



# THE YEAR IN REVIEW

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

2015 • VOLUME 49

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## **International Legal Developments** **Year in Review: 2014**

CINDY GALWAY BUYS, KIM D. CHANBONPIN, AND MARK E. WOJCIK\*

This volume surveys important political and legal developments in international law during the year 2014. It compiles reports from various committees of the American Bar Association Section of International Law, whose members span the globe and whose committees monitor the full range of topics that arise in international law. Even a volume of this size cannot include every development, however, and the omission of a particular development should not be construed as meaning that it was not significant. Our committees work under extremely strict guidelines that limit the number of words that each committee has to roughly 7,000 words, including footnotes. Within these constraints, committee members contribute portions of articles that describe the most significant developments in that substantive practice area or geographic region. In some cases, non-section members who have particular knowledge or expertise in an area may also be contributing authors.

Committee chairs and committee editors solicited the contributing authors for each article. The heroic committee editors kept the collective contributions within our admittedly unreasonable word limits. They made difficult decisions on what to include, what to cut, and what to hope some other committee included. Committee editors are identified in each article. After the committee editors did their work, it went to an amazing team of Deputy Editors who reviewed articles as they were sent to us. Then we, as overall co-editors for this volume, reviewed the articles again before sending them to the brave student editors at the Dedman School of Law at Southern Methodist University in Dallas, Texas. Mai Tran was the Editor-in-Chief of *The International Lawyer* this year and Ben Stephens served as the Managing Editor. They supervised an outstanding editorial team whose individual names you can read in the masthead for this volume. These brave students checked the sources cited and reviewed each article line by line and word by word, fearing no corner of the Bluebook. Professor Beverly Caro Duréus served again this year as the Faculty Executive Editor for the Year in Review Volume, working closely with us

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\* Professor Cindy Galway Buys teaches at Southern Illinois University School of Law in Carbondale, Illinois. Professors Kim D. Chanbonpin and Mark E. Wojcik teach at The John Marshall Law School in Chicago. Professor Wojcik is also an adjunct professor at the Facultad Libre de Derecho de Monterrey (Mexico) and at the University of Lucerne Faculty of Law (Switzerland). They served as the overall co-editors for the 2012, 2013, and 2014 editions of the *International Law Year in Review*.

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and with the student editors. We also appreciate the support received from all of the Division Chairs and other leaders of the ABA Section of International Law.

Because of all the work that goes into producing this volume, the final product that you hold in your hands (or that you are viewing electronically) is a useful and reliable overview of international law events during the year 2014. Readers interested in a particular substantive or geographic area should read not only this year's summary, but also those from earlier years.

We work with a team of volunteer Deputy Editors from around the world. The Deputy Editors include a great many law professors who specialize in legal writing, international law, and topics related to foreign and international law. The ABA Section of International Law is blessed to have such a skilled, dedicated, and generous team of Deputy Editors, many of whom have now served for several years. We are now sometimes in the fortunate position of having more editors than articles. Here is the list of the Deputy Editors who worked on articles this year, with apologies to anyone omitted from the list. Together with the lists from previous years, we believe that we have the strongest editorial team of any journal in the world. We thank all of our committee editors named in the individual articles and our deputy editors named here for the generous contributions of their time and talent.

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Karin Mika (Cleveland State University, Cleveland-Marshall College of Law)  
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David Simon (Florida Coastal School of Law)  
Christine M. Venter (Notre Dame Law School)

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

Cindy Galway Buys  
Southern Illinois University School of Law  
Kim D. Chanbonpin  
The John Marshall Law School—Chicago  
Mark E. Wojcik  
The John Marshall Law School—Chicago

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## Customs Law

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JAMIE JOINER, GREG KANARGELIDIS, DANIEL L. KISELBACH, RYAN MCCLURE,  
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TRICE STABLER, CYNDEE TODGHAM-CHERNIAK, NGHIA “NEO” T. TRAN,  
GEORGE TUTTLE III, LUIS VALDEZ JIMENEZ, VICKY WU\*

### I. Introduction

This article summarizes important developments in 2014 in customs law, including U.S. judicial decisions, trade, legislative, administrative, and executive developments, as well as Canadian and European legal developments.<sup>1</sup>

### II. U.S. Judicial Nominations and Appointments and Review of Customs-Related Determinations<sup>2</sup>

#### A. CHANGES AND NOMINATIONS

Judge Stanceu assumed duties of Chief Judge at the U.S. Court of International Trade (CIT),<sup>3</sup> replacing Judge Pogue, who assumed senior status.<sup>4</sup> Judges Carman and Eaton also assumed senior status in 2014.<sup>5</sup> President Obama nominated Jeanne E. Davidson

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\* The committee editor of this year in review article was Brandi B. Frederick, The Frederick Firm, Birmingham, Alabama. Section editors and contributors are identified in each section.

1. For developments during 2013, see Jennifer Diaz, et al., *Customs Law*, 48 INT'L LAW. 5 (2014).

2. Section editor: George R. Tuttle, III, Esq., George R. Tuttle, APC; Authors: George R. Tuttle, III, Esq., George R. Tuttle, APC; Jennifer R. Diaz, Esq, Becker & Poliakoff; Trice Stabler, Esq., Maynard, Cooper & Gale, P.C.; and Ryan McClure, Esq.

3. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Stanceu, Timothy C.*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3217&cid=999&ctype=na&instat=na> (last visited Nov. 4, 2014).

4. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Pogue, Donald Carl*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3210&cid=999&ctype=na&instat=na> (last visited Nov. 4, 2014).

5. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Carman, Gregory Wright*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3200&cid=999&ctype=na&instat=na> (last visited Nov. 4, 2014); *History of the Federal Judiciary, Biographical Directory of Federal Judges: Eaton, Richard K.*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3202&cid=999&ctype=na&instat=na> (last visited Nov. 4, 2014).

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(currently at the Department of Justice Civil Division as Director of the Offices of Foreign Litigation and International Legal Assistance and the International Trade Field Office in the Commercial Litigation Branch<sup>6</sup>) to serve on the court.<sup>7</sup> Judge Sharon Prost assumed duties of Chief Circuit Judge at the Federal Circuit Court of Appeals,<sup>8</sup> replacing Judge Rader.<sup>9</sup>

B. OVERVIEW OF 2014 U.S. COURT OF INTERNATIONAL TRADE CASES

In 2014, the CIT released the following notable cases relating to 28 U.C.S. § 1581 actions:

1. *LDA Incorporado v. U.S.*<sup>10</sup>

CBP denied the importer's protest stating the assessment of antidumping duties on imported merchandise is not protestable under 19 U.S.C. § 1514. The importer contested the denial via 28 U.S.C. § 1581(a). The Government sought to dismiss the action for lack of jurisdiction, claiming: CBP's determination is not protestable under 19 U.S.C. § 1514(a)(2); importer is required to seek a timely scope ruling from the Department of Commerce; and importer's failure to do so deprives the court of jurisdiction. But, the court distinguished this action from those holding an importer cannot protest Customs' liquidation of an entry with dumping duties and bring suit via § 1581(a),<sup>11</sup> stating the *Sandvik* rule only applies to cases where the scope of the order is in question, not where Customs has mistakenly applied the order on its own.<sup>12</sup> As in *Xerox*, CIT found Customs had not acted in a merely ministerial capacity, but made its own decision the goods were within the scope of the order. Thus, under *Xerox*, where it is alleged Customs erred as a matter of fact by including the goods within the scope of the order, Customs' determination is protestable.

2. *Ford Motor Co. v. United States*<sup>13</sup>

The CIT affirmed CBP's denial of Ford's NAFTA post-entry duty refund claims under 19 U.S.C. § 1520(d), because the associated certificates of origin were not submitted within one year of the date of importation. The court of appeals remanded, seeking clarification from CBP as to its different treatment of claims for waivers for traditional post-

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6. *President Obama Announces Intent to Nominate Jeanne E. Davidson to Serve on the United States Court of International Trade*, THE WHITE HOUSE (Aug. 18, 2014), <http://www.whitehouse.gov/the-press-office/2014/08/18/president-obama-announces-intent-nominate-jeanne-e-davidson-serve-united>.

7. *Id.*

8. *Sharon Prost, Chief Circuit Judge*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/judges/sharon-prost-chief-circuit-judge.html> (last visited Nov. 4, 2014).

9. *History of the Federal Judiciary, Biographical Directory of Federal Judges: Rader, Randall Ray*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=1952&cid=999&ctype=na&inst=na> (last visited Nov. 4, 2014).

10. *LDA Incorporado v. United States*, 978 F. Supp. 2d 1359, 1361-62 (U.S. Ct. Int'l Trade 2014).

11. *See, e.g., Sandvik v. United States*, 957 F. Supp. 276, 277 (U.S. Ct. Int'l Trade 1997), *aff'd* 164 F.3d 596, 598 (Fed. Cir. 1998); *Fujitsu Ten Corp. of Am. v. United States*, 957 F. Supp. 245, 246-47 (U.S. Ct. Int'l Trade 1997), *aff'd sub nom. Sandvik v. United States*, 164 F.3d 596, 598 (Fed. Cir. 1998).

12. *See Xerox Corp. v. United States*, 289 F.3d 792 (Fed. Cir. 2002).

13. *Ford Motor Co. v. United States*, 978 F. Supp. 2d 1350 (U.S. Ct. Int'l Trade 2014).

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import NAFTA claims and those under the Reconciliation Program. On remand, CIT sustained CBP's explanation for the distinction based on the interpretation of two different statutes, stating 1520(d) "claims are not treated as entries and therefore do not have certain statutory safeguards to remedy mistakes and misconduct in awarding duty free treatment under NAFTA"<sup>14</sup> while claims for waiver under the Reconciliation Program "are treated as entries and therefore have a set of statutory safeguards that permit Customs to remedy mistakes and misconduct in awarding duty free treatment under NAFTA."<sup>15</sup> Therefore, Customs' "waiver authority under § 1520(d) must be viewed within the context of these two separate mechanisms for filing post-importation claims under NAFTA."<sup>16</sup>

3. *Other Notable Cases*

Additional CIT cases include:

- a. In *Netchem, Inc. v. United States*,<sup>17</sup> CIT dismissed for lack of jurisdiction because entries were untimely liquidated, untimely paid, or protested at the wrong port.
- b. In *BP Oil Supply Co. v. United States*,<sup>18</sup> the court denied cross-motions for summary judgment on claims for "substitution unused merchandise drawback" of certain customs duties, taxes and fees paid on importations of crude petroleum.
- c. In *Streetsurfing, LLC v. United States*,<sup>19</sup> "waveboards" were classified as sports equipment instead of wheeled toys.
- d. In *Best Key Textiles Co. Ltd. v. U.S.*,<sup>20</sup> "metalized" yarn's classification was considered.

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

1. *United States v. Trek Leather, Inc.*,<sup>21</sup>

The CAFC, en banc, affirmed a decision by CIT<sup>22</sup> imposing civil penalties pursuant to 19 U.S.C. § 1592(c)(2) against a closely held corporation's owner for gross negligence when he arranged for the importation of merchandise by means of false statements and/or material omissions.<sup>23</sup> The decision vacates an earlier Federal Circuit panel decision, holding corporate officers of an "importer of record" are not personally liable for penalties under § 1592(a) absent justification for piercing the corporate veil.<sup>24</sup> The full court found 19

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14. *Id.* at 1356.

15. *Id.* at 1357.

16. *Id.* at 1357.

17. *Netchem, Inc. v. United States*, 961 F. Supp. 2d 1336, 1339 (U.S. Ct. Int'l Trade 2014).

18. *BP Oil Supply Co. v. United States*, 2011 Ct. Intl. Trade LEXIS 114, at \*1 (U.S. Ct. Int'l Trade Sept. 16, 2011).

19. *Streetsurfing, LLC v. United States*, 11 F. Supp. 3d 1287 (U.S. Ct. Int'l Trade 2014).

20. *Best Key Textiles Co. Ltd. V. United States*, No. 13-00367, 2014 WL 705286, at \*1 (U.S. Ct. Int'l Trade Feb. 25, 2014).

21. *United States v. Trek Leather, Inc.*, 767 F.3d 1288 (Fed. Cir. 2014) (en banc).

22. *United States v. Trek Leather Inc.*, 781 F. Supp. 2d 1306 (U.S. Ct. Int'l. Trade 2011), rev'd 724 F.3d 1330 (Fed. Cir. 2013).

23. *United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1290 (Fed. Cir. 2014).

24. *See United States v. Trek Leather, Inc.*, 724 F.3d 1330 (Fed. Cir. 2013), *vacated* No. 2011-1527, 2014 WL 843527, at \*1 (March 5, 2014).

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U.S.C. § 1592 permits assessment of penalties against any individual who “introduces” merchandise into the commerce of the United States by means of “a material and false statement,” even if those individuals are not the “importer of record” and when there has not been any showing of fraud.<sup>25</sup> Based on Supreme Court precedent, the CAFC held “introduction” includes filing customs papers that “enter” goods into United States commerce, and the term is flexible and broad enough to ensure the statute is not restricted to the “technical” process of “entering” goods.<sup>26</sup>

This decision recognizes personal liability can extend to a person involved with introducing merchandise into commerce using a material and false misstatement even if: (1) he is not the actual importer, (2) he is not an officer of the importer, and (3) the activity does not involve fraud.

2. *Other Notable Customs-Related CAFC Decisions*

Other Customs-related decisions issued by CAFC include classification of:

- a. “White sauce”<sup>27</sup>
- b. “Sports sandals”<sup>28</sup>
- c. “Glass flower vases”<sup>29</sup>
- d. “Beef jerky products”<sup>30</sup>
- e. “Tempura vegetables and vegetable bird’s nests”<sup>31</sup>
- f. “Football jerseys, pants and girdles” as apparel products<sup>32</sup>
- g. “Shelf bra camisoles” as articles similar to brassieres since the garments had dual purposes of body coverage and bust support<sup>33</sup>
- h. A flexible multilayer sheet, composed of several plastic layers encasing a single aluminum layer, as “plastic” under HTSUS subheading 3921.90.40 where there was no error in CIT’s determination the sheet did not contain the essential character of plastic<sup>34</sup>
- i. A mixture containing beta-carotene, antioxidants, gelatin, sucrose, and corn starch as “provitamins, unmixed” under HTSUS subheading 2936.10.00.<sup>35</sup>

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25. See *United States v. Trek Leather, Inc.* 767 F.3d at 1294 (citing *United States v. Hitachi America, Ltd.*, 172 F.3d 1319 (Fed. Cir. 1999)).

26. *Id.*, (citing *United States v. 25 Packages of Panama Hats*, 231 U.S. 358, 359-60 (1913)).

27. *Int’l Custom Prods. v. United States*, 748 F.3d 1182, 1182 (Fed. Cir. 2014).

28. *Deckers Corp. v. United States*, 752 F.3d 949, 951 (Fed. Cir. 2014).

29. *Dependable Packaging Solutions, Inc. v. United States*, 757 F.3d 1374, 1375 (Fed. Cir. 2014).

30. *Link Snacks, Inc. v. United States*, 742 F.3d 962, 964 (Fed. Cir. 2014).

31. *R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1351 (Fed. Cir. 2014).

32. *Riddell, Inc. v. United States*, 754 F.3d 1375, 1377 (Fed. Cir. 2014).

33. *Victoria’s Secret Direct, LLC v. United States*, 2014 U.S. App. LEXIS 19832, at \*1 (Fed. Cir. 2014).

34. *Alcan Food Packaging (Shelbyville) v. United States*, 2014 U.S. App. LEXIS 21796, at \*1 (Fed. Cir. Nov. 18, 2014).

35. *Roche Vitamins v. United States*, 2014 U.S. App. LEXIS 21963, at \*14 (Fed. Cir. Nov. 20, 2014).

D. CUSTOMS AND BORDER PROTECTION

1. *CBP's Pilot Trusted Trader Program*

On June 16, 2014, CBP published a Federal Register Notice<sup>36</sup> titled “Announcement of Trusted Trader Program Test,” commencing with an 18-month pilot program. The Trusted Trader Program unifies Customs-Trade Partnership Against Terrorism (C-TPAT) and Importer Self-Assessment (ISA) voluntary programs into a new “Trusted Trader” program. The results of the pilot will determine whether the Trusted Trader Program will go forward. CBP is collaborating with the U.S. Consumer Product Safety Commission (CPSC) and the U.S. Food and Drug Administration (FDA) to create the Trusted Trader Program. The three agencies will collaborate, share information, streamline the application and validation process; and increase the efficiencies in existing trade programs.

2. *CBP Centers of Excellence and Expertise*

On March 10, 2014, CBP published a Federal Register Notice modifying prior notices regarding its Centers of Excellence and Expertise (Centers) Test.<sup>37</sup> Specifically, the notice announces changes to the scope of coverage for some of the Centers and expansion of types of entries processed by the Centers, waiving additional regulation for test participants, and clarifying the submission process for responses to Requests for Information and Notices of Action.

**III. Trade Promotion and Other Legislative Branch Developments and Administrative and Executive Policy Developments<sup>38</sup>**

A. U.S. CUSTOMS AND BORDER PROTECTION ANNOUNCED CHANGES TO THE FOCUSED ASSESSMENT PROGRAM

CBP published updates to its Focused Assessment (FA) program for all new Pre-Assessment Survey (PAS) engagements effective October 1, 2014. Typically, high-volume importers are targeted as potential candidates for FA. The PAS is the beginning stage of a FA.

A FA is a comprehensive audit conducted by CBP's Regulatory Audit (RA) Division. The FA's purpose is to determine whether adequate internal controls are in place to ensure an acceptable level of compliance with CBP laws and regulations. If CBP finds the company has an unacceptable number of compliance errors or deficiencies, the company may be required to formulate a Compliance Improvement Plan (CIP) and/or tender any loss of revenue owed to the U.S. Government.

The FA program is divided into three distinct phases: (1) PAS; (2) Assessment Compliance Testing (ACT); and (3) Post Assessment Follow-Up. The PAS assesses an entity's

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36. Announcement of Trusted Trader Program Test, 79 Fed. Reg. 34,334, 34334 - 34340 (June 26, 2014).

37. Centers of Excellence and Expertise Test; Modifications, 79 Fed. Reg. 13,322 (Mar. 10, 2014).

38. Section editors: Jamie Joiner, Joiner Law Firm, Houston, Texas; David Salkeld, Arant Fox LLP, Washington, D.C.; and Vicky Wu, Joiner Law Firm, Houston, Texas. Authors: Jamie Joiner, Joiner Law Firm; Bethany Nelson, University of Wisconsin-Madison; David Salkeld, Arant Fox LLP; Louis Valdez Jimenez, 2015 JD/MBA Candidate University of Wisconsin-Madison; Vicky Wu, Joiner Law Firm.

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system of internal controls over import activities to determine if the auditee poses an “acceptable risk” for complying with CBP laws and regulations. If there are significant internal control deficiencies or material non-compliance issues, the FA team will either: (i) permit the auditee to develop a CIP and perform its own review to calculate the loss of revenue owed to CBP; or (ii) proceed to an ACT. The changes implemented in 2014 only address the PAS phase of the FA program. Updates to other phases are expected to be implemented in the next few years.

Notable changes to the PAS<sup>39</sup> phase of the FA process implemented in 2014 include:

- **Earlier Notification of the Pre-Assessment Survey Phase & Elimination of the Formal Advance Conference:** The FA team may request certain readily available information (e.g., written policies and procedures and/or accounting records) to better tailor the risk assessment plan and questionnaire to the importer. Auditors will no longer conduct an onsite formal advance conference but informally explain the FA process to the importer and provide reference materials.
- **Preliminary Assessment of Risk (PAR):** Auditors will no longer assess a level of risk at the PAR phase. Because the PAR is limited to an analysis of CBP and other readily available data, CBP states “it is premature to assess the level of inherent risk at this point.” Since auditors continue to reassess risk as they obtain additional information, the assessment of risk will occur at a later stage in the PAS process, after more information is obtained.
- **Increased Emphasis on the Consideration of Significance and Materiality in Making Audit Decisions:** (e.g., value, classification, free trade agreements, anti-dumping and countervailing duties, etc.). The auditor may decide to include or exclude audit areas from review based on information gathered during the PAS.
- **Changes to the Questionnaire:** CBP renamed the Internal Control Questionnaire the Pre-Assessment Survey Questionnaire (PASQ) and included additional standard questions regarding business practices and import activities. Auditors will tailor the PASQ to ensure questions are relevant to the importer’s activity and identified risks and environment (e.g., knowledge and skill of importer’s personnel) useful in finalizing the risk assessment.
- **Selecting Additional Entry Line Items for Walkthrough Tests:** CBP will select more walkthrough entries to help auditors identify and understand the different types of transactions and procedures.
- **Larger Sample Sizes:** CBP will determine which areas to examine more closely by selecting sample transactions to verify procedures and identify deficiencies. CBP replaced the number of samples with more general guidelines. For 250 items or more, auditors may select 20-40 samples, for fewer than 250 items, auditors may test ten percent.<sup>40</sup>
- **Incorporate Changes in Report Language:** CBP incorporated changes to its PAS report language, such as: (i) limiting findings to period of the audit, (ii) including language expressing inherent limitations of internal control and cautioning projection

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39. For additional information see *Focused Assessment Program (FA)*, CPB.GOV, <http://www.cbp.gov/trade/audits/focused-assessment> (last visited Jan. 23, 2015).

40. U.S. Customs and Border Protection Office of International Trade, *Regulatory Audit* (2014), 4, available at <http://www.cbp.gov/sites/default/files/documents/Exhibit%20C%20%20FA%20PAS%20Audit%20Program%20%2810012014%29.pdf>.

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of results to future periods; and (iii) when applicable, explaining the limited nature of audit procedures performed for IP rights, FTZs, and NAFTA.

**B. FTAs AND POST-ENTRY CORRECTION-CBP GUIDANCE ON POST-IMPORTATION CLAIMS FOR PREFERENTIAL TARIFF TREATMENT**

On August 11, 2014, CBP issued guidance regarding post-entry preference claims on free trade agreements. Importers can no longer utilize the protest mechanism in 19 USC § 1514 to file an initial claim of preference. According to CBP, a right of protest is not available when there is a failure to timely claim preference.

However, there are several free trade agreements with mechanisms for post-importation claims of preference. CBP will allow such claims after importation.

For programs lacking a section 1520(d) provision, CBP has changed its guidelines. It will allow amendments to unliquidated entries with either a Post-Entry Amendment or a Post Summary Correction. However, amendments on liquidated entries “will not be treated as protests.”<sup>41</sup> Therefore, protests will no longer be accepted in lieu of timely filing preference or pre-liquidation amendments claims.

**C. CENTERS OF EXCELLENCE AND EXPERTISE PILOT CHANGES**

CBP established the Centers of Excellence and Expertise (CEE) to “bring all of CBP’s trade expertise to bear on a single industry in a strategic location.”<sup>42</sup> The CEEs are designed to be resources to the trade community and government authorities and have specialized staff to answer questions, provide information, and implement strategies to ensure uniformity and resolve compliance issues.<sup>43</sup> In addition, each CEE conducts industry-specific validation activities, protests, and post-entry amendment/post-summary correction reviews.<sup>44</sup> Since CBP announced the creation of CEEs in 2012, CBP has established 10 CEEs throughout the country.<sup>45</sup>

At the CBP East Coast Trade Symposium in March of 2014, CBP announced major changes to the CEEs: the Electronics CEE in New York, the Pharmaceuticals CEE in Los Angeles, and the Petroleum, Natural Gas and Minerals CEE in Houston will handle all entries for their designated industries.<sup>46</sup> CEE Port Directors were also empowered with the authority to: (1) process additional entry types; (2) waive certain regulatory requirements including those contained in section 10.847(c) of the CBP regulations allowing

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41. U.S. Customs and Border Protection, CSMS Message: Post-importation Claims for Preferential Tariff Treatment (Aug. 14, 2014 3:16 PM), [http://apps.cbp.gov/csms/docs/20244\\_674951276/Post\\_entry\\_preference\\_claims\(b\).txt](http://apps.cbp.gov/csms/docs/20244_674951276/Post_entry_preference_claims(b).txt).

42. U.S. CUSTOMS AND BORDER PROTECTION, CENTERS OF EXCELLENCE AND EXPERTISE TRADE PROCESS DOCUMENT, 3 (2014), *available at* <http://www.cbp.gov/sites/default/files/documents/Updated%20CEE%20Trade%20Process%20Document%20032814.pdf>

43. *Id.*

44. *Id.*

45. U.S. CUSTOMS AND BORDER PROTECTION, ADVISORY COMMITTEE ON COMMERCIAL OPERATIONS CENTERS OF EXCELLENCE AND EXPERTISE, 1, (2014), *available at* <http://www.cbp.gov/sites/default/files/documents/TM%20E%20CEEs%20Oct%202014%20COAC%20EXTERNAL.pdf>.

46. Kathleen M. Murphy and Mollie D. Sitkowski, *CBP Announces Changes to CEEs*, DRINKERBIDDLE, (Mar. 18, 2014), <http://www.drinkerbiddle.com/resources/publications/2014/CBP-Announces-Changes-to-CEEs-?Section=Publications>.

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participants to submit their corrected duty free treatment claims to the CEE where the claim was originally filed instead of the CBP port; and (3) require Notices of Action and Requests for Information be sent electronically to an importer's designated CEE.<sup>47</sup>

**D. AFRICAN GROWTH AND OPPORTUNITY ACT (AGOA) AND GENERALIZED SYSTEM OF PREFERENCES AND TRADE BENEFITS UNDER AGOA**

Regulatory amendments that became effective on June 26, 2014 reflect and clarify the statutory standard for preferential tariff treatment under the AGOA. This final rule also included specific documentary, procedural and other related requirements that must be met in order to qualify for preferential treatment. The changes included clarification regarding inclusion of certain costs in order to satisfy the value content requirement.<sup>48</sup>

**IV. Other Governmental Agencies<sup>49</sup>**

**A. ACE UP CBP'S SLEEVE: MIGRATION & PGA INTEGRATION**

2014 represented a significant milestone in the slow but sure migration of CBP from its current and antiquated Automated Commercial System (ACS) to its new and improved system, coined the Automated Commercial Environment (ACE).<sup>50</sup> "ACE is the backbone of CBP trade processing and risk management,"<sup>51</sup> and is intended to serve as a "single window" for CBP, the trade community, and the multitude of Partner Government Agencies (PGAs) whose laws and regulations impact the import process.

The single window concept was derived from the SAFE Port Act of 2006, which directed all federal agencies to participate in the International Trade Data System (ITDS) with the goal of establishing a single funnel for the communication of trade data and communication with the trade community.<sup>52</sup> However, despite that mandate and regardless of many years of ACE development, challenges in programming and in securing government funding, as well as delays in on-boarding PGAs, have caused CBP to repeatedly extend its deployment schedule.

The much-needed boost for ACE implementation finally came on February 19, 2014, with the issuance of Executive Order 13659-*Streamlining the Export/Import Process for America's Businesses*.<sup>53</sup> The Executive Order established a deadline of December 31, 2016 by which time PGAs must have the necessary agreements and requirements in place to use ITDS and ACE as the primary means by which CBP and PGAs are to interface with the

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47. Centers of Excellence and Expertise Test; Modifications, 79 Fed. Reg. 13,322 (Mar. 10, 2014).

48. See Agency Information Collection (Contract for Training and Employment) Activities Under OMB Review, 79 Fed. Reg. 30,357 (May 27, 2014).

49. Section editor: Nghia "Neo" T. Tran, Kutak Rock, Washington, D.C. Authors: Shannon Fura, Fura Page, P.C.; Yankun Guo, 2015 JD Candidate, John Marshall Law School; Rebecca Rodriguez, Gray Robinson P.A.

50. U.S. Customs and Border Protection, *Automated Commercial Environment (ACE)/International Trade Data System (ITDS) "ACEopedia,"* (2014).

51. *Id.*

52. SECURITY AND ACCOUNTABILITY FOR EVERY PORT ACT OF 2006, Pub. L. No. 109-347, § 405, 120 Stat. 1929-31 (2006).

53. PROCLAMATION NO. 37, 79 Fed. Reg. 10,657 (Feb. 25, 2014).

trade for the submission, review, and release of trade-related data and cargo.<sup>54</sup> In response to that E.O., CBP has launched an aggressive deployment schedule and, by extension, accelerated PGA integration, including timeframes under which PGAs must provide specific message sets, i.e., data requirements to be collected by CBP from the trade on behalf of PGAs for cargo release and entry summary response.<sup>55</sup> The schedule mandates migration to ACE for all electronic manifest filings by May 1, 2015; mandatory use of ACE for all electronic cargo release and related entry summary filings by November 1, 2015; and mandatory use of ACE for all remaining electronic portions of the CBP cargo process by October 1, 2016.<sup>56</sup>

The drive to the 2015/2016 implementation dates has caused concern in the trade community due to the sheer number of PGAs that must be engaged in the process.<sup>57</sup> Not surprisingly, some PGAs are much further along in the implementation process than others. At the forefront of integration are the Environmental Protection Agency (EPA) and the Food Safety and Inspection Service (FSIS), with both agencies in pilot stages with CBP on discrete aspects of their areas of oversight.<sup>58</sup> For example, as of April 30, 2014, the EPA has pilots in production that include ozone-depleting substances and vehicle and engine declaration with notice of arrival for pesticide imports and hazardous waste exports (spent lead acid batteries) scheduled for late 2014.<sup>59</sup>

Understanding the need to engage the trade community, PGAs are establishing working groups to finalize the message sets and to volunteer to participate in pilot testing.<sup>60</sup> The establishment of these message sets may constitute changes in current procedures. In some cases, PGAs may potentially require data at the time of entry *or earlier*, rather than post-entry, as may currently be the case.<sup>61</sup> Given these likely changes, it is incumbent upon the trade to monitor PGA implementation guides to understand how these changing requirements may impact their import operations. As time continues to grow shorter, importers and brokers alike have voiced concern over the timing to onboard PGAs and whether implementation will be effective.

At the most recent Trade Support Network Plenary Session held in Washington, DC this past October, CBP Commissioner Kerlikowske reiterated that ACE is an Administration priority and that CBP recognizes the concerns raised by the trade with respect to PGA rollout and the impact on the ACE deadlines schedule for 2015/2016.<sup>62</sup> The Commissioner did not back down from the planned implementation schedule, however, stating that CBP is working with PGAs to keep on track.<sup>63</sup> How 2015 will unfold remains to be seen.

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54. *Id.*

55. See U.S. Customs and Border Protection, *ACE and Automated Systems* (2014).

56. See *id.*

57. Report to Congress on the International Trade Data System, ii (2013).

58. See *id.*

59. Roy Chaudet, *EPA ACE Pilots: Looking for Volunteers* 3 (2014).

60. U.S. Customs and Border Protection, *Commissioner Kerlikowske opens COAC Meeting in Washington, D.C.* (2014).

61. *Id.*

62. *Id.*

63. *Id.*

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**B. DEVELOPMENTS ON THE SECURITIES AND EXCHANGE COMMISSION'S CONFLICT-MINERALS DISCLOSURE RULE**

Pursuant to Section 1502 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Section 1502), the SEC, in 2012, adopted a rule (Conflict Minerals Rule) requiring companies to comply with disclosure requirements for “conflict materials” that originate from the Democratic Republic of the Congo (DRC).<sup>64</sup> The congressional intent behind the rule is to ensure that companies using minerals from the DRC do not help finance conflict characterized by extreme levels of violence in the eastern [DRC], particularly sexual-and gender-based violence, and contributing to an emergency humanitarian situation.<sup>65</sup>

On April 14, 2014, a panel of the Court of Appeals for the D.C. Circuit affirmed in part the decision of the District Court rejecting three trade associations’ statutory challenges to the Conflict Minerals Rule under the Administrative Procedure Act and the Securities Exchange Act.<sup>66</sup> However, Judge Randolph, writing the court’s opinion, concluded that the Conflict Minerals Rule and Section 1502 “violate the First Amendment to the extent [they] require regulated entities to report to the [SEC] and to state on their website that any of their products have ‘not been found to be “DRC conflict free.””<sup>67</sup>

Nevertheless, on November 18, 2014, the Court of Appeals for the D.C. Circuit granted a limited rehearing of the case<sup>68</sup> in light of the holding that mandatory disclosure of an animal’s country-of-origin does not violate First Amendment free speech, in *American Meat Institute v. U.S. Department of Agriculture*.<sup>69</sup> The rehearing on the Conflict Minerals Rule will likely be held in early 2015, but only on the First Amendment issue, meaning companies must still comply with the rest of the SEC’s Conflict Minerals Rule.<sup>70</sup>

**V. Canadian Legal Developments<sup>71</sup>**

**A. WITHDRAWAL OF GENERAL PREFERENTIAL TARIFF (GPT) TREATMENT**

In 2014, Canada offered duty-free or preferential duties rates to goods originating from 176 countries under GPT.<sup>72</sup> A review revealed the income level and trade competitiveness of some GPT beneficiary countries has improved, so Canada decided to modernize GPT.

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64. CONFLICT MINERALS RULE, 77 Fed. Reg. 56274 (Sept. 12, 2012) (codified at 17 C.F.R. pts. 240, 249b).

65. DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, H.R. 4173, 11th Cong. § 1502 (2010). See also 56 Cong. Rec. S3976 (daily ed. May 19, 2010) (statement of Sen. Russ Feingold).

66. Nat’l Ass’n of Mfrs. v. S.E.C., 748 F.3d 359, 365-70 (D.C. Cir. 2014).

67. *Id.* at 371.

68. Nat’l Ass’n of Mfrs. v. S.E.C., No. 13-5252, slip op. at 14 n.1 (D.C. Cir. Nov. 18, 2014).

69. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014).

70. Andrew Zajac, *Conflict Mineral Rule Gets New Life in Disclosure Rehearing*, BLOOMBERG, Nov. 18, 2014. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014).

71. Section Editor: Daniel Kiselbach, Deloitte Tax Law LLP, Vancouver, Canada. Authors: Greg Kanargelidis, Blake, Cassels & Graydon LLP; Daniel Kiselbach, Deloitte Tax Law LLP, and Cyndee Todgham Cherniak, Leksage.

72. Canada Border Services Agency, *Customs Tariff Departmental Consolidation* (2014).

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Effective January 1, 2015, entitlement to GPT will be withdrawn from goods originating from 72 higher-income and trade-competitive countries, including goods originating from countries such as Brazil, Chile, and China.<sup>73</sup> The Most-Favoured-Nation Tariff (MFNT) will apply instead of the GPT.<sup>74</sup>

**B. FREE TRADE AGREEMENTS**

Two key free trade agreement activities affecting customs are noted below. First, the legal text for the *Canada-European Union: Comprehensive Economic and Trade Agreement* (CETA) was issued.<sup>75</sup> CETA will eliminate substantially all customs tariffs for Canadian goods imported into the EU and for EU goods imported into Canada.<sup>76</sup> CETA must undergo a legal ratification process before it is brought into force. Second, Canada signed a free trade agreement with Korea<sup>77</sup> that will substantially eliminate customs duties for qualifying goods. Canada and South Korea have committed to ratify the agreement to be effective as soon as possible.<sup>78</sup>

**C. CANADIAN CUSTOMS VALUATION JURISPRUDENCE**

Since the last *Year in Review*, the Canadian International Trade Tribunal (CITT) issued the following decisions dealing with customs valuation of imported goods

1. *Skechers USA Canada, Inc v. CBSA*<sup>79</sup>

Skechers addressed whether a payment between related parties for research, development, and design expenses was required to form part of the “transaction value” of the imported goods on which customs duties are payable.<sup>80</sup> The central issue concerned a payment made by Skechers Canada on account of research, development and design (R&D).<sup>81</sup> Some of these R&D expenses were attributable to footwear designs that were ultimately produced and imported into Canada, but some of the R&D expenses were attributable to eliminated designs never manufactured into goods.<sup>82</sup> Skechers Canada argued that the “R&D” payment was for intangibles and not a payment “in respect of” the goods.<sup>83</sup> The Tribunal determined the totality of such expenses are necessary for production of the goods, and the R&D payments remain inseparable from the footwear products themselves, and must be added to the “transaction value” of the goods.<sup>84</sup>

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73. *General Preferential Tariff Withdrawal Order*, CANADA GAZETTE, Sept. 27, 2013.

74. *Id.*

75. Government of Canada, *Canada-European Union: Comprehensive Economic and Trade Agreement* (CETA) (2014).

76. *Id.*

77. *Foreign Affairs, Trade and Development Canada, Canada-Korea Free Trade Agreement (CKFTA)* (2014).

78. *Id.*

79. *Skechers USA Canada, Inc. v. CBSA*, (2013), Appeal No. AP-2012-073 (Can. Ont.).

80. *Id.* at 1.

81. *Id.* at 2.

82. *Id.* at 4.

83. *Id.*

84. *Id.* at 72.

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2. *Double J Fashion Group Inc. v. The President of the Canada Border Services Agency*<sup>85</sup>

*Double J Fashion* addressed whether a “distribution fee” payable by the importer to the vendor, separate from the price of the goods, must be included in the “transaction value” on which customs duties are payable.<sup>86</sup> The Tribunal decided the “distribution fee” was a payment “in respect of” the imported goods, and formed part of the value of the goods for duty purposes. The Tribunal’s decision was based on a number of factors.<sup>87</sup> The price of the goods was at the vendor’s cost, so the goods were not sold at a profit.<sup>88</sup> The so-called distribution fee was purportedly for advertising and marketing services, but payments were mandatory, calculated as a percentage of the discounted price of the goods, and there was no means of measuring whether and to what extent any services were being provided.<sup>89</sup>

3. *Hudson’s Bay Company v. President of the Canada Border Services Agency*<sup>90</sup>

*Hudson’s Bay* concerned whether certain discounts granted to Hudson’s Bay Company (HBC) should reduce the duty value of the imported goods, or be disregarded as having been “effected” subsequent to importation.<sup>91</sup> HBC purchased goods from Macy’s Merchandising Group (Macy’s).<sup>92</sup> HBC filed refund claims for “margin support” and “advertising support” discounts granted by Macy’s to HBC.<sup>93</sup> For a rebate to be deducted from price paid or payable, the Tribunal held the trigger or reason for the rebate must “exist before importation, and not be dependent on a condition that can only be met after such importation has occurred. . . .”<sup>94</sup> The Tribunal concluded HBC was entitled to a reduction in the transaction value of the goods equal to the value of the discounts, with a corresponding refund of customs duties.<sup>95</sup>

4. *Bluestein Enterprises Inc v. The President of the Canada Border Services Agency*<sup>96</sup>

*Bluestein Enterprises* concerned customs valuation of printed t-shirts and concert memorabilia imported by Bluestein from the U.S.<sup>97</sup> Bluestein did not purchase the goods it imported.<sup>98</sup> It acted as the importer and sold the goods to Canadian consumers at

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85. *Double J Fashion Group Inc. v. The President of the Canada Border Services Agency*, (2014), Appeal No. AP-2013-017 (Can. Ont.).

86. *Id.* at 2.

87. *Id.* at 86.

88. *Id.* at 82.

89. *Id.* at 85.

90. *Hudson’s Bay Company v. President of the Canada Border Services Agency*, (2014), Appeal No. AP-2012-067 (Can. Ont.).

91. *Id.* at 2.

92. *Id.* at 10.

93. *Id.* at 11.

94. *Id.* at 36.

95. *Id.* at 79.

96. *Bluestein Enterprises Inc. v. The President of the Canada Border Services Agency*, (2014), Appeal No. AP-2013-028 (Can. Ont.).

97. *Id.* at 3.

98. *Id.* at 5.

concerts: at all times the goods remained the property of the U.S. merchandisers.<sup>99</sup> The Tribunal concluded that the deductive value method was applicable, based on the selling price of the imported goods to Canadian customers.<sup>100</sup> From such resale prices, the CBSA agreed to deduct Bluestein's fees to the U.S. merchandisers, including expenses to bring the goods to Canada and to sell the goods, plus included profit earned by Bluestein.<sup>101</sup> The Tribunal interpreted the statutory deduction for "profit and general expenses" to mean profit realized by the Canadian-based earner, Bluestein, which expenses were incurred in Canada.<sup>102</sup> The CBSA therefore did not make any deductions for profits earned by U.S. merchandisers.<sup>103</sup> Furthermore, CBSA did not make any deductions for royalties paid by U.S. merchandisers to U.S. license holders of designs printed on the goods, because the deductive value method does not specifically provide for deduction of royalties.<sup>104</sup>

5. *Comments On Valuation Jurisprudence*

The four customs valuation decisions released by the CITT since our last Year in Review address issues of potentially broad application to many import scenarios. In the two cases involving whether certain payments are "in respect of" imported goods and therefore form part of the "price paid or payable" for the goods, the *Skechers* case demonstrates that "R&D" type payments are at risk of being dutiable unless the transactions are properly structured to avoid this result. Similarly, planning may have assisted the importer in *Double J*. The CITT appears to have come to the correct result in the *HBC* case, though planning would have made satisfying the burden of proof much easier. Finally, *Bluestein* considered the extent of deductions permitted from the resale price in Canada to arrive at the "deductive value" method. Some of CITT's conclusions are subject to debate. Overall, the cases demonstrate the customs valuation of imported goods should be the subject of advance planning in order to avoid the assessment of additional duties and taxes.

D. CANADIAN JUDICIAL REVIEW JURISPRUDENCE

Certain decisions of CBSA cannot be appealed to the Canadian International Trade Tribunal and must be judicially reviewed to the Federal Court of Canada (Federal Court).<sup>105</sup>

On February 24, 2014, the Federal Court decided *Dorel Industries Inc. v. The President of the Canada Border Services Agency*,<sup>106</sup> regarding CBSA's advance ruling about duty drawbacks. The Federal Court determined that absent false representations or concealed information, the Minister of Public Safety and Emergency Preparedness could not retroactively change its mind and held:

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99. *Id.*

100. *Id.* at 61.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. FEDERAL COURTS ACT, R.S.C. 2011, c. F-7.

106. *Dorel Industries Inc. v. Canada (Border Services Agency)*, (2014), F.C. 175 (Can. C.A.).

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“The Minister . . . is undoubtedly entitled to change a ruling and is not bound by previous decisions. However, in the absence of a clear indication that Parliament intended to give the Minister the power to withdraw retroactively a certificate granting relief of duties that has been validly issued, I am unable to agree with the Respondent that it may now reassess the Applicant. . . .”<sup>107</sup>

The Federal Court allowed judicial review because the Minister’s actions were unreasonable and legally incorrect.<sup>108</sup>

In *Thériault v. Minister of Public Safety and Emergency Preparedness*,<sup>109</sup> the Federal Court upheld seizure of \$16,210.50 under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*<sup>110</sup> (PoC Act). The Applicant and a friend were at a Canadian airport to board a plane to the Dominican Republic.<sup>111</sup> The Applicant was stopped by CBSA, who asked to search his baggage.<sup>112</sup> CBSA found and counted cash.<sup>113</sup> The Applicant said he was carrying his cash, his son’s cash, and cash belonging to his friend.<sup>114</sup> None of the individuals reported they had over \$10,000.<sup>115</sup> The Federal Court upheld the CBSA’s seizure and held the provisions of the PoC Act are strictly applied.<sup>116</sup>

E. NEXUS CONFISCATIONS

NEXUS is a cooperative program developed by CBSA and CBP to allow low risk pre-approved individual travelers expedited processing at the Canada-US border.<sup>117</sup> NEXUS is a discretionary regulatory program.<sup>118</sup>

In 2014, CBSA Recourse Directorate considered numerous requests for decisions regarding seizures at the border by CBSA. The Recourse Directorate decisions are not published or made available to the public.

In 2014, CBSA Recourse Directorate considered the circumstances of a traveler who incorrectly read the E311 Declaration Card (completed by all air travelers entering Canada) and checked “no” instead of “yes” when answering whether he/she had exceeded personal exemption limits. CBSA acknowledged the traveler made an unintended mistake. In rendering its decision to uphold seizure, CBSA Recourse Directorate indicated the CBSA was not required to consider intention. This decision is being judicially reviewed.

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107. *Id.*

108. *Id.* at 23.

109. *Thériault v. Minister of Public Safety and Emergency Preparedness*, (2014), F.C. 270 (Can. C.A.).

110. PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT, R.S.C. 2014, c.17 (Can.).

111. *Thériault*, (2014), F.C. 270 at 23.

112. *Id.* at 5.

113. *Id.*

114. *Id.* at 1.

115. *Id.* at 5.

116. *Id.* at 22.

117. U.S. Customs and Border Protection, *NEXUS Program Description* 1.

118. *Id.*

In *Sadana v. Minister of Public Safety*,<sup>119</sup> the Federal Court upheld a NEXUS membership revocation while expressing sympathy since the infraction was a relatively minor violation.

## VI. European Legal Developments<sup>120</sup>

### A. COMMISSIONER OF CUSTOMS

On November 1, 2014, Pierre Moscovici replaced Algirdas Šemeta as Commissioner for Economic and Financial Affairs, Taxation and Customs Union.<sup>121</sup>

### B. THE UNION CUSTOMS CODE

On October 30, 2013, the Union Customs Code (UCC)<sup>122</sup> entered into force and repealed the Community Customs Code (CCC).<sup>123</sup> UCC's substantive provisions will take effect May 1, 2016, once the UCC-related Delegated and Implementing Acts are adopted by the Member States (no later than May 2015).<sup>124</sup> Until then, CCC continues to apply.

UCC lays down "general rules and procedures applicable to goods" imported into or exported out of the "customs territory" of the EU.<sup>125</sup> UCC streamlines existing EU customs legislation and procedures in the context of modern-day needs, offers greater clarity and uniformity to trade, and reinforces expedited customs processing for compliant Authorized Economic Operators.

Arguably, UCC's most significant change is the possibility of withdrawal of the "first sale" valuation principle which allows EU importers to use the earlier sale in the supply chain as the basis for customs value.<sup>126</sup> The withdrawal of the "first sale" rule has not been finalized as UCC's Delegated and Implementing Acts are still in draft form and under discussion by the Member States.<sup>127</sup>

UCC's other significant changes include a mandatory guarantee requirement for all traders wishing to utilize simplified customs procedures; a reduction in the period of a Binding Tariff Information rulings' validity from 6 to 3 years;<sup>128</sup> and permission for AEO-C certified operators to file import/export entries in their own records rather than by submitting full declarations to customs.<sup>129</sup>

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119. *Sadana v. Minister of Public Safety*, (2013), F.C. 1005 (Can. C.A.).

120. Section Editor/Author: Ruta Riley, Redondo Beach, California.

121. Xinhua/Ye Pingfan, *Juncker announces new line-up of European Commission*, CCTV, (Sept. 9, 2014).

122. 2013 O.J. (L 952) 269.

123. 2008 O.J. (L 450) 145.

124. 2013 O.J. (L 952) 269.

125. Regulation (EU) No 952/2013, *supra* note 73, at L 269/11, Article 1.1.

126. Provided the sale was intended for export to the EU. See Baker & McKenzie, *EU - Customs Valuation: EU proposal to withdraw First Sale for Export* INTERNATIONAL TRADE COMPLIANCE UPDATE (Feb 6, 2014, 3:38 PM) <http://www.internationaltradeupdate.com/?entry=1619>.

127. *Id.*

128. Regulation (EU) No 952/2013, *supra* note 73, at L 269/22, Art 33(3).

129. *Id.* at L 269/6, Preamble 43.



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Some UCC changes depend on the development of EU-wide electronic systems.<sup>130</sup> EU customs business is expected to be completely electronic by December 31, 2020.<sup>131</sup>

C. PROPOSED HARMONIZATION OF CUSTOMS PENALTIES

Currently, enforcement of customs laws differs across EU Member States. On December 13, 2013, the EC issued a proposal for a directive<sup>132</sup> that would harmonize customs enforcement across the Member States. The directive establishes a framework concerning infringements of EU customs legislation and provides sanctions for those infringements to be applied uniformly by all Member States.<sup>133</sup>

D. CUSTOMS 2020

On December 20, 2013, the EU established Customs 2020,<sup>134</sup> a cooperation program for customs in the EU for 2014-2020. Customs 2020 establishes a network through which national customs administrators may train, network, and exchange information and expertise.<sup>135</sup> The goal of the program, *inter alia*, is to develop a trans-European electronic system for EU customs administrations.<sup>136</sup>

E. GENERALIZED SCHEME OF PREFERENCES (GSP)

On January 1, 2014, EU's new GSP took effect.<sup>137</sup> Three levels of benefits are available under the EU's GSP:

- “The standard/general GSP arrangement” provides for “tariff reduction to developing countries.”<sup>138</sup>
- The GSP+ provides for “full removal of tariffs on essentially the same product categories as those covered by the general arrangement.”
- “Everything But Arms (EBA) arrangement for least developed countries (LDCs) grants duty-free, quota-free access to all products, except for arms and ammunitions.<sup>139</sup>

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130. *Id.* at L269/86, Art. 278.

131. The Union Customs Code: A Recast of the Modernized Customs Codes [http://ec.europa.eu/taxation\\_customs/customs/customs\\_code/union\\_customs\\_code/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_code/union_customs_code/index_en.htm) (last visited 1/12/2015).

132. *See generally* Proposal for a Directive of the European Parliament and Council on the Union Legal Framework for Customs Infringements COM (2013) 884 final (Dec. 13, 2013).

133. The proposal calls for enactment of provisions by Member States by May 1, 2017. *Id.* at art. 19.

134. *See generally* Council Regulation 1294/2013, 2013 O.J. (L 347) 209 (EU).

135. *Taxation and Customs Union* [http://ec.europa.eu/taxation\\_customs/customs/cooperation\\_programmes/key\\_policies/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/cooperation_programmes/key_policies/index_en.htm) (last visited 1/14/15).

136. *See* Council Regulation (EU) 1294/2013, *supra* n. 80 at L 347/211, preamble 19.

137. Regulation No. 978/2012 Art. 8(2), (L 303) 1, 6 (EU). The application of this Regulation was delayed until 2014 to permit economic operators to adapt to the new scheme.

138. *I.e.* “partial or complete removal of tariffs on two-thirds of all product categories.” *Generalized Scheme of Preferences*, <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/> (last visited 1/14/15).

139. *Id.*

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The new GSP scheme significantly cut the number of beneficiaries from 176 to 90; 41 low and lower-middle income countries will benefit under the standard GSP and/or GSP+ arrangement, and 49 LDCs will benefit under the EBA scheme.<sup>140</sup>

F. CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS (IPRs)

Regulation (EU) 608/2013, concerning customs enforcement of IPRs, went into effect on January 1, 2014.<sup>141</sup> The regulation expanded the scope of IPRs within customs enforcement, “such as topography of semi-conductor products, utility models, and trade names.”<sup>142</sup> Additionally, the regulation amended the definition of “counterfeit goods” “to include packaging, labels, stickers, brochures, and other similar items”<sup>143</sup> infringing upon a registered trade mark or a geographical indication.<sup>144</sup>

G. FREE TRADE AGREEMENTS (FTAs) AND NEGOTIATIONS<sup>145</sup>

1. *Transatlantic Trade and Investment Partnership (TTIP)*<sup>146</sup>

As of October 3, 2014, there have been seven negotiation rounds between the United States and the European Union, and negotiations are now moving into the textual phase, based on specific textual proposals.

2. *EU-Canada Trade Agreement (CETA)*<sup>147</sup>

Negotiations for European Union-Canada trade agreement (CETA) ended September 26, 2014. The Agreement must undergo legal edits and translation into all official EU languages.

3. *Singapore*<sup>148</sup>

The European Union and Singapore completed FTA negotiations on October 17, 2014. The draft agreement must be EC approved and EP ratified.

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140. See Revised EU Trade Scheme to Help Developing Countries Applies on January 1, 2014, Brussels European Commission (Dec. 19, 2013).

Of the 176 former beneficiaries, 54 countries will no longer receive GSP benefits, but will still receive privileged access to EU market under different arrangements. 32 countries will stop benefiting from GSP arrangement as they are now classified by WTO as high and upper-middle income countries or are overseas territories non-dependent on the EU. Countries that lost GSP benefits include China, Ecuador, Thailand, and the Maldives. See Regulation No 1421/2013, 2013 O.J. (L 355) 2 (EU).

141. Regulation No. 608/2013 Art. 40(2), 2013 O.J. (L 181) 33 (EU).

142. *New EU Customs Regulation January 1, 2014*, Zacco, <http://www.zacco.com/new-eu-customs-regulation-january-1-2014> (last visited Feb. 13, 2015).

143. Caroline Casalonga and Karina Dimidjian-Lecomte, *Anti-counterfeiting 2014- A Global Guide*, World Trademark Review (April 24, 2014), <http://www.worldtrademarkreview.com/Intelligence/Anti-Counterfeiting/2014/Country-chapters/European-Union>.

144. Regulation No. 1352/2013 Art. 4, 2013 O.J. (L 341) 10, 11 (EU).

145. The list of 2014 EU trade agreements presented in this section is not inclusive.

146. *Overview of FTA and Other Trade Negotiations*, [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf) (last visited 1/15/15).

147. *Id.*

148. *Id.*

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4. *Ukraine, Georgia, and Moldova*<sup>149</sup>

On, March 21, 2014, the European Union signed an Association Agreement (AA) with Ukraine. The parties signed Comprehensive Free Trade Area (DCFTA) provisions on June 27, 2014. The EU signed all the same provisions with Georgia, and Moldova on June 27, 2014. The European Union and Ukraine are preparing for implementation of some AA parts. EU-Georgia and EU-Moldova AAs will be provisionally effective September 1, 2014.

5. *World Trade Organization (WTO) Green Goods Initiative*

In July 2014, the EU and 13 other members<sup>150</sup> of WTO launched negotiations aiming to “remove barriers to trade and investment in ‘green’ goods, services, and technologies.”<sup>151</sup> The first stage of negotiations “will focus on removing tariffs” on qualifying environmental products.<sup>152</sup>

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149. *Id.*

150. Australia, Canada, China, Costa Rica, Hong Kong (China), Japan, South Korea, New Zealand, Norway, Singapore, Switzerland, Taiwan, and the USA. See *The ‘Green Goods Initiative’: Liberalising trade in environmental goods and services*, European Commission (July 3, 2014), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1116>.

151. *Id.* At the first meeting, parties focused on agreeing upon a timetable for negotiations and participants’ goals.

