treaty-making process in Mexico, as in many other countries, consists of three big phases: 1) negotiation, 2) signature and 3) ratification. These phases are subsequent and interrelated. This means that if you do not finish the first phase, it is impossible to continue with the next.

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14. Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331.

15. *Id.* art. 26.

16. Statute of the International Court of Justice art. 38, <https://www.icj-cij.org/en/statute>.

The first phase of negotiation corresponds to the President of Mexico, the Head of the Mexican State. According to Article 89 subsection X<sup>17</sup> of the Mexican Constitution, the President has the power to negotiate treaties with other countries and carry out the operations to establish the text of a treaty. These juridical negotiations can be conferences, congresses, bilateral or multilateral meetings among secretaries of states and ministers of foreign affairs and so on. Some call the President of the United Mexican States “the Big Legislator,” because he is the only one that participates in the negotiation process without the intervention of any member of the Federal House of Representatives or the Senate. This is so even though the Senate participates in the ratification process.

The second phase in the treaty-making process is the signing of a treaty. There are two types of signatures in the process: definitive and *ad cautelam* or *ad referendum*. The President of Mexico makes the first signature in his role as the Head of the Mexican State and as the people’s representative. As discussed in the paragraph above, this branch of government has the power and duty to definitively sign treaties once the negotiating States and international organizations agree to a treaty’s text. The head of the negotiating team, which can be the Secretary of the State, Ambassador, or any other designated Mexican state representative, makes the second signature. This *ad cautelam* signature becomes definitive only after the head of the negotiating team signs the treaty and the President of Mexico confirms the instrument.

This signature process has two functions: 1) to establish the end of the negotiation period and 2) to express consent to be bound by a treaty. These two phases correspond to the President of Mexico. Both phases are a form of exercising a centralized power in the treaty-making process without the intervention of any other branch of government.

The third phase is ratification, which corresponds to the Mexican Senate. In Mexico, ratification is a synonym for “approval” because,

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17. The original wording of Article 89 of the Mexican Constitution in Spanish: Las facultades y obligaciones del Presidente, son las siguientes:[...] X.- Dirigir la política exterior y celebrar tratados internacionales, así como terminar, denunciar, suspender, modificar, enmendar, retirar reservas y formular declaraciones interpretativas sobre los mismos, sometiéndolos a la aprobación del Senado. En la conducción de tal política, el titular del Poder Ejecutivo observará los siguientes principios normativos: la autodeterminación de los pueblos; la no intervención; la solución pacífica de controversias; la proscripción de la amenaza o el uso de la fuerza en las relaciones internacionales; la igualdad jurídica de los Estados; la cooperación internacional para el desarrollo; el respeto, la protección y promoción de los derechos humanos y la lucha por la paz y la seguridad internacionales; [...].

Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 89, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

according to Article 76 subsection I of the Mexican Constitution<sup>18</sup>, the Senate has the power to “approve” treaties that the President of Mexico negotiated. This is the Senate’s only duty in the treaty-making process because it does not participate in the negotiating phase. Members of the Senate simply “raise their hand” or “press the button” to approve a treaty without intervening in the definition of the terms of the treaty. This is very different from the treaty-making process in the United States of America. In American law, the Senate has the power to advise the President during the negotiating process. By contrast, in Mexico, the President has the exclusive power to define the terms of a treaty during negotiation.

## V. SUPREMACY CLAUSE IN THE MEXICAN CONSTITUTION

Article 133 of the Mexican Constitution establishes a constitutional supremacy,<sup>19</sup> which means that all treaties and federal and local laws are subject to the Constitution. They take their legal validity from the *Magna Carta*. According to Article 133, the Mexican Constitution is the foundation of all treaties and laws that apply in Mexico.

Supremacy means that something stands above all else, that something is on the top. Therefore, under Article 133, the Mexican Constitution stands on the top of all treaties, laws, and statutes. In this context, the Constitution is the fundamental norm, the primary source of law, the origin of the Mexican legal system.

Therefore, constitutional supremacy means that the Constitution is the fundamental norm because it stands over all other laws and treaties. In a constitutional State like Mexico, the Constitution is the point of convergence and reference for the rest of the statutes and treaties. They must exist under the Constitution because it is the fundamental law from which human rights and the State’s organs derive.

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18. The original wording of Article 76 of the Mexican Constitution in Spanish is:

Son facultades exclusivas del Senado: I. Analizar la política exterior desarrollada por el Ejecutivo Federal con base en los informes anuales que el Presidente de la República y el Secretario del Despacho correspondiente rindan al Congreso. Además, aprobar los tratados internacionales y convenciones diplomáticas que el Ejecutivo Federal suscriba, así como su decisión de terminar, denunciar, suspender, modificar, enmendar, retirar reservas y formular declaraciones interpretativas sobre los mismos;[...].

*Id.* art. 76.

19. The original wording of Article 133 of the Mexican Constitution in Spanish is:

Artículo 133. Esta Constitución, las leyes del Congreso de la Unión que emanen de ella y todos los tratados que estén de acuerdo con la misma, celebrados y que se celebren por el Presidente de la República, con aprobación del Senado, serán la Ley Suprema de toda la Unión. Los jueces de cada entidad federativa se arreglarán a dicha Constitución, leyes y tratados, a pesar de las disposiciones en contrario que pueda haber en las Constituciones o leyes de las entidades federativas.

*Id.* art. 133.

However, in 2011, the Constitution underwent reform. Reform ultimately challenged the supremacy that Article 133 established. A modified Article 1<sup>o</sup> paragraph one now stands in contrast to Article 133 by stating that the human rights that derive from treaties share the same hierarchical position as the human rights that derive from the Constitution.<sup>20</sup>

Yet, constitutional supremacy remains for domestic laws but not for international treaties because the human rights in the Constitution and in treaties exist at the same level. No one set of human rights can obtain their legal validity from the other. Rather, they complement each other and amplify the human rights of Mexicans.

In this sense, what used to be “the law of nations” (*ius gentium*<sup>21</sup>) is now “international law.” However, the concept of international law (*ius inter gentes*) is misleading because it falsely suggests the existence of a body of laws that only governs relations between nations and not persons. In truth, international human rights belong to human beings as part of an international community of persons that share the same rights. No matter the country, all people belong to this international community.

The positivist Jeremy Bentham first coined the term “international law.”<sup>22</sup> He could not find a better concept to synthesize the emergence of a new body of laws which nations were creating. However, nowadays this body of laws applies not only to States but also to human beings in human rights matters.

Consequently, there is a problem with Articles 1<sup>o</sup> and 133 of the Mexican Constitution. Article 1<sup>o</sup> is a “coordination article” while Article 133 is a “subordination article.” There is a clear contradiction between them. Yet, the Mexican Supreme Court decided to maintain constitutional supremacy regardless of what Article 1<sup>o</sup> states about the human rights that derive from treaties.

There is no doubt that the Mexican Supreme Court’s interpretation of Articles 1<sup>o</sup> and 133 is going to change in the future, just as the Court has

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20. The original wording of Article 1<sup>o</sup> of the Mexican Constitution in Spanish is:  
Artículo 1o. En los Estados Unidos Mexicanos todas las personas gozarán de los derechos humanos reconocidos en esta Constitución y en los tratados internacionales de los que el Estado Mexicano sea parte, así como de las garantías para su protección, cuyo ejercicio no podrá restringirse ni suspenderse, salvo en los casos y bajo las condiciones que esta Constitución establece. [...].

*Id.* art. 1.

21. See Jeremy Waldron, *Foreign Law and the Modern Jus Gentium*, 119 HARV. L. REV. 129, 133 (2005) (stating “[b]ut I shall use the Latin phrase ‘jus gentium’ to refer to the law of nations in the more comprehensive sense—a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems”).

22. HART, *supra* note 7, at 237.

changed the criteria regarding other constitutional articles. It is possible to predict that the “coordination article” is going to prevail over the principle of constitutional supremacy because, in an even more globalized and interdependent world, there must be general rules, principles, and norms which the international community shares. The international community accepts these norms as good for itself, in other words, deems them important enough to become international law: “*a construit son concept de droit à partir de la notion d’acceptation, et non de la notion de sanction.*”<sup>23</sup>

## VI. PRINCIPAL TREATIES REGARDING SUSTAINABLE DEVELOPMENT SIGNED BY MEXICO

According to the Mexican Senate official journal, Mexico has signed seventy-two treaties related to environmental matters.<sup>24</sup> Some of them relate to sustainable development; therefore, we are going to mention the most important treaties pertaining to the matter. In this context, what is the meaning of sustainable development for Mexico? Is there a new or different way to conceptualize it from an international perspective? The concept first appeared in the 1987 report of the World Commission on the Environment and Development (WCED). The report defined the concept of sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their needs.”<sup>25</sup> This commission, also known as “the Brundtland Commission” because of it being chaired by Gro Harlem Brundtland, was very important. It established that poverty is an evil itself, and that “sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life.”<sup>26</sup>

This concept is a very ethical and philosophical one, because it looks to the future generations: future people that we expect will be living on this planet. It suggests that present living people have a duty to protect the planet from environmental degradation. Of course, it recognizes that

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23. Alberto Puppo, *Lutte Internationale Contre le Terrorisme, Sécurité Internationale et Droits Fondamentaux. Les Pirouettes des Juges Européens Entre Creation de Hiérarchies Normatives Improbables et Sacrifice de Garanties Juridictionnelles les Plus Élémentaires*. 9 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 279, 280 (2009).

24. Proposiciones de Ciudadanos Legisladores, *Gaceta del Senado de Mexico*, SENADO DE LA REPÚBLICA (May 22, 2019), [https://www.senado.gob.mx/64/gaceta\\_del\\_senado/documento/95687](https://www.senado.gob.mx/64/gaceta_del_senado/documento/95687) (last visited Oct. 4, 2022).

25. U.N. Secretary-General, *Development and International Economic Co-operation: Environment*, ¶ 27, U.N. Doc A/42/427 (Aug. 4, 1987), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N87/184/67/IMG/N8718467.pdf?OpenElement>.

26. *Id.*

present living people must also take advantage of the planet, but without risking the social and economic development of the coming generations.

The concept of sustainable development is also multidimensional, with many meanings depending on the field of knowledge that we are studying. For instance, we may study the concept of sustainable development from an economic perspective, trying to refer to this concept as economic growth without affecting the environment, or we can study the concept from an environmental perspective and consider that any other dimension of sustainable development has to take into consideration the environmental protection, and so on. Indeed, there is not a single concept of sustainable development serving as a umbrella concept.<sup>27</sup> In addition, any State, like Mexico, can take this concept in their proper view, exercising their sovereign rights as State, in terms of principle 2 of the Rio Declaration, but taking into consideration what the international community has considered as sustainable development.<sup>28</sup>

Sustainable development has been adopted by Mexico in some international treaties, as a form of agreements among international subjects of law, including States and International Intergovernmental Organizations. Therefore, the concept of a treaty is taken from the Vienna Convention on the Law of Treaties, which in article 2 refers to a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>29</sup>

In Mexico, there is a national law that also considers a concept of a treaty as the agreement governed by public international law, concluded in a written form between the Government of the United Mexican States and one or various subjects of international public law, and for its application requires the celebration of particular agreements in specific areas by which the United Mexican States make commitments.<sup>30</sup>

In this context, the first international treaty that was signed by Mexico regarding sustainable development was the Stockholm Declaration on the Human Environment of 1972, which was the first global treaty about the negative impacts on the environment by human economic activities,

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27. Sudumu Atapattu, *From ‘Our Common Future’ to Sustainable Development Goals: Evolution of Sustainable Development Under International Law*, 36 WIS. INT’L L. J. 215, 228 (2019).

28. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), princ. 2 (Aug. 12, 1992). [hereinafter *Rio Declaration*].

29. Vienna Convention on the Law of Treaties, *supra* note 14, art. 2.

30. Ley Sobre la Celebración de Tratados (Mexican Law on Treaties) [LCT], Artículo 2, Diario Oficial de la Federación [DOF] 2-1-1992, últimas reformas DOF 20-05-2021 (Mex.).

“[w]hile the phrase ‘sustainable development’ does not appear in the Stockholm Declaration, it planted the first seeds of sustainable development.”<sup>31</sup>

One of the principles that allows us to establish that it was the first international treaty regarding sustainable development is principle 2 which mentions that: “[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.”<sup>32</sup> This principle clearly identifies the responsibility for the present generations to safeguard the environment for the future ones. By the way, the phrase “for present and future generations” appears also in principle 1.

Another important principle is established under principle 8, which considers that “[e]conomic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.”<sup>33</sup> For the first time in human history of international law, the community of states recognized the essential relationship between economic growth and environmental protection for improving the quality of life.

Another important treaty to which Mexico is a party is the Rio Declaration on Environment and Development (RDED) adopted in 1992, just five years after the release of the WCED report. It contains several important principles regarding sustainable development; for instance, principle 1 establishes that “[h]uman beings are at the centre of concerns for sustainable development”;<sup>34</sup> principle 3 says that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”;<sup>35</sup> and principle 4 expresses that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”<sup>36</sup>

In addition, principle 5 refers that (for Mexico) eradication of poverty is an essential requirement for sustainable development;<sup>37</sup> principle 11

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31. Atapattu, *supra* note 27, at 218.

32. U.N. Environment Programme, Res. 2994 (XXVII), Stockholm Declaration on the Human Environment, princ. 2 (Dec. 15, 1972).

33. *Id.* princ. 8.

34. *Rio Declaration*, *supra* note 28, princ. 1.

35. *Id.* princ. 3.

36. *Id.* princ. 4.

37. *Id.* princ. 5.

establishes that the Mexican state must “enact effective environmental legislation”;<sup>38</sup> and principle 13 considers that Mexico “shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.”<sup>39</sup>

This is a comprehensive treaty about sustainable development because it refers to information, warfare, scientific information, technology, communication among countries in case of a natural disaster or transboundary pollution, environmental impact assessment, also, it encourages the participation of women, youth, and indigenous people.

Another treaty to which Mexico is a party, is the Convention on Biological Diversity, which in general terms refers to the sustainable use of biological diversity and the sustainable use of its components as one of the objectives of the Convention.

The Copenhagen Declaration on Social Development is another important treaty in which the Mexican state assumed responsibility. According to commitment 1, Mexico agreed to create at the national level “a stable legal framework, in accordance with our constitutions, laws and procedures, and consistent with international law and obligations,”<sup>40</sup> in order to create “economic, political, social, cultural, and legal environment that will enable people to achieve social development; eradicating poverty; promoting full employment.”<sup>41</sup>

Equally, according to the Johannesburg Declaration on Sustainable Development, Mexico has obligations regarding sustainable development, to formulate legal public policies, as the modification of the Mexican constitution, to achieve sustainable development, because it represents a challenge not only for Mexico, but also for the entire international community, in this sense, principle 26 of the treaty mentions:

We recognize sustainable development requires a long-term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels. As social partners we will continue to work for stable partnerships with all major groups respecting the independent, important roles of each of them.<sup>42</sup>

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38. *Id.* princ. 11.

39. *Id.* princ. 13.

40. World Summit for Social Development, *Copenhagen Declaration on Social Development*, U.N. Doc. A/CONF.166/9, annex I (Mar. 14, 1995).

41. Atapattu, *supra* note 27, at 223.

42. World Summit on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF. 199/20, annex I (Sept. 4, 2002).



Also, Mexico “adopted the 2030 Agenda for Sustainable Development containing 17 Sustainable Development Goals (SDGs) with 169 targets,”<sup>43</sup> which establishes the three dimensions of sustainable development: economic, social, and environmental.

Finally, Mexico adopted the Convention on Climate Change that ended in the Paris Agreement on Climate Change in which sustainable development is very important in the framework of environmental protection.

## VII. SUSTAINABLE DEVELOPMENT IN THE MEXICAN CONSTITUTION AS A HUMAN RIGHT

It is found, in the Mexican constitution, that the words “sustainable” and “sustainability” appear in different articles. Both are situated in Articles 2°, 4°, 25, 27, and 73.<sup>44</sup> In regard to sustainable development, the two expressions in Article 4°: a) “personal development” and b) “well-being” establishes, perhaps, one of the most important human rights. It relates to principle 1 of the Stockholm Declaration,<sup>45</sup> and principles 1 and 3 of the Rio Declaration.<sup>46</sup> Article 4° provides that:

Every person has the right to a healthy environment for their development and well-being. The State will guarantee the respect of this right. The damage and deterioration of the environment will generate responsibility for whom caused it in terms of the law.<sup>47</sup>

Article 2° is another important article pertaining to sustainable development as a human right. It establishes the constitutional obligation of the three spheres of government (federal, local, and municipal) to promote equal development opportunities for indigenous people. It further considers that, to eliminate the lack of development opportunities, the federal, local, and municipal authorities have the obligation:

VII.- To support the productive activities and sustainable development of the indigenous communities through actions that allow them to get enough income, the application of stimulus to public and private investments that promote the creation of jobs, the incorporation of technologies to increase

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43. Atapattu, *supra* note 27, at 226.

44. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 2, 4, 25, 27, 73, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

45. U.N. Conference on Environment and Development, *Declaration of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, princ. 1 (June 1972).

46. *Rio Declaration*, *supra* note 28, princ. 1, 3.

47. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

their own productive capacity, as well as to guarantee the equitable access to the supplies and commercialization systems.<sup>48</sup>

Therefore, Articles 4<sup>o</sup> and 2<sup>o</sup> consider sustainable development as human right. In addition, there are other articles in the Mexican constitution that establish the obligation of the authorities to guarantee sustainable development as a part of the national development of the State in terms of the obligations that came from treaties to which Mexico is a party. One of those articles is Article 25, stating:

Article 25.- Corresponds to the State, the rectory of the national development to guarantee its integrality and sustainability, that fortifies the national sovereignty and its democratic regime, and that, through competitiveness, the encouragement of the economic growth and the use of a more just distribution of income and wealth, allows the full exercise of liberty and dignity of the individuals, groups and social classes which the security this Constitution protects.<sup>49</sup>

Also, paragraph 9 in this article establishes that the law will protect the economic activities made by the private sector to contribute to the national economic development, promoting competitiveness and implementing a national policy for the sustainable industrial development; it is important to point out that only in this paragraph 9 of the Mexican constitution, the term “industrial sustainable development” is mentioned.<sup>50</sup>

In this context, Article 27 section XX mentions another type of sustainable development, called “rural sustainable development,”<sup>51</sup> which refers to the creation of jobs for the rural people and to guarantee their well-being and their participation in the national development through their forestry, agriculture, and livestock industry.

Finally, the last constitutional article related to sustainable development is Article 73 which, in section XXIX-N, gives the power to the Mexican Federal Congress, which is formed by the Senate and the House of Representatives (Diputados), to legislate in the matter of one form of social organization named “cooperatives” in order to regulate that, the activities made by this particular form of social organization, were done in a sustainable development manner.<sup>52</sup>

As it was mentioned, the Mexican Constitution establishes five different types of sustainable development: i) Sustainable development as a

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48. *Id.* art. 2.

49. *Id.* art. 25.

50. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 25, para. 9, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

51. *Id.* art. 27.

52. *Id.* art. 73.

human right to live in a healthy environment; ii) Sustainable development for indigenous people; iii) Sustainable development of the activities made by the industry; iv) Sustainable development of the economic activities made by rural people; and v) Sustainable development related to the activities made by “cooperatives,” which represent one legal form of social organization.

In Mexico, the main reference to the human right of sustainable development, is established in paragraph 5 of Article 4<sup>o</sup> but it is not well conceptualized. Like constitutions of many other countries, the Mexican one, has a challenge to look for the protection of the environment through sustainable development, for instance, “[t]he United States (US) Constitution is one of the few such texts in the world that fails to explicitly address environmental protection.”<sup>53</sup>

In fact, it appears that this failure to conceptualize sustainable development as a human right in the Mexican Constitution was made on purpose, just to have the minimum number of environmental provisions and, of course, with little impact in the activities of different governmental organs that are responsible for environmental protection. It happens in other countries where “for those countries that do have express environmental provisions in their constitutions, the provisions tend to be vaguely specified and weakly enforced.”<sup>54</sup>

We must consider that Mexico, as a federal state, represents the convergence of three spheres of government (federal, local, and municipal), with specific regulations regarding environmental protection, however, all these regulations shall be considered in terms of the supremacy clause (article 133)<sup>55</sup> and the human rights clause (article 1).<sup>56</sup>

In this regard, federal, local, and municipal laws coexist, and are related with the international treaties accorded by the Mexican state. This interaction between national and international law generates three kinds of jurisdictions: supranational (Interamerican Court of Human Rights), federal (Federal Judiciary power represented by the Supreme Court), and local (State Courts).

Federal (national) and local jurisdictions coexist and have equal hierarchy. It depends on the competence of the jurisdiction (article 124 of the Mexican Constitution). Both apply directly to individuals, and to have

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53. Kysar, *supra* note 2, at 83.

54. *Id.* at 85.

55. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 133, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

56. *Id.* art. 1.

the supranational jurisdiction, one must exhaust the ordinary means of internal defense in both the local and federal levels.

#### VIII. THE MEXICAN SUPREME COURT AND THE INTERPRETATION OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT

The Mexican Supreme Court has dictated jurisprudence regarding the right of a healthy environment directly related to sustainable development as a human right. According to its interpretation, the human right to a healthy environment is guaranteed by Article 4° of the Mexican Constitution, interpreting that “personal development” means “sustainable development” as a social interest of protecting the environment.<sup>57</sup> Therefore, the Supreme Court considers that this right of a healthy environment directly relates to Article 25 paragraphs first, second and sixth of the Mexican Constitution, which considers “sustainable development” as a part of the general interest of Mexico.<sup>58</sup> Consequently, there is a linkage between the right of a healthy environment with the right of sustainable development, in the framework of constitutional liberties; they complement each other in a relationship of synergy, harmony and balance.<sup>59</sup>

The Supreme Court mentions principle 10 of the Rio Declaration<sup>60</sup>, trying to create a comprehensive meaning of sustainable development, which also means that all necessary means must be taken to eliminate or reduce all financing obstacles related to the justiciability of this human right.<sup>61</sup>

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57. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 4, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

58. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 25, paras. 1, 2, 6, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

59. Medio Ambiente Adecuado Para el Desarrollo y Bienestar. Su Relación con Otros Derechos Fundamentales y Principios Constitucionales que Intervienen en su Protección (Adequate Environment for Development and Welfare. Its Relationship with Other Fundamental Rights and Constitutional Principles that Intervene in its Protection), Pleno de la Suprema Corte de Justicia [SCJN], SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [SJFG], Decima Epoca, Tomo 1, Agosto de 2012, Tesis I.4° A.811 A (9ª), Página 1807 (Mex.).

60. *Rio Declaration*, *supra* note 28, princ. 10.

61. Medio Ambiente Sano. Parámetro que Deberán Atender los Juzgadores de Amparo, Para Determinar Si es Dable Eximir al Quejoso de Otorgar Garantía Para Conceder la Suspensión de Actos que Involucren Violación a Aquel Derecho Humano (Healthy Environment Parameter that the Judges must Observe to Determine Whether it is Possible to Exempt the Complainant from Granting Guarantee to Grant the Suspension of Acts Involving Violation of that Human Right), Pleno de la Suprema Corte de Justicia [SCJN], SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [SJFG], Decima Epoca, Tomo 40, Vol. II, Marzo de 2017 Página 1199, Tesis 2a./J. 19 2017 (10a.) (Mex.).

The Mexican Supreme Court has considered sustainable development as a form to protect the environment,<sup>62</sup> which guarantees every person's right to achieve their development and well-being, therefore, there is a "social interest" in the protection of the environment which justifies restrictions, to preserve and maintain that "social interest"; moreover, sustainable development is part of that "social interest" as human right looking at the environmental protection. Consequently, the protection of the environment includes the promotion of personal development and well-being, the protection of natural resources, and the preservation and restoration of the ecological balance; those are fundamental principles in the Mexican Constitution; principles that are not well defined by the Constitution, but the Supreme Court have conceptualized them through systematic interpretation.<sup>63</sup>

Additionally, the judiciary power has taken the Brundtland Report of 1987 and principles 2, 3, 4, 7, and 15 of the Rio Declaration to conceptualize sustainable development as a human right,<sup>64</sup> because a healthy environment for the development and well-being of the people, incorporated in Article 4<sup>o</sup> paragraph five of the constitution, means that an ecological sustainability is necessary to guarantee the use of natural resources for the present and future generations.<sup>65</sup> Therefore, in accordance with the jurisprudence, sustainable development means: a) the efficient use of natural resources and the quantitative development; b) the limitation of poverty, the maintenance of social and cultural systems and social equity; and c) the preservation of the physical and biological systems (natural resources) that support the life of human beings in order to guarantee personal rights related with life, health, food and water.<sup>66</sup> The challenge for

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62. Protección al Ambiente y Preservación y Restauración del Equilibrio Ecológico. Es una Materia Concurrente por Disposición Constitucional (Environmental Protection and Preservation of the Ecological Balance. It is a Concurrent Matter by Constitutional Provision), Pleno de la Suprema Corte de Justicia [SCJN], SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [SJFG], Decima Epoca, Tomo 1, Vol. I, Octubre de 2011, Página 297, Tesis P7J. 36/2011 (9a.) (Mex.).

63. Medio Ambiente Sano. Su Relación con el Desarrollo Sustentable y Otros Derechos Fundamentales que Intervienen en su Protección (Healthy Environment. Its Relationship with Sustainable Development and Other Fundamental Rights that Intervene in its Protection) Pleno de la Suprema Corte de Justicia [SCJN], SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [SJFG], Decima Epoca, Tomo IV, Junio de 2018, Página 3093, Tesis 3o.16CS (10a.) (Mex.).

64. *Rio Declaration*, *supra* note 28, princ. 2, 3, 4, 7, 15.

65. Constitución Política de Los Estados Unidos Mexicanos [CPEUM], art. 4, para. 5, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 05-28-2021 (Mex.).

66. Medio Ambiente Adecuado Para el Desarrollo y Bienestar. Concepto, Regulación y Concreción de esa Garantía (Adequate Environment for Development and Welfare. Concept, Regulation and Specification of this Guarantee) Pleno de la Suprema Corte de Justicia [SCJN],

the legislature is to properly conceptualize sustainable development as a human right, while considering not only the terms of international treaties but also the interpretation that has been made by the highest tribunal.

#### IX. THE PROBLEM OF SUSTAINABLE DEVELOPMENT AS HUMAN RIGHT IN THE MEXICAN CONSTITUTION

The Mexican constitution must encompass not only the national interest of the people, but also the global community's interests regarding the protection of the environment, through sustainable development. There is a common need to resolve a common problem represented, among other things, by environmental degradation through economic activities that are not sustainable.

The international community has created many treaties to protect the environment for the present and future generations, but these treaties have to be applied at the national level, creating norms precisely to protect nature. Therefore, the creation or modification of existing norms regarding sustainable development must initiate at the constitutional level which is the highest law in the structure of the hierarchization of norms in a constitutional supremacy point of view.

There is no doubt, however, that the problem of sustainable development as human right really exists in the Constitution, even though international law advocates the protection of the planet by imposing sustainable practices. Nowadays, sustainable development is seen as a part of environmental protection to maintain a healthy environment for the people's development and well-being in terms of article 4 of the *Magna Carta*.

However, there is not a proper concept of sustainable development, because international law has not considered incorporating the concept through the Constitution. It does not consider the phrase "present and future generations," it says nothing about the eradication of poverty, and it is misleading by using the term "well-being," a term that is too general to determine or specify.

Perhaps the lack of a concept of sustainable development as human right is because this concept, through the years, has been considered as a way to impose duties on a country that looks for its economic growth in spite of the degradation of the environment, or perhaps, the concept of sustainable development has been considered "another form of colonialism

and oppression by developed countries to stall their quest for economic development.”<sup>67</sup>

## X. CONCLUSION

Treaties are very important in the Mexican legal system because they represent a form by which Mexico participates in the international community, negotiates and signs treaties with other countries, and of course, is obligated by those international instruments which establish additional human rights as a form to expand those rights that already are in the Constitution.

In Mexico, there is a monist perspective of law. Human rights are not only in the Constitution but are also in international instruments carried out by the government. There is an expansion of human rights (national and international) both are in the same hierarchical level in the legal system.

One of those very important human rights derived from international law is sustainable development, which includes the obligation for the Mexican government to provide an atmosphere of environmental protection to develop other human rights such as life and health, taking into consideration present and future generations, and providing adequate means to eradicate poverty.

Including in the Constitution of Mexico a new concept of sustainable development—according to international treaties—will recognize the importance of international law in the challenge of expanding human rights in a globalization era. Therefore, the human right of sustainable development established mainly in Article 4° of the Mexican Constitution should be reformed to include the conceptualization considered in environmental treaties to which Mexico is a party. National law must meet the international compromises assumed by the government, but mainly, to apply the human rights available for Mexicans in the legal system.

Thus, it is necessary to make a constitutional amendment to modify Article 4° paragraph five of the Mexican Constitution to include the human right of sustainable development in terms of its treaties. These treaties are negotiated by the President of Mexico and ratified by the Senate on matters such as environmental protection, economic practices, eradication of poverty and looking for the present and future generations.

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67. Atapattu, *supra* note 27, at 218.

# OLYMPIC LAW TODAY

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Christoph Vedder\*

I.	HOSTING OLYMPIC GAMES .....	773
	1. <i>Olympic law versus domestic law of the host State</i> .....	773
	2. <i>Host City Contract, Agenda 2020</i> .....	774
	3. <i>Jurisdiction of the CAS and Ad Hoc-Division at Olympic Games</i> .....	777
	4. <i>Global Anti-Doping law, WADA Code and UNESCO Convention</i> .....	779
II.	THE OLYMPIC CHARTER—THE HUB OF INTERNATIONAL SPORTS	
	LAW .....	780
	1. <i>Scope of application: Olympic Movement</i> .....	781
	2. <i>Olympic Charter: Rules, Bye-laws, Regulations, Codes and other rules adopted by the IOC</i> .....	782
	3. <i>The IOC Ethics Code</i> .....	783
	4. <i>Incorporation of the WADA Code</i> .....	784
	5. <i>The IOC Anti-Doping Regulations</i> .....	785
	6. <i>Dispute Settlement by the CAS, Code of Sport-related Arbitration</i> .....	786
	7. <i>Other instruments issued by the IOC</i> .....	786
	8. <i>Extension of the Olympic Charter on the IFs, the NOCs, the OCOGs and Host Cities</i> .....	786
	9. <i>Extension of the IOC law to non-Olympic matters</i> .....	788
III.	THE WORLD ANTI-DOPING CODE .....	788

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1.	<i>Legal Nature of the WADA Code</i> .....	788
2.	<i>The Elements of the WADA Code</i> .....	789
	a. The WADA Code.....	789
	b. The International Standards .....	791
	(1) The WADA Prohibited List .....	792
	(2) International Standard for Testing and Investigation (ISTI).....	792
	(3) International Standard for Laboratories (ISL).....	792
	(4) International Standard for Therapeutic Use Exemptions (ISTUE).....	793
	(5) International Standard for the Protection of Privacy and Personal Information (ISPPPI) .....	793
	(6) International Standard for Code-Compliance by Signatories (ISCCS) .....	794
	(7) International Standard for Education (ISE).....	794
	(8) International Standard for Results Management (ISRM).....	795
3.	<i>Implementation of the WADA Code</i> .....	801
	a. IOC, IPC, NOCs, and other parts of the Olympic Movement .....	802
	b. International Federations.....	802
	c. NADOs.....	802
	d. International Testing Agency .....	803
	e. Anti-Doping Division of the Court of Arbitration for Sport.....	804
4.	<i>The Role of Governments in Anti-Doping policies</i> .....	806
	a. Involvement of governments under the WADA Code.....	806
	b. The UNESCO Convention.....	808
	c. National anti-doping legislation.....	809

Sports are exercised globally and according to the same rules. This applies to the rules of the game as well as to the rules governing the participation in and all aspects of the organization of sports events. Such rules were created before the turn of the second last century with the Olympic Charter (OCh) as the most prominent example. The Olympic Charter's history goes back to the decisions adopted by the first Olympic Congress in 1894 in Paris and was first published coherently in 1908.

With the abolishment of the "amateur rule" of the OCh at the 11<sup>th</sup> Olympic Congress in 1981, sports have become a business and a way of earning one's living for athletes. The Olympic Congress decided to

establish an IOC Athletes' Commission. That decision clearly entails that the athletes are no longer just individuals who must obey the rules and decisions of the sport's governing bodies, thus they should be given a voice through the IOC Athletes' Commission. In 1972, at the venue of the Olympic Winter Games at Sapporo, the Austrian downhill racer Karl Schranz who was the expected to win the gold medal, was excluded from the Games by a personal decision of the IOC president and had no choice but to fly home because no legal remedies were available.

These two essential concepts: (1) identical rules for all sports globally, and (2) respect for the rights of the athletes, must be balanced by the sets of rules governing the exercise of sport. Sport is basically a private activity exercised in the framework of private associations, federations, or other private entities under rules and regulations established by those private entities.

Such genuine sports law includes the rules adopted by the private bodies which govern various sports worldwide. Because the Olympic Games of Modern Age are still the most important sports event with a global audience and possesses a certain political standing, the IOC, as laid down in the OCh,<sup>1</sup> claims to lead all Olympic sports worldwide. Hence, according to the IOC, the OCh represents the basic "Charter" for all sports worldwide. The OCh formulates the assertive claim that it regulates all Olympic matters exclusively without the interference of the governments and domestic law of the States. When awarding the Olympic Games to a Host City like Beijing for 2022 as well as Paris for 2024 and Los Angeles for 2028,<sup>2</sup> the IOC emphasized the universal and supreme validity of the OCh and its implementing legal instruments, including the regulations of the International Federations governing their sport ("IFs") over State law.

Conflicts between sports law and domestic law of the States occur on many occasions, including, but not limited to, the holding of Olympic Games or, on an almost day-to-day basis, wherever the global anti-doping law is applied, forming an essential part of the "Olympic Law."

In view of the 2028 Los Angeles Olympic Games, some areas of potential conflict will be mentioned. However, this essay mainly attempts to explore the manifold and close interrelationship between the OCh, the World Anti-Doping Code, and the Code of Sports-related Arbitration based on a comprehensive examination of the legal statutes in the regulations

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1. Int'l Olympic Comm. [IOC], *Olympic Charter in Force as from 17 July 2020*, at 15, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>.

2. Discussed in Section I.2.

related thereto. This approach is designed as a piece of basic research in law and is part of ongoing legal research.<sup>3</sup>

With the World Anti-Doping Code 2021 (WADA Code) the worldwide anti-doping law constitutes a comprehensive set of rules and exclusively governs all aspects of doping and excludes interference by State law. What facilitates the independent operation of the anti-doping law of sports is that any dispute arising in that area of law is determined exclusively by arbitration, to the exclusion of the jurisdiction of State courts. That has been the essential rationale for the creation of the Court of Arbitration for Sports (CAS) in Lausanne, Switzerland, which has developed into a globally recognized last instance arbitral tribunal for sports-related disputes.

However, that independence from State courts and State law, including constitutional law, was recently under review before the German Constitutional Court with potential harsh consequences for international sports. On a constitutional complaint lodged by the German speed skater *Claudia Pechstein*, after a thirteen-year course of legal disputes before the CAS, the Swiss Federal Court, the European Court of Human Rights and German civil courts, on June 3, 2022, the Constitutional Court held that the individual right of access to justice, guaranteed by the German Constitution, that included the right to have a public hearing, was violated. The Court found that, in 2009 when *Pechstein's* appeal against her doping sanction was heard by the CAS, the Statutes of the CAS, applicable at that time, did not provide for a public hearing. Therefore, the Court concluded that the CAS award of 2009 that determined that *Pechstein* committed a doping offence is not valid in Germany.<sup>4</sup> Today, however, the amended CAS code provides the right of athletes to have a public hearing before the CAS<sup>5</sup>.

On June 30, the eve of the 1984 Olympic Games in Los Angeles, the Code of Sport-related Arbitration (CAS Code), the Statute and procedural rules applicable to the CAS, entered into force and slowly became operational since then. The creation of the CAS stems back to an event in 1976, where, for reasons of foreign policy in relation to China, the Canadian government did not allow the athletes from Taiwan to enter Canada to participate in the 1976 Olympic Games in Montreal. After the

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3. Christoph Vedder, *Anti-Doping-Recht – global*, in 50 JAHRE JURISTISCHE FAKULTÄT AUGSBURG 567 (Koch et al., eds. 2021).

4. BVerfG, 1 BvR 2103/16, June 3, 2022, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rk20220603\\_1bvr210316en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rk20220603_1bvr210316en.html).

5. *Code of Sports-related Arbitration*, R57 – Scope of Panel's Review, Hearing, CT. OF ARB. FOR SPORT (Nov. 1, 2022), <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>.

boycott of the 1980 Moscow Olympic Games by many Western States due to the invasion of Afghanistan by the Soviet Union in December 1979, the 1984 Los Angeles Olympic Games were the last Games that suffered from a political boycott due to foreign politics.

However, repercussions from global politics may affect the Olympic Games in Paris 2024 or, perhaps, Los Angeles 2028. Russia's armed attack on Ukraine and the Iranian government's repression against the protests in 2022 make it seem possible or even likely that, by way of a reverse boycott, States will be excluded by the IOC from participating in the 2024 Games in their entirety or by individual IFs for the sports competitions under their auspices. If such measures are not taken, it is also conceivable that individual States will refrain from sending teams to the Games for overriding political reasons. The idea of an Olympic truce during the duration of the Games, recognized in Ancient Greece and advocated by the UN,<sup>6</sup> is not a solution to the political and moral dilemma between sport and politics. More generally, the repercussions of global and regional human rights and, again prompted by the war in Ukraine, of the fundamental rules of international law as expressed in the Charter of the United Nations, are a matter of increasing urgency and importance for sports.

In 1976, the author of this essay, as a freshly appointed research assistant at the Institute for Public International Law at the University of Munich, where some years later Robert Lutz did research under his Humboldt Fellowship, was involved in providing a shorthand legal opinion on that matter via a newspaper two days before the Opening Ceremony of the 1976 Montreal Games, and, in 1977, seconded in a "Pilot Study" on improving the legal status of the IOC.<sup>7</sup> In this opinion, it was proposed to establish an arbitration procedure for resolving disputes between the IOC and States with an arbitral body present at the venue of the Games. That idea was followed up by Judge Keba M'Baye, member of the International Court of Justice and vice-president of the IOC, and eventually led to the establishment of the CAS under the presidency of Judge M'Baye. In October 1986, the author of this essay was invited by Robert Lutz to give a lecture on "Olympic Law."<sup>8</sup> Now, leading up to the Los Angeles 2028 Olympic Games, it is time to become aware of and anticipate areas of foreseeable potential conflict between Olympic law and U.S. law or California law. Different from 1984, in 2028, the CAS will be present at

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6. G.A. Res. 76/13 (Dec. 2, 2021), <https://digitallibrary.un.org/record/3950835?ln=en>.

7. Rudolf et. al., Pilot Study on the Improvement of the Judicial Status of the IOC (May 1977) (unpublished) (submitted to the IOC).

8. For recent use of the term "Olympic Law," see Mestre's work: ALEXANDRE M. MESTRE, THE LAW OF THE OLYMPIC GAMES 5 (T.M.C. Asser Press 1st ed. 2009).

L.A. with two of its divisions: the ad hoc Division and the Anti-Doping Division,<sup>9</sup> with the purpose of resolving potential sports-related disputes by arbitration.

## I. HOSTING OLYMPIC GAMES

Recent events have shown that the rules of sport law and the law of States hosting major international sports events may easily collide. Novak Djokovic was refused by the competent Australian authorities to enter the country to participate in the Australian Open in January 2022 because he did not meet the requirements of the applicable Australian anti-COVID measures, despite the fact that he was qualified to start according to the relevant rules of the international and national tennis federations.<sup>10</sup>

### 1. *Olympic law versus domestic law of the host State*

The Beijing Olympic Winter Games in 2022 dramatically witnessed clashes between the legal situation required by the OCh and the octroi of legislation or administrative measures taken by the authorities. This included the following: strict entry and stay conditions due to COVID-19, including strict limitation of the freedom of movement; very limited freedom of expression inside and outside the stadium; and almost total surveillance by digital means under the pretext of COVID-related information.

The Olympic Games, according to the OCh, are intended to be exclusively governed by the OCh and the implementing regulations thereto. According to Rule 7.2 OCh,

“the Olympic Games are the exclusive property of the IOC which owns all rights relating thereto...”

The OCh applies to the whole range of the Olympic Movement and other players in international sports by way of acceptance or agreement.<sup>11</sup> On the other hand, the Olympic Games take place on the territory of a state that hosts the Games. Consequently, the domestic law of the host state, including statutory legislation as well as constitutional law, apply to the running of the Games. Also, international treaties concluded by the host state, such as regional and universal Human Rights Conventions or climate

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9. Int'l Olympic Comm [IOC], *Host City Contract Principles, Games of the XXXIV Olympiad in 2028* (Sept. 13, 2017); discussed in Section I.3.

10. *Djokovic v. Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3, 1 (Austl.).

11. Int'l Olympic Comm. [IOC], *supra* note 1, at 22; discussed in Section II.1.

change-related conventions, apply to the organization of Olympic Games. The Games are not exempt from the application of the full set of rules in force on the territory of the host state.

## 2. *Host City Contract, Agenda 2020*

According to Rule 36 of the OCh, immediately upon the election of the host city, a Host City Contract (“HCC”) is signed by the IOC, the City, and the National Olympic Committees (NOC) of the country. Upon its establishment, the Organizing Committee for the Olympic Games (“OCOG”) will also become a party. Local, regional, or state authorities may become parties if deemed appropriate by the IOC.

During the bidding process for the Olympic Games, the government of the country where the candidate city is located must provide guaranties to respect the OCh. Those guaranties constitute the inherent basis of the HCC. In the preamble of the HCC 2024 with the city of Paris it is stated:

“the IOC has taken note of, and has specifically relied upon, the covenant given by the government of the country in which the Host City and the Host NOC are situated (the Host Country) to respect the Olympic Charter and the Host City Contract.”<sup>12</sup>

With regard to those guaranties or covenants, paragraph 5.1 of the HCC 2024 speaks of “Candidature Commitments made by Host Countries Authorities” and provides that they “shall continue in effect after the election and be binding” upon the Host City, the Host NOC and the OCOG which are “responsible to ensure that all Candidature Commitments remain in effect.”

Such clauses must be understood as an indirect commitment of the government concerned. Such effect is intensified by the fact that, according to paragraph 38.2 of the HCC 2024, the non-respect of “*any material Candidature Commitment*” gives cause to terminate the HCC and withdraw the Games from the Host City.<sup>13</sup> As a result, the government must encourage and support the primary parties (i.e., the Host City, the NOC, and the Organizing Committee) to the Contract, to comply with “core requirements” such as those set forth in paragraphs 13 and 14 of the HCC 2024:

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12. Int’l Olympic Comm [IOC], *Host City Contract Principles, Games of the XXXIII Olympiad in 2024* (Sept. 13, 2017).

13. *Id.* at 34. (emphasis added) (The IOC is also entitled to terminate the HCC if the Host Country is, “in a state of war, civil disorder, boycott, embargo decreed by the international community.”).

- to prohibit any discrimination with regard to a country or person on whatever grounds;
- to protect and respect human rights consistent with international agreements and laws as well as “*all internationally recognized human rights standards and principles*” applicable in the Host Country;
- to refrain from fraud or corruption inconsistent with any international agreements, laws and standards applicable in the Host Country;
- to carry out all activities foreseen under the contract “in a manner which embraces sustainable development and contributes to the UN Sustainable Development Goals.”<sup>14</sup>

More specifically, paragraph 20 of the HCC 2024 provides that the Olympic Identity and Accreditation Card (OIAC), issued by the IOC, confers on its holders the right to take part in the Games and that the Host City, the Host NOC, and the Organizing Committee

“are responsible to ensure, in cooperation with competent Host Country authorities, that, together with a passport or other official travel document, the OIAC allows its holders to enter and remain in the Host Country and perform Games-related activities for the duration of the Games, including for a period of at least one month before the scheduled commencement of the Games and one month after the conclusion of the Games.”<sup>15</sup>

Similar obligations are stipulated in respect to labor laws and to the temporary entry of specialized workforce and the import of equipment.

It is possible that holders of the OIAC will be classified by a host State as terrorists or suspected terrorists, or simply as criminals under arrest warrants and be denied entry to the country or be arrested upon arrival. Holders of the OIAC may be listed under sanctions imposed by the UN Security Council or by unilateral sanctions enacted by the host State. Amongst the holders of an OIAC may be war criminals and perpetrators of other crimes under the Rome Statute or persons under international or national warrants.

The HCC 2024, according to paragraph 51.2, is exclusively governed by “the substantive, internal laws” of Switzerland to the exclusion of the rules regarding conflicts of law, i.e., the Swiss international private law. Following such choice of law, as a step further on the way to a fully independent legal environment for such contract, paragraph 51.2 of the HCC 2024 provides that any dispute arising from the HCC shall exclusively be determined by the CAS in accordance with the CAS Code, to the exclusion of the state courts of Switzerland, the Host Country, or any other

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14. Int'l Olympic Comm. [IOC], *Host City Contract Principles*, 2024, *supra* note 12, ¶ 13.2.

15. *Id.* ¶ 20.1.

country. According to paragraph 51.3 HCC 2024, the Host City, the Host NOC, and the Organizing Committee waive the application of any provision under which they may claim immunity against any lawsuit or arbitration.

Furthermore, the HCC 2024, in its preamble, states that the Host City and the Host NOC “acknowledge the importance of Olympic Agenda 2020.” To cope with the internal and external challenges the Olympic sport was confronted with, in 2014 the IOC had adopted its Agenda 2020<sup>16</sup> which displayed forty recommendations for shaping the future of the Olympic Movement. For the first time, Agenda 2020 has now been introduced into the bidding process for the 2024 Games. Fifteen additional recommendations were adopted by the IOC in May 2021 under the heading of *Olympic Agenda 2020 + 5*.<sup>17</sup>

With these documents, the IOC dedicates the Olympic Movement mainly to the following goals: sustainable development in line with the UN Sustainable Development Goals (including climate action), good governance and ethics, reduction of costs, non-discrimination in sexual orientation, support to and protection of clean athletes, athletes’ rights and responsibilities,<sup>18</sup> and support for refugees and populations affected by displacement.

The IOC’s dedication to these goals and their cautious embodiment in the HCC awaits implementation. However, the trend towards the major goals of the Agenda 2020 is irreversible and most likely will be common ground before the 2028 Los Angeles Olympics.

An emerging area of conflict is related to the application of international human rights and freedoms within the exercise of sports and, thus, in relation to Olympic Games and other major events. Presently under debate is freedom of speech versus the prohibition of political propaganda under Rule 50 of the OCh and gender equality.<sup>19</sup> With the references to human rights in the HCC and other documents, human rights within sports have become a matter of concern for the IOC. In 2018, the IOC established

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16. Int’l Olympic Comm. [IOC], *Olympic Agenda 2020 – 20+20 Recommendations*, at 1 (Dec. 9, 2014).

17. Int’l Olympic Comm. [IOC], *Olympic Agenda 2020 +5 – 15 Recommendations*, at 3 (May 12, 2021).

18. See *Athletes’ Rights and Responsibilities Declaration*, INT’L OLYMPIC COMM. (Apr. 14, 2019), <https://olympics.com/athlete365/who-we-are/athletes-declaration> (last visited Oct. 20, 2022); discussed in Section II.2.

19. Rep. of the U.N. High Comm’r for Hum. Rts., *Intersection of race and gender discrimination in sport*, at 9, U.N. Doc A/HRC/44/26 (June 15, 2020) (The medium distance racer Caster Semenya lodged a complaint against Switzerland before the European Court of Human Rights on February 18th, 2021. The CAS had declared a relevant regulation adopted by the WA valid.).



a Human Rights Advisory Committee and received, in 2020, Recommendations for an IOC Human Rights Strategy, which led to the seminal Strategic Framework on Human Rights adopted by the IOC Executive Board on September 9, 2022.<sup>20</sup>

### 3. *Jurisdiction of the CAS and Ad Hoc-Division at Olympic Games*

In 1984, the CAS was created to resolve any kind of sports-related disputes by virtue of an arbitration agreement or arbitration clause. As a consequence of the judgement of the Swiss Federal Tribunal of 1993 in the *Gundel* case<sup>21</sup> the CAS was reorganized and released to full institutional independence from the IOC. Hence, the International Council for Arbitration in Sports (ICAS) was established as the organization responsible for the operation of the CAS. In addition to the now Ordinary Arbitration Division (OAD) a distinct Appeals Arbitration Division (AAD) of the CAS was inaugurated. According to Article R47 CAS Code, the AAD is competent for appeals

“against the decision of a federation, association or sports-related body ... if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available...”<sup>22</sup>

Today, all sports organizations have introduced such arbitration clauses into their rules, such as Rule 61 of the OCh or the HCC and, following the WADA Code, the IFs in their Anti-Doping and other regulations. The CAS provides, depending on the circumstances, first-instance or second-instance adjudication, in any event ruling as last instance in sports-related disputes. As of 2021, more than 8,000 appeals or other disputes have been filed with the CAS. The CAS operates under the review of the Swiss Federal Tribunal which, pursuant to the Swiss Statute on International Private Law, is limited to a set number of procedural issues.