152. *Id.*

## Export Controls and Economic Sanctions

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LAWRENCE WARD\*

### I. Introduction

On October 15, 2014, the one-year anniversary of the first round of rulemaking in support of President Obama's Export Control Reform (ECR) initiative took place.<sup>1</sup> As of December 30, 2014, the Obama Administration had thus far issued final rules to revise fifteen of the twenty-one United States Munitions List (USML) categories.<sup>2</sup> Some critical categories, including firearms, artillery, and ammunition, thus far have not received formal proposed rulemaking, signaling that ECR will continue into 2015 and beyond.<sup>3</sup> The Department of State reports a 64 percent reduction in license volume in the thirteen USML categories implemented as of November, as well as an increase in interoperability with allies and generally increased national security.<sup>4</sup> In addition to the ECR changes from the past year, including those by the Department of Commerce's Bureau of Industry and Security (BIS), the purpose of this article is to summarize other major developments in U.S. export control and economic sanctions law and policy that occurred over the last year.<sup>5</sup>

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1. Press Release, U.S. Dep't of State, Export Control Reform Marks One Year of Progress (Nov. 3, 2014), available at <http://www.state.gov/t/pa/prs/ps/2014/11/233659.htm>; *President's Export Control Reform Initiative*, export.gov, <http://export.gov/ecr/> (last updated Dec. 31, 2014).

2. *President's Export Control Reform Initiative*, EXPORT.GOV, <http://export.gov/ecr/> (last updated Dec. 31, 2014).

3. See *Export Control Reform*, U.S. Dep't of State, <https://www.pmdtc.state.gov/ECR/index.html> (last updated July 31, 2014).

4. Export Control Reform Marks One Year of Progress, *supra* note 1.

5. This article includes developments occurring between December 1, 2013, and November 30, 2014.

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**II. Export Control Reform (ECR)**

**A. MULTI-CATEGORY REVISIONS**

The reform initiative that was set in motion in 2010—including a single, positive, tiered list of controlled items—took significant steps in 2014. The year began with the second of three major USML category revision rules from the State Department taking effect on January 6, 2014,<sup>6</sup> after a six-month grace period.<sup>7</sup> The BIS published a concurrent rule to avoid the potential for jurisdictional limbo and account for the migration of items from the USML to the Commerce Control List (CCL) of the Export Administration Regulations (EAR).<sup>8</sup>

The continued implementation rule of early January changed four USML categories: VI, VII, XIII, and XX.<sup>9</sup> The rule clarifies and narrows the types of “surface vessels of war and special naval equipment” covered by the USML Category VI and moved submarines to USML Category XX.<sup>10</sup> Instead of broadly covering all items specially designed for a defense article, the new Category VI contains a list and the remaining parts, components, accessories, and attachments are subject to the 600 series controls in the CCL.<sup>11</sup> Similarly, the continued implementation rule clarifies and narrows the scope of USML Category VII ground vehicles while implementing the new definition of “specially designed” for applicable articles.<sup>12</sup> USML Category XIII, which covers materials and miscellaneous articles, and USML Category XX, which lists submersible vessels and related articles, were both clarified to establish a clearer line between items controlled by the Departments of Commerce and State.<sup>13</sup>

Additionally, the International Traffic in Arms Regulations (ITAR) was updated to provide definitions of “ground vehicles,” “submersible vessels,” “organizational-level maintenance,” “intermediate-level maintenance,” and “depot-level maintenance,” while the definition of “surface vessels of war” was updated.<sup>14</sup>

On July 1, 2014, the third and largest major USML category update effectively revised Categories IV, V, IX, X, XVI approximately six months from the continued implementa-

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6. See Amendment to the International Traffic in Arms Regulations: Continued Implementation of Export Control Reform, 78 Fed. Reg. 40,922 (July 8, 2013). The first and third rules involving major USML category revisions are Amendment to the International Traffic in Arms Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,740 (Oct. 15, 2013) and Amendment to the International Traffic in Arms Regulations: Third Rule Implementing Export Control Reform, 79 Fed. Reg. 34 (July 1, 2014).

7. Amendment to the International Traffic in Arms Regulations: Continued Implementation of Export Control Reform, *supra* note 6, at 40,922.

8. See Revisions to the Export Administration Regulations: Military Vehicles; Vessels of War; Submersible Vessels, Oceanographic Equipment; Related Items; and Auxiliary and Miscellaneous Items That the President Determines No Longer Warrant Control Under the United States Munitions List, 78 Fed. Reg. 40,892 (July 8, 2013).

9. Amendment to the International Traffic in Arms Regulations: Continued Implementation of Export Control Reform, *supra* note 6, at 40,922.

10. *Id.*

11. *Id.* at 40,922-23.

12. *Id.* at 40,923-24.

13. *Id.* at 40,924-25.

14. Amendment to the International Traffic in Arms Regulations: Corrections, Clarifications, and Movement of Definitions, 79 Fed. Reg. 61,230 (Oct. 10, 2014); Amendment to the International Traffic in Arms Regulations: Continued Implementation of Export Control Reform, *supra* note 6, at 40,922.

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tion rule.<sup>15</sup> The third rule revised categories that included launch vehicles, missiles, rockets, torpedoes, bombs, and mines (IV),<sup>16</sup> explosives, and energetic materials (V),<sup>17</sup> military training equipment (IX),<sup>18</sup> personal protective equipment (X),<sup>19</sup> and nuclear weapons related articles (XVI).<sup>20</sup> Catch-all paragraphs were removed from Category V,<sup>21</sup> blasting caps were removed from Category IV,<sup>22</sup> and military training articles<sup>23</sup> and personal protective equipment<sup>24</sup> were further defined to establish a “bright-line” classification. The BIS established a sister rule accepting the items migrated from USML to its jurisdiction on the CCL.<sup>25</sup> The third rule also implemented a definition for “equipment” in a continued effort to positively identify controlled items.<sup>26</sup>

Both the continued implementation rule and the third implementation rule follow the ECR trend in adding a new “paragraph (x)” to all updated categories to avoid dual licensing.<sup>27</sup> The (x) paragraph allows commodities, software, and technical data subject to the EAR to be shipped under ITAR licenses so long as they are described in the purchase documentation submitted with the Directorate of Defense Trade Controls (DDTC) license application.<sup>28</sup> The commercial viability of shipping EAR and ITAR items under the same license caters to the industry’s request to simplify the licensing process.

A later rule moved the notes and interpretations identified after the USML to be incorporated within the USML.<sup>29</sup> This rule also moved the definitions of parts, components, accessories, attachments, firmware, software, systems, equipment, and end-items from 22 C.F.R. section 121.8 to 22 C.F.R. section 120.45.<sup>30</sup> Importantly, a number of correction rules have been issued by the Departments of State and Commerce.<sup>31</sup>

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15. See International Traffic in Arms Regulations: Third Rule Implementing Export Control Reform, *supra* note 6.

16. *Id.* at 34.

17. *Id.* at 35.

18. *Id.* at 36.

19. *Id.*

20. *Id.* at 37.

21. International Traffic in Arms Regulations: Third Rule Implementing Export Control Reform, *supra* note 6, at 34.

22. *Id.*

23. *Id.* at 36.

24. *Id.*

25. Control of Military Training Equipment, Energetic Materials, Personal Protective Equipment, Shelters, Articles Related to Launch Vehicles, Missiles, Rockets, Military Explosives, and Related Items, 79 Fed. Reg. 264 (Jan. 2, 2014) (to be codified at 15 C.F.R. pts. 740 and 774).

26. See 22 C.F.R. § 121.8(g) (2014); International Traffic in Arms Regulations: Third Rule Implementing Export Control Reform, *supra* note 6, at 37.

27. See Amendment to the International Traffic in Arms Regulations: Continued Implementation of Export Control Reform, *supra* note 6, at 40923–40925; International Traffic in Arms Regulations: Third Rule Implementing Export Control Reform, *supra* note 6, at 35–37.

28. See Amendment to the International Traffic in Arms Regulations: Continued Implementation of Export Control Reform, *supra* note 6, at 40923; International Traffic in Arms Regulations: Third Rule Implementing Export Control Reform, *supra* note 6, at 35.

29. See Amendment to the International Traffic in Arms Regulations: Corrections, Clarifications, and Movement of Definitions, 79 Fed. Reg. 61226 (Oct. 10, 2014).

30. See 22 C.F.R. § 120.45 (2014).

31. See, e.g., Export Control Reform, ECR Implementation Status, U.S. Dep’t of State, <https://www.pmddtc.state.gov/ECR/index.html> (last updated July 31, 2014).

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B. SINGLE CATEGORY REVISIONS: SPACE ARTICLES & MILITARY ELECTRONICS

Regarding spacecraft and related articles, the State Department published an interim final rule revising USML Category XV that took effect on November 10, 2014.<sup>32</sup> The BIS effected a concurrent interim final rule to move space-related items formerly controlled by the ITAR to EAR jurisdiction,<sup>33</sup> establishing new Export Control Classification Numbers (ECCNs) under 9X515.<sup>34</sup>

Formerly, all satellites and space-related items were mandatorily controlled by the ITAR under the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999,<sup>35</sup> but after a 2010 risk assessment and a 2012 interdepartmental report to Congress identifying items more appropriately governed by the EAR, the authority to determine how space-related articles are governed was returned to the President in 2013.<sup>36</sup> This rule presents a significant shift for the domestic satellite industry, as many argue that satellite exports were significantly hampered by the former export control regime.<sup>37</sup> For instance, many of the items that migrated to the CCL will now be subject to the EAR's de minimis exception, which allows for the uninhibited re-export of foreign satellites with less than 25 percent controlled U.S. origin content by value.<sup>38</sup> Commercially, this may quell the development of so-called "ITAR-free" satellites by allowing for the integration of U.S. satellite components in foreign satellite end-products.<sup>39</sup> Additionally, a new paragraph (x) has been added to USML Category XV to allow items migrated to the EAR to continue licensure with the DDTTC.<sup>40</sup>

In addition to space-related articles, concurrent rules from the Departments of State and Commerce regarding the export of military electronics were issued on July 1, 2014, and came into effect on December 30, 2014.<sup>41</sup> This update to USML Category XI marks

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32. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV, 79 Fed. Reg. 27180 (May 13, 2014).

33. Revisions to the Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 79 Fed. Reg. 27418 (May 13, 2014).

34. *Id.*

35. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920.

36. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV, *supra* note 32, at 27181.

37. *Rep. Berman and Bipartisan Coalition Introduce Legislation to Restore America's International Competitiveness in Commercial Satellites*, U.S.H.R. COMMITTEE ON FOREIGN AFF.: DEMOCRATS (Nov. 2, 2011), [http://democrats.foreignaffairs.house.gov/press\\_display.asp?id=888#](http://democrats.foreignaffairs.house.gov/press_display.asp?id=888#).

38. Reid Whitten, *ECR Episode XI: Rewriting the Guide to the Galaxy-Satellites Passed to Commerce Control*, NAT'L L. REV. (Nov. 6, 2014), <http://www.natlawreview.com/article/ecr-episode-xi-rewriting-guide-to-galaxy-satellites-passed-to-commerce-control>.

39. David Damast, *Export Control Reform and the Space Industry*, 42 GEO. J. INT'L L. 211, 220 (2010) ("As this 'ITAR-free' competition grows, foreign businesses have become able to ignore American export controls by simply sourcing abroad.")

40. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV, *supra* note 32, at 27181.

41. Amendment to the International Traffic in Arms Regulations: United States Munitions List Category XI (Military Electronics), and Other Changes, 79 Fed. Reg. 37536 (July 1, 2014); Revisions to the Export Administration Regulations (EAR): Control of Military Electronic Equipment and Other Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 79 Fed. Reg. 37551 (July 1, 2014).

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the fifteenth category overhaul to date.<sup>42</sup> USML Category XI was clarified to more precisely identify the articles subject to ITAR control.<sup>43</sup> Specifically, subparagraphs were added to paragraphs (a) and (c) to enumerate additional controlled items.<sup>44</sup> Consistent with other revised categories of the USML, an entry for paragraph (x) was added to allow for items subject to the EAR to be exported under ITAR licenses, if the relevant commodities, software, and technology are used in or with ITAR articles and are described in the purchase documentation submitted with the license application.<sup>45</sup>

There are currently no proposed changes to the export controls for USML Categories I, II, III, XII, XIV, and XVIII. Given the six-month delay between the publication date of the final rule and its effective date, it is very likely that ECR will continue well into 2016.

### III. Ukraine-Related Sanctions

In March 2014, President Obama issued a series of three Executive Orders (EOs) to address the unrest in the Crimean region of Ukraine.<sup>46</sup> Through the Ukraine-Related Sanctions Regulations (URSR), codified at 31 C.F.R. Part 589, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued regulations to implement the EOs on May 8, 2014.<sup>47</sup> EOs 13660 and 13661 chiefly are property-blocking measures that provided the U.S. Departments of the Treasury and State broad authority to determine which individuals and entities qualify as persons subject to the EOs.<sup>48</sup> The individuals and entities determined by the Departments of the Treasury and State to be subject to the blocking measures are included on the OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List). EOs 13660 and 13661 also ban travel to and from the United States by certain individuals.<sup>49</sup>

EO 13662 includes property-blocking measures targeting any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

- (i) to operate in the financial services, energy, metals and mining, engineering and defense and related materiel sectors in the Russian Federation;
- (ii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of any person whose property and interests in property are blocked; or

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<sup>42</sup> *President's Export Control Reform Initiative*, EXPORT.GOV, <http://export.gov/ecr/> (last updated Dec. 31, 2014).

<sup>43</sup> Amendment to the International Traffic in Arms Regulations: United States Munitions List Category XI (Military Electronics), and Other Changes, *supra* note 41, at 37536.

<sup>44</sup> See 22 C.F.R. § 121.1 (2014); Amendment to the International Traffic in Arms Regulations: United States Munitions List Category XI (Military Electronics), and Other Changes, *supra* note 41, at 37536.

<sup>45</sup> Amendment to the International Traffic in Arms Regulations: United States Munitions List Category XI (Military Electronics), and Other Changes, *supra* note 41, at 37537.

<sup>46</sup> See Exec. Order No. 13660, 79 Fed. Reg. 13493 (Mar. 6, 2014); Exec. Order No. 13661, 79 Fed. Reg. 15535 (Mar. 16, 2014); and Exec. Order No. 13662, 79 Fed. Reg. 16169 (Mar. 20, 2014).

<sup>47</sup> 79 Fed. Reg. 26365 (May 8, 2014) (Implementing 31 C.F.R. pt. 589).

<sup>48</sup> See Exec. Order No. 13660 and 13661, *supra* note 46.

<sup>49</sup> See Exec. Order No. 13660, 79 Fed. Reg. 13,493 (Mar. 10, 2014); see Exec. Order No. 13661, 79 Fed. Reg. 15,535 (Mar. 19, 2014).

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- (iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked.<sup>50</sup>

As implemented, the sectoral sanctions issued under EO 13662 target specific activities in various sectors of the Russian Federation economy, but do not apply the URSR's property-blocking provisions to persons subject to the sanctions. Each of the EOs prohibits any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in the EOs.<sup>51</sup>

On July 16, under EO 13662, OFAC issued Directives implementing sectoral sanctions on the financial services (Directive 1) and energy sectors (Directive 2) of the Russian Federation economy by prohibiting persons subject to U.S. jurisdiction from transacting in, providing financing for, or otherwise dealing in new debt of longer than ninety days maturity for listed persons, their property or interests in property.<sup>52</sup> Further, under Directive 1, persons subject to U.S. jurisdiction were prohibited from transacting in, providing financing for, or otherwise dealing in new equity for such persons, and such property and interests in property.<sup>53</sup> On September 12, OFAC amended Directives 1 and 2 to prohibit transactions in new debt of maturity longer than thirty days. OFAC also issued Directives 3 and 4 under EO 13662.<sup>54</sup> Directive 3 extends the new debt restrictions of Directives 1 and 2 to certain entities in the defense sector of the Russian Federation economy.<sup>55</sup> Directive 4 is targeted at certain Russian oil and gas companies and prohibits U.S. persons from the "provision, exportation, or reexportation, directly or indirectly, of goods, services . . . or technology in support of exploration or production for deepwater, Arctic offshore, or shale projects that have the potential to produce oil in the Russian Federation, or in maritime area claimed by the Russian Federation and extending from its territory" . . .<sup>56</sup>

URSR Section 589.201 prohibits all transactions prohibited under the EOs.<sup>57</sup> URSR Section 589.406 applies these prohibitions to all property and interests in property of an entity in which it owns, directly or indirectly, a 50 percent or greater interest.<sup>58</sup> OFAC's *Revised Guidance on Entities Owned By Persons Whose Property and Interests in Property are Blocked* (Revised Guidance), issued on August 13, 2014, clarifies that any entity owned in the aggregate, directly or indirectly, 50 percent or more by one or more blocked persons is itself considered to be a blocked person. OFAC's Revised Guidance applies to each of the prohibitions under Directives 1 through 4. Accordingly, these prohibitions apply not only to the persons on the applicable SSI List, but also to entities which are owned 50 percent or more by one or more persons identified as subject to the Directives.

On August 6, the BIS announced new rules that limit the items subject to the EAR that may be supplied to the Russian oil and gas sector and suppliers of that sector.<sup>59</sup> In partic-

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50. See Exec. Order No. 13662, 79 Fed. Reg. 16,169 (Mar. 24, 2014).

51. See Exec. Order Nos. 13660, 13661 and 13662.

52. Office of Foreign Asset Controls, Directives 1 and 2 Pursuant to Exec. Order 13662 (Jul. 16, 2014).

53. Office of Foreign Asset Controls, Directive 1 Pursuant to Exec. Order 13662 (Jul. 16, 2014).

54. Office of Foreign Asset Controls, Directives 1, 2, 3, and 4 Pursuant to Exec. Order 13662 (Sep. 12, 2014).

55. Office of Foreign Asset Controls, Directive 3 Pursuant to Exec. Order 13662 (Sep. 12, 2014).

56. Office of Foreign Asset Controls, Directive 4 Pursuant to Exec. Order 13662 (Sep. 12, 2014).

57. 31 C.F.R. § 589.201 (2014).

58. 31 C.F.R. § 589.406 (2014).

59. 79 FR 45675-14 (Aug. 6, 2014).

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ular, these newly covered items are those specified in ECCNs 0A998, 1C992, 3A229, 3A231, 3A232, 6A991, 8A992 and 8D999.<sup>60</sup> Additionally, Supplement No. 2 to EAR Part 746 (*Russian Industry Sector Sanctions List*) lists fifty-two Schedule B numbers of various controlled items.<sup>61</sup> These new BIS rules apply when an:

[E]xporter, reexporter or transferor knows or is informed that the item will be used directly or indirectly in Russia's energy sector for exploration or production from deepwater (greater than 500 feet [152.4 meters]), Arctic offshore, or shale projects in Russia that have the potential to produce oil or gas or is unable to determine whether the item will be used in such projects in Russia.<sup>62</sup>

The new rules state that, for all items requiring a license for export to Russia, BIS's license review policy "is a presumption of denial when there is potential for use" for the purposes above.<sup>63</sup>

#### IV. NON-ECR, EAR and ITAR Developments

##### A. ITAR POLICY CHANGES: CENTRAL AFRICAN REPUBLIC ARMS EMBARGO; UK DEFENSE TRADE TREATY; VIETNAM POLICY

On April 17, the State Department issued a final rule in accordance with United Nations Resolution 2127 which established an arms embargo on the Central African Republic and Resolution 2134, which extended the embargo and added exceptions to the embargo for the European Union.<sup>64</sup> ITAR Section 122 was augmented with paragraph (u) to prohibit the sale of ITAR items to the Central African Republic (CAR) with exceptions for non-lethal military equipment for training purposes, personal protective equipment for UN personnel, and certain other designated end-uses.<sup>65</sup>

A minor change was also made to the license exemption available under the Treaty Between the Government of the United States of America and the Government of the United Kingdom Concerning Defense Trade Cooperation, at ITAR Section 126.17, to more clearly define the formal exemption requirements.<sup>66</sup>

The State Department loosened its policy on arms exports to Vietnam with a final rule that became effective on November 10.<sup>67</sup> It remains the policy of the United States to deny licenses for lethal defense articles to Vietnam, but when such defense articles or

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. See 22 C.F.R. § 126 (2014); Amendment to the International Traffic in Arms Regulations: Central African Republic, 79 Fed. Reg. 21,616 (Apr. 17, 2014).

65. Amendment to the International Traffic in Arms Regulations: Central African Republic, 79 Fed. Reg. 21,616 (Apr. 17, 2014).

66. Amendment to the International Traffic in Arms Regulations: Changes to Authorized Officials and the UK Defense Trade Treaty Exemption, 79 Fed. Reg. 21,616 (Apr. 17, 2014).

67. See 22 C.F.R. § 126 (2014); Amendment to the International Traffic in Arms Regulations: Policy on Exports to Vietnam, 79 Fed. Reg. 66,615 (Nov. 10, 2014).

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services are to enhance maritime security capabilities and domain awareness they may be approved on a case-by-case basis, along with various non-lethal articles.<sup>68</sup>

**B. EAR DEVELOPMENTS: MCTR UPDATES, RUSSIAN ENTITY RESTRICTIONS,  
VENEZUELAN MILITARY END-USE**

The BIS issued a final rule incorporating changes made to the Missile Technology Control Regime (MTCR) after the 2013 plenary meeting in Rome, Italy, and a technical experts meeting in Bonn, Germany.<sup>69</sup> The rule, which became effective May 27, updated eight ECCNs and added an additional ECCN.<sup>70</sup> Definitional changes were made to the term “payload” and “repeatability” to align with the MTCR annex and various changes were made to the ECCNs: 1B102, 1B117, 1D001, 1D018, 1D101, 6A107, 9A101.<sup>71</sup> ECCN 9A102 was added in order to control specially designed turboprop engine systems falling under the missile controls.<sup>72</sup>

Additionally, in reaction to the Venezuelan military’s violent repression of protestors starting in February, the BIS implemented “military end-use” and “military end-user” license requirements on shipments to Venezuela.<sup>73</sup> Where in Part 744.21 restrictions on military end use to the People’s Republic of China or Russia previously existed,<sup>74</sup> the section will now include exports to Venezuela<sup>75</sup> based on the Venezuelan military’s anti-democratic actions against the Venezuelan people. If the exporter has knowledge of a military end-use or end-user, a license will be required for items listed in EAR Supplement No. 2 to Part 744.<sup>76</sup>

In other developments, the BIS elicited commentary on a proposed rule to remove the Special Comprehensive License (SCL) from the EAR.<sup>77</sup> The SCL involves complicated interagency review and is narrow in scope with fewer than a dozen such licenses ever issued.<sup>78</sup> The BIS also requested comments on the effectiveness of its licensing procedures for the export of agricultural products to Cuba, with the comment period ending October 6.<sup>79</sup>

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68. Amendment to the International Traffic in Arms Regulations: Policy on Exports to Vietnam, 79 Fed. Reg. 66,615 (Nov. 10, 2014).

69. See 15 C.F.R. 772, 774 (2014); Revisions to the Export Administration Regulations Based on the 2013 Missile Technology Control Regime Plenary Agreements, 79 Fed. Reg. 30,021 (May 27, 2014).

70. Revisions to the Export Administration Regulations Based on the 2013 Missile Technology Control Regime Plenary Agreements, *supra* note 69.

71. *Id.* at 30021–22.

72. *Id.* at 30022.

73. Venezuela: Implementation of Certain Military End Uses and End Users License Requirements Under the Export Administration Regulations, 79 Fed. Reg. 66,288 (Nov. 7, 2014) (to be codified at 15 C.F.R. pt. 744).

74. 15 C.F.R. §744.21 (2014).

75. *Id.*

76. 79 Fed. Reg. 66,288 (Nov. 7, 2014).

77. Proposed Amendments to the Export Administration Regulations: Removal of Special Comprehensive License Provisions, 79 Fed. Reg. 58,704 (proposed Sept. 30, 2014) (to be codified at 15 C.F.R. pt. 752).

78. *Id.* at 58,705.

79. Effectiveness of Licensing Procedures for Agricultural Commodities to Cuba, 79 Fed. Reg. 52,591 (Sept. 4, 2014) (to be codified at 15 C.F.R. § 740.18).

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In addition, the BIS, consistent with understandings reached among members of the Australia Group, revised controls on certain fermenters, adjusted the category controlling animal pathogens, and amended the EAR to reflect the membership of Mexico.<sup>80</sup> The BIS revised the CCL to harmonize it with changes to the Wassenaar Arrangement List of Dual-Use Goods and Technologies, including changes relating to digital computers.<sup>81</sup> The BIS amended the EAR to reflect developments in the control list for the Nuclear Suppliers Group, to acknowledge the status of several new Group participating countries, to amend the export licensing policy for items subject to nuclear nonproliferation controls, and for other purposes.<sup>82</sup>

Over a period of about six months, the BIS added a little more than two dozen entries to the Entity List in connection with the unrest in Ukraine. On April 16, the BIS added a Crimean energy company after it was largely expropriated by Russian government interests.<sup>83</sup> Thirteen more entities went on the list effective May 1,<sup>84</sup> followed by eleven more on July 22.<sup>85</sup> Two weeks later, the BIS added another entity.<sup>86</sup> Finally, on September 17, the BIS added ten more entries to the Entity List, and extended the EAR's military end use/user controls to Russia.<sup>87</sup>

## V. EAR and ITAR Related Enforcement Actions

### A. EAR RELATED ENFORCEMENT AND OTHER ACTIONS

#### 1. *Pursuit of Li Fangwei*

On April 29, the Obama Administration publicized a coordinated law enforcement effort directed at Li Fangwei (also known as Karl Lee), a Chinese national alleged to have made substantial contributions to Iran's ballistic missile program, in violation of both U.S. law and United Nations sanctions. The BIS added eight companies and one individual associated with Fangwei to the Entity List, effective May 1.<sup>88</sup> At the same time, OFAC made corresponding changes to the SDN List, and the Department of Justice announced that it filed criminal charges in a Manhattan federal court against Fangwei for fraud and

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80. Implementation of the Understandings Reached at the June 2013 Australia Group (AG) Plenary Meeting and the December 2012 AG Intersessional Decisions, 79 Fed. Reg. 16,664-65 (Mar. 26, 2014) (to be codified at 15 C.F.R. pt. 740).

81. Wassenaar Arrangement 2013 Plenary Agreements Implementation: Commerce Control List, Definitions, and Reports; and Extension of Fly-by-Wire Technology and Software Controls, 79 Fed. Reg. 45,288 (Aug. 4, 2014).

82. Implementation of Understandings Reached at the 2005, 2012, and 2013 Nuclear Suppliers Group (NSG) Plenary Meetings and a 2009 NSG Intersessional Decision; Addition to the List of NSG Participating Countries, 79 Fed. Reg. 46,316 (Aug. 7, 2014).

83. Addition of Person to the Entity List, 79 Fed. Reg. 21,394 (Apr. 16, 2014).

84. Addition of Certain Persons to the Entity List, 79 Fed. Reg. 24,558 (May 1, 2014) (to be codified at 15 C.F.R. pt. 744).

85. Addition of Certain Persons to the Entity List, 79 Fed. Reg. 42,452 (July 22, 2014) (to be codified at 15 C.F.R. pt. 744).

86. Russian Oil Industry Sanctions and Addition of Person to the Entity List, 79 Fed. Reg. 45,675 (Aug. 6, 2014) (to be codified at 15 C.F.R. pt. 744).

87. Russian Sanctions: Addition of Persons to the Entity List and Restrictions on Certain Military End Uses and Military End Users, 79 Fed. Reg. 55,608 (Sept. 17, 2014) (to be codified at 15 C.F.R. pt. 744).

88. Addition of Certain Persons to the Entity List, 79 Fed. Reg. 24,563 (May 1, 2014).

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various violations of OFAC's regulations.<sup>89</sup> The Federal Bureau of Investigation has offered a \$5 million reward for information leading to the capture of Fangwei, who resides outside of the United States.<sup>90</sup>

2. *Dutch Company Fokker Fined \$21 Million in Civil and Criminal Settlements*

On June 5, authorities announced that Fokker Services B.V. (Fokker), a company based in the Netherlands, entered into parallel civil and criminal settlement agreements with fines totaling \$21 million.<sup>91</sup> Fokker was alleged to have engaged in unlawful transactions in connection with the unauthorized export of aircraft parts, technologies, and services to Burma, Iran, and Sudan. Government investigators found that Fokker personnel engaged in systematic efforts to avoid detection by concealing the ultimate destinations and end-users for various transactions.<sup>92</sup>

3. *Wind River Agrees to \$750,000 Civil Penalty*

On October 7, Wind River Systems, Inc. (Wind River), a subsidiary of Intel Corporation, was fined \$750,000 for fifty-five alleged violations of the EAR.<sup>93</sup> The charges involved unauthorized exports of encryption software to government agencies in China, Hong Kong, Israel, Russia, South Africa, and South Korea and various entities in China on the Entity List.<sup>94</sup>

B. MAJOR ITAR ENFORCEMENT ACTIONS

1. *Esterline Fined \$20 Million*

Esterline Technologies Corporation (Esterline) entered into a \$20 million consent agreement effective March 5.<sup>95</sup> The DDTTC alleged that Esterline and several acquired subsidiaries violated the ITAR a total of 282 times.<sup>96</sup> The alleged violations were widespread and included not only administrative and recordkeeping infractions, but also unauthorized exports, re-exports, and retransfers of a diverse variety of defense hardware, data, and services.<sup>97</sup> Destination countries and nationalities included Brazil, Burkina Faso, Ca-

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89. Press Release, U.S. Dep't of Justice, Li Fangwei Charged in Manhattan Federal Court With Using a Web of Front Companies to Evade U.S. Sanctions (Apr. 29, 2014), <http://www.justice.gov/usao/nys/press-releases/April14/LiFangweiIndictmentPR.php>.

90. Wanted Notice, Federal Bureau of Investigation, Li Fangwei, <http://www.fbi.gov/wanted/counterintelligence/li-fangwei> (last visited Jan. 27, 2014).

91. Press Release, U.S. Dep't of Justice, Fokker Services B.V. Agrees to Forfeit \$10.5 Million for Illegal Transactions with Iranian, Sudanese, and Burmese Entities (June 5, 2014), <http://www.justice.gov/usao/dc/news/2014/jun/14-130.html>.

92. *Id.*

93. *In re* Wind River Systems, Inc. (U.S. Dep't of Commerce, Bureau of Indus. and Sec. Oct. 7, 2014), available at [http://efoia.bis.doc.gov/index.php/component/docman/doc\\_download/959-e2394?Itemid=](http://efoia.bis.doc.gov/index.php/component/docman/doc_download/959-e2394?Itemid=).

94. *Id.*

95. *In re* Esterline Technologies Corporation (U.S. Dep't of State, Bureau of Politico-Military Affairs Mar. 5, 2014), available at [http://pmdtcc.state.gov/compliance/consent\\_agreements/pdf/Esterline\\_CA.pdf](http://pmdtcc.state.gov/compliance/consent_agreements/pdf/Esterline_CA.pdf).

96. Letter from Sue Gainor, Office of Def. Trade Controls Compliance, to Curtis Reusser, President and CEO, Esterline Technologies Corp., (Mar. 2013), available at [http://pmdtcc.state.gov/compliance/consent\\_agreements/pdf/Esterline\\_PCL.pdf](http://pmdtcc.state.gov/compliance/consent_agreements/pdf/Esterline_PCL.pdf).

97. *Id.* at 5.

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nada, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, France, Honduras, India, Liechtenstein, Mexico, South Korea, Spain, and the United Kingdom.<sup>98</sup>

2. *Intersil Enters into \$10 Million Consent Agreement*

Intersil Corporation (Intersil) consented to a \$10 million civil ITAR settlement effective June 16.<sup>99</sup> DDTC alleged 339 violations of the ITAR in connection with unauthorized exports and reexports of radiation-hardened and radiation-tolerant integrated circuits.<sup>100</sup> The violations stemmed largely from Intersil's misapprehension that the circuits were subject to the EAR, rather than the ITAR.<sup>101</sup> Ultimate destinations included Argentina, Austria, Belgium, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong, India, Israel, Italy, Japan, the Netherlands, Norway, Georgia, Russia, Singapore, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.<sup>102</sup>

The DDTC's charging letter stated that several of the violations were likely the result of inaccurate reexport advice that a DDTC official provided to Intersil in 2010. According to correspondence, a DDTC official misinformed Intersil that certain ITAR-controlled items already inadvertently exported as EAR-controlled were not subject to the ITAR's reexport/retransfer restrictions.<sup>103</sup>

C. MAJOR ITAR COURT CASES

On January 28, the U.S. Court of Appeals for the Fourth Circuit upheld a criminal conviction under the Arms Export Control Act (AECA) where the defendant, a Foreign Service Officer employed by the U.S. State Department, attempted to export without a license small arms ammunition to Jordan in anticipation of his assignment there.<sup>104</sup> The Fourth Circuit applied a broader standard of willfulness under the AECA, consistent with criminal cases that have arisen in other federal circuits,<sup>105</sup> by requiring "that willfulness under the AECA requires only general knowledge of illegality."<sup>106</sup> In this case, the court did not require that the defendant knew that the items were defense articles, and therefore required a license.<sup>107</sup> Instead, the defendant's awareness that the underlying conduct was unlawful was sufficient to support a criminal conviction. Moreover, the court considered the evidence that the defendant was an intelligence official and had awareness of the Department of State's policies.<sup>108</sup>

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98. *Id.* at 15.

99. INTERSIL CORP., CURRENT REPORT (FORM 8-K) (June 17, 2014), available at <http://www.fool.com/p/60/www.motleyfoolp.idmanagedsolutions.com/widgets/secFilings/download?id=10056514&downloadType=pdf>.

100. Letter from Sue Gainor, Office of Def. Trade Controls Compliance, to Dr. Necip Sayiner, President, Intersil Corp. (June 2014), available at [https://www.pmdtce.state.gov/compliance/consent\\_agreements/pdf/Intersil\\_%20PCL.pdf](https://www.pmdtce.state.gov/compliance/consent_agreements/pdf/Intersil_%20PCL.pdf).

101. *Id.* at 3.

102. *Id.* at 5–6.

103. *Id.* at 5.

104. *United States v. Bishop*, 740 F.3d 927, 928–29 (4th Cir. 2014).

105. See *United States v. Murphy*, 852 F.2d 1, 7 (1st Cir. 1988); *United States v. Tsai*, 954 F.2d 155, 162 (3d Cir. 1992); *United States v. Roth*, 628 F.3d 827, 835 (6th Cir. 2011).

106. *Bishop*, 740 F.3d at 935.

107. *Id.*

108. *Id.*

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**V. Other OFAC Developments and Enforcement Actions**

On January 12, OFAC and the State Department announced the implementation of the “Joint Plan of Action” (JPOA) as part of the nuclear program negotiations between Iran and the “P5+1” countries (China, France, Germany, Russia, United Kingdom, United States).<sup>109</sup> Under the JPOA, and in conjunction with the European Union, the U.S. Government agreed to provide limited, temporary, and reversible sanctions relief to Iran. The JPOA sanctions relief was initially in effect between January 20 and July 20,<sup>110</sup> but was later extended first to November 24,<sup>111</sup> and again to June 30, 2015.<sup>112</sup> Subject to various conditions and limitations, the JPOA resulted in the suspension of certain U.S. secondary (or extraterritorial) sanctions targeting exports of Iran’s petrochemical products, automotive industry, trade in gold and other precious metals, and petroleum and petroleum products.<sup>113</sup> Except for an OFAC licensing policy for certain exports of goods or services to ensure the safe operation of commercial passenger aircraft for certain Iranian airlines,<sup>114</sup> the comprehensive Iran-related prohibitions on parties subject to the Iranian Transactions and Sanctions Regulations (ITSR) were not affected by the JPOA. Finally, a mechanism to facilitate payments from Iran for humanitarian and certain other transactions was established as part of the JPOA.<sup>115</sup>

Notwithstanding the JPOA, other U.S. sanctions targeting Iran remain in place and have been actively enforced by OFAC and the State Department. In 2014, OFAC announced several rounds of SDN designations under U.S. terrorism and weapons of mass destruction proliferation sanctions programs for parties evading U.S. sanctions targeting Iran,<sup>116</sup> and the State Department imposed sanctions against two parties under the Iran

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109. See Press Release, U.S. Dep’t of the Treasury, Implementation of the Joint Plan of Action (Jan. 20, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140120.aspx>; *see also* OFAC, Joint Plan of Action (Nov. 24, 2013), *available at* [http://eeas.europa.eu/statements/docs/2013/131124\\_03\\_en.pdf](http://eeas.europa.eu/statements/docs/2013/131124_03_en.pdf).

110. U.S. Dep’t of the Treasury, Guidance Related to the Provision of Certain Temporary Sanctions Relief in Order to Implement the Joint Plan of Action Reached on November 24, 2013, between the P5+1 and the Islamic Republic of Iran (Jan. 20, 2014), *available at* [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa\\_guidance.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa_guidance.pdf).

111. U.S. Dep’t of the Treasury, Guidance Related to the Provision of Certain Temporary Sanctions Relief in Order to Implement the Joint Plan of Action Reached on November 24, 2013, between the P5+1 and the Islamic Republic of Iran as Extended Through November 24, 2014 (Jul. 21, 2014), *available at* [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa\\_guidance\\_ext.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa_guidance_ext.pdf).

112. U.S. Dep’t of Treasury, Guidance Relating to the Provision of Certain Temporary Sanctions Relief in Order to Implement the Joint Plan of Action Reached on November 24, 2013, Between the P5 + 1 and the Islamic Republic of Iran, as Extended through June 30, 2015 (Nov. 25, 2014), *available at* [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/guidance\\_ext\\_11252004.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/guidance_ext_11252004.pdf).

113. See Joint Plan of Action, *supra* note 109, at 3.

114. OFAC, Amended Statement of Licensing Policy on Activities Related to the Safety of Iran’s Civil Aviation Industry (Jul. 21, 2014), *available at* [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/civil\\_aviation\\_slp\\_iran\\_ext.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/civil_aviation_slp_iran_ext.pdf); *see also* OFAC, Statement of Licensing Policy on Activities Related to the Safety of Iran’s Civil Aviation Industry (Jan. 20, 2014), *available at* [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/civil\\_aviation\\_slp\\_iran.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/civil_aviation_slp_iran.pdf).

115. See Joint Plan of Action, *supra* note 109, at 3.

116. See, e.g., Press Release, U.S. Dep’t of the Treasury, Counter Terrorism Designations; Iran Sanctions Designations; Non-proliferation Designations (Feb. 6, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140206.aspx>; Press Release, U.S. Dep’t of the Treasury, Treasury Targets Networks Linked to Iran (Feb. 6, 2014), *available at* <http://www.treasury.gov/press-center/press>

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Sanctions Act and the Iran Freedom and Counter-Proliferation Act.<sup>117</sup> OFAC also published a separate Foreign Sanctions Evaders (FSE) List in February 2014, with specific parties being accused of evading U.S. sanctions targeting Iran.<sup>118</sup> These FSEs have not had their property or property interests subject to U.S. jurisdiction blocked, as is the case with SDNs, but U.S. persons are generally prohibited from engaging in any dealings with FSEs.<sup>119</sup>

In 2014, OFAC issued a new general license and expanded certain general licenses under the ITSR. On February 7, OFAC issued Iran General License D-1 (GL-D1) to replace Iran General License D (GL-D) from May 2013.<sup>120</sup> GL-D1 expanded the scope of GL-D's authorization with respect to the exportation and reexportation of certain services, software, and hardware incident to the exchange of personal communications with persons in Iran.<sup>121</sup> Among other things, GL-D1 expanded authorizations for parties subject to the ITSR to export to Iran certain hardware and software not subject to the EAR and for parties not subject to the ITSR to export to Iran similar hardware and software subject to the EAR.<sup>122</sup> On March 20, OFAC issued Iran General License G to authorize: (a) accredited U.S. academic institutions to establish and operate undergraduate and graduate academic exchange agreements with Iranian universities; and (b) exports to Iran of certain educational services or the administration of university entrance and other examinations for Iranian students.<sup>123</sup> On April 7, OFAC expanded the scope of the "Ag/Med" general license at ITSR section 560.530 to (a) expand the definition of "agricultural commodities;" (b) clarify that eligible items include those not subject to the EAR; (c) authorize parties not subject to the ITSR to export to Iran eligible items subject to the EAR; and (d) authorize the export to Iran of replacement parts for certain medical devices limited to a one-for-one export.<sup>124</sup>

OFAC announced its Revised Guidance on August 13.<sup>125</sup> The February 2008 version of that guidance, which was subsequently incorporated into OFAC's regulations, provided

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releases/Pages/jl2287.aspx; Press Release, U.S. Dep't of the Treasury, Counter Terrorism Designations; Iran Sanctions Designations; Non-proliferation Designations (Aug. 29, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140829.aspx>; Press Release, U.S. Dep't of the Treasury, Treasury Targets Networks Linked to Iran (Aug. 29, 2014), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/jl2618.aspx>.

117. Persons on Whom Sanctions Have Been Imposed Under the Iran Sanctions Act of 1996 and the Iran Freedom and Counter-Proliferation Act of 2012, 79 Fed. Reg. 59,890 (Oct. 3, 2014).

118. OFAC, *Identification of Foreign Sanctions Evaders and the Publication of a New Foreign Sanctions Evaders List*, U.S. Dep't of the Treasury (Feb. 6, 2014), [http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/fse\\_list\\_intro.aspx](http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/fse_list_intro.aspx).

119. *Id.*

120. See Department of the Treasury, ITSR General License D-1 (effective Feb. 7, 2014), *available at* [www.treasury.gov/resource-center/sanctions/Programs/Documents/iran\\_gld1.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_gld1.pdf); see also OFAC, *Questions Relating to Iranian General License D-1*, U.S. DEP'T OF THE TREASURY, [http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques\\_index.aspx#iran\\_gld1](http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx#iran_gld1) (last visited Jan. 27, 2015).

121. ITSR General License D-1, *supra* note 120, at 1.

122. *Id.* at 1-2.

123. Dep't of the Treasury, ITSR General License G (effective Mar. 20, 2014), *available at* [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran\\_glg.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_glg.pdf).

124. 31 C.F.R. § 560.530 (2014).

125. *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked*, U.S. DEP'T OF TREASURY, [http://www.treasury.gov/resource-center/sanctions/Documents/licensing\\_guidance.pdf](http://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf) (last visited Jan. 17, 2015) [hereinafter Revised Guidance].

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that an entity 50 percent or more owned by a single SDN was itself considered to be an SDN, even though it is not identified on the SDN List.<sup>126</sup> Under the revised OFAC Guidance, an entity may also be considered an SDN if it is 50 percent or more owned by one or more SDNs.<sup>127</sup> The agency issued several “FAQs” to explain the practical application of this revised rule. The FAQs noted that the revised OFAC Guidance also applies to entities 50 percent or more owned by one or more parties on the Sectoral Sanctions Identifications (SSI) List.<sup>128</sup>

On October 17, OFAC published its “Guidance Related to the Provision of Humanitarian Assistance by Not-For-Profit Non-Governmental Organizations,” which is intended to clarify the reach of economic sanctions for NGOs involved in humanitarian activities by highlighting the existence of humanitarian general licenses and clarifying certain SDN-related compliance issues.<sup>129</sup>

OFAC amended regulations related to U.S. sanctions targeting Syria, Burma, and Zimbabwe. In May, OFAC reissued in their entirety the Syrian Sanctions Regulations (SSR) to incorporate prohibitions in six existing Executive Orders, as well as general licenses and licensing policies previously found on OFAC’s website.<sup>130</sup> In particular, the SSR now incorporate the broad prohibitions in Executive Order 13582 from August 2011, and the reissued SSR include some changes to existing general licenses and new general licenses.<sup>131</sup> Similarly, in July, OFAC reissued in their entirety the Burmese Sanctions Regulations to incorporate existing Executive Orders and general licenses previously found only on the agency’s website.<sup>132</sup> In the same month, OFAC also adopted as a final rule the Zimbabwe Sanctions Regulations with some changes to the 2004 version, which were proposed as an interim final rule.<sup>133</sup>

OFAC also instituted two new SDN List-based programs. In April, OFAC issued Executive Order 13664 addressing parties who threaten the peace, security, or stability of South Sudan,<sup>134</sup> which was incorporated in July into the South Sudan Sanctions Regulations.<sup>135</sup> In May, OFAC implemented United Nations’ sanctions related to the CAR by issuing Executive Order 13667, which targeted certain persons contributing to the conflict in the CAR.<sup>136</sup> This order was incorporated into the Central African Republic Sanctions

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126. See, e.g., 31 C.F.R. § 537.425 (2012); 31 C.F.R. § 537.416 (2014); 31 C.F.R. § 552.406 (2012).

127. Revised Guidance, *supra* note 125.

128. *Questions Related to Entities Owned by Persons Whose Property and Interests in Property are Blocked*, U.S. DEP’T OF TREASURY, [http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques\\_index.aspx#50\\_percent](http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx#50_percent) (last visited Jan.27, 2015).

129. *Guidance Related to the Provision of Humanitarian Assistance by Non-for-Profit Non-Governmental Organizations*, U.S. DEP’T OF TREASURY, [http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo\\_humanitarian.pdf](http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ngo_humanitarian.pdf) (last visited Jan. 27, 2015).

130. Syrian Sanctions Regulations, 79 Fed. Reg. 25,414-01 (May 2, 2014) (to be codified at 31 C.F.R. pt. 542).

131. See *id.*

132. Burmese Sanctions Regulations, 79 Fed. Reg. 37,106-01 (June 30, 2014) (to be codified at 31 C.F.R. pt. 537).

133. Zimbabwe Sanctions Regulations, 79 Fed. Reg. 39,312-01 (July 10, 2014) (to be codified at 31 C.F.R. pt. 541).

134. Exec. Order No. 13,664, 79 Fed. Reg. 19,283 (Apr. 3, 2014).

135. South Sudan Sanctions Regulations, 79 Fed. Reg. 37,190-01 (July 1, 2014) (to be codified at 31 C.F.R. pt. 558).

136. Exec. Order No. 13,667, 79 Fed. Reg. 28,387 (May 12, 2014).

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Regulations in July.<sup>137</sup> Several individuals have since been designated as SDNs under Executive Orders 13664 and 13667.<sup>138</sup>

Finally, in 2014, OFAC imposed the largest single penalty in its history as part of a year in which it imposed its largest amount of penalties in aggregate. As of November 30, 2014, OFAC had entered into twenty announced settlements during calendar year 2014, totaling \$1,176,124,975.<sup>139</sup> The largest of these settlements was with BNP Paribas S.A. (BNPP) for \$963,619,900, which settled BNPP's civil liability for apparent violations of sanctions targeting Sudan, Iran, Cuba, and Burma.<sup>140</sup> The BNPP settlement was part of a global settlement totaling \$8.9 billion with the Justice Department, the New York County District Attorney's Office, the Federal Reserve Board of Governors, and the Department of Financial Services of the State of New York (NYDFS).<sup>141</sup> OFAC determined that BNPP's apparent violations were not voluntarily self-disclosed; its actions were egregious; and it acted with reckless disregard for U.S. sanctions regulations.<sup>142</sup>

On January 23, OFAC announced that Clearstream Banking S.A. (Clearstream) agreed to a \$151,902,000 settlement for apparent ITSR violations in relation to its maintenance of an account at a U.S. financial institution through which the Central Bank of Iran (CBI) maintained a beneficial ownership interest in securities held in custody at a central securities depository in the United States.<sup>143</sup> Clearstream failed to properly remedy this sanctions compliance issue after meeting with OFAC officials in late 2007 and early 2008.<sup>144</sup> OFAC determined that Clearstream's apparent violations were reckless and not voluntarily self-disclosed, and that Clearstream's actions were egregious.<sup>145</sup>

OFAC's third largest settlement in 2014 was with Fokker Services B.V. for \$50,992,208 to settle potential civil liability for apparent violations of the Iranian and Sudanese sanctions.<sup>146</sup> This settlement was part of a global settlement with the BIS and the Department of Justice's U.S. Attorney's Office for the District of Columbia.<sup>147</sup>

Separately, the NYDFS imposed additional penalties in 2014 on a bank with which it had previously reached a sanctions-related settlement. In November, NYDFS ordered Bank of Tokyo Mitsubishi UFJ (BTMU) to pay an additional \$315 million penalty and accept additional administrative measures, primarily for having pressured a consultant to

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137. Central African Republic Sanctions Regulations, 79 Fed. Reg. 38,248-01 (July 7, 2014) (to be codified at 31 C.F.R. pt. 553).

138. *OFAC Sanctions Resources and Recent Actions*, PRICE BENOWITZ LLP, available at <http://ofaclawyer.net/resources.html> (last visited Jan. 27, 2015).

139. *Civil Penalties and Enforcement Information*, U.S. DEP'T OF TREASURY, <http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx> (last visited Jan. 27, 2015).

140. *Enforcement Information for June 30, 2014*, U.S. DEP'T OF TREASURY, [http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140630\\_bnp.pdf](http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140630_bnp.pdf) (last visited Jan. 27, 2015).

141. *Id.*

142. *Id.*

143. *Enforcement Information for January 23, 2014*, U.S. DEP'T OF TREASURY, [http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123\\_clearstream.pdf](http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream.pdf) (last visited Jan. 27, 2015).

144. *Id.*

145. *Id.*

146. *Enforcement Information for June 5, 2014*, U.S. DEP'T OF TREASURY, [http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140605\\_fokker.pdf](http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140605_fokker.pdf) (last visited Jan. 27, 2015).

147. *Id.*

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remove key warnings to regulators in a report that BTMU submitted to NYDFS.<sup>148</sup> In June 2013, BTMU agreed to a \$250 million settlement with NYDFS for related sanctions compliance issues.<sup>149</sup>

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148. Press Release, N.Y. State Dep't of Fin. Servs., NYDFS Announces Bank of Tokyo Mitsubishi UFJ to Pay Additional \$315 Million Penalty for Misleading Regulator, Individual Bank Employees will Resign and Accept Bans (Nov. 18, 2014), *available at* <http://www.dfs.ny.gov/about/press2014/pr1411181.htm>.

149. *Id.*

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## International Antitrust

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This article outlines the year's most important antitrust developments in thirteen jurisdictions.

### I. Australia

#### A. LEGISLATIVE DEVELOPMENTS

There were no relevant amendments of Australian law in 2014. The Competition Policy Review released a draft report in September with recommendations on misuse of market power prohibitions, cartel prohibitions, replacing bespoke price signaling laws with “concerted practices” laws, changing the unused formal merger clearance process, and removing *per se* prohibitions on third line forcing.<sup>2</sup>

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1. Nikiforos Iatrou & Bronwyn Roe, WeirFoulds LLP (CAN.); Paul Schoff, Katrina Groshinski & Eric White, Minter Ellison (AUS); Ana Carolina Estevão & Maria Cecilia Andrade, Mattos Muriel Kestener Advogados (BRA); Adam S. Goodman, Dentons Canada LLP (CAN); Peter Wang & Yizhe Zhang, Jones Day (PRC); Laurie-Anne Grelier & Peter Camesasca, Covington & Burling LLP (EU); Aurélien Condomines, Aramis Société d'Avocats (FRA); Vinod Dhall & Sonam Mathur, Vinod Dhall and TT&A (IND); Tal Eyal-Boger & Ziv Schwartz, Fischer Behar Chen Well Orion & Co. (ISR); Gerardo Calderon-Villegas, Baker & McKenzie, S.C. (MEX); Vassily Rudomino, Ksenia Tarkhova, Roman Vedernikov & Alla Azmukhanova, ALRUD Law Firm (RUS); Heather Irvine & Lara Granville, Norton Rose Fulbright (S. AFR); Philipp Girardet & Rahul Saha, King & Wood Mallesons (UK); William F. Cavanaugh, Robert P. LoBue, Deirdre A. McEvoy, Terra Hittson & J. Taylor Kirklín, Patterson Belknap Webb & Tyler LLP (USA). The editors thank Robert Eisenberg and James White, students at WeirFoulds LLP, for their assistance.

2. *The Draft Report*, COMPETITION POLICY REV. (Sept. 22, 2014), <http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf>.

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**B. MERGERS**

The Australian Competition and Consumer Commission (ACCC) opposed four proposed transactions, including the acquisition of a state-owned electricity generator by an electricity retailer. Subsequently, the Australian Competition Tribunal (ACT) authorized the merger on public benefit grounds, the first ever merger authorization from ACT.<sup>3</sup>

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

The ACCC unsuccessfully prosecuted two airlines on price fixing charges for airfreight services, as the relevant conduct was found not to have occurred in a “market in Australia.”<sup>4</sup> The ACCC has not announced whether it will appeal.

In late 2013, the ACCC unsuccessfully prosecuted ANZ Bank for allegedly entering into an anticompetitive agreement with a distributor (mortgage broker).<sup>5</sup> In considering a similar distribution relationship, the Federal Court found that a travel agent attempted to enter into anti-competitive arrangements with several airlines and imposed a fine of A\$11 million.<sup>6</sup> Both decisions have been appealed.<sup>7</sup>

The ACCC released a revised immunity policy for cartel conduct, removing the “clear leader” exception and clarifying immunity process and requirements.<sup>8</sup>

**D. ABUSE OF DOMINANCE**

Pfizer faced proceedings alleging misuse of market power and exclusive dealing in relation to the supply of a generic version of the “blockbuster” drug atorvastatin, ahead of the expiry of Pfizer’s patent.<sup>9</sup> Judgment is expected in 2015.

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3. *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Ltd.* [2014] ACompT 1 (Competition Tribunal) (Austl.).

4. *ACCC v Air New Zealand Ltd.* [2014] FCA 1157 (Fed. Court of Austl.).

5. *ACCC v Australia & New Zealand Bank. Grp. Ltd.* [2013] FCA 1206 (Fed. Court of Austl.).

6. *ACCC v Flight Centre Ltd. (No 3)* [2014] FCA 292 (Fed. Court of Austl.); *ACCC v Flight Centre Ltd. (No 2)* [2013] FCA 1313 (Fed. Court of Austl.); see also Press Release, Austl. Competition & Consumer Comm’n, \$11 million penalties imposed on Flight Centre (Mar. 28, 2014), available at <http://www.accc.gov.au/media-release/11-million-penalties-imposed-on-flight-centre>.

7. *ACCC v Flight Centre Ltd.*, AUSTRALIAN COMPETITION LAW, <http://www.australiancompetitionlaw.org/cases/2013flightcentre.html#appeal> (last visited Jan. 23, 2015).