The CAS operates through a panel of three arbitrators or sole arbitrator elected from a list of about 400 experts in sports law. Its seat is in Lausanne, Switzerland where the CAS court office headed by a Director

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20. PRINCE ZEID RA'AD AL HUSSEIN & RACHEL DAVIS, RECOMMENDATIONS FOR AN IOC HUMAN RIGHTS STRATEGY 1 (2020); *IOC approves Strategic Framework on Human Rights*, INT'L OLYMPIC COMM. (Sept. 9, 2022), <https://olympics.com/ioc/news/ioc-approves-strategic-framework-on-human-rights>.

21. Tribunal fédéral [TF] [Federal Supreme Court] Mar. 15, 1993, ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 119 II, at 271. (Switz.).

22. Court of Arbitration for Sport, *Code of Sports-related Arbitration*, at R47 (July 1, 2020); DESPINA MAVROMATI & MATTHIEU REEB, *THE CODE OF THE COURT OF ARBITRATION FOR SPORT* 380 (Wolters Kluwer ed., 2015).

General operates. The awards are final and binding, and enforceable as true international awards under the New York Convention.

On the basis of the CAS Code, the CAS provides full remedies against decisions of sports bodies and, thus, legal protection of the athletes' rights with procedural guaranties respecting all rule of law requirements as equivalent to state courts.<sup>23</sup> The CAS with its globally accepted jurisdiction represents the institution essential for the independence of the Olympic Law and sports law in general.

During the 1996 Olympic Games at Atlanta, for the first time, an Ad hoc-Division of the CAS was present at the venue of Olympic Games in order to resolve disputes arising in connection with that edition of the Olympic Games in an expedited procedure within twenty-four hours. Since then, at every edition of Olympic Games and Olympic Winter Games an ad hoc-Division of the CAS was present.

The Olympic ad hoc divisions are governed by specific Arbitration Rules<sup>24</sup> that form an integral part of the general CAS Code. The ad hoc divisions consist of a special list of twelve arbitrators chosen from the list of CAS arbitrators, a president, and a co-president as well as a Court Office. Their legal seat is in Lausanne, Switzerland, the location of the CAS headquarters, and they operate under Chapter 12 of the Swiss Statute on International Private Law,<sup>25</sup> which governs international arbitration in Switzerland. While the first ad hoc division in 1996 settled six cases, the ad hoc division set up for the Olympic Games Tokyo 2020 (which was held in 2021) dealt with more than twenty disputes.

The ad hoc divisions have jurisdiction to hear any dispute covered by Rule 61 of the OCh, insofar

“as they arise during the Olympic Games or a period of ten days preceding the Opening Ceremony.”

Thus, all disputes arising “on the occasion of, or in connection with, the Olympic Games” shall exclusively be submitted to the CAS. That broad definition is specified by Article 1 of the Arbitration Rules for the ad hoc division which includes, but not to a jurisdictional limit, to “decisions pronounced by the IOC, an NOC, an International Federation or an Organizing Committee for the Olympic Games.”

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23. Mutu and Pechstein v. Switzerland, Case No. 40575/10 & 67474/10, Eur. Ct. H.R. 14 (Oct. 2, 2018), [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-186434%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-186434%22]).

24. Court of Arbitration for Sport, *Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games*, art. 1 (2021).

25. SCHWEIZER BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [SWISS STATUTE ON PRIVATE INTERNATIONAL LAW] Dec. 12, 1987, ch. 12 (Switz.) (as of February 1, 2021 after amendment).

This provides access to arbitration to all individuals participating in the Olympic Games and to all sports organizations involved in the Games as appellants against decisions taken by other such entities. With the Organizing Committee, at least indirectly, the Host City and other public authorities are captured. As paragraph 51 of the HCC 2024 does not pertain to the Host Country,<sup>26</sup> it is advisable to enter into an arbitration agreement for the determination of disputes between the IOC and the Host Country related to the Candidature Commitments made by the Host Country.

The Arbitration Rules for ad hoc divisions provide an expedited procedure with full guarantees of procedural rights, such as the right to be heard, to be represented, to provide evidence, and to have a hearing. The panel or sole arbitrator shall rule on the dispute pursuant to the OCh, the applicable regulations—that term refers to the statutes and regulations adopted by the IFs and other sports governing bodies—the “general principles of law and the rules of law, the application of which it deems appropriate.”

The disputes are heard by a panel of three members or a sole arbitrator; the arbitrators can be challenged; preliminary relief can be granted; the panel or sole arbitrator may issue a final or a partial award and/or refer the matter to the regular CAS for further consideration. The decision shall be given within twenty-four hours of the lodging of the application. The operation of the ad hoc division is free of charge. Regularly, the decisions are final and binding, and immediately enforceable.

As the Swiss Federal Tribunal ruled in 2003 in its decision in the matter of Lazutina and Danilova<sup>27</sup> regarding the CAS, the ad hoc divisions are an integral part of the structure of the CAS, representing true and independent arbitration issuing awards in the sense of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.<sup>28</sup>

#### 4 *Global Anti-Doping law, WADA Code and UNESCO Convention*

The fight against doping constitutes a major concern for the Olympic Movement. The OCh incorporates the WADA Code in Rule 40. Fair competition amongst clean athletes is the cornerstone of sports.

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26. Int'l Olympic Comm. [IOC], *Host City Contract Principles*, 2024, *supra* note 12, ¶ 51.2; discussed in Section I.2.

27. Tribunal fédéral [TF] [Federal Supreme Court] May 27, 2003, ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 129 III, at 446-7 (Switz.).

28. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 8 (New York, 1958), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf>.

The WADA Code, in its 2021 version, has been considerably amended. In response to the doping-related events during the 2014 Olympic Winter Games in Sochi, the monitoring and sanctioning of the code-compliance by the anti-doping organizations of sports was reinforced in order to capture and sanction doping-related misconduct of sports organizations. Generally, the various procedures available under the WADA Code have been improved and met the rule of law requirements. As a unique feature, the States committed themselves to the WADA Code through an international treaty, i.e., the UNESCO Convention against Doping in Sport.<sup>29</sup>

The WADA Code provides identical rules with global application for all sports, and together with settled case-law mainly made by the CAS, constitutes a self-contained regime of genuine sports law applicable inside and out of the Olympic Games. That is emphasized by the fact that, as of 2016, the CAS, in addition to the ad hoc divisions, is present at the Olympic Games with an Anti-Doping Division (ADD) to hear doping-related disputes at the venue, as demonstrated at Beijing 2022.<sup>30</sup>

## II. THE OLYMPIC CHARTER—THE HUB OF INTERNATIONAL SPORTS LAW

The OCh aims at regulating all aspects of the Olympic Games and, therefore, applies to all activities and institutions related to the organization of and participation in the Olympic Games. To that end, in recent years, based upon the OCh as a constitution of sports, many implementing or complementing regulations such as the Ethics Code were adopted by the IOC and other major sets of rules and regulations such as the WADA Code, were included by reference.

As determined by Rule 1 of the OCh, the IOC

“is an international non-governmental organization, of unlimited duration, in the form of an association with the legal status of a legal person, recognized by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2020.”

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29. Int'l Convention Against Doping in Sport, Oct. 19, 2005, ED. 2005/CONVENTION ANTI-DOPING Rev, <https://en.unesco.org/themes/sport-and-anti-doping/convention>; discussed in Section III.4.b.

30. Court of Arbitration for Sport, Ad Hoc Division, Olympic Winter Games Beijing 2022, IOC, Wada, ISU v. RUSADA, CAS OG 22/08, 09, 10, [https://www.tas-cas.org/fileadmin/user\\_upload/OG\\_22\\_08-09-10\\_Arbitral\\_Award\\_publication\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/OG_22_08-09-10_Arbitral_Award_publication_.pdf) (In this ad-hoc award, the panel refused to impose a provisional suspension on the fifteen-year-old Russian figure skater Kamila Valieva; the decision of the Russian Anti-Doping Agency (RUSADA) to release her from an alleged doping offense was appealed by the IOC, by WADA, and by the International Skating Union (ISU).)

It follows that the IOC enjoys the status of a private legal person under Swiss law and, thus the OCh is to be considered a private statute with no capacity to issue binding rules outside its own membership or otherwise establish binding effect.<sup>31</sup>

*1. Scope of application: Olympic Movement*

Rule 1 of the OCh defines the scope of application of the OCh through the intermediary term “Olympic Movement” and the role of the IOC, in particular:

“Under the supreme authority and leadership of the [IOC], the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the [OCh].”

According to that provision, the application of the OCh arises from agreement and, under that condition, also extends to individuals such as athletes and their support personnel.

The Olympic Movement includes the IOC, the International Federations (IFs), the National Olympic Committees (NOCs), and the Organizing Committees for the Olympic Games (OCOGs) as its “main constituents,” as well as

“the national associations, clubs and persons belonging to the IFs and NOCs, particularly the athletes, whose interests constitute a fundamental element of the Olympic Movement’s action, as well as the judges, referees, coaches, and the other sport officials and technicians. It also includes other organizations and institutions as recognized by the IOC.”<sup>32</sup>

Abundantly, Rule 1.4 OCh sets forth:

“Any person or organization belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.”

The term “decisions” includes any regulation or other legally binding act adopted by the IOC.

The OCh, according to its “Introduction,” represents “the codification of the Fundamental Principles of Olympism, Rules and Bye-laws” adopted by the IOC and “governs the organization, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games.” As “a basic instrument of a constitutional nature,” it defines the “fundamental principles and essential values of Olympism,”

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31. Christoph Vedder, *The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law*, 27 GERMAN Y.B. INT’L L. 233, 249 (1984).

32. Int’l Olympic Comm. [IOC], *Olympic Charter*, *supra* note 1, Rule 1.3.

serves as statutes for the IOC, and “defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement,” the IOC, the IFs, the NOCs, and the OCOGs “all of which are required to comply with the Olympic Charter.”

“Such scope of application, claimed by the IOC, is reiterated in the OCh on various occasions and is eventually accepted by the NOCs, the IFs, the OCOGs, and others by way of their recognition or contract.<sup>33</sup> Paragraph 7 of the Fundamental Principles generally stipulates: “[b]elonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.”

## 2. *Olympic Charter: Rules, Bye-laws, Regulations, Codes and other rules adopted by the IOC*

Narrowly, the proper law of the IOC consists of the Rules of the OCh and the bylaws within it. The Bye-laws mainly implement the rules they are attached to by setting forth more detailed provisions. These bylaws are legally binding.

Furthermore, the IOC has the capacity to adopt, by way of its respective decision-making bodies, “regulations of the IOC.” According to Rule 19.3.10 of the OCh, the IOC Executive Board has the general and extensive power to issue

“regulations of the IOC, which are legally binding, in the form it deems appropriate, such as, for instance, codes, rulings, norms, guidelines, guides, manuals, instructions, requirements, and other decisions, including, in particular, but not limited to, all regulations necessary to ensure the implementation of the Olympic Charter and the organization of the Olympic Games.”

A number of major significant regulations have been adopted by the Executive Board and form a set of secondary IOC law. Significant examples include the IOC Anti-Doping Regulations applicable specifically to each of the editions of the Olympic Games.<sup>34</sup> The authority to amend the OCh and to adopt and amend the *Athletes' Rights and Responsibilities Declaration*,<sup>35</sup> however, in accordance with Rule 18.2 OCh is reserved for

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33. *Id.* at 12.

34. Int'l Olympic Comm. [IOC], *Anti-Doping Rules applicable to the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016*, at 3 (Aug. 6, 2015).

35. Int'l Olympic Comm. [IOC], *Athletes' Rights and Responsibilities Declaration* (Oct. 9, 2018) (adopted by the IOC Session, Preamble: “... inspired by the Universal Declaration of Human Rights and other internationally recognized human rights standards, principles and treaties [the IOC] outlines a common set of aspirational rights and responsibilities for athletes within the Olympic Movement and under the jurisdiction of its members.”).

the Session which, according to Rule 18.1 OCh, is “the supreme organ” of the IOC.

By virtue of Rule 22 of the OCh, the IOC Code of Ethics<sup>36</sup> and other ethics-related regulations were adopted. Modifications of those legal instruments are proposed by the IOC Ethics Commission and approved by the IOC Executive Board in accordance with the Bye-laws to Rule 22 paragraph 2.

### 3. *The IOC Ethics Code*

In response to the 1998 corruption scandal related to the awarding of the 2002 Winter Games in Salt Lake City, the IOC, in 1999, established an Ethics Commission, adopted a Code of Ethics, and started a far-reaching overhaul of the OCh. Today, the Ethics Code, which itself forms an “integral part” of the OCh, is accompanied by a package of ethics-related regulations and other legal instruments.

The Ethics Commission is responsible for investigating complaints related to violations of the Ethics Code or ethical principles and proposing sanctions to the IOC Executive Board. The composition and procedures before the Ethics Commission are set forth in the

“Statutes of the IOC Ethics Commission” and

“Rules of Procedure Governing Cases of Possible Breach of Ethical Principles.”

In substance, the IOC ethics standards are codified in the Code of Ethics while particular ethical requirements related to various actions proved to be prone to manipulation are provided for in the following specific legal instruments:

- *Directions Concerning the Election of the IOC President*
- *Rules Concerning Conflicts of Interest Affecting the Behavior of the Olympic Parties*
- *Future Host Election, Rules of Conduct for Continuous Dialogue*
- *Future Host Election, Rules of Conduct for Targeted Dialogue*
- *Rules for the Register of Consultants*
- *Rules of Conduct for the Recognized International Federations seeking inclusion in the Olympic Games Organizing Committee’s proposal on additional sports.*

Other ethics-related legal instruments are of broader relevance:

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36. Int’l Olympic Comm. [IOC], *Ethics*, at 4 (Jan. 2022).

- *The Basic Universal Principles of Good Governance of the Olympic and Sports Movement*
- *Olympic Movement Code on the Prevention of the Manipulation of Competitions*

and with regard to the Olympic Winter Games 2022:

- *Rules for the Application during the XXIV Olympic Winter Games Beijing 2022 of Articles 7 to 10 of the Code of Ethics and of Olympic Movement Code on the Prevention of the Manipulation of Competitions.*

However, the IOC Ethics Code does not include the anti-doping rules as some IFs chose to do in overarching “Integrity Rules.” As a forerunner, the IAAF (also known as World Athletics (WA) since 2019) adopted its *World Athletics Integrity Code of Conduct* in 2019 which procedurally overarched the doping offences under the World Athletics Anti-Doping Rules and delegated its power to oversee these matters to an Athletics Integrity Unit and a Disciplinary Tribunal.<sup>37</sup> Also in 2019, the International Biathlon Union (IBU) adopted its Integrity Code,<sup>38</sup> The IBU Integrity Code combines provisions to prevent and sanction both unethical misconduct and doping in the same code. Both Integrity Units and the WA Disciplinary Tribunal are created as structurally independent institutions within the framework of their respective IF.<sup>39</sup>

#### 4. *Incorporation of the WADA Code*

The “amateur rule” provided for in Rule 26 of the OCh was replaced with the new “Eligibility Rule” in 1981. The new Rule 26 simply stated that “Doping is prohibited” and the participation in the Olympic Games was linked to the compliance with an IOC Medical Code prohibiting doping more precisely. In the late 1990s, the IOC took the initiative to harmonize the anti-doping rules and eventually the WADA was founded in 1999. At the second *World Conference on Doping in Sports*, in March 2003 at Copenhagen, the first edition of the WADA Code was adopted.<sup>40</sup> As one of

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37. *Book of Rules: Book D – Integrity Code of Conduct*, WORLD ATHLETICS § 2.4 (Nov. 1, 2019), <https://www.worldathletics.org/about-iaaf/documents/book-of-rules>.

38. Int'l Biathlon Union, *Integrity Code*, Ch. A, § 1.1.1 (Oct. 19, 2019).

39. Discussed in Section III.2.b (8) (b).

40. World Anti-Doping Agency, *World Anti-Doping Code 2003*, at 1 (Mar. 2003).



the “signatories” of the Code, the IOC was bound to implement the WADA Code within its legal instruments.

Therefore, today, Rule 40 of the OCh provides that

“[t]o participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter and the World Anti-Doping Code.”

More generally, beyond the eligibility of individuals to compete in the Olympic Games, Rule 43 of the OCh sets forth that

“[c]ompliance with the World Anti-Doping Code and the Olympic Movement Code on the Prevention of Manipulation of Competitions is mandatory for the whole Olympic Movement.”

##### 5. *The IOC Anti-Doping Regulations*

As of the entry into force of the 2003 WADA Code before the Torino Olympic Winter Games in 2006, the IOC adopted Anti-Doping Regulations applicable to each edition of the Games. These Anti-Doping Regulations incorporate the substantial and procedural provisions of the WADA Code with adaptations necessary to meet the particular conditions of the Olympic Games.<sup>41</sup>

The IOC Anti-Doping Regulations exclusively apply to a specific edition of the Olympic Games, for example, the “IOC Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022.”<sup>42</sup> These Rules are based on the “Model Major Events Organizations Anti-Doping Code” issued by the WADA.<sup>43</sup> The IOC Anti-Doping Rules implement the whole of the WADA Code with, however, some remarkable specific features which are in line with the requirements of the WADA Code.

While the IOC remains the Anti-Doping Organization responsible under the WADA Code, in 2018, for the first time, it delegated some of its responsibilities related to doping control to the predecessor of the “International Testing Agency” (ITA) which itself became fully operational in 2019.<sup>44</sup> According to a contract between the IOC and the ITA, the Agency is in charge of the test distribution planning, the therapeutic use exemptions, doping control, and result management. The ITA will carry out doping-testing and the results management on behalf of the IOC.

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41. Int’l Olympic Comm. [IOC], *supra* note 34, at 4.

42. Int’l Olympic Comm. [IOC], *Anti-Doping Rules applicable to the XXIV Olympic Winter Games Beijing 2022*, at 3 (Nov. 2021).

43. World Anti-Doping Agency, *2021 Model Rules for Major Event Organizations*, at 6 (June 2020).

44. Discussed in Section III.3.d

Furthermore, in case an anti-doping rule violation is asserted, the ITA will file an application to the Anti-Doping Division of the CAS (ADD) in the name of the IOC. The CAS ADD also became operational in 2019 and will be present at the venue during the Games.<sup>45</sup>

With those features, the IOC acts as the forerunner of a new policy in the fight against doping. With the establishment of the ITA and, in parallel, the creation of the CAS ADD by the ICAS (both initiated by the IOC) independent institutions were made available to conduct all aspects of doping control, including result management, and to serve as the first-instance doping hearing panel, according to Article 8 of the WADA Code in lieu of the respective IOC and IFs.

#### 6. *Dispute Settlement by the CAS, Code of Sport-related Arbitration*

Also the Code of Sport-related Arbitration<sup>46</sup> is included in the realm of Olympic Law. Rule 61.2 of the OCh provides:

“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sport-related Arbitration.”

IOC regulations, in particular the Anti-Doping Regulations, more specifically establish the CAS as a dispute settlement institution, either as second-instance appeals arbitration or, only recently, as first-instance adjudication.<sup>47</sup>

#### 7. *Other instruments issued by the IOC*

For each edition of the Olympic Games, the IOC constantly issues a large number of regulations, guidelines, rules of procedure, protocols, and other documents related to rules of the OCh. These include Media Guides, Protocol Guides, the Rule 50 Guidelines and many more.<sup>48</sup>

#### 8. *Extension of the Olympic Charter on the IFs, the NOCs, the OCOGs and Host Cities*

Rule 1.4 of the OCh generally extends the applicability of the OCh and the “decisions of the IOC” (which include all legal acts adopted by the

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45. Int'l Olympic Comm. [IOC], *supra* note 42, at 29; discussed in Section III.3.e.

46. Court of Arbitration for Sport, *supra* note 22, at S1.

47. Int'l Olympic Comm. [IOC], *supra* note 42, at 9.

48. *See generally IOC Documents*, INT'L OLYMPIC COMM. (2021), <https://olympics.com/ioc/documents/international-olympic-committee>.

IOC) to all members of the Olympic Movement.<sup>49</sup> More specifically, in respect to the IFs, Rule 25.2 of the OCh provides that

“[t]he statutes, practice and activities of the IF within the Olympic Movement must be in conformity with the Olympic Charter, including the adoption and implementation of the [WADA Code] as well as the Olympic Movement Code on the Prevention of Manipulation of Competitions.”

According to the wording of that provision, the statutes and regulations of the IFs must be in conformity only with the OCh, the WADA Code, and the Anti-Manipulation Code.<sup>50</sup> That obligation pertains, as the Ethics Code forms an integral part of the OCh, to the whole set of integrity rules but not to other regulations of the IOC such as the Anti-Doping Regulations. That is consistent because the IFs, as signatories of the WADA Code, implement that Code in their own Anti-Doping Regulations.<sup>51</sup>

However, these parts of the IOC rules and regulations are mandatory for the IFs only to the extent of their activities “within the Olympic Movement,” i.e., at or in connection with the Olympic Games. Beyond that sphere of application, the IFs govern their respective sports independently but, with identical rules.<sup>52</sup>

Except for the general provision of Rule 1.4 of the OCh, there is no specific provision that expressly binds the NOCs to comply with the OCh. According to Rule 27.2.2 and 27.2.8 of the OCh, the NOCs must “ensure the observance of the Olympic Charter in their countries” and adopt and implement the WADA Code.

The OCOGs and the Host Cities are bound by the Host City Contract, according to Rules 35 and 36 of the OCh. The Host City Contracts<sup>53</sup> are concluded, on the one hand, between the IOC and, on the other hand, the elected Host City, the NOC of the applicable country, the OCOG, as well as the local, regional, state or national authorities in the country. The Contracts must stipulate (amongst technical details) the adherence to the OCh and the IOC regulations.

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49. Int'l Olympic Comm. [IOC], *Olympic Charter*, *supra* note 1, at 16.

50. Int'l Olympic Comm. [IOC], *Olympic Movement Code on the Prevention of Manipulation of Competitions* (adopted by the IOC Executive Board in December 2015).

51. Discussed in Section II.3.b.

52. Discussed in Section II.9.

53. Contract between the Tokyo Metropolitan Government, the Japanese Olympic Committee and the International Olympic Committee, signed in 2013.

### 9. *Extension of the IOC law to non-Olympic matters*

As the Olympic Games represent a major event in world sports, the rules and regulations established by IOC, as a matter of fact, also apply in the non-Olympic framework. It would not make sense to exercise sports and organize events outside Olympic Games, by the IFs, under different rules and conditions.

## III. THE WORLD ANTI-DOPING CODE

The WADA Code constitutes the second pillar of international sports law. The foundation of the World Anti-Doping Agency in 1999 was the result of various international conferences convened by the IOC with the aim of creating anti-doping rules applicable globally in all countries for all sports. The WADA is a foundation under Swiss law with its legal seat in Lausanne and its headquarters in Montreal, Canada.

The WADA Code was adopted by the second World Conference on Doping in Sport at Copenhagen on March 5, 2003 and became effective on the eve of the 2006 Olympic Winter Games in Torino. Since then, the WADA Code represents the single and uniform set of anti-doping rules for all sports with global application. The original 2003 WADA Code has been amended by the 2009 and 2015 WADA Codes and was replaced by the 2021 WADA Code<sup>54</sup> as of January 1, 2021.

### 1. *Legal Nature of the WADA Code*

As set forth by Article 23.1.1, the WADA Code was signed and is binding upon various categories of sports organizations, including the IOC, the IFs, the NOCs, the Major Event Organizations (MEOs), the National Anti-Doping Organizations (NADOs), and others which became “signatories” of the Code. Beyond the sports organizations, the States are involved too. According to Articles 22 and 22.1 of the 2021 WADA Code,<sup>55</sup> the governments are committed to the WADA Code through the intermediary of the International Convention against Doping in Sports adopted within the framework of the UNESCO in 2005 (“UNESCO Convention”).<sup>56</sup>

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54. World Anti-Doping Agency, *World Anti-Doping Code 2021*, WADA (Jan. 1, 2021), [https://www.wada-ama.org/sites/default/files/resources/files/2021\\_wada\\_code.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf).

55. Article 22 of the 2003 version of the WADA Code was differently worded in order to first create the involvement of states. *Id.* at 139.

56. Int'l Convention Against Doping in Sport, *supra* note 29; discussed in Section III.4.

The WADA Code, although mandatory for the signatories, is not directly applicable; it does not establish rights and obligations for the athletes and other individuals. It rather obliges, according to Article 23.2.1, the signatories to implement the Code within the statutes and regulations governing their particular realm of sports-related activities. The signatories are bound to enact “Code-compliant” anti-doping rules for their particular areas of responsibilities.<sup>57</sup> Only those anti-doping regulations directly apply to the athletes and other persons concerned under the jurisdiction of each of the signatories. In accordance with Article 21.1.1 of the WADA Code, it is the athlete’s responsibility “to be knowledgeable of and comply with all applicable anti-doping policies adopted pursuant to the Code.”

That provision clearly refers to the anti-doping rules adopted by the signatories in accordance with Article 23.2.1 of the Code.

As a result, the IOC, the IFs, and other sport governing bodies abandoned their individual anti-doping rules in favor of almost uniform Code-compliant anti-doping regulations which mainly copy the rules of the WADA Code with organizational adaptations necessary to meet the requirements of the particular signatory. Thus, the aim of the WADA Code to establish a universally applicable anti-doping law was achieved by the core of anti-doping rules, which are uniform both in substance and procedure. Article 23.2.2 of the Code lists a great number of Articles of the Code which must be implemented without changes.<sup>58</sup>

By way of this two-step law-making process, which is comparable to, but more stringent than, law-making through directives and implementing domestic laws of the Member States within the European Union, the IFs, and other signatories created harmonized and uniform law.

## 2. *The Elements of the WADA Code*

Over time, under the auspices of the WADA, the anti-doping law expanded into an elaborated web of various kinds of rules which, by way of providing detailed regulations for the application of the Code itself, aim at utmost uniformity and procedural and legal certainty.

### a. The WADA Code

As set out in its “Introduction”:

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57. World Anti-Doping Agency, *World Anti-Doping Code 2021*, *supra* note 54, at 145; discussed in Section III.3.

58. *Id.*; discussed in Section III.3.c (3).

“Part One of the Code sets forth specific anti-doping rules and principles that are to be followed by organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority....”

These Anti-Doping Organizations (ADO) include the IOC, the IPC, the IFs, the NOCs, the NPCs, Major Event Organizations (MEO), and the National Anti-Doping Organizations (NADOs).

Part One on “Doping Control,” which constitutes the core of the WADA Code in Articles 1 through 17, (i) provides the definition of the various anti-doping rule violations, (ii) establishes the burdens, standards and methods of proof for these violations, (iii) stipulates the conditions for listing prohibited substances and methods in the WADA Prohibited List, (iv) sets out rules on doping testing and investigation, (v) provides for fundamental rules related to laboratory analysis, (vi) provides rules for the results management, including the decision on the anti-doping rule violation, to be followed by the ADOs, and (vii) establishes the right to, and conditions for, a fair doping hearing following the results management decision. Detailed rules on sanctions and the right to appeal from doping-related decisions before national independent tribunals or the CAS follow.

According to Article 1 of the WADA code, “doping” is defined as the occurrence of one or more of the eleven “anti-doping rule violations” set forth in Article 2:

- Art. 2.1: the presence of a prohibited substance or its metabolites or markers in an athlete’s sample
- Art. 2.2: the use or attempted use by an athlete of a prohibited substance or prohibited method
- Art. 2.3: evading, refusing or failing to submit to a sample collection by an athlete
- Art. 2.4: three whereabouts failures within twelve months by an athlete
- Art. 2.5: tampering or attempted tampering with any part of doping control by an athlete or other person
- Art. 2.6: possession of a prohibited substance or a prohibited method by an athlete or athlete support personnel
- Art. 2.7: trafficking or attempted trafficking in any prohibited substance or prohibited method by an athlete or other person
- Art. 2.8: administration or attempted administration of any prohibited substance or prohibited method by an athlete or other person to an athlete
- Art. 2.9: complicity or attempted complicity by an athlete or other person involving a doping offence or a participation in sports during a period of ineligibility committed by another person
- Art. 2.10: prohibited association by an athlete or other person with any athlete support person who is sanctioned for a doping offence

- Art. 2.11: threatening or intimidating another person by an athlete or other person in order to discourage or retaliate against reporting to authorities.

In the meantime, the various elements of these doping offences are clarified by the abundant case-law of the CAS and other adjudication bodies.<sup>59</sup>

Parts Two, Three and Four of the Code contain provisions on doping-related education and research, on the roles and responsibilities of the signatories of the Code and the athletes and other persons concerned as well as the governments, and on acceptance, compliance, modification, and interpretation of the Code.

Most of the articles of the Code are annotated by Comments which, according to Article 26.2 of the Code, “shall be used to interpret the Code.”

#### b. The International Standards

For different doping-related technical and operational areas, the WADA adopted International Standards (IS). They aim at harmonization amongst the ADOs in execution of the WADA Code. According to the introduction to the WADA Code, “adherence to the International Standards is mandatory for compliance with the Code.”

This means that through the intermediary of the Code, the IS are legally mandatory. The IS are intended to complement particular rules of the Code in more detail. In contrast to the Code itself, the IS are adopted and regularly revised by the WADA Executive Committee outside the procedure for amending the Code. Eight IS have been adopted so far.

Today, IS exist for all key areas of the WADA Code. The majority of them were updated in line with the 2021 WADA Code while two new IS became effective with the new edition of the WADA Code on January 1, 2021, i.e., the International Standard for Education and the International Standard for Results Management.<sup>60</sup>

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59. The doping offences under Articles 2.1 through 2.11 of the WADA Code, including the Burden and standard of proof, are analyzed by Taylor and Lewis. ADAM LEWIS & JONATHAN TAYLOR, *SPORT: LAW AND PRACTICE* 739-910 (Bloomsbury Professional ed.) (2021).

60. See generally FEI Clean Sport, *WADA Code & International Standards 2021: Summary of Significant Changes*, FEDERATION EQUESTRE INTERNATIONALE (Apr. 20, 2020), available at <https://inside.fei.org/system/files/Summary%20of%20significant%20changes%20WADA%20Code%20and%20Standards%202021.pdf>.

(1) *The WADA Prohibited List*

The most well-known IS is the Prohibited List<sup>61</sup> which, according to Art. 4.1 of the WADA Code, is published at least annually and must be given effect by the ADOs under their anti-doping regulations. The Prohibited List identifies the prohibited substances and the prohibited methods classified by different categories, and thus forms the core of the various anti-doping rule violations under the Code. The Prohibited Lists are published by end of September of each year and apply as of January 1 of the following year. Compared to its predecessors, the 2021 Prohibited List underwent major changes and has been redesigned in a new format to improve the usability for the athletes and their support personnel.

(2) *International Standard for Testing and Investigation (ISTI)*

The ADOs conduct testing and investigations to obtain analytical and other evidence of the athletes' compliance or non-compliance with the WADA Code's prohibition of certain substances and methods, and anti-doping rule violations in accordance with Article 5 of the WADA Code. As authorized in Articles 5.3.2, 5.4.1, 5.5, and 5.7 of the WADA Code, the ISTI<sup>62</sup> provides detailed rules on planning and conducting testing, notification of sample collection to the athletes, conducting sample collection, maintaining the integrity and identity of the samples taken, and the transport of samples to the laboratory. Some of the areas previously covered by the ISTI have been relocated to the new ISRM.<sup>63</sup>

(3) *International Standard for Laboratories (ISL)*

The ISL provides detailed requirements to be met by the WADA accredited laboratories to ensure the production of valid analytical results and evidentiary data. Compliance by the laboratories with the ISL is specifically related to the burden and standard of proof under Article 3 of the WADA Code. According to Art. 3.2.2 of the WADA Code, laboratories are presumed to have conducted the whole procedure of the sample analysis in accordance with the ISL. However, pursuant to Article 3.2.3 of the WADA Code, athletes may rebut this presumption by establishing that a departure from the ISL occurred which could have reasonably caused a positive analytical result. Then, the burden of proof shifts back to the ADO

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61. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Prohibited List* (Jan. 1, 2023).

62. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Testing and Investigations* (Jan. 2021).

63. Discussed in Section III.2.b (8).



which must prove that such departure did not cause the positive result. According to Article 3.2.3 of the WADA Code, the same mechanism applies to departures from any other IS.

The 2021 edition of the ISL,<sup>64</sup> which is referred to in Articles 6.4, 6.6 and 6.7 WADA Code, sets out technical and logistical requirements for laboratories in order to produce valid results. To that end, the ISL also includes the conditions for obtaining, maintaining, or revoking the WADA accreditation and operating standards for the laboratory operation. In particular, the ISL includes the requirements for security and the A- and B-sample confirmation as well as a code of ethics. Further details are outlined in related Technical Documents.<sup>65</sup>

#### (4) *International Standard for Therapeutic Use Exemptions (ISTUE)*

Also of pivotal importance for an anti-doping rule violation related to prohibited substances or methods is the possession or non-possession of a therapeutic use exemption (TUE). According to Art. 4.4.1 of the WADA Code, no anti-doping rule violation based on prohibited substances or methods is given if the situation is consistent with the provision of a TUE and refers to the ISTUE. The ISTUE<sup>66</sup> ensures that the process of granting TUEs is harmonized across sports and countries and provides for rules on applying for and obtaining a TUE as well as for the recognition of a TUE and the review of TUE decisions by the WADA.

#### (5) *International Standard for the Protection of Privacy and Personal Information (ISPPPI)*

The anti-doping law and procedures have a deep impact on privacy and personal data of the athletes and other persons concerned. Art. 14 of the WADA Code provides detailed rules related to collecting, storing, processing, and disclosing personal information and, in Art. 14.6, refers to the IS, in general, and, specifically, to the ISPPPI. Regarding the “Whereabout” information to be delivered by the athletes, Art. 5.6 of the WADA Code refers specifically to the ISPPPI. To comply with the General Data Protection Regulation of the EU, the 2021 edition of the ISPPPI was seriously amended.<sup>67</sup> The ISPPPI focuses on proportionate data processing,

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64. World Anti-Doping Agency, *World Anti-Doping Code: International Standard for Laboratories* (2021).

65. See World Anti-Doping Agency, *infra* note 80.

66. World Anti-Doping Agency, *International Standard for Therapeutic Use Exemptions* (Oct. 2020).

67. World Anti-Doping Agency, *International Standard for the Protection of Privacy and Personal Information* (Sept. 24, 2020).

disclosure and security of personal data, and retention regarding the biological passport.

(6) *International Standard for Code-Compliance by Signatories (ISCCS)*

The WADA monitors the compliance with the WADA Code, including the IS,<sup>68</sup> and the UNESCO Convention, by the signatories in accordance with Articles 23.3 and 24.1 of the WADA Code. The signatories are obliged to report on their compliance. The ISCCS<sup>69</sup> provides detailed rules which ensure that “Code-compliant” anti-doping rules are consistently and effectively applied and enforced, so that clean athletes can have confidence in fair competition and a level playing field, and public confidence in the integrity of sports can be maintained. The monitoring of Code-compliance has evolved into the main legal procedure in order to sanction doping-related misconduct of ADOs, laboratories, and other sports organizations as shown by the events at the 2014 Sochi Games.<sup>70</sup>

For that purpose, the ISCCS provides for the responsibilities and procedures of various bodies involved in the WADA compliance monitoring system and supports the signatories to ensure compliance. Particularly important is that the CAS is the sole authority to hear and adjudicate on compliance as well as determine consequences and sanctions. The CAS alone has the authority to impose sanctions for non-compliance on a signatory of the WADA Code.

(7) *International Standard for Education (ISE)*

The ISE<sup>71</sup> is a new IS and, based on Article 18.1 of the WADA Code, complements Article 18 of the WADA Code on education. The ISE establishes mandatory standards and principles rather than contents and details. Chiefly, the athletes must receive anti-doping education tailored for the local cultural and sporting environments, while the NADOs and the IFs are responsible for education plans within their areas of responsibility.

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68. Discussed in Section II.2.b

69. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Code Compliance by Signatories*, (Jan. 2021).

70. *World Anti-Doping Agency v. Russian Anti-Doping Agency*, Ct. of Arb. for Sport, CAS2020/O/6689 (2020).

71. World Anti-Doping Agency, *World Anti-Doping Code: International Standard for Education* (2021).

(8) *International Standard for Results Management (ISRM)*

The most recent IS is the ISRM<sup>72</sup> adopted in November 2019 by the WADA Executive Committee and became effective as of January 1, 2021, together with the 2021 WADA Code. The ISRM is an example for the law-making process within the WADA: since October 2014, the matter was dealt with in the non-mandatory *Results Management, Hearings and Decisions Guidelines*.<sup>73</sup>

With the 2021 WADA Code, the results management was profoundly amended. The results management process which was, and still is, governed by Article 7 of the WADA Code, now extends to the hearing process, set forth in Article 8 of the WADA Code, and, as a last step, the right to appeal in Article 13 of the WADA Code, which includes two stages: the *pre-adjudication phase* and the *adjudication phase*. While the sparse provisions on the hearing previously contained in Article 8 underwent no substantial amendments, Article 7 of the WADA Code has been changed fundamentally.

According to Article 7,

“a process designed to resolve anti-doping rule violation matters in a fair, expeditious and efficient manner”

is established by Articles 7, 8, and 13 of the WADA Code. Article 7 acknowledges that each ADO “is permitted” to implement its own results management process which, however, must respect the principles set forth in Article 7. For that purpose, the processes established by the ADOs

“shall at a minimum meet the requirements set forth in the International Standards for Results Management.”

In the same way, Article 8.1 of the WADA Code, as a minimum standard, provides for

“a fair hearing within a reasonable time by a fair, impartial and operationally independent hearing panel in compliance with the International Standard for Results Management.”

Based on these authorizations, the ISRM constitutes the most extensive of the IS under substantive and procedural aspects related to the handling and adjudication of doping cases. It complements the whole range of Article 2 through 15 except for Article 4 (the Prohibited List) and Article 6 (laboratory analysis) of the WADA Code and, thus, provides for detailed rules applicable to the results management process.

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72. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Results Management* (2021).

73. World Anti-Doping Agency, *ISTI: Guidelines for Implementing an Effective Testing Program* (Oct. 2014).

That process, according to the definition contained in Article 3.1 of the ISRM, encompasses the timeframe between the notification of an adverse analytical finding, i.e., a positive result, or other indications of a doping offence through the “charge,” i.e., the decision that a doping offence was committed, “until the final resolution of the matter, including the end of the hearing process at first instance or on appeal.” Generally, the whole result management procedure is confidential and must be terminated within six months.

With the ISRM in force, from January 1, 2021 onwards, the provisions of the Code on doping control are accompanied and completed by International Standards in this order: the Prohibited List, the ISTI, the ISL, the ISTUE, the ISRM, and the ISPPI.

Though the ISRM including its annexes is “mandatory” pursuant to its own Article 1.0 and Article 3.7.6, a departure from the ISRM only “may give rise to compliance consequences under the (ISCCS)” but

“shall not invalidate analytical results or other evidence of an anti-doping rule violation and shall not constitute a defense to an anti-doping rule violation, except as expressly provided for under Code Article 3.2.3.”

Like the WADA Code itself, the ISRM is annotated by Comments which, by virtue of its Article 3.7.3, “shall be used to guide its interpretation.” As a general rule of interpretation, Article 3.7.2 of the ISRM sets forth that the ISRM

“shall be interpreted and applied in the light of the principle of proportionality, human rights, and other applicable legal principles.”

In conformity with Articles 7, 8, and 13 of the 2021 WADA Code, the ISRM subdivides the result management into two major parts: *pre-adjudication phase* (Articles 5 through 7 of the ISRM) and *adjudication phase* (Articles 8 through 10 of the ISRM) and provides for mandatory requirements to be complied with by the ADOs acting as *Results Management Authorities* (RMAs) in a particular case.

(a) Pre-adjudication phase

For the pre-adjudication phase, Article 5.1 of the ISRM sets forth detailed provisions for the initial review of a positive analysis result which reviews whether a TUE has been granted or a departure from the ISL occurred that could have caused the positive result, or whether the positive result was caused by the ingestion of the prohibited substance through a permitted route. Article 5.1.2 of the ISRM specifies the elements of the notification to the athlete, including but not limited to the right to the opening of the B-sample and the right to provide an explanation. With

respect to the scheduling and conduct of the B-sample, the ISRM grants more rights and options than before to the athletes.

Furthermore, Article 5.2 of the ISRM establishes requirements applicable to atypical findings, such as when the laboratory results need further investigation, or to other potential doping offences, such as whereabouts failures or findings on the athlete's biological passport. Article 6 of the ISRM provides detailed requirements for the notification of the mandatory provisional suspension or related to an optional or voluntary suspension.

If, after receipt of an explanation by the athlete or after the expiry of the deadline to provide such explanation, the RMA maintains that a doping offence was committed, the RMA shall promptly charge the athlete with that anti-doping rule violation. Article 7.1 of the ISRM sets out the elements of such a "letter of charge" in details, in particular regarding the right to a hearing.

#### (b) Adjudication phase

The adjudication phase of the results management process consists of the hearing process and the decision emanating thereof. Compared to the sparse rules in Article 8 of the 2015 WADA Code on the right to a fair hearing, Article 8 of the 2021 WADA Code and the implementing Article 8 of the ISRM establish detailed provisions on the first instance hearing process which considerably improves the process and takes into consideration the rights of the athletes. Ultimately, the conditions set forth in the ISRM related to the adjudication phase significantly develop and enhance the legal standards of resolving doping-related disputes from the first-instance adjudication and onward.

#### The ADOs

"shall confer jurisdiction on hearing panels to hear and determine whether an athlete ... has committed an anti-doping rule violation and, if applicable, to impose the relevant consequences."

Hereafter, the RMA acts as a party to the proceedings and the ADO may delegate that task to a third party, such as the ITA.<sup>74</sup>

The hearing panels must consist of "a wider pool of panel members" with "anti-doping experience, including legal, sports, medical and/or scientific expertise." The relevant rules of the ADOs

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74. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Results Management*, *supra* note 72, at 31; discussed in Section III.3.d.

“shall provide for an independent person or body to determine in their discretion the size and composition of a particular hearing panel to adjudicate an individual case.”

This provision, at least, opens the avenue for a regime where the particular panels were to be appointed by an independent third person or institution. However, according to the comment to Article 8.2, “the independent person may be a designated chairperson of the pool.” Such a system seems to be the one regularly chosen by the ADOs.<sup>75</sup> Upon appointment, the designated panel members must sign a declaration of independence and the parties may challenge an appointed panel member.

The hearing panels, under the rules of the ISRM, can, and most likely will, be established within the framework of the ADOs, in particular the IFs. However, in accordance with Articles 8.6 and 8.7 of the ISRM, the ADOs

“shall guarantee the operational independence” of the hearing panels and “provide adequate resources to ensure that hearing panels are able to fulfill their tasks efficiently and independently...”

As a matter of fact, the institutional requirements set forth in Articles 8.1 through 8.7 of the ISRM, were met by the Anti-Doping Hearing Panel set up by the IBU<sup>76</sup> in 2008 and operational until 2019 as a forerunner of independent hearing panels of IFs. The same applies to the Integrity Units recently established by the WA (formerly known as the IAAF) and the IBU in 2019. The Athletics Integrity Unit is completed by a Disciplinary Tribunal of the WA<sup>77</sup> whereas the IBU delegated its power to first instance adjudication to the CAS ADD.<sup>78</sup>

Article 8.8 of the ISRM sets out the following minimum principles for the hearing process: the hearing must be fair, impartial, and independent; the hearing must be accessible and affordable and must be conducted within a reasonable time. In addition, the athlete has the following rights: to be informed of the asserted doping offence, to be represented by counsel, to have access to and to present evidence, to present written and oral submissions, to call and examine witnesses, to request an interpreter at the

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75. According to Rule 8.1.5 of the Anti-Doping Rules of the IBU as in force until October 2019, the chairman of the IBU Anti-Doping Hearing Panel, which existed from 2008 until 2019, appointed the particular panels for each case; Int'l Biathlon Union, *IBU Rules 2016* at 5-34.

76. *Id.* at 5-33.

77. *World Athletics (WA) Constitution*, arts. 70, 75 (2019); *WA Integrity Code of Conduct* (2019); *Anti-Doping Rules* (2020) and *Athletics Integrity Unit Rules* (2020), *World Athletics Book of Rule*, WORLD ATHLETICS, <https://www.worldathletics.org/about-iaaf/documents/book-of-rules> (last visited Nov. 23, 2022).

78. *International Biathlon Union 2019 Constitution*, arts. 28, 30.2; *International Biathlon Union 2019 Rules* at 01-33, 01-36.

hearing, to be provided a schedule for the course of the hearing, and the right to request a public hearing.<sup>79</sup>

Furthermore, the ISRM, in Article 9, stipulates that, in the panel's decision, the following issues must be addressed and determined: the panel's jurisdiction and the applicable law, the factual background, the anti-doping rule violation committed, the applicable consequences, and the appeal routes and deadlines. The decisions shall be promptly notified by the RMA to the athlete or other persons concerned and other ADOs with a right of appeal (the WADA in particular) and reported to the Anti-Doping Administration and Management system of the WADA (ADAMS).

Article 13 of the WADA Code on appeals from doping-related decisions emanating from the results management has become part of the results management process under the 2021 WADA Code with few changes. Therefore, as authorized by Article 13.1 of the 2021 WADA Code, the ISRM, in Article 10, contains a few principles to be met.

National appeal hearings are governed by Articles 8 and 9.1 of the ISRM and the national hearing institutions must be "fully institutionally independent" from the RMA. With respect to appeals before the CAS, Article 10.3 of the ISRM contains a few rules about the notification of proceedings before and decisions rendered by the CAS.

Annex A and Annex B to the ISRM, which have the same legal nature as the ISRM itself, collect rules that, before 2021, were comprised in the ISTI and now transferred to the ISRM. Annex A provides specific rules for the review on cases of "failures to comply" (i.e., doping offences under Article 2.3 WADA Code—evading, refusing, or failing to submit to sample collection—and Article 2.5 WADA Code—tampering with doping control). Annex B sets forth particular rules related to anti-doping rule violations in the form of "whereabout failures" under Article 2.4 WADA Code.

### (c) Guidelines, Model Rules, Technical Documents, Best Practices

Guidelines and models of best practice based in the Code or IS, as well as Technical Documents are adopted and provide solutions in different areas of anti-doping action. According to the "Purpose and Scope of the Code," stated at the beginning of the 2021 WADA Code, guidelines and models of best practice which are based on the Code of IS "to provide solutions in different areas of anti-doping"

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79. Mutu and Pechstein v. Switzerland, Case No. 40575/10 & 67474/10, Eur. Ct. H.R. 14 (Oct. 2, 2018), [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-186434%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-186434%22]).

“are recommended by WADA ... to the signatories and other relevant stakeholders, but will not be mandatory.”

Technical Documents, however, are adopted for the implementation of ISs and

“are mandatory for compliance with the Code,”

thus creating a third level of binding rules.

The wide range of those instruments are addressed to the signatories of the WADA Code and, even though not mandatory *per se*, may entail legal effects which depend on their specific aim and content. Generally, they aim at facilitating compliance with, and implementation of the WADA Code and the IS.

### (1) *Guidelines*

Guidelines provide the signatories with best practices for various aspects of the anti-doping action and offer technical guidance to the ADOs for the implementation of the anti-doping programs and procedures. Presently, WADA issues Guidelines on a great variety of subjects: privacy protection, information gathering and intelligence sharing, major events, a collaboration between IFs and NADOs as well as between international ADOs, implementing effective testing programs, conducting and reporting doping analysis related to specific aspects such as human growth hormones, blood sample collection, urine sample collection, alcohol testing, sample collection personnel, therapeutic use exemptions, the Athlete Biological Passport, and, together with the ISE guidelines for anti-doping education.

### (2) *Technical Documents*

At present, thirteen Technical Documents are in place which apply to various aspects of the sample analysis and reporting as well as the athlete's biological passport.<sup>80</sup>

### (3) *Model Rules*

Model Rules issued by WADA, however, have a different quality. Based on Art. 23.2 of the WADA Code, WADA made revised Model Rules available for the signatories to implement the 2021 WADA Code: Model

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80. World Anti-Doping Agency, *WADA Technical Documents*, TD2022INDEX (2022).



Rules for the NOCs, the IFs, the Major Event Organizers and NADOs.<sup>81</sup> According to Art. 23.2.2 of the WADA Code, many of the Code provisions must be reproduced without substantive changes, or even verbatim, while other clauses may be amended or reworded in order to fit best to the needs of the signatories. These Model Rules, in principle, reiterate the provisions of the Code.

### 3. *Implementation of the WADA Code*

According to Article 23.2, the WADA Code (including its related legal instruments) compel the signatories

“to implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within in their relevant spheres of responsibility.”

Only through the intermediary of the statutes and regulations adopted by the signatories, the WADA law becomes binding and directly applicable upon the athletes and other persons concerned. Article 23.1.1 lists as signatories the IOC and the IPC, the IFs, the NOCs, and the NPCs, as well as the major event organizations and the NADOs.