8. *ACCC immunity and cooperation for cartel conduct*, AUSTRALIAN COMPETITION & CONSUMER COMM’N (Sept. 2014), [https://www.accc.gov.au/system/files/884\\_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct\\_FA.pdf](https://www.accc.gov.au/system/files/884_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct_FA.pdf).

9. Press Release, Austl. Competition & Consumer Comm’n, ACCC takes action against Pfizer Australia for alleged anti-competitive conduct (Feb. 13, 2014), available at <https://www.accc.gov.au/media-release/accc-takes-action-against-pfizer-australia-for-alleged-anti-competitive-conduct>.

## II. Brazil

### A. LEGISLATIVE DEVELOPMENTS

The Administrative Council for Economic Defense's (CADE) Resolution No. 2 sets out the procedures for filing merger transactions and prescribes the requisite filing form.<sup>10</sup> It also addresses: (i) the concept of an economic group, (ii) what transactions should be filed under the summary proceeding, and (iii) when minority shareholdings must be notified. In 2014, Resolution No. 2 was amended to: (i) alter the concept of economic group for investment funds, (ii) exempt proposed consolidation of control from notification, and (iii) increase market share thresholds for vertically integrated companies eligible for the summary proceeding from twenty percent to thirty percent.<sup>11</sup>

CADE published another resolution in 2014<sup>12</sup> defining the concept of "associative agreement" for mandatory filing.<sup>13</sup> According to this resolution, an agreement shall be considered associative if its term exceeds two years and results in horizontal or vertical cooperation or in risk sharing, creating an interdependent relationship between parties. Now, an interdependent relationship arises when the joint market share in horizontal agreements exceeds twenty percent, or, for vertical agreements, one of party's share exceeds thirty percent and (i) the parties share revenues or losses or (ii) the agreement mandates exclusivity.

### B. MERGERS

CADE rejected the first proposed merger under the New Antitrust Law. The acquisition of Solvay Indupa by Braskem was rejected on grounds that it would harm competition in the polyvinyl chloride market in South America.<sup>14</sup>

CADE's General Superintendence (GS) recommended the approval of the multijurisdictional merger of Holcim and Lafarge, conditional on a Merger Control Agreement, because the transaction would result in a high market concentration in the cement and ready-mix concrete markets in parts of Brazil.<sup>15</sup>

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10. Resolução No. 2, de 29 de maio de 2012 (Resolution No. 2), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.10.2014 (Braz.).

11. Resolução No. 9, de 1 de outubro de 2014 (Resolution No. 9), DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.10.2014 (Braz.).

12. Resolução No. 10, de 29 outubro de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 4.11.2014 (Braz.).

13. Lei No. 12.529, de 30 de novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.A.] de 1.12.2011 (Braz.).

14. C.A.D.E. [Administrative Council of Economic Defense], Ato de Concentração No. 08700.000436/2014-27, Relator: Conselheiro Gilvandro Vasconcelos Coelho de Araujo, 12.11.2014, 215, DIÁRIO OFICIAL DE UNIÃO [D.O.U.], 6.11.2014, 32 (Braz.); *Químicos Defendem Venda da Solvay a Braskem*, ABCD MAIOR (Nov. 13, 2014), [http://www.abcdmaior.com.br/noticia\\_exibir.php?noticia=63021](http://www.abcdmaior.com.br/noticia_exibir.php?noticia=63021).

15. C.A.D.E. [Administrative Council of Economic Defense], Ato de Concentração No. 08700.007621/2014-42, Relator: Conselheiro Alessandro Serafin Octaviani Luis, 10.12.2014, 235, DIÁRIO OFICIAL DE UNIÃO [D.O.U.], 17.12.2014, 32 (Braz.).

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C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

CADE censured a cement cartel, marking the first ever imposition of divestitures in a cartel case.<sup>16</sup> R\$3.1 billion in fines were imposed on companies, individuals, and organizations. A motion for clarification is pending.

D. ABUSE OF DOMINANCE

The GS accused Telemar Norte Leste of abusing its dominance in telecommunications.<sup>17</sup> The company is said to have previously monitored its clients' phone calls to a new entrant's call center in 2000, when Telemar had roughly ninety percent market share.<sup>18</sup>

E. COURT DECISIONS

CADE has appealed from a Supreme Federal Court's (SFC) decision allowing any federal court to hear challenges to CADE's decisions. CADE argues that such claims should be filed before the Supreme Federal Court in Brasilia.<sup>19</sup>

In June, the SFC denied CADE's extraordinary appeal regarding jurisdiction over bank mergers, confirming the Brazilian Central Bank's exclusive jurisdiction over bank mergers.<sup>20</sup>

### III. Canada

A. LEGISLATIVE DEVELOPMENTS

There were no significant legislative amendments in Canada this year, but the Competition Bureau (Bureau) released new guidance regarding communications during the course of its inquiries;<sup>21</sup> price maintenance;<sup>22</sup> and intellectual property.<sup>23</sup>

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16. C.A.D.E. [Administrative Council of Economic Defense], Processo Administrativo No. 08012.011142/2006-79, Relator: Conselheiro Gilvandro Vasconcelos Coelho de Araujo, 21.5.2014, 96, DIÁRIO OFICIAL DE UNIÃO [D.O.U.], 22.5.2014, 24 (Braz.).

17. Processo Administrativo [Administrative Proceeding] No. 08012.003918/2005-04, Telemar Norte Leste S/A., Judgment.

18. *Telemar Norte Leste Highlights From 4th Quarter/01*, SEC, [http://www.sec.gov/Archives/edgar/containers/fix029/1066113/02/000106611302000010/t3\\_exp-010302.txt](http://www.sec.gov/Archives/edgar/containers/fix029/1066113/02/000106611302000010/t3_exp-010302.txt) (last visited Jan. 25, 2014).

19. S.T.F. [Supreme Federal Trib.], Recurso Extraordinário No. 627.709 D.F., Relator: Min. Ricardo Lewandowski, 20.8.2014, 170, DIÁRIO OFICIAL DE UNIÃO [D.O.U.], 3.9.2014, 34 (Braz.).

20. S.T.F. [Supreme Federal Trib.], Recurso Extraordinário No. 664.189 D.F., Relator: Min. Dias Toffoli, 9.6.2014, 148, DIÁRIO OFICIAL DE UNIÃO [D.O.U.], 31.6.2014, 644, 644-645 (Braz.).

21. *Bulletin: Communication During Inquiries*, CAN. COMPETITION BUREAU (June 26, 2014), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-doc-com-inquiries-e.pdf/\\$FILE/cb-doc-com-inquiries-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-doc-com-inquiries-e.pdf/$FILE/cb-doc-com-inquiries-e.pdf).

22. *Enforcement Guidelines: Price Maintenance (Section 76 of the Competition Act)*, CAN. COMPETITION BUREAU (Sept. 15, 2014), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-eg-price-maintenance-e.pdf/\\$file/cb-eg-price-maintenance-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-eg-price-maintenance-e.pdf/$file/cb-eg-price-maintenance-e.pdf).

23. *Enforcement Guidelines: Intellectual Property*, CAN. COMPETITION BUREAU (Sept. 18, 2014), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-eg-ipegs-e.pdf/\\$file/cb-eg-ipegs-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-eg-ipegs-e.pdf/$file/cb-eg-ipegs-e.pdf).

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**B. MERGERS**

The Bureau sought structural and behavioral merger remedies, notwithstanding its traditional preference for the former.<sup>24</sup> For example, Loblaw's acquisition of Shoppers Drug Mart was approved subject to the divestiture of certain stores and behavioral restrictions regarding suppliers.<sup>25</sup>

Burger King's C\$12.5 billion acquisition of Tim Hortons was cleared without remedies due to remaining competition.<sup>26</sup>

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

The Bureau ceased its LIBOR investigations but remained active in international and domestic cartel investigations.<sup>27</sup> For example, the Bureau obtained fines from Japanese bearings manufacturer NSK and Panasonic.<sup>28</sup>

**D. ABUSE OF DOMINANCE**

The Bureau settled against two water heater companies regarding return policies that allegedly prevented consumer switching.<sup>29</sup> Settlements were also reached following eBook pricing investigations,<sup>30</sup> although retailer Kobo is challenging those settlements.<sup>31</sup>

**E. COURT DECISIONS**

A Competition Tribunal decision concerning access restrictions for the Toronto Multiple Listing Service was overturned.<sup>32</sup> This decision establishes that an industry association can be found to engage in anticompetitive behavior under the abuse of dominance provisions.

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24. *Bulletin: Merger Remedies in Canada*, CAN. COMPETITION BUREAU (Sept. 22, 2006), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/Mergers\\_Remedies\\_PDF\\_EN1.pdf/\\$FILE/Mergers\\_Remedies\\_PDF\\_EN1.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/Mergers_Remedies_PDF_EN1.pdf/$FILE/Mergers_Remedies_PDF_EN1.pdf).

25. *Competition Bureau Review of the Proposed Acquisition of Shoppers Drug Mart Corporation by Loblaw Companies Limited, Position Statements*, CAN. COMPETITION BUREAU (Mar. 21, 2014), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03703.html>.

26. Press Release, Can. Competition Bureau, Competition Bureau clears Burger King/Tim Hortons merger (Oct. 28, 2014), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03828.html>.

27. Press Release, Can. Competition Bureau, Competition Bureau Discontinues Its LIBOR Investigation (Jan. 3, 2014), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03642.html>.

28. Press Release, Can. Competition Bureau, Japanese Bearings Manufacturer Fined \$4.5 Million (Jan. 30, 2014), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03652.html>; Press Release, Can. Competition Bureau, Panasonic Fined \$4.7 Million for Rigging Bids (Feb. 20, 2014), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03669.html>.

29. Press Release, Can. Competition Bureau, Competition Bureau Strengthens Competition in Ontario's Water Heater Industry (Nov. 6, 2014), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03836.html>.

30. Press Release, Can. Competition Bureau, Competition Bureau Takes Action to Promote Competition for ebooks (Feb. 7, 2014), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03658.html>.

31. *Kobo Inc. v Commissioner of Competition*, 2014 Comp Trib 2 (Can.).

32. *Comm'r of Competition v. Toronto Real Estate Bd.*, 2014 F.C.A. 29 (Can. Fed. C.A.).

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A class action concerning alleged price fixing for polyether polyol was certified in March,<sup>33</sup> following the Supreme Court of Canada's "Trilogy," which decided that indirect purchasers have a cause of action.<sup>34</sup>

#### IV. China

##### A. LEGISLATIVE DEVELOPMENTS

The Ministry of Commerce (MOFCOM), responsible for merger review under the Anti-Monopoly Law (AML), published Rules on Thresholds for Simple Cases<sup>35</sup> and updated the Guidelines for Notification of Concentration.<sup>36</sup> The National Development and Reform Commission (NDRC), responsible for non-merger price violations, issued Rules on Reporting of Price Related Violations<sup>37</sup> and Rules on Administrative Penalty for Price-Related Violations.<sup>38</sup> The State Administration for Industry and Commerce (SAIC), responsible for non-merger non-pricing antitrust enforcement, issued draft rules on antitrust and intellectual property rights for comment.

##### B. MERGERS

MOFCOM unconditionally cleared over 150 mergers<sup>39</sup> and cleared twenty-three under the simple case procedure.<sup>40</sup> MOFCOM imposed conditions in four cases<sup>41</sup> and blocked the proposed P3 Network alliance of major shipping companies.<sup>42</sup>

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33. *Crosslink Technology Inc. v. BASF Canada*, 2014 ONSC 1682 (Can. Ont. S.C.J.) (unreported).

34. *Infinion Tech. AG v. Option consommateurs*, [2013] 3 S.C.R. 600 (Can.); *Sun-Rype Prods. Ltd. v. Archer Daniels Midland Co.*, [2013] 3 S.C.R. 545 (Can.); *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, [2013] 3 S.C.R. 477 (Can.).

35. *Guanyu Jingyingzhe Jizhong Jianyi Anjian Shiyong Biaozhun de Zanxing Guiding* [Interim Provisions on the Standards Applicable to Simple Cases of Concentration of Undertakings promulgated by the People's Rep. of China MOFCOM, Feb. 11, 2014, effective Feb. 12, 2014] (China), *available at* <http://fldj.mofcom.gov.cn/article/c/201409/20140900743277.shtml>.

36. *Guanyu jingying zhe jizhong shenbao de zhidao yijian* [Guiding Opinions on the Application for Concentration of Undertakings (promulgated by the People's Rep. of China MOFCOM, June 6, 2014, effective June 6, 2014) (China), <http://fldj.mofcom.gov.cn/article/c/201406/20140600614679.shtml>].

37. *Jiage Weifa Xingwei Jubao Chuli* [Rules on Reporting of Price Related Violations promulgated by National Development and Reform Commission, Jan. 15, 2014, effective May 1, 2014] (China), *available at* [http://jjs.ndrc.gov.cn/zcfg/201401/t20140121\\_576448.html](http://jjs.ndrc.gov.cn/zcfg/201401/t20140121_576448.html).

38. *Guifan Jiage Xingzheng Chufaquan de Ruogan* [Rules on Reporting of Price Related Violations promulgated by National Development and Reform Commission, June 7, 2014, effective July 1, 2014] (China), *available at* [http://jjs.ndrc.gov.cn/zcfg/201406/t20140618\\_615520.html](http://jjs.ndrc.gov.cn/zcfg/201406/t20140618_615520.html).

39. *See generally* Unconditional Clearance of Concentrations of Undertakings webpages (the People's Rep. of China MOFCOM) (China), <http://fldj.mofcom.gov.cn/article/zcfb/201404/20140400540463.shtml>; *id.* *available at* <http://fldj.mofcom.gov.cn/article/zcfb/201407/20140700650711.shtml>; *id.* *available at* <http://fldj.mofcom.gov.cn/article/zcfb/201410/20141000755915.shtml>.

40. Simple Case Procedure Cases the People's Rep. of China MOFCOM) (China), *available at* <http://fldj.mofcom.gov.cn/article/jyzjzyajgs/>.

41. Conditional Approval Decisions webpage (the People's Rep. of China MOFCOM) (China), *available at* <http://fldj.mofcom.gov.cn/article/ztxx>.

42. Notice of Antitrust Review Decisions on Prohibiting Concentration of Maersk, MSC, and CMA to Establish Network-Centric Business Promulgated by the People's Republic of China MOFCOM, June 17, 2014) (China), <http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml>.

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C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Examples of NDRC and SAIC investigations and penalties include: (1) fines of US\$195 million against auto parts manufacturers for price fixing;<sup>43</sup> (2) fines of US\$3 million against glasses and contact lens companies for price maintenance;<sup>44</sup> (3) settling with InterDigital regarding allegations of, among other things, unfairly high royalties;<sup>45</sup> and (4) investigations against Microsoft, Qualcomm, TetraPak, and others for potential abuses of dominance.<sup>46</sup>

Dawn raids were employed in cartel, vertical restraint, and abuse of dominance cases.

D. COURT DECISIONS

China's Supreme People's Court (SPC) rendered its first decision under the AML,<sup>47</sup> setting a precedent for market definition, the assessment of dominance and abusive conduct, and the use of economic analysis.

V. European Union

A. LEGISLATIVE DEVELOPMENTS

In November, Margrethe Vestager succeeded Joaquín Almunia as the European Commission's (EC) Competition Commissioner, with a mission to promote a more economic approach to antitrust enforcement, focusing on financial services, energy policy, the digital single market, state aid, and tax evasion.<sup>48</sup>

Before this transition, the EC adopted revised technology transfer rules,<sup>49</sup> and considered extending the merger notification system to acquisitions of minority shareholdings.<sup>50</sup> Legislation was adopted to facilitate damages claims for antitrust violations.<sup>51</sup>

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43. Administrative Penalty Decisions Promulgated by National Development and Reform Commission (China), available at <http://jjs.ndrc.gov.cn/fjgld>.

44. Press Release, Nat'l Dev. and Reform Comm'n, Glasses and Contact Lens Companies Fined for Retail Price Maintenance (May 29, 2014).

45. Press Release, Nat'l Dev. and Reform Comm'n, NDRC Suspends Investigation against InterDigital Regarding Alleged Price Monopoly (May 22, 2014).

46. Press Release, China, Anti-trust Law Enforcement (Sep. 11, 2014), *Microsoft Targeted in China Antitrust Probe*, FT, July 28, 2014, <http://www.ft.com/cms/s/0/355714d0-1665-11e4-93ec-00144feabdc0.html#axzz3JyPjLJzx>.

47. Press Release, SPC, The Supreme Court Announced Final Decision on the First Anti-trust Case (Oct. 16, 2014).

48. Margrethe Vestager, *Letter of mission* (Nov. 1, 2014), [http://ec.europa.eu/commission/sites/cwt/files/commissioner\\_mission\\_letters/vestager\\_en.pdf](http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/vestager_en.pdf).

49. Press Release, Eur. Comm'n, Antitrust: Commission adopts revised competition regime for technology transfer agreements (Mar. 21, 2014), available at [http://europa.eu/rapid/press-release\\_IP-14-299\\_en.htm](http://europa.eu/rapid/press-release_IP-14-299_en.htm).

50. *Towards more effective EU Merger control*, WHITE PAPER (July 9, 2014), available at [http://ec.europa.eu/competition/consultations/2014\\_merger\\_control/mergers\\_white\\_paper\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf).

51. Press Release, Eur. Comm'n, Antitrust: Commission welcomes Council adoption of Directive on anti-trust damages actions (Nov. 10, 2014), available at [http://europa.eu/rapid/press-release\\_IP-14-299\\_en.htm](http://europa.eu/rapid/press-release_IP-14-299_en.htm).

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**B. MERGERS**

The cement industry generated several deals in 2014: the EC cleared asset swaps between Holcim and Cemex in France, Germany, the Netherlands,<sup>52</sup> and Spain.<sup>53</sup> The EC also gave its green light to the proposed “megamerger” between Holcim and Lafarge, subject to conditions.<sup>54</sup>

The EC imposed a \_20 million fine on Marine Harvest for failure to notify of its acquisition of Morpol,<sup>55</sup> the second largest EC “gun jumping” fine since *Electrabel*.

**C. ANTICOMPETITIVE PRACTICES**

The EC issued nine cartel decisions, with fines totaling \_1.7 billion,<sup>56</sup> and announced that more fines are to be expected in the ongoing auto parts investigations.<sup>57</sup> Additionally, in its second decision concerning reverse-payment patent settlements, the EC imposed fines totaling \_428 million on Servier and five generic pharmaceutical companies.<sup>58</sup>

**D. ABUSE OF DOMINANCE**

In its first smartphone “patent wars” decision, the EC found that Motorola abused its dominance by seeking an injunction against Apple on the basis of its standard essential patents.<sup>59</sup> The investigation of Google’s search and advertising services continues, after Google’s three successive remedy packages were considered unsatisfactory.<sup>60</sup>

**E. COURT DECISIONS**

The EU Court of Justice underscored that the concept of infringement “by object” (which is close to a *per se* infringement) must be reserved to the most serious types of (i.e.,

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52. Press Release, Eur. Comm’n, Mergers: Commission approves acquisition of Cemex West by Holcim in the building materials sector (June 5, 2014), *available at* [http://europa.eu/rapid/press-release\\_IP-14-639\\_en.htm](http://europa.eu/rapid/press-release_IP-14-639_en.htm).

53. Press Release, Eur. Comm’n, Mergers: Commission approves acquisition of Holcim assets by Cemex in the building materials sector (Sept. 9, 2014), *available at* [http://europa.eu/rapid/press-release\\_IP-14-985\\_en.htm](http://europa.eu/rapid/press-release_IP-14-985_en.htm).

54. Press Release, Eur. Comm’n, Mergers: December 15, 2014, Commission approves acquisition of Lafarge by Holcim, subject to conditions (Dec 15, 2014), *available at* [http://europa.eu/rapid/press-release\\_IP-14-2683\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2683_en.htm)

55. Press Release, Eur. Comm’n, Mergers: Commission fines Marine Harvest \_20 million for taking control of Morpol without prior EU merger clearance (July 23, 2014), *available at* [http://europa.eu/rapid/press-release\\_IP-14-862\\_en.htm](http://europa.eu/rapid/press-release_IP-14-862_en.htm).

56. EC cartel, *available at* <http://ec.europa.eu/competition/cartels/cases/cases.html>.

57. Joaquin Almunia, *Some highlights from EU competition enforcement* (Sept. 19, 2014), *available at* [http://europa.eu/rapid/press-release\\_SPEECH-14-608\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-608_en.htm).

58. Press Release, Eur. Comm’n, Antitrust: Commission fines Servier and five generic companies for curbing entry of cheaper versions of cardiovascular medicine (July 9, 2014), *available at* [http://europa.eu/rapid/press-release\\_IP-14-799\\_en.htm](http://europa.eu/rapid/press-release_IP-14-799_en.htm).

59. Press Release, Eur. Comm’n, Antitrust: Commission finds that Motorola Mobility infringed EU competition rules by misusing standard essential patents (April 29, 2014), *available at* [http://europa.eu/rapid/press-release\\_IP-14-489\\_en.htm](http://europa.eu/rapid/press-release_IP-14-489_en.htm).

60. Joaquin Almunia, *EU competition policy and sectoral challenges* (Sept. 12, 2014), *available at* [http://europa.eu/rapid/press-release\\_SPEECH-14-592\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-592_en.htm).

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cartel-like) anticompetitive arrangements.<sup>61</sup> It also ruled that umbrella price damage claims are allowed,<sup>62</sup> and confirmed the EU's tough stance on fidelity- or exclusivity-type rebates by dominant companies, despite the effects-based analysis advanced by Intel.<sup>63</sup>

## VI. France

### A. LEGISLATIVE DEVELOPMENTS

A law, entered into force in October, organizes class actions and enables a limited number of government-approved consumer protection associations to bring actions before civil courts and seek damages caused to consumers. The home court of the defendant will have jurisdiction for handling the complaints, and the Paris court will have jurisdiction for foreign defendants. The model contemplates an opt-in mechanism: consumers will have to adhere to the class action and mandate a consumer association to conduct the proceedings.

### B. MERGERS

The French competition authority reviewed more than 150 merger filings, and received four referrals of cases from the European Commission. Among notable decisions, an April decision is interesting because the acquisition of exclusive control was not based on a change in the target's shareholder structure, but on a long-term contract that gave the acquirer control over production processes and sales policies.<sup>64</sup>

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

In November, the competition authority imposed fines below \_1 million to three companies regarding transportation services.<sup>65</sup> It also announced an investigation, at the request of the Minister for the Economy, into joint purchasing entities created by several retailers.

### D. ABUSE OF DOMINANCE

There were several dominance cases in telecommunications, in one example, the Competition Authority sanctioned SFR for engaging in price discrimination between so-called "in-net" and "off-net" phone calls.<sup>66</sup> Another notable decision concerned Nespresso for

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61. Case C-67/13 P *Groupement des Cartes Bancaires*: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157516&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=443608>.

62. Case C-557/12 *Kone*: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153312&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=493805>.

63. Case T-286/09 *Intel*: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153543&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=444292>.

64. *Autorité de la Concurrence*, Decision No. 14-DCC-57 of 17 April 2014 on the Acquisition of Sole Control by Orlait Company Affiliate, Activity Shelf Milk Consumption (May 28, 2014).

65. *Autorité de la Concurrence*, Decision No. 14-D-16 of 18 November 2014 relating to Practices Implemented in the Military Moving Industry Affected in Martinique.

66. *Autorité de la Concurrence*, Decision No. 14-D-05 of 13 June 2014 relating to practices Implemented in the Mobile Phone Industry to Residential Customers in Reunion and Mayotte.

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bundling and tying in the markets for portioned coffee machines and for Nespresso capsules.<sup>67</sup> Nespresso and Nestle have committed to eliminate and modify a number of practices and representations regarding their machines' compatibility with capsules other than Nespresso's.

### **VIII. India**

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

To plug loopholes in the merger notification rules, the Competition Commission of India (CCI) amended merger control regulations to include a "substance test," whereby notification requirements are based on the substance of the transaction, not just its form.

#### **B. MERGERS**

In separate cases, the CCI imposed its first penalties for gun-jumping on Etihad Airways,<sup>68</sup> and on Thomas Cook and Sterling Holidays.<sup>69</sup>

The CCI also held that acquisitions of shares and voting rights below 25 percent may raise competition concerns where there is horizontal overlap or a vertical relationship between acquirer and target.<sup>70</sup> Previously, such acquisitions made solely as investments or during the ordinary course of business were exempt from notification.

#### **C. CARTELS AND OTHER AGREEMENTS**

In its first sector-wide investigation, the CCI imposed penalties on fourteen automobile parts manufacturers.<sup>71</sup> It also intervened in the healthcare sector, imposing a penalty on Hiranandani Hospital for exclusive anticompetitive agreements.<sup>72</sup>

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67. Autorité de la Concurrence, Decision No. 14-D-09 of 4 September 2014 on Practices Implemented by Nestlé Companies Nestec, Nestlé Nespresso Nestlé Nespresso France and Enterprises in the Espresso Machine Industry.

68. COMPETITION COMM'N OF INDIA, COMBINATION REGISTRATION NO. C-2013/05/122 (Dec. 19, 2013), *available at* <http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/Order%20191213.pdf>.

69. COMPETITION COMM'N OF INDIA, COMBINATION REGISTRATION NO. C-2014/02/153 (May 21, 2014), *available at* <http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2014-02-153R.pdf>.

70. COMPETITION COMM'N OF INDIA, COMBINATION REGISTRATION NO. C-2014/08/202 (Nov. 10, 2014), *available at* <http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2014-08-202.pdf>.

71. COMPETITION COMM'N OF INDIA, SHRI SHAMSHER KASTARIA V. HONDA SIEL CARS INDIA LTD & OTHERS, CASE NO. 3 OF 2011 (Aug. 25, 2014), *available at* <http://cci.gov.in/May2011/OrderOfCommission/27/032011.pdf>.

72. COMPETITION COMM'N OF INDIA, RAMAKANT KINI V. DR. L.H. HIRANANDANI HOSPITAL, CASE NO. 39 OF 2012 (Feb. 5, 2014), *available at* <http://cci.gov.in/May2011/OrderOfCommission/27/392012.pdf>.

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D. ABUSE OF DOMINANCE

CCI pursued government-owned companies, finding Coal India Limited to have abused its dominance with onerous supply agreements.<sup>73</sup> It also held the Indian Trade Promotion Organization abused its dominance over exhibition space licenses.<sup>74</sup>

E. COURT DECISIONS

The CCI has faced numerous challenges from the judiciary. Its jurisdiction in examining abuses by standard essential patent holders was successfully challenged before the High Court. The Competition Appellate Tribunal, while upholding an order against real estate giant DLF for abuse of dominance, observed that while the CCI can direct a party to discontinue abusive conduct, it cannot modify agreements that contravene the Act.<sup>75</sup>

**IX. Israel**

A. LEGISLATIVE DEVELOPMENTS

The Israeli Restrictive Trade Practices Law (Law) excludes certain arrangements from the Law, so they are not considered restrictive arrangements. An amendment effective next March limits statutory exclusions for agricultural producers and wholesalers.

B. MERGERS

In 2012, the Israeli Antitrust Authority (IAA) blocked an acquisition by the Azrieli Group (Azrieli), a large commercial real estate group, of a shopping complex from Mashhar Shopping and Leisure Centers (Mashhar). Azrieli appealed in 2013, but the appeal was dismissed as “theoretical” because the transaction had since been abandoned. Its further appeal to the Supreme Court in 2014 succeeded, arguing that the 2013 decision immunizes the IAA from judicial review, as parties rarely maintain a merger throughout the appeal process. The case has been sent back to the Antitrust Tribunal (AT).<sup>76</sup>

In July, ShuferSal, Israel’s largest supermarket chain, and its executives were convicted of violations, *inter alia*, of merger conditions regarding the merger between ShuferSal and ClubMarket. The executives were fined and sentenced to prison and community service, while ShuferSal had to pay a fine of US\$800,000.<sup>77</sup> An appeal is pending.

Following an investigation into alleged violations of merger conditions by the Israeli bookstore chain, Steimatzky, the IAA issued a decision regarding a merger between Steimatzky and another bookstore chain. Suspicions arose following Steimatzky’s alleged de-

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73. COMPETITION COMM’N OF INDIA, SHRI BIJAY PODDAR V. M/S COAL INDIA LIMITED AND ITS SUBSIDIARIES, CASE No. 59 OF 2013 (Oct. 27, 2014), *available at* <http://cci.gov.in/May2011/OrderOfCommission/27/592013.pdf>.

74. COMPETITION COMM’N OF INDIA, INDIAN EXHIBITION INDUSTRY ASSOCIATION V M/O COMMERCE & INDIAN TRADE PROMOTION ORGANIZATION, CASE No. 74 OF 2012 (Apr. 3, 2014), *available at* <http://cci.gov.in/May2011/OrderOfCommission/27/742012.pdf>.

75. COMPETITION APP. TRIB., M/S DLF LIMITED V. CCI & OTHERS, APPEAL No 20 OF 2011 (May 19, 2014), *available at* [http://compat.nic.in/upload/PDFs/mayordersApp2014/19\\_05\\_14.pdf](http://compat.nic.in/upload/PDFs/mayordersApp2014/19_05_14.pdf).

76. CA 6426/13 Azrieli Group Ltd. v. General Dir. of the IAA [2014] (Isr.).

77. CC 118/10 Antitrust Auth. v. Rozenhaus (2014) (Isr.).

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mand for exclusive rights to sell certain titles at discounted prices. In July, the AT approved a Consent Decree between the IAA, Steimatzky, and its CEO with no admission of liability. Steimatzky paid approximately US\$400,000 to the State Treasury and its CEO paid approximately US\$14,000.<sup>78</sup>

C. CARTEL AND OTHER ANTICOMPETITIVE PRACTICES

In August, the IAA published a Draft Policy Paper regarding unilateral public disclosure statements and publications potentially harming competition. The IAA notes the guidelines provided will bring policies in line with OECD Best Practices and the antitrust laws of the EU and United States.<sup>79</sup>

In September, it published a non-binding paper setting trade association contact standards, stating that though trade associations are important institutions, their activity may threaten competition by enacting restrictive arrangements, facilitating the exchange of sensitive information or boycotts.<sup>80</sup>

D. COURT DECISIONS

The IAA reached an agreement with Israel's five largest banks regarding alleged restrictive arrangements of bank fee information. In June, the AT approved the agreement as a Consent Decree. The banks had to pay approximately US\$19 million to the State Treasury, without admission of liability.

E. ABUSE OF DOMINANCE

In April, the IAA published Guidelines regarding the Prohibition on Excessive Pricing by a Monopoly. These Guidelines state excessive pricing might be deemed an abuse of dominance by a monopoly.<sup>81</sup>

In November, the IAA published a decision (Determination) stating that Bezeq, Israel's leading telecommunication company, abused its monopolistic position by engaging in a "margin squeeze" by offering internet access infrastructure, an essential service for internet based telephone services, to competitors at a higher price, thus putting them at a disadvantage.<sup>82</sup>

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78. AT 42033-06-14 General Dir. of Restrictive Trade Practices v. Steimatzky (2005) Ltd. (2014) (Isr.).

79. Israeli Antitrust Auth., *Draft Policy Paper: Unilateral Public Disclosures May Facilitate Cartel-Like Pricing*, (Aug. 3, 2014), <http://www.antitrust.gov.il/subject/131/item/33262.aspx>.

80. Israeli Antitrust Auth., *Trade Associations Policy Paper*, (Sept. 4, 2014), <http://www.antitrust.gov.il/subject/130/item/33332.aspx>.

81. Israeli Antitrust Auth., *Excessive Pricing Policy Paper*, (Apr. 09, 2014), <http://www.antitrust.gov.il/subject/130/item/33113.aspx>.

82. Israeli Antitrust Auth., *Determination on the ground of section 43(A)(5) to the Israeli Restrictive Trade Practices Law 5748-1988-Bezeq-The Israel Telecommunication Corp, Ltd - abuse of dominant position*, (Nov. 16, 2014), <http://www.antitrust.gov.il/subject/126/item/33396.aspx>.

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**X. Mexico**

**A. LEGISLATIVE DEVELOPMENTS**

A new competition law came into force in July, strengthening the Federal Economic Competition Commission's (Cofece) powers, and introducing new powers and novel legal concepts, some of which are controversial.

The law contemplates: (i) strengthened dawn raid powers (allowing access to any place, storage or electronic device, or other source of evidence and compelling explanations regarding any document or information obtained during the raid) and coercive measures (Cofece may order the arrest of individuals for obstructing an investigation); (ii) decisions to initiate an investigation will no longer be published in the Federal Official Gazette; and (iii) Cofece will have powers to file a claim or complaint regarding presumed criminal conduct in antitrust matters, with no need to wait until a final resolution is issued by the Plenary in the administrative stage.

New offenses have been created: (i) the exchange of information between competitors, when resulting in, or having the purpose of, price fixing, allocation of markets, restricting output or rigging bids, has been incorporated as an independent cartel violation; and (ii) companies with a dominant position may not restrict or grant discriminatory access to "essential inputs" or engage in conduct resulting in a margin squeeze. Additionally, Cofece will have authority to order measures to eliminate "barriers to free competition", to conduct studies to look for market power, and to order divestitures.

For mergers: (i) filing thresholds were modified so that only annual sales originating in Mexico or assets in the Mexican territory are taken into consideration; (ii) mergers cannot be completed until clearance is obtained, making Mexico's a suspensory regime; (iii) the time for assessing mergers increased from thirty-five to sixty business days (plus an additional forty days in complex cases); and (iv) Cofece is obliged to inform the parties of any possible risks to competition that may result from a transaction, in order for the parties to submit remedies or conditions proposals.<sup>83</sup>

**B. MERGERS**

Cofece resolved over eighty-five concentrations, all of which were authorized (four with conditions). Significant authorizations included: (i) the acquisition of Merck's consumer care business by Bayer; (ii) the acquisition of Farmacias Ahumada by Alliance Boots; and (iii) the clearance of the alliance between Toyota and Mazda to jointly manufacture a new compact car.<sup>84</sup>

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83. Decreto por el que se expide la Ley Federal de Competencia Económica y se reforman y adicionan diversos artículos del Código Penal Federal [Decree on the Federal Antitrust Law amending and supplementing the Federal Penal Code], Diario Oficial de la Federación [DO], 23 de mayo de 2014 (Mex.).

84. Comisión Federal de Competencia [Federal Commission of Competition], Bayer Aktiengesellschaft/Merck & Co., Inc., Report No. CNT-045-2014; Comisión Federal de Competencia [Federal Commission of Competition], AB Acquisitions Holdings Limited/Alliance Boots GMBH/Walgreen Co./Walgreen Scotland Investments LP/Walgreen Swiss International GMBH, Report No. CNT-082-2014; Comisión Federal de Competencia [Federal Commission of Competition], Mazda Motor Manufacturing de Mexico, S.A. de C.V./Toyota Motor de Mexico, S. de R.L. de C.V., Report No. CNT-052-2014.

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C. CARTELS AND OTHER ANTICOMPETTIVE PRACTICES

Cofece initiated six investigations for cartel conduct in: (i) healing materials; (ii) airport ground transportation; (iii) cranes and dragging services in Guerrero; (iv) maritime transportation in Quintana Roo; (v) music rights licenses; and (vi) latex products.<sup>85</sup> There are currently fourteen ongoing investigations.<sup>86</sup>

Furthermore, Cofece sanctioned diverse real estate agents (companies and individuals) for a total amount of approximately US\$4 million for price fixing of commissions.<sup>87</sup> Cofece sanctioned five appliance companies for approximately US\$14.7 million for price fixing in the market for hermetic compressors.<sup>88</sup>

D. ABUSE OF DOMINANCE

Cofece initiated only one new investigation for abuse of dominance conduct, in the market for air gases. Specific conduct being investigated includes tying agreements, exclusivity, and raising of rivals' costs.<sup>89</sup> There are eight ongoing abuse of dominance investigations.

**XI. Russia**

A. LEGISLATIVE DEVELOPMENTS

In 2014, the procedure for post-transaction notifications was abolished in order to decrease the administrative burden on the Federal Antimonopoly Service of the Russian Federation (FAS).

The government also approved a draft law which significantly amends the Competition Law and referred it to the State Duma (lower house) of the Russian Parliament for consideration. These amendments are commonly called the "Fourth Antimonopoly Package."<sup>90</sup>

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85. Comision Federal de Competencia [Federal Commission of Competition], Mercado de materiales de curación de polietileno adquiridos por el sector salud en el territorio nacional, Report No. DE-020-2014; Comision Federal de Competencia [Federal Commission of Competition], Servicios de arrastre de vehiculos, Report No. DE-023-2013; Comision Federal de Competencia [Federal Commission of Competition], De los servicios de transporte marítimo de pasajeros en el estado de Quintana Roo, Report No. DE-002-2014; Comision Federal de Competencia [Federal Commission of Competition], Otorgamiento de licencias para la comunicación o utilización pública de obras musicales, sus interpretaciones o ejecuciones, de fonogramas y videogramas en el territorio nacional, Report No. DE-025-2013; Comision Federal de Competencia [Federal Commission of Competition], Producción, distribución y comercialización de productos de látex adquiridos por el sector salud en el territorio nacional, Report No. DE-024-2013.

86. Note that as of July 7, 2014 Cofece no longer publishes decisions to initiate investigations and therefore additional investigations might have been initiated.

87. Comision Federal de Competencia [Federal Commission of Competition], Servicios proporcionados por asesores en bienes raíces, corredores, agentes, administradores y, en general, profesionales del ramo inmobiliario, Report No. DE-019-2007.

88. Comision Federal de Competencia [Federal Commission of Competition], Producción, distribución y comercialización de compresores herméticos, Report No. IO-002-2009.

89. Comision Federal de Competencia [Federal Commission of Competition], Producción, distribución y comercialización de gases del aire, Report No. DE-006-2014.

90. Draft of the Federal Law No. 5906?-?13 of Sept. 12, 2014 amending Federal Law No. 135-FZ of Oct. 26, 2006, *available at* [http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/3D7F7ECD370205AC43257D51005F7B90/\\$FILE/602468-6.pdf](http://asozd2c.duma.gov.ru/addwork/scans.nsf/ID/3D7F7ECD370205AC43257D51005F7B90/$FILE/602468-6.pdf).

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Further, after being considered by the State Duma, the draft bill on collective actions is now being revised. One amendment, developed by non-governmental organizations and academics, would increase the number of plaintiffs necessary for filing a class action suit from five to twenty.<sup>91</sup>

**B. MERGERS**

Based on the decreased number of applications and notifications considered by the antimonopoly authorities, the number of transactions considered by the FAS likely will increase as a result of the forthcoming amendments to the Competition Law. According to those amendments, the list of transactions under the jurisdiction of the FAS will include joint venture agreements where specific thresholds are met.

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

Russia's economy is permeated by thousands of foreign entities, some of which engage in practices that violate the Russian antimonopoly regime. In response, the FAS believes that protecting the economic interests of Russia from international cartels must be done through strengthening antimonopoly regulation. Accordingly, the FAS is deepening cooperation with foreign competition agencies in investigations of domestic and international cartels.

Moreover, although the Criminal Code of the Russian Federation has criminalized cartels since 2009, it is only recently that this provision has actually been used. In 2014, the first cartel conviction was issued. Undoubtedly, this decision will have a significant impact in future cases.

**D. ABUSE OF DOMINANCE**

In 2013, there was a marked increase in the number of publicized cases of violations of Article 10 of the Competition Law (abuse of dominance).<sup>92</sup> According to the 2013 FAS report, 3,370 violations were publicized in 2013, a 10% increase from 2012.<sup>93</sup>

**XII. South Africa**

In 2014, the South African competition authorities focused more on public interest factors in merger reviews and exercised their new powers to initiate market inquiries. The government also addressed staff shortages which plagued the authorities in 2013.<sup>94</sup>

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91. Press Release, FAS, Lawyers are trying to change the requirements for class action] (Feb. 7, 2014), [http://fas.gov.ru/fas-in-press/fas-in-press\\_38287.html](http://fas.gov.ru/fas-in-press/fas-in-press_38287.html).

92. О защите Конкуренции No. 135-ФЗ (с изменениями и дополнениями) [On Protection of Competition No. 135-FZ, as amended], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]*. 2006. No. 31 (1). ST. 3434 [Russian Federation Collection of Legislation] 2006, No. 31 (1 p.). Art. 3434 (Russ.).

93. FAS, *Report on the State of the Competition in Russia, 2014*, (2014), available at [http://www.fas.gov.ru/netcat\\_files/225/164/h\\_9b92126b92a13bcf9f26422c223d22ef](http://www.fas.gov.ru/netcat_files/225/164/h_9b92126b92a13bcf9f26422c223d22ef).

94. Press Release, Econ. Dev. Dep't of S. Afr., Minister Patel Announces Appointment of New Competition Commissioner, (May 16, 2014), <http://www.compcom.co.za/wp-content/uploads/2014/09/Minister-Patel-announces-appointment-of-new-Competition-Commissioner.pdf>; Press Release, Competition Trib. S. Afr., Appointment of Chairperson and Members of the Competition Tribunal, (Aug. 11, 2014), <http://www>

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A. LEGISLATIVE DEVELOPMENTS

There were no relevant legislative changes in South Africa in 2014, but the Minister of Economic Development has suggested amendments to extend the authority's powers to order divestitures by dominant firms in abuse cases.<sup>95</sup>

B. MERGERS

In Oceana's acquisition of Foodcorp, the Tribunal required the divestment of Foodcorp's fishing quota because the combination of the merging parties' rights was said to enable an already dominant player to increase its power and undermine competition from other players.<sup>96</sup> The decision was successfully appealed.<sup>97</sup>

The authorities' increasingly broad view of their powers to impose conditions on mergers in the "public interest" is illustrated by AgriGroupe's buyout of Afgri, in which the Tribunal required the establishment of a fund and a development program for emerging farmers.<sup>98</sup> In response, merging parties have had to be more proactive in ameliorating potentially adverse employment effects before seeking merger approval, as was done in the Nashua Mobile transactions.<sup>99</sup>

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The Commission has referred cartel complaints in the power-cable,<sup>100</sup> fishing,<sup>101</sup> and construction industries<sup>102</sup> (despite having settled numerous construction cartel complaints

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[.comptrib.co.za/publications/press-releases/appointment-of-chairperson-and-members-of-the-competition-tribunal/](http://www.comptrib.co.za/publications/press-releases/appointment-of-chairperson-and-members-of-the-competition-tribunal/).

95. Carol Paton, *Patel Reworks Competition Act against Excessive Pricing*, BUSINESSDAY, (Aug. 11, 2014), <http://www.bdlive.co.za/business/2014/08/11/patel-reworks-competition-act-against-excessive-pricing>.

96. Ann Crotty, *Oceana Set to Battle for Foodcorp's Fishing Business*, BUSINESS TIMES, (July 06, 2014), <http://www.bdlive.co.za/business/2014/07/06/oceana-set-to-battle-for-foodcorp-s-fishing-business>.

97. *Id.*

98. Case No. 017939 (Competition Tribunal) (S. Afr.), *available at* <http://www.comptrib.co.za/assets/Uploads/017939.pdf>.

99. *Atech Autopage Cellular (Pty) Limited v. Nashua Mobile (Pty) Limited in respect of its Cell C subscriber base (Nashua)*, 2014 Case No. 019166 (Competition Tribunal) (S. Afr.), *available at* <http://www.comptrib.co.za/assets/Uploads/019166.pdf>; *Mobile Telephone Networks (Pty) Limited and Nashua*, 2014 Case No. 019018 (Competition Tribunal) (S. Afr.), *available at* <http://www.comptrib.co.za/assets/Uploads/019018.pdf>; *Vodacom (Pty) Limited and Nashua*, 2014 Case No. 019034 (Competition Tribunal) (S. Afr.), *available at* <http://www.comptrib.co.za/assets/Uploads/27.pdf>.

100. Press Release, Competition Comm'n of S. Afr., Comm'n Refers Cable Investigation (Mar. 19, 2014), <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Commission-refers-cable-investigation.pdf>.

101. Press Release, Competition Comm'n of S. Afr., The Commission Refers Fishing Collusion Investigation (Mar. 27, 2014), <http://www.compcom.co.za/wp-content/uploads/2014/09/The-Commission-refers-fishing-collusion-investigation.pdf>.

102. Katy Oglethorpe, *SA takes World Cup Riggers to Court*, GLOBAL COMPETITION REVIEW (Nov. 13, 2014), <http://globalcompetitionreview.com/news/article/37261/sa-takes-world-cup-riggers-court/>.

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through the “fast-track” settlement process).<sup>103</sup> The Commission also conducted dawn raids in the edible oil<sup>104</sup> and auto body repair<sup>105</sup> industries.

The Commission exercised its new market inquiry powers by publishing terms of reference for inquiries into private healthcare<sup>106</sup> and liquefied petroleum gas.<sup>107</sup>

**D. ABUSE OF DOMINANCE**

The Tribunal found that Sasol Chemical Industries charged excessive prices for inputs in plastics manufacturing.<sup>108</sup> It was critically important that Sasol’s acquisition of dominance was achieved through State support, and that the relevant inputs are low-cost because they are by-products of Sasol’s fuel production process. The matter is being appealed.<sup>109</sup>

**E. COURT DECISIONS**

The Constitutional Court held that costs cannot be awarded against the Commission in Tribunal proceedings and that the Competition Appeal Court should only award such costs in its own proceedings where the Commission has not litigated in good faith.<sup>110</sup>

In the healthcare inquiry, the High Court dismissed a case brought by hospital group Netcare seeking to interdict KPMG, which had previously performed consulting work for Netcare, from being appointed as the Commission’s healthcare inquiry technical service provider.<sup>111</sup>

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103. Norton Rose Fulbright, *2011 – a year in review – competition law in South Africa*, (Jan. 9, 2012), <http://www.nortonrosefulbright.com/news/61536/2011-a-year-in-review-competition-law-in-south-africa>.

104. Press Release, Competition Comm’n of S. Afr., Competition Commission Raids Unilver SA and Sime Darby Offices (Apr. 2, 2014), <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-raids-Unilever-SA-and-Sime-Darby-offices.pdf>.

105. Press Release, Competition Comm’n of S. Afr., Competition Commission Raids Precision and Eldan offices (July 4, 2014), <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-raids-Precision-and-Eldan-offices.pdf>.

106. Press Release, Competition Comm’n of S. Afr., Commission Outlines the Guidelines and Statement of Issues for the Private Healthcare Inquiry (Apr. 16, 2014), <http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Health-Inquiry-Stakeholder-Engagement-Meeting.pdf>.

107. Competition Comm’n of S. Afr., *Liquefied Petroleum Gas (LPG) Market Inquiry*, , <http://www.compcom.co.za/lpg-inquiry/> (last visited Feb. 4, 2015).

108. *Competition Comm’n of S. Afr. v. Sasol Chem. Indus. Ltd.*, 2014 48/CR/Aug10, available at <http://www.comptrib.co.za/assets/Uploads/Non-Conf-Decision-011502.pdf>.

109. Ann Crotty, *Sasol Faces Battle Over Appeal Bid*, BUS. TIMES (June 29, 2014, 7:24 AM), <http://www.bdlive.co.za/business/2014/06/29/sasol-faces-battle-over-appeal-bid>.

110. *Competition Comm’n of S. Afr. v. Pioneer Hi-Bred Int’l Inc.*, 2013 ZACC 50 (CC) at paras. 42-43, 47 (S. Afr.), available at <http://41.208.61.234/uhtbin/cgiisr/20140128181712/SIRSI/0/520/J-CCT58-13>.

111. Netcare Hospitals (Pty.) Ltd. v. KPMG Services (Pty.) Ltd., 2014 ZAGPJHC Case No. 47505 at para. 140 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAGPJHC/2014/186.html>.

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**XIII. United Kingdom**

A. LEGISLATIVE DEVELOPMENTS

Last year heralded significant change to the institutional structure of the U.K. competition law regime with the creation of a new, single competition authority, the Competition and Markets Authority (CMA).<sup>112</sup> The CMA fully took over in April, replacing the Office of Fair Trading (OFT) and the Competition Commission.

The Enterprise and Regulatory Reform Act 2013<sup>113</sup> created the CMA and introduced changes to the U.K. antitrust, mergers, and markets regimes. In particular, the CMA can compel individuals to answer questions in Competition Act 1998 investigations.

The dishonesty requirement was removed from the U.K. criminal cartel offense, but new exemptions and defenses were introduced.

The U.K.'s merger notification regime remains voluntary. But the CMA now has enhanced powers to impose hold-separate undertakings; businesses which fail to comply risk significant penalties.

B. MERGERS

In June, the CMA referred the proposed Pure Gym-The Gym merger for a detailed Phase II inquiry.<sup>114</sup> Unusually, the CMA raised concerns that the merger might affect both actual and potential competition.<sup>115</sup> The parties abandoned the merger, using a new procedural right of parties to suspend the Phase II review for up to three weeks to consider whether to proceed with the merger proposal.<sup>116</sup>

In August, the CMA relied on the failing firm defense to clear the merger of Alliance Medical and IBA Molecular at Phase II.<sup>117</sup>

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March, the former OFT fined Hamsard £387,856 for cartel conduct.<sup>118</sup> The OFT found that Hamsard and Lloyds Pharmacy had agreed to share the market for the supply

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112. Enterprise and Regulatory Reform Act, 2013, c. 24 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>.

113. *Id.*

114. Press Release, Competition and Markets Authority, CMA Refers Gyms Merger for In-Depth Investigation (June 26, 2014), <https://www.gov.uk/government/news/cma-refers-gyms-merger-for-in-depth-investigation>.

115. *Id.*

116. Press Release, Pure Gym, Pure Gym and The Gym Group Terminate Merger Plan After Regulator Refers Transaction for In-Depth Investigation (July 16, 2014), <http://www.thegymgroup.com/blog/article/pure-gym-and-the-gym-group-terminate-merger-plan-after-regulator-refers-transaction-for-in-depth-investigation-6469/>.

117. Press Release, Competition and Markets Auth., Radioactive Tracer Merger Cleared (Aug. 15, 2014), <https://www.gov.uk/government/news/radioactive-tracer-merger-cleared>.

118. Press Release, Office of Fair Trading, OFT Issues Decision in Care Home Medicine Cartel Case (Mar. 20, 2014), <http://webarchive.nationalarchives.gov.uk/20140402142426/http://oft.gov.uk/news-and-updates/press/2014/17-14>.

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of prescription medicines to care homes in England. The OFT also issued a decision regarding pricing restrictions for online mobility scooter sales.<sup>119</sup>

D. COURT DECISIONS

In *Skyscanner*,<sup>120</sup> the U.K. Competition Appeal Tribunal heard the first ever judicial review of a U.K. commitments decision in the *Hotel Online Booking* case and quashed the former OFT's decision, remitting the matter back to the new CMA.

In relation to time limits for follow-on damages actions, the U.K. Supreme Court ruled that a European Commission (Commission) decision establishing an infringement constitutes a series of individual decisions addressed to its addressees.<sup>121</sup> Further, "the only relevant decision establishing infringement in relation to [a non-appealing] addressee . . . is the original Commission decision" (even if another addressee successfully appeals against it).<sup>122</sup>

**XIV. United States**

A. LEGISLATIVE DEVELOPMENTS

The Judiciary Committee of the U.S. House of Representatives approved a bill to amend the Clayton and Federal Trade Commission Acts to align the standards and processes for Federal Trade Commission (FTC) or Department of Justice (DOJ) review of proposed mergers and acquisitions.<sup>123</sup> If it becomes law, the FTC would review mergers under the Clayton Act's standards (as the Attorney General currently does) and would no longer engage in the administrative adjudication of mergers and other transactions.<sup>124</sup>

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119. Press Release, Office of Fair Trading, OFT Issues Decision in Mobility Scooters Sector (Mar. 27, 2014), <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/news-and-updates/press/2014/23-14>.

120. *Skyscanner v. Competition and Markets Auth.*, [2014] CAT 16 at paras. 1, 174 (Eng. & Wales), available at [http://www.catribunal.org.uk/files/1226\\_Skyscanner\\_Judgment\\_CAT\\_16\\_260914.pdf](http://www.catribunal.org.uk/files/1226_Skyscanner_Judgment_CAT_16_260914.pdf).

121. *Deutsche Bahn AG v. Morgan Advanced Materials*, [2014] UKSC 24 at paras. 1, 28 (U.K.), available at [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0209\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0209_Judgment.pdf).

122. *Id.*

123. Press Release, H.R. Judiciary Comm., Judiciary Committee Approves Antitrust Legislation (Sept. 10, 2014), <http://judiciary.house.gov/index.cfm/2014/9/judiciary-committee-approves-antitrust-legislation>.

124. Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014, H.R. 5402, 113th Cong. (2014).

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**B. MERGERS**

Three companies—Embarcadero Technologies,<sup>125</sup> Flakeboard America Ltd.,<sup>126</sup> and Louisiana-Pacific Corp.<sup>127</sup>—abandoned proposed mergers after the DOJ expressed concern about “likely anticompetitive effects.”

In January 2013, in a rare post-acquisition challenge, the DOJ filed a civil suit against Bazaarvoice Inc., the leading provider of online reviews and ratings platforms, challenging Bazaarvoice’s acquisition of rival PowerReviews.<sup>128</sup> In January, following a three-week trial, the court found that Bazaarvoice had violated Section 7 of the Clayton Act by acquiring PowerReviews. In April 2014, the DOJ and Bazaarvoice agreed that Bazaarvoice would divest all assets of PowerReviews and take additional measures to restore competition in the market.

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

The DOJ Antitrust Division secured large criminal fines from its London Interbank Offered Rate (LIBOR) and auto parts investigations. Among others who pled guilty, Lloyds Banking Group agreed to pay US\$86 million for its actions in manipulating the LIBOR.<sup>129</sup> For their roles in a conspiracy to fix prices and rig bids for automotive parts, eight Japanese manufacturers agreed to plead guilty and, in combination, paid US\$753 million in fines.<sup>130</sup> The DOJ also prosecuted defendants in California, Georgia, and New Jersey for their roles in rigging bids at municipal foreclosure and tax lien auctions.<sup>131</sup>

The DOJ secured the first litigated extradition on an antitrust charge for a former executive of a rubber hose manufacturer who pled guilty to a “conspiracy to rig bids, fix prices, and allocate market shares of marine hoses sold in the United States.”<sup>132</sup>

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125. Press Release, U.S. Dept. of Justice, Embarcadero Technologies and CA Inc. Terminate Proposed Transfer of CA Inc.’s Erwin Data Modeler (Nov. 5, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/309752.pdf](http://www.justice.gov/atr/public/press_releases/2014/309752.pdf).