The “roles and responsibilities” of the various categories of signatories under the WADA Code are clarified in Article 20 of the Code. Article 23.2 of the Code sets out a list of Code provision which must be complemented by the signatories mandatorily and “without substantial changes.”<sup>82</sup> That list includes the whole of Part One of the Code dealing with doping control with the exception of Articles 5 through 8 (on testing, investigation, laboratory analysis, results management and first-instance hearing<sup>83</sup>) and Articles 12, 14, and 16 (on sanctions against sports bodies, confidentiality and animals). According to Article 23.2.3, the signatories are encouraged to use the Model Rules recommended by WADA.<sup>84</sup>

Article 24 of the WADA Code provides for detailed rules on the monitoring and, if needed, enforcement of the signatories’ compliance with the Code.<sup>85</sup>

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81. World Anti-Doping Agency, *2021 Model Rules*, <https://www.wada-ama.org/en/model-rules-guidelines-and-protocols>.

82. Discussed in Section III.2.c (3).

83. Discussed in Section III.2.b (8).

84. Discussed in Section III.2.c.

85. Discussed in Section III.2.b (6).

a. IOC, IPC, NOCs, and other parts of the Olympic Movement

Articles 20.1, 20.2 and 20.4 clarify the particular responsibilities of the IOC and NOCs as well as the IPC and NPC under the WADA Code. How the WADA Code is implemented by the IOC and, thus, for the Olympic Movement, in its entirety is described above under II. 4, 5, and 8 of this essay.

b. International Federations

Article 20.3 of the WADA Code clarifies the particular responsibilities of the IFs under the WADA Code. How the WADA Code is implemented by the IFs is described above under II. 8 of this essay in relation to their role in the Olympic Games. The relevant anti-doping regulations of the IFs, of course, apply to their non-Olympic activities in the same way.

c. NADOs

Article 20.5 of the WADA Code clarifies the responsibilities of the NADOs under the WADA Code. As signatories of the WADA Code, pursuant to Article 23.1.1, the NADOs must implement the Code. In Germany, implementation is accomplished by the National Anti-Doping Agency (NADA) by adopting a National Anti-Doping Code (NADC) which partly literally reproduces Articles 1 through 21 of the WADA Code in the German language. According to its “Introduction,” the NADC 2021 constitutes “the fundamental, general and binding” legal anti-doping instrument in Germany and the national sports federations and other sports bodies are required to implement the NADC and the IS within their areas of responsibilities, respectively.<sup>86</sup>

Interestingly, in Austria, the implementation of the WADA Code is achieved under a different approach. The “NADA Austria” does not adopt a national anti-doping code; it confines itself to publish a WADA-certified German translation of the WADA Code for informational purposes only. Instead of an Austrian NADA Code, the main rules of the WADA Code are incorporated through a domestic statute: the Federal Act on Combatting Doping in Sports.<sup>87</sup> The Austrian anti-doping statute also provides the

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86. National Anti-Doping Agency Germany, *National Anti-Doping Code 2021*, at 7 (Sept. 2021).

87. ANTI-DOPING BUNDESGESETZ 2021—ADBG 2021 UND ÄNDERUNG DES BUNDESGESETZ SPORTFÖRDERUNGSGESETZES 2017—BSFG 2017 [FEDERAL ANTI-DOPING ACT 2021 AND AMENDMENT TO THE FEDERAL SPORTS PROMOTION ACT 2017] BUNDESGESETZBLATT [BGBl.] I NO. 152/2020, AS AMENDED ON DEC. 23, 2020, [https://www-ris-bka-gv-at.translate.google/eli/bgbl/I/2020/152?\\_x\\_tr\\_sl=de&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en&\\_x\\_tr\\_pto=sc](https://www-ris-bka-gv-at.translate.google/eli/bgbl/I/2020/152?_x_tr_sl=de&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc) (Austria).

establishment and functioning of the Austrian NADA and the various, however structurally independent, dispute settlement bodies under its umbrella.

In the U.S., the USADA<sup>88</sup> is responsible for implementing the WADA Code. That is done mainly through “Protocols” and “Policies” such as the USOPC National Anti-Doping Policy of January 1, 2021.<sup>89</sup> As of this date, the Rodchenkov Anti-Doping Act is in force and stipulates criminal sanctions for doping offences.<sup>90</sup>

d. International Testing Agency

Beginning in the late 1990s, the IOC launched the WADA with the goal to establish a set of anti-doping rules uniformly applicable to all sports worldwide and to act as an international agency for amending and monitoring compliance with those rules. At that time, the CAS was already available for adjudication in doping-related matters.

However, experience showed that efforts to properly apply the WADA Code may differ between IFs and between other sports governing bodies responsible for the fight against doping. Therefore, in cooperation with the WADA, the IOC took the initiative to take testing and results management (including first instance doping hearing) out of the hands of the responsible sports bodies and outsourced it to an institution independent of the sport governing bodies and other anti-doping institutions.

As a result, the International Testing Agency (ITA) was established as a foundation under Swiss law domiciled in Lausanne in January 2018 and became fully operational in July 2018. The ITA offers management of the anti-doping programs of the international sports federations, major event organizers and any other entity with responsibility in the fight against doping. These anti-doping organizations remain responsible but may delegate the execution of their anti-doping programs to the ITA by way of agreement. Up until the present, a great number of IFs, the IOC, and some other organizations delegated their doping-related responsibilities to the ITA.

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88. Implementation of WADA by the USADA is established in the USADA’s bylaws. The United States Anti-Doping Agency, *Bylaws of the United States Anti-Doping Agency*, (Oct. 12, 2017). The USADA is a non-profit organization funded on the basis of the USADA Reauthorization Act of 2021. *See* United States Anti-Doping Agency Reauthorization Act of 2021, S. 585, 117<sup>th</sup> Cong. (2021).

89. United States Olympic & Paralympic Committee, *National Anti-Doping Policy* (Jan. 1, 2021).

90. Rodchenkov Anti-Doping Act of 2019, Pub. L. No. 116-206, 134 Stat. 998.

In accordance with the definition of *Testing Authority* attached to the WADA Code, ISTI and ISRM, the ADOs

“may authorize a Delegated Third Party to conduct testing pursuant to the authority of and in accordance with the rules of the Anti-Doping Organization. ... The Anti-Doping Organization remains the Testing Authority and ultimately responsible under the Code to ensure the Delegated Third Party conducting the testing does so in compliance with the Requirements of the (ISTI).”<sup>91</sup>

More generally, Article 20 of the WADA Code stipulates a large authority to delegate:

“each Anti-Doping Organization may delegate aspects of doping control ... for which it is responsible but remains fully responsible for ensuring that any aspect it delegates is performed in compliance with the Code.”<sup>92</sup>

and indirectly provides for an obligation of any delegated third party to apply the WADA Code and the IS:

“To the extent such delegation is made to a delegated third party that is not a signatory, the agreement with the delegated third party shall require its compliance with the Code and International Standards.”<sup>93</sup>

As a result, the ITA, though not signatory, is bound by the WADA law when it acts by the delegation on behalf of an IF, the IOC, or another sporting body.

The ITA executed its functions on behalf of the IOC at the 2021 Olympic Games in Tokyo and the 2022 Winter Games in Beijing.

e. Anti-Doping Division of the Court of Arbitration for Sport

For the first time, the CAS, on an ad-hoc basis, had established an Anti-Doping Division in charge of doping-related disputes arising on the occasion of the Olympic Games 2016 at Rio de Janeiro and, thus, replaced the IOC Disciplinary Commission which was formerly competent for such disputes.<sup>94</sup> Also, for the Olympic Winter Games 2018 at PyeongChang an Anti-Doping Division was created.<sup>95</sup> These CAS ADDs acted as first instance authority for doping-related matters.

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91. World Anti-Doping Agency, *World Anti-Doping Code: International Standard Testing and Investigations*, *supra* note 62, at 16.

92. World Anti-Doping Agency, *World Anti-Doping Code 2021*, *supra* note 54, § 20.

93. *Id.*

94. Court of Arbitration for Sport: Anti-Doping Division, *Arbitration Rules applicable to the CAS Anti-doping Division* (2016).

95. Court of Arbitration for Sport: Anti-Doping Division, *Arbitration Rules applicable to the CAS Anti-doping Division* (2018).

For that purpose, the IOC Executive Committee delegated its power to decide upon any violation of the WADA Code arising on the occasion of Olympic Games, based on Rule 59.2.4 of the OCh, as a first instance authority. Consequently, the CAS ADD had jurisdiction to apply the Anti-Doping Regulations of the IOC. This occurred in the more general context of removing the anti-doping activities from the IOC, the IFs, and other sports bodies, thus transferring them to independent institutions.

These temporary anti-doping divisions were replaced by a permanent CAS ADD<sup>96</sup> which became operational as of 2019. It exercises its jurisdiction as the first instance hearing body by delegation from the sports bodies responsible for anti-doping policies. Therefore, the CAS ADD represents a doping hearing body according to Article 8 of the WADA Code and must comply with the WADA ISRM.

Pursuant to A1 of its Arbitration Rules, the ADD

“has been established to hear and decide anti-doping cases as a first instance authority pursuant to the delegation of powers from the International Olympic Committee (IOC), International Federations of sports on the Olympic program (Olympic IFs), International Testing Agency (ITA) and any other signatories of the World Anti-Doping Code (WADAC).”<sup>97</sup>

According to A2 of its Arbitration Rules, the CAS ADD

“has jurisdiction to rule as first instance authority on behalf of any sports entity which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions.”<sup>98</sup>

In line with its jurisdiction by delegation, the CAS ADD applies the Anti-Doping Regulations of the delegating sports body and thus accomplishes the duty to provide a doping hearing under Article 8 of the WADA Code of those signatories which delegated this task to the CAS ADD. At present, the IOC and some IFs have accepted the CAS ADD as a first instance doping tribunal by agreement.

The CAS ADD, though part of the CAS, operates organizationally independent from other CAS Divisions with a distinct list of arbitrators, under its own Managing Counsel, at a distinct location.

Under particular arbitration rules, the CAS ADD is present at each edition of the Olympic Games<sup>99</sup> with a special list of arbitrators in order to resolve doping-related disputes within twenty-four hours.

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96. Court of Arbitration for Sport: Anti-Doping Division, *Arbitration Rules* (2019).

97. *Id.* at A1.

98. *Id.* at A2.

99. Court of Arbitration for Sport: Anti-Doping Division, *Arbitration Rules Applicable to the CAS Anti-Doping Division, Olympic Games Beijing 2022* (2022).

#### 4. *The Role of Governments in Anti-Doping policies*

In the fight against doping in sports, a remarkable and unique cooperation between the sports governing bodies and State governments has evolved. That cooperation reflects the delimitation of responsibilities between the world of sports and their primary regulatory autonomy, and the overall political responsibility of the State governments. The IOC and the UNESCO joined forces on their way to a global anti-doping policy.

The UNESCO has instituted itself as the global intergovernmental forum responsible for Olympic and top-level sports since its *World Conference of Ministers Responsible for Physical Education and Sports* (MINEPS) 1976 in Paris. The IOC convened the first *World Conference on Doping in Sport* which, in its final *Declaration of Lausanne* of February 2, 1999, called for a worldwide convention against doping.<sup>100</sup> That Declaration led to the foundation of the WADA on November 10, 1999 and, in December 1999, the third MINEPS Conference put an anti-doping convention on the agenda of the UNESCO.

After the Additional Protocol to the *European Convention against Doping* of November 16, 1989 of the Council of Europe was adopted on September 12<sup>th</sup>, 2002<sup>101</sup> and the second *World Conference on Doping in Sport* convened by the IOC and the WADA had approved the WADA Code on March 5, 2003, the fourth MINEPS Conference in December 2004 decided to draw up an international convention. As soon as October 19, 2005, the General Conference of the UNESCO unanimously adopted the *UNESCO Convention against Doping in Sports*<sup>102</sup> which entered into force on February 1, 2007, and includes 191 State parties in 2022, including the U.S., Russia, China, and the European countries.

##### a. Involvement of governments under the WADA Code

For obvious reasons, States could not become parties to the WADA Code set up by private sports governing bodies. Article 20 of the WADA Code does not define governments as Code signatories. However, according to the Copenhagen Declaration of March 3, 2003 adopted by the second *World Conference on Doping in Sports* with the participation of representatives of governments, the governments shall support the WADA Code and create an international convention in order to implement the Code.

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100. World Anti-Doping Agency, *Lausanne Declaration on Doping in Sports* (Feb. 4, 1999).

101. Additional Protocol to the European Anti-Doping Convention, Sept. 12, 2002, E.T.S. No. 188.

102. Int'l Convention Against Doping in Sport, *supra* note 29.

Accordingly, Article 22 of the 2003 WADA Code stated,

“each government’s commitment to the Code will be evidenced by signing a Declaration ... to be followed by a process leading to a convention ... to be implemented as appropriate to the constitutional and administrative contexts of each government.”<sup>103</sup>

As of its 2009 versions, Article 22 of the WADA Code establishes a direct link to the UNESCO Convention which already had become effective in 2007:

“Each government’s commitment to the Code will be evidenced by its signing the Copenhagen Declaration ... and by ratifying, accepting, approving or acceding to the UNESCO Convention.”<sup>104</sup>

Article 22 goes on and expresses the expectations of the signatories, that

“Each government should take all actions and measures necessary to comply with the UNESCO Convention....

Each government should respect arbitration as the preferred means of resolving doping-related disputes, subject to human rights and fundamental rights and applicable national law....

Each government should respect the autonomy of a *National Anti-Doping Organization*.”<sup>105</sup>

Finally, Article 22.10 of the WADA Code provides that

“Failure by a government ... to comply with the UNESCO Convention ... as determined by the UNESCO, may result in meaningful consequences by UNESCO and WADA as determined by each organization”<sup>106</sup>

and Article 23.4.1 of the WADA Code stipulates:

“Compliance with the commitments reflected in the UNESCO Convention will be monitored as determined by the Conference of Parties to the UNESCO Convention following consultation with the State Parties and WADA.”<sup>107</sup>

According to that provision, WADA is involved in the surveillance of compliance by governments with the UNESCO Convention as far as it “reflects,” i.e., incorporates, the WADA Code.

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103. World Anti-Doping Agency, *2003 World Anti-Doping Code*, art. 22, [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_code\\_2003\\_en.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_code_2003_en.pdf).

104. World Anti-Doping Agency, *2009 World Anti-Doping Code*, art. 22.

105. World Anti-Doping Agency *World Anti-Doping Code 2021*, *supra* note 54, arts. 22.1, 22.6, 22.8.

106. *Id.*

107. *Id.* art. 23.

In conclusion, throughout the WADA Code and related legal instruments, close legal connections are established between the WADA Code and the UNESCO Convention.

b. The UNESCO Convention

Beginning with its preamble, the UNESCO Convention displays a close and narrow interrelation with the WADA Code. Most of the definitions given in Article 2 are taken from the WADA Code. Article 3 of the Convention provides:

“In order to achieve the purpose of the Convention, States Parties undertake to:

- (a) adopt appropriate measures at the national and international levels which are consistent with the principles of the Code; ...
- (c) foster international cooperation between State Parties and leading organizations in the fight against doping in sport, in particular with the World Anti-Doping Agency.”<sup>108</sup>

Though, according to Article 4 paragraph 2 of the Convention, the WADA Code is not an integral part of the Convention. Articles 4 and 5 express a clear commitment to the “principles of the Code”. Article 4 paragraph 1 provides that

“State Parties commit themselves to the principles of the Code as the basis for the measures provided for in Article 5 ...”<sup>109</sup>

and Article 5 paragraph 1 sets forth that

“In abiding by the obligations contained in this Convention, each State Party undertakes to adopt appropriate measures. Such measures may include legislation, regulation, policies or administrative practices.”<sup>110</sup>

The second part of the Convention, Articles 7 through 12, contains specific obligations for anti-doping activities of the governments at the national level: cooperation with anti-doping organizations and sports authorities, financial support and sanctions for sports and anti-doping organizations, and facilitating doping control. The most relevant is the obligation set forth in Article 8 paragraph 1:

“to adopt measures to restrict the availability of prohibited substances and methods in order to restrict their use in sport by athletes ... These include measures against trafficking to athletes and, to this end, measures to control production, movement, importation, distribution and sale.”<sup>111</sup>

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108. See Int'l Convention Against Doping in Sport, *supra* note 29, art. 3.

109. *Id.* art. 4.

110. *Id.* art. 5.

111. *Id.* art. 8.



Pursuant to Article paragraph 2, the States shall “encourage” the sport organizations to adopt measures to prevent and to restrict the use and possession of prohibited substances and methods by athletes. Article 9 extends these obligations beyond the athletes to athletes’ support personnel.<sup>112</sup>

c. National anti-doping legislation

Based upon the general commitment set forth in Articles 3, 4, and 5 and the specific obligation under Article 8 of the UNESCO Convention, the States are required and legally bound to enact national anti-doping legislation. In its explanatory statement to the German Federal Anti-Doping Statute of 2015,<sup>113</sup> the German government stated that Germany is bound to implement the UNESCO Convention by public international law. Article 1, paragraph 1 of the Austrian Federal Anti-Doping Act of 2007<sup>114</sup> refers to the Convention by stating that the Convention “obliges Austria to support the measures ... laid down by the Convention.”

Essentially, the national anti-doping laws provide for penal provisions which enable the state authorities to prosecute anti-doping violations and impose criminal sanctions<sup>115</sup> independent of and in addition to the sports anti-doping organizations under the WADA law. In the U.S., the Rodchenkov Anti-Doping Act of 2019<sup>116</sup> introduces criminal sanctions for doping violations.

As a result, in the pyramidal hierarchy of the world-wide anti-doping law, at the foot we recognize domestic legislation of the States in the field of doping. In accordance with binding obligations under public international law emanating from the UNESCO Convention, which establishes the legal link to the WADA Code, domestic law is put into the service of Olympic law which is genuine sports law created by private entities.

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112. *Id.* art. 9.

113. Anti-Doping-Gesetz [Act against doping in sport], Dec. 10, 2015, BUNDESGESETZBLATT [BGBl] I at 2210, as amended on Aug. 12, 2021 (Ger.).

114. ANTI-DOPING BUNDESGESETZ 2021—ADBG 2021 UND ÄNDERUNG DES BUNDES-BUNDESGESETZ SPORTFÖRDERUNGSGESETZES 2017—BSFG 2017 [FEDERAL ANTI-DOPING ACT 2021 AND AMENDMENT TO THE FEDERAL SPORTS PROMOTION ACT 2017] BUNDESGESETZBLATT [BGBl] I No. 152/2020, AS AMENDED ON DEC. 23, 2020, [https://www.ris-bka-gv-at.translate.goog/eli/bgb1/I/2020/152?\\_x\\_tr\\_sl=de&\\_x\\_tr\\_tl=en&\\_x\\_tr\\_hl=en&\\_x\\_tr\\_pto=sc](https://www.ris-bka-gv-at.translate.goog/eli/bgb1/I/2020/152?_x_tr_sl=de&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc) (Austria).

115. Anti-Doping-Gesetz, arts. 2.3, 4 (Ger.); ANTI-DOPING BUNDESGESETZ 2021, art. 22 (Austria).

116. Rodchenkov Anti-Doping Act of 2019, *supra* note 90.

# LOST, ABANDONED, AND FORGOTTEN: REFUGEE PROTECTION IN THE TIME OF COVID

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*by Sultan R. Alshawa\**

I. INTRODUCTION .....	810
II. INTERNATIONAL HUMAN RIGHTS LAW, NON-DISCRIMINATION, AND STATES OF EMERGENCY.....	815
<i>A. Non-Discrimination</i> .....	815
<i>B. Protections Against Discrimination in International Law</i> .....	817
<i>C. States of Emergency</i> .....	818
<i>D. The Case of COVID and Refugees</i> .....	820
III. INTERNATIONAL HUMANITARIAN LAW AND THE PRINCIPLE OF PROPORTIONALITY .....	822
<i>A. Proportionality</i> .....	822
<i>B. Protection from Refoulement</i> .....	823
<i>C. Waging War on COVID</i> .....	824
IV. UNCHECKED DISCRETION AND THE MOCKERY OF INTERNATIONAL OBLIGATIONS OF REFUGEE LAW .....	826
<i>A. Sovereignty and Discretion</i> .....	826
<i>B. Rational Surrender of Unchecked Discretion</i> .....	828
V. CONCLUSION .....	829

## I. INTRODUCTION

The Coronavirus COVID-19 (COVID) is a contagious disease that had its first known case reported in China during December 2019.<sup>1</sup> By March

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2020, the World Health Organization (WHO) had declared that COVID was a pandemic and was rapidly spreading among countries worldwide.<sup>2</sup> Despite extensive research into the health impacts of the disease following the declaration as a pandemic, there is still much that we do not know. The impacts on global society, however, have been much clearer. COVID and the measures implemented by governments to combat its spread have resulted in massive challenges to the global economy and international society, as well as negative economic and social impacts within nearly every country in the world.<sup>3</sup> With that said, one particularly vulnerable group has been hit especially hard by the pandemic: refugees. Many countries have established states of emergency during COVID to block the entry of refugees,<sup>4</sup> but any such suspension must have a sufficient connection to its aim. If the goal is illusory or clearly not being achieved, then the suspension cannot be justified. Furthermore, any suspension must be proportional and adequately balance the harms imposed against the social gains. Finally, any suspension must be undertaken not from the position that states enjoy absolute sovereignty, but that sovereignty is always checked by human rights concerns.

It has been estimated that roughly 39% of the global population lived behind borders closed to non-citizens and non-residents by April 2020.<sup>5</sup> Indeed, the United Nations High Commissioner for Refugees (UNHCR) reported that fifty-seven states had fully closed their borders only one

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1. Marco Cascella et al., *Features, Evaluation, and Treatment of Coronavirus (COVID-19)*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. 1 (June 30, 2022) (originally published through StatPearls).

2. Domenico Cucinotta and Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, 91(1) ACTA BIOMED. 157-160 (Mar. 19, 2020).

3. See Warwick McKibbin & Roshen Fernando, *The Global Macroeconomic Impacts of COVID-19: Seven Scenarios* (Ctr. for Applied Macroeconomic Analysis, Working Paper No. 19, Feb. 29, 2020); N.T. Pramathesh Mishra et al., *Global Impacts of Pre- and Post-COVID-19 Pandemic: Focus on Socio-Economic Consequences*, SENSORS INT'L (Sep. 23, 2020).

4. See Nasar Meer & Leslie Villegas, *The Impact of COVID-19 on Global Migration 4* (May 27, 2020) (GLIMER, Working Paper) (uncovering that states had introduced "roughly 46,000 mobility restrictions," resulting in the closure of most international borders for most nonessential travel); *UN High Commissioner for Refugees Calls on States to Lift Remaining Pandemic-Related Asylum Restriction*, UNHCR (May 20, 2022), <https://www.unhcr.org/news/press/2022/5/6287a0634/un-high-commissioner-refugees-calls-states-lift-remaining-pandemic-related.html>; Miriam Jordan, *Appeals Court Allows 'Remain in Mexico' Policy to Continue Blocking Migrants at the Border*, N.Y. TIMES, (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/us/migrantsborder-remain-in-mexico-mpp-court.html>.

5. A smaller number of states shut their borders entirely, including in Central Asia and Ecuador. See Phillip Connor, *More than Nine-in-Ten People Worldwide Live in Countries with Travel Restrictions amid COVID-19*, PEW RES. CTR. (Apr. 1, 2020), <https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/>.

month earlier.<sup>6</sup> Combined with measures by governments to prevent their citizens from leaving their territory and the largely halted global aviation industry,<sup>7</sup> the ability of vulnerable populations and individuals to seek asylum was massively curtailed.<sup>8</sup> Faced with the virulent pandemic,<sup>9</sup> many states went even further and adopted additional emergency measures<sup>10</sup> to help slow or halt the spread of COVID as much as possible. While many states preferred border closures, many also imposed health requirements on their populations, modified the conditions of visas, and even outright denied entry to their countries by people of specific nationalities.<sup>11</sup> By July 2020, more than 71,000 restrictive measures aimed at halting the spread of COVID were implemented by 219 states and territories.<sup>12</sup> Most relevant to this project is how at least ninety-nine states made no exceptions for people seeking asylum in their countries.<sup>13</sup>

At the height of the worldwide lockdown, 168 out of almost 200 countries fully or partially closed their borders with around ninety making no exceptions for those seeking asylum.<sup>14</sup> Some countries have pushed asylum seekers back to the countries they originally came from, or back to

6. See *COVID-19 Platform: Temporary Measures and Impact on Protection*, UNHCR [https://im.unhcr.org/covid19\\_platform/#\\_ga=2.208987670.5069971.1661399081-2017143156.1661399081](https://im.unhcr.org/covid19_platform/#_ga=2.208987670.5069971.1661399081-2017143156.1661399081) (last visited Mar. 7, 2022).

7. As of August 2020, there had been a 57-64% reduction in international passenger seats offered by airlines. INTERNATIONAL CIVIL AVIATION ORGANIZATION, EFFECTS OF NOVEL CORONAVIRUS (COVID-19) ON CIVIL AVIATION: ECONOMIC IMPACT ANALYSIS (Aug. 12, 2020).

8. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 12, (Dec. 16, 1966) (entered into force Mar. 23, 1976).

9. T. Alexander Aleinikoff et al., *Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and Other Displaced Persons*, 31 INT'L J. OF REFUGEE L. 549, 549 (2020).

10. Alan Greene, *State of Emergency: How Different Countries Are Invoking Extra Powers to Stop the Coronavirus*, THE CONVERSATION (Mar. 30, 2020, 10:25 PM), <https://theconversation.com/state-of-emergency-how-different-countries-are-invoking-extrapowers-to-stop-the-coronavirus-134495> [<https://perma.cc/DW95-45P7>]. See also Stephen Thomson & Eric C. Ip, *COVID-19 Emergency Measures and the Impending Authoritarian Pandemic*, 7 J. L. & BIOSCIENCES 1, 4 (2020).

11. *Global Mobility Restriction Overview*, INT'L ORG. FOR MIGRATION 1, 1 (July 9, 2020).

12. *Id.*; see also *Coronavirus: Travel Restrictions, Border Shutdowns by Country*, AL-JAZEERA (June 3, 2020), <https://www.aljazeera.com/news/2020/6/3/coronavirus-travel-restrictions-border-shutdowns-by-country>.

13. See U.N. Policy Brief: COVID-19 and People on the Move (June 3, 2020), <https://data.unhcr.org/en/documents/details/76793> (Eighty-one states made no exception as of March 11, 2021); see also *COVID-19 Platform*, *supra* note 6.

14. *Forced displacement passes 80 million by mid-2020 as COVID-19 tests refugee protection globally*, UNHCR (Dec. 9, 2020), <https://www.unhcr.org/en-us/news/press/2020/12/5fcf94a04/forced-displacement-passes-80-million-mid-2020-covid-19-tests-refugee-protection.html>.

other countries, including children.<sup>15</sup> This raises real concerns about a violation of a cornerstone of international refugee law: the principle of nonrefoulement. The principle of nonrefoulement states that a country cannot push a person back to another country where they will suffer severe human rights deprivations such as persecution or torture.<sup>16</sup> These global border closures caused serious problems for refugees, because now individuals who, under international law, have the right to seek asylum are denied the ability.<sup>17</sup>

For example, a flagrant violation of international law occurred when boats carrying asylum seekers in the Mediterranean seas were prohibited from landing and denied the right to disembark.<sup>18</sup> This goes against the international requirement under the law of the sea for the rescue of those in peril.<sup>19</sup> The closed borders had actually caused some refugees to attempt to return to their home countries in order to be in some place as opposed to being in transit, even when it was dangerous. But some of those who decided to return home to their own country were denied entry due to the fear they would bring in COVID-19, even though under international law, citizens have the right to return to their own country.<sup>20</sup>

Modern international law is closely tied to the protection of human rights, especially the rights of those in vulnerable populations like

15. *Id.*

16. Off. of the High Comm'r for Human Rights (OHCHR), *The Principle of Non-Refoulement under International Human Rights* (Nov. 30, 2020), <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>; Oona Hathaway et al., *COVID-19 and International Law: Refugee Law – The Principle of Non-Refoulement*, JUST SECURITY (Nov. 30, 2020) <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/>.

17. *Id.*; Marta Crebelli, *COVID-19 and its Impact in the United States and European Union: A Tool to Circumvent Refugee Protection*, 27 ILSA J INT'L & COMP. 27 (2020).

18. Joanna Kakissis, *Asylum-Seekers Make Harrowing Journeys in Pandemic, Only to be Turned Back*, NPR (Feb. 13, 2021), <https://www.npr.org/2021/02/13/949182773/the-harrowing-journeys-to-safety-of-asylum-seekers-during-a-pandemic>.

19. *Id.*; Philip Roche, *The Rescue of Migrants at Sea – Obligations of the Shipping Industry*, NORTON ROSE FULBRIGHT (Mar. 2016), <https://www.nortonrosefulbright.com/en/knowledge/publications/09f857fc/the-rescue-of-migrants-at-sea—obligations-of-the-shipping-industry#:~:text=To%20SOLAS%20Chapter%20V%20was,the%20ship's%20master%20in%20delivering.>

20. *UN High Commissioner for Refugees Calls on States to Lift Remaining Pandemic-Related Asylum Restriction*, UNHCR (May 20, 2022), <https://www.unhcr.org/news/press/2022/5/6287a0634/un-high-commissioner-refugees-calls-states-lift-remaining-pandemic-related.html>; *The Principle of Non-Refoulement Under International Human Rights Law*, UN Human Rights Office of the High Commission, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>.

refugees.<sup>21</sup> Despite this, protections guaranteed by international law for the human rights of refugees have been undermined by many states during the COVID pandemic. Indeed, many violations were committed systematically on these vulnerable populations.<sup>22</sup> For the human rights of refugees to be properly protected, principles of non-discrimination and proportionality, which are already enshrined in international law, must be applied alongside a crackdown on the unchecked discretion of states in their handling of the pandemic before more suffering and violations of international law occur.<sup>23</sup>

The rest of this note breaks down into four sections. In the first section, I address the concept of non-discrimination and how it is protected within international law. Following a discussion of relevant international law, I explore how it has been applied to refugees during the COVID pandemic. In the second section, I tackle the issue of proportionality as it has been applied to international law (most often in the case of conflicts and wars). International law applies the logic of proportionality most clearly in the context of humanitarian law, which offers useful analogies for its application in refugee law. In the third section, I begin with an elaboration on sovereignty and how it implies unlimited discretion for states in managing their domestic affairs. I demonstrate that the purpose of sovereignty is to fulfill the needs of states, which are tied up in the lives and health of their populations. By allowing unchecked discretion in how various states deal with COVID (prioritizing their citizen populations over refugees), they are actually prolonging the pandemic and its costs. I conclude with a summary of the major takeaways related to the handling of the pandemic and what this trend means for the future of the treatment of refugees.

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21. See MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 320, 322 (Oxford Univ. Press, 2nd ed. 2018) (1980); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AMER. J. OF INT'L L. 866, 869 (Oct. 1990).

22. See Amanda B. Egdell et al., *Pandemic Backsliding: Violations of Democratic Standards During COVID-19*, 285 SOC. SCI. & MED. 1, 2 (July 24, 2021); Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, 395 THE LANCET 664, 665 (Feb. 13, 2020); Francisco-José Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AMER. J. OF INT'L L. 687, 692 (Oct. 2020); Muhammed Rahman et al., *Mental Distress and Human Rights Violations During COVID-19: A Rapid Review of the Evidence Informing Rights, Mental Health Needs, and Public Policy around Vulnerable Populations*, 11 FRONTIERS IN PSYCHIATRY 1, 1 (Jan. 2021).

23. G.A. Res. 2200A (XXI), *supra* note 8, art. 7.

## II. INTERNATIONAL HUMAN RIGHTS LAW, NON-DISCRIMINATION, AND STATES OF EMERGENCY

In the best of times, refugee populations are vulnerable in ways that the citizens of states are not, due to their poorer living conditions and lack of ability to access social and economic safety nets. These vulnerabilities have only worsened during the pandemic due to greater difficulties in maintaining social distancing and COVID safety measures in overcrowded detention centers and refugee camps.<sup>24</sup> Furthermore, the restrictions on movement resulting from government efforts to crack down on the spread of COVID have resulted in more impediments for refugees to access basic services,<sup>25</sup> such as public healthcare, child and social protections, education, and income support.<sup>26</sup> To make matters worse, in some cases, refugees have been outright excluded from obtaining these services.<sup>27</sup> From the standpoint of fighting the spread of COVID, this does not make much sense, as the UNHCR observed that “the virus does not distinguish between nationals and migrants, and having a two-tiered system in place to access [for example] essential medical service during this health crisis serves no one’s interest.”<sup>28</sup> These occurrences of discrimination seem counter to the efforts to ensure non-discrimination through international law.

### A. Non-Discrimination

Regarding the term “discrimination,” as presented in the International Covenant on Civil and Political Rights, the Human Rights Committee has stated that it might be best interpreted in the following manner:

the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based

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24. For instance, in Bangladesh as of June 16, 2020, thirty-eight COVID-19 cases among refugee communities had been confirmed and two people had died. See STATE RESPONSES TO COVID-19: A GLOBAL SNAPSHOT AT 1 JUNE 2020 61-2, 79, 82 (Nichole Georgeou & Charles Hawksley eds. 2020). However, it has been noted that testing rates are low and that numbers are likely higher than has been reported. See Amy Bainbridge, *A Coronavirus Crisis is Building Inside Cox’s Bazar, the World’s Largest Refugee Camp*, ABC NEWS (June 16, 2020), <https://www.abc.net.au/news/2020-06-16/rohingya-refugees-co-xs-bazar-coronavirus/12356046>.

25. *Global COVID-19 Emergency Response*, UNHCR (Aug. 28, 2020), [https://reporting.unhcr.org/sites/default/files/28082020\\_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf](https://reporting.unhcr.org/sites/default/files/28082020_UNHCR%20Global%20COVID-19%20Emergency%20Response.pdf).

26. *Integrating Migration into COVID-19 Socio-Economic Response: A Toolkit for Development Partners*, INT’L ORG. FOR MIGRATION i, ii (Aug. 2020).

27. *Id.*

28. Lena Kainz, *As COVID-19 Slows Human Mobility, Can the Global Compact for Migration Meet the Test for a Changed Era*, MIGRATION POL’Y INSTITUTE (Apr. 2020), <https://www.migrationpolicy.org/news/covid19-global-compact-migration-faces-test>.

on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>29</sup>

Furthermore, the Inter-American Court of Human Rights has wrestled with the concept and meaning of equality, and has presented this response regarding the place of discrimination within international law:

that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.<sup>30</sup>

So important is the notion of equality and protection against discrimination in international law that the following determination is expressed within the second preambular paragraph of the United Nations Charter: “[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>31</sup> Starting from this basis, Articles 1(2) and (3) of the United Nations Charter outline the purposes of the organization “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” and in order

“to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>32</sup>

While Article 2(1) of the UN Charter confirms that the organization is based on the principle of sovereign equality in regard to all members, the principle of non-discrimination itself is reaffirmed in regard to human rights in Articles 13(1)(b), 55(c), and 76(c).<sup>33</sup> Specifically, Article 55(c) of the UN Charter asserts that peace and security within the international system depends, in large part, on the extent there exists “universal respect for, and observance of, human rights and fundamental freedoms for all without

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29. UNHRC, *General Comment No. 18: Non-discrimination*, 37<sup>th</sup> Sess., U.N. Doc. HRI/GEN/1/Rev.6, ¶ 7.

30. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 (ser. A) No. 4, ¶¶ 55-7 (Jan. 19, 1984).

31. U.N. Charter, preamble, ¶ 2.

32. *Id.* art. 1, ¶¶ 2-3.

33. *Id.* art. 13, ¶ 1(b), art. 55, art. 76.



distinction as to race, sex, language, or religion.” That being said, the importance of the principle of non-discrimination to international law in regard to human rights might best be emphasized by the Human Rights Committee as, “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a based and general principle relating to the protection of human rights.”<sup>34</sup>

### *B. Protections Against Discrimination in International Law*

Given concerns about discrimination in the international community being large enough to warrant specific references to this phenomenon in the UN Charter itself, it should be no surprise that numerous attempts have been made to protect against its occurrence in international law. Notable examples include the Universal Declaration of Human Rights (UDHR),<sup>35</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>36</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>37</sup> It should be noted that Article 2 of the UDHR prohibits distinctions of any kind, which can be interpreted as meaning that there are no differences that might be legally tolerated under international law.

In addition to global efforts, there have been several attempts to protect against discrimination in international law at the regional level. Examples of this are the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, and the European Convention on

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34. See UNHRC, *supra* note 29, at 185, ¶ 1.

35. UDHR Article 1 states, “All human beings are born free and equal in dignity and rights,” while UDHR Article 2 states, “Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” In terms of the right to equality, UDHR Article 7 states, “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” G.A. Res. 217 (III) A, *supra* note 8, art. 1, 2, 7.

36. Article 26 is the cornerstone of protection in the Covenant against discrimination, which reads, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.* art. 26.

37. Under Article 2(2) state parts agree “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.* art. 2, ¶ 2.

Human Rights.<sup>38</sup> It is also noteworthy to bring attention to the fact that the principle of non-discrimination is contained within the four 1949 Geneva Conventions as well as their Additional Protocols from 1977.<sup>39</sup> Each of the provisions contained in these sources of international law indicate that, even in the direst of circumstances, the states of the international system who have signed onto these conventions are strictly bound to respect specific legal human standards, such as the right to equal treatment and the principle of non-discrimination.<sup>40</sup>

It should also be noted, however, that each of these three regional treaties discussed above also allows for the derogation of international legal obligations for protection in strictly specified conditions. Even in these circumstances, however, both the International Covenant on Civil and Political Rights and the American Convention on Human Rights assert that this derogation cannot involve discrimination on the basis of race, color, sex, language, religion, or social origin.<sup>41</sup> Despite progress being made at the level of international law in terms of protections for individuals and groups from discrimination, acts taken by states that violate human rights have continued to occur. In regard to the COVID pandemic, the declaration of a State of Emergency is being held up as a justification for these violations.

### *C. States of Emergency*

It is important to be aware that, despite what appears to be suggested by the wording in Article 2 of the Universal Declaration of Human Rights<sup>42</sup> and Article 2(1) of the International Covenant on Civil and Political

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38. See African [Banjul] Charter and People's Rights, OAU Doc. CAB/LEG/67/3, art. 2 (June 27, 1981) (entered into force Oct. 21, 1986); Org. of Am. States, American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), art. 1 (1978); Eur. Consult., Ass., *European Convention on Human Rights*, 4.XI.1950, art. 15(1) (Dec. 10, 1948).

39. For full text, see Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S.; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S.; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S.; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S.; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S.; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S..

40. U.N., *Equality and Non-discrimination*, UN, <https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/> (last visited Oct. 12, 2022).

41. For the relevant texts, see G.A. Res. 2200A (XXI), *supra* note 8, art. 4.

42. G.A. Res. 217 (III) A, *supra* note 8, art. 2.

Rights,<sup>43</sup> not all distinctions between persons and groups of persons are automatically classified as discrimination in the true sense of the term. This follows from the consistent case law of a number of international monitoring bodies, which recognize that distinctions between people are justified provided that they are generally reasonable and imposed in order to reach an objective and legitimate purpose. Unfortunately, it is undeniable that all states will, at one point or another, be confronted with crises. Wars, societal upheaval, environmental change, and even pandemics like COVID will eventually crop up and incentivize states to limit the human rights of their citizens in order to restore peace and order. The Inter-American Court of Human Rights made a concession regarding these potential states of emergency when it stated:

“it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree [from guaranteeing these rights].”<sup>44</sup>

That being said, these circumstances have generally been constrained to those in which the life or existence of the state as an internationally recognized entity is at stake,<sup>45</sup> even though discrimination is explicitly protected against.

Declaring a State of Emergency in response to COVID allows a state to implement restrictions on movement and other activities in an effort to curtail the spread of the disease and, ideally, end the pandemic sooner and at a lesser cost. A public health emergency is, in fact, one of the few circumstances in which it is permissible for a state to constrain movement and the right to leave the territory of said state.<sup>46</sup> However, restrictions on healthcare, supplies necessary to ensure survival, and the human rights of refugees are harder to justify. Though the costs associated with the COVID pandemic have been high socially, economically, and in terms of public health, it is hard to argue that the existence of the state itself is at direct risk. Yet, these restrictions have still been inflicted on vulnerable refugee populations.

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43. G.A. Res. 2200A (XXI), *supra* note 8, art. 2, ¶ 1.

44. Proposed Amendments, *supra* note 30, ¶ 58.

45. Though war is explicitly referenced in the second two treaties, none of the referenced treaties mention pandemics. *See* G.A. Res. 2200A (XXI), *supra* note 8, art. 4, ¶ 1; American Convention on Human Rights, *supra* note 38, art. 27, ¶ 1; European Convention on Human Rights, *supra* note 38, art. 15, ¶ 1.

46. G.A. Res. 2200A (XXI), *supra* note 8, art. 12, ¶ 3.

*D. The Case of COVID and Refugees*

Any derogation must functionally advance the reason for said derogation. Under the International Covenant on Economic, Social, and Cultural Rights, the non-discrimination obligation applies to all individuals within a state, including refugees,<sup>47</sup> and is not susceptible to derogation.<sup>48</sup> For this reason, the Committee on Economic, Social, and Cultural Rights has urged all state signatories of the treaty to adopt special, targeted measures to protect and mitigate the impacts of the COVID pandemic on vulnerable populations such as refugees.<sup>49</sup> Despite this, many states have acted to lodge formal notices of derogation in response to the COVID pandemic.<sup>50</sup>

Part of the issue surrounding the treatment of refugees during the COVID pandemic lies in part within a provision of Article 9 of the Refugee Convention, which states:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.<sup>51</sup>

This provision was likely left purposefully vague to allow signatory states greater leeway in pursuing their own self-interests, as “grave and exceptional circumstances” was intended to capture the difficult-to-define grey area that exists between the more narrow concept of a national emergency and the more expansive concept of national security.<sup>52</sup> At its core, these human rights treaties serve to minimize violations during

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47. See Comm. On Econ., Soc. And Cultural Rights, General Comment No. 20: Non-Discrimination in Economic Social and Cultural Rights, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

48. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 4, (Dec. 16, 1966) (entered into force Jan. 3, 1976).

49. Comm. On Econ., Soc. And Cultural Rights, Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights, ¶ 15, U.N. Doc. E/C.12/2020/1 (Apr. 6, 2020).

50. Martin Scheinin, *COVID-19 Symposium: To Derogate or Not to Derogate?*, OPINIOJURIS (June 4, 2020), <http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>.

51. Convention Relating to the Status of Refugees art. 9, July 28, 1951, 189 U.N.T.S 150.

52. Ulrike Davy, *Article 9 1951 Convention, in The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* 781, 787, 792 (Andreas Zimmermann et al. eds., Oxford Univ. Press, 2011).

emergencies by authorizing states to “derogate”—that is, to suspend certain civil and political liberties in response to grave crises.<sup>53</sup>

In an initial examination of the COVID pandemic, which has indeed proven to be an expansive threat to states and their populations on many levels, this exception would seem to apply. However, it is still hard to make the case that discrimination against refugee populations in favor of a state’s own population is necessary during the pandemic, especially as the provision of aid to these populations in line with the demands of international law will actually contribute to ending the pandemic sooner, as providing such assistance will diminish the spread of the disease. Despite this clear-cut logic, many refugees have been discriminated against, as they are seen as the source of the spread of COVID-19 in specific regions. The fact remains that many refugees are not granted access to adequate medical care nor the freedom of movement necessary to work and provide for their families.<sup>54</sup> A particularly poignant example of this is projections surrounding Cox’s Bazar in Bangladesh, which is the location of some 600,000 Rohingya refugees. These massive numbers of people suggest that an outbreak of COVID would lead to rapid exhaustion of medical resources, camp hospitals being overwhelmed in less than fifty-eight days, and a surge in deaths.<sup>55</sup> It is clear that the actions of states are violating international law regarding their treatment of refugees,<sup>56</sup> which has, in no way, contributed to a positive impact on ending the COVID pandemic sooner in their respective countries. Though only one example, the situation in Cox’s Bazar illustrates how derogating the rights of refugees to health and life during the COVID pandemic has not worked and makes the situation worse.

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53. Emile M. Hafner-Burton et al., *Emergency and Escape: Explaining Derogations From Human Rights Treaties*, 65 INT’L ORG. 673, 673 (2011).

54. WORLD HEALTH ORG. [WHO], WORLD HEALTH STATISTICS: MONITORING HEALTH FOR THE SUSTAINABLE DEVELOPMENT GOALS, at 3 (2020).

55. Qais Alemi et al., *Refugees and COVID-19: Achieving a Comprehensive Public Health Response*, 98(8) BULL. WORLD HEALTH ORG. 510, 510 (2020).

56. *Marckx v. Belgium*, App. No. 6833/74, ¶ 2 (June 13, 1979), <https://hudoc.echr.coe.int/fre?i=001-57534>; see generally UNHRC, *General Comment No. 18: Non-discrimination*, *supra* note 29.

### III. INTERNATIONAL HUMANITARIAN LAW AND THE PRINCIPLE OF PROPORTIONALITY

#### *A. Proportionality*

According to the principle of proportionality in international law, the legality of an action will be determined based on the balance between the objective sought and the means and methods pursued to attain the said objective, as well as the consequences of the action itself. Essentially, this implies that there is an obligation on behalf of the actor to appreciate the context of a given situation prior to deciding if an action is illegal or legal under international law.

In terms of its use in international law, the principle of proportionality is often applied within the context of militant conflicts. It is particularly important to balance the argument by an actor regarding military necessity when it comes to the legality of the use of force. This principle is often applied in the case of individual or group self-defense, in the event of a state deploying armed forces to restore order or ensure public safety, and in cases of domestic or international conflicts. Moreover, international humanitarian law, as applied to armed conflicts,<sup>57</sup> draws upon the principle of proportionality to limit the damages caused by military operations against the civilian population and infrastructure. International humanitarian law prohibits any attack that may cause “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>58</sup> Over time, it has become recognized that the principle of proportionality is a rule of customary law, that is applicable at both the international and domestic levels during armed conflicts.<sup>59</sup>

While primarily used in reference to armed conflicts, the principle of proportionality also comes into play in situations in which restrictions to human rights are imposed by a state in the name of national security, or the defense of public order in situations of unrest or terrorism. In such situations, it is the responsibility of the international conventions on human rights, as well as courts at the national or regional level, to recall the context and content of the requirement for proportionality. From this jurisprudence, human rights would remain applicable to individuals and groups in these

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57. *What are jus bello and jus in bello?*, INT’L COMM. OF THE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

58. Protocol Additional, *supra* note 39, art. 51, 57.

59. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, INT’L COMM. OF THE RED CROSS (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 1984).

crisis situations, except in the case of legitimate derogations made by states acting in accordance with international law procedures that allow them to do so. That being said, even in these situations, refugees would possess protection from refoulement.

### *B. Protection from Refoulement*

With no positive, enforceable right to asylum on behalf of refugees in existence, protection from refoulement<sup>60</sup> has become regarded as the fundamental norm regarding refugee protection.<sup>61</sup> Much like the principle of proportionality, protection from refoulement for refugees has garnered such widespread acceptance that it has attained the status of customary international law, and there may well be a strong case for its recognition as *jus cogens*.<sup>62</sup>

While some may claim that the COVID pandemic can be categorized as being a “grave and exceptional circumstance” that warrants the derogation of international human rights in the interests of implementing temporary restrictions to ensure a quicker transition out of the pandemic, this is not the case. According to Oona Hathaway,<sup>63</sup> the drafters of the Refugee Convention did not end up adopting an all-encompassing power of derogation for times of national crisis and rejected additional reasons for invoking provisional measures, such as “public order.”<sup>64</sup> For this reason, it would be difficult to justify restrictive measures against refugees by stating that such measures are being implemented to contain the pandemic on behalf of national security concerns.<sup>65</sup> Even then, such efforts are explicitly not allowed to include refoulement under the Refugee Convention and any measures against refugees themselves would need to be applied on an

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60. Refoulement is best thought of as the forcible return of asylum seekers or refugees to their country of origination, where they are liable to be subjected to persecution or become subject to serious harm. For a more in-depth discussion, see Davy, *supra* note 52, art. 33.

61. For a broader discussion of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees, see *generally* U.N. Refugee Agency, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007).

62. Cathryn Costello & Michelle Foster, *Non-Refoulement as Custom and Jus Cogens: Putting the Prohibition to the Test*, 46 NETH. Y.B. OF INT'L L. 273, 273 (2015).

63. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 L. & CONTEMP. PROBS. 115, 115 (2008).

64. JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 297 (Cambridge Univ. Press, 2nd ed. 2021).

65. Jean-François Durieux & Jane McAdam, *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 16 INT'L J. OF REFUGEE L. 4, 4 (2004).

individual basis.<sup>66</sup> For this reason, there is no legal justification under international humanitarian law for the violations of refoulement that have occurred over the course of the COVID pandemic.

### C. *Waging War on COVID*

In both Article 4(1) of the International Covenant on Civil and Political Rights and Article 15(1) of the European Convention on Human Rights, a principle of proportionality in the case of a public emergency threatening the existence of a state is included. Under this inclusion, states would be allowed to take measures outside of their legal obligations to human rights only to the extent necessary to deal with the emergency situation of the COVID pandemic itself and no further. Indeed, the UN Human Rights Committee has called for states to:

not derogate from their duty to treat all persons, including persons deprived of their liberty, with humanity and respect for their human dignity, and must pay special attention to the adequacy of health conditions and health services in places of incarceration, and also to the rights of individuals in situations of confinement...<sup>67</sup>

Furthermore, this call has also been supported by judgments in a number of international humanitarian law cases. In its judgment in the case of *Aksoy v. Turkey*, the ECHR recalled that:

it falls to each Contracting State, with its responsibility for “the life of [its] nation,” to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. . . . Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, inter alia, the States have gone beyond the ‘extent strictly required by the exigencies’ of the crisis.