126. Press Release, U.S. Dept. of Justice, Flakeboard Abandons Its Proposed Acquisition of SierraPine (Oct. 1, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/309005.pdf](http://www.justice.gov/atr/public/press_releases/2014/309005.pdf).

127. Press Release, U.S. Dept. of Justice, Louisiana-Pacific Corp. Abandons Its Proposed Acquisition of Ainsworth Lumber Co. Ltd. (May 14, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/305936.pdf](http://www.justice.gov/atr/public/press_releases/2014/305936.pdf).

128. Press Release, U.S. Dept. of Justice, Justice Department and Bazaarvoice Inc. Agree on Remedy to Address Bazaarvoice’s Illegal Acquisition of PowerReviews (Apr. 24, 2014), <http://www.justice.gov/opa/pr/justice-department-and-bazaarvoice-inc-agree-remedy-address-bazaarvoice-s-illegal-acquisition>.

129. Press Release, U.S. Dept. of Justice, *Lloyds Banking Group Admits Wrongdoing in Libor Investigation, Agrees to Pay \$86 Million Criminal Penalty* (July 28, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/307355.pdf](http://www.justice.gov/atr/public/press_releases/2014/307355.pdf).

130. Press Release, U.S. Dept. of Justice, DOJ, Hitachi Metals Ltd. Agrees to Plead Guilty for Fixing Prices and Rigging Bids on Automotive Parts Installed in U.S. Cars (Oct. 31, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/309636.htm](http://www.justice.gov/atr/public/press_releases/2014/309636.htm).

131. U.S. Dept. of Justice Antitrust Div., *Antitrust Division 2014 Criminal Enforcement Update*, (Spring 2014), <http://www.justice.gov/atr/public/division-update/2014/criminal-program.html> (last visited Feb. 4, 2015).

132. Press Release, U.S. Dept. of Justice, Former Marine Hose Executive Who Was Extradited to United States Pleads Guilty for Participating in Worldwide Bid-Rigging Conspiracy (Apr. 24, 2014), [http://www.justice.gov/atr/public/press\\_releases/2014/305376.htm](http://www.justice.gov/atr/public/press_releases/2014/305376.htm).

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D. MONOPOLIZATION

The DOJ tried a case, under reserve, against American Express (AmEx), alleging that the company's "anti-steering" rules prohibiting merchants from encouraging customers to use other credit cards violated antitrust law.<sup>133</sup> During the trial, the parties hotly disputed numerous issues, including the relevant market, the effects on competition, and AmEx's market power.

E. COURT DECISIONS

In November, the Seventh Circuit Court of Appeals issued its ruling after rehearing *Motorola Mobility LLC v. Au Optronics Corp.*<sup>134</sup> The issue on appeal was whether Au Optronics Corp.'s sales of LCD panels to Motorola's foreign subsidiaries, that were then incorporated into phones and shipped to other countries, including the United States, were excluded from the reach of the Sherman Act because the conduct did not have a "direct" effect on U.S. commerce as required by the Foreign Trade Antitrust Improvements Act (FTAIA). While the court said it was possible for price fixing abroad to have a foreseeable, substantial effect on U.S. commerce, bringing it under the Sherman Act, Motorola's claim was barred by the FTAIA's requirement that "the effect of anticompetitive conduct on domestic U.S. commerce give rise to an antitrust cause of action." Thus, the court held that Motorola was not the proper plaintiff to bring an antitrust suit in the United States because the harm was incurred by Motorola's foreign subsidiaries and not the parent company itself. In a criminal case brought by the DOJ's Antitrust Division charging a price-fixing scheme of TFT-LCDs sold directly to U.S. companies, the Ninth Circuit upheld the convictions of AUO and its executives, holding that the FTAIA does not exclude import trade from the Sherman Act or activities that have a "direct, substantial, and reasonably foreseeable effect on U.S. commerce."<sup>135</sup>

The U.S. Supreme Court granted certiorari in *North Carolina State Board of Dental Examiners v. FTC* and heard arguments in October.<sup>136</sup> The Supreme Court is considering whether a quasi-public board of dental examiners could be found to have violated the antitrust laws for allowing only dentists to use teeth-whitening technology.<sup>137</sup>

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133. *United States of America v. American Express Co.*, No. 1:10-cv-04496-NGG-RER (E.D.N.Y. May 7, 2014).

134. *Motorola LLC v. Au Optronics Corp.*, No. 14-8003 (7th Cir. Nov. 26, 2014).

135. *United States v. Hui Hsiung*, 758 F.3d 1074, 1086 (9th Cir. 2014).

136. Transcript of Oral Argument at 1, *North Carolina Board of Dental Examiners v. FTC*, No 13-534 (US 2014), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-534\\_8nj9.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_8nj9.pdf).

137. *Id.* at 12, 20.

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

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This article reviews developments in mergers and acquisitions (“M&As”) and joint ventures (“JVs”) during the year 2014.

### **I. Brazil**

Among the many functions of the Brazilian Securities and Exchange Commission (“CVM”), is the promotion of capital market expansion in Brazil. CVM has been implementing new rules to further stimulate securities public offerings in Brazil since 2009.

The first major step was the implementation of CVM Instruction No. 476<sup>1</sup> (“iCVM 476”), which aimed to reduce the costs of public offerings, facilitating new issuers in raising funds through the issuance of certain securities, including debentures (the Brazilian equivalent of bonds), that are exempted from registration. CVM has limited the scope of offerings exempted under iCVM 476 to investors with the ability and knowledge to evaluate these investments and who have the capacity to bear losses of part or all of their investments. These investors are referred to as qualified investors.

The registration exemption accelerated the offering process, reducing the timeframe between the decision of the issuer to raise funds and the debt issuance, thus increasing the

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1. Instrução CVM No. 476, de 16 de Janeiro de 2009, D.O.U. de 19.01.2009 (Braz.).

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profitability rate of the security. More companies now have access to this sort of funding. Many of them end up making their first steps on the capital market. After the implementation of iCVM 476, there was a “boom” of debentures issuances. From a little more than a few dozen of debentures issuances in 2008, Brazil now has hundreds of issuances per year.

The debt market has been growing since the implementation of iCVM 476. The equity market wished for a similar regulatory modification, which would enable it to experience the same growth. These modifications were implemented with CVM Instruction No. 551/2014<sup>2</sup> (“iCVM 551”), which expanded the number of securities which can be offered under the scope of iCVM 476, including shares and convertible or exchangeable debentures, subscription warrants,<sup>3</sup> certificates of deposit of shares, and certificates of structured transactions.

To obtain a registration exemption, the offering needs to follow a series of requirements, applicable to all securities regulated by iCVM 476. For example, the limitation of the offering to qualified investors and the number of qualified investors that can participate. However, CVM decided to increase the maximum number of qualified investors who can participate in restricted offerings under iCVM 476 from twenty to fifty, and to increase the number of investors who can be consulted during the process from fifty to seventy five. Furthermore, CVM decided to exempt the ninety days restriction to trade (lock-up) that applies to securities offered under iCVM 476, if such offering concerns shares, subscription bonuses, and certificates of deposit.

Companies that already have their shares publicly traded and have plans to make a subsequent offer (“follow-on”) will benefit the most from this greater flexibility in offerings. As a simple comparison, the initial review period for CVM in relation to an offering to a wider public (under CVM Instruction No. 400<sup>4</sup>) is twenty days, but the registration of the offering may take more or less time depending on how quickly the company is able to comply with the demands of CVM. In case of the distribution of shares under iCVM 476, the time involved with an offering may be limited to the time that the existing shareholders of a company would have to exercise their right of first refusal, (i.e. five business days). With the implementation of iCVM 551, the risk of exposure of the issuers to the volatility of the shares dramatically lowers. CVM showed it has heard the wishes of the market. The door to more investments is open.

## II. Canada

The Canadian Securities Administrators (the “CSA”), recently updated the status of proposals to regulate take-over bids in a harmonized fashion across Canada (the “Pro-

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2. Instrução CVM No. 551, de 25 de Setembro de 2014, D.O.U. de 26.09.2014 (Braz.).

3. Shares, debentures convertible into shares, shares that are the object of exchangeable debentures and warrants should be issued by a issuer registered as a public company of the “A” category as defined by Instrução CVM No. 480, de 25 de Dezembro de 2009, D.O.U. de 09.12.2009 (Braz.).

4. Instrução CVM No. 400, de 29 de Dezembro de 2003, D.O.U. de 09.01.2004 (Braz.).

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posed Amendments”<sup>5</sup> that will also affect the treatment of shareholder rights plans (i.e. “poison pills”).

In contrast to Delaware practice, Canadian shareholder rights plans have traditionally been strictly limited to the single purpose of helping a board of directors “buy time” to seek out improved or alternative offers (i.e., a “white knight”)<sup>6</sup> Once that purpose has been served, Canadian securities commissions would routinely issue a “cease trade” order in respect of a pill, thereby sending whatever offer was on the table to a shareholder vote. It was widely accepted that, under such conditions, a “just say no” defense was generally unavailable in Canada.<sup>7</sup>

This position was consistent with the minimal guidance available under Canadian securities laws regarding defensive tactics<sup>8</sup> and was demonstrated in an influential Ontario Securities Commission decision over two decades ago that stated: “The time had come for the pill to go.”<sup>9</sup> As a result, a generation of market participants has acted on the understanding that Canadian securities regulators will generally terminate pills within some fixed period after the commencement of a hostile bid. This approach has conditioned board responses to hostile bids and, in the global mergers and acquisition context, has made Canadian issuers attractive targets, setting aside the existence of a shareholder rights plan.

Notwithstanding the above, under Canada’s fragmented securities regulatory regime, various jurisdictions have issued contradictory decisions, in which the Delaware-style business judgment rule was seemingly adopted and the relevant question became whether (and not when) a pill should be terminated.<sup>10</sup> This question of timing has recently come to the forefront as a result of the British Columbia Securities Commission’s (the “BCSC”) recent decision regarding Augusta Resource Corporation’s shareholder rights plan during HudBay Minerals Inc.’s proposed hostile takeover bid of Augusta. In *Augusta*, the BCSC allowed the pill to survive for an unprecedented 156 days.<sup>11</sup> The BCSC weighed several factors, including: (a) the length of time the bid was outstanding; (b) the likelihood that a superior proposal could ultimately be found; and (c) whether the bid was coercive (the BCSC determined that all three factors supported HudBay’s bid)<sup>12</sup> However, a fourth key factor—the approval of the rights plan by 94 percent of the votes cast by Augusta shareholders (excluding the votes of HudBay),<sup>13</sup> combined with the likelihood that HudBay would extend its bid—was sufficient for the BCSC to allow the pill to survive for such an extended period.

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5. See CSA Notice 62-306-Update on Proposed National Instrument 62-105 Security Holder Rights Plans and AMF Consultation Paper An Alternative Approach to Securities Regulators’ Intervention in Defensive Tactics (2014), 37 O.S.C. Bull. 8229 (Can.).

6. PHILLIP MARTINIUS, M&A: PROTECTING THE PURCHASER, 155, (2005).

7. See In the Matter of Baffinland Iron Mines Corporation et al. (2010), 33 O.S.C. Bull. 11385 (Can.).

8. See National Policy 62-202—Take-Over Bids—Defensive Tactics (1997), 20 O.S.C. Bull. 3525 (Can.).

9. See Re Canadian Jorex Limited and Mannville Oil & Gas Ltd. (1992), 15 O.S.C. Bull. 257 (Can.).

10. See, e.g. Neo Material Technologies inc., (Re) (2009), available at [https://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad\\_20090901\\_neo-material.pdf](https://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20090901_neo-material.pdf); Pulse Data Inc., (Re) (2007), 2007 A.S.C. Bull. (Can. Alta. Sec. Com.).

11. HudBay Minerals Inc. and Augusta Resource Corporation. (2014), 2014 BSECCOM 154 ¶79 (Can. B.C. Sec. Com.).

12. *Id.* at ¶¶46, 51, 59.

13. *Id.* at ¶ 21.

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The Proposed Amendments, once adopted, should buttress the traditional Canadian position—that a pill has a definitive shelf-life notwithstanding the target board’s judgment or machinations. Furthermore, the Proposed Amendments, in an effort to harmonize and codify the takeover bid rules in Canada as they relate to hostile bids and shareholder rights plans, would require all formal bids for Canadian public targets to, among other things, include a minimum bid period of 120 days.<sup>14</sup>

With the stated objective of rebalancing the current dynamics between hostile bidders and target boards, the Proposed Amendments aim to make it easier for shareholders to make voluntary, informed, and coordinated tender decisions, while giving target boards more time to respond to hostile bids.

Presumably, as the Proposed Amendments will remove some of the coercive features of the current regime, target boards can likely expect to have a more difficult time defending a poison pill that goes beyond the protections of the Proposed Amendments. However, depending on how the Proposed Amendments are implemented, the CSA may leave open the possibility for regulatory intervention in appropriate circumstances, which could continue to conflict on a case-by-case and jurisdiction-to-jurisdiction basis.

### III. Chile

A number of relevant legal developments have taken place in the Corporate and M&A field in Chile in 2014. The most important is Law 20,720<sup>15</sup> on Reorganization and Liquidation, which came into force on October 10, 2014, replacing the previous bankruptcy regime with a new reorganization and liquidation system.

This law provides a new paradigm in the Chilean bankruptcy field, moving from a system focused on asset liquidation to a system aimed at pursuing a balance between liquidation and reorganization. This new system also seeks to maximize the asset value, preserve the insolvency estate to allow for a fair distribution among the creditors, and promote a fast and efficient termination of the insolvency process.

Under Law 20,720, the protection given to the debtor has been significantly strengthened. For example, upon filing the reorganization form, the competent court will grant financial bankruptcy protection to the debtor for a period of 30 to 90 days (depending on the creditors’ support).<sup>16</sup> During this period, all contracts to which the debtor is a party remain in force, and their payment terms and conditions cannot be modified.

Furthermore, the body of creditors may now challenge contracts that the company entered into before the reorganization or liquidation. The challenges happen through revocatory actions if the relevant contract caused damages to the body of creditors and the party executing the contract had actual knowledge of the bad economic condition of the company.

Another element of Law 20,720 that will likely improve the process of reorganization, liquidation, and bankruptcy is that insolvency proceedings will be subject to the jurisdiction of specialized courts rather than ordinary civil courts.

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14. See CSA Notice 62-306, *supra* note 5.

15. See Law No. 20720, Diciembre 30, 2013, DIARIO OFICIAL [D.O.] (Chile).

16. *Id.*

In an effort to simplify the Chilean corporate regulations, Law 20,712<sup>17</sup> on Funds and Portfolio Management (also known as “Single Funds Act”) entered into force on May 1, 2014. This law consolidates the regulations applicable to private equity and venture capital investment funds in one single bill. Its main purpose is to unify and simplify the legal bodies governing the management of funds in a common and orderly legal framework and to incorporate certain basic regulations on management of individual portfolios. The old regulations that governed mutual funds, investment funds, foreign capital investment funds, and real estate funds were repealed.

The Single Funds Act distinguishes between three types of funds: (i) mutual funds, which allow full and permanent recovery of shares with the redemption payment being made within 10 days; (ii) public investment funds, which are those funds that are not mutual funds, and that can be divided into funds that do not allow redemption and funds that permit it with the redemption payment being made in 180 days or more; and (iii) private investment funds, which are investment funds with fewer than fifty investors.<sup>18</sup> While public mutual funds and investment funds are subject to the supervision of the Securities and Insurance Authority, private investment funds are not.

Finally, the scope of Law 20,659<sup>19</sup> (also known as the “One-Day Companies Act”), which simplifies the incorporation, amendment and dissolution of Chilean companies, has continued to expand, as it is now applicable not only to limited liability companies (*sociedades de responsabilidad limitada*), but also to single-owner limited liability enterprises (*empresas individuales de responsabilidad limitada*) and, most interestingly, to companies limited by shares (*sociedades por acciones*).

Pursuant to the One-Day Companies Act, a special electronic platform was created on which the Enterprises and Companies Register administers the registrations of companies under the supervision of the Ministry of Economy, Development and Tourism. Companies can be registered by uploading a form available for any person on the website, while the taxpayer number and an authorization to start business activities are simultaneously granted by the Tax Authority.

The One-Day Companies Act should become applicable to all types of companies in the next couple of years, except for listed stock corporations.

#### **IV. China**

Chinese legislators adopted important regulations in 2013 and 2014. A primary policy drive is to streamline burdensome regulatory approval requirements and administration practices, in the context of a slower export-based economic growth in China.

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17. See Law No. 20712, Diciembre 24, 2013, DIARIO OFICIAL [D.O.] (Chile).

18. *Id.*

19. See Law No. 20659, Enero 31, 2013, DIARIO OFICIAL [D.O.] (Chile).

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A. CONTINUED LIFTING OF FOREIGN INVESTMENT MARKET ENTRY RESTRICTIONS

Following the launch of the China (Shanghai) Pilot Free Trade Zone in September 2013, the Chinese government updated the Negative Approval List in June 2014.<sup>20</sup> With the exception of 139 specific industries listed in the Negative Approval List, foreign direct investments are exempt from foreign investment approval, which would require a filing with the authorities.<sup>21</sup>

In November 2014, the National Development and Reform Commission released the revised draft of the Catalogue of Industries for Guiding Foreign Investment (the “Catalogue”) for consultation with the public.<sup>22</sup> The revised Catalogue will likely come into effect by the end of 2014. Pursuant to the draft, many industries are to be removed from the “Restricted Category,” such as online distribution, development of land, trust companies, insurance brokerage companies, real estate brokerage and the operation of high-class hotels, office buildings, and movie theaters. Pursuant to the revised Catalogue in certain industries, such as the development of new technologies for oil exploration and exploitation and the design and manufacture of airborne equipment for civil aviation, foreign investors may set up wholly-owned subsidiaries to structure their investment. In other industries, such as the maintenance of railway infrastructures and international marine transportation services, foreign investors may set up a joint venture company, with the foreign investor owning the majority interest.

B. REVISIONS TO THE COMPANY LAW AND CHANGE OF COMPANY REGISTRATION RULES

The equity capital contribution rules were extensively liberalised by revisions to the Company Law adopted at end of 2013 and certain follow-on regulations of the State Council.<sup>23</sup> The main changes include the transition of the registered capital payment system from a mandatory full amount contribution to a voluntary subscription, the removal of requirements of minimum equity capital, the removal of the time limit of the actual payment of the registered capital, and the removal of the minimum percentage of cash contribution.<sup>24</sup> However, such changes do not apply to a list of twenty seven industries, including insurance companies, banks, securities houses, and trust companies.<sup>25</sup> The

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20. Special Management Measures for the Market Entry of Foreign Investment in the China (Shanghai) Pilot Free Trade Zone (Negative List) (2014 Revision), (promulgated by the Standing Comm. People’s Cong. Shanghai Municipality, June 30, 2014, effective Oct. 1, 2014) (Westlaw China).

21. *Id.*

22. National Development and Reform Commission on the “Catalogue for the Guidance of Foreign Investment Industries” revised public comment, NAT’L DEV. & REFORM COMM’N, [http://www.ndrc.gov.cn/xwzx/xwfb/201411/t20141104\\_647350.html](http://www.ndrc.gov.cn/xwzx/xwfb/201411/t20141104_647350.html) (last visited Nov. 18, 2014).

23. The Registered Capital of the State Council on the Issuance of a Registration System Reform Program Notice, Guo Fa [2014] on the 7th, available at [http://www.gov.cn/zwgk/2014-02/18/content\\_2611545.htm](http://www.gov.cn/zwgk/2014-02/18/content_2611545.htm); George Qi & Dawn Zhang, China Publishes Administrative Provisions on the Registration of the Registered Capital of Companies, NAT’L L. REV. (Aug. 15, 2014), <http://www.natlawreview.com/article/china-publishes-administrative-provisions-registration-registered-capital-companies>.

24. Company Law (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 23, 2013, effective Mar. 1, 2014), arts. 23, 26, 27, 29, 80; Reform Plan, *supra* note 22, art. 2 (1).

25. Reform Plan, *supra* note 22, Appendix.

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changes apply to enterprises in China that have foreign investments. However, the total investment in a company by a foreign investor is still subject to limitations.<sup>26</sup>

C. CHINESE OUTBOUND INVESTMENT—LIFTING OF GOVERNMENTAL APPROVAL REQUIREMENTS

Both the National Development and Reform Commission (“NDRC”) and the Ministry of Commerce (“MOFCOM”) issued new regulations that substantially delegated approval powers for Chinese outbound investment projects (“OIPs”) to lower-level authorities. Only OIPs in “sensitive countries or regions” or “sensitive industries” are to be approved by NDRC and MOFCOM.<sup>27</sup> Furthermore, OIPs with a proposed Chinese investment exceeding RMB 1 billion must be approved by NDRC.<sup>28</sup> Other OIPs are to be approved by provincial-level authorities.

V. Colombia

A. TAX REFORM

In 2012, an innovative tax reform was approved in Colombia by means of Law 1607<sup>29</sup>. The tax reform became effective in 2013 and has significantly modified the landscape of transactions in Colombia. Likewise, after the reelection of President Juan Manuel Santos, the government is planning an additional tax reform, aiming to raise over US\$26.5 billion in the next four years. With this reform, the government seeks not only the creation and expansion of several taxes in Colombia, but also the implementation of an adequate mechanism to fight tax evasion.

The draft tax reform is mostly focused on high net worth individuals.<sup>30</sup> As many Colombian companies are family owned, this reform may have an impact on M&A activity as such companies will likely reorganize assets in Colombia in order to mitigate the effects of the tax reform.

B. PRIVATE EQUITY AND VENTURE CAPITAL INCREASING INVESTMENT IN COLOMBIA

Large high profile transactions were common in Colombia during 2014, but in particular private equity and venture capital transactions significantly increased in volume. Private equity transactions increased in volume due to the changes in the economic environment and the broadening of private equity platforms. The latest Latin American

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26. See Jiamu Sun, *MOFCOM to Confirm Relaxation of Registered Capital Contribution Requirements for FIEs*, CHINA LAW UPDATE BLOG (July 8, 2014), <http://www.chinalawupdate.cn/2014/07/articles/foreign-direct-investment/mofcom-to-confirm-relaxation-of-registered-capital-contribution-requirements-for-fies/>.

27. See Laney Zhang, *China: Rules Revised to Facilitate Overseas Investments*, LIBR CONGRESS (Oct. 31, 2014), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205404181\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404181_text).

28. *Id.*

29. L. 1607, diciembre 26, 2012, DIARIO OFICIAL [D.O.] (Colom.).

30. See Oscar Medina, *Colombia Follows Piketty Plan in Raising Tax on Largest Fortunes*, BLOOMBERG (Sept. 9, 2014), <http://www.bloomberg.com/news/2014-09-09/colombia-follows-piketty-plan-in-raising-tax-on-largest-fortunes.html>.

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Private Equity & Venture Capital Association (“LAVCA”) reports highlighted Colombia’s efforts to promote its regulation and improve its status on the scorecard.<sup>31</sup> Moreover, Colombian Association of Private Equity Funds (“ColCapital”) has been very active during 2014, evaluating the increasing investments and exits of private equity funds in Colombia.<sup>32</sup> At a more general level, private equity in the Latin-American region is expected to further increase its investment during 2015.<sup>33</sup> Although the venture capital industry has been slowly growing during the past years, during 2014 it captured an important portion of the M&A market in Colombia. With the consolidation of government sponsored entities such as Innpulsa, Corporación Ventures and Bancoldex, the Colombian government has attracted more investors interested in startups. Additionally, the number of angel investors has increased during the past years. Recently, local angel networks such as the Bavaria Foundation, the Bolívar-Davivienda Foundation, and Capitalia have been very successful in attracting more investment to the industry.

C. HIGHLIGHTED TRANSACTIONS

Although 2014 has not been an outstanding year in M&A activity, some of the most important deals in the history of Colombia came through. The most relevant event of the year was the closing of the merger between Millicom Spain Cable S.L. and state-owned fixed services provider UNE EPM Telecomunicaciones S.A. The US\$4.4 billion purchase price was one of the most relevant characteristics of the transaction. The deal required multiple and rigorous approvals and included a bond offering for an aggregate amount of US\$800 million.<sup>34</sup>

In the financial industry, Banco Itaú acquired a controlling stake in Corpbanca. The deal included a merger of the Colombian and Chilean subsidiaries of Corpbanca and an injection of US\$652 million in the resulting entity. The overall transaction had an approximate value of US\$2.2 billion and is subject to regulatory approvals. With this deal, Banco Itaú will enter the retail banking industry, resulting in a breakthrough transaction for the Colombian banking industry.

VI. Germany

“Paper is patient”—a common saying in Germany. Even if something is put on paper, it certainly does not mean that it is already effective. This is presumably what Chancellor Merkel’s right-of-center CDU party had in mind when it publicly supported a statutory quota for women on the supervisory boards of Germany’s largest corporations. This provision was part of the coalition agreement entered into by the CDU and the left-of-center

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31. See *2014 Scorecard Update*, LAVCA (May 29, 2014), <http://lavca.org/2014/05/29/2013-lavca-scorecard-2014-update/>.

32. See Janette Recarte, “*La industria de private equity en Colombia vive un momento clave*”, FUNDS PEOPLE (May 29, 2014, 9:00 AM), <http://www.fundspeople.com/noticias/la-industria-de-private-equity-en-colombia-vive-un-momento-clave>.

33. See Thomas Muskett-Ford, *LatAm private equity to deploy funds and diversify in 2015*, LATIN LAWYER (Sept. 15, 2014), <http://latinlawyer.com/news/article/47234/latam-private-equity-deploy-funds-diversify-2015/>.

34. See Lulu Rumsey, *Millicom Moves to Medellín*, LATIN LAWYER (Oct. 17, 2014), <http://latinlawyer.com/news/article/47375/millicom-moves-medellin/>.

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SPD party on November 27, 2013 (the “Coalition Agreement”).<sup>35</sup> Specifically, the Coalition Agreement sets forth that the CDU/SPD coalition government will enact legislation requiring Germany’s largest corporations to have supervisory boards that consist of at least thirty percent women.<sup>36</sup> German statutory law provides for a two-tier board: large German corporations must have both an executive board and a supervisory board. A supervisory board, as the name would indicate, monitors and advises the executive board.

In July 2001, the German government issued the “Agreement Between the Federal Government and the Primary Trade Associations of German Business to Promote Equal Treatment for Women and Men in the Private Company.”<sup>37</sup> The purpose of this agreement, which in itself was a political compromise as there was not enough political support for a statute promoting gender diversity at the workplace, was to establish concrete goals for equal treatment of women in the workplace, including instituting flex time and telecommuting and promoting mentoring in the workplace for women. Not much has happened since then as women currently hold slightly less than six percent of the executive board positions and approximately only nineteen percent of the supervisory board positions in Germany.<sup>38</sup> Nor has much happened since November 27, 2013, in terms of introducing specific legislation to promote women on corporate boards—until now.

Manuela Schwesig, Germany’s Minister of Families, Senior Citizens, Women and Youth, and Heiko Maas, the Minister of Justice, both cabinet members and SPD party members, presented a joint draft statute earlier this year. Under the proposal, thirty percent of supervisory board positions of companies that are publicly listed and that have more than 2,000 employees (just over 100 companies) are to be held by women.<sup>39</sup> Companies that satisfy only one of these thresholds (approximately 3,500 companies) would be subject to less stringent thresholds, but would also be required to increase the number of female supervisory board members and executive board members.<sup>40</sup>

Despite the clear wording of last year’s Coalition Agreement, a number of influential CDU cabinet members have raised concerns about the draft statute stating that it would not pass constitutional muster. One not very politically savvy politician noted that it would be in Germany’s best interest to delay the implementation of the statute because of Europe’s current weak economy (apparently meaning that adding women as executive and supervisory board members would be an unnecessary risk to an already fragile economy).

Other European countries have introduced legislation setting forth quotas for women at the board level, most notably Norway, France, Spain, Iceland, Belgium, the Netherlands,

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35. Deutschlands Zukunft Gestalten [Shaping Germany’s Future], Nov. 27, 2013, *available at* <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>.

36. *Id.*

37. Vereinbarung zwischen der Bundesregierung und den Spitzenverbänden der deutschen Wirtschaft zur Förderung der Chancengleichheit von Frauen und Männern in der Privatwirtschaft [Agreement Between the Federal Government and the Primary Trade Associations of German Business to Promote Equal Treatment for Women and Men in the Private Company], July 2, 2001, *available at* [www.dihk.de/ressourcen/downloads/chancengleichheit.pdf](http://www.dihk.de/ressourcen/downloads/chancengleichheit.pdf).

38. *Id.*

39. Harriet Torry, *30% Female Quota for German Boards Proposed*, WALL ST. J., Nov. 18, 2013, *available at* <http://www.wsj.com/articles/SB10001424052702303531204579205452997816042>.

40. *Id.*

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and Italy. The European Parliament proposed a draft directive in 2012<sup>41</sup> calling for publicly held companies to have at least forty percent female non-executive directors by January 2018.<sup>42</sup> At this point, it is doubtful that the European Parliament's proposal will be implemented. In Germany, however, Chancellor Merkel's government will approve the women's quota for Germany on December 11, 2014.<sup>43</sup> As of January 1, 2016, Germany will require publicly listed companies, as well as companies with more than 2,000 employees, to have their supervisory boards comprise of at least thirty percent women.<sup>44</sup> Surprisingly, this requirement will also apply to European companies (*Societas Europaea*) with German headquarters (currently seven companies). Companies will have three years as of 2016 to satisfy this statutory requirement.

## VII. India

The year 2014 witnessed certain Indian competition law developments that are notable for their implications on international mergers & acquisitions (M&A). The Indian Competition Act, 2002<sup>45</sup> (Competition Act) regulates both domestic and international M&A that have bearing on the Indian market. In case of international M&A having local nexus, the parties are required to notify the Competition Commission of India (CCI) about the nexus within thirty days of board approval or of executing an agreement.<sup>46</sup> Under the Competition Act, the term "Combinations" includes M&A, taking place within or outside the territory of India. Even for overseas Combinations, the Competition Act has prescribed "Threshold" limits.<sup>47</sup> The parties must notify CCI of any Combination that meets the threshold. As per its "Exempted Threshold Notification"<sup>48</sup>, CCI has exempted companies from notification until March 2016 if the target company in India has assets less than INR 2.50 billion and turnover less than INR 7.50 billion. But, when an Indian target company crosses the "Exempted Threshold," then the overall deal is subjected to the "Test of Threshold." If that is also met, then notification to CCI becomes mandatory. The procedural aspects of notification have been provided under CCI Combination Regulations, 2011.<sup>49</sup> The parties can notify CCI in various prescribed forms. Once the notifi-

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41. *Proposal for a Directive of the European Parliament and of The Council on Improving the Gender Balance Among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures* (Nov. 14, 2012), available at [http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive\\_quotas\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf).

42. Press Release, European Commission Justice, Women on Boards: Commission proposes 40% objective (Nov. 14, 2012) available at [http://ec.europa.eu/justice/newsroom/gender-equality/news/121114\\_en.htm](http://ec.europa.eu/justice/newsroom/gender-equality/news/121114_en.htm).

43. Gleichberechtigung: Koalition einigt sich auf Frauenquote in Aufsichtsräten [Equal Rights: Coalition Reaches Agreement on Women's Quota for Supervisory Boards], SPIEGEL ONLINE (Nov. 26, 2014), available at <http://www.spiegel.de/politik/deutschland/frauenquote-in-aufsichtsraten-koalition-einigt-sich-auf-30-prozent-a-1005033.html>.

44. *Id.*

45. Competition Act, 2002, No. 12 of 2003, INDIA CODE (2007) as amended by the Competition (Amendment) Act, No. 39 of 2007 INDIA CODE (2007).

46. *Id.* at § 6.

47. *Id.* at § 5.

48. Lex Mundi Publication, PRE-MERGER NOTIFICATION GUIDE, INDIA 1 (2012), available at [www.lexmundi.com/Document.asp?DocID=961](http://www.lexmundi.com/Document.asp?DocID=961).

49. CCI Procedure in regard to the transaction of business relating to combinations Regulations, (May 11, 2009), available at [http://cci.gov.in/May2011/Home/regulation/Combination%20Regulations%20as%20at%2028-3-14%20\(2\).pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00](http://cci.gov.in/May2011/Home/regulation/Combination%20Regulations%20as%20at%2028-3-14%20(2).pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00).

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cation is received by CCI, CCI will express its prima facie view within thirty days, and within 210 days either rejects the deal or clears the deal with or without modifications.<sup>50</sup>

A. AMENDMENT COMBINATION REGULATIONS, 2014<sup>51</sup>

On March 28, 2014, the Combination Regulations were amended and a new Regulation 9(5) was added empowering CCI to look into the substance of the deal by looking through the structures. This effectively means that CCI can make the companies notify even if they are not crossing the “Threshold.” Regulation 9(4) requires a “Consolidated Notification” if a business transaction involves series of interdependent steps where one or two can be classified as Combination. This could be the reason for the amendment. It eases the compliance on the part of the companies as they are not required to notify at each step. It is still to be understood and clarified what would be considered as “substance of the transaction.” In absence of any clarification from CCI, companies should consider applying both the tests of “Threshold” and “Substance” while structuring any M&A deal. It is important to look at the transaction in a holistic way rather than in parts.

B. M&A DEAL OF SUN PHARMACEUTICALS INDUSTRIES LIMITED (SUN PHARMA) AND RANBAXY LABORATORIES LIMITED (RANBAXY)<sup>52</sup>

Sun Pharma and Ranbaxy notified CCI of their Combination proposal on May 6, 2014. CCI started its investigation and framed its prima facie view that this Combination will have an appreciable “adverse effect.”<sup>53</sup> This is the first time CCI has invoked the second level investigation in any Combination. It has asked parties to publish details of the Combination and has sought public comments. Based on the comments, CCI may ask parties for further information. After receiving further clarifications, CCI may reject the deal, pass it, or pass it with certain modifications. In this case, CCI made combined market shares of the companies in various categories of drugs the basis of its prima facie view. Clearly the parties need to consider the factors of nature of business and combined market shares while structuring a deal, as these may be decisive in determining the timeframe and outcome of CCI’s imperative approval process.

### VIII. Netherlands

The issue of directors having sufficient time to properly fulfill their duties is increasingly becoming the subject matter of legislation, which imposes restrictions on the possibilities of board position appointment or reappointment. This year the rules that applied to listed companies and so-called “large companies” have been extended by similar new regulations for pension funds and “significant” banks and investment institutions.

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50. *Id.*

51. See The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2014 (March 28, 2014), available at <http://cci.gov.in/May2011/Home/regulation/march%202014.pdf>.

52. Press Release, Form IV Contained in Schedule II to the Combination Regulations Under Sec 29(2) of Competition Act, 2002 (as amended) (Sept. 4, 2014), available at <http://www.sunpharma.com/press-releases>.

53. *Id.* at § 20(4).

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The Dutch Corporate Governance Code (the “Code?”)<sup>54</sup> was the first regulation limiting the number of board positions that managing and supervisory directors can hold within Dutch-listed companies.<sup>55</sup> The Code applies on a “comply or explain” basis. But, due to the mandatory nature of the Dutch Civil Code (the “Civil Code”), Dutch-listed companies that also qualify as a “large company” within the meaning of the Civil Code<sup>56</sup> can no longer deviate from the Code on this point. Pursuant to the Code, managing directors of Dutch-listed companies cannot hold more than two supervisory positions nor can they act as chairman of a supervisory board.<sup>57</sup> The maximum number of supervisory boards of Dutch-listed companies that an individual may be a member of is limited to five. But, for these purposes, the chairmanship of a supervisory board counts as double.<sup>58</sup> The provisions in the Code with respect to supervisory directors also apply to non-executive directors in a one-tier board.<sup>59</sup> The Code does not limit the number of managing or executive board positions.

The Civil Code limits the number of board positions that directors can hold within “large” companies.<sup>60</sup> The question whether the nominee is eligible for a position has to be assessed at the time of appointment or re-appointment.<sup>61</sup> The limitations set out in the Civil Code are the same as the limitations of the Code. But, contrary to the Code, an appointment in violation of the Civil Code is void, although it does not invalidate the decision-making in which the director concerned participated. If the nominee holds a position with a pension fund or “significant” bank or investment company, it is necessary to establish that the specific regulations for these sectors do not result in any additional complications.

On July 1, 2014, a limitation regulation was adopted that specifically applies to pension funds (the “pension funds regulation”).<sup>62</sup> A pension fund cannot proceed with an appointment if the managing or supervisory director would hold more than one full-time equivalent (“FTE”) in managing and supervisory board positions.<sup>63</sup> The regulation includes a weighing factor to determine the time involved with the position concerned.<sup>64</sup> As of August 1, 2014, the Financial Supervision Act includes a limitation regulation that specifically applies to banks and investment institutions that qualify as “significant” (the

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54. Dutch Corporate Governance Code, Jan. 1, 2009, *available at* <http://commissiecorporategovernance.nl/dutch-corporate-governance-code>.

55. *Id.*

56. *See* art. 2:153 BW (Neth.); *see also* art. 2:263 BW (Neth.).

57. Dutch Corporate Governance Code, *supra* 54, at Best Practice Provision II.1.8.

58. *Id.* at III.3.4

59. Press release, The Monitoring Committee (Neth.) (Sept. 26, 2012), *available at* <http://www.corpgov.nl/nieuws/1986/Code-en-non-executive-directors>.

60. *See* art. 2:132a BW (Neth.); *see also* art. 2:142a BW (Neth.); *see also* art. 2:242a BW (Neth.); *see also* art. 2:52a (Neth.).

61. *Id.*

62. Wet versterking bestuur pensioenfondsen [Pension Fund Governance Act] July 1, 2014 (Neth.), *available at* <https://zoek.officielebekendmakingen.nl/stb-2013-302.html>.

63. *See* Pensioenwet [Pension Act] art. 106a (Neth.); *see also* Besluit uitvoering pensioenwet [Implementation Decree Pension Act] art. 35a (Neth.).

64. *See* Pensioenwet [Pension Act] art. 106a (Neth.); *see also* Besluit uitvoering pensioenwet [Implementation Decree Pension Act] art. 35a (Neth.).

“CRD IV regulation”).<sup>65</sup> The European Union (EU) directive implemented by the CRD IV regulation does not provide a specific interpretation of “significant,” but describes that individual circumstances and the nature, scale, and complexity of the institution’s activities need to be examined.<sup>66</sup> Directors of “significant” banks or investment institutions may not hold more than one management board position and two supervisory positions, or four supervisory positions at the same time, including the position with the significant bank or investment institution.<sup>67</sup> As the CRD IV regulation is based on an EU directive, positions outside the Netherlands also presumably count. Directors within these institutions are continuously required to observe these limitations, regardless of whether their appointment or re-appointment is at stake. An appointment in violation of these limitations is not void, but the authorities can commence an enforcement procedure.

## IX. Spain

Over the last few years, the EU has considered lack of strict and mandatory corporate governance regulations as an indirect and underlying cause of the financial crisis that its economy has been and is currently suffering. As a result, the legislative powers in Spain have passed several regulations seeking to control or limit excessive and imprudent risk-taking. In addition, these regulations strive to standardize the implementation of transparent and reasonable remuneration systems for directors and top executives and the professionalization of the governing bodies of financial entities and private companies.

On May 30, 2014, the Spanish parliament passed the Draft Companies Act Amendment regarding improvements on corporate governance<sup>68</sup> (the “Bill”), which intends to implement amendments or include new articles regarding matters related to corporate governance. Especially relevant is the amendment related to accumulation in the same person of the positions of chairman of the board of directors and chief executive officer of companies listed on the stock exchange in Spain. If the Bill is finally approved, most of these companies will have to amend their current bylaws and internal structure.

The separation of the positions of chairman of the board of directors and chief executive officer of a company are organized so that these positions are held by two different people, which has always been included in the expert reports on corporate governance regarding listed companies. Particularly, in Spain, this matter has been addressed in Sec-

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65. Implementatiewet richtlijn en verordening kapitaalvereisten [Implementation Act Directive and Regulation Capital Requirements (CRD IV)] Aug. 1, 2014 (Neth.), *available at* <https://zoek.officielebekendmakingen.nl/stb-2014-253.html>.

66. Directive on Capital Requirements 2013/36/EU PbEU (L 176) (EU), *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEX:32013L0036>.

67. *See* Wet op het financieel toezicht [Financial Supervision Act] art. 3:8 (3), (4) and art. 4:9b (Neth.); *see also* Besluit prudentiële regels Wft [Decree on Prudential Rules Financial Supervision Act] art. 17d (Neth.); *see also* Besluit gedragstoezicht financiële ondernemingen Wft [Decree on Market Conduct Supervision Financial Institutions] art. 30b (Neth.).

68. Spanish Companies Act Amendment Bill B.O.E. 2014, No. 121/000097, *available at* [http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-97-1.pdf](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-97-1.pdf)

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tion 3.2 of the so-called Olivencia Report,<sup>69</sup> in Section IV.4 of the Aldama Report,<sup>70</sup> and in Recommendation 16 of the “Unified Code of Good Corporate Governance.”<sup>71</sup>

These reports highlight the difficulty in deciding whether it is better to separate or accumulate the positions of chairman of the board of directors and chief executive officer of a listed company. All of these reports state that there are advantages and disadvantages to each system. The reports suggest that there should not be a prohibition per se of the accumulation of positions in the same person, but when this situation occurs, a lead independent director should be appointed.

The Bill seems to have adopted this suggestion in creating a new article 529 of the Spanish Companies Act related to the separation of positions.<sup>72</sup> This article has two implications: on the one hand, it establishes that the post of chairman of the board of directors and chief executive officer can be held by the same person, unless otherwise provided in the bylaws of the company. On the other hand, the article requires an enhanced majority to appoint the chairman of the board. As a second safeguard, if the positions of chairman of the board of directors and chief executive officer are combined in one person, the article requires a new figure: the lead independent director. These measures—especially the second one—are intended to avoid negative consequences that may arise from the accumulation of power within one person, particularly when such person carries out activities that are subject to the control and approval of the governing body chaired and run by that same person.

If the Bill is finally passed, a time will come for the general shareholders and governing bodies of listed companies to decide whether they intend to continue with the accumulation of positions or whether they are willing to separate the positions in order to avoid the appointment of a lead independent director.

## **X. Ukraine**

The ongoing political and economic crisis in Ukraine has significantly affected the commercial expectations of investors. Likewise, the structure, value, and size of M&A transactions have changed. The main reasons for the low M&A activity in 2014 are the lack of funds available for investments, the concentration of assets controlled by Ukrainian business groups in key sectors, and the lack of transparency in acquisition and ownership structures. These factors serve to deter foreign investors from considering projects and potential M&A transactions involving a Ukrainian target.

The areas that showed activity in 2014 are agriculture, food, and beverage, infrastructure and energy (oil and gas, electricity and renewables), pharmaceuticals, and IT. Agriculture tops the list due to its significant potential and relatively low level of asset

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69. *Comisión Especial para el Estudio de un Código Ético de los Consejos de Administración de las Sociedades*, El Gobierno de las Sociedades Cotizadas—Código de Buen Gobierno (February 26, 1998) (Spain) available at <https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/govsocot.pdf>

70. *Informe de la Comisión Especial para el Fomento de la Transparencia y Seguridad en los Mercados y en las Sociedades*, Informe Aldama, (January 8, 2003) (Spain), available at <https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/INFORMEFINAL.pdf>.

71. *Comisión Nacional del Mercado de Valores 2013, Código Unificado de Buen Gobierno Corporativo* available at [https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CUBGrefundido\\_JUNIO2013.pdf](https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CUBGrefundido_JUNIO2013.pdf).

72. Spanish Companies Act Amendment Bill B.O.E. 2014, No. 121/000097, available at [http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-97-1.pdf](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-97-1.pdf).

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consolidation. It is worth noting that there has not been much progress in financing Ukrainian businesses through IPOs in the international capital markets, although the market has seen some activity. Experts predict that IPOs are planned by several Ukrainian companies in different sectors, mainly food and agriculture. But, given the latest macroeconomic slowdown, IPOs most likely will be postponed to 2015 or 2016.

A. NON-FLEXIBLE CORPORATE LEGISLATION

The Ukrainian legislative environment has not seen any significant changes in 2014. Ukrainian corporate legislation still does not recognize mechanisms such as derivative actions, squeeze-out rights, call and put options, and drag-along and tag-along rights. There is no specific act regulating public or private takeovers and mergers in Ukraine. The concept of public bids is also underdeveloped in the Ukrainian legal framework. For example, no distinction is made between hostile bids and bids that are supported by the board of the target company.

Furthermore, limited liability companies (“LLCs”) are still regulated by the outdated Law on Business Companies.<sup>73</sup> Since 2013, the adoption of the Law on LLCs and Additional Liability Companies has been actively discussed and would be one of the most awaited changes in corporate legislation. There are two alternative proposals: No. 2011<sup>74</sup> and No.2011-1.<sup>75</sup> The main innovations of the proposals are the possibility to attend the general meeting with the use of electronic communication means, the possibility to establish a supervisory board in an LLC, and the approval rights of the shareholders in relation to the company entering into transactions that are significant or not at arm’s length. The next step in the legislative process is the acceptance of one of these proposals by Verkhovna Rada for consideration and adoption.

B. RECENT CHANGES

The key problem that foreign investors have faced in 2014 is the restriction on repatriation of investments in Ukrainian companies. Until December 2, 2014, the following foreign currency transactions relating to investments in Ukrainian companies are prohibited:

- repatriation of funds received by foreign investors as a result of sale of equity interests in Ukrainian companies not represented by securities (such as equity in LLCs); and
- repatriation of dividends by foreign investors, except for dividends received from securities listed at one of the local stock exchanges.<sup>76</sup>

In practice, this means that, at least until December 2, 2014, a foreign investor will not be able to repatriate its investments. Although these restrictions should not affect the transfer of title to shares and other equity interests as such, any proceeds from such transactions will have to remain in Ukrainian bank accounts.

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73. Закон н° 576-ХІІ 1 Жовтень 1991, *available at* <http://zakon4.rada.gov.ua/laws/show/1576-12>.

74. Draft Law on LLCs and Additional Liability Companies No. 2011 (2013) (Ukr.) (draft revoked Nov. 11, 2014), *available at* [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=45462](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=45462).

75. *Id.*

76. Resolution of the National Bank of Ukraine No. 591, September 22, 2014, *available at* <http://zakon4.rada.gov.ua/laws/show/v0591500-1>.

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C. INFORMATION ON BENEFICIAL OWNERS

All Ukrainian companies will be required to disclose information on their ultimate beneficiaries to the State Registrar by May 25, 2014. Failure to comply with the disclosure obligations may result in the director of the company being fined for 5,100 to 8,500 Ukrainian Hryvnias (approximately USD 400 to 650).<sup>77</sup>

**XI. United States**

In 2014, Delaware courts continued to delineate directors' fiduciary duties in various M&A contexts.

Upholding last year's Court of Chancery decision in *In re MFW Shareholders Litigation*<sup>78</sup> (discussed in the 2013 *Year in Review*),<sup>79</sup> the Delaware Supreme Court, in *Kahn v. M&F Worldwide Corp.*<sup>80</sup> held that the deferential "business judgment" standard of review applies in cases of "go-private" mergers involving a controlling stockholder, if (i) the controlling stockholder conditions the deal at the outset on the approval of both a special committee of the target corporation's board of directors and the "majority of the minority" of the target's stockholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to veto the transaction; (iv) the special committee acts with care in negotiating a fair price; (v) the minority stockholders' vote is informed; and (vi) the minority stockholders are not coerced.<sup>81</sup> The Supreme Court noted, however, that full trials may be necessary to determine whether special committees have met their obligations to negotiate effectively with controlling stockholders.

In *Third Point LLC v. Ruprecht*,<sup>82</sup> the Court of Chancery denied plaintiffs' motion to enjoin Sotheby's 2014 annual meeting. The plaintiff stockholders, led by the activist fund Third Point, alleged that the Sotheby's board breached its fiduciary duties by adopting a two-tiered stockholder rights plan (allowing passive investors to acquire up to a twenty percent interest, while restricting activist investors to a ten percent stake), and refusing to permit Third Point to acquire up to a twenty percent stake in Sotheby's.<sup>83</sup> In denying the preliminary injunction, the Court held that (i) Unocal's "enhanced scrutiny" provided the appropriate standard of review with respect to the adoption of the rights plan and the refusal to waive the rights plan trigger for Third Point, and (ii) the actions taken by the Sotheby's board were reasonable and proportionate in response to a legally cognizable threat posed by Third Point and other activist investors.<sup>84</sup> Because of the procedural posture and fact-specific nature of the Court's analysis, practitioners must be cautious in drawing broad conclusions from this decision.

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77. Закон н° 1701-VII 14 ЖОВТЕНЬ 2014, available at <http://zakon2.rada.gov.ua/laws/show/1701-vii>.

78. *In re MFW Shareholders Litig.*, 67 A.3d 496 (Del. Ch. 2013).

79. Maria Cibele Crepaldi Affonso dos Santos *et al.*, *International M&A and Joint Ventures*, 48 YEAR REVIEW. 65, 85 (2013).

80. *Kahn v. M&F Worldwide Corp.*, No. 334, 2013, slip op., 2014 WL 99270 (Del. Mar. 14, 2014).

81. *Id.*

82. *Third Point LLC v. Ruprecht*, et al., C.A. No. 9469-VCP (Del. Ch. May 2, 2014).

83. *Id.*

84. *Id.*

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The Delaware Court of Chancery's opinions in *In re Rural/Metro Corporation Stockholders Litigation*<sup>85</sup> provided practitioners with a stern reminder of the importance of running an orderly, conflict-free sale process. In evaluating the process of Rural/Metro Corporation's 2011 sale to a Warburg Pincus LLC affiliate, the Court found various deficiencies and conflicts of interest, including: (i) an uninvolved Rural/Metro board of directors; (ii) a sale process managed by a conflicted special committee of Rural/Metro's board; (iii) the special committee's engagement of a lead financial advisor, RBC, that (unknown to Rural/Metro) prioritized a speedy sale in hopes of providing "stapled" financing to potential buyers above maximizing stockholder value; (iv) the absence of valuation analyses through the sale process, followed by RBC's "last-minute" provision of manipulated analyses designed to induce Rural/Metro's acceptance of Warburg's offer; and (v) a sale process that, at RBC's suggestion, coincided with the sale process of EMS, Rural/Metro's largest competitor, effectively disqualifying any potential bidders that were occupied pursuing EMS.<sup>86</sup> Plaintiffs' claims against Rural/Metro's directors were settled, but plaintiffs' actions against RBC proceeded to trial. Despite the generous premium paid by Warburg in the acquisition (and Rural/Metro's subsequent bankruptcy), the Court held that RBC aided and abetted the Rural/Metro board's breach of its fiduciary duties. In a later opinion that has ignited much debate, the Court determined that RBC was liable for \$75.8 million of the \$91.3 million in damages suffered by Rural/Metro's stockholders.<sup>87</sup>

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85. *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54 (Del. Ch. 2014); *in re Rural Metro Corp. Stockholders Litig.*, 102 A.3d 205 (Del. Ch. 2014).

86. *Id.*

87. *Id.*

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## International Trade

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This article outlines the most important developments in international trade law during 2014.<sup>1</sup> It summarizes developments in international trade negotiations, World Trade Organization (WTO) dispute settlement activities, U.S. trade remedies cases, and related legislation.

### I. Negotiation Developments

#### A. WTO NEGOTIATIONS

##### 1. *The Bali Package*

With Doha Round negotiations continuing, WTO Members adopted the “Bali Package” at the Ministerial Conference in Bali, Indonesia in December 2013—a set of agreements extracted from issues in the Doha Round.<sup>2</sup> The package consists of agreements to streamline trade and provide interim food-security and other programs for developing and least-developing countries.

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1. For developments during 2013, see Stephen W. Brophy et al., *International Trade*, \_\_ INT’L LAW. \_\_ (2014).

2. World Trade Organization, Bali Ministerial Declaration, WT/MIN(13)/DEC, available at [http://wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/bali\\_texts\\_combined\\_e.pdf](http://wto.org/english/thewto_e/minist_e/mc9_e/bali_texts_combined_e.pdf).

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a. Trade Facilitation Agreement

The Trade Facilitation Agreement (TFA), part of the Bali Package, was scheduled to be incorporated into the WTO's legal framework by July 31, 2014.<sup>3</sup> This deadline was derailed when India withheld its approval, as discussed below. Negotiations on the impasse continued until an agreement was reached in November. Governments may now begin the domestic ratification process.<sup>4</sup> Members adopted the Protocol of Amendment that incorporates the TFA into WTO legal texts. The TFA is the first new multilateral trade agreement since the WTO's creation in 1995.<sup>5</sup>

The TFA focuses on streamlining customs procedures. Members pledged to publish information on documentation required for imports, export, and transit procedures and fees; duty rates; rules for the classification and valuation of imported goods; laws, regulations and rulings regarding rules of origin; penalty provisions and appeal procedures; and procedures related to the administration of tariff quotas.<sup>6</sup> Additionally, Members agreed to publish on the Internet all information necessary for the "practical steps" of importation and exportation, including the forms required and contact information in case of inquiries.<sup>7</sup>

Under the TFA, Members should publish new laws and regulations as soon as possible after enactment and provide notice and comment opportunities.<sup>8</sup> And Members "shall issue" advance, binding rulings "in a reasonable, time bound manner," as well as the requirements for initiating such rulings.<sup>9</sup> Ruling requests may involve tariff classification, valuation, origin, quota administration, or other appropriate matters; the right to appeal administrative decisions must also be provided.<sup>10</sup>

The TFA also provides that, if a Member adopts a border regulation regime for food, beverages, or feedstuffs consisting of notifications or guidance to the ports, then the regime may be based on risk, the notification must be suspended when the conditions related to the enhanced regime no longer exist, termination of the notice must be published promptly and accessibly, and, in actions for detention or inspection, the importer or carrier must be notified promptly.<sup>11</sup> The TFA also urges Members to establish electronic payment procedures for duties, taxes, and other fees, as well as to establish a "single window" for the submission of import and export documentation.<sup>12</sup> The TFA allows developing and least-developed countries to implement its provisions on a delayed timeline.<sup>13</sup>

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3. *Days 3, 4 and 5: Round-the-dock consultations produce 'Bali Package'*, WORLD TRADE ORG. (Dec. 5-7, 2013), [http://www.wto.org/english/news\\_e/news13\\_e/mc9sum\\_07dec13\\_e.htm](http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm).