As a consequence, the derogative measures must be strictly required by the exigencies of the specific situation and only that specific situation.<sup>68</sup>

What if the COVID pandemic was on the same level as war and genocide in international humanitarian law? After all, the lives of billions of people have been radically altered over the past two years. Millions have lost their lives, the global economy has been rocked in a way that hasn't been felt since the Great Depression, and governments around the world

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66. Davy, *supra* note 52, at 802.

67. U.N. Human Rights Comm., *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, ¶ 2(e) UN CCPR/C/128/2 (Apr. 30, 2020).

68. *Aksoy v. Turkey*, App. No. 21987/93, ¶ 68 (Dec. 18, 1996) <https://hudoc.echr.coe.int/fre?i=001-58003>.



continue to ask that their citizens make sacrifices for the good of all. Yet, even if we were to equate the COVID pandemic to war or genocide under international humanitarian law, a case can still be made that the principle of proportionality has been violated regarding the treatment of refugees via the Convention on the Prevention and Punishment of the Crime of Genocide, which states in its first Article:

“the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

While Article II (a) presents what acts might be considered genocidal in nature, such as those generally committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>69</sup> Particularly, three acts under Article II stand out as being applicable to the treatment of refugees during the COVID pandemic: killing members of a group, causing serious bodily or mental harm to members of a group, or deliberately inflicting on a group conditions of life calculated to bring about the physical destruction of the said group in whole or in part. An identical definition of genocide can be found in the Rome Statute of the International Criminal Court under Article 6, as well as in both Article 4(2) of the Statute of the International Tribunal for the Former Yugoslavia and Article 2(2) of the Statute of the International Tribunal for Rwanda.

In the fight against COVID, like an enemy invading your country, you don’t exert efforts against them where they are not present. You secure your defenses, build up your forces, strike hard and fast to disrupt the enemy, and, hopefully, knock them out before too much damage can be caused. Letting this enemy build strongholds from which to strike within pockets of refugees is not in the best interests of states.

In summary, the continued denial of access to welfare and other forms of support for refugees during the COVID pandemic goes directly against the Refugee Convention. Despite the requirements for states to provide the same standards of treatment and assistance to lawful refugees as would be given to their own citizens, states continue to violate these requirements.<sup>70</sup>

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69. G.A. Res. 260A (III), Convention on the Prevention and Punishment of the Crime of Genocide, art. II (Dec. 9, 1948) (entered into force Jan. 12, 1951).

70. Again, the discussion of Rohingya refugees suffering in refugee camps in Bangladesh referenced previously bears mentioning here. Proper provisions of care and medical assistance to the Rohingya in Cox’s Bazar would have saved lives and spared needless suffering, while also help slow the spread of the COVID pandemic. Yet this is not what happened. See Alemi, *supra* note 55, for a more complete description of how Bangladesh violated international humanitarian law in this case.

#### IV. UNCHECKED DISCRETION AND THE MOCKERY OF INTERNATIONAL OBLIGATIONS OF REFUGEE LAW

International law does not view sovereignty as conferring unlimited discretion in regard to human rights violations.<sup>71</sup> In order to understand the problem of unchecked discretion regarding the abrogation of human rights to refugees during the COVID pandemic, it would be best to start with an understanding of the sovereignty of the state itself.

##### *A. Sovereignty and Discretion*

The sovereignty of states might best be understood as a bundle of properties rather than a single characteristic, including the authority to govern, the supremacy of this governing authority, the independence of this governing authority, and the territoriality of this governing authority.<sup>72</sup> The independence of the state and the fact that it is associated with a defined territorial space allow for discretion in how states handle their internal affairs.

In recent decades, however, there has been some debate over the place of international law in regard to state sovereignty, as some have asserted that the relationship has changed as a consequence of the emergence of human rights.<sup>73</sup> Those who assert that the sovereignty of states is limited by the norms of human rights might disagree on where those limits lie,<sup>74</sup> but all accept the underlying idea that the said limits do exist.<sup>75</sup> Critics point to the uncertainty over the precise limits themselves, contributing to a situation in which there is no identifiable source of human rights and, as such, it is simply a representation of morals and not law.<sup>76</sup> These critics go on to mention the expansion of human rights language to include diverse

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71. See BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011); see Dominik Eisenhut, *Sovereignty, National Security and International Treaty Law. The Standard of Review of International Courts and Tribunals with regard to 'Security Exceptions,'* 48 ARCHIV DES VÖLKERRECHTS 431 (2010).

72. Hathaway, *supra* note 63, at 120.

73. *Id.* at 145.

74. *Id.*

75. See Kofi Annan, *Two Concepts of Sovereignty*, THE ECONOMIST 1, 3 (Sep. 18, 1999); see generally Louis Henkin, *Human Rights and State Sovereignty*, SIBLEY LECTURE 31 (Mar. 1999); see generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AMER. J. OF INT'L L. 866 (Feb. 27, 2017).

76. See Harv. Univ. Inst. of Politics, *Human Rights Debate: Is the Language of Rights Useful in the Fight Against Poverty?* Youtube (Feb. 26, 2005), <https://www.youtube.com/watch?v=TrXp2ADK2go> [hereinafter Harvard video]; see generally Christina Ochoa, *Advancing the language of human rights in a global economic order: An analysis of a Discourse*, 3 B.C. THIRD WORLD L. J. 57 (Jan. 2003).

new issues, such as labor rights, rights to healthcare, rights to food, and even the right to be free from poverty.<sup>77</sup>

According to Hathaway,<sup>78</sup> these critics do have some merit to their arguments. The idea that states do not have unchecked discretion in dealing with issues that impinge upon human rights might well override the principles of autonomy and self-determination in international law. That being said, Hathaway also states that such critics are wrong to argue that human rights cannot be justified outright as a limitation on state authority, as sovereignty is itself a social and legal construction of the modern international legal system. States cannot claim recognition and unchecked discretion based on the place of sovereignty in international law while at the same time claiming not to recognize the requirements under international law to protect human rights.<sup>79</sup>

Under sovereignty, as the legitimate legal authority of a population within a specific territory, states receive a number of benefits under international law, including protection from the threat or use of force against them. In return for this protection and membership in the international community, states are expected to accept some limits on their own behaviors. While states that are not counted as members of the international community would not have these obligations, they would also not have the protections that membership affords them.<sup>80</sup> The UN Charter notes that the notion of state sovereignty carries with it obligations to provide for the welfare of their populations and meet certain obligations to the international community.<sup>81</sup>

These sentiments have been supported in international courts as well. In its 1988 judgement of the *Velasquez Rodriguez v. Honduras* case, the Inter-American Court for Human Rights affirmed that, regardless of the crimes committed, the power of the state is not unlimited, nor may it resort

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77. Harvard video, *supra* note 76.

78. Hathaway, *supra* note 63, at 146.

79. It should also be kept in mind that the concept of state sovereignty itself is still a relatively new concept in the international community. It is possible that the collective international laws regarding human rights are also going through a period of internalization, in which case the unchecked discretion regarding their lack of protection may not prove to be an issue forever. *See also* this work for an overview of why sovereignty is more recent in construction than the Treaty of Westphalia. Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*. 55 INT'L ORG. 251, 281 (2001).

80. U.N. Charter art. 2, ¶ 4.

81. U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*. Secretary-General's High-Level Panel on Threats, Challenges, and Change, ¶ 29, U.N. Doc. A/59/565 (Dec. 2, 2004).

to any means to which it is capable of attaining its goals.<sup>82</sup> For this reason, modern sovereignty is not unconditional, nor do states possess unchecked discretion when dealing with issues like human rights. Even if some human rights are up for debate, a fundamental core that should not be open to discussion is the prohibition of state-sanctioned torture, political killings, or genocide. Unfortunately, in the case of refugees seeking redress for human rights violations, they will have to exhaust domestic remedies prior to pursuing international mechanisms.<sup>83</sup>

### *B. Rational Surrender of Unchecked Discretion*

Might it not be in the best interests of states to surrender unchecked discretion when it comes to the treatment of the human rights of refugees? Perhaps. The reasoning behind this is tied up in the relationship of the state to international law. While adherence to many of these principles is voluntary for states, they still limit the future behavior of states and give authority to others over specific actions. They are right to do so. According to Hathaway,<sup>84</sup> states stand to gain from binding themselves to international law, as doing so helps them avoid short-term temptations and achieve long-term goals. For example, by refusing to cave into public pressure to restrict the human rights of refugees in order to uphold international law, their refugee population might well be healthier during the duration of the pandemic, leading to fewer COVID cases, and a sooner ending of the pandemic with less costs incurred by the state.

Related to this logic are assertions made by political theory institutionalists that effective regimes, like treaties, could allow for states to pursue cooperative activities that set aside short-term power maximization in favor of the attainment of long-term goals.<sup>85</sup> Adherence to international laws on human rights in the context of the COVID pandemic would likely translate into better care for vulnerable refugee populations, which, in turn, would constrain the spread of COVID and lower overall costs to the state.

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82. *Velazquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 154 (July 29, 1988).

83. *See* No. 14668, International Covenant on Civil and Political Rights Adopted by the General Assembly of the United Nations art. 41, Dec. 19, 1966, 999 UNTS 171; G.A. Res. 2200A (XXI), *supra* note 8, art. 2; G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 11, ¶ 3 (Dec. 21, 1965); European Convention on Human Rights, *supra* note 38, art. 26; American Convention on Human Rights, *supra* note 38, art. 50; African [Banjul] Charter and People's Rights, *supra* note 38, art. 50; UNESCO, *Procedure for the protection of human rights: the legislative history of the 104 EX/3.3*, L.A.2009/WS/1, ¶ 14 (2009).

84. Hathaway, *supra* note 63, at 144.

85. ROBERT O. KEOHANE & JOSEPH S. NYE, JR., *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 158-65 (1977).

With this being the case, states might relinquish unchecked discretion in terms of their sovereignty by entering into and upholding international agreements on human rights. Weak democracies, for example, would help ensure the future protection of human rights by signing onto institutions like the European Convention on Human Rights, as doing so might prevent backsliding on these protections.<sup>86</sup> Signing onto international agreements on human rights, while constraining some rights of individuals, will improve collective benefits by ensuring the human rights of a state's own citizens are protected elsewhere in the world. The benefits of pursuing actions like this have already been definitively proven in the case of international standards for mail, weights and measures, and general commerce (among other areas).<sup>87</sup> Finally, by agreeing to international treaties regarding the protection of human rights, states also attain a way to overcome the collective action dilemma, as these agreements generally require reciprocal commitments from the states signing onto them.<sup>88</sup>

If states were to set aside unchecked discretion regarding the human rights of refugees in pandemics, such as this current COVID pandemic, they might well gain collective benefits that would not otherwise have been attained. Provision of aid to refugees at the behest of international human rights law will, by the nature of pandemics, lead to healthier refugees in these vulnerable populations. This will, in turn, lower infection rates and the number of deaths, as well as allow for a quicker transition to a post-pandemic period in which less costs are imposed on the state and its population. As this will be the case, the costs of surrendering unchecked discretion in this scenario do not outweigh the tangible benefits of doing so.

## V. CONCLUSION

Throughout this note, I have examined the issues related to the enforcement of the principles of discrimination, proportionality, and the problem of unchecked discretion regarding the protection of the human rights of refugees during the COVID pandemic. Given the nature of pandemics and how they can spread across borders and populations regardless of the wishes of states and their governing bodies, withholding protections for the human rights of refugees is a violation of international law and counterproductive in the struggle to end a pandemic. The derogation of responsibility to protect the human rights to health and life in

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86. See generally Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

87. Hathaway, *supra* note 63, at 144.

88. *Id.*

refugee populations not only harms those directly experiencing restrictions, but will likely lead to a longer-lasting pandemic that will inflict additional costs on states' own citizens that might not otherwise have been the case.

While public opinion might call for strong measures and restrictions on refugees, which governments are inclined to agree to in order to gain the public's support, the peace and security of the state would be better served by applying the protections of human rights equally to both citizens and refugees. Concentrated efforts by states and the international legal community to ensure this occurs will help protect human rights for all. Moreover, when it comes to the issue of unchecked discretion, should states get away with violating the rights of refugees during the COVID pandemic, it is possible that, during future crises, they will begin abrogating the human rights of their own citizens to the degree they can get away with. Should many states do this, it will become impossible to hold violators accountable for these actions. In such a scenario, legal interventions, such as those that occurred in Nuremberg, Yugoslavia, Rwanda, and Darfur, would be presented as an overreach by the international community into domestic affairs that are the sole purview of the state itself.

While it would be correct to say that a balance must be struck between the legitimate rights of the state vis-à-vis the human rights of its citizens and vulnerable groups such as refugees, one set of rights should not be over-emphasized over another during crises like the COVID pandemic such that state instability or mass oppression results. In summary, states should pursue international law's principles of non-discrimination and proportionality to guarantee the human rights of refugees and make efforts not to hide violations of human rights behind the excuse of unchecked discretion. Doing so will ensure human rights for all are preserved, and pandemics like COVID will pass more quickly and at less cost than would otherwise be the case.

**HIT EM’ WHERE IT HURTS: THE UNITED STATES SHOULD CRIMINALIZE EMPLOYMENT DISCRIMINATION TO MAKE BAD BEHAVIOR KNOWN AND FACILITATE IMPROVEMENT**

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*by Juliet Di Pietro\**

I.	INTRODUCTION .....	832
II.	SYSTEMS IN FOREIGN COUNTRIES PRESENT MEANINGFUL MODELS OF CRIMINALIZING EMPLOYMENT DISCRIMINATION .....	834
III.	THE IMPOSITION OF CRIMINAL RESPONSIBILITY WOULD PROVIDE AMERICAN EMPLOYEES AN ALTERNATIVE TO ARBITRATION AGREEMENTS THAT BAR VICTIMS FROM LITIGATION .....	839
IV.	ADDING CRIMINAL RESPONSIBILITY TO EMPLOYMENT DISCRIMINATION WOULD SATISFY RETRIBUTION AND DETERRENCE JUSTIFICATIONS FOR PUNISHMENT .....	845
V.	CONCLUSION .....	846

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## I. INTRODUCTION

Suppression of information keeps people in the dark, unaware of problems that should be addressed. In the United States, information in employment discrimination cases is suppressed by using confidential arbitration of disputes. In various other countries, those disputes are made public, and the perpetrators' actions are brought to light, encouraging changes in their behavior. Changes in American practices to reveal concealed facts may help suppress discriminatory behavior, rather than the information about it.

Events that transpired in a Tesla discrimination case demonstrate just how bad employer behavior can be and how it could be remedied. In October of 2021, a federal jury ordered the Tesla company to pay Owen Diaz, a former contract elevator operator, nearly \$137 million in punitive and emotional distress damages for racist abuse and discrimination he suffered at the company's automotive plant in Fremont, California.<sup>1</sup>

The contracted employee said that he had been looking forward to working at a well-known tech company.<sup>2</sup> However, instead of the positive experience he expected, he faced horrors "straight from the Jim Crow era."<sup>3</sup> Tesla employees harassed Mr. Diaz by calling him racial slurs, telling him to return to Africa, and leaving drawings of racist and derogatory pictures scattered around the factory.<sup>4</sup> Mr. Diaz testified that he suffered from a loss of appetite which led to weight loss, and he experienced many "sleepless nights."<sup>5</sup> He told the jurors that there were days he would sit on his staircase and cry.<sup>6</sup>

The Vice President for Tesla released a statement in which she said the verdict was unjustified and defended the use of racial slurs in the workplace by stating that employees used the word "in a friendly manner."<sup>7</sup> Mr.

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1. Malathi Nayak et al., *Tesla Hit with \$137 Million Judgment in Workplace Racism Case*, FORTUNE (Oct. 5, 2021, 4:03 AM), <https://fortune.com/2021/10/05/tesla-137-million-judgement-lawsuit-workplace-racism-case-owen-diaz>.

2 Joe Hernandez, *Tesla Must Pay \$137 Million to a Black Employee Who Sued for Racial Discrimination*, NPR (Oct. 5, 2021, 1:56 PM), <https://www.npr.org/2021/10/05/1043336212/tesla-racial-discrimination-lawsuit>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Nayak et al., *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> Valerie Capers Workman, *Regarding Today's Jury Verdict*, TESLA (Oct. 4, 2021), <https://www.tesla.com/blog/regarding-todays-jury-verdict>.



Diaz's case was unusual because Tesla had to defend itself in a public trial.<sup>8</sup> Tesla, like many other companies, normally mandates that arbitration handles employee disputes.<sup>9</sup> A third-party agency contracted with Mr. Diaz, so he did not sign the standard employee mandatory arbitration agreement.<sup>10</sup>

The Tesla arbitration agreements prevent arbitrated employees from directly accessing the courts, force them to waive their rights to all judicial relief, and bar them from bringing class-action lawsuits. Cases concerning arbitrated employees who suffer from sexual harassment, discrimination, racism, and violent threats are kept in the dark, and persons considering working for Tesla or purchasing Tesla products are kept unaware of information those persons may find important and helpful.

Professor Julie C. Suk's article, "Procedural Path Dependence: Discrimination and the Civil-Criminal Divide," explains the current limitations of employment discrimination in the United States because it is, and always has been, treated as a purely civil offense.<sup>11</sup> She argues that American law should break through these limits and forge a new path, as the offense is neither inherently criminal nor inherently civil.<sup>12</sup> Her argument holds strong, especially in modern times, with the latest recognition in the United States that racism and other forms of discrimination are more than morally shameful—they are evil. American values have evolved, and the harsh impact of compulsory arbitration has become clearer since her article was written in 2008. However, while Suk correctly identified the issue of relying on one path of procedure for employment discrimination, she does not necessarily call for criminalizing the injustice. Rather, she argues that the United States Equal Employment Opportunity Commission (EEOC) should step in as a rulemaking body. In 2008 this may have made more sense, but the EEOC has since come under criticism for its shortcomings and lack of response in handling employment discrimination. Although she makes a strong argument advocating for more "flexibility than reliance" on either procedural system, the argument falls short in the way that it trusts administrative agencies to lead the way.<sup>13</sup> Victims of these harmful and evil acts should involve a criminal prosecutor

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<sup>8</sup> Nayak et.al., *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1317 (2008).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1371.

who would pursue cases with a more viable chance of survival and success in criminal courts.

The United States' inadequate enforcement of laws prohibiting employment discrimination appears to be mainly due to American companies' extensive use of arbitration agreements. These agreements result in sealed cases and limited redress abilities for victims. Practices in other countries offer the United States a solution to this problem: the criminalization of employment discrimination. The United States should utilize this solution to help solve the problem of sweeping the dirty details under the rug and bring to light the cases of employment discrimination in American society. Without the option of concealing wrongful acts from the public, employers will have no choice but to risk public and employee knowledge of their discriminatory practices. Thus, this would hold employers accountable for their bad behavior.

## II. SYSTEMS IN FOREIGN COUNTRIES PRESENT MEANINGFUL MODELS OF CRIMINALIZING EMPLOYMENT DISCRIMINATION

Arbitration agreements present many challenges to plaintiffs in employment discrimination cases in the United States. In fact, employment discrimination victims cannot become plaintiffs as they are often barred from litigation. There is a need for an alternative solution to this problem. In several countries such as France and Brazil, the criminalization of employment discrimination has provided meaningful and effective ways to address the issue of forced arbitration agreements barring employees from litigation.

France's treatment of discrimination as a crime originates from a history of criminalizing racist speech. The prohibition of racial defamation in the press became a part of French law when anti-Semitic propaganda began to spread in 1939.<sup>14</sup> French employment discrimination law was built into French anti-racism law, so it became a matter of criminal law.<sup>15</sup> In 1982, a provision of the Labor Code, codified under *Code du travail* Article L. 122-45, made it possible for victims of employment discrimination to pursue their cases in the country's civil system.<sup>16</sup> Later in 2001, France added the EU Race Directive against indirect discrimination and

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<sup>14</sup> *Id.* at 1328; *see also* MICHAEL R. MARRUS & ROBERT O. PAXTON, VICHY FRANCE AND THE JEWS 34-71 (1981).

<sup>15</sup> Suk, *supra* note 11, at 1328.

<sup>16</sup> *Id.* at 1329; *see also* J.O. decision No. 82-689, Aug. 4, 1982, Rec. 2518 (Fr.); Code du travail [C. trav.] [Labor Code] art. L 122-45 (Fr.).

implemented the burden of proof provisions.<sup>17</sup> Today, employment discrimination is both a civil and criminal offense. It imposes on wrongdoers a maximum of three years' imprisonment and a fine.<sup>18</sup> The fines range from 45,000 euros to 225,000 euros depending on the employer's status as an individual or as a company.<sup>19</sup>

Victims of discrimination in France can consult anti-racist organizations to assist them in their legal actions. For example, in 2007, the anti-racist organization SOS-Racisme filed a complaint alleging that the well-known cosmetics company L'Oréal engaged in employment discrimination.<sup>20</sup> The complaint asserted that the L'Oréal marketing director's hiring process instructed against hiring African, Arabic, or Asian women.<sup>21</sup> French prosecutors presented evidence that L'Oréal employed the shorthand "BBR" in a fax transmission to describe the desired look for its female models.<sup>22</sup> "BBR" is a well-known code in the industry. It means bleu, blanc, rouge (the French flag's colors), used to describe white French people. After L'Oréal lost at trial, the court sentenced the marketing director to three months of imprisonment for racial discrimination in her hiring process.<sup>23</sup> SOS-Racisme considered this verdict a triumph and expected that it would influence other companies to pay attention to possible consequences, evaluate their practices, and obey the law.<sup>24</sup>

The French legal system differs from the American one as it provides victims with an option not available in the United States—an option to join the criminal case as civil parties who can receive compensation for their injuries.<sup>25</sup> The criminal process in France does not preclude victims of discrimination from receiving compensation.<sup>26</sup>

Some victims in France turn to the criminal courts to pursue their claims. There are several reasons for electing to go down this route. First,

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<sup>17</sup> Suk, *supra* note 11, at 1330; *see also* Law No. 2001-1066 of Nov. 16, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 17, 2001, p. 18311.

<sup>18</sup> C. PEN. art. 225-2.

<sup>19</sup> *Id.*; *see also* FLICHY GRANGÉ AVOCATS, EMPLOYMENT LAW OVERVIEW: FRANCE 2019-2020 14 (2020).

<sup>20</sup> *See* Suk, *supra* note 11, at 1343.

<sup>21</sup> Nathalie Brafman, *L'Oréal et Adecco Condamnées pour Discrimination [L'Oréal and Adecco Condemned for Discrimination]*, LE MONDE [THE WORLD] (July 7, 2007, 12:58 PM), [https://www.lemonde.fr/economie/article/2007/07/07/l-oreal-et-adecco-condamnees-pour-discrimination\\_932834\\_3234.html](https://www.lemonde.fr/economie/article/2007/07/07/l-oreal-et-adecco-condamnees-pour-discrimination_932834_3234.html).

<sup>22</sup> *Id.*

<sup>23</sup> Angélique Chrisafis, *You're Worth It – If White. L'Oréal Guilty of Racism*, GUARDIAN (July 6, 2007, 7:03 PM), <https://www.theguardian.com/world/2007/jul/07/france.angeliquechrisafis>.

<sup>24</sup> Brafman, *supra* note 21.

<sup>25</sup> Suk, *supra* note 11, at 1331.

<sup>26</sup> *Id.*

the French view discrimination as worthy of criminal punishment, and merely imposing civil sanctions is insufficient in terms of punishment.<sup>27</sup> The prosecutor leads the way against the discriminator as the crime is viewed not only as a wrong to the victim but as “a wrong to the entire republic.”<sup>28</sup> This social mindset starkly contrasts the American view of discrimination as a private dispute between two parties.<sup>29</sup>

Second, there are practical considerations for French victims, such as not having to hire a private attorney to pursue their claims. French victims also avoid the challenges of discovery in French civil procedure. The victim can contact the prosecutor or an investigating judge to open an investigation.<sup>30</sup> Once the criminal investigation begins, the victim no longer has the task of proving the facts in dispute.<sup>31</sup>

Third, the French victim benefits from the power and pressure brought by the prosecutor or investigating judge handling the case. Not only can the investigating judge summon parties for questioning, but they also have search and seizure power to obtain documents.<sup>32</sup> French civil action plaintiffs cannot compel discovery from their adversaries to prove claims.<sup>33</sup>

History and tradition also shape a society’s procedures, and there is a natural reluctance to deviate from the norm. Oona Hathaway wrote about the American common-law system of *stare decisis* and how it created “path dependence theory.”<sup>34</sup> Civil legal systems value predictability, even without applying the doctrine of *stare decisis*.<sup>35</sup> Suk applied this theory to the French legal system, referring to it as “procedural path dependence.”<sup>36</sup>

As another example, Brazil’s unique history explains the importance of anti-discrimination provisions in its laws. Brazil was the last country in the Western Hemisphere to abolish slavery when it did so in 1888, and it had brought in seven times as many African people to be enslaved than were brought to the United States.<sup>37</sup> In contrast to the white North American settlers relocating as family units, in Brazil, a large number of settlers from

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<sup>27</sup> *Id.* at 1317.