4. *WTO Members Sign Off on Food Stocks, Trade Facilitation Decisions*, 18 BRIDGES 40 (Nov. 27, 2014), available at <http://www.ictsd.org/bridges-news/bridges/news/wto-members-sign-off-on-food-stocks-trade-facilitation-decisions>.

5. World Trade Organization, *supra* note 2a.

6. WTO, Protocol Amending the Marrakesh Agreement Establishing The World Trade Organization, WT/L/940 at 3,4 (Nov. 28, 2014).

7. *Id.* at 4.

8. *Id.* at 3.

9. *Id.* at 5.

10. *Id.* at 5-7.

11. *Id.* at 7-8.

12. WTO Protocol, *supra* note 4 at 9, 15.

13. *Id.* at 22-26.

b. Agriculture

The Bali Package contained an interim mechanism for the “peace clause”—whether governmental purchases of crops to distribute to the food-insecure should be counted against subsidy limits—and an agreement to continue negotiations for a permanent solution, expected to be reached in 2017.<sup>14</sup>

India and a few other countries argued for a permanent solution prior to incorporation of the TFA into the WTO. As noted above, negotiations, led by the U.S. and India, continued until Members reached a solution in November 2014. The WTO retained the interim arrangement that food stockholding programs would not violate the subsidy provisions; this provision will not expire in 2017.<sup>15</sup> But, the solution accelerated the goal of reaching a permanent solution to the end of 2015.<sup>16</sup>

2. *Information Technology Agreement*

For the past two years, Information Technology Agreement (ITA) negotiations have centered on expanding product coverage, but progress was slowed over China’s resistance to include new products in its scope, including multi-component integrated circuits (MCOs), medical devices, flat-panel displays, and semiconductor manufacturing equipment. In November, China agreed to expanded product coverage, allowing ITA negotiations to continue among the fifty-four participating countries (covering 90 percent of technology trade).<sup>17</sup> China agreed to include MCOs, magnetic resonance imaging machines, and high-tech testing equipment in the negotiations, but not flat-panel displays.<sup>18</sup>

B. BILATERAL AND REGIONAL NEGOTIATIONS

1. *Bilateral Investment Treaties*

In July 2013, the United States and China announced their intentions to negotiate a bilateral investment treaty (BIT).<sup>19</sup> China has committed to negotiating market access on a “pre-establishment” basis, using a “negative list” approach (i.e., all industries and sectors are covered unless specifically excluded).<sup>20</sup> In October, China announced that it hoped to

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14. WTO, Ministerial Decision of 7 December 2013, WT/MIN(13)/38, WT/L/913 available at [http://www.wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/desci38\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/mc9_e/desci38_e.htm).

15. WTO, Decision of 27 November 2014, WT/L/939 available at [http://wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/balipackage\\_e.htm#agriculture](http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm#agriculture).

16. *Id.*

17. See Office of the Press Secretary, FACT SHEET: Supporting Economic Growth at Home and Abroad by Eliminating Trade Barriers on Information Technology Products, WHITE HOUSE (Nov. 10, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/10/fact-sheet-supporting-economic-growth-home-and-abroad-eliminating-trade->.

18. *See id.*

19. US-China Bilateral Investment Treaty: Update on Negotiations and What it Means for Companies, THE U.S.-CHINA BUSINESS COUNCIL, <https://www.uschina.org/events/us-china-bilateral-investment-treaty-update-negotiations-and-what-it-means-companies>.

20. *Id.*

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conclude talks by the end of 2016.<sup>21</sup> China also stated, however, that it was facing difficulties paring down its negative list.<sup>22</sup>

In July 2013, India indicated its willingness to discuss a BIT with the United States.<sup>23</sup> Negotiations proceeded slowly in 2014, and the issue of intellectual property rights protection remains contentious.<sup>24</sup>

## 2. *Trans-Pacific Partnership*

A new urgency entered Trans-Pacific Partnership (TPP) negotiations in the wake of the APEC summit in Beijing in November.<sup>25</sup> The TPP is a proposed regional free-trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.<sup>26</sup> The countries seek to conclude an agreement eliminating tariffs and nontariff trade barriers while establishing or expanding rules on intellectual property rights, foreign direct investment, and other trade-related issues.<sup>27</sup>

The most recent formal round of TPP negotiations took place in Brunei in August 2013.<sup>28</sup> But TPP leaders informally met in Beijing in November, in conjunction with the APEC summit.<sup>29</sup> The countries have reportedly made significant progress in negotiations, including reaching an “informal agreement” on topics including intellectual property and textile rules of origin. Remaining disagreements reportedly involve the automobile industry and agriculture.<sup>30</sup> The United States and Japan have conducted numerous bilateral meetings on these topics without reaching full agreement,<sup>31</sup> but both

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21. *China Sets Two Year Goal for Finishing BIT; Chamber Submits Input*, INSIDE US – CHINA TRADE, Oct. 15, 2014) available at <http://search.proquest.com/docview/1611603953?accountid=6667>.

22. *Id.*

23. Yashwant Raj, *India agrees to negotiate Bilateral Investment Treaty*, HINDUSTAN TIMES (July 13, 2013, 1:15 IST), <http://www.hindustantimes.com/business-news/india-agrees-to-negotiate-bilateral-investment-treaty-with-us/article1-1091797.aspx>.

24. *Keen to have a Bilateral Investment Treaty with India: US*, JAGRAN POST (Nov. 14, 2014, 6:41 PM), <http://post.jagran.com/keen-to-have-a-bilateral-investment-treaty-with-india-us-1415970682>.

25. See Michael Schuman, *Why You Should Care About Obscure Asian Trade Pacts*, TIME (Nov. 12, 2014), <http://time.com/tag/time-region-asia/page/2/>; see Press Release, Office of the United States Trade Representative, Remarks by President Obama Before the Trans-Pacific Partnership Meeting (Nov. 10, 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/November/Remarks-by-the-President-Before-TPP-Meeting>.

26. Ian Fergusson et. al., CONG. RESEARCH SERV., R42694, THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS 1 (2014).

27. *See id.*

28. *See id.* at 4.

29. *See* Press Release, Office of the United States Trade Representative, Trans-Pacific Partnership Trade Ministers' Report to Leaders (Nov. 10, 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/November/Trans-Pacific-Partnership-Trade-Ministers-Report-to-Leaders>.

30. *See id.*; see also Press Release, Office of the United States Trade Representative, Joint Statement of the Ministers and Heads of Delegation for the Trans-Pacific Partnership Countries (Oct. 27, 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/October/Joint-Statement-of-the-Ministers-and-Heads-of-Delegation-for-the-TPP-Countries>; CONG. RESEARCH SERV., *supra* note 24, at 23-24; *Trans-Pacific Partnership: Summary of U.S. Objectives*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/tpp/Summary-of-US-objectives>.

31. *See* Press Release, Office of the United States Trade Representative, Readout of the Meetings Between Acting Deputy USTR Wendy Cutler and Ambassador Takeo Mori of Japan on Motor Vehicle Trade (July 20, 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/Readout-Meetings-Act>.

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governments report that there is “steady progress” and remaining differences are narrow. New Zealand trade minister Groser remarked in November that he expected the TPP to be finalized in early 2015.<sup>32</sup>

3. *Transatlantic Trade and Investment Partnership*

The Transatlantic Trade and Investment Partnership (TTIP), a proposed “high standards” bilateral free trade agreement between the United States and the EU, would further link two economies that together account for about 50 percent of global GDP and roughly one-third of global trade, by value.<sup>33</sup> Key objectives of the negotiations include elimination of remaining tariff barriers and harmonization of regulatory standards.<sup>34</sup>

Since the launch of TTIP negotiations in early 2013,<sup>35</sup> the parties have held seven negotiation rounds. The parties held the fourth round in Brussels in March, covering services, labor, rules of origin, intellectual property, and sectors for possible regulatory cooperation.<sup>36</sup> The fifth round was held in Arlington, Virginia in May<sup>37</sup> and covered the same topics, in addition to agricultural market access, investment, and technical barriers to trade.<sup>38</sup> The parties covered the full array of topics in the sixth negotiation round in Brussels in July<sup>39</sup> and in the seventh round in Chevy Chase, Maryland from September 29 to October 3.<sup>40</sup> In the key area of regulatory harmonization, the parties identified the following sectors for possible harmonization: textiles, chemicals, pharmaceuticals, cosmetics, medical devices, cars, information, communications and technology (ICT), engineering, and pesticides.<sup>41</sup>

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ing-Dip-USTR-Wendy-Cutler-Amb-Mori-Motor-Vehicle-Trade; *see* Press Release, Office of the United States Trade Representative, Readout of Meeting Between Acting Deputy USTR Wendy Cutler and Ambassador Hiroshi Oe on TPP and Agriculture (July 16, 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/Readout-Mtg-Btrwn-Acting-Deputy-USTR-Cutler-Ambassador-Hiroshi-Oe-TPP-Agriculture>; *see* Press Release, Office of the United States Trade Representative, Readout of Meeting Between United States and Japanese Trade Negotiators Regarding TPP and Agriculture (Aug. 6, 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/August/Readout-Meeting-Btrwn-US-Japanese-Trade-Negotiators-Regarding-TPP-Agriculture>.

32. Bob Davis, *TPP Deal in Sight Says Groser*, WALL ST. J. (Nov. 10, 2014, 7:10 AM), <http://www.wsj.com/articles/tpp-deal-in-sight-says-groser-1415621413>.

33. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, WHITE HOUSE FACT SHEET: TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (T-TIP) (2013).

34. *Id.*

35. President Obama formally announced the launch of TTIP negotiations in his 2013 State of the Union Address. *See* President Obama, State of the Union Message, 113TH CONG., 1ST SESS. (Feb. 12, 2013) *available at* <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

36. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, ROUND 4: BRUSSELS, BELGIUM (2014), *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts/round4> (last visited Feb. 6, 2015).

37. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, ROUND 5: ARLINGTON, VIRGINIA (2014), *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts/round5> (last visited Feb. 6, 2015).

38. *Id.*

39. *See* EU-US trade—latest round of talks on transatlantic trade pact ends in Brussels, EUR. COMMISSION (July 18, 2014) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1132>.

40. *See* Readouts from T-TIP Negotiating Rounds, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/ttip/ttip-round-information>.

41. *See* Kara Sutton, *TTIP Negotiations: A Summary of Round 6*, BERTELSMANN FOUNDATION, Aug. 5, 2014.

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All negotiation rounds to date have included public stakeholder forums. Participants have raised concerns on issues ranging from food safety standards to regulatory harmonization in the automotive sector.<sup>42</sup>

While 2014 began with a shared U.S.-EU objective of concluding negotiations by year-end, observers now hope for conclusion before the next U.S. presidential election in 2016.<sup>43</sup> Some controversies have complicated the negotiating process, including the scope of the European Parliament's consultative powers vis-à-vis the European Commission.<sup>44</sup>

Other areas of controversy include the unwillingness of the United States to include financial services in regulatory harmonization discussions,<sup>45</sup> and the EU's reluctance to include investor-state dispute settlement in a final accord.<sup>46</sup> Most recently, U.S. Congress members have warned their counterparts in the European Parliament against adoption of a pending resolution that would be adverse to U.S. digital commerce companies.<sup>47</sup>

4. *Conditions on U.S. Market Access*

a. U.S. Withdraws Russia's Beneficiary Developing Country Designation

On May 7, 2014, President Obama notified Congress of his intent to withdraw Russia's beneficiary developing country designation under the Generalized System of Preferences (GSP) program. The President determined that "Russia is sufficiently advanced" in economic development and trade competitiveness, such that the designation was no longer necessary.<sup>48</sup> Because the GSP program expired on July 31, 2013 and has yet to be renewed, there are no immediate adverse impacts on Russian imports. However, withdrawal of Russia's beneficiary designation, a long-standing demand by some legislators, will likely facilitate GSP program renewal and reflects the deterioration in U.S.-Russia relations as the conflict in Ukraine continues.

b. U.S. Cracks Down on Black Market Ivory

In 2014, the United States continued taking aggressive actions against black market ivory traffickers. The Convention on International Trade in Endangered Species of Wild

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42. See, e.g. OFFICE OF THE U.S. TRADE REPRESENTATIVE, ROUND 5: ARLINGTON, VIRGINIA (2014), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts/round5> (last visited Feb. 6, 2015).

43. See *Lights On At WTO; Chinese Tires; U.S.-India Meeting; TTIP Transparency*, INSIDE U.S. TRADE'S NEWSTAND, Nov. 24, 2014.

44. See *Malmstrom Says EU Will Publish TTIP Text Proposals, Boost Parliament Access*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Nov. 19, 2014; *New EU Transparency Push Leaves Out Market Access Offers*, U.S. TEXTS, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Nov. 26, 2014.

45. See *Portman Says U.S., EU Should Not Be 'Taking Things Off The Table' in TTIP*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Nov. 20, 2014.

46. See *TTIP Without ISDS Would Fall Short of 'Model' Deal For World, Froman Says*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Oct. 31, 2014.

47. See *Trade Committee Leaders Warn of TTIP Fallout From EU Digital Market Resolution*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE, Nov. 26, 2014.

48. See Press Release, Office of the Press Secretary, Message to the Congress—With Respect to Russia's Status Under the Generalized System of Preferences, WHITE HOUSE (May 7, 2014), <http://www.whitehouse.gov/the-press-office/2014/05/07/message-congress-respect-russia-s-status-under-generalized-system-prefer>.

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Fauna and Flora (CITES) banned worldwide trade in most ivory in 1989.<sup>49</sup> The U.S. Fish and Wildlife Agency (FWS) and the U.S. Justice Department launched “Operation Crash,” an ongoing nationwide investigation into illegal ivory trade, in 2011.<sup>50</sup> By February, FWS had arrested over 400 alleged wildlife poachers, seizing rhinoceros horns and elephant ivory from dozens of countries.<sup>51</sup> By March, Operation Crash yielded nine convictions for conspiracy, smuggling, money laundering, tax evasion, bribery, making false documents, and violations of the Endangered Species and Lacey Acts.<sup>52</sup> In July, environmental groups announced their intention to file a Pelly Amendment<sup>53</sup> petition demanding that the Obama Administration sanction Mozambique for its role in elephant and rhinoceros poaching.<sup>54</sup>

c. Increased Scrutiny Over Pesticides and Food Packaging Chemicals

The U.S. Environmental Protection Agency (EPA) recently proposed to remove 72 chemicals (e.g., methyl ethyl ketone, tetrahydrofuran, phthalate derivatives, and nonylphenol) from those currently approved as inert pesticide ingredients under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),<sup>55</sup> in response to petitions suggesting they are hazardous.<sup>56</sup> If delisted, these chemicals can no longer be used in pesticides sold in the United States without prior EPA analysis, including of the chemicals’ potential carcinogenic/toxic effects, and approval.<sup>57</sup> The EPA announced its proposal less than a week after environmental groups petitioned the U.S. Food and Drug Administration (FDA) to ban several toxic chemicals from continued use in food packaging due to concerns they may harm fetal development, male reproductive systems, and pre-and-post natal brain development, and may cause cancer.<sup>58</sup>

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49. See *CITES*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/international/cites/index.html> (last visited Jan. 28, 2015).

50. See OFFICE OF LAW ENFORCEMENT, U.S. FISH AND WILDLIFE SERVICE, OPERATION CRASH, (2014).

51. See Laura Parker, *Fighting Wildlife Crime: New U.S. Strategy Broadens Scope*, NAT’L. GEOGRAPHIC, Feb. 11, 2014.

52. See *CITES*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/international/cites/index.html> (last visited Jan. 28, 2015).

53. The Pelly Amendment gives the President the authority to embargo imports of any products from any country if the U.S. Interior or Commerce Secretaries certify that nationals of that country are undermining certain international conservation programs. See Fishermen’s Protective Act § 8, 22 U.S.C. §§ 1971-1979, amended by P.L. 95-376 (92 Stat. 714), P.L. 96-61 (93 Stat. 408), P.L. 100-711 (102 Stat. 4755), P.L. 102-582 (106 Stat. 4904), P.L. 104-43 (109 Stat. 390) and P.L. 104-208 (110 Stat. 3009, 3009-41).

54. See Media Release, International Rhino Foundation, Environmentalists Call for Trade Sanctions Against Mozambique for Rhino And Elephant Poaching (July 2, 2014) <http://www.rhinos.org/news-room/environmentalists-call-for-trade-sanctions-against-mozambique-for-rhino-and-elephant-poaching>.

55. 7 U.S.C. §§ 136a - 136γ (1991).

56. See Proposed Removal of Certain Inert Ingredients From Approved Chemical Substance List for Pesticide Products, 79 Fed. Reg. 63,120 (Oct. 22, 2014).

57. *Id.* at 63,121.

58. Press Release, Natural Resources Defense Council, Groups Petition FDA to Ban Toxic Chemicals Used in Pizza Boxes and Other Food Packaging (Oct. 16, 2014), <http://www.nrdc.org/media/2014/141016a.asp> (last visited Feb. 6, 2015).

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## II. WTO Dispute Settlement Activity

The last year saw seventeen new disputes filed in the WTO Dispute Settlement Body (DSB)—almost as many as last year’s twenty.<sup>59</sup> At the time of writing, twenty remain in consultations; panels have been composed in three; and panels have been established, but not composed, in two.<sup>60</sup> Notable developments include tit-for-tat EU-Russia disputes, as well as concerns over the DSB’s heavy workload and scarce resources.<sup>61</sup> Eleven reports had been circulated in 2014 at the time of writing—eight by panels and three by the Appellate Body (AB)—a few of which are summarized here.

### A. PANEL REPORTS

#### 1. *Argentina–Import Measures*

This case saw the EU, Japan, and the United States contest two Argentine measures: (a) a law requiring all importers to file Advance Sworn Import Declarations (or “DJAI”) and (b) five “unwritten” import requirements, deemed the “Restrictive Trade-Related Requirements” (RTRRs).<sup>62</sup>

Complainants alleged that both measures violated provisions in the General Agreement on Tariffs and Trade (GATT) and the Import Licensing Agreement (ILA). The panel ruled on only three claims—those asserting that the RTRRs violated GATT Article XI:1 (prohibiting quantitative import/export restrictions) and that the DJAI requirement violated GATT Articles XI:1 and III:4 (requiring national treatment).<sup>63</sup>

The panel found that both measures violated GATT Article XI:1 and that the RTRRs violated GATT Article III:4.<sup>64</sup> The decision was notable in light of the unwritten nature of the RTRRs—demonstrating that even “off-the-books” regulations can violate WTO rules. Argentina appealed; the AB report is expected by January 2015.

#### 2. *U.S.–COOL (Article 21.5)*

This long-running dispute over U.S. meat labeling requirements continued in 2014. Mexico and Canada filed complaints in 2008.<sup>65</sup> A 2012 AB ruling largely upheld U.S.-adverse panel findings, with which the United States was required to comply by May 2013.<sup>66</sup> Canada and Mexico requested that a panel determine U.S. compliance; the panel

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59. See *Chronological List of Disputes Cases*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Feb. 6, 2015). At the time of writing, a total of twelve disputes had been filed in calendar year 2014; five were filed in the last two months of 2013—i.e., prior to 2014 but following the authoring of the 2013 *Year-in-Review* section on WTO dispute settlement.

60. *Id.*

61. *Azevêdo Says Success of WTO Dispute Settlement Brings Urgent Challenges*, WTO News, Sept. 26, 2014, available at [http://www.wto.org/english/news\\_e/spra\\_e/spra32\\_e.htm](http://www.wto.org/english/news_e/spra_e/spra32_e.htm) (last visited Feb. 6, 2015).

62. Panel Reports, *Argentina—Measures Affecting the Importation of Goods*, §§ 2.1–2.4, 6.121, WT/DS438/R, WT/DS444/R//DS445/R (Aug. 22, 2014).

63. See, e.g., *id.* at 7.1(g); 7.2(d)–(f).

64. *Id.* at 6.265, 6.295, 6.479.

65. *United States—Certain Country of Origin Labeling (COOL) Requirements*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds384\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm) (last updated Dec. 10, 2014).

66. *Id.*

issued a report in October finding that, despite regulatory amendments, the United States had failed to comply.<sup>67</sup>

The United States appealed in November; if the AB upholds the ruling, the DSB could authorize Canada and Mexico to enforce sanctions against the United States.

**B. APPELLATE BODY REPORT IN *EC–Seal Products***

This case concerned Europe’s ban on most seal products.<sup>68</sup> Canada and Norway contended that the ban violated provisions under the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and GATT Articles I:1 (requiring “most-favored nation” treatment) and III:4.<sup>69</sup>

In November 2013, a dispute settlement panel ruled that the ban violated most of these provisions. The EU defended the ban under GATT Article XX, which can justify trade-restrictive policies through (a) any one of ten enumerated exceptions, as long as they (b) do not “constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.”<sup>70</sup> Article XX(a) allows, inter alia, measures “necessary to protect public morals.”<sup>71</sup> The EU succeeded in proving (a), but failed to satisfy (b).<sup>72</sup>

All parties appealed. Four months later, the AB upheld the panel’s rulings on GATT Articles I:1, III:4, and XX(a), but declared those on the TBT Agreement “moot and of no legal effect” because the ban was not a “technical regulation” under the TBT Agreement.<sup>73</sup> The AB seemingly expanded the traditionally significant deference accorded to the concept of public morals,<sup>74</sup> in part by dismissing Canada’s argument that a panel is not “required to identify the exact content of the public morals standard at issue.”<sup>75</sup>

**III. U.S. Trade Remedies**

**A. NEW RULEMAKING**

Two administrative trade agency rules of note were finalized in 2014.

First, the U.S. Department of Commerce (Commerce) published a notice that it did not intend to apply methodological rules on targeted dumping that it had previously withdrawn, in response to a U.S. Court of International Trade (CIT) remand.<sup>76</sup> Those rules established an exception to the statutory antidumping (AD) calculation methodology,

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67. Panel Report, *United States—Certain Country of Origin Labeling (COOL) Requirements—Recourse to Article 21.5 of the DSU by Can. & Mex.*, ¶ 8.6, WT/DS384/RW (Oct. 20, 2014).

68. Appellate Body Report, *European Communities—Measures Prohibiting the Importation & Mktg. of Seal Products*, ¶ 1.4, WT/DS400/AB/R/WT/DS401/AB/R (May 22, 2014).

69. *Id.* at ¶ 1.5.

70. General Agreement on Tariffs & Trade Art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

71. *Id.* at art. XX(a).

72. Appellate Body Report, *European Communities—Measures Prohibiting the Importation & Mktg. of Seal Products*, ¶ 1.8(d), WT/DS400/AB/R (May 22, 2010).

73. *Id.* at ¶ 5.70.

74. *See, e.g., id.* at ¶ 6.461. (“Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ . . . according to their own systems and scales of values”).

75. *Id.* at ¶ 5.199.

76. Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 79 Fed. Reg. 22,371 (Apr. 22, 2014) (to be codified at 19 C.F.R. pt. 351).

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whereby average normal values could be compared to individual transaction export prices if “targeted” dumping criteria were met, based on a pattern of export prices that differ significantly among purchasers, regions, or periods of time. Commerce withdrew this provision but was directed by the CIT to reconsider whether to apply it in one investigation.<sup>77</sup> The agency invited comments and announced in 2014 that it would not apply the withdrawn rules, but would rather continue to evaluate how to compare normal value and export prices on a case-by-case basis, including application of a recently developed differential pricing analysis (the “Cohen’s d Test”).<sup>78</sup>

Second, the U.S. International Trade Commission (Commission) published final regulations concerning primarily technical requirements and formats for submissions in AD and countervailing duty (CVD) investigations.<sup>79</sup> The rules specify that all requests for the Commission to obtain additional information be presented at the draft questionnaire stage of a final investigation; directs lost sales and revenue allegations to be submitted in an electronic format; and extends the time for completing change circumstances reviews.

**B. LEGISLATIVE DEVELOPMENTS**

*1. Bipartisan Congressional Trade Priorities Act of 2014*

In January, U.S. House Ways and Means Chairman Dave Camp (R-MI), Senate Finance Committee Chairman Max Baucus (D-MT), and Ranking Member Orrin Hatch (R-UT) introduced the *Bipartisan Congressional Trade Priorities Act of 2014*.<sup>80</sup> The legislation sets negotiating objectives for the U.S. Trade Representative in ongoing trade talks and renews trade promotion authority (TPA) for four years, with the option to extend it an additional three years.<sup>81</sup> Renewal of TPA has been deemed by many as paramount to successful conclusion of the TPP and TTIP negotiations.<sup>82</sup> At time of publication, the bills remained in committee.

*2. Generalized System of Preferences (GSP) Update Act*

Congressmen Ander Crenshaw (R-NE) and Adrian Smith (R-NE) introduced the *GSP Update for Production Diversification and Trade Enhancement Act*<sup>83</sup> in the House in May 2013.<sup>84</sup> The legislation broadens the scope of the GSP to include travel goods, such as

77. *Gold East (Jiangsu) Paper Co. v. United States*, 918 F.Supp.2d 1317, 1325 (Ct. Int’l Trade 2013).

78. 79 Fed. Reg. 22,372.

79. *Conduct of Antidumping & Countervailing Duty Investigations & Reviews*, 75 Fed. Reg. 35,920 (June 25, 2014) (to be codified at 19 C.F.R. pts. 201, 207) (effective with respect to all proceedings pending as of July 25, 2014).

80. See Press Release, Committee on Finance, Baucus, Hatch, Camp Unveil Bill to Bring Home Job-Creating Trade Agreements, U.S. CONG. (Jan. 9, 2014), available at <http://www.finance.senate.gov/newsroom/chairman/release/?id=7cd1c188-87f1-4a0b-8856-3fc139121ca9>.

81. See Overview of the Bipartisan Cong. Trade Priorities Act of 2014, Senate Fin. Comm. & Ways & Means Comm., <http://www.finance.senate.gov/imo/media/doc/TPA%20One%20Pager.pdf>.

82. See Baucus, *supra* note 82.

83. See GSP UPDATE Act, H.R. 2139, 113th Cong. (2013).

84. See Press Release, Ander Crenshaw, Crenshaw, Smith International Trade Bill Would Open Production Opportunities to U.S. Travel Good Industry (May 22, 2013), available at <http://crenshaw.house.gov/index.cfm/pressreleases?ID=12217a69-a79f-47b8-b74e-83fd788d2a22>.

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purses, briefcases, and backpacks.<sup>85</sup> In December 2013, a companion bill was introduced in the Senate by Senators Roy Blunt (R-MO) and Mark Begich (D-AK).<sup>86</sup> Both bills remained in Committee at time of publication.

While the GSP Update Act bills would not renew the GSP program, bills were introduced in both houses of Congress in July 2013 that would extend GSP, which expired on July 31, 2013, until September 30, 2015. These bills also remained in committee at the time of publication.

3. *Miscellaneous Tariff Bill*

In July 2013, House Ways and Means Chairman Camp (R-MI), Ranking Member Sandy Levin (D-MI), Trade Subcommittee Chairman Devin Nunes (R-CA), and Ranking Member Charles Rangel (D-NY) announced the *U.S. Job Creation and Manufacturing Competitiveness Act of 2013*, commonly referred to as the Miscellaneous Tariff Bill (MTB).<sup>87</sup> The bill includes hundreds of bills submitted and approved under the MTB process, which includes review by the House Committee on Ways and Means, Senate Finance Committee, the Commission, and Commerce.<sup>88</sup> At time of publication, the legislation still had not moved out of committee.

C. SIGNIFICANT COMMERCE CASES

2014 was another active year for AD/CVD litigation at Commerce. In addition to administrative and scope reviews, Commerce initiated over twenty AD and CVD investigations, involving at least nine different countries and products ranging from solar panels, to steel shelving, to sugar.<sup>89</sup> Domestic producers are currently seeking import relief in cases on certain passenger tires from China, steel nails from five countries, and welded line pipe from Korea and Turkey, among others.

1. *“Solar II” Investigations*

In January 2014, Commerce initiated AD/CVD investigations on *Crystalline Silicon Photovoltaic Products from China and Taiwan*. These cases were particularly notable in that they follow recent, similar investigations, in which AD/CVD orders were issued on *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China* in December 2012.<sup>90</sup> The domestic solar industry filed the follow-up investigations to close a “loop-

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85. See GSP UPDATE Act, H.R. 2139, 113th Cong. (2013).

86. See GSP Update Act, S. 1839, 113th Cong. (2014).

87. See Press Release, Brendan Buck, Ways & Means Committee Leaders Re-Introduce U.S. Job Creation and Manufacturing Competitiveness Act of 2013, Committee on Ways & Means (Jul. 17, 2013), available at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=342878>.

88. See U.S. Job Creation & Mfg. Competitiveness Act of 2013, H.R. 2708, 113th Cong. (2013).

89. See, e.g., Certain Crystalline Silicon Photovoltaic Products from China and Taiwan, 79 Fed. Reg. 4661 (Jan. 29, 2014) (initiation of antidumping duty investigations); Boltless Steel Shelving Units Prepackaged for Sale from China, 79 Fed. Reg. 56,562 (Sept. 22, 2014) (initiation of countervailing duty investigation); Sugar from Mex., 79 Fed. Reg. 22,790 (Apr. 24, 2014) (initiation of antidumping duty investigation).

90. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China, 77 Fed. Reg. 63,788 (Oct. 17, 2012) (amended final deter. of sales at less than fair value, and antidumping duty order).

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hole” left open by the agency in the scope of the existing AD/CVD orders (i.e., they do not cover Chinese modules assembled from third-country cells). Commerce’s final determinations in these “Solar II” investigations will be issued in December 2014, with the Commission’s injury finding to be issued in early 2015.

2. *Oil Country Tubular Goods Investigations*

In July, Commerce made affirmative final determinations in the AD/CVD investigations of oil country tubular goods (OCTG) from several countries. The investigation began with nine countries, before Commerce reached a suspension agreement with Ukraine<sup>91</sup> and amended its final determination on Saudi Arabia to a negative finding,<sup>92</sup> and the Commission found imports from the Philippines and Thailand to be negligible, as discussed below. Although a few countries escaped the investigation, in September 2014, Commerce published CVD orders on India and Turkey<sup>93</sup> and AD orders on India, Korea, Taiwan, Turkey, and Vietnam, completing one of the largest investigations undertaken by Commerce in years.<sup>94</sup> Commerce found CVD margins for all individual companies in India and Turkey, ranging from 2.53 percent to 19.57 percent,<sup>95</sup> and AD margins ranging from 2.05 percent to 111.47 percent.<sup>96</sup>

3. *Termination of Suspension Agreement on Hot-Rolled Steel from Russia*

In October, Commerce announced that it was terminating a fifteen year-old suspension agreement on hot-rolled, flat-rolled, carbon quality steel products from Russia,<sup>97</sup> in response to a request from the domestic industry. As of December 16, 2014, Commerce will begin collecting AD duties in the amount of 73.59% for Severstal, a top Russian steel producer, and 184.56% for other Russian producers.<sup>98</sup> Domestic manufacturers had provided Commerce with evidence demonstrating that the agreement was ineffective and that Russian imports continued to surge into the United States.<sup>99</sup>

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91. Certain Oil Country Tubular Goods From Ukr., 79 Fed. Reg. 41,959 (July 18, 2014) (suspension of antidumping investigation).

92. Certain Oil Country Tubular Goods from Saudi Arabia, 79 Fed. Reg. 49,102 (Aug. 19, 2014) (amended final deter. and termination of the investigation of sales at less than fair value).

93. Certain Oil Country Tubular Goods from India and the Republic of Turk., 79 Fed. Reg. 53,688 (Sept. 10, 2014) (countervailing duty orders and amended affirmative final countervailing duty deter. for India) [hereinafter *OCTG CVD Order*].

94. Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turk., and the Socialist Republic of Viet.: Antidumping Duty Orders; and Certain Oil Country Tubular Goods From the Socialist Republic of Viet.: Amended Final Determination of Sales at Less Than Fair Value, 79 Fed. Reg. 53,691 (Sept. 10, 2014) [hereinafter *OCTG AD Order*].

95. *Id.* at 53,690.

96. *Id.* at 53,693-94.

97. Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 64 Fed. Reg. 38,642 (July 19, 1999) (suspension of antidumping duty investigation).

98. *Id.*

99. *U.S. to scrap trade deal on Russian steel duties*, REUTERS (Oct. 21, 2014) available at <http://www.reuters.com/article/2014/10/21/usa-trade-steel-idUSL2N0SG0X120141021>.

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D. SIGNIFICANT INTERNATIONAL TRADE COMMISSION CASES

1. *Oil Country Tubular Goods from India, Korea, the Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, and Vietnam*

In September 2014, the Commission issued affirmative final determinations in *OCTG from India, Korea, the Philippines, Taiwan, Thailand, Turkey, Ukraine, and Vietnam* with regard to imports from all subject countries, except for Thailand and the Philippines, which were found to be negligible.<sup>100</sup> The Commission found present material injury with regard to cumulated imports from India, Korea, Turkey, Ukraine, and Vietnam, and a threat of injury with regard to Taiwanese imports.<sup>101</sup>

Following an amended negative final antidumping determination by the Commission in *OCTG from Saudi Arabia*, imports from the Philippines, Taiwan, and Thailand fell below the seven-percent aggregate negligibility threshold for present material injury.<sup>102</sup> The Commission found that, of the three, only the subject imports from Taiwan were likely to exceed the negligibility threshold for the purpose of its threat determination. This aspect of the determination is currently on appeal to the CIT.

2. *Grain-Oriented and Non-Oriented Electrical Steel Investigations*

The Commission issued determinations in two electrical steel investigations in 2014. In *Grain-Oriented Electrical Steel from Germany, Japan, and Poland* (GOES), the Commission voted 5-1 that subject imports neither injured nor threatened material injury to the U.S. industry.<sup>103</sup> In an investigation into a similar product, *Non-Oriented Electrical Steel from China, Germany, Korea, Sweden, and Taiwan*, the Commission made an affirmative final determination in a 4-1 vote.<sup>104</sup> The Commission's negative determination in *GOES* was one of several negative determinations in 2014, also including *1,1,1,2-Tetrafluorethane from China*,<sup>105</sup> *Ferrosilicon from Venezuela*,<sup>106</sup> *Certain Steel Threaded Rod from India*,<sup>107</sup> and *Silica Bricks and Shapes from China*.<sup>108</sup>

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100. Certain Oil Country Tubular Goods from India, Korea, Phil., Taiwan, Thai., Turk., Ukr., & Viet., Inv. Nos. 701-TA-499-500, 731-TA-1215-1217, 1219-1223, USITC Pub. 4489 (Sept. 2014) (Final).

101. *Id.*

102. *Id.*

103. Grain-Oriented Elec. Steel from Ger., Japan, & Pol., Inv. Nos. 731-TA-1233, 1234, 1236, USITC Pub. 4491 (Sept. 2014) (Final).

104. Non-Oriented Electrical Steel from China, Ger., Japan, Korea, Swed., & Taiwan Injures U.S. Indus., USITC (Nov. 6, 2014) (News Release).

105. Press Release, USITC, 1,1,1,2-Tetrafluorethane from China ("R-134a") does not Injure U.S. Indus., Says USITC, (Nov. 12, 2014), [http://www.usitc.gov/secretary/fed\\_reg\\_notices/701\\_731/701\\_509\\_notice12042014sgl.pdf](http://www.usitc.gov/secretary/fed_reg_notices/701_731/701_509_notice12042014sgl.pdf).

106. Ferrosilicon from Venez., Inv. No. 731-TA-1225, USITC Pub. 4490 (Sept. 2014) (Final).

107. Certain Steel Threaded Rod from India, Inv. Nos. 701-TA-498, 731-TA-1213, USITC Pub. 4487 (Aug. 2014) (Final).

108. Silica Bricks & Shapes from China, Inv. No. 731-TA-1205, USITC Pub. 4443 (Jan. 2014) (Final).

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3. *Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad & Tobago, and Ukraine: Sunset Review*

In a highly contested second sunset review of the orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad & Tobago and Ukraine, the Commission found that subject imports from each country, except Ukraine, were likely to lead to continuation or recurrence of material injury to the domestic industry.<sup>109</sup> Cumulation was a major issue. The Commission did not cumulate Ukrainian imports with those from other subject countries because it found that a local supply policy prevented the largest producer in Ukraine from exporting considerable volumes to the United States.<sup>110</sup> As a result, the Commission focused its analysis on the production experience of the only other significant Ukrainian wire rod producer<sup>111</sup> and found it unlikely that producer would direct more than a modest portion of its limited excess capacity to the United States, and that this volume would be too small to have negative price effects or an adverse impact on the U.S. market.<sup>112</sup>

On the other hand, the Commission rejected arguments not to cumulate subject imports from Mexico because Mexican producers, like those in the other subject countries, continued to add capacity during the period and produced and sold 4.75 mm wire rod, demonstrating their continued interest in the U.S. market.<sup>113</sup> Accordingly, the Commission cumulated imports from the remaining five countries and found that their production capacities were massive, that they were likely to undersell the domestic like product, and that revocation of the orders would likely have a significant adverse impact on the domestic industry.<sup>114</sup>

E. SECTION 337 DEVELOPMENTS

Several significant Section 337 developments occurred in 2014, including: (i) important rulings by the Commission relating to importation and domestic industry issues; (ii) controversial decisions by the U.S. Court of Appeals for the Federal Circuit (CAFC) concerning induced infringement of method claims and interpretation of consent orders; and (iii) a critical report by the U.S. Government Accountability Office (GAO) relating to deficiencies in the exclusion order enforcement processes used by CBP.

In *Digital Models and Digital Data*, the Commission ruled that digital data sets transmitted electronically from Pakistan to Texas were “articles” within the meaning of Section 337, and that transmission of such sets was an “importation” under Section 337.<sup>115</sup> The decision, which was predicated on the Commission’s interpretation of Section 337’s legis-

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109. Carbon & Certain Alloy Steel Wire Rod from Braz., Indon., Mex., Mold., Trin. & Tobago, & Ukr., Inv. Nos. 701-TA-417, 731-TA-953, 957-959, 962, USITC Pub. 4472 (June 2014) (Second Review).

110. *Id.* at 20-21.

111. *Id.* at 20-22, 47-48.

112. *Id.* at 47-48.

113. *Id.* at 17-18, 26-27.

114. *Id.* at 39-47.

115. Certain Digital Models, Digital Data, & Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, & Methods of Making the Same, Inv. No. 337-TA-833, USITC (Apr. 3, 2014) (Final) (comm’n finding a violation).

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lative history, is currently on appeal to the CAFC and will be decided in 2015. While the appeal is pending, the Commission has stayed enforcement of its cease and desist order.<sup>116</sup>

The Commission also issued three important rulings relating to domestic industry requirements. In *Computers and Computer Peripheral Devices*, the Commission ruled that, in accordance with decisions issued by the CAFC in *Interdigital I*, *Interdigital II*, and *Microsoft*,<sup>117</sup> a complainant alleging the existence of a domestic industry under Section 337(a)(3)(C) must show the existence of an article protected by the patent (i.e., effectively implementing a technical prong requirement for complainants seeking to establish a licensing-based domestic industry).<sup>118</sup> Moreover, in *Integrated Circuit Chips*, the Commission further held that, under Section 337(a)(3)(C), a complainant must establish a nexus between the claimed investment and the asserted patent.<sup>119</sup> But in a remand order issued in *Optical Disc Drives*, the Commission clarified that Section 337 does not require that a domestic industry be comprised of any specific entity or that a complainant present its case under any specific subsection of the statute, and that, therefore, it was acceptable for the complainant in the case to rely on the activities of its licensee(s) to satisfy the domestic industry requirements under Section 337(a)(1)(A)-(B) and that such activities need not be production-driven (i.e., they could be revenue-driven).<sup>120</sup>

Important, albeit controversial, decisions also were issued by the CAFC. In *Suprema*, the CAFC vacated a Commission determination based on induced infringement, holding that the Commission has no authority under Section 337 to find a violation in an inducement case involving method claims where the articles do not directly infringe at the time of importation.<sup>121</sup> Subsequently, petition for *en banc* review of this ruling was granted, and an *en banc* decision is expected in early 2015. In a somewhat less contentious ruling, the CAFC held in *uPI Semiconductor Corp.* that the Commission has the authority to assess a civil penalty against a complainant for its violation of a consent order's provisions (e.g., a knowingly aiding and abetting provision).<sup>122</sup>

CBP's enforcement of exclusion orders also was the subject of considerable discussion during the past year. In January, it was made known that CBP issued a letter to Senator Wyden (D-OR) defending its enforcement of exclusion orders and noting that it was developing a procedure for adjudicating exclusion order rulings that allows both the importer/respondent and the complainant to make arguments and rebuttals. Most recently, in November, the GAO issued a report concluding that CBP's management of its exclusion order enforcement processes at U.S. ports contains weaknesses that result in ineffi-

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116. Certain Digital Models, Digital Data, & Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, and Methods of Making the Same, Inv. No. 337-TA-833, USITC (June 11, 2014) (Comm'n Opinion) (comm'n granting stay).

117. *Interdigital Commc'ns v. Int'l Trade Comm'n*, 690 F.3d 1318 (Fed. Cir. 2012); *InterDigital Commc'ns v. Int'l Trade Comm'n*, 707 F.3d 1295 (Fed. Cir. 2013); *Microsoft Corp. v. Int'l Trade Comm'n*, 731 F.3d 1354 (Fed. Cir. 2013).

118. Certain Computers & Computer Peripheral Devices, and Components Thereof, and Products Containing the Same, Inv. No. 337-TA-841, USITC (Jan. 9, 2014) (Comm'n Opinion) (comm'n finding no violation).

119. Certain Integrated Circuit Chips & Products Containing the Same, Inv. No. 337-TA-859, USITC (Aug. 22, 2014) (Comm'n Opinion) (comm'n finding no violation).

120. Certain Optical Disc Drives, Components Thereof, & Products Containing the Same, Inv. No. 337-TA-897, USITC (Sep. 3, 2014) (Remand Order).

121. *Suprema, Inc. v. Int'l Trade Comm'n*, 742 F.3d 1350, 1351 (Fed. Cir. 2013).

122. *uPI Semiconductor Corp. v. Int'l Trade Comm'n*, 767 F.3d 1372, 1377 (Fed. Cir. 2014).

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ciencies and an increased risk of infringing products entering U.S. commerce, and that improved processes need to be implemented.<sup>123</sup>

F. COURT APPEALS

The CAFC also addressed several significant aspects of U.S. trade remedies law in 2014, including in the following cases.

1. *United States v. Trek Leather*

In *United States v. Trek Leather*, the CAFC held in an *en banc* ruling that the president and sole shareholder of a corporation may be held personally liable for submitting false documents to CBP on behalf of the corporation.<sup>124</sup> The court—rejecting the argument of the company president that, absent intentional fraud, only the “importer of record” could be held civilly liable for submitting false documents in connection with the importation of merchandise—held that the applicable statute (19 U.S.C. § 1592) was not limited to those who “enter” the merchandise, but also applies to any “person” who “attempt[s] to enter or introduce” merchandise into the commerce of the United States.<sup>125</sup> The holding allows CBP to impose penalties directly on officers or employees of companies involved in preparing false or incomplete entry documentation even absent a finding of intentional fraud.

2. *Fedmet Resources Corp. v. United States*

In *Fedmet Resources Corp. v. United States*, the CAFC overturned a CIT ruling and held that Commerce erred when it found that magnesia alumina carbon (MAC) bricks imported into the United States were included in its AD/CVD orders on magnesia carbon bricks from China and Mexico.<sup>126</sup> The court determined that, in accordance with explicit statements made by the Petitioner during the course of the underlying investigations, MAC bricks were unambiguously excluded from the scope despite any ambiguity in the actual scope language.<sup>127</sup> The court found MAC bricks were clearly excluded based on an analysis of the so-called “(k)(1) sources”—the descriptions of the merchandise as found in the petition, initial investigation and determinations of Commerce and the Commission—so a further investigation into the “(k)(2) sources” was unnecessary and inappropriate.<sup>128</sup> The court denied a petition for rehearing and hearing *en banc*.<sup>129</sup>

3. *Guangdong Wireking Housewares & Hardware Co., Ltd.*

*Guangdong Wireking Housewares & Hardware Co., Ltd.* dealt with constitutional challenges to Commerce’s simultaneous application of AD and CVD duties on a respondent from China, a non-market economy (NME), in a case initiated prior to Congress’s 2012

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123. U.S. GOV’T. ACCOUNTABILITY OFFICE, GAO 15-78, U.S. CUSTOMS & BORDER PROTECTION COULD BETTER MANAGE ITS PROCESS TO ENFORCE EXCLUSION ORDERS (2014).

124. *United States v. Trek Leather*, 767 F.3d 1288, 1299 (Fed. Cir. 2014).

125. *Id.*

126. *Fedmet Resources Corp. v. United States*, 755 F.3d 912, 922 (Fed. Cir. 2014).

127. *Id.*

128. *Id.*

129. *Guangdong Wireking Housewares & Hardware Co., Ltd.*, 745 F.3d 1194, 1196 (Fed. Cir. 2014).

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revision of the 1930 Tariff Act.<sup>130</sup> Before this revision, the court interpreted the Act to mandate that CVD laws did not apply to NMEs; the revision changed the law to allow for application of CVD provisions in NME cases. The court noted, in agreement with the Appellant, that application of the 2012 revisions to cases initiated prior to 2012 was retroactive.<sup>131</sup> But it found that unfair trade laws are predominantly remedial in nature. Because the Appellant's challenge failed to meet both prongs of an *ex post facto* claim—that a law is applied retroactively and imposes a punishment for an act that was not punishable at the time committed—the court held in favor of the Appellee.

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130. *Id.* at 1202.

131. *Id.* at 1211.

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## **Privacy, E-Commerce, and Data Security**

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KYOUNG YEON KIM, JAI LEE AND DOIL SON\*

This article reviews select important legal developments during 2014 in the fields of privacy, e-commerce, and data security.<sup>1</sup> Attention in this year's contribution is focused exclusively on major developments in the European Union and in the Asia-Pacific region.

### **I. Developments in the European Union**

2014 was an important year for privacy, e-commerce and data security developments in Europe, which included legislative action, important court decisions, and advisory guidance.

#### **A. LEGISLATIVE ACTION**

The European Parliament was very active on privacy, e-commerce and data security issues prior to its May 2014 elections; however the Council of the European Union (Council) lagged behind.

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\* The committee editor was W. Gregory Voss, Toulouse University, Toulouse Business School, Member of the IRDEIC Research Institute, Toulouse, France. The authors were: Europe section: European Union: Legislative Action, and Court Decisions and Related Advisory Guidance: W. Gregory Voss; EU Article 29 Data Protection Working Party (WP) Guidance: Katherine H. Woodcock, Associate General Counsel, Privacy & Security, Nike; Asia-Pacific section: APEC Cross-Border Privacy, and Australia: W. Gregory Voss; China: Mr. Cecil Saehoon Chung, Vice-Chair of the Antitrust Practice Group and Head of International Antitrust at the law firm of Yulchon LLC in Seoul, Korea; Ms. Kyoungh Yeon Kim, Partner in the Antitrust Practice Group at Yulchon LLC; and South Korea: Mr. Jai Lee, Senior Foreign Counsel and U.S. patent attorney specialized in technology laws at Yulchon, LLC, Mr. Doil Son, Partner and Korean licensed attorney practicing primarily in Mergers & Acquisitions, Technology, Media & Telecommunications (TMT), and Cyber Security, Yulchon LLC. The committee editor and the China section authors wish to thank Mr. Kyu Hyun Kim, Senior Associate at Yulchon LLC, Mr. Tae Yong Kim, foreign counsel at Yulchon, and Yankun Guo, a third-year student at the John Marshall Law School in Chicago, IL, U.S.A., for their assistance. The committee editor and the South Korea section authors would like to thank Youyoung Kim, Washington University School of Law in St. Louis, MO, U.S.A., J.D. Candidate 2015, for citation and editing assistance.

1. For earlier developments in this field, see W. Gregory Voss, et al., *Privacy, E-Commerce, and Data Security*, 48 ABA/SIL YIR 103 (2014).

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1. *General Data Protection Regulation*

The European Parliament voted overwhelmingly on first reading in plenary session (621 votes for, 10 against, and 22 abstentions) on March 12, 2014, for a version of the proposed EU General Data Protection Regulation (GDPR).<sup>2</sup> Agreement between the European Parliament and the Council on the text of the GDPR in two successive readings is required for it to become binding and directly applicable in Member States.<sup>3</sup> The GDPR was debated at the October 10, 2014 meeting of the Justice and Home Affairs ministers of the Council, but various issues still remain to be decided.<sup>4</sup>

2. *Network & Information Security Directive*

One day after its GDPR vote, the European Parliament voted favorably on the Network & Information Security (NIS) Directive in the first reading by a large margin—521 in favor, 22 against, and 25 abstentions.<sup>5</sup> The NIS Directive, if and when finally approved through the ordinary legislative procedure with the Council, would impose cyber security obligations on public administrations and market operators, essentially with respect to “critical infrastructure essential for the maintenance of vital economic and societal activities in the fields of energy, transport, banking, financial market infrastructures or health”.<sup>6</sup> In this context, Computer Emergency Response Teams would be set up in Member States.<sup>7</sup> At writing, the NIS Directive is still awaiting a Council first reading position.<sup>8</sup>

3. *Connected Continent Regulation*

On April 3, 2014, the European Parliament adopted in first reading (by 534 votes to 25, with 58 abstentions) a legislative resolution amending the proposal of the European Com-

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2. See Press Release, Eur. Comm’n, Progress on EU Data Protection Reform Now Irreversible Following European Parliament Vote, MEMO/14/186, (Mar. 12, 2014), available at [http://europa.eu/rapid/press-release\\_MEMO-14-186\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-186_en.htm); see also *Text Adopted by Parliament, 1st Reading/Single Reading*, PARL. EUR. DOC. 2012/0011(COD), available at <http://www.europarl.europa.eu/oeil/popups/printsummary.pdf?id=1342337&l=en&t=D>. For a discussion of the GDPR when it was initially proposed in 2012, see W. Gregory Voss et al., *Privacy, E-Commerce, and Data Security*, 47 ABA/SIL YIR 99, 102–04 (2013).

3. See Consolidated Version of the Treaty on the Functioning of the European Union, art. 294, at 173–75, Oct. 26, 2012, 2012 O.J. (C 326) 55, available at [http://www.ecb.europa.eu/ecb/legal/pdf/c\\_32620121026en.pdf](http://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf) (for details of the ordinary legislative procedure (formerly known as the co-decision procedure), which is the procedure that applies to the adoption of the GDPR).

4. See Debate in Council, PARL. EUR. DOC. 2012/ 0011(COD), Oct. 10, 2014, available at <http://www.europarl.europa.eu/oeil/popups/printsummary.pdf?id=1361735&l=en&t=E>.

5. Press Release, Eur. Comm’n, *Great News for Cyber Security in the EU: The EP Successfully Votes Through the Network & Information Security (NIS) Directive* (Mar. 13, 2014), available at [http://europa.eu/rapid/press-release\\_STATEMENT-14-68\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-68_en.htm). See also, *European Parliament Legislative Resolution on the Proposal for a Directive of the European Parliament and of the Council Concerning Measures to Ensure a High Common Level of Network and Information Security Across the Union*, COM (2013) 0048 (Mar. 13, 2014) [hereinafter NIS Directive], available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0244>.

6. NIS Directive, *supra* note 5.

7. See *Text Adopted by Parliament, 1st Reading/Single Reading* (Mar. 13, 2014), 2013/0027(COD), available at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1342725&t=e&l=en>.

8. See *High Common Level of Network and Information Security Across the Union*, EUR. PARL., [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0027\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/0027(COD)&l=en) (last visited Nov. 30, 2014).

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mission (Commission) “for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent” (Connected Continent Regulation).<sup>9</sup> On June 5, 2014 the Council debated the proposed Connected Continent Regulation, many issues were raised about it, and several remain unresolved.<sup>10</sup> If finally adopted in the form approved by the European Parliament, the Connected Continent Regulation will end certain roaming charges in December 2015, apply the net neutrality principle, and allow internet access providers to provide specialized services to users, among other provisions.<sup>11</sup>

4. *Consumer Rights in the Digital Single Market Resolution*

On November 27, 2014, the European Parliament voted a non-binding resolution on supporting consumer rights in the digital single market. Such resolution called for, *inter alia*, “the swift adoption of the new modernised Data Protection Package”, which includes the GDPR, called for the Council to move swiftly on the Connected Continent Regulation proposal, supported measures promoting net neutrality, and called upon the Commission “to consider proposals aimed at unbundling search engines from other commercial services”, as one way to achieve competition policy goals.<sup>12</sup> The press saw the latter point as being aimed at “American technology giant Google,”<sup>13</sup> which also was subject to judicial action in Europe in 2014.

B. COURT DECISIONS AND RELATED ADVISORY GUIDANCE

The Court of Justice of the European Union (“ECJ”) handed down two important decisions discussed below: one invalidating the Data Retention Directive, and the other providing for de-listing of web sites in the *Google Spain* case. With respect to the latter, an EU advisory group later provided related guidance.

1. *Google Spain Case*

The ECJ rendered its decision in the *Google Spain* proceeding on May 13, 2014.<sup>14</sup> The case involved the request for a ruling by a Spanish court on points related to a lawsuit

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9. See, *European Single Market for Electronic Communication*, EUR. PARL. (Apr. 3, 2014), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0281>.

10. See Debate in Council (June 5, 2014), 2013/0309(COD), available at <http://www.europarl.europa.eu/oeil/popups/printsummary.pdf?id=1350214&l=en&t=E>. See also, Council of the European Union, Progress Report (May 26, 2014), 10109/14, 2013/0309(COD), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010109%202014%20INIT>.

11. See Texts Adopted by Parliament 1st Reading/Single Reading (Apr. 03, 2014), 2013/0309(COD), available at <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1345346&t=d&l=en>.