<sup>28</sup> *Id.* at 1333.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1340.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1341.

<sup>33</sup> *Id.* at 1335.

<sup>34</sup> Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).

<sup>35</sup> See Suk, *supra* note 11, at 1324.

<sup>36</sup> *Id.* at 1315.

<sup>37</sup> Edward Telles, *Racial Discrimination and Miscegenation - The Experience in Brazil*, 44 U.N. CHRON. 46, 46 (2007).

Portugal were single males.<sup>38</sup> Many of them married African, indigenous, and multi-racial females.<sup>39</sup> Today, many Brazilians are proud of the diversity in their history.<sup>40</sup> Even though arbitration agreements have become more prevalent in Brazil since 2017,<sup>41</sup> negotiations of these agreements cannot involve a person's fundamental rights and Brazilian courts can overrule any agreement that violates their constitution, which provides protection against discrimination.<sup>42</sup>

Brazilian law criminalizes acts of discrimination. Section XLII of the Brazilian Constitution states that racism is a non-bailable crime subject to imprisonment.<sup>43</sup> Furthermore, the Brazilian government has enacted numerous laws which protect its people from discrimination, and several acts apply to the area of employment.<sup>44</sup> Victims of employment discrimination begin the process by filing a police complaint.<sup>45</sup> Some victims lack the resources to hire a private attorney. Brazilian law typically employs a system where the loser pays for the legal fees, unlike the American style, in which parties pay their own unless otherwise provided by contract or statute.<sup>46</sup> Similar to France, Brazilian criminal convictions allow victims to seek restitution, and victims can also contribute information and participate in the prosecution.<sup>47</sup> For these reasons, Brazilian victims benefit from seeking justice publicly rather than pursuing a private lawsuit.<sup>48</sup>

In a recent case, the Inter-American Commission on Human Rights ("the Commission") insisted that Brazil enforce its criminal law on discrimination. In 1998, Ms. Neusa dos Santos Nascimento and Ms. Gisele Ana Ferreira each applied for a position at Nipomed, a health insurance company.<sup>49</sup> The hiring manager turned away the applicants of African

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Jose Carlos Wahle, *Employment & Labour Law in Brazil*, in Lexology Navigator — Employment: International (2019).

<sup>42</sup> *Id.*

<sup>43</sup> CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL, 2010, art. 42.

<sup>44</sup> *Anti-Discrimination and Equality Laws in Brazil- Racial Discrimination in Employment*, in Equal Rights Trust, (Sept. 2009).

<sup>45</sup> Benjamin Hensler, *Nao Vale a Pena? (Not Worth the Trouble?) Afro-Brazilian Workers and Brazilian Anti-Discrimination Law*, 30 HASTINGS INT'L & COMP. L. REV. 267, 303 (2007).

<sup>46</sup> *Id.* at 304.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Neusa Dos Santos Nascimento and Gisele Ana Ferreira v. Brazil, Inter-Am. Comm'n H.R., Report No. 84/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 ¶ 7 (2007).

descent and said there were no open positions.<sup>50</sup> Later the same day, the manager offered a position to a white woman and asked her whether she knew of other persons with similar characteristics for another position.<sup>51</sup> The victims filed a police report alleging racist discrimination, and the prosecutor filed a criminal complaint against the hiring manager.<sup>52</sup> The court sentenced the hiring manager to two years' imprisonment in 2004, but the judge ruled that the statute of limitations had passed.<sup>53</sup> The prosecutor's office filed an appeal, arguing that the statute of limitations could not apply to the crime of racism under Article 5 (LXII) of the Federal Constitution of Brazil.<sup>54</sup>

The case went through several rounds of appeals until the victims turned to the Commission, arguing that Brazil violated several articles of the American Convention because it failed to guarantee the exercise of fundamental individual rights.<sup>55</sup> The Commission concluded that Brazil did not provide adequate justice to the victims and, therefore, Brazil had violated the American Convention.<sup>56</sup> The Commission made several recommendations for Brazil to make reparations for the human rights violations, raise awareness on the punishment of racial discrimination, and implement legislation that compels companies to enact due diligence procedures in their hiring processes.<sup>57</sup> The case might never have gotten so far if the victims were required to file all of their appeals through civil procedure, as the criminal process requires state participation. Thus, the Commission's involvement was linked to participation by the state since the actions were against the state and only the state has a duty to investigate, try, and punish cases like this one.

Americans may scoff at the idea of imprisonment as a punishment for acts that have been treated for so long as private disputes, given the United States' long history of preferring civil actions. In the discrimination context, Title VII of the Civil Rights Act of 1964 protects employees and job applicants from employment discrimination based on race, color, religion, sex, and national origin.<sup>58</sup> Victims of discrimination in the United States must file a "Charge of Discrimination" with the Equal Employment

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* ¶ 8.

<sup>52</sup> *Id.* ¶ 11.

<sup>53</sup> *Id.* ¶¶ 32-3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* ¶¶ 14-5.

<sup>56</sup> *Id.* ¶¶ 57-8.

<sup>57</sup> *Id.*

<sup>58</sup> Civil Rights Act of 1964, P.L. 88-352, § 705(g), 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C. § 2000e-2).

Opportunity Commission (“EEOC”) within 180 days of the incident (unless the complaint is also covered by a state or local anti-discrimination law, in which the time period is extended to 300 days).<sup>59</sup> If the victim is a federal employee or applicant, the reporting deadline is shorter—forty-five days.<sup>60</sup> The complaint is the first step before consulting with an attorney to begin a civil lawsuit against the employer.<sup>61</sup> Victims may receive compensation for their injuries if the lawsuit is successful. In this way, the law treats employment discrimination as a “tortious injury.”<sup>62</sup>

### III. THE IMPOSITION OF CRIMINAL RESPONSIBILITY WOULD PROVIDE AMERICAN EMPLOYEES AN ALTERNATIVE TO ARBITRATION AGREEMENTS THAT BAR VICTIMS FROM LITIGATION

Arbitration agreements, such as the forced arbitration agreement in Tesla’s employment contract, help companies avoid costly and time-consuming trials, while simultaneously depriving employees, potential employees, and the public at large of valuable information about actual workplace conditions.<sup>63</sup> These agreements favor discriminatory employers.<sup>64</sup> To date, appellate courts in the United States have significantly favored employers. Employee victims need a meaningful alternative to hold discriminatory employers responsible.

In addition to saving money and time, employers also benefit from avoiding juries and their tendency to favor employees more than employers.<sup>65</sup> Juries sympathize with employee victims more than arbitrators, and it is more likely that a jury would award substantial damages.<sup>66</sup> There is a recognized bias in arbitration that benefits the employer called the “repeat player effect.”<sup>67</sup> Lisa Bingham introduced this term in 1997 to explain the favoritism displayed by arbitrators for the

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<sup>59</sup> *Filing a complaint*, EEOC, <https://www.eeoc.gov/youth/filing-complaint>.

<sup>60</sup> *Facts About Federal Sector Equal Employment Opportunity Complaint Processing Regulations (29 CFR Part 1614)*, EEOC, <https://www.eeoc.gov/publications/facts-about-federal-sector-equal-employment-opportunity-complaint-processing>.

<sup>61</sup> *Filing a complaint*, *supra* note 59.

<sup>62</sup> Suk, *supra* note 11, at 1317.

<sup>63</sup> Alexia Fernandez Campbell & Alvin Chang, *There’s a Good Chance You’ve Waived the Right to Sue Your Boss*, VOX (Sep. 7, 2018, 4:21 PM), <https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

companies who consistently hire them to arbitrate their cases.<sup>68</sup> In 2011, Alexander Colvin identified another bias. He found that arbitrators were more likely to award smaller amounts of money damages to employees, even after finding the employer at fault.<sup>69</sup>

Employers using mandatory arbitration agreements benefit from handling negative matters privately. Arbitration agreements commonly contain confidentiality clauses.<sup>70</sup> Nearly all the agreements include the term “private,” regarding either the arbitrator’s neutrality or the arbitration itself.<sup>71</sup> The National Labor Relations Board (“NLRB”) initially found that such confidentiality clauses violated Section 7 of the National Labor Relations Act because they prohibited employees from discussing the workplace.<sup>72</sup>

However, the NLRB retracted from this position after recent U.S. Supreme Court and NLRB decisions.<sup>73</sup> The NLRB has since declared that confidential arbitrations do not violate Section 7 of the National Labor Relations Act, but states that settlements should not be kept confidential to the extent that they would prohibit open discussion of the settlements among employees.<sup>74</sup> While there are arguments for confidentiality, the agreements risk employees’ rights, such as the protection from discrimination.<sup>75</sup>

By contrast, employee victims who sign arbitration agreements enjoy fewer benefits than the employers. In 2019, approximately sixty million

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<sup>68</sup> *Id.*; see also Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 192 (1997).

<sup>69</sup> Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*, 11 EMP. RTS. & EMP. POL’Y J. 405, 419 (2007).

<sup>70</sup> Bingham, *supra* note 68, at 189.

<sup>71</sup> Laura A. Kaster, *Confidentiality in U.S. Arbitration*, NYSBA N.Y. DISP. RESOL. L., Spring 2012, at 23.

<sup>72</sup> Adam S. Forman & Kyle D. Winnick, *NLRB Holds Arbitration Agreements Can Remain Confidential—for Now*, THE NAT’L L. REV. (Apr. 8, 2021), <https://www.natlawreview.com/article/nlr-holds-arbitration-agreements-can-remain-confidential-now>.

<sup>73</sup> *Id.*

<sup>74</sup> Mark Theodore et al., *Requiring Employees to Maintain the Confidentiality of Arbitration Proceedings Held to be Lawful Under the NLRA...For Now*, PROSKAUER (Mar. 26, 2021), <https://www.laborrelationsupdate.com/nlra/requiring-employees-to-maintain-the-confidentiality-of-arbitration-proceedings-held-to-be-lawful-under-the-nlra-for-now/>.

<sup>75</sup> Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.



American employees gave up their rights to litigate disputes.<sup>76</sup> Even if a new employee spends the time to thoroughly read the agreement, signing it may be a requirement to be hired. Aside from having little choice, employees looking for a paying job or a better one may be optimistic and naïve in these matters, and may not foresee the possibility of being a victim of discrimination. Mr. Diaz at Tesla, for example, did not anticipate the distressing treatment he received.

With employers who require the use of the arbitration clause, a potential employee who declines it forfeits the opportunity of the job.<sup>77</sup> This illustrates an imbalance of power during contract formation, and the agreements hinder victims' abilities to hold the employer accountable.

Although the use of mandatory arbitration agreements has recently become popular, arbitration was used in ancient Phoenicia.<sup>78</sup> Since the time of its ancient origins, arbitration subsequently was frowned upon by those who favored the common law system, and courts allowed parties to a lawsuit to retract their arbitration agreements.<sup>79</sup> The use of arbitration continued to evolve as society and lawmakers responded to the “demands of business,” which made these agreements as enforceable as any other contract.<sup>80</sup> By treating arbitration agreements as contracts, the door to contract defenses was opened.<sup>81</sup>

In *Diaz v. Sohnen Enterprises*, the employee experienced recurring acts of sexual harassment from a coworker.<sup>82</sup> She informed her manager about the incidents, suffered retaliation, and ultimately filed a lawsuit against the company for discrimination and other claims.<sup>83</sup> Less than a month after Diaz filed the lawsuit, the company informed her about their new dispute resolution policy which required arbitration of all claims.<sup>84</sup> Though she continued to work for the company, Diaz never signed the proposed arbitration agreement. She objected to it twice—verbally and in writing.<sup>85</sup> The trial court judge rejected the defendant's motion to compel arbitration

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<sup>76</sup> Alexia Fernandez Campbell, *The House Just Passed a Bill that Would Give Millions of Workers the Right to Sue their Boss*, VOX (Sep. 20, 2019, 11:30 AM), <https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act>.

<sup>77</sup> Colvin, *supra* note 75.

<sup>78</sup> Jonathan E. Breckenridge, *Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements*, 1991 ANN. SURV. AM. L. 925, 925 (1991).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 926.

<sup>82</sup> *Diaz v. Sohnen Enters.*, 245 Cal. Rptr. 3d 827, 829 (2019).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

stating that “there was no meeting of the minds.”<sup>86</sup> However, the appellate court reversed and remanded, ruling that Diaz was required to resolve the claims in arbitration. The appellate court ruled that by continuing to work at Sohnen after receiving notification of the arbitration requirement, Diaz gave implied consent to the arbitration requirement.<sup>87</sup>

In the same vein, the Supreme Court of the United States has favored business interests over employee rights since its landmark decision in *Gilmer v. Interstate/Johnson Lane Corp.* in 1991.<sup>88</sup> In *Gilmer*, the Court held that the age discrimination claim was subject to mandatory arbitration pursuant to the signed arbitration agreement.<sup>89</sup> Since then, the Court has continued to show an unwavering preference for employers.<sup>90</sup> In 2018 the Court combined three cases, *Epic Systems Corp. v. Lewis*, *Ernst & Young v. Morris*, and *NLRB v. Murphy Oil*, and held that employers could continue to insist upon arbitration agreements for all work-related claims.<sup>91</sup> Furthermore, the *Epic* decision extended the use of mandatory arbitration to include class and collective waivers.<sup>92</sup> The late Justice Ginsburg wrote the dissent and argued that Congress showed its intent to provide employees with “strength in numbers” to offset the might and resources of employers when it enacted the NLRA.<sup>93</sup> Although these three cases involved wage and hour claims, the Court’s decision extended to include sexual harassment and discrimination claims.<sup>94</sup>

In upholding the arbitration requirements, United States courts have allowed the exercise of significant power by corporations.<sup>95</sup> The corporations retain the upper hand in their relationships with consumers and employees since they write the rules, define the procedures used for interpretation and application of said rules when disputes arise, and ban class-action lawsuits.<sup>96</sup> This dynamic allows corporations to take advantage

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 831.

<sup>88</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991); see also Stephanie Greene & Christine Neylon O’Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements—#TimesUp on Workers’ Rights*, 15 STAN. J. OF CIV. RTS. & C. L. 43, 44 (2019).

<sup>89</sup> *Gilmer*, 500 U.S. at 26-7.

<sup>90</sup> Green & O’Brien, *supra* note 88, at 52.

<sup>91</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 1633 (Ginsburg, J., dissenting).

<sup>94</sup> *Id.*

<sup>95</sup> Colvin, *supra* note 75, at 1.

<sup>96</sup> *Id.* at 3.

of these agreements without consequence. The focus is on the corporation, rather than consumer and labor rights.<sup>97</sup>

If the United States were to add criminal punishment as a consequence for discriminatory practices, criminal trials would be public proceedings and employers would become more accountable and may suffer public embarrassment. Criminal liability would change the relationship dynamic with employers because they would no longer hold as much of the power in their relationships with employees as they currently hold. There would also be less opportunities for the repeat-player bias to occur.

Arbitration agreements aside, there are other problems for plaintiffs with civil litigation remedies being the only available path for employment discrimination victims. Both civil and criminal lawsuits are public proceedings. However, parties in civil matters can settle pre-suit. Settlements may require closure by way of dismissal with terms of confidentiality, with nondisclosure agreements (NDAs) in place. NDAs endanger the complainant's recovery in the event of a violation of the NDA's terms. On the other hand, criminal proceedings generally remain public all the way through.<sup>98</sup> Therefore, criminal prosecutions may present more of a concern for persons or entities who care about their public image.

Companies have a lot to lose if their public image and reputation are damaged. Public scandal risks a decrease in sales, a reduction in shareholder confidence, a bruise to employee morale, and the expenditure of funds to pay for legal fees in dealing with the problem.<sup>99</sup> The advancement of technology and the internet has greatly increased the sharing of opinions and information between potential and existing customers, and previous and current employees.<sup>100</sup> When the pandemic forced many indoors, the internet and social media became the place to socialize and communicate.<sup>101</sup> As such, people spent a "record amount of time online."<sup>102</sup> These technological advancements and the recent pandemic fathered a practice called "cancel culture."<sup>103</sup> Cancel culture refers to "canceling" a person or a company by withdrawing support, whether

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<sup>97</sup> *Id.* at 11.

<sup>98</sup> Frederick W. Goundry III, Comment, *When Can the Courtroom be Closed in Criminal Proceedings?* 21 U. BALT. L. F. 17, 17 (1990).

<sup>99</sup> John L. Hines Jr. et al., *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. J. 97, 97 (2003).

<sup>100</sup> *Id.*

<sup>101</sup> Kian Bakhtiari, *Why Brands Need to Pay Attention to Cancel Culture*, FORBES (Sept. 29, 2020, 6:32 PM), <https://www.forbes.com/sites/kianbakhtiari/2020/09/29/why-brands-need-to-pay-attention-to-cancel-culture/?sh=76526cb5645e>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

financial or social.<sup>104</sup> Like it or not, the practice is very popular among consumers and the younger generation. Companies that stayed out of politics might find it less avoidable than in the past.<sup>105</sup>

Today, silence and neutrality on political matters may be viewed as complicity, and companies cannot afford to lose customers and employees due to a lack of support.<sup>106</sup> Furthermore, they cannot afford to get it wrong either, or risk being labeled “tone-deaf.” In response, some companies have developed and dedicated departments to preserve their image, in terms of political messaging to consumers as well as to employees.<sup>107</sup> In this current age of political messaging, companies will likely show a particular concern toward criminal accusations of discrimination. These dedicated departments have rolled out “diversity and inclusion initiatives,” which implement action plans and procedures to encourage a diverse work environment.<sup>108</sup> Some companies, such as Disney, have even created public web pages displaying the diversity within their company in terms of race and gender.<sup>109</sup>

One cannot overstate the importance of public knowledge. The American people deserve to be informed—especially in the employment context—because information regarding workplace environments directly affects jobseekers, family or friends seeking jobs, and those who choose whether to spend their money at a particular business based on the company’s values or lack thereof. Additionally, attorneys require knowledge of these details when researching cases for new clients. It is a well-known fact that most civil cases never make it to trial.<sup>110</sup> Many of these cases are settled after negotiations between the parties have resulted in a mutual agreement.<sup>111</sup> During the negotiations, the topic of implementing a confidentiality clause often arises, and such clauses block public knowledge.<sup>112</sup> The right to information should trump the risk of employers looking bad. Adding criminal responsibility would keep the

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Somen Mendal, *Diversity and Inclusion: A Complete Guide for HR Professionals*, IDEAL (Sept. 15, 2021), <https://ideal.com/?s=diversity+and+inclusion>.

<sup>109</sup> *The Walt Disney Company Workforce Diversity Dashboard*, THE WALT DISNEY CO., <https://impact.disney.com/app/uploads/2022/01/FY21-Workforce-Dashboard.pdf>.

<sup>110</sup> SHARI L. KLEVENS & ALANNA CLAIR, *SHHH: COMPLYING WITH CONFIDENTIALITY CLAUSES IN SETTLEMENT AGREEMENTS*, Daily Rep., (2020).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

proceedings public, the information would be readily available and, in some cases, publicized by news reporters and journalists.

Victims of employment discrimination would also benefit from the state taking on their claims and treating them not as tortious injuries, but as criminal offenses to the state.<sup>113</sup> The requirement of finding direct economic harm under Title VII can be difficult to prove, especially in hiring discrimination cases.<sup>114</sup> As a result of the low economic harm damages for victims of hiring discrimination, attorneys are less inclined to take the case as their fees would also be low.<sup>115</sup>

Although such cases are rarely brought to the courts, hiring discrimination is still an issue in American society, as shown by the latest labor statistics.<sup>116</sup> The 2021 third-quarter data from the Bureau of Labor Statistics shows Black and Hispanic groups have higher rates of unemployment than those of white people.<sup>117</sup> In treating employment discrimination and consequently, cases of hiring discrimination and hostile work environments as a harm to society, the burden of proof would no longer rest on one individual's shoulders and the focus would shift from proving injury to proving intent.<sup>118</sup> If victims had the opportunity to file their complaints with a prosecutor, the strength of the state and the change in the requirement of proof would add viability to their claims.

#### IV. ADDING CRIMINAL RESPONSIBILITY TO EMPLOYMENT DISCRIMINATION WOULD SATISFY RETRIBUTION AND DETERRENCE JUSTIFICATIONS FOR PUNISHMENT

Criminal acts carry a societal stigma, and criminalizing employment discrimination would mean that public shame and embarrassment would attach to the crime.<sup>119</sup> This characterization would contribute to the goal of retribution because it would punish the morally reprehensible act in the way that civil penalties fall short, especially when most cases get arbitrated or settled with nondisclosure agreements.<sup>120</sup> Retribution would be satisfied by criminalizing employment discrimination because it would punish more

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<sup>113</sup> See Suk, *supra* note 11, at 1368.

<sup>114</sup> *Id.* at 1368.

<sup>115</sup> *Id.* at 1370.

<sup>116</sup> *Id.* at 1369; see also U.S. Bureau of Lab. Stat., *Labor Force Statistics from the Current Population Survey* (2021).

<sup>117</sup> Suk, *supra* note 11, at 1369; see also U.S. Bureau of Lab. Stat., *Labor force characteristics by race and ethnicity, 2020* (Nov. 2021).

<sup>118</sup> See Suk, *supra* note 11, at 1368.

<sup>119</sup> *Id.* at 1333.

<sup>120</sup> *Id.* at 1318.

aspects of the wrongful act, instead of merely placing a price tag on it.<sup>121</sup> In addition to retribution, the imposition of imprisonment and the threat of bad publicity should help to deter employers from engaging in improper discriminatory conduct. Dismissing harm as complex as discrimination in the workplace dismisses its social and psychological effects on workers, and too often, companies' statements lack remorse and understanding.<sup>122</sup> Wrongdoers of the harm deserve to reap what they sow. Their wrongful acts deserve punishment, and the law should evolve to accommodate society's needs as civil remedies alone prove insufficient.

The goal of deterrence would support the criminalization of employment discrimination as a way to work around forced arbitration agreements. First, for many people there is no greater threat than criminal punishment or imprisonment. For companies with millions of dollars, a fine may be an acceptable way to deal with pesky situations and move on from them. Therefore, the threat of criminal punishment would strike a deeper fear because it involves one's liberty. Second, the fear of bad publicity may encourage companies to refrain from discrimination in the workplace and punish it more harshly when they come across it. Bad publicity spreads fast, so employers and companies would be wise to learn from others' mistakes after they learn about the wrongful acts from the internet or news reporters. After offending employers are caught and punished, they should refrain from engaging in the same type of behavior going forward.

Even if the imposition of criminal responsibility on employment discrimination was not enforced, declaring it to be a crime would be a statement of solidarity. The United States government would be sending a message to society—declaring its core values and making them explicit. To discriminate against others in the workplace would no longer constitute an offense only to those individuals, but to society and its core values of equality.

## V. CONCLUSION

Since its inception, America has been a place of hope built from the dreams of immigrants and persons of different colors and backgrounds. To deny or hinder one's ability to earn an income based on color, sexual

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<sup>121</sup> *Id.* at 1368.

<sup>122</sup> Valerie Capers Workman, *Regarding Today's Jury Verdict*, TESLA (Oct. 4, 2021), <https://www.tesla.com/blog/regarding-todays-jury-verdict> (insinuating that a jury verdict finding that the company failed to prevent racial harassment was unjustified and unreflective of company policy).

orientation, gender, religion, or a disability is to deny the person's basic rights of autonomy and happiness.

Mandatory arbitration agreements present a unique challenge to the American legal system and place too much focus on protecting companies, leaving employees vulnerable to discrimination and other harms. These agreements are dangerous because they greatly risk many rights of employees and consumers. Civil procedure has not and cannot provide a solution to this problem that is strong enough to make a difference. Civil procedure presents its own unique challenges to enforcing employment discrimination by way of confidentiality clauses, financial burdens, and its requirement to show sufficient economic harm. Furthermore, the EEOC's effectiveness has recently been seriously questioned.

Adding criminal responsibility would open new doors for victims of employment discrimination and allow for societal change. Two justifications for criminal punishment—retribution and deterrence—would be satisfied and the United States would declare its moral values and send a message of solidarity. Transforming the harm from a private dispute between two parties to a crime against society would give more claims viability and strength. Employment discrimination should be viewed as more than a tortious injury, for its effects are far-reaching and complex.