12. Resolution on Supporting Consumer Rights in the Digital Single Market, EUR. PARL. (Nov. 27, 2014), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2014-0071&language=EN&ring=B8-2014-0286>.

13. See, e.g., James Kanter, *E.U. Parliament Passes Measure to Break Up Google in Symbolic Vote*, N.Y. TIMES (Nov. 27, 2014), <http://nyti.ms/1rqGJci>.

14. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD)*, Mario Costeja González, EUR-Lex (May 13, 2014), available at <http://eur-lex.europa.eu/legal-content/EN/TEXT/HTML/?uri=LEX:62012CJ0131&rid=14>.

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brought by Mr. Costeja González, against Google Spain SL and Google Inc. seeking to have them withdraw personal data concerning him from their index and preventing future access to such data through search engine links to certain pages from the web site of Catalan newspaper *La Vanguardia*. The ECJ found that the European 1995 Data Protection Directive applied to Google Inc., that search engines engage in data processing separate from that of the web sites they index, and that a right to object to such processing may lead to a case-by-case balancing of rights and interests analysis in the handling of data subject exercising of such right.<sup>15</sup>

As a result of the *Google Spain* decision, the search engine set up an online form for receiving requests for exercise of such right<sup>16</sup> and, as of November 25, 2014, Google reported having received 174,226 delisting requests, and having deleted 208,520 URL search engine result links, out of a total of 602,479 URLs examined following the requests.<sup>17</sup>

2. *Working Party Guidance on Implementation of Google Spain Decision*

On November 26, 2014, the EU Article 29 Data Protection Working Party (Working Party), an independent advisory body on data protection and privacy, made up of the EU Member State data protection agencies (DPAs), the European Data Protection Supervisor, and the Commission, issued guidelines on implementation of the *Google Spain* decision (WP 225).<sup>18</sup> WP 225, which “contains the list of common criteria which the DPAs will apply to handle the complaints, on a case-by-case basis, filed with the national offices following refusals of de-listing by search engines,”<sup>19</sup> is not aimed solely at Google. According to the Working Party, the *Google Spain* ruling “is specifically addressed to generalist search engines, but that does not mean that it cannot be applied to other intermediaries,” and that data subjects may exercise their rights “with the national subsidiaries of search engines in their respective Member States of residence.”<sup>20</sup> WP 225 clears up a point previously unresolved – *Google Spain* applies not only to EU Member State national domain names (or country code top-level domains—“ccTLDs”), as “de-listing should also be effective on all relevant domains, including .com”<sup>21</sup> (thus extending to generic top-level domains or “gTLDs”, as well). The right “only affects the results obtained on searches made by the name of the individual”, although this applies to possible different versions of the name, different spellings, family names,<sup>22</sup> and pseudonyms and nicknames as well, where these latter two can be linked to the real identity of the data

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15. See W. Gregory Voss, *The Right to Be Forgotten in the European Union: Enforcement in the Court of Justice and Amendment in the Proposed General Data Protection Regulation*, 18(1) J. INTERNET L 3 (2014).

16. See *Search Removal Request Under Data Protection Law in Europe*, GOOGLE, [https://support.google.com/legal/contact/lr\\_eudpa?product=websearch](https://support.google.com/legal/contact/lr_eudpa?product=websearch) (last visited on Nov. 30, 2014).

17. See European Privacy Request for Search Removals, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy/> (last visited on Nov. 30, 2014).

18. *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González” C-131/12, ART. 29 DATA PROT.* WORKING PARTY, WP 225, Nov. 26, 2014, available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf).

19. *Id.* at 5.

20. *Id.* at 8.

21. *Id.* at 3.

22. *Id.* at 9.

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subject.<sup>23</sup> Notices about de-listing should not be provided in a way that allows users to conclude that an individual has asked for de-listing, so general and consistent statements should be used and, finally, webmasters should generally not be informed that their pages have been de-listed, and search engines are encouraged to publish their specific de-listing criteria.<sup>24</sup>

3. *Invalidation of Data Retention Directive*

The ECJ also rendered a decision on April 8, 2014,<sup>25</sup> declaring invalid Directive 2006/24/EC<sup>26</sup> regarding data retention by, *inter alia*, telecommunications operators and internet service providers for purposes such as the fight against terrorism and organized crime, on the basis of the protection of fundamental rights.<sup>27</sup>

C. OVERVIEW OF GUIDANCE FROM THE EU ARTICLE 29 DATA PROTECTION WORKING PARTY (WP)

The Working Party was extremely active in 2014. Learning lessons from the past and looking to create standard guidance throughout the EU, it issued guidance on new technologies in relatively quick succession. Summarized below are a few of the Working Party's opinions and activities from 2014.

1. *BCRs and CBPRs*

Due to the questionable future of the U.S.-EU Safe Harbor (which allows cross-border data transfers) and increasing restrictions on data location, interoperability and alternative means for cross-border transfers were the objects of companies' and governments' attention. Early in 2014, the Working Party issued an opinion linking binding corporate rules (BCRs) to the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPRs) (Opinion 02/2014).<sup>28</sup> It aims to serve as an informal checklist-or referential-for

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23. *Id.* at 13.

24. *Id.* at 9–10.

25. Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd (C-293/12) v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General, intervener: Irish Human Rights Commission, and Kärntner Landesregierung (C-594/12)*, Michael Seitlinger, Christof Tschohl and others, EUR-Lex (Apr. 8, 2014), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0293&qid=1402263080147&from=EN>.

26. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in Connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks and Amending Directive 2002/58/EC, 2006 O.J. (L 105) 54 (Apr. 13, 2006).

27. See W. Gregory Voss, *European Union Data Privacy Law Developments*, 70(1) BUS. LAW. 253, 257–259 (2014/2015).

28. See, *Opinion 02/2014 on a Referential for Requirements for Binding Corporate Rules submitted to National Data Protection Authorities in the EU and Cross Border Privacy Rules Submitted to APEC CBPR Accountability Agents*, WP 212, ART. 29 DATA PROT. WORKING PARTY, Feb. 27, 2014, [hereinafter *Opinion 02/2014*], available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp212\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp212_en.pdf). The referential was also issued by APEC, see *Joint Work between Experts from the Article 29 Working Party and from APEC Economies*, APEC, [http://www.apec.org/-/media/Files/Groups/ECSG/20140307\\_Referential-BCR-CBPR-reqs.pdf](http://www.apec.org/-/media/Files/Groups/ECSG/20140307_Referential-BCR-CBPR-reqs.pdf) (last visited Mar. 31, 2015).

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companies looking to bridge the gap between the EU and APEC cross-border privacy frameworks. This paves the way for Opinion 02/2014 to serve as a basis for organizations seeking double certification; meaning that companies could use the referential when drafting their internal privacy rules for both frameworks.<sup>29</sup> Presented as a practical comparative tool outlining the different requirements of both the EU and APEC rules, it lists the common elements or blocks for both frameworks, followed by the additional elements where the frameworks deviate.<sup>30</sup> However, Opinion 02/2014's aim is not to have mutual recognition for both systems. The Working Party clearly indicates that both systems still require any privacy rules to be approved by EU DPAs, in line with EU law, and for the CBPRs, the certification by recognized accountability agents.<sup>31</sup> Nevertheless, Opinion 02/2014 marks a bridge between diverse approaches to data privacy and legal systems, looking towards interoperability solutions for global data transfers.

2. *Microsoft's Cloud Contracts*

Setting the tone for cloud providers, Microsoft worked together with the Working Party to have its cloud computing agreements for EU customers formally approved by DPAs.<sup>32</sup> This approval process was coordinated through the Working Party and announced in a joint letter on April 2, 2014.<sup>33</sup> The practical impact is that DPAs consider that Microsoft's data processing agreement for enterprise cloud services, including Azure and Office 365, is "in line with Standard Contractual Clause 2012/87/EU, and should therefore not be considered as 'ad hoc' clauses".<sup>34</sup> Thus, Microsoft's enterprise agreement qualifies as the controller to processor model contract and, as such, will require fewer approvals or prior authorizations of national DPAs for the transfer of data outside of the EU. It is anticipated moving forward that other cloud providers will seek similar approvals for their contracts in order to ensure a level playing field within the EU for cloud services.<sup>35</sup>

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29. *Opinion 02/2014*, *supra* note 28, at 7.

30. *Id.* at 8; *see generally*, the twenty-seven referential points listed, *id.* at 11–58.

31. *Id.* at 7–8.

32. *See Enterprise Enrollment Addendum Microsoft Online Services Data Processing Agreement (with EU Standard Contractual Clauses)*, MICROSOFT (May 2012), [http://assets-production.govstore.service.gov.uk/Gii%20Attachments/06b%20Cats%20-%20uploaded/G2.179%20-%20Microsoft%20Ireland%20Operations%20Ltd/Archive1/\(B116\)EAEnrAmend\(Office365DataProcessAgrWithModelClauses\)\(WW\)\(ENG\)\(May2012\)\(CR\).pdf](http://assets-production.govstore.service.gov.uk/Gii%20Attachments/06b%20Cats%20-%20uploaded/G2.179%20-%20Microsoft%20Ireland%20Operations%20Ltd/Archive1/(B116)EAEnrAmend(Office365DataProcessAgrWithModelClauses)(WW)(ENG)(May2012)(CR).pdf).

33. Letter from Isabelle Falque-Pierrotin, Chairwoman, Working Party, to Dorothee Belz, Associate General Counsel, Microsoft EMEA (Apr. 2, 2014), *available at* [http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140402\\_microsoft.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140402_microsoft.pdf).

34. *Id.*

35. *See generally* Privacy Authorities Across Europe Approve Microsoft's Cloud Commitments, MICROSOFT (Apr. 10, 2014), <http://blogs.microsoft.com/blog/2014/04/10/privacy-authorities-across-europe-approve-microsofts-cloud-commitments/>. *See also* Letter from Isabelle Falque-Pierrotin, Chairwoman, Working Party, to Satya Nadella, CEO, Microsoft (Sept. 22, 2014) *available at* [http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140922\\_letter\\_microsoft\\_service\\_agreement.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140922_letter_microsoft_service_agreement.pdf).

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3. *Clarification on Use of Legitimate Interest Basis*

The Working Party issued guidance on the legal basis for processing personal data contained in Article 7(f) of Directive 95/46/EC, where processing may occur based on the legitimate interests of the data controller.<sup>36</sup> This Opinion 06/2014 looks not only to the application of Article 7(f) but takes the opportunity to provide an overview of all the legal bases under Article 7.<sup>37</sup> Opinion 06/2014 sets out the balancing test for weighing the legitimate interest of the data controller (or third parties) against the fundamental rights or interests of the data subject. The Working Party highlights that this is not the last possible basis for having processing deemed illegitimate. The balancing test is not to be considered straightforward, but instead requires the consideration of a number of factors, including the source and nature of the legitimate interests, whether processing is necessary for the exercise of a fundamental right (or is otherwise in the interests of the public), the actual impact on the data subject and their reasonable expectations about the data processing, as well as the nature of the data and how it will be processed. Finally, any additional safeguards limiting the impacts on the individuals should also be considered.<sup>38</sup>

Opinion 06/2014 includes a number of examples and quick guide on how to carry out the Article 7(f) balancing test.<sup>39</sup> This quick guide includes assessing which ground will be applicable under Article 7, whether an interest is legitimate or illegitimate, determining whether the process is necessary, establishing the balancing test (both in a provisional manner and a final determination), and demonstrating compliance and insurance transparency as well as ensuring the exercise of individual rights. The last two steps trigger practical consequences for controllers, as they will need to be able to demonstrate via documentation or mapping of their balancing test.<sup>40</sup>

4. *Other Opinions and Guidance*

Keeping abreast of new technological developments, the Working Party issued an opinion on the Internet of Things setting out guidance for three specific technologies: wearable devices, quantified-self and domotics.<sup>41</sup> The Working Party also issued statements on

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36. See *Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC*, WP 217, Art. 29 Data Prot. Working Party, Apr. 9, 2014, [hereinafter *Opinion 06/2014*] available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp217\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf). Article 7(f) of the Directive provides that the processing of personal data is permitted when “necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject”. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 23/11/EC, 1995 O.J. (L 281) 31, 41, available at <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:31995L0046&from=en>.

37. *Id.* at 13; see also, *id.* at 16–23.

38. *Id.* at 3; see also, *id.* at 22–48.

39. *Id.* at 55–57.

40. *Id.* at 56.

41. See *Opinion 08/2014 on the Recent Developments on the Internet of Things*, WP 223, Art. 29 Data Prot. Working Party, Sept. 16, 2014, available at [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp223\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp223_en.pdf).

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Big Data<sup>42</sup> and—relatedly—guidance on anonymization.<sup>43</sup> Its discussion on Big Data and the identifiability of data subjects (individuals) also sets the stage for the ongoing discussions around the data protection reforms within the EU.

## II. Developments in Asia-Pacific Region

Significant developments also arose in APEC, Australia, China and South Korea in 2014.

### A. APEC CROSS-BORDER PRIVACY

In addition to the Working Party and APEC's referential, discussed in Part I. C. 1 above, APEC was busy working through its Cross-Border Privacy Rules System Joint Oversight Panel, which issued its Findings Report on April 25, 2014, in which it found that Japan met the conditions to become a Participant in the Cross-Border Privacy Rules System.<sup>44</sup> Thus, Japan joined the U.S. and Mexico in this regard, becoming the third participant.<sup>45</sup>

### B. AUSTRALIA

With respect to Australia, it should first be noted that the 2012 amendments to Australia's Privacy Act 1988<sup>46</sup> came into force on March 12, 2014.<sup>47</sup> Next, during the first half of 2014, the Australian House of Representatives' Social Policy and Legal Affairs Committee held hearings on drones and privacy,<sup>48</sup> and the Nationals Deputy Whip made a statement on behalf of such Committee, saying that "[a]lthough drones have the potential to add great value to the Australian economy, widespread use of drones also raises serious

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42. Letter from Isabelle Falque-Pierrotin, Chairwoman, Working Party, to John Podesta, Counselor to the U.S. President, White House (June 11, 2014), *available at* [http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140611\\_letter\\_to\\_podesta.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140611_letter_to_podesta.pdf). See also *Statement on Statement of the WP29 on the Impact of the Development of Big Data on the Protection of Individuals with regard to the Processing of their Personal Data in the EU* [sic], WP 221, Art. 29 Data Prot. Working Party, Sept. 16, 2014, *available at* [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp221\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp221_en.pdf).

43. See *Opinion 05/2014 on Anonymisation Techniques*, WP 216, Art. 29 Data Prot. Working Party, Apr. 10, 2014, *available at* [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp216\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp216_en.pdf). For a discussion of Opinion 05/2014 see *European Union Data Privacy Law Developments*, *supra* note 27, at 253-254.

44. Findings Reports, Cross-Border Privacy Rules System Joint Oversight Panel, APEC, *Cross-Border Privacy Rules System Participation of Japan* (Apr. 25, 2014), [http://www.apec.org/~media/Files/Groups/ECSCG/CBPR/20140430\\_CBPR\\_Japan\\_Final\\_Report.pdf](http://www.apec.org/~media/Files/Groups/ECSCG/CBPR/20140430_CBPR_Japan_Final_Report.pdf).

45. Press Release, APEC, APEC Expands Data Privacy System to Protection Consumers (May 1, 2014), *available at* [http://www.apec.org/Press/News-Releases/2014/0501\\_CBPR.aspx](http://www.apec.org/Press/News-Releases/2014/0501_CBPR.aspx). For a discussion of the U.S.'s joining this System, see *Privacy, E-Commerce, and Data Security*, *supra* note 2, at 110.

46. For a discussion of these amendments, see *Privacy, E-Commerce, and Data Security* *supra* note 2, at 111-12.

47. See *Message from the Privacy Commissioner, Timothy Pilgrim*, Austl. Gov't, Office of the Austl. Info. Comm'r, Annual Report 2013-2014, *available at* <http://www.oaic.gov.au/about-us/corporate-information/annual-reports/oaic-annual-report-201314/message-from-the-privacy-commissioner-timothy-pilgrim>.

48. See *Public Hearings*, PARL. OF AUSTL., [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Drones/Public\\_Hearings](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Drones/Public_Hearings) (last visited Mar. 30, 2015).

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privacy issues that will need to be resolved.<sup>49</sup> According to that same Committee, today's Australian laws do not protect citizens' privacy from drones, and following its hearings it tabled a report in Parliament calling on the Australian Government to "modernize and simplify Australia's privacy laws to protect against potentially invasive new technologies like drones."<sup>50</sup> That report contained, *inter alia*, the following recommendations: (i) that the Civil Aviation Safety Authority include privacy law information with a safety pamphlet that it provides to remotely piloted aircraft vendors, highlighting users' responsibility "not to monitor, record or disclose individuals' private activities without their consent" (recommendation 2);<sup>51</sup> (ii) that the Australian Government "consider introducing legislation by July 2015 which provides protection against privacy-invasive technologies" (recommendation 3);<sup>52</sup> and (iii) that the Australian Government start action to introduce harmonized surveillance laws covering "the use of:

- listening devices,
- optical surveillance devices,
- data surveillance devices, and
- tracking devices" (recommendation 4).<sup>53</sup>

Thus, future Australian legislation should be tracked in order to follow these developments.

C. CHINA

In China, there were a number of developments in 2014. Two of them are particularly noteworthy. First, a major revision to the country's privacy law, as part of a broader overhaul of its consumer protection law, went into force. Second, two foreign private investigators for global corporations were sentenced to prison for illegally purchasing personal information.

1. *Protection of Personal Information as Part of Major Overhaul of Consumer Protection Law*

On October 25, 2013, China passed an amendment to the Law on the Protection of Consumer Rights and Interests,<sup>54</sup> representing a truly major overhaul of the country's consumer protection law that was first enacted in 1993. On March 15, 2014, the amended

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49. Cth, Parliamentary Debates, House of Representatives, 17 Mar. 2014, 1983-1984 (Mr Christensen, Soc. Policy and Legal Aff. Comm.) (Austl.), *available at* [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/19c32232-832c-45aa-8efa-783c9a3446a4/0016/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/19c32232-832c-45aa-8efa-783c9a3446a4/0016/hansard_frag.pdf;fileType=application%2Fpdf).

50. Press Release, H.R. Standing Comm. on Social Policy and Legal Issues (Austl.), Committee Calls for New Privacy Protections as Drone Use Surges (July 14, 2014), *available at* <http://www.aph.gov.au/DocumentStore.ashx?id=06d9c0a8-81a3-4b27-986d-609cef3fc430>.

51. Rep., H.R. Standing Comm. on Soc. Policy and Legal Issues (Austl.), Eyes in the Sky (July 14, 2014), ch. 4 at 47, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_vand\\_Legal\\_Affairs/Drones/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_vand_Legal_Affairs/Drones/Report).

52. *Id.* at 48.

53. *Id.*

54. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai «Zhonghua Renmin Gongheguo Xiaofei Zhe Quanyi Baohù Fa» de Jueding 全国人民代表大会常务委员会关于修改《中华人民共和国消费者权益保护法》的决定 [Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests](promulgated by the

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law became effective. Among other things, the amended law provides for: a shift of burden of proof to vendors regarding consumers' defective product or service claims; a seven-day refund requirement for Internet sales; protection of personal information collected during sales process; allowance of lawsuits or support by consumer interest groups; and strengthened punitive damages against sellers from twice the product price to three times.

Regarding the protection of personal information, in order to collect consumers' personal information, businesses must disclose the purpose, method, and scope of collection and intended use of personal information gathered during sales process, and obtain consent of consumers. Businesses must: (i) preserve the confidentiality of the collected personal information; (ii) not disclose personal information to third parties without the prior consent of consumers; (iii) not send commercial communications to consumers without their consent or request; (iv) honor consumers' request to opt out of receiving further communications; and (v) not use the personal information in any lawful fashion.<sup>55</sup> This is the first time China has explicitly recognized through legislative action that consumers' personal information is the consumers' protected right.<sup>56</sup> While other measures to protect consumers' privacy are industry-specific or communication-mode specific rules, this amendment covers consumers' privacy, data security and e-commerce rights in a much broader context.

2. *Foreign Nationals Imprisoned for Illegal Collection of Personal Information for Corporate Investigations*

In August 2014, a Shanghai court sentenced a British corporate investigator to thirty months in prison and his American wife investigator to twenty-four months, along with a combined fine of approximately \$57,000 for illegally collecting personal information. The private investigators were corporate investigators who help global corporate clients uncover business partners' and employees' suspected corruption and other types of wrongdoing. More specifically, they purchased personal information about Chinese nationals as part of their investigative work. The most important type of personal information the investigator couple illegally purchased and possessed was Chinese citizens' national identification number (similar to the social security numbers in the U.S.).<sup>57</sup>

This is not the first time those who illegally purchased or misused personal information were criminally punished. But the nationality and occupation of the defendants may make this case a truly noteworthy and defining development. The defendants were foreign nationals and they were not mass marketers or spammers but corporate investigators who supposedly obtained and used personal information to help their corporate clients detect bribery and other illegal conduct.

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Standing Comm. Nat'l People's Cong., October 25, 2013, effective Mar. 14, 2014) (Lawinfochina)(China), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=15517&CGid=>.

55. *Id.* art. 29.

56. *China Amends Consumer Rights Law*, XINHUANET (Oct. 25, 2013), [http://news.xinhuanet.com/english/china/2013-10/25/c\\_132830969.htm](http://news.xinhuanet.com/english/china/2013-10/25/c_132830969.htm).

57. *Brenda Gob & Engen Tham, China Sentences GSK-Linked Investigators to Prison*, REUTERS (Aug. 08, 2014), <http://uk.reuters.com/article/2014/08/08/uk-china-gsk-trial-idUKKBN0G80F620140808>.

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3. *Other Developments*

Most other noteworthy developments relate to China's continuing efforts to strengthen the protection of personal information and data security through industry or communication mode-specific initiatives. For example, in October 2014, the Supreme People's Court issued interpretations on the protection of personal information on the Internet.<sup>58</sup>

Similarly, earlier in March 2014, China's State Postal Bureau issued three formal rules, which had been previously issued in draft form in late 2013 for public comments, concerning the protection of personal information in the context of postal delivery of traditional mail items.<sup>59</sup>

D. SOUTH KOREA

Early in 2014, a major breach of personal information in South Korea was recorded by three credit card companies.<sup>60</sup> Through the incident, more than 100 million items of personal information were compromised, including credit card numbers, passwords, date of birth, residence registration numbers (similar to the social security number in the U.S.), addresses and others. More than 4.7 million people replaced or cancelled their credit cards.<sup>61</sup>

The problem related to the loss of personal information that could also be used for other purposes. For example, in Korea, the residence registration number was used by many entities for many purposes (e.g., banks, Internet games, Internet shopping, insurance, rental cars, customs office to deliver a package from overseas, etc.) up until July 2014. Realizing the common information could be very useful for criminals, the

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58. Zuigao Renmin Fayuan Guanyu Shenli Liyong Xinxi Wangluo Qin Hai Renshen Quanyi Minshi Jiufen Anjian Shiyong Falu Ruogan Wenti de Guiding 最高人民法院关于审理利用信息网络侵害人身权益民事纠纷案件适用法律若干问题的规定 [Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases involving Civil Disputes over Infringements upon Personal Rights and Interests through Information Networks] (promulgated by the Sup. People's Ct., June 23, 2014, effective Oct. 10, 2014) (Lawinfochina)(China), available at <http://www.lawinfochina.com/display.aspx?id=17960&lib=law>.

59. Jidi Fuwu Yonghu Geren Xinxi Anquan Guanli Guiding (寄递服务用户个人信息安全管理规定) (Provisions on the Management of the Security of Personal Data of Postal and Delivery Service Users) (promulgated by the State Post Bureau of P.R.C., March 26, 2014)(China), available at [http://www.spb.gov.cn/zcfg/gfxwj/201403/t20140326\\_301911.html](http://www.spb.gov.cn/zcfg/gfxwj/201403/t20140326_301911.html) (the "Security Provisions"); Wufa Toudi You Wufa Tuihui Kuaijian Guanli Guiding (无法投递又无法退回快件管理规定) [Provisions on the Management of Undeliverable and Unreturnable Express Items] (promulgated by the State Post Bureau of P.R.C., effective Mar. 10, 2014) (China), available at [http://www.spb.gov.cn/zcfg/gfxwj/201403/t20140319\\_298677.html](http://www.spb.gov.cn/zcfg/gfxwj/201403/t20140319_298677.html) (the "Undeliverable Items Provisions"); Youzheng Hangye Anquan Xinxi Baogao He Chuli Guiding (邮政行业安全信息报告和处理规定) [Provisions on the Reporting and Handling of Security-related Operational Information in the Postal Industry] (promulgated by the State Post Bureau of P.R.C., effective Mar. 10, 2014) (China), available at [http://www.spb.gov.cn/zcfg/gfxwj/201403/t20140326\\_301911.html](http://www.spb.gov.cn/zcfg/gfxwj/201403/t20140326_301911.html) (the "Reporting Provisions").

60. Ted Thornhill, *Nearly Half of South Koreans Have their Bank Details Stolen (including the President) as Anti-Fraud Worker Arrested*, MAILONLINE (Jan. 21, 2014) <http://www.dailymail.co.uk/news/article-2543167/Data-100MILLION-South-Korean-credit-cards-stolen-scam-affecting-40-population-including-President-Park-Geun-hye.html>.

61. *Id.*

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lawmakers amended both the Personal Information Protection Act (PIPA)<sup>62</sup> and the Act of Promotion of Information and Communication Network Utilization and Information Protection (the Network Act)<sup>63</sup> totally abandoning the collection of the residence registration number as from August 7, 2014, unless otherwise absolutely required under other laws, such as tax, insurance and medical-related laws.

While the vibrant discussion on the subject of prohibiting the collection of residence registration numbers was ongoing, a particular event occurred in relation to the famous Korean drama called *My Love from the Star*.<sup>64</sup> In the drama, an alien who came to the Earth 400 years ago, but still looked as young as a 30-year-old man, fell in love with a famous Korean actress. Because the drama was so popular, models of dresses and accessories worn by the actress were quickly sold out through Internet shopping malls, but shoppers from neighboring foreign countries could not purchase the clothes, handbags and accessories.<sup>65</sup> This was because they, unfortunately, did not have a Korean residence registration number and a digital authentication certificate required to register and sign in on Korean Internet shopping mall sites, and which also can only be obtained by using a residence registration number. This caused a huge loss of sales potential and, as a result, the issue was put on the agenda of a cabinet meeting with South Korean President Park.<sup>66</sup> After the cabinet meeting, the Financial Services Commission immediately relaxed its strict rules to allow foreign shoppers to purchase products without an e-certification.

Since August 7, 2014, collection of resident registration numbers is prohibited under the PIPA, unless such collection is required by other laws.<sup>67</sup> In addition, the PIPA also was revised to provide that companies that currently retain resident registration numbers should delete the numbers from their systems by August 6, 2016.<sup>68</sup> Sanctions for violation of the PIPA were also increased. Any violation of the provision prohibiting the retention of residence registration numbers is subject to a penalty of up to 30 million Won.<sup>69</sup> In the event personal information is compromised and data security measures have not been implemented, the maximum penalty would be up to 500 million Won.<sup>70</sup>

In addition to the changes in the PIPA, the “Network Act” was also amended. The PIPA is a general law in relation to personal information and the Network Act is only

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62. Gae-in Jeong-bo Bo-ho Bop [Personal Information Protection Law], Art. 24(2) (S. Kor.), amended Aug. 6, 2013 and effective Aug. 7, 2014.

63. Jeongbotongsinmang Bop [The Act on Promotion of Information and Communications Network Utilization and Data Protection], art. 23-2 (S. Kor.), available at [http://koreanlii.or.kr/w/images/d/df/DPAAct2014\\_ext.pdf](http://koreanlii.or.kr/w/images/d/df/DPAAct2014_ext.pdf).

64. See *My Love from the Star*, WIKIPEDIA, [http://en.wikipedia.org/wiki/My\\_Love\\_from\\_the\\_Star](http://en.wikipedia.org/wiki/My_Love_from_the_Star) (last updated Mar. 28, 2015).

65. Hwangbo Yon, “Cancerous regulations” Still Complicate Online Shopping, THE HANKYOREH (Apr. 3, 2014), [http://english.hani.co.kr/arti/english\\_edition/e\\_business/631104.html](http://english.hani.co.kr/arti/english_edition/e_business/631104.html).

66. Sam Lim, *Online Shopping in Korea to Become More Accessible to Foreigners*, SEOULSYNC (July 31, 2014), <http://www.seoulsync.com/news/online-shopping-become-accessible-foreigners>.

67. See Gae-in Jeong-bo Bo-ho Bop [Personal Information Protection Law], *supra* note 61.

68. See Hee-Eun Kim, *Korea Strengthens Protection for ‘Resident Registration Numbers’ (RRNs): Leaks May Face a Fine of up to 0.5 Billion Korean Won*, INSIDEPRIVACY (Aug. 7, 2014), <http://www.insideprivacy.com/international/korea-strengthens-protection-for-resident-registration-numbers-rrns-leaks-may-face-a-fine-of-up-to-0/>.

69. See Gae-in Jeong-bo Bo-ho Bop [Personal Information Protection Law], *supra* note 61, art. 72.

70. *Id.* art. 34–2.

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applicable to companies that provide services through the Internet.<sup>71</sup> The newly revised Network Act took effect on November 29, 2014.<sup>72</sup> Among other changes, the retention period for unused personal information was shortened to one year from the previous three-year period.<sup>73</sup> So, Internet shopping malls need to delete personal information if the owner of the personal information has not logged into the mall web site for one year, after sending a notice to the lapsed users.

Moreover, in the event personal information is compromised, the penalty rate was increased from 1 percent to 3 percent of sales revenue.<sup>74</sup> This would be a significant increase for Internet shopping malls. Furthermore, companies should notify or report to the proper authority within twenty-four hours following the breach of personal information.<sup>75</sup> This twenty-four hour reporting requirement seems to be very short, especially considering the time required to determine which personal information was breached.

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71. See Gae-in Jeong-bo Bo-ho Bop [Personal Information Protection Law], *supra* note 61; see Jeongbotongsinmang Bop [The Act on Promotion of Information and Communications Network Utilization and Data Protection], *supra* note 62.

72. See Jeongbotongsinmang Bop [The Act on Promotion of Information and Communications Network Utilization and Data Protection], *supra* note 62.

73. *Id.* art. 1.

74. See James Lim, *South Korea Increases Data Breach Fines, Lowers Liability Threshold*, BNA BLOOMBERG (May 19, 2014), <http://www.bna.com/south-korea-increases-n17179890601/>.

75. See Jeongbotongsinmang Bop [The Act on Promotion of Information and Communications Network Utilization and Data Protection], *supra* note 62, art.76(1)–2–2.

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## International Arbitration

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### I. Introduction

This article surveys developments in international arbitration during 2014. The first two sections survey significant U.S. court actions relevant to international commercial arbitration, with the first section covering developments in arbitration law such as arbitrability, and the second section focusing on significant decisions on recognition and enforcement of awards. The third section examines developments in investment treaty arbitration. Finally, the fourth section reviews significant arbitration decisions from foreign courts.

### II. Arbitration Developments in U.S. Courts

#### A. DECISIONS ON THE ARBITRATOR'S ROLE IN DETERMINING ARBITRABILITY

##### 1. *Decisions on Gateway Questions of Arbitrability*

In *BG Group PLC v. Republic of Argentina*,<sup>1</sup> a case involving the enforcement of an investment treaty arbitration award, the U.S. Supreme Court considered whether the arbitral panel's decision not to require compliance with the treaty's pre-arbitration local litigation requirement should be reviewed *de novo*, or with deference.<sup>2</sup> An investment treaty between the United Kingdom and Argentina contained a clause requiring parties to attempt to litigate their dispute in local courts prior to commencing arbitration proceedings. This precondition was not met, and Argentina argued BG Group's claims should be dismissed.<sup>3</sup> The panel held that Argentina's passage of laws that allegedly hindered BG

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\* The following authors contributed to this chapter: Jeffrey Rosenthal, Shira Kaufman, and Elizabeth Hanly of Cleary Gottlieb (U.S. law developments in sections I and II); George Burn of Vinson & Elkins (Investment Treaty Arbitration); Alexander Blumrosen and Fleur Malet-Deraedt of Bernard-Hertz-Béjot (Paris) (EU and France); Brenda Horrigan of Herbert Smith Freehills (China); Gregor Kleinknecht of Hunters (England & Wales); and James Menz of Schellenberg Wittmer (Switzerland).

1. *BG Grp. PLC v. Republic of Arg.*, 134 S. Ct. 1198 (2014).

2. *Id.* at 1203-04.

3. *Id.* at 1204.

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Group's recourse to the Argentinian judiciary amounted to a waiver of Argentina's right to object to BG Group's failure to comply with the local litigation requirement.<sup>4</sup> Argentina sought to vacate the eventual award, in part because of BG Group's non-compliance with the local litigation precondition.

The U.S. Supreme Court upheld the validity of the arbitral award. The Court first examined the issue under regular contract principles,<sup>5</sup> which presume, unless otherwise specified, that the parties intend courts to decide arbitrability, and arbitrators to decide the meaning and application of procedural preconditions for arbitration.<sup>6</sup> The Court held the local litigation requirement was akin to a procedural precondition, because it determined "*when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate."<sup>7</sup> Second, the Court reasoned that the status of the contract as a treaty between sovereigns did not render inapplicable principles of contract interpretation, particularly where, as here, there is an "absence of explicit language in [the] treaty demonstrating that the parties intended a different delegation of authority."<sup>8</sup> The Court concluded that the arbitrators' determination with respect to the need for BG Group to comply with the local litigation requirement was entitled to considerable deference,<sup>9</sup> and did not warrant vacatur.<sup>10</sup>

In *Employers Insurance Co. of Wausau v. OneBeacon American Insurance Co.*,<sup>11</sup> the First Circuit Court of Appeals also examined the respective roles of arbitrators and courts in determining gateway issues of arbitrability. The issue was whether arbitrators or courts should determine the preclusive effect of a prior arbitration award on pending arbitration proceedings. Plaintiff, OneBeacon, sought to arbitrate the same claim against defendants that it previously arbitrated and lost against a different reinsurer, pursuant to a materially identical contract.<sup>12</sup> Defendants petitioned the court for a declaratory judgment that the prior arbitration award precluded the current arbitration.<sup>13</sup> The district court dismissed the case, holding that "the preclusive effect of a prior arbitration is a matter for arbitrators to decide."<sup>14</sup> The First Circuit affirmed, noting the "broad agreement among the circuit courts that the effect of an arbitration award on future awards . . . is properly resolved through arbitration."<sup>15</sup>

Defendants argued that the issue should be decided by a court in this instance because federal courts have exclusive jurisdiction to determine the preclusive effects of their own judgments, and the award at issue had been confirmed by a federal court.<sup>16</sup> The First Circuit rejected this argument on the ground that collateral estoppel applies only when a

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4. *Id.* at 1204–05.

5. *See id.* at 1206.

6. *Id.* at 1206–07.

7. *Id.* at 1207.

8. *Id.* at 1208–09.

9. *Id.* at 1210.

10. *Id.* at 1212–13.

11. *Emp'rs Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25 (1st Cir. 2014).

12. *Id.* at 26.

13. *Id.*

14. *Id.* at 26–27.

15. *Id.* at 27 (alteration in original) (internal quotation marks omitted).

16. *Id.* at 28.

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subsequent action involves the same issues, but the federal action to confirm the arbitral award was distinct from the arbitral award itself.<sup>17</sup>

2. *Interpretation of Whether an Arbitration Clause Permits Class Arbitration*

Class arbitration continued to be a hot topic among U.S. courts in 2014. Several courts considered whether courts or arbitrators should decide if a particular arbitration clause permits class arbitration. In 2003, the Supreme Court came close to resolving the issue, when a four-judge plurality in *Green Tree Financial Corp. v. Bazzle* viewed the permissibility of class arbitration under an arbitration clause as presumptively a procedural issue for the arbitrators to decide.<sup>18</sup> But in its 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>19</sup> and its 2013 decision in *Oxford Health Plans LLC v. Sutter*,<sup>20</sup> the Supreme Court made clear that the *Bazzle* plurality's conclusion is not binding, and that the Court has not yet decided the issue. The Sixth Circuit subsequently addressed this issue in *Reed Elsevier, Inc. v. Crockett*,<sup>21</sup> and, contrary to the plurality's determination in *Bazzle*, held that whether an arbitration clause permits class arbitration is a gateway issue to be decided by courts.

This year, the Third Circuit weighed in, agreeing with the Sixth Circuit's determination. In *Opalinski v. Robert Half International Inc.*,<sup>22</sup> employees wished to bring a class action alleging that Robert Half International (RHI) had violated the Fair Labor Standards Act (FLSA). The employment agreement's arbitration clause made no mention of classwide arbitration.<sup>23</sup> The district court granted RHI's motion to compel arbitration, allocating to the arbitrator the question of whether the arbitration could proceed on a classwide basis.<sup>24</sup> The question on appeal was whether, in the absence of allocation in the contract, availability of classwide arbitration should be decided by the district court or left to an arbitrator.<sup>25</sup> The Third Circuit reasoned that the availability of class arbitration was a threshold "question of arbitrability" to be decided by the court, because it was a question of *whose* claims an arbitrator is authorized to arbitrate, and such questions presumptively fall to the court to decide.<sup>26</sup>

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17. *Id.* at 29.

18. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003).

19. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680–81 (2010).

20. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013).

21. *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).

22. *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014).

23. *Id.* at 329.

24. *Id.*

25. *See id.*

26. *Id.* at 332. U.S. District Courts are also split on this issue. *See, e.g.*, *Chico v. Hilton Worldwide, Inc.*, No. CV 14–5750–JFW (SSx), 2014 WL 5088240, at \*11 (C.D. Cal. Oct. 7, 2014) (following *Opalinski*); *In re A2P SMS Antitrust Litig.*, No. 12 CV 2656(AJN), 2014 WL 2445756, at \*10 (S.D.N.Y. May 29, 2014) (rejecting *Opalinski* view).

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**B. ARBITRABILITY OF STATUTORY CLAIMS**

In *Walthour v. Chipio Windshield Repair, LLC*,<sup>27</sup> the Eleventh Circuit applied the Supreme Court's reasoning in *CompuCredit Corp. v. Greenwood*<sup>28</sup> to the question of whether certain claims arising under FLSA can be arbitrated. In *CompuCredit*, the Supreme Court held that the Credit Repair Organizations Act (CROA)<sup>29</sup> did not preclude enforcement of an arbitration agreement to resolve alleged violations of CROA because the "CROA is silent on whether claims under the Act can proceed in an arbitrable forum."<sup>30</sup> The issue in *Walthour* was "whether an arbitration agreement, which waives an employee's ability to bring a collective action under [FLSA] is enforceable under the Federal Arbitration Act."<sup>31</sup> Plaintiffs argued that the arbitration agreements were unenforceable because they contained a waiver of their statutory right to file a collective action.<sup>32</sup> The Eleventh Circuit noted that, per *CompuCredit*, the focus of its analysis must be on whether the statutory text contains a "contrary congressional command" that specifically precludes the arbitration of FLSA claims.<sup>33</sup> The Eleventh Circuit joined a growing number of circuit courts in holding that claims brought under the FLSA are arbitrable because there is no "contrary congressional command" in the statute's text.<sup>34</sup> Accordingly, it held that the arbitration agreements' waivers of plaintiffs' right to file FLSA collective actions were valid.<sup>35</sup>

Similarly, in *Santoro v. Accenture Federal Services, LLC*,<sup>36</sup> the Fourth Circuit applied the *CompuCredit* holding to claims brought under the Age Discrimination in Employment Act (ADEA), the Family Medical Leave Act (FMLA), and the Employee Income Retirement Security Act (ERISA), finding that none of these statutes preclude a waiver of statutory rights. The Fourth Circuit noted that, as the Supreme Court pointed out in dicta in *CompuCredit*, certain whistleblower claims brought under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) are not arbitrable.<sup>37</sup> Here, however, because the plaintiff was not bringing any Dodd-Frank whistleblower claims, all of his federal statutory claims were subject to arbitration.<sup>38</sup>

**C. APPEALABILITY OF DISTRICT COURT ORDERS COMPELLING ARBITRATION**

This year, a number of federal courts addressed the issue of whether a district court order compelling arbitration is a final, appealable ruling under the FAA. While the Ninth

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27. *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014).

28. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

29. 15 U.S.C. §§ 1679–1679j (2012).

30. *CompuCredit Corp.*, 132 S. Ct. at 673.

31. *Walthour*, 745 F.3d at 1327.

32. *Id.* at 1330.

33. *Id.*

34. *See, e.g.*, *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002).

35. *Walthour*, 745 F.3d at 1337.

36. *Santoro v. Accenture Fed. Servs., LLC*, 748 F.3d 217 (4th Cir. 2014).

37. *Id.* at 222.

38. *Id.* at 223–24.

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Circuit adopted a rebuttable presumption that an order compelling arbitration is not final and appealable, the Eleventh Circuit opted for a functional inquiry.

In *MediVas, LLC v. Marubeni Corp.*,<sup>39</sup> the Ninth Circuit held that an order compelling arbitration is not appealable when the district court neither explicitly dismisses nor explicitly stays the court action during the arbitral proceedings. The district court in *MediVas* entered an order compelling arbitration with respect to certain claims and remanding the remaining claims to state court. On appeal, the Ninth Circuit adopted a “a rebuttable presumption that an order compelling arbitration but not explicitly dismissing the underlying claims stays the action as to those claims pending the completion of the arbitration.”<sup>40</sup> Thus, the district court’s order was not final and appealable under Section 16(a)(3) of the FAA.<sup>41</sup>

In contrast, in *Martinez v. Carnival Corp.*,<sup>42</sup> the Eleventh Circuit held that the district court’s order compelling arbitration of a worker’s action against a cruise ship owner was a final appealable decision, even though the district court did not dismiss the case but closed it for administrative purposes. The Eleventh Circuit reasoned that “[w]hat matters is whether the case, in all practicality, is finished.”<sup>43</sup> Because the district court dismissed as moot all other pending motions, and did not retain jurisdiction to confirm the arbitration award or to award attorneys’ fees, the district court was left with nothing more to decide, and the order was final.<sup>44</sup> Thus, the Eleventh Circuit’s ruling demonstrates a practical approach as to whether the case before the district court has been concluded.

D. RES JUDICATA *Effect of Prior Arbitrations on U.S. Federal Court Actions*

In *W.J. O’Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*,<sup>45</sup> the Sixth Circuit held that an arbitration award did not bar a subsequent suit asserting additional claims that the parties had not agreed to arbitrate, reasoning that a prior arbitration award “cannot bar a claim that the arbitrator lacked authority to decide, and an arbitrator lacks authority to decide a claim that the parties did not agree to arbitrate.”<sup>46</sup> This was a split panel decision, in which the dissent argued that a suit following a prior arbitration award is barred by the doctrine of *res judicata*, where, as here, plaintiff and defendant were active, adverse participants in the prior arbitration proceeding, arose from the same facts as the lawsuit.<sup>47</sup>

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39. *MediVas, LLC v. Marubeni Corp.*, 741 F.3d 4 (9th Cir. 2014); *see also* *Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019 (9th Cir. 2014).

40. *MediVas*, 741 F.3d at 9.

41. 9 U.S.C. § 16(a)(3) (2012).

42. *Martinez v. Carnival Corp.*, 744 F.3d 1240 (11th Cir. 2014).

43. *Id.* at 1245.

44. *Id.*

45. *W.J. O’Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, 765 F.3d 625 (6th Cir. 2014).

46. *Id.* at 627.

47. *Id.* at 635.

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**III. Recognition and Enforcement of Foreign Arbitral Awards in U.S. Courts**

A. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS VERSUS FOREIGN JUDGMENTS

A recent circuit court opinion addressed the issue of whether there is a difference for purposes of FAA preemption between enforcement of an arbitral award and a foreign judgment that enforced an arbitral award. In *Commissions Import Export S.A. v. Republic of the Congo*,<sup>48</sup> the District Court for the District of Columbia dismissed an action brought to enforce a foreign judgment under the District of Columbia's Uniform Foreign-Country Money Judgments Recognition Act (D.C. Recognition Act) because the foreign judgment was itself the enforcement of an arbitration award. Reversing the district court, the D.C. Circuit Court held that the FAA does not preempt parallel schemes for the enforcement of foreign judgments, even if those judgments are based on an underlying arbitral award.<sup>49</sup>

B. WAIVING DEFENSES TO THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

Two circuit courts addressed parties' ability to waive defenses to arbitral award confirmation and enforcement.

In *In re Wal-Mart Wage and Hour Employment Practices Litigation*,<sup>50</sup> the Ninth Circuit considered as a matter of first impression whether "a non-appealability clause in an arbitration agreement that eliminates all federal court review of arbitration awards, including review under § 10 of the FAA" is enforceable.<sup>51</sup> As part of a global settlement agreement with Wal-Mart, the parties agreed that any fee disputes among plaintiffs' counsel would be resolved through "binding, non-appealable arbitration."<sup>52</sup> The Ninth Circuit concluded the clause was ambiguous as to whether the parties intended to only preclude review of the merits or also intended to preclude federal court review on the basis of vacatur as found in Section 10 of the FAA.<sup>53</sup> The Ninth Circuit determined it did not need to resolve the ambiguity, because the second interpretation would be unenforceable. Allowing parties to waive the FAA's grounds for vacatur, the court found, "would not only run counter to the text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration."<sup>54</sup>

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48. *Comm'n's Imp. Exp. S.A. v. Congo*, 916 F. Supp. 2d 48 (D.D.C. 2013), *rev'd* 757 F.3d 321 (D.C. Cir. 2014).

49. *Comm'n's Imp. Exp. S.A. v. Congo*, 757 F.3d 321 (D.C. Cir. 2014). *See also* *Mont Blanc Trading Ltd. v. Khan*, No. 13 Civ. 700(AJN), 2014 WL 1116733 (S.D.N.Y. Mar. 20, 2014) (holding that when a party seeks to enforce a foreign judgment confirming an arbitral award in the United States, the resulting action involves the enforcement of the foreign court's judgment, governed by state law, not the enforcement of the underlying arbitration award, governed by the FAA).

50. *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262 (9th Cir. 2013).

51. *Id.* at 1264.

52. *Id.* at 1264–65.

53. *Id.* at 1265–66.

54. *Id.* at 1268.

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In *Sonera Holding B.V. v. Cukurova Holding A.S.*,<sup>55</sup> the Second Circuit addressed the issue of whether, and in what circumstances, parties to an arbitration agreement waive their ability to assert personal jurisdiction defenses in U.S. court. *Sonera Holding* involved an action to confirm a foreign arbitral award brought by a Dutch holding company against a Turkish joint stock corporation.<sup>56</sup> *Sonera Holding* argued that the language of its arbitration agreement with *Cukurova* indicated an implicit agreement to waive all personal jurisdiction defenses and to consent to the jurisdiction of any court with subject matter jurisdiction over enforcement actions.<sup>57</sup> The arbitration agreement at issue stated:

Any award of the arbitral tribunal may be enforced by judgment or otherwise in any court having jurisdiction over the award or over the person or the assets of the owing Party or Parties. Applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be.<sup>58</sup>

The Second Circuit rejected plaintiff's reading as overbroad and instead concluded it constituted nothing more than "a standard entry-of-judgment clause designed to clarify that, following any arbitration award, a court of the arbitral venue or in any jurisdiction in which the parties' persons or assets are located would have jurisdiction to enter judgment on that award."<sup>59</sup> The arbitration clause did not speak to personal jurisdiction, and plaintiff could not establish that New York courts had jurisdiction over *Cukurova*; accordingly, the Second Circuit remanded with an instruction to dismiss for lack of personal jurisdiction.<sup>60</sup>

C. DECISIONS ON THE POWERS OF COURTS IN PRIMARY VERSUS SECONDARY JURISDICTIONS

In *CBF Indústria de Gusa S/A/ v. AMCI Holdings, Inc.*,<sup>61</sup> plaintiffs brought an action to enforce a previously unconfirmed French arbitration award against the alter egos or successors-in-interest of the award debtor. Relying on a Second Circuit opinion from 1963, *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*,<sup>62</sup> the district court held that it did not have subject matter jurisdiction under the FAA to enforce an unconfirmed award against a party who is not the award debtor.<sup>63</sup> In *Orion Shipping*, the Second Circuit held that confirmation actions under the FAA are generally not appropriate occasions to extend confirmation of the award to nonparties such as alleged alter egos, because the factual and legal issues involved in whether the nonparty is bound by the award will bog down what is intended to be a summary proceeding.<sup>64</sup> Accordingly, the

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55. *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221 (2d Cir. 2014), cert. denied, 134 S. Ct. 2888 (2014).

56. *Id.* at 223.

57. *Id.* at 226–27.

58. *Id.* at 226.

59. *Id.* at 227.

60. *Id.*

61. *CBF Indústria de Gusa S/A/ v. AMCI Holdings, Inc.*, 14 F. Supp. 3d 463 (S.D.N.Y. Apr. 9, 2014).

62. *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Pan.*, 312 F.2d 299 (2d Cir. 1963).

63. *CBF Indústria*, 14 F. Supp. 3d at 479.

64. *Orion Shipping*, 312 F.2d at 301.

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district court in *CBF Indústria* dismissed the case for lack of jurisdiction.<sup>65</sup> It noted that plaintiffs were free to recommence their enforcement action after successfully petitioning to have the arbitration award modified in a French court with primary jurisdiction.<sup>66</sup>

*Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*<sup>67</sup> involved foreign mining companies' request for confirmation and enforcement of a Malaysian arbitral award against the government of Laos. Plaintiffs' request was initially granted by the district court and affirmed by the Second Circuit.<sup>68</sup> Subsequently, however, after the High Court of Malaysia vacated the arbitral award, the government of Laos moved to vacate the district court's judgment. In response, the mining companies moved to require Laos to post security as a condition for entry of a vacatur order. The district court granted the government of Laos' motion to vacate the prior judgment enforcing the award because Malaysia, the primary jurisdiction, had vacated the award, and no extraordinary circumstances justified the district court's exercise of its discretion to override the Malaysian court's vacatur. In addition, the court held that requiring Laos to post security would violate Laos' sovereign immunity under the Foreign Sovereign Immunities Act.

#### **IV. Investment Treaty Arbitration**

##### **A. TRIBUNAL AWARDS RECORD SUM TO INVESTORS IN YUKOS OIL COMPANY**

In July 2014, a tribunal, constituted in three parallel cases brought under the Energy Charter Treaty, awarded the majority shareholders in OAO Yukos Oil Company, once Russia's largest oil company, US\$ 50 billion in compensation for Russia's treatment of Yukos and the expropriation of its assets. While the amount awarded represents less than half what was originally claimed, the sum awarded significantly dwarfs the next largest investment treaty award ever rendered. The three separate arbitrations were heard jointly by the same tribunal and all administered by the Permanent Court of Arbitration in the Netherlands.<sup>69</sup>

Yukos went into bankruptcy in 2006 and its assets were sold off, after the Russian Government retroactively imposed tax demands of US\$ 24 billion for the period 2000–2004. Yukos' then CEO Mikhail Khordorkovsky, an opponent of President Vladimir Putin, was charged with crimes including forgery, fraud, tax evasion, embezzlement, and money laundering.

The tribunal held that Russia's actions constituted a "full assault on Yukos and its beneficial owners in order to bankrupt Yukos and appropriate its assets while, at the same time,

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65. *CBF Indústria*, 14 F. Supp. 3d at 479–80.

66. *Id.* at 479.

67. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Laos*, 997 F. Supp. 2d 214 (S.D.N.Y. 2014).

68. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Laos*, No. 10 Civ. 5256(KMW), 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011), *aff'd*, 492 F. App'x 150 (2d Cir. 2012).

69. *Hulley Enters. Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 226, Final Award (July 18, 2014); *Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n*, PCA Case No. AA 227, Final Award (July 18, 2014); *Veteran Petroleum Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 228, Final Award (July 18, 2014). The Final Awards are, in all material respects, identical and reference in this article will be made only to the Final Award in the *Hulley Enterprises Limited* case.

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removing Mr. Khodorkovsky from the political arena.”<sup>70</sup> It decided that “the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets.”<sup>71</sup> Yukos’ largest asset was acquired at less than market valuation by Rosneft, a state-owned company, in an auction that the tribunal described as “in effect a devious and calculated expropriation.”<sup>72</sup> The bankruptcy of Yukos and the auction of its remaining assets was, in the Tribunal’s determination, “the final act of the destruction of the Company by the Russian Federation and the expropriation of its assets for the sole benefit of the Russian State and State-owned companies Rosneft and Gazprom.”<sup>73</sup> Furthermore, the tribunal held that the conviction of Mr Khordokovsky and others “indicate[s] that Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State-controlled company, and incarcerate a man who gave signs of becoming a political competitor.”<sup>74</sup>

The award is some thirty times larger than the previous largest known award in an investment arbitration of US\$ 1.7 billion, plus interest, in *Occidental Petroleum Corp. v. Republic of Ecuador*.<sup>75</sup> Russia was also ordered to bear the full \$8.4 million arbitration costs, together with 75 percent of the claimants’ US\$ 80 million legal fees.

The case is significant in a number of respects beyond the huge sum awarded. For example, the award was reduced from the US\$ 113 billion claimed as a result of the claimants’ use of domestic low-tax regions in Russia, and their use of a double taxation agreement between Cyprus and Russia. The tribunal held that as a result of these actions “Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent’s destruction of Yukos” and reduced the award accordingly.<sup>76</sup> This approach mirrors the approach taken by the tribunal in *Occidental v. Ecuador*<sup>77</sup> to address misconduct by the claimant; that tribunal was chaired by Yves Fortier, also the chair of the Yukos arbitrations. In addition, the Yukos tribunal’s 2009 jurisdictional decision,<sup>78</sup> which paved the way for this merits ruling, is notable for its holding that the Energy Charter Treaty was binding on Russia, even though Russia had never ratified it.

**B. ARBITRATOR CHALLENGES**

Applications challenging the position of arbitrators in particular cases has been a fertile area of activity in Investor-State cases. Most of those applications, as would be expected, failed. This was true in *Chevron v. Ecuador*,<sup>79</sup> *ConocoPhillips v. Venezuela*,<sup>80</sup> *Içkale Insaat*

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70. *Hulley Enters.*, PCA Case No. AA 226, Final Award, para. 515.

71. *Id.* para. 756.

72. *Id.* para. 1037.

73. *Id.* para. 1180 (quoting the Claimants).

74. *Id.* para. 1583.

75. *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).

76. *Hulley Enters.*, PCA Case No. AA 226, Final Award, para. 1637.

77. *Occidental Petroleum*, ICSID Case No. ARB/06/11.

78. *Hulley Enters. Ltd. (Cyprus) v. Russian Fed’n*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility (Nov. 30, 2009).

79. *Chevron Corp. v. Republic of Ecuador (U.S. v. Ecuador)*, PCA Case No. 2009-23, Decision on Challenge to Arbitrator (Nov. 21, 2014) (not published). See also *In-Depth: Why PCA Secretary-General Declined to*

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*Limited Sirketi v. Turkmenistan*,<sup>81</sup> *Abaclat v. Argentina*,<sup>82</sup> *RSM v. St. Lucia*,<sup>83</sup> and *South American Silver v. Bolivia*.<sup>84</sup> But the applicant succeeded in unseating the targeted arbitrator in three cases: *Mytilineos v. Serbia*<sup>85</sup> (removed), *Caratube v. Kazakhstan*<sup>86</sup> (removed), and *Pey v. Chile*<sup>87</sup> (stepped down).

The approach of the Permanent Court of Arbitration (PCA) in *Chevron v Ecuador*<sup>88</sup> is instructive. It stated that the standard governing challenges is objective in nature, and the question should therefore be viewed from the perspective of a reasonable and informed third party. The PCA Secretary-General made it clear that it was not his role to substitute his views on the underlying matters for those of the tribunal. Instead, his responsibility was to scrutinize the integrity of the tribunal's proceedings and decisions: not to assess the wisdom and correctness of the actions of the arbitrators, but instead to decide whether there were procedural failings that are "so manifestly unreasonable that bias is the most likely explanation for them."<sup>89</sup> The high bar that must be reached by the applicant in a disqualification matter was cited also in *Abaclat v. Argentina*,<sup>90</sup> an International Center for the Settlement of Investment Disputes (ICSID) case. In that case, the reference in the ICSID Rules to a need to show that the supposed lack of requisite qualities was "manifest" meant that it will always be very difficult for the applicant to prevail.

In *Mytilineos v. Serbia*,<sup>91</sup> the respondent-State's original nominee was removed on the ground that the arbitrator's relationship with the respondent in other cases created an appearance of bias. The claimant objected to the nomination because the arbitrator had already been appointed by the State in another case, allegedly involving similar issues.

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*Remove Arbitrators for Alleged "Failure to Act" on Ecuador Requests in Chevron Case*, INVESTMENT ARB. REP. (Nov. 30, 2014), [http://www.iareporter.com/articles/20141201\\_1](http://www.iareporter.com/articles/20141201_1).

80. *ConocoPhillips Petrozuata B.V. v. Bolivian Republic of Venez.* (Neth. v. Venez.), ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration (Mar. 10, 2014).

81. *Içkale Insaat Ltd. Sirketi v. Turkmenistan* (Turk. v. Turkm.), ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands (July 11, 2014).

82. *Abaclat & Others v. Argentine Republic* (It. v. Arg.), ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014).

83. *RSM Prod. Corp. v. St. Lucia* (U.S. v. St. Lucia), ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC (Oct. 23, 2014).

84. *S. Am. Silver Ltd. (Berm.) v. Bol.*, PCA Case No. 2013-15, Decision on Bolivia's Challenge to Francisco Orrego Vicuña (Oct. 30, 2013) (not published). See also *Investor's Bid to Disqualify Former Argentine Attorney General from Sitting on Tribunal Is Rejected by PCA Secretary-General*, INVESTMENT ARB. REP. (Apr. 9, 2014), [http://www.iareporter.com/articles/20140409\\_2](http://www.iareporter.com/articles/20140409_2).

85. *Mytilineos Holdings SA v. Republic of Serb.* (Greece v. Serb.), Decision on Challenge to Arbitrator (Perm. Ct. Arb. 2014) (not published). See also *As Serbia Is Sued at ICSID over Regulation of Animal-Rendering Industry, A Tribunal in UNCITRAL Case Is Finalized after Arbitrator Disqualification*, INVESTMENT ARB. REP. (Nov. 25, 2014), [http://www.iareporter.com/articles/20141126\\_2](http://www.iareporter.com/articles/20141126_2).

86. *Caratube Int'l Oil Co. v. Kaz.* (U.S. v. Kaz.), ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014).

87. *Pey Casado v. Chile* (Spain v. Chile), ICSID Case No. ARB/98/2, Philippe Sands' Letter of Resignation from the Tribunal (Jan. 10, 2014).

88. *Chevron Corp. v. Republic of Ecuador* (U.S. v. Ecuador), PCA Case No. 2009-23, Decision on Challenge to Arbitrator (Nov. 21, 2014) (not published).

89. *Id.*

90. *Abaclat & Others v. Argentine Republic* (It. v. Arg.), ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014).

91. *Mytilineos Holdings SA v. Republic of Serb.* (Greece v. Serb.), Decision on Challenge to Arbitrator (Perm. Ct. Arb. 2014) (not published).

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The judge appointed by the PCA to decide the question acknowledged that no evidence suggested actual bias towards the respondent, but he found that the cumulative effect of the arbitrator's ties with respondent would incline a reasonable third party observer to have justifiable doubts as to his impartiality and independence to sit as an arbitrator. So, the appearance of bias was sufficient to justify disqualification.

Similar grounds existed in the case of *Caratube v Kazakhstan*.<sup>92</sup> This decision is a watershed as it is the first ICSID case in which an application to disqualify an arbitrator has succeeded. The targeted arbitrator had been appointed previously by the respondent-State, and separately also on numerous occasions by the respondent's counsel. But that did not justify his disqualification. Rather, the decision hinged on the perceived similarity of the issues in the instant case and in a previous ICSID case in which the arbitrator had sat (*Ruby Roz Agricol LLP v. Kazakhstan*<sup>93</sup>). The fact that there would be arguments from *RubyRozAgricol* that would be familiar to the arbitrator would, in the view of the applicant, create a manifest risk of the issue being pre-judged. Indeed, the relationship between the two cases was unusually close: not only was the respondent-State the same, but the two claimant entities were also closely related.

The developments in the *Pey v. Chile*<sup>94</sup> case tell little to the observer about the standards applicable in disqualification applications because the challenged arbitrator, Philippe Sands QC, resigned, rather than force the issue. Although the grounds of the application were weak, Mr. Sands stepped down from the tribunal, citing the need for the proceedings to move forward without delay and, in his words, "without distraction." Although this development adds nothing to the body of knowledge of the legal standards in this area, it does demonstrate the tactical utility of a disqualification application for a party content to adopt an aggressive approach.

Finally, a challenge to the independence of an arbitrator failed in *RSM v St Lucia*.<sup>95</sup> The claimant filed the application following the first ruling in an ICSID case requiring a party to post security for the costs of an arbitration. Appended to that decision had been the "Assenting Reasons" of one of the arbitrators, Dr. Gavan Griffith QC, setting out his own rationale for the decision to order the claimant to post security for costs.<sup>96</sup> Those reasons had included general comments about the implications for Investor-State arbitration of the involvement of third-party funders: investors who inject money into international arbitration proceedings in exchange for a share of any recovery of compensation achieved by the claimant. The claimant, RSM, contended that these comments, including the colorful language in which they were expressed, revealed a general lack of independence and impartiality on the part of Dr. Griffith, justifying his removal from the tribunal.

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92. *Caratube Int'l Oil Co. v. Kaz. (U.S. v. Kaz.)*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014).

93. *Ruby Roz Agricol LLP v. Kaz.*, UNCITRAL, Award on Jurisdiction (Aug. 1, 2013).

94. *Pey Casado v. Chile (Spain v. Chile)*, ICSID Case No. ARB/98/2, Philippe Sands' Letter of Resignation from the Tribunal (Jan. 10, 2014).

95. *RSM Prod. Corp. v. St. Lucia (U.S. v. St. Lucia)*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC (Oct. 23, 2014).

96. *RSM Prod. Corp. v. St. Lucia (U.S. v. St. Lucia)*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs (Aug. 13, 2014).

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The decision rejecting Dr. Griffith's disqualification acknowledged that "the language in the Assenting Reasons [is] radical and perhaps extreme in tone."<sup>97</sup> While Dr. Griffith

[M]ay well, with the expressions used, have stepped close to the edge of what can be considered as an objective reasoning . . . we believe that he has not actually stepped over the demarcation line between radical and extreme language on the one hand and clearly inappropriate and hence unacceptable expressions in the context of an arbitration on the other hand.<sup>98</sup>

C. EUROPEAN UNION INTERVENES IN INVESTMENT TREATY ARBITRATION

The European Union (EU), through its executive branch, the European Commission (the Commission), has previously made clear its opposition to investment treaties entered into by EU Member States. Regarding treaties made between Member States (intra-EU BITs), the Commission's position is that these are incompatible with European law (and specifically the jurisdiction of Member State courts to decide disputes within Europe) and must be phased out by Member States. Regarding treaties made between Member States and third countries (extra-EU BITs), the Commission's position is that responsibility for investment protection passed to the EU by virtue of the Treaty of Lisbon, and that existing BITs should be replaced with treaties entered into by the EU, although existing BITs should remain in place until replaced. Debate on these points, and in particular the mechanics by which responsibility for cases brought under EU BITs would be handled, has continued in 2014, with a Regulation being passed setting out the division of responsibility between a Member State and the Commission in respect of a claim brought under a treaty negotiated by the EU as a result of the actions of that Member State.<sup>99</sup>

In addition, the EU is currently in the process of negotiating free trade agreements with, among others, the United States and Canada, in which the inclusion of investor-state dispute settlement mechanisms (ISDS) is in doubt. The Commission, which appears to desire a radical change in the way ISDS is conducted, launched a consultation in 2014 on the inclusion of ISDS in the EU-US free trade agreement (the Transatlantic Trade and Investment Partnership), following the publication of a factsheet at the end of 2013 that set out the Commission's proposals in relation to improving ISDS.<sup>100</sup> In brief, the Commission's proposals would seek to: improve transparency by allowing submissions from interested parties and public access to documents and hearings; define the circumstances in which government measures constitute indirect expropriation; define the fair and equitable treatment standard; introduce the "loser pays" principle; introduce a binding code of conduct for arbitrators; introduce a roster of arbitrators; introduce an appellate mechanism for investment disputes; and permit states to influence interpretations and "correct any potential erroneous interpretations" by tribunals.

But, in addition to the EU's actions in shaping the future of investor-state arbitration, the Commission has shown in 2014 that it is also prepared to take a more aggressive

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97. *RSM Prod. Corp.*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, para. 86.

98. *Id.*

99. Regulation (EU) No 912/2014, 2014 O.J. (L 257) 121.

100. Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, EUR. COMMISSION (Nov. 2013), [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf).

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approach in relation to current cases and what it considers to be incompatibilities between investment arbitration and EU law. The Commission has previously intervened in cases, as *amicus curiae*, in an effort to persuade arbitrators that they have no jurisdiction over disputes brought under intra-EU BITs. In 2014, the Commission sought to intervene in a variety of cases to argue that: a tribunal has no jurisdiction under an intra-EU BIT because the subsequent EU investment protection regime supersedes the BIT;<sup>101</sup> more extensive protections contained in intra-EU BITs as compared with EU law would discriminate against EU nationals who do not benefit from that BIT protection, and would therefore be incompatible with EU law;<sup>102</sup> investment arbitration tribunals have no jurisdiction to decide issues of interpretation or application of EU law;<sup>103</sup> the actions of Member States that are challenged by investors in certain cases were necessary to eliminate unlawful state aid, and an award in favor of the claimants would therefore constitute new unlawful state aid;<sup>104</sup> it has a “systemic interest” in the interpretation of individual extra-EU BITs;<sup>105</sup> and the Energy Charter Treaty contains an implicit disconnection clause, which means that the substantive protections of the treaty do not apply as between EU Member States.<sup>106</sup>

In addition to intervening in ongoing arbitral cases, in 2014 the Commission intervened to prevent payment of an award rendered by an ICSID tribunal. In May 2014, the Commission issued an injunction preventing the Romanian government from paying a US\$ 250 million ICSID award rendered in December 2013 in favour of Ioan and Viorel Micula and their associated companies, after an arbitration under the Sweden-Romania BIT.<sup>107</sup> The case revolved around Romania’s withdrawal, ahead of schedule, of incentives and benefits offered to investors to increase investment in certain disadvantaged areas of the country. The Commission had intervened in the arbitration in an attempt to persuade the arbitrators that Romania’s actions were the result of conforming with EU law obligations to eliminate state aid. The Commission had warned the arbitrators that an order requiring Romania to compensate the investors would amount to a new grant of state aid, which would also be unlawful under EU law.

The Commission’s injunction restrains Romania from paying the award until the Commission has ruled on the compatibility of the award with the European single market. In that regard, in October 2014 the Commission launched an investigation into the implementation of the award, under the relevant procedures set out in the Treaty on the Functioning of the European Union, and it has invited interested parties to submit their

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101. U.S. Steel Global Holdings I B.V. (Neth.) v. Slovak Republic, PCA Case No. 2013-6.

102. *Id.*

103. *Id.*

104. *Id.*; Antaris Solar GmbH v. Czech (Ger. v. Czech), UNCITRAL (Perm. Ct. Arb.); Natland Inv. Grp. NV v. Czech (Neth. v. Czech), UNCITRAL (Perm. Ct. Arb.); I.C.W. Eur. Invs. Ltd. v. Czech, UNCITRAL (Perm. Ct. Arb.); Voltaic Network GmbH v. Czech (Ger. v. Czech), UNCITRAL (Perm. Ct. Arb.); Photovoltaik Knopf Betriebs-GmbH v. Czech (Eur. v. Czech), UNCITRAL (Perm. Ct. Arb.); WA Invs.-Europa Nova Ltd. v. Czech, UNCITRAL (Perm. Ct. Arb.).

105. Iberdrola Energía S.A. v. Guat. (Spain v. Guat.), ICSID Case No ARB/09/5.

106. EDF Int’l S.A. (Fr.) v. Hung., UNCITRAL. The issue has also been raised in the context of the Czech Republic cases, *supra* note 104, because some of those cases are brought under the Energy Charter Treaty, though it is not clear which ones those are.

107. Commission Decision C(2014) 3192 of 13 May 2014 to Enjoin Romania to Suspend the Granting of State Aid to Micula (EC). See generally Micula v. Rom., ICSID Case No. ARB/05/20.

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comments.<sup>108</sup> The Commission's preliminary view is, unsurprisingly, that complying with the award would constitute a new grant of unlawful state aid by Romania.

Given that enforcement of the award is currently being sought in the United States, it is possible that a U.S. court will be required to decide whether Romania must comply with its obligations under the ICSID Convention or its obligations to the European Union.

D. NEW TRANSPARENCY RULES FOR INVESTOR-STATE ARBITRATIONS ISSUED BY  
UNCITRAL

One of the numerous areas of discussion and debate in relation to Investor-State arbitration revolves around transparency, confidentiality, and openness. In a very small minority of examples, such as in treaties entered into recently by the United States and Canada, the parties have agreed to provisions stipulating that any Investor-State disputes brought under them shall be conducted openly. In the general absence of such transparency provisions in the governing treaty, it is very unusual to see the parties to a particular dispute agree to conduct the case openly. One example where such consensus did arise was in *Guaracachi America, Inc. v. Bolivia*.<sup>109</sup>

In April 2014, the United Nations Commission on International Trade Law (UNCITRAL) issued a set of rules intended to bring greater transparency to Investor-State disputes. The Rules on Transparency in Treaty-Based Investor-State Arbitration<sup>110</sup> will require open hearings and publication of a host of dispute-related documents (including notices of arbitration, statements of case and pleadings, and awards and orders issued by the tribunal). But the rules will only apply in arbitrations begun under investment treaties coming into force after the rules came into effect (absent consent of the parties or an order of the tribunal). Efforts are underway, however, to make the rules applicable to disputes arising under the more than three thousand existing BITs.

Pursuant to Article 1.9 of the transparency rules, the rules can be used in not only UNCITRAL arbitrations, but also arbitrations conducted under other rules (ICSID Arbitration Rules, ICSID Additional Facility Rules, International Center of Commerce (ICC) Rules, etc.).

Alongside the transparency rules themselves, an online registry has been launched by UNCITRAL.<sup>111</sup> The parties will be responsible for sending the notice of arbitration to the UNCITRAL registry. The document will not be posted immediately; instead, UNCITRAL will publish details of the names of the parties, the treaty under which the claim is brought, and the economic sector in which the dispute arises. The notice of arbitration, along with subsequent documents, will be posted on the online registry after an arbitral tribunal has been constituted.

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108. State Aid SA.38517 (2014/C) (ex 2014/NN) — Implementation of Arbitral Award Micula v Romania of 11 December 2013 — Invitation to Submit Comments Pursuant to Article 108(2) of the Treaty on the Functioning of the European Union, 2014 O.J. (C 393) 27.

109. *Guaracachi America, Inc. v. Bol.*, PCA Case No. 2011-17.

110. UNITED NATIONS COMM'N ON INT'L TRADE LAW, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2014), available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

111. *Transparency Registry*, UNITED NATIONS COMMISSION ON INT'L TRADE L., <http://www.uncitral.org/transparency-registry> (last visited Mar. 28, 2015).

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**V. Country Case Law Developments in Arbitration**

**A. EUROPEAN COURT OF JUSTICE (ECJ)**

In a decision of February 13, 2014, the European Court of Justice (ECJ) confirmed that an arbitral tribunal established by law is a “court or tribunal” within the meaning of Article 267 of the Treaty on the Functioning of the European Union (TFEU), so that the tribunal may refer a question to the ECJ for a preliminary ruling in interpretation of EU law.<sup>112</sup>

In *Merck Canada Inc. v. Accord Healthcare Ltd.*, the Portuguese “Tribunal Arbitral necessário” referred a question to the ECJ in interpretation of EU intellectual property law. The ECJ first verified the issue of admissibility of the question. The ECJ started by reminding the national court that it should take a number of factors into account to determine whether a referring body is a “court or tribunal” (such a question being governed by EU law alone), such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter parties, whether it applies rules of law, and whether it is independent.

The ECJ reaffirmed that a conventional arbitration tribunal is not a “court or tribunal of a Member State” within the meaning of Article 267 of TFEU if the parties are under no obligation, in law or in fact, to refer their disputes to arbitration, and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration and are not required to intervene of their own accord in the proceedings before the arbitrator.

The principal interest of the decision is the statement by the Court that an arbitral tribunal, which may vary in form, composition, and rules of procedure, and which is dissolved after making its decision, may still be a “permanent” body. Indeed, the Court weighed the preceding factors raising doubts as to its permanence with the facts that the “Tribunal Arbitral necessário” had been established on a legislative basis, that it had permanent compulsory jurisdiction and, in addition, that the Portuguese legislation defined and framed the applicable procedural rules. In consequence, the Court found that, in the present case, the requirement of permanence was also met.

**B. CHINA**

Beginning January 1, 2014, all court judgments in China must be published on a centralized database managed by the Supreme People’s Court.<sup>113</sup> A regulation published by the Supreme People’s Court on November 21, 2013, requires the publication of all court judgments except for cases involving national secrets, personal privacy, or settlement by mediation.<sup>114</sup> To date, courts from twenty-two out of the thirty-one provinces in main-

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112. Case C-555/13, *Merck Can. Inc. v. Accord Healthcare Ltd.*, <http://curia.europa.eu/juris/celex.jsf?celex=62013CO0555&lang1=en&type=TEXT>.

113. ZHONGGUÓ CÁIPÀN WÉNSHU WANG [JUDICIAL OPINIONS OF CHINA], <http://www.court.gov.cn/zqcpwsw/> (last visited Mar. 28, 2015).

114. Zuigao Rénmín Fayuàn Guanyú Rénmín Fayuàn Zài Hùliánwang Gongbù Cáipàn Wénshu de Guiding (最高人民法院 关于人民法院在互联网公布裁判文书的规定) [Supreme People’s Court’s Measures for the People’s Courts to Publish Judicial Opinions on the Internet] (promulgated by Sup. People’s Ct., Nov. 21, 2013, effective Jan. 1, 2014), <http://www.chinacourt.org/article/detail/2013/11/id/1152212.shtml> (China).

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land China have managed to publish all their cases online. This is considered to be a major development in China's drive to achieve greater judicial transparency, as part of a broader scheme aimed at reforming the court system in China to make information more accessible to the public. From the arbitration practitioner's point of view, the publication of court judgments in China, together with the requirement under the PRC Civil Procedure Law that any decision for setting aside or refusing to enforce arbitral awards must set out the reasons for such set-aside or refusal, should increase the visibility of the Chinese judiciary's approach and practice in arbitration-related matters. Even though prior judgments in China do not form binding precedents, the ability to search previous court judgments on enforcement and setting aside of arbitral awards should offer some points of reference and guidelines to parties who need to enforce or set aside their arbitral awards in China.

C. ENGLAND AND WALES

The long-running arbitration proceedings in *U&M Mining Zambia Ltd. v. Konkola Copper Mines PLC* have so far given rise to no fewer than four decisions of the Commercial Court between 2013 and 2014. In the latest decision,<sup>115</sup> the court continued a world-wide freezing order first granted in June 2014 on a without-notice application in support of the enforcement of awards granted by an arbitral tribunal in arbitration proceedings seated in London. The arbitral tribunal had made three awards in favor of the claimant, none of which had been satisfied. The court held that it could infer from the respondent's conduct in the arbitration, which included dishonest evidence given by its employees and obstructive tactics, a real risk that the respondent would dissipate its assets to thwart enforcement of the awards.

The decision clarifies that, if the seat of the arbitration is in London, the English courts have jurisdiction to issue orders in support of arbitration and that it will ordinarily be appropriate to do so. The fact that most of the respondent's assets were located in Zambia, where enforcement would take place, and that the Zambian courts also had jurisdiction to grant a freezing order, would not make it inappropriate for the English courts to grant a world-wide freezing order. If the seat of arbitration is in England and Wales, the English courts may grant a world-wide freezing order in support of enforcement of arbitral awards even in the absence of assets within the jurisdiction.

D. FRANCE

On January 15, 2014, the French Cour de cassation confirmed that the liability of the arbitrator may be upheld only if she committed gross negligence.<sup>116</sup> In this case, an individual sold the shares of an audit company to another individual, with the right for the seller to purchase at a later stage, in whole or in part, the portfolio of clients of the sold company. A difficulty arose between the parties during the sale of the portfolio of clients, and the purchaser of the audit company initiated arbitration against the seller. A first award was issued on June 23, 2000, ordering the seller to indemnify the purchaser. In

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115. *U&M Mining Zambia Ltd. v. Konkola Copper Mines PLC*, [2014] EWHC 3250 (Comm).

116. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 15, 2014, Bull. civ. I, No. 1 (Fr.).

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October 18, 2001, the court of appeal confirmed the award. On December 19, 2001, the seller initiated a new arbitration against the purchaser for misrepresentation, with the arbitral tribunal being identical to the one that issued the first award. The arbitral tribunal decided to reopen the arbitral proceedings, and that decision was overturned by the court of appeal on February 19, 2004. In 2004, the arbitral tribunal nonetheless issued three awards conflicting with the first 2000 award insofar as this time, the purchaser was ordered to indemnify the seller.

The purchaser initiated proceedings against the arbitrators *inter alia* for failing to respect the preclusive effect of the October 18, 2001, and February 19, 2004, decisions. He based his claim on the contractual liability of the arbitrators.

Both the Court of Appeal of Paris (March 1, 2011) and the Cour de cassation denied the request. The Cour de cassation found that the purchaser was in fact trying to challenge the content of the 2004 awards and consequently was challenging the jurisdictional powers of the arbitrators. In particular, the Cour de cassation found that the arbitral tribunal, which assumed in 2004 the powers of *amiable compositeur*, decided to pursue the arbitral proceedings after the October 18, 2001, decision due to the submission of new facts. As a result, the purchaser's claim was dismissed because he had not proven "a personal wrong" of the arbitrators "equivalent to a guilty mind or constitutive of a fraud, a gross negligence or a denial of justice."<sup>117</sup>

E. SWITZERLAND

Switzerland's Federal Supreme Court (Supreme Court) considered, for the first time, Article 20 of the 1999 FIDIC Conditions of Contract and the jurisdiction of an arbitral tribunal to hear a dispute that has not gone through the Dispute Adjudication Board (DAB) procedure.<sup>118</sup> Because Swiss law is frequently chosen in FIDIC and international construction contracts, this decision is particularly relevant. Relying on the principle of good faith enshrined in Swiss law, the Supreme Court held that while the DAB procedure is, in principle, mandatory and therefore a condition precedent to arbitration, the parties need not undergo the process if doing so would amount to an abuse of rights because it appears futile to an efficient resolution of the dispute in the event of an inordinate delay in appointing the DAB. The Supreme Court also confirmed that the alleged non-compliance with a pre-arbitration dispute resolution provision may be challenged in setting aside proceedings against an arbitral award on the basis of lack of jurisdiction *ratione temporis*.<sup>119</sup> The Supreme Court further held that, just like an arbitration agreement, a pre-arbitration dispute resolution provision is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the

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117. *Id.*

118. Bundesgericht [BGer] [Federal Supreme Court] July 7, 2014, docket no. 4A\_124/2014 (Switz.), available at <http://www.bger.ch>. This decision has also been reviewed in more detail in Schellenberg Wittmer Ltd's Arbitration Case Digest. Christopher Boog & James Menz, *First Decision on FIDIC Dispute Adjudication Boards (Swiss Supreme Court)*, SCHELLENBERG WITTMER LTD (Sept. 25, 2014), [http://www.swlegal.ch/getdoc/c72ab5f7-c0a6-4a38-b21d-5e7e7872e605/2014\\_Christopher-Boog\\_James-Menz\\_First-decision-on.aspx](http://www.swlegal.ch/getdoc/c72ab5f7-c0a6-4a38-b21d-5e7e7872e605/2014_Christopher-Boog_James-Menz_First-decision-on.aspx).

119. See Bundesgesetz über das Internationale Privatrecht [Swiss International Private Law Act] Dec. 18, 1987, SR 291, art. 190(2)(b) (Switz.).

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main contract, or to Swiss law.<sup>120</sup> Finally, the Supreme Court confirmed that, in deciding on an arbitral tribunal's jurisdiction, it may rely on pertinent foreign law—an approach befitting international contract schemes like FIDIC.

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120. *See id.* art. 178(2) (reflecting the principle of *favorem validitatis*).

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## International Courts

CINDY GALWAY BUYS, STEPHANIE MACUIBA, AND MARK E. WOJCİK\*

This article reports on selected developments during 2014 before the International Court of Justice, the Inter-American Court of Human Rights, and various international criminal courts and tribunals.

### I. International Court of Justice

During 2014, the International Court of Justice (“ICJ”) issued judgments in two contentious cases and one order regarding a request for preliminary measures. Five new cases were filed with the ICJ in 2014: two maritime delimitation cases and three cases on nuclear disarmament.

#### A. *Maritime Dispute* (Peru v. Chile)

On January 27, 2014, the ICJ issued its judgment in the Maritime Dispute between Peru and Chile.<sup>1</sup> Peru had asked the ICJ “to determine the course of the boundary between the maritime zones of the two States in accordance with international law . . . and to adjudge and declare that Peru possesses exclusive sovereign rights in the maritime area situated within the limit of 200 nautical miles from its coast but outside Chile’s exclusive economic zone or continental shelf.”<sup>2</sup> Chile asked the ICJ to dismiss Peru’s claims and to declare that “the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement” following a stated boundary and that Peru was not entitled to any maritime zone south of that area.<sup>3</sup> In a complex opinion, the ICJ examined the claims and agreed upon a single maritime boundary between Chile and Peru.<sup>4</sup> The ICJ defined the course of the maritime boundary between Chile and Peru without fixing its precise

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1. Maritime Dispute (Peru v. Chile), Judgment (Jan. 27, 2014), *available at* <http://www.icj-cij.org/docket/files/137/17930.pdf>.

2. *Id.* at 11, ¶ 13.

3. *Id.* at 12, ¶ 14.

4. *Id.* at 67-68, ¶¶ 196-98. *See also* Press Release, I.C.J., Maritime Dispute (Peru v. Chile) (Jan. 27, 2014), *available at* <http://www.icj-cij.org/docket/files/137/17928.pdf> (ICJ press release summarizing the judgment).

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geographical coordinates.<sup>5</sup> The judgment states that the ICJ expects Chile and Peru to determine those coordinates in accordance with the judgment and “in the spirit of good neighbourliness.”<sup>6</sup>

President Peter Tomka of Slovakia,<sup>7</sup> Vice-President Bernardo Sepúlveda-Amor of Mexico,<sup>8</sup> Judge Leonid Skotnikov of the Russian Federation,<sup>9</sup> Judge Joan E. Donoghue of the United States,<sup>10</sup> Judge Giorgio Gaja of Italy,<sup>11</sup> and Judge *ad hoc* Gilbert Guillaume of France<sup>12</sup> appended separate declarations to the judgment. Judge Hisashi Owada of Japan<sup>13</sup> added a separate opinion and Judge *ad hoc* Orrego Vicuña added a separate opinion partly concurring and partly dissenting.<sup>14</sup> Judge Julia Sebutinde of Uganda added a dissenting opinion<sup>15</sup> and Judges Xue Hanqin of China, Giorgio Gaja of Italy, Dalveer Bhandari of India, and Judge *ad hoc* Orrego Vicuña issued a joint dissenting opinion.<sup>16</sup>

B. *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening)

On March 31, 2014, the ICJ issued its judgment on Whaling in the Antarctic.<sup>17</sup> In 2010, Australia had filed an action against Japan complaining that the Japanese Whale Research Program under Special Permit in the Antarctic (‘JARPA II’) violated the International Convention for the Regulation of Whaling and other international obligations to preserve marine mammals and the marine environment.<sup>18</sup> New Zealand intervened as a non-party in 2012, without objection from Australia or Japan.<sup>19</sup> Australia asked the ICJ to order Japan to stop its whaling activities in the Southern Ocean, in particular by ordering Japan to “(a) observe the zero catch limit in relation to the killing of whales for commercial purposes; (b) refrain from undertaking commercial whaling of fin whales in the Southern Ocean Sanctuary; and (c) observe the moratorium on taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships.”<sup>20</sup> Australia also asked the ICJ to declare that Japan’s whaling program was “not a

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5. Maritime Dispute (Peru v. Chile), Judgment (Jan. 27, 2014), *available at* <http://www.icj-cij.org/docket/files/137/17930.pdf>.

6. *Id.* at 67, ¶ 197.

7. *Id.* (Declaration of President Tomka), *available at* <http://www.icj-cij.org/docket/files/137/17938.pdf>.

8. *Id.* (Declaration of Judge Sepúlveda-Amor), *available at* <http://www.icj-cij.org/docket/files/137/17940.pdf>.

9. *Id.* (Declaration of Judge Skotnikov), *available at* <http://www.icj-cij.org/docket/files/137/17944.pdf>.

10. *Id.* (Declaration of Judge Donoghue), *available at* <http://www.icj-cij.org/docket/files/137/17948.pdf>.

11. *Id.* (Declaration of Judge Gaja), *available at* <http://www.icj-cij.org/docket/files/137/17950.pdf>.

12. *Id.* (Declaration of Judge *ad hoc* Guillaume), *available at* <http://www.icj-cij.org/docket/files/137/17954.pdf>.

13. *Id.* (Separate Opinion of Judge Owada), *available at* <http://www.icj-cij.org/docket/files/137/17942.pdf>.

14. *Id.* (Separate Opinion of Judge *ad hoc* Orrego Vicuña), *available at* <http://www.icj-cij.org/docket/files/137/17956.pdf>.

15. *Id.* (Dissenting Opinion of Judge Sebutinde), *available at* <http://www.icj-cij.org/docket/files/137/17952.pdf>.

16. *Id.* (Joint Dissenting Opinion of Judges Xue, Gaja, Bhandari and Judge *ad hoc* Orrego Vicuña), *available at* <http://www.icj-cij.org/docket/files/137/17946.pdf>.

17. Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment (March 31, 2014), *available at* <http://www.icj-cij.org/docket/files/148/18136.pdf>.

18. *Id.* at 9, ¶ 1.

19. *Id.* at 11, ¶ 12.

20. *Id.* at 14, ¶ 24.

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program for purposes of scientific research” allowed under the International Convention for the Regulation of Whaling.<sup>21</sup> Japan, for its part, asked the ICJ to find either (1) that it lacked jurisdiction over Australia’s claim and that New Zealand’s permission to intervene should lapse, or (2) that Australia’s claims against Japan should be rejected.<sup>22</sup>

The ICJ found unanimously that it had jurisdiction<sup>23</sup> and found by a vote of 12-4 that Japan’s killing of whales was not “for the purposes of scientific research” allowed under the International Convention for the Regulation of Whaling.<sup>24</sup> Observing that Japan’s whaling program was on going, the ICJ ordered Japan to “revoke any extant authorization, permit[,] or license to kill, take[,] or treat whales in relation to JARPA II” and to refrain from granting any further permits.<sup>25</sup>

Judge Kenneth Keith of New Zealand issued a separate declaration.<sup>26</sup> Judge Antônio Augusto Cançado Trindade of Brazil,<sup>27</sup> Judge Christopher Greenwood of the United Kingdom,<sup>28</sup> Judge Xue Hanqin of China,<sup>29</sup> Judge Julia Sebutinde of Uganda,<sup>30</sup> Judge Dalveer Bhandari of India,<sup>31</sup> and Judge *ad hoc* Hillary Charlesworth issued separate opinions.<sup>32</sup> Judge Hisashi Owada of Japan,<sup>33</sup> Judge Ronny Abraham of France,<sup>34</sup> Judge Mohammed Bennouna of Morocco<sup>35</sup> and Judge Abdulqawi Ahmed Yusuf of Somalia<sup>36</sup> issued dissenting opinions.

C. *Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia)

The Democratic Republic of Timor-Leste instituted proceedings against Australia in December 2013, alleging that Australian agents had raided the offices of legal advisers to Timor-Leste and seized documents and data from their offices in the Australian Capital

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21. *Id.*

22. *Id.* at 16, ¶ 25.

23. *Id.* at 22, ¶ 41.

24. *See id.* at 69, ¶ 242, and at 71-72, ¶ 247.

25. *Id.* at 70, ¶ 245, and at 71-72, ¶ 247.

26. *Id.* (Declaration of Judge Keith), available at <http://www.icj-cij.org/docket/files/148/18142.pdf>.

27. *Id.* (Separate Opinion of Judge Cançado Trindade), available at <http://www.icj-cij.org/docket/files/148/18146.pdf>.

28. *Id.* (Separate Opinion of Judge Greenwood), available at <http://www.icj-cij.org/docket/files/148/18150.pdf>.

29. *Id.* (Separate Opinion of Judge Xue), available at <http://www.icj-cij.org/docket/files/148/18152.pdf>.

30. *Id.* (Separate Opinion of Judge Sebutinde), available at <http://www.icj-cij.org/docket/files/148/18154.pdf>.

31. *Id.* (Separate Opinion of Judge Bhandari), available at <http://www.icj-cij.org/docket/files/148/18156.pdf>.

32. *Id.* (Separate Opinion of Judge *ad hoc* Charlesworth), available at <http://www.icj-cij.org/docket/files/148/18158.pdf>.

33. *Id.* (Dissenting Opinion of Judge Owada), available at <http://www.icj-cij.org/docket/files/148/18138.pdf>.

34. *Id.* (Dissenting Opinion of Judge Abraham), available at <http://www.icj-cij.org/docket/files/148/18141.pdf> (opinion available only in French).

35. *Id.* (Dissenting Opinion of Judge Bennouna), available at <http://www.icj-cij.org/docket/files/148/18144.pdf>.

36. *Id.* (Dissenting Opinion of Judge Yusuf), available at <http://www.icj-cij.org/docket/files/148/18148.pdf>.

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Territory.<sup>37</sup> The documents and data seized under the Australian Security Intelligence Organisation Act related to a pending arbitration between Timor-Leste and Australia under the Timor Sea Treaty.<sup>38</sup> Timor-Leste claimed that the seizure and continued detention of documents and data relating to the pending arbitration violated its sovereignty and asked for an apology as well as the immediate return of the material seized and destruction of any copies made.<sup>39</sup> Timor-Leste also requested the indication of specific preliminary measures including a request that Australia immediately seal the documents and data and immediately delivery all copies to the ICJ or to the offices the legal advisors to Timor-Leste.<sup>40</sup> Australia, for its part, asked the ICJ to deny the request for preliminary measures and to stay the case brought by Timor-Leste until the arbitral tribunal reached a decision in the *Arbitration under the Timor Sea Treaty*.<sup>41</sup>

Under Article 41 of the Statute of the International Court of Justice, the ICJ may indicate provisional measures before ruling on the merits as a way to preserve the respective rights claimed by parties to a case.<sup>42</sup> The rights claimed must have a link to the subject of the proceedings before the ICJ.<sup>43</sup>

Timor-Leste claimed that it sought to protect sovereign rights in the material seized and that as a general principle of law, “confidentiality of communications between legal counsel and client is covered by legal professional privilege . . . .”<sup>44</sup> Australia argued that even assuming the material seized from the lawyers did belong to Timor-Leste, “there is no general principle of immunity or inviolability of State papers and property, and therefore the rights asserted by Timor-Leste are not plausible.”<sup>45</sup> But the Attorney-General of Australia also offered a written undertaking to the ICJ that none of the material seized would be made available to any part of the Australian Government except for “national security purposes (which include potential law enforcement referrals and prosecutions).”<sup>46</sup>

It was not disputed that at least some of the material seized related to the pending arbitration between Timor-Leste and Australia (the Timor Sea Treaty Arbitration), and the ICJ noted at least a plausible right for Timor-Leste “to conduct arbitration proceedings or negotiations without interference by Australia, including the right of confidentiality of and non-interference in its communications with its legal advisers . . . .”<sup>47</sup> The ICJ also found that if the contents of the documents were to be disclosed, then that “breach of confidentiality might not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information.”<sup>48</sup> The ICJ did find “a significant contribution in mitigating the risk of irreparable prejudice” was

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37. Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Austl.), Order on the Request for the Indication of Provisional Measures, at 2 ¶ 1 (Mar. 3. 2014), *available at* <http://www.icj-cij.org/docket/files/156/18078.pdf>.

38. *Id.*

39. *Id.* ¶ 2.

40. *Id.* at 3-4, ¶¶ 5-6.

41. *See id.* at 5, ¶ 16.

42. *Id.* at 6, ¶ 22.

43. *Id.* ¶ 23.

44. *Id.* ¶ 24.

45. *Id.* ¶ 25.

46. *Id.* at 12, ¶ 45.

47. *Id.* at 7, ¶¶ 27-28.

48. *Id.* at 11, ¶ 42.

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the written undertaking of the Australian Attorney-General to keep the seized material from Australian government representatives participating in the Timor Sea Treaty Arbitration.<sup>49</sup> Yet the ICJ found that even with that undertaking, there was “still an imminent risk of irreparable prejudice” that justified the indication of preliminary measures “to protect Timor-Leste’s rights pending the Court’s decision on the merits of the case.”<sup>50</sup>

Noting that it had the power to fashion an indication of preliminary measures that might differ from the preliminary measures requested by the parties,<sup>51</sup> and noting oral assurances to the ICJ that the Attorney-General of Australia would not disclose any of the seized material “without prior consultation with the Court,”<sup>52</sup> the ICJ found by a vote of 12-4 that Australia should “keep the seized documents and electronic data and any copies thereof under seal until further decision of the Court.”<sup>53</sup> The ICJ also found by a vote of 15-1 that Australia should be ordered “not to interfere in any way in communications between Timor-Leste and its legal advisers, either in connection with the pending arbitral proceedings and with any future bilateral negotiations concerning maritime delimitation, or in connection with any other related procedure between the two States, including the present case before the Court.”<sup>54</sup>

Judge Antônio Augusto Cançado Trindade of Brazil<sup>55</sup> and Judge Joan E. Donoghue of the United States<sup>56</sup> appended separate opinions to the court’s order of preliminary measures. Judge Kenneth Keith of New Zealand,<sup>57</sup> Judge Christopher Greenwood of the United Kingdom,<sup>58</sup> and Judge Ian Callinan (chosen as an *ad hoc* judge by Australia)<sup>59</sup> appended dissenting opinions.

D. FIVE NEW CASES FILED WITH THE ICJ IN 2014

Five new cases were filed before the ICJ in 2014. One case involved a *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya)<sup>60</sup> while another case involved a *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Costa Rica v. Nicaragua).<sup>61</sup> And the

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49. *Id.* at 12, ¶¶ 46-47.

50. *Id.* at 13, ¶ 48.

51. *Id.* at 13, ¶ 49.

52. *Id.* at 13, ¶ 50.

53. *Id.* at 13, ¶ 51, and at 15, ¶¶ 55(1)-55(2).

54. *Id.* at 13-14, ¶ 52, and at 15 ¶ 55(3).

55. *Id.* (Separate Opinion of Judge Cançado Trindade), available at <http://www.icj-cij.org/docket/files/156/18082.pdf>.

56. *Id.* (Separate Opinion of Judge Donoghue), available at <http://www.icj-cij.org/docket/files/156/18086.pdf>.

57. *Id.* (Dissenting Opinion of Judge Keith), available at <http://www.icj-cij.org/docket/files/156/18080.pdf>.

58. *Id.* (Dissenting Opinion of Judge Greenwood), available at <http://www.icj-cij.org/docket/files/156/18084.pdf>.

59. *Id.* (Dissenting Opinion of Judge *ad hoc* Callinan), available at <http://www.icj-cij.org/docket/files/156/18088.pdf>.

60. Dispute Concerning Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Application Instituting Proceedings (Aug. 28, 2014), available at <http://www.icj-cij.org/docket/files/161/18362.pdf>.

61. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicar.), Application Instituting Proceedings (Feb. 25, 2014), available at <http://www.icj-cij.org/docket/files/157/18344.pdf>.

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Marshall Islands filed separate cases against the United Kingdom,<sup>62</sup> Pakistan,<sup>63</sup> and India<sup>64</sup> on *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. These new filings brought to fourteen the number of cases that were pending before the ICJ at the end of 2014.<sup>65</sup>

## II. Inter-American Court of Human Rights

The Inter-American Court of Human Rights (“IACHR” or Court) issued sixteen decisions or judgments in 2014. It also issued an advisory opinion on migrant children, its first advisory opinion in five years, and received a request for another advisory opinion regarding the right to strike and form labor organizations. This section summarizes some of the developments at the Court during 2014.

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62. *Obligation to Pursue in Good Faith and Conclude Negotiations Leading to Nuclear Disarmament* (Marsh. Is. v. U.K.), Application Instituting Proceedings (April 24, 2014), *available at* <http://www.icj-cij.org/docket/files/160/18296.pdf>.

63. *Obligation to Pursue in Good Faith and Conclude Negotiations Leading to Nuclear Disarmament* (Marsh. Is. v. Pak.), Application Instituting Proceedings (April 24, 2014), *available at* <http://www.icj-cij.org/docket/files/159/18294.pdf>.

64. *Obligation to Pursue in Good Faith and Conclude Negotiations Leading to Nuclear Disarmament* (Marsh. Is. v. India), Application Instituting Proceedings (April 24, 2014), *available at* <http://www.icj-cij.org/docket/files/158/18292.pdf>.

65. The fourteen contentious cases pending at the end of 2014 were:

1. *Maritime Delimitation in the Indian Ocean* (Som. v. Kenya);
2. *Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marsh. Is. v. U.K.);
3. *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marsh. Is. v. Pak.);
4. *Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marsh. Is. v. India);
5. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Costa Rica v. Nicar.);
6. *Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Aust.);
7. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicar. v. Colom.);
8. *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (Nicar. v. Colom.);
9. *Obligation to Negotiate Access to the Pacific Ocean* (Bol. v. Chile);
10. *Construction of a Road in Costa Rica along the San Juan River* (Nicar. v. Costa Rica);
11. *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicar.);
12. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda);
13. *Gabcikovo-Nagymaros Project* (Hung. v. Slov.); and
14. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croat. v. Serb.).

On February 3, 2015, the ICJ issued its judgment in the case involving the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.). *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croat v. Serb.), Judgment (Feb. 3, 2015), *available at* <http://www.icj-cij.org/docket/files/118/18422.pdf>.

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A. ADVISORY OPINION ON THE RIGHTS AND GUARANTEES OF CHILDREN IN THE  
CONTEXT OF MIGRATION AND/OR IN NEED OF INTERNATIONAL  
PROTECTION, OC-21/14

On August 19, 2014, the IACHR issued an Advisory Opinion under Article 64 of the American Convention on Human Rights addressing the human rights of migrant children. In 2011, the Applicant States of Argentina, Brazil, Paraguay, and Uruguay asked the Court for an Advisory Opinion to “determine the precise obligations of the States in relation to the possible measures to be adopted regarding children, their immigration status or the status of their parents in light of the interpretation of Articles 1(1), 2, 4(1), 5, 7, 8, 11, 17, 19, 22(7), 22(8), 25, and 29 of the American Convention on Human Rights; Articles 1, 6, 8, 25, and 27 of the American Declaration of the Rights and Duties of Man; and Article 13 of the Inter-American Convention to Prevent and Punish Torture.”<sup>66</sup> In making the request, the Applicant States pointed out that approximately 25 million persons have migrated from Latin America and the Caribbean to North America and Europe and another 6 million have migrated to other parts of Latin America. Many of these migrants have an irregular immigration status and many are children. As such, they are a particularly vulnerable group in need of protection. Accordingly, the Applicant States requested that the Court “clearly define precise standards, principles and obligations that States must comply with in relation to the human rights of migrants, especially in relation to the rights of migrant children and children born to migrant parents . . . .”<sup>67</sup>

The Court received written submissions from several Member States and many regional, national, and international organizations, including the U.N. High Commissioner for Refugees. The Court held public hearings in October 2013. Based on these hearings and submissions, the Court found the following facts:

In 2013, there were 231,522,215 migrants worldwide and, of these, 61,617,229 corresponded to the Americas.<sup>68</sup> Meanwhile, of the total number of migrants on our continent, 6,817,466 were under 19 years of age.<sup>69</sup> According to data from the end of 2013, around 806,000 persons on the American continent were refugees or persons in similar situations as that of refugees<sup>70</sup> . . . . Although children usually travel with their parents, members of their extended family, or other adults, currently, a growing and significant number are migrating autonomously and unaccompanied.<sup>71</sup>

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66. Inst. for Pub. Policy in Human Rights, *Request for an Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights* (April 6, 2011), available at [http://www.corteidh.or.cr/solicitudoc/solicitud\\_eng.pdf](http://www.corteidh.or.cr/solicitudoc/solicitud_eng.pdf).

67. *Id.*

68. See U.N. Department of Economic and Social Affairs, Population Division, *Trends in International Migrant Stock: The 2013 Revision—Migrants by Age and Sex*, U.N. database, POP/DB/MIG/Stock/Rev.2013/Age (Dec. 2013).

69. See *id.*

70. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, ¶ 34 (Aug. 19, 2014) (citing U.N. High Commissioner for Refugees (UNHCR), *War's Human Cost, Global Trends 2013*, at 12), available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf).

71. *Id.* ¶ 35 (citing Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development*, UN Doc. A/HRC/11/7, ¶ 19 (May 14, 2009)).

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The Court further stated that children migrate internationally for many reasons: for economic or educational opportunities, for family reunification, to escape environmental degradation, domestic abuse, extreme poverty, organized crime, child trafficking, or the effects of natural disasters.<sup>72</sup> Thus, international migration is a complex phenomenon and a human rights approach to immigration policies is needed, especially when children are involved.<sup>73</sup> But the Court also reaffirmed that “in the exercise of their authority to establish immigration policies, States may establish mechanisms to control the entry into and departure from their territory of persons who are not their nationals, provided that these policies are compatible with the norms for the protection of human rights established in the American Convention.”<sup>74</sup>

After dealing with matters of jurisdiction and general interpretation, the Court divided its Advisory Opinion into chapters dealing with different aspects of migration. Chapters VII to XII deal with immigration procedures for migrants in an irregular status where international protection may not be required. The remaining chapters deal with the right of non-refoulement or to seek and receive asylum.

In Chapter VII, the Court states that the right to seek and receive asylum “entails certain specific obligations on the part of the host State, which include: (i) to allow children to request asylum or refugee status, which consequently means they may not be rejected at the border without an adequate and individualized analysis of their requests with due guarantees by the respective procedure; (ii) not to return children to a country in which their life, freedom, security or personal integrity may be at risk, or to a third country from which they may later be returned to the State where they suffer this risk; and (iii) to grant international protection when children qualify for this and to grant the benefit of this recognition to other members of the family, based on the principle of family unity.”<sup>75</sup> These obligations mean that “border authorities should not prevent the entry of foreign children into national territory, even when they are alone, should not require them to produce documentation that they may not have, and should proceed to direct them immediately to personnel who are able to assess their needs for protection based on an approach in which their condition as children prevails.”<sup>76</sup> The initial assessment should take place in a way that is sensitive to the child’s gender, age, culture, language skills, and related characteristics.<sup>77</sup> The remainder of this Chapter continues to set forth the specifics of the assessment the receiving State must conduct and how the State should evaluate the need for protection.

Chapter VIII concerns the guarantees of due process applicable in immigration proceedings involving children.<sup>78</sup> The Court identifies several due process guarantees that must be observed in immigration and asylum proceedings involving children:

- (i) the right to be notified of the existence of proceedings and of the decision adopted during the immigration proceedings; (ii) the right that immigration proceedings are conducted by a specialized official or judge; (iii) the right of the child to be heard and

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72. *Id.* ¶ 35.

73. *See id.* ¶ 41.

74. *See id.* ¶ 39 (internal citations omitted).

75. *See id.* ¶ 81.

76. *Id.* ¶ 83.

77. *Id.* ¶ 85.

78. Chapter VIII of the Advisory Opinion begins at paragraph 108.

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to participate in the different stages of the proceedings; (iv) the right to be assisted without charge by a translator or interpreter; (v) effective access to communication with consular authorities and to consular assistance; (vi) the right to be assisted by a legal representative and to communicate freely with the representative; (vii) the obligation to appoint a guardian in the case of unaccompanied or separated children; (viii) the right that the decision adopted has assessed the child's best interest and is duly reasoned; (ix) the right to appeal the decision before a higher court with suspensive effect, and (x) reasonable time for the duration of the proceedings.<sup>79</sup>

In Chapter IX, the Court rejects the detention of migrant children, finding that "the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order . . . [and] is arbitrary and consequently contrary to both the Convention and the American Declaration."<sup>80</sup> When a child is accompanying his or her parents and the child's best interest requires keeping the family together, the requirement not to deprive the child of liberty extends to the parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.<sup>81</sup> The Court finds that a State has an obligation to design, adopt and implement alternative measures to closed detention centers under these circumstances.<sup>82</sup>

Chapter X addresses alternative measures to detention. In this regard, the Court stresses that "solutions based on the family and the community should be given priority over institutionalization."<sup>83</sup> Chapter XI continues this theme by considering basic conditions that must be met for living quarters for migrant children.<sup>84</sup> The Court recognizes that where it is not possible to place the child in a family or community environment, a State may place the child in a center or shelter accommodation for a short period necessary to resolve the child's immigration status.<sup>85</sup> Such accommodation is subject to the principles that unaccompanied children should be lodged separately from adults, children with family members have a right to family unity, children have a right to open accommodation allowing entry and exit, and have a right to material conditions that include lodging, education, maintenance, health care and legal assistance.<sup>86</sup>

Chapter XII addresses guarantees of due process when liberty is deprived. Here the Court discusses due process guarantees similar to those in Chapter VIII above referring to due process guarantees in immigration proceedings.<sup>87</sup>

In Chapter XIII, the Court affirms that the right of non-refoulement applies to child migrants, i.e., the right not to be returned to a country where the child's life or freedom would be threatened or the right to seek and receive asylum. The Court also emphasizes that in the context of the Inter-American human rights system, the obligation not to re-

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79. Advisory Opinion, *supra* note 70, ¶ 116.

80. *Id.* ¶ 154.

81. *Id.* ¶ 158.

82. *Id.*

83. *Id.* ¶ 167.

84. *Id.* ¶ 171.

85. *Id.* ¶ 173.

86. *Id.* ¶ 174.

87. *Id.* ¶¶ 190, 209.

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turn a child to a country where the child is likely to face harm is broader than the obligation of non-refoulement under international refugee law.<sup>88</sup>

Chapter XIV describes the procedures to ensure the right of children to seek and receive asylum, which only conclude when a durable solution has been achieved. The Court summarizes the requirements to effectively ensure the right recognized in Articles 22(7) of the American Convention and XXVII of the American Declaration as follows. States must adapt the asylum or refugee proceedings to provide children with meaningful access to the procedures, which entails: not impeding entry to the country; access to the authorities responsible for granting asylum or refugee status or other procedures for the protection; priority processing of requests for asylum made by children; availability of professionals who can examine the child to determine her or his state of health; conducting an examination and interview endeavoring not to cause further trauma or revictimization; having available a place to accommodate the applicant, if they do not have one; issuing an identity document to avoid return; studying the case with sufficient flexibility as regards the evidence; assigning an independent and trained guardian in the case of unaccompanied or separated children; if refugee status is granted, proceed to carry out family reunification procedures, if necessary in view of the best interest of the child; and lastly, seeking a durable solution, such as voluntary repatriation, resettlement or social integration, in accordance with the determination of the best interest of the child.<sup>89</sup>

Finally, Chapter XV refers to the situation of children whose parents are faced with expulsion or deportation for migratory reasons. Here, the Court deals with two conflicting rights: the right of the State to implement its immigration policy and the right to family unity.<sup>90</sup> It states that in balancing these rights, an assessment must be made as to “whether the measure: is established by law, and complies with the requirements of (a) suitability; (b) necessity, and (c) proportionality; in other words, it must be necessary in a democratic society.”<sup>91</sup>

The Court’s Advisory Opinion should provide guidance to government entities designing and implementing procedures for dealing with migrant children. It also should provide guidance to advocates for migrant children as they seek to protect the human rights of these children.

**B. REQUEST FOR ADVISORY OPINION**

On April 28, 2014, Panama submitted a request for an advisory opinion asking that the Court “interpret and determine the scope of Article 1(2) of the Convention in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of this instrument, as well as of the right to strike and to establish federations and confederations recognized in Article 8 of the Protocol of San Salvador.”<sup>92</sup> In accordance with Rule 73 of the Court’s Rules, interested parties were invited to submit observations on the request. The comment period closed on January 30, 2015.

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88. *Id.* ¶¶ 217, 231.

89. *Id.* ¶ 261.

90. *Id.* ¶ 275.

91. *Id.*

92. Inter-Am. Court of Human Rights, Request for an Advisory Opinion Submitted by Panama, <http://www.corteidh.or.cr/index.php/en/observaciones-14-11-14> (last visited March 25, 2015).

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C. CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

1. *Matter of Rueda*

In this matter, the Inter-American Commission of Human Rights asked the Court to order Colombia to take provisional measures to protect the life and personal integrity of human rights defender, Daniel Rueda.<sup>93</sup> Mr. Rueda is a founding member and director of the Inter-Church Justice and Peace Commission (CIJP).<sup>94</sup> In Colombia, human rights defenders continue to face serious abuses to their rights by parties to the conflict in Colombia with a view towards silencing them. The Commission has received information about harassment of and attacks on members of CIJP since 2002, which continue to today.<sup>95</sup> Recently, the place where Mr. Rueda lives and where part of his family works has been attacked by pellets which impacted the security window panes.<sup>96</sup> Although members of CIJP, including Mr. Rueda, have been under precautionary measures ordered by the Commission in 2003, there was a notable increase in the threat in 2013 and the first part of 2014.<sup>97</sup> Accordingly, pursuant to Article 63(2) of the American Convention and Article 27 of the Rules of Procedure for the Court, the Commission requested that the Court order Colombia to take additional protective measures in light of the extreme gravity and urgency of the situation.<sup>98</sup>

The State of Colombia responded that efforts have been made to protect the life and personal integrity of the members of CIJP, including Mr. Rueda, and that the State has proposed a meeting with the relevant parties to discuss an individualized protection scheme.<sup>99</sup> Thus, the State considers that the matter can be adequately dealt with in the context of the precautionary measures ordered by the Commission and there is no need for additional protective measures to be ordered by the Court.<sup>100</sup>

Based on the information provided by the Commission, the Acting President of the Court determined that “Mr. Rueda faces a situation of extreme gravity and urgency, since his life and personal integrity are threatened and at risk.”<sup>101</sup> The Acting President found that the collective protection measures provided for the members of CIJP were insufficient to protect Mr. Rueda individually in his work. Accordingly, the Acting President ordered urgent measures to protect Mr. Rueda and ordered Colombia to report back within ten days regarding the risk faced by Mr. Rueda and the individualized protective measures it has taken to protect him.<sup>102</sup>

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93. Order of the Acting President: Request for Provisional Measures regarding Colombia in the Matter of Daniel Rueda, ¶ 1 (Inter-Am. Ct. H.R. May 2, 2014), *available at* [http://www.corteidh.or.cr/docs/medidas/rueda\\_se\\_01\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/rueda_se_01_ing.pdf).

94. *Id.*

95. *Id.* ¶ 2.

96. *Id.* ¶ 1.

97. *Id.* ¶ 2.

98. *Id.* ¶ 4.

99. *Id.* ¶ 7.

100. *See id.*

101. *Id.* ¶ 18.

102. *Id.* ¶ 22.

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2. *Véliz Franco v. Guatemala*

In *Véliz Franco v. Guatemala*, Rosa Elvira Franco Sandoval de Véliz (Rosa), the Center for Justice and International Law, and the Network against Violence against Women in Guatemala brought a complaint against the Government of Guatemala for the failure to effectively investigate the murder of Rosa's child, María Isabel Véliz Franco (Maria).<sup>103</sup> Maria, aged 15, disappeared on December 17, 2001 in the City of Guatemala and was found dead the next day.<sup>104</sup> The investigation was filled with irregularities and inadequacies including gross delays, conflicting police jurisdictions, failure to take Rosa's concerns seriously, and a failure to fully investigate possible sexual violence.<sup>105</sup>

The Court established that the duty to protect the rights of children is particularly strong.<sup>106</sup> And the State failed to protect this right when no serious search efforts were established.<sup>107</sup> In addition, given the increasing frequency of violence against women, Guatemala should have promptly and seriously investigated the obvious signs of sexual violence.<sup>108</sup> The Court stressed that when crimes against women routinely go unpunished, a precedent is set that violence can be accepted and tolerated.<sup>109</sup> As such, a State must adopt rules or implement the necessary measures to enable authorities to conduct an investigation with due diligence.<sup>110</sup>

The Court found that Guatemala violated Maria's right to life (Article 4.1), right to personal integrity (Article 5.1), rights of the child (Article 19.1), and guarantee of rights without discrimination (Article 1.1) under the American Convention on Human Rights.<sup>111</sup> The State also violated the obligation to act with due diligence to prevent and investigate violence against women (Article 7b) under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.<sup>112</sup>

The Court also found that Guatemala violated the rights of Maria's family, including her mother, brothers, and grandparents.<sup>113</sup> As to these people, Guatemala violated the right to due process (Article 8.1), judicial protection (Article 25.1), equal protection (Article 24), and failure to implement and ensure protections (Article 1.1 and 2) under the American Convention on Human Rights.<sup>114</sup> And with regard to the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, the Court found that Guatemala failed to investigate and sanction violence against women (Article 7.b and 7.c).<sup>115</sup>

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103. *Veliz Franco y Otros v. Guatemala: Resumen Oficial Emitido por la Corte Interamericana*, 1 (Inter-Am. Ct. H.R. May 19, 2014), available at [http://www.corteidh.or.cr/docs/casos/articulos/resumen\\_277\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/resumen_277_esp.pdf).

104. *Id.*

105. *Id.* at 2.

106. *Id.* at 3.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

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As far as reparations, the Court ordered that Guatemala shall: (a) conduct an investigation effectively and, if appropriate, prosecute and punish those responsible for the humiliation and deprivation of the life of María; (b) publish in the official newspaper of Guatemala and in a newspaper of national circulation, the official summary judgment and publish it in full on official websites of the judiciary, prosecutors and the National Police; (c) publicly apologize; (d) develop a plan to strengthen the National Institute of Forensic Science; (e) implement the law against femicide and other forms of violence against women, adopted in 2008; (f) implement programs and courses for civil servants; (g) provide medical or psychological care to Rosa Elvira Franco Sandoval; (h) pay the amounts set as compensation for pecuniary and non-pecuniary damages as well as reimbursement of costs and expenses, (i) submit a report on measures being taken to comply with the judgment.<sup>116</sup>

3. *Liakat Ali Alibux v. Suriname*

The Inter-American Commission submitted the case of Liakat Ali Alibux to the Court on January 29, 2012 against Suriname.<sup>117</sup> The case pertains to the investigation and criminal proceedings brought against Mr. Alibux, the former Minister of Finance and former Minister of Natural Resources, who, on November 5, 2003, was convicted of forgery pursuant to the Indictment of Political Office Holders Act (IPOHA).<sup>118</sup> After an investigation, the Commission concluded that the State was responsible for violating Mr. Alibux's right to appeal, freedom from ex post facto laws, freedom of movement, and right to judicial protection.<sup>119</sup> The Commission recommended that the State nullify the criminal proceedings and provide reparations to Mr. Alibux. The Commission alleges that Suriname has violated Articles 8, 9, 22, and 25 of the American Convention.<sup>120</sup>

After rejecting Suriname's argument that Mr. Alibux had failed to exhaust all domestic remedies,<sup>121</sup> the Court turned to the merits of the dispute as follows. Acting in his capacity as the Minister of Finance, between June and July 2000, Mr. Alibux purchased land in Paramaribo for the Ministry of Regional Development.<sup>122</sup> Mr. Alibux resigned his position in August 2000. In 2001, Suriname authorities began an investigation of Mr. Alibux and three others in connection with an alleged forgery of a proposal letter to the Council of Ministers relating to the purchase of the property.<sup>123</sup> The Prosecutor General sought an indictment of Mr. Alibux in August 2001, which he amended and resubmitted in January 2002.<sup>124</sup> In January 2002, the National Assembly agreed to the Prosecutor General's request that Mr. Alibux be indicted under the IPOHA.<sup>125</sup> Before the Suriname High Court of Justice, Mr. Alibux argued, inter alia, that the indictment was improper because the Prosecutor General had attempted to indict him for acts that took place prior to the

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116. *Id.* at 4.

117. Case of Liakat Ali Alibux v. Suriname, Judgment on Preliminary Objections, Merits, Reparations and Costs, ¶ 1 (Inter-Am Ct. H.R. Jan. 30, 2014), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_276\\_eng.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_276_eng.pdf).

118. *Id.*

119. *Id.* ¶ 2.

120. *Id.* ¶ 3.

121. *Id.* ¶ 22.

122. *Id.* ¶ 33.

123. *Id.* ¶ 34.

124. *Id.* ¶¶ 35, 39.

125. *Id.* ¶ 40.

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IPOHA taking effect in October 2001.<sup>126</sup> The High Court ruled that it did not have constitutional jurisdiction to assess the validity of the acts of the National Parliament under the IPOHA.<sup>127</sup> Thereafter, it found Mr. Alibux guilty of one count of forgery on November 5, 2003.<sup>128</sup>

The Court first found that Mr. Alibux's right under Article 9 of the Convention had not been violated.<sup>129</sup> Article 9 prohibits the conviction of a person based on an act or omission that was not considered a criminal offense at the time it occurred.<sup>130</sup> Although the IPOHA was not in effect when the relevant conduct took place, the IPOHA was adopted to implement Article 140 of the Suriname Constitution, which set forth the procedures for trying public officials for wrongdoing.<sup>131</sup> Forgery was also a crime under Article 278 of the Penal Code of 1910, so Mr. Alibux had sufficient notice that his behavior could entail criminal responsibility.<sup>132</sup> The Court further held that the ban on *ex post facto* laws applies to substantive criminal laws, not laws setting forth procedures, as was the case with the IPOHA.<sup>133</sup>

The Court next turned to Mr. Alibux's right to a fair trial, including the right to appeal, under Article 8 of the Convention.<sup>134</sup> The Court stated that it is compatible for a State to subject high ranking officials to a procedure different from the ordinary criminal procedure.<sup>135</sup> But the State must still guarantee a right of appeal. In this case, the High Court of Justice prosecuted and convicted Mr. Alibux and there was no appeal to another body.<sup>136</sup> Accordingly, Suriname violated Article 8 of the Convention.<sup>137</sup> As a result of this decision, the Court determined that it was not necessary to make a separate determination of whether Mr. Alibux's right to judicial protection under Article 25 of the Convention had been violated.<sup>138</sup>

With respect to the last claim, Mr. Alibux claimed that the State had violated his right to freedom of movement under Article 22 of the American Convention by preventing him from taking a four-day trip out of the country in January 2003.<sup>139</sup> The Court held that Suriname violated Mr. Alibux's right to freedom of movement because the State's ability to detain him under the circumstances was not clearly established by law.<sup>140</sup>

The Court declined to ask the State to nullify the proceedings and declined to order reparations as it did not find a violation of Article 9 of the American Convention.<sup>141</sup> The Court also declined to order the State to provide guarantees of nonrepetition, as Suriname

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126. *Id.* ¶ 42.

127. *Id.* ¶ 46.

128. *Id.* ¶ 47.

129. *Id.* ¶ 76.

130. *Id.* ¶ 59.

131. *Id.* ¶ 73.

132. *Id.*

133. *Id.* ¶ 74.

134. *Id.* ¶ 83.

135. *Id.* ¶ 102.

136. *Id.* ¶ 103.

137. *Id.* ¶ 106.

138. *Id.* ¶¶ 119, 125.

139. *Id.* ¶ 130.

140. *Id.* ¶ 136.

141. *Id.* ¶ 145.

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had already amended the law to address the right of appeal.<sup>142</sup> The Court did order Suriname to publish the judgment,<sup>143</sup> to pay Mr. Alibux US\$10,000 in non-pecuniary damages,<sup>144</sup> and to pay Mr. Alibux's costs and expenses.<sup>145</sup>

D. STATUS OF DOMINICAN REPUBLIC BEFORE THE IACHR

On November 4, 2014, the Constitutional Court of the Dominican Republic issued judgment TC/0256/14 declaring unconstitutional the instrument it deposited accepting the jurisdiction of the Inter-American Court of Human Rights.<sup>146</sup> The Dominican Republic had deposited that instrument with the Organization of American States on March 25, 1999 and had participated in a number of proceedings before the Court since that date. The Inter-American Commission of Human Rights has denied the legal effect of the judgment declaring it to be contrary to international law.<sup>147</sup> Thus, the continued participation of the Dominican Republic before the Inter-American Court remains in doubt.

### III. International Criminal Tribunals

A. INTERNATIONAL CRIMINAL COURT (ICC)

The ICC continued to investigate or conduct judicial proceedings in eight separate situations involving twenty-one potential or actual cases involving the Central African Republic, Cote d'Ivoire, Darfur (Sudan), Democratic Republic of the Congo, Kenya, Libya, Uganda and Mali.<sup>148</sup> The Prosecutor is also conducting preliminary reviews in ten additional situations involving Afghanistan, Central African Republic, Colombia, Comoros ("Gaza Freedom Flotilla" incident), Georgia, Guinea, Honduras, Iraq, Nigeria and Ukraine.<sup>149</sup>

Of particular significance as to the ICC, however, was the action taken on September 5, 2014 to indefinitely adjourn the prosecution of the case against Kenyan President Uhuru Kenyatta due to problems obtaining information necessary for the prosecution of the case.<sup>150</sup>

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142. *Id.* ¶ 151.

143. *Id.* ¶ 147.

144. *Id.* ¶ 157.

145. *Id.* ¶ 166. Judge Alberto Pérez filed a separate opinion with respect to the issue of the exhaustion of domestic remedies, Judge Eduardo Vio Grossi filed a dissenting opinion on the same issue, and Judge Eduardo Ferrar Mac-Gregor Poisot filed a concurring opinion.

146. Press Release, Inter-Am. Comm'n on Human Rights, IACHR Condemns Judgment of the Constitutional Court of the Dominican Republic (Nov. 6, 2014), *available at* [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/130.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/130.asp)

147. *See id.*

148. Report of the Inter. Crim. Ct. on its Activities in 2013/2014, U.N. Doc. A/69/321 (Sept. 18, 2014), *available at* <http://www.icc-cpi.int/iccdocs/presidency/ICC-Rep-UNGA-30-10-2014-Eng.pdf>.

149. *Id.*

150. *See, e.g.*, Patrick Gathara, *Did Kenya Get Justice at the ICC?*, AL JAZEERA (Dec. 7, 2014), <http://www.aljazeera.com/indepth/opinion/2014/12/did-kenya-get-justice-at-icc-201412754837787870.html>.

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**B. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)**

The Appeals Chamber of the ICTR rendered six judgments concerning eight persons in the *Ndindiliyimana et. al.*,<sup>151</sup> and *Bizimungu*<sup>152</sup> cases. Additionally, on September 29, 2014, the Appeals Chamber delivered a further three judgments concerning four persons in the *Karemera & Ngirumpatse*,<sup>153</sup> *Nizeyimana*,<sup>154</sup> and *Nzabonimana*<sup>155</sup> cases. In each of the judgments, the Appeals Chamber affirmed, at least in part, the convictions of each accused.

**C. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)**

The Appeals Chamber of the ICTY rendered two judgments affecting five accused during 2014. These included judgments in the cases of *Sainovic et al.*<sup>156</sup> and *Djordjevic*.<sup>157</sup> In each case, the Appeals Chamber affirmed, at least in part, convictions of all accused persons in each case. Significantly, in the case of *Djordjevic*, the ICTY Appeals Chamber reversed the Trial Chamber and found the Accused guilty of the crime of persecutions through sexual assaults as a crime against humanity (Count 5), pursuant to the third category of joint criminal enterprise, in relation to the sexual assaults of Witness K20 and the other two young women in Beleg, Witness K14, and the Kosovo Albanian girl in a convoy.<sup>158</sup>

Four cases continue in some phase of trial at the ICTY, including those of *Radovan Karadzic*, where the final arguments have been presented and a judgment is being drafted, *Ratko Mladic* and *Goran Hadzic*, still in the trial phase, and the case of *Vojislav Seselj*. In the last of these cases, *Seselj*, the case was due for judgment when one of the three assigned judges to the case, *Frederick Harhoff*, was recused following his delivery of a memo

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151. *Ndindiliyimana v. Prosecutor*, Case No. ICTR-00-56-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber Feb. 11, 2014), *available at* <http://www.unict.org/sites/unict.org/files/case-documents/ictr-00-56/appeals-chamber-judgements/en/140211.pdf>.

152. *Bizimungu v. Prosecutor*, Case No. ICTR-00-56B-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber June 30, 2014), *available at* <http://www.unict.org/sites/unict.org/files/case-documents/ictr-00-56/appeals-chamber-judgements/en/140630.pdf>.

153. *Karemera v. Prosecutor*, Case No. ICTR-98-44-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber Sept. 29, 2014), *available at* <http://www.unict.org/sites/unict.org/files/case-documents/ictr-98-44a/appeals-chamber-judgements/en/050523.pdf>.

154. *Nizeyimana v. Prosecutor*, Case No. ICTR-00-55C-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber Sept. 29, 2014), *available at* <http://41.220.139.198/Portals/0/Case%5CEnglish%5CNizeyimana%5CJudgment%5C140929-Appeal%20Judgment.pdf>.

155. *Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-A, Judgement (Inter. Crim. Trib. for Rwanda Appeals Chamber Sept. 29, 2014), *available at* <http://www.unict.org/sites/unict.org/files/case-documents/ictr-98-44d/appeals-chamber-judgements/en/140929.pdf>.

156. *Prosecutor v. Šainovic*, Case No. IT-05-87-A, Judgement (Inter. Crim. Trib. for the Former Yugoslavia Appeals Chamber Jan. 23, 2014), *available at* <http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf>.

157. *Prosecutor v. Djordjevic*, Case No. IT-05-87/1-A, Judgement (Inter. Crim. Trib. for the Former Yugoslavia Appeals Chamber Jan. 27, 2014), *available at* <http://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf>.

158. *Id.* at 380.

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sent by email that was determined to reflect a bias that precluded his remaining on the case.<sup>159</sup>

D. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)

The ECCC rendered its judgment in Case 002/01, *Prosecutor v. Nuon and Khieu* on August 7, 2014.<sup>160</sup> Both were convicted and sentenced to life in prison for crimes against humanity, extermination, political persecution, and other inhumane acts for their roles in the 1970s regime that plunged Cambodia into turmoil and killed about 1.7 million people. Each has appealed their conviction.

E. SPECIAL TRIBUNAL FOR LEBANON (STL)

The STL commenced trial of five accused, all being tried in absentia, for offenses charged in connection with the February 14, 2005 assassination of Rafik Hariri and the deaths of twenty-one others. Trial commenced on January 16, 2014 against four of the five accused. In February 2014, the case of the fifth Accused, Merhi, was joined to the trial of *Prosecutor v. Ayyash*, et al. Proceedings are ongoing against all five accused.

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159. *Prosecutor v. Šeselj*, Case No. IT-03-67-T, Decision on Continuation of Proceedings (Inter. Crim. Trib. for the Former Yugoslavia Dec. 13, 2013), available at <http://www.icty.org/x/cases/seselj/tdec/en/131213.pdf>.

160. *Prosecutor v. Nuon & Khieu*, Case No. 002/01, Judgment of the Trial Chamber (Extraordinary Chambers in the Cts. of Cambodia Aug. 7, 2014), available at [http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313\\_Trial%20Chamber%20Judgement%20Case%20002\\_01\\_ENG.pdf](http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-08-07%2017:04/E313_Trial%20Chamber%20Judgement%20Case%20002_01_ENG.pdf).

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## **International Family Law**

ROBERT G. SPECTOR AND MELISSA A. KUCINSKI\*

### **I. International Conventions and Federal Law Developments**

#### A. THE HAGUE CHILD SUPPORT CONVENTION

On September 29, 2014, the President signed the Preventing Sex Trafficking and Strengthening Families Act, the implementing legislation for the Hague Convention on the International Recovery of Child Support and Maintenance. As of the President's signature, 12 states had already enacted UIFSA 2008, which implements the Convention at the state level. When enacted by all states and territories, the United States will deposit its instrument of ratification for the Child Support Convention in The Hague.

In a statement issued on September 30, 2014, U.S. Secretary of State John Kerry said that: "The United States has a comprehensive system to establish, recognize and enforce domestic and international child support obligations. The Convention just requires that all treaty partners have similar systems in place and, as a result, more children in the United States and abroad will be receiving more support, more expeditiously than ever before."<sup>1</sup>

#### B. HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

Haiti, Croatia, and Serbia joined the Hague Convention on the Protection of Children and Co-Operation in Respect of Adoption Convention in 2014.<sup>2</sup> The Hague Conference on Private International Law also announced that it will hold a Special Commission meeting on the practical operation of the Adoption Convention from June 8 to 12, 2015.

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1. See <http://www.state.gov/secretary/remarks/2014/09/232337.htm>.

2. See *Status Table*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW WEBSITE, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Apr. 29, 2015).



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C. HR 3212: THE “GOLDMAN ACT”

On August 8, 2014, the President signed the Sean and David Goldman International Child Abduction Prevention and Return Act of 2013.<sup>3</sup> The Goldman Act’s goal is to establish measures that the U.S. government can take when countries are non-cooperative in resolving international parental child abduction cases. It also mandates detailed compliance reports by the U.S. Department of State.

**II. International Litigation**

A. THE HAGUE CHILD ABDUCTION CONVENTION

Most U.S. international family law litigation involved the 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>4</sup> its implementing legislation, the International Child Abduction Remedies Act (ICARA).<sup>5</sup> A request for return of a child under the Child Abduction Convention is appropriate in either a U.S. federal or state court.

The Child Abduction Convention operates to promptly return children to their habitual residence. To obtain an order returning the child, the petitioner must prove that the child was wrongfully removed from or retained outside of the child’s “habitual residence” and that the petitioner had “a right of custody,” which he or she was “actually exercising” (or would have exercised but for the abduction), under the law of the habitual residence.

1. *Applicability of the Child Abduction Convention*

The Child Abduction Convention only applies to countries that have ratified or acceded to it. It cannot be made applicable to a case by the parties’ stipulation. The Convention ceases to apply when the child in question turns sixteen.

2. *Jurisdiction*

In *Gee v. Hendroff*,<sup>6</sup> the court determined that the children must be present in the same state where the Hague return petition is filed. If the petition is filed in Nevada while the children are on a two-week visit to California, the district court in Nevada has no subject matter jurisdiction.

3. *Habitual Residence of the Child*

The Child Abduction Convention does not define the term “habitual residence.” Therefore, courts have made this “fact-based” determination in a number of cases, leading to a split among the circuits as to its definition. The majority view, pioneered by the Ninth Circuit, looks to the parents’ shared intent in determining their child’s habitual residence. True to precedent, the Ninth Circuit found the parents’ shared intent for their

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3. H.R. 3212 (113th): *Sean and David Goldman International Child Abduction Prevention and Return Act of 2014*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr3212> (last visited Apr. 29, 2015).

4. T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11.

5. ICARA, 42 U.S.C. § 11603 *et seq.* (2012).

6. *Gee v. Hendroff*, 2014 WL 60325 (D. Nev. 2014).

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daughter to be habitually resident in the United States, even though she had been living with her Mother in Ireland for three years with the Father's agreement to see how "it worked."<sup>7</sup>

However, in *Seaman v. Peterson*<sup>8</sup> a couple clearly intended to abandon the United States as their child's habitual residence. The parents seldom, if ever, returned to the United States, they enrolled their children in a Mexican school, they established legal, temporary residency in Mexico intending to become Mexican citizens, and their fourth child was born and raised in Mexico and had never been to the United States prior to her removal from Mexico.<sup>9</sup>

In *Valenzuela v. Michel*<sup>10</sup>, Mexican-born children split their time with their father in the United States and their mother in Mexico. The court found the parents shared the intent to abandon Mexico as the children's sole habitual residence and, therefore the court concluded that the children had alternating habitual residences. In *Berezowsky v. Ojeda*,<sup>11</sup> the parents separated prior to the child's birth and engaged in litigation concerning the child for years. The child was born in Texas and therefore had a habitual residence there. Given that the parents were in constant litigation, there could be no shared intent that Mexico would become the child's habitual residence.

After the U.S. Supreme Court permitted the father's appeal in *Chafin v. Chafin*,<sup>12</sup> the Eleventh Circuit decided that the child was properly returned to her habitual residence of Scotland. Affirming the District Court's 2011 grant of the mother's Hague Convention petition, the court said that the parents had not agreed to make the United States their daughter's habitual residence, abandoning her habitual residence in Scotland and that, therefore, the father's retention of the child in Alabama was wrongful.

The Central District of California found Sweden to be a child's habitual residence, despite the child being born in California and having lived in California his entire 10-month life because the last location of shared parental intent for the child's habitual residence was Sweden, and the Court believes that a "location of some stability is more likely to be a child's habitual residence." Habitual residence is not determined automatically because it is the infant's birthplace or solely because of the location of its mother.<sup>13</sup>

In *Hollis v. O'Driscoll*,<sup>14</sup> the parents' lack of stable accommodations after their separation did not affect, much less negate, clearly establishing the child's habitual residence in New Zealand. The parents lived together in New Zealand for approximately nine months prior to the child's birth and for the first six months of the child's life, and they considered New Zealand home.

Even if a child's relocation is time-limited, habitual residence may shift. In *Neergaard v. Colon*,<sup>15</sup> the parents shared an intent to live in Singapore as a family only for the three

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7. *Murphy v. Sloan*, 764 F.3d 1144 (9th Cir. 2014).

8. *Seaman v. Peterson*, 766 F.3d 1252 (11th Cir. 2014).

9. On somewhat similar facts, a Florida federal court determined that the parties had not agreed to abandon Mexico as the child's habitual residence in favor of the United States. See *In re S.L.C.*, 4 F. Supp. 3d 1338 (M.D. 2014).

10. *Valenzuela v. Michel*, 736 F.3d 1173 (9th Cir. 2013).

11. *Berezowsky v. Ojeda*, 765 F.3d 456 (5th Cir. 2014).

12. *Chafin v. Chafin*, 742 F.3d 93424 (11th Cir. 2013).

13. *In re ALC and ERSC, Carlwig v. Carlwig*, 2014 WL 1571274 (C.D. Cal. 2014).

14. *Hollis v. O'Driscoll*, 739 F.3d 108 (2d Cir. 2014).

15. *Neergaard v. Colon*, 2014 WL 936691 (D. Mass. 2014).

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years the father was assigned to work there. However, it was their shared intent that the children reside in Singapore coupled with the fact that the children—now ages two and three—“have spent a substantial amount of time in Singapore” that made Singapore the main station of the children’s lives and made it their habitual residence. On appeal,<sup>16</sup> however, this determination was reversed because the trial court failed to determine whether the parties had agreed to abandon their habitual residence in the United States and, therefore, remanded the case to determine the child’s habitual residence. The First Circuit contrasted *Neergard* with *Sanchez-Londono v. Gonzalez*,<sup>17</sup> where the father’s retention of his child in the United States following her two-and-a-half year stay in Colombia with her mother was not wrongful because the parents intended for the United States to be her habitual residence.<sup>18</sup>

Some courts look to the child’s acclimatization more than the parents’ intent. In *Langa v. Langa*,<sup>19</sup> the court noted that a child’s three-month stay with grandparents in South Africa could not possibly change the child’s habitual residence.

In another case, the court returned children to Canada from Massachusetts because Quebec was the place where the children had been physically present for a sufficient time to acclimatize and Quebec has a degree of settled purpose from the children’s perspective. Even though the Mother was American, and eventually had a desire to move to Massachusetts with the children, the children lived much of their lives in Quebec and even after the parents separated, the Mother remained in Quebec for a period of time before electing to move to the United States.<sup>20</sup>

The Fourth Circuit used both an intent and acclimatization analysis in *Reyes v. Jeffcoat*,<sup>21</sup> and found that the child’s habitual residence did not shift to Venezuela from South Carolina. The court analyzed the parents’ immigration statuses, real estate purchases, job movement, studies, and the children’s homeschooling under South Carolina law.

A child’s parents had a conditional agreement for the child’s mother to move him to the Bronx in May 2010 and for the child to remain in the United States if he were granted permanent residency and he would adjust to and like his new life in the United States (conditions that were met).<sup>22</sup> Therefore, the United States was the child’s habitual residence, which was further clarified when the father signed a consent form for the child to leave the Dominican Republic on a one-way ticket.

#### 4. *Rights of Custody*

A removal or retention is only wrongful if the left-behind parent had a right of custody and was “actually exercising” that right at the time of removal, or would have exercised that right, but for the removal. A determination by a Brazilian court that the mother

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16. *Neergard v. Colon*, 752 F.3d 526 (1st Cir. 2014).

17. *Sanchez-Londono v. Gonzalez*, 752 F.3d 533 (1st Cir. 2014).

18. See *Mauvais v. Herisse*, 2014 WL 5659412 (1st Cir. 2014).

19. *Langa v. Langa*, 549 Fed. Appx. 114 (3d Cir. 2014).

20. *Mauvais v. Herisse*, 2014 WL 1454452 (D. Mass. 2014).

21. *Reyes v. Jeffcoat*, 548 Fed. Appx. 887 (4th Cir. 2013).

22. In the Matter of a Custody Proceeding MG, Petitioner, against WZ, Respondent, 2014 N.Y. Misc. LEXIS 4386; 2014 NY Slip Op 24296 (9/30/14).

could not remove the children from Brazil without the father's consent (i.e., a *ne exeat* right<sup>23</sup>) gave the father a right of custody.<sup>24</sup>

In *Slight v. Noonkester*,<sup>25</sup> a "chasing order" obtained from an Irish court after the mother left with the child does not affect her right to custody, nor give her a right of custody, since a parent's custody rights must be determined as the time of the abduction.

#### 5. *Defenses*

There are a number of defenses that a respondent may assert in arguing that a child should not be returned to his or her habitual residence.

##### a. Child Is Settled in a New Environment

Article 12 of the Child Abduction Convention provides that the authorities need not return a child if more than one year has elapsed between the child's abduction or retention and the child is now settled in the child's new environment. The one-year period runs from the date the retention or removal became "wrongful."

The First Circuit followed the 2nd Circuit and held that the one-year period for bringing the petition for return is not subject to equitable tolling.<sup>26</sup> This split in the circuits was resolved by the U.S. Supreme Court in *Lozano v. Alvarez*,<sup>27</sup> which held that even though "equitable tolling is part of the established backdrop of American law," the United States cannot "export such background principles of our law to contexts outside their jurisprudential home." Treaties are "contracts" between signatory nations, the court said, and therefore must be read to incorporate their "shared" expectations. Not only did the father fail to identify a shared "background principle of equitable tolling," but many intermediate courts in contracting states—including England, Canada, and Hong Kong—have explicitly refused to apply the principle in Hague Convention cases. Not only that, but the one year period is not really a statute of limitations because it does not offer certainty or repose. Three justices concurred emphasizing that even though the one-year period cannot be tolled, courts have the discretion to return the child after one year.

In *Cascio v. Pace*,<sup>28</sup> the court found the children to be settled when the testimony revealed that they resided at the same place since they relocated to the United States, their residence was stable, one child was halfway through a second school year at the same school, the children enjoyed their school, they made numerous friends in the area, and have been active in school and church functions.

A wrongfully retained child who had resided in the United States for two and a half years must be returned to her father in Colombia because she is not "settled" in her new environment. The child had lived in three different locations, attended three different schools, the mother's employment and financial situation were unstable, and both she and the child were in the United States illegally.<sup>29</sup> Also not settled was a child from Mexico

23. *Abbott v. Abbott*, 542 F.3d 1081 (2010).

24. *Sanchez v. Suasti*, 140 So.3d 658 (Fla. Ct. App. 2014).

25. *Slight v. Noonkester*, 2014 WL 282642 (D. Mont. 2014).

26. *Yaman v. Yaman*, 730 F.3d 1 (1st Cir. 2013).

27. *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014).

28. *Cascio v. Pace*, 992 F. Supp. 2d 856 (N.D. Ill. 2014).

29. *Buenaiver v. Vasquez*, 2014 WL 3058250 (E.D. N.Y. 2014).

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who needed therapy because of his parents' separation, lacked English as a primary language and had an uncertain immigration status.<sup>30</sup>

b. Grave Risk of Harm/Intolerable Situation

An authority is not bound to order the return of a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

The Fifth Circuit remanded a case to determine whether three Mexican children, who were granted asylum in the United States subsequent to their mother obtaining their return under the Hague Convention, would be exposed to a grave risk of harm if returned.<sup>31</sup>

A grave risk of harm must be presented through clear and convincing evidence. A court found no grave risk in returning a child to Comos, Peru, even after the respondent presented evidence that the child's cousin was kidnapped in Peru, a child was killed by a car in that town, and there was a lot of criminal activity.<sup>32</sup> A "grave risk" of harm does not exist when the respondent is only able to show five or six instances of violence over a ten-year period and there had never been any violence directed toward the child.<sup>33</sup>

The Second Circuit determined that an autistic child would suffer harm if removed from his New York therapy program, and therefore there was grave risk to him if returned to Italy.<sup>34</sup> In another case the court found a grave risk despite having no documentary or physical evidence of the father's alleged abuse because multiple witnesses, including the child, corroborated his abusive behavior.<sup>35</sup>

c. Mature Child's Objection

A court has discretion to raise a child's stated objection to being returned on its own, without a party raising the objection.<sup>36</sup>

Even though a New York family court judge found one of two children to be mature, and to have stated a preference to remain in New York at the time of her *in camera* interview, the judge found that her "objection" was not within the scope of this defense. "[A]n objection within the meaning of the Convention and ICARA refers to a more substantial basis, such as fear of physical, emotional or psychological harm, or some substantive basis other than enjoying the activities in which they are engaged or liking their friends in their new environment or the opportunities that new environment presents."<sup>37</sup>

d. Other Attempted Defenses

i. *Human Rights and Fundamental Freedoms*

A mother argued that Sweden is a racist country that would not welcome her mixed race children, but this was insufficient to demonstrate that returning her children to Sweden

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30. Bobadilla v. Cordero, 2014 WL 3869998 (M.D. N.C. 2014).

31. Sanchez v. R.G.L., 761 F.3d 495 (5th Cir. 2014).

32. San Martin v. Moquillaza, 2014 WL 3924646 (E.D. Tex. 2014).

33. Rodriguez v. Romero, 2014 WL 4063112 (S.D. Fla. 2014).

34. Ermini v. Vittori, 758 F.3d 153 (2d Cir. 2014).

35. Ortiz v. Martinez, 2014 WL 1409446 (N.D. Ill. 2014).

36. *Id.*

37. RB v. KG, 2014, 2014 WL 5347587 (N.Y. Fam. Ct. 2014).

would violate fundamental principles relating to human rights and fundamental freedoms. Not only were there few examples of hate crimes and racism, but those instances did not shock the conscience and Sweden is not the only country where this is a problem.<sup>38</sup>

*ii. Consent/Acquiescence*

A family bought one-way tickets for everyone to travel from Northern Ireland to the United States. The mother was unable to go because of visa problems but planned to join the father and the other child when the visa problems were settled. This constituted her consent and acquiescence to the child's removal and therefore the child need not be returned.<sup>39</sup>

*6. Other Issues Under the Child Abduction Convention and ICARA*

*a. Attorney's Fees*

A trial court properly ordered a father to pay the legal fees and costs incurred by the child's mother in connection with her petition under the Convention for the child's return to Venezuela. The parents voluntarily settled the underlying custody dispute and because the settlement agreement was incorporated into a court order and ICARA authorizes fees when a court orders a child to be returned, fees were proper.<sup>40</sup>

A father's fee request was granted in part, but denied for fees expended for an uncertified translator and fees relating to the underlying custody proceeding. The court also reduced the father award by 25% given the mother's financial status.<sup>41</sup>

However, in *Aguilera v. De Lara*,<sup>42</sup> the father was denied all fees because the mother had little ability to pay, partly as a result of the father's failure to pay child support, and his disinterest in the child, leaving it in the mother's sole custody.

*b. Procedural Issues*

When a petition for return is denied, the case should be dismissed with prejudice.<sup>43</sup>

*i. Stays*

An Iowa court found the stay of a return order to Mexico was not warranted past the 30-day appeal period. The father would not be irreparably injured absent a stay, a claim for relief on appeal consisting of an order for "re-return" was not so implausible as to be nugatory, the children would lose precious time when they could be readjusting to life in Mexico, and the public interest favored the expeditious resolution of petitions for return of children.<sup>44</sup> However, where a federal case for the return of the child is pending, a state

38. *In re ALC and ERSC*, 2014 WL 1571274 (C.D. Cal. 2014).

39. *Bowen v. Bowe*, 2014 WL 2154905 (W.D. Penn. 2014).

40. *Salazar v. Maimon*, 750 F.3d 514 (5th Cir. 2014).

41. *Larrategui v. Laborde*, 2014 WL 2154477 (E.D. Cal. 2014).

42. *Aguilera v. De Lara*, 2014 WL 4204947 (D. Ariz. 2014).

43. *Ermini v. Vittori*, 758 F.3d 153 (2d Cir. 2014).

44. *Mendoza v. Silva*, 987 F. Supp. 2d 883 (N.D. Iowa 2013).

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court should, according to Nevada, stay its proceedings until the federal matter is decided.<sup>45</sup>

*ii. Temporary Restraining Orders*

A federal court in Nevada determined that it could issue a temporary restraining order without notice to the mother, restraining her from removing the children from Nevada pending a hearing on the father's petition for a preliminary injunction.<sup>46</sup>

*iii. State Proceedings*

When a Hague petition is filed, it is improper for a federal district court to abstain in favor of a custody proceeding in state court. However, a federal district court in New York determined it was inappropriate to enjoin a state custody proceeding because no act expressly gave the court the authority to do so and the outcome of the custody proceeding could not affect the return proceeding.<sup>47</sup>

*iv. Undertakings*

Parents who stipulated that their five children should be returned from the United States to Singapore submitted a request for the court to order certain undertakings related to the children's return. The court assessed each parent's specific undertaking request and selected those undertakings that were "limited in scope and further the Convention's goal of ensuring the prompt return of the child." Therefore, the court ordered undertakings for ensuring school enrollment, payment for travel costs, payment for the taking parent's housing upon return to Singapore, cooperating in obtaining visas, restraint from physical violence, and maintaining health insurance policies, but did not order child support (which was covered under a London order) or legal expenses for the taking parent to litigate custody in Singapore.<sup>48</sup>

*v. Enforcement*

A trial court did not err when it accorded comity to a German decision to not return the children to the United States on the basis that the father consented to it, the decision did not clearly misinterpret the Convention, or contravene its fundamental premises or objectives, and the decision was reasonable.<sup>49</sup>

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45. *Gabrielle v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 2014 WL 5502460 (Nev. 2014).

46. *Rocha v. Florez*, 2014 WL 317779 (D. Nev. 2014). See also *Alcala v. Hernandez*, 2014 WL 5506739 (D. S.C. 2014) (the court also took judicial notice of Mexican law but refused to seal the record as requested by the petitioner).

47. *Matter of A.A.S.*, 2014 WL 840010 (S.D. N.Y. 2014).

48. *Skolnick v. Wainer*, 2014 WL 1513997 (D. Conn. 2014).

49. *Smedley v. Smedley*, 2014 WL 5647426 (4th Cir. 2014).

B. OTHER CASES INVOLVING INTERNATIONAL FAMILY LAW LITIGATION

1. *Marriage*

A marriage ceremony conducted in the Congo, in which the groom was not physically present but participated by telephone, was not repugnant to Maryland's public policy and would therefore be recognized under the doctrine of comity in a divorce action by the wife. The husband's argument that a telephone marriage "clearly goes against the solemnity of marriages" was not sufficient by itself to leap over the high bar of repugnancy that is required in order to overcome the comity doctrine.<sup>50</sup>

2. *Divorce—Jurisdiction and Recognition of Foreign Judgments and Divorce*

A woman was entitled to an annulment when her husband married her solely for a green card and then obtained a Muslim divorce immediately after he received the green card.<sup>51</sup>

A deceased woman's estate brought an action to enforce the monetary provisions of her Japanese divorce decree. When the trial court denied recognition of her decree under comity principles, it abused its discretion. Her American ex-husband was not given notice of a post-divorce Japanese guardian proceeding involving their child where the maternal grandmother in Japan was made the child's guardian after the custodial mother's death. However, this had no effect on the husband's legal obligations (including child support) under the earlier divorce decree.<sup>52</sup>

The first wife of a retired union worker was entitled to a portion of her ex-husband's pension benefits because the court found that their divorce was valid, despite it being declared invalid on the TV show "The People's Court." The couple was married in Chile in 1975, and they divorced in Mexico in 1983. He married his second wife in 1983 in Los Angeles, and that marriage ended in 2006. The man retired in 2010. The court said, "after thirty years of silence, to permit [the first wife] to now raise an issue challenging the validity of that second marriage would be plainly inequitable."<sup>53</sup>

3. *Children's Issues*

a. Custody

i. *Jurisdiction and Enforcement*

New Jersey did not have jurisdiction to issue an initial custody determination when it had been five years since the mother and child left for Germany and have had no contacts with New Jersey since then. The father never sought to have the child returned under the Child Abduction Convention.<sup>54</sup> Mississippi determined that after three years, Canada was a more appropriate forum to hear the mother's motion to modify the father's visitation.<sup>55</sup>

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50. *Tshiani v. Tshiani*, 81 A.3d 414 (Md. 2013).

51. *Manjlai v. Manjlai*, 2014 WL 4199201 (Tex. Ct. App. 2014).

52. *Estate of Toland*, 329 P.3d 878 (Wash. 2014).

53. *Bd. of Trs. of the Masters, Mates & Pilots Pension Plan v. Carney*, 2013 WL 6260538 (D. Md. 2013).

54. *Brown v. Brown*, 2014 WL 1174538 (N.J. Super. Ct., App. Div. 2014).

55. *Hersey v. Gratton*, 136 So.3d 1085 (Miss. Ct. App. 2014).



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However, an eighteen-month stay in Canada was insufficient to convince a Pennsylvania court to relinquish jurisdiction.<sup>56</sup>

New York continues to have jurisdiction to decide custody as the child's home state, even though the child was not returned to the United States from the Dominican Republic under the Abduction Convention.<sup>57</sup>

*ii. Relocation*

The mother's desire to live with her deported husband is a legitimate reason to relocate and therefore the case had to be remanded to determine whether it was in the best interests of the child to move.<sup>58</sup>

A trial court's order authorizing a mother to relocate with her child to Israel contained adequate protections for the father. The court found that the mother did not have adequate resources to post a monetary bond, but the order did require the mother to file a stipulation consenting to California's continuing jurisdiction and further stipulate that she would not file any action seeking modification in any but a California court. The court required the mother to register the judgment with the Israeli court system and submit and file proof of such registration, and ordered that all child support paid by the father would be deposited into a trust account established and owned by the father with the mother as a beneficiary, to be used to pay for the costs of any litigation, and that anything left over would be paid to the mother. The Court of Appeal rejected the father's argument that the absence of a bond was fatal.<sup>59</sup>

*iii. Substantive Custody Determinations*

The Third Circuit dismissed an action brought by a group of fathers against Israeli officials and charities. It found that neither the Alien Tort Statute<sup>60</sup> nor the Torture Victim Protection Act ("TVPA")<sup>61</sup> authorized their action, which alleged that Israel's family law system discriminated against fathers in custody and support disputes.<sup>62</sup>

A divorce court acted within its discretion when, in determining custody of the parties' twins, it declined to assign any significant weight to the children's French citizenship.<sup>63</sup>

*iv. Enforcement*

In the long-running battle of Maria Carrascosa's custody case, a federal district court denied her application for *habeas corpus* to be released from a New Jersey jail, where she was convicted of felony child abduction, because she had not exhausted her state remedies.<sup>64</sup>

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56. S.K.C. v. J.L.C., 94 A.3d 402 (Pa. Super. Ct. 2014).

57. Matter of Katz, 986 N.Y.S.2d 611 (N.Y. App. Div. 2014).

58. Daniels v. Maldonado-Morin, 847 N.W.2d 79 (Neb. 2014).

59. J.M. v. G.H., 175 Cal. Rptr. 3d 371 (Cal. Ct. App. 2014).

60. 28 U.S.C. § 1350.

61. 106 Stat. 73, note following 28 USC § 1350.

62. Ben-Haim v. Neeman, 543 Fed. Appx. 152 (3d Cir. 2014).

63. Harignordoquy v. Barlow, 313 P.3d 1265 (Wyo. 2013).

64. Carrascosa v. Hauck, 2013 WL 6816177 (D. N.J. 2013).

*v. Visitation*

The Georgia Supreme Court affirmed a trial court's ruling that the husband not be permitted to take the children out of Georgia because of the mother's fear that he would take them to Pakistan where she would have a very limited right to seek their custody.<sup>65</sup> In *Cooper v. Fewer*,<sup>66</sup> the trial court refused to allow the mother's request to take her child to Japan because of concerns that the Japanese courts would not cooperate in returning the child. However, the appellate court did reverse the trial court's order that the father to purchase six return trip airfares so that the mother's relatives could visit the child in Arizona.<sup>67</sup>

A trial court erred in permitting visitation between a Jamaican father and his children because the father had been deported to Jamaica after being convicted of two batteries on the mother, and he allegedly repeatedly threatened to kidnap the children. In its decree, the trial court required him to post a \$50,000 bond for each child before each visit to discourage him from kidnapping them and to ensure that sufficient funds were available for the mother to retrieve them if he did not return them. The appellate court found this insufficient to protect the children and reversed.<sup>68</sup>

In *Aristizabal v. Aristizabal*,<sup>69</sup> the trial court allowed a father to take his child to Colombia for ten days each year over the mother's objections because Colombia's record for returning children under the Hague Abduction Convention had improved, the father had substantial ties to Arizona—specifically ongoing employment in Arizona, permanent resident status, and an immediate intention to apply for citizenship—and the father was willing to travel with a third-party companion.

4. *Other Cases*

a. Alimony and Child Support

An Illinois trial court properly awarded a woman temporary maintenance after she registered a Polish divorce judgment from a court that lacked jurisdiction over her.<sup>70</sup>

A New York trial court determined that a woman was entitled to collect on a money judgment entered by a Hong Kong court for child support totaling over half a million dollars since the husband could not show that the judgment was obtained by fraud, or that recognition of the judgment would violate some strong public policy. Therefore, comity required recognition.<sup>71</sup>

A Texas trial court properly refused to register and enforce a 1993 Israeli child support order against a Texas resident after finding that he had never been served in the foreign support action. The court was not persuaded by the state's arguments that the support

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65. *Sahibzada v. Sahibzada*, 757 S.E.2d (Ga. 2014).

66. *Cooper v. Fewer*, 2014 WL 1388378 (Ariz. Ct. App. 2014).

67. The issue of whether visitation should be allowed to non-Hague countries continues to split the courts. Compare *Shaowei Dai v. Maxson*, 2014 WL 2931949 (Mo. Ct. App. 2014) (allowing mother to take the son to China for visitation) with *Davis v. Ewalefo*, 2014 WL 3809493 (Nev. 2014) (affirming order not allowing visitation to Rwanda).

68. *Matura v. Griffith*, 135 So.3d 377 (Fla. Ct. App. 2014).

69. *Aristizabal v. Aristizabal*, 2014 WL 47345 (Ariz. Ct. App. 2014).

70. *In re Lasota and Luterek*, 17 N.E.3d 690 (Ill. Ct. App. 2014).

71. *Bond v. Lichtenstein*, 40 Fam. L. Rep. (BNA) 1477 (N.Y. Sup. Ct. 2014).

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order was entitled to either full faith and credit under the Uniform Interstate Family Support Act or comity. It also rebuffed the argument that a best interests of the child analysis trumps UIFSA's statutory scheme.<sup>72</sup>

b. Affidavit of Support–Immigration

A man and his uncle are liable for the support of his ex-wife pursuant to the federal affidavits of support they executed in connection with her immigration to the United States even though the marriage was never consummated and the husband contended he was fraudulently induced to marry the wife.<sup>73</sup> In another case, a court decided that a woman's waiver of spousal support in her premarital agreement did not nullify her ex-husband's obligations under the federal affidavit of support he signed after their 1998 wedding in connection with her immigration from the Ivory Coast.<sup>74</sup>

A Washington State Court determined that a trial court may refuse to consider a federal obligation in setting the wife's alimony amount. The court found the obligation could be entertained in a separate action.<sup>75</sup> If, however, the trial court did consider the affidavit of support in awarding alimony, then a federal court in California decided that a man's motion to dismiss his ex-wife's complaint for enforcement of the affidavit that he signed in connection with her immigration from the Philippines should be granted because the issue of support was litigated in their state divorce action.<sup>76</sup>

A man who obtained a dismissal of his ex-wife's complaint for enforcement of the federal affidavit of support he signed in connection with her immigration to the United States may not recoup the legal fees he expended in that action.<sup>77</sup>

c. Attorney Malpractice

In *Innes v. Marzano–Lesnevich*,<sup>78</sup> the husband brought a legal malpractice action against the wife's attorney and law firm arising out of the attorney and firm's release of his daughter's passport to the wife, in contravention of an agreement for the passport to be held by the attorney in trust during the custody dispute, resulting in the wife's out-of-country removal of their daughter and separation of the husband from his daughter. The trial court ruled for the husband; the appellate court affirmed holding that the attorney's release of the daughter's American passport to the wife was a proximate cause of any damages suffered by the husband as a result of her subsequent removal of their daughter from the country. The conduct of the attorney and law firm was sufficiently egregious and extraordinary so as to warrant an award of emotional distress damages.

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72. *In re* E.H., 41 Fam. L. Rep. (BNA) 1005 (Tex. Ct. App. 2004).

73. *Matloob v. Farhan*, 2014 WL 1401924 (D. Md. 2014).

74. *Toure-Davis v. Davis*, 2014 WL 1292228 (D. Md. 2014).

75. *Khan v. Khan*, 332 P.3d 1016 (Wash. Ct. App. 2014).

76. *Yaguil v. Lee*, 2014 WL 1400959 (E.D. Cal. 2014).

77. *Yaguil v. Lee*, 2014 WL 3956693 (E.D. Cal. 2014).

78. *Innes v. Marzano–Lesnevich*, 87 A.3d 775 (N.J. Super. Ct. App. Div. 2014).

## International Litigation

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### I. Foreign Sovereign Immunities Act

A foreign state is presumptively immune from suit, and its property presumptively immune from attachment and execution, unless an exception enumerated in the Foreign Sovereign Immunities Act (FSIA) applies. In *Republic of Argentina v. NML Capital, Ltd.*, the U.S. Supreme Court analyzed the question of whether a foreign state's immunity from attachment and execution under the FSIA itself limits discovery concerning a foreign sovereign's extraterritorial assets.<sup>1</sup> In a 7-to-1 decision, the Court (Scalia, J.) answered the question in the negative, reasoning that the text of the FSIA contains no such limitation.<sup>2</sup> At issue were two subpoenas served on New York banks that sought information about Argentina's "worldwide" assets, notwithstanding that the FSIA does not contemplate execution on sovereign property located abroad. The Court noted that "other sources of law," including the Federal Rules of Civil Procedure and principles of international comity, "ordinarily will bear on the propriety of discovery requests of this nature and scope."<sup>3</sup>

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\* This article summarizes developments in international litigation during 2014. The article was edited by Aaron Marr Page, managing attorney at Forum Nobis PLLC in Washington, D.C., with assistance from Peter Hogge, a staff attorney at the Maryland Court of Special Appeals. Jonathan I. Blackman and Carmine D. Boccuzzi, partners at Cleary Gottlieb Steen & Hamilton LLP in London and New York, respectively, authored Section I and VII, with assistance from Michael M. Brennan, James Blakemore, and Elizabeth Block, associates at the same firm. (The firm represented the Republic of Argentina and the Democratic Republic of the Congo in the cases discussed in Sections I and VII.) Erin Lawrence, an associate at Frommer Lawrence & Haug LLP in New York, authored Section II. Phillip B. Dye, Jr., a partner at Vinson & Elkins L.L.P. in Houston, Texas, authored Sections III and VIII, with assistance from Liane Noble and Page Somerville Robinson, associates at the same firm. Matthew D. Slater, a partner at Cleary Gottlieb Steen & Hamilton LLP in Washington, D.C., authored Section IV, with assistance from Caroline Stanton, an associate, and Gypsy Moore, a law clerk, at the same firm. Howard S. Zelbo, a partner at Cleary Gottlieb Steen & Hamilton LLP in New York, authored Section V, with assistance from Christopher P. DeNicola and Esti Tambay, associates at the same firm. Charles A. Patrizia, Joseph R. Profaizer, and Igor V. Timofeyev, partners at Paul Hastings LLP in Washington, D.C., authored Sections VI and IX, with assistance from Danielle Acker Susanj, an associate at the same firm.

1. 134 S. Ct. 2250, 2255 (2014).
2. *Id.* at 2256-58.
3. *Id.*

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Justice Ginsburg dissented, favoring an interpretation of the FSIA that would limit discovery to sovereign property “used in connection with . . . commercial activities,” and noting that the plaintiff had not shown “the sky [to] . . . be the limit” in foreign jurisdictions either.<sup>4</sup>

In *European Community v. RJR Nabisco, Inc.*, the Second Circuit for the first time held that an entity created by numerous individual foreign states to qualify as a foreign-state “organ” under the FSIA.<sup>5</sup> The European Community argued that it should be considered an “organ” of a foreign state—and therefore meets the definition of “foreign state”—under the Act.<sup>6</sup> Applying the five-factor “organ” balancing test set forth in *Filler v. Hanvit Bank*,<sup>7</sup> the Second Circuit found that the European Community was created for a national purpose, is supervised by its member states, holds exclusive rights in those nations, is treated as a government entity under their laws, and has public employees.<sup>8</sup> The Court acknowledged that the member states themselves do not employ the public employees, but found the distinction “of small importance,” noting that in any event the “factors are merely issues to be considered,” and need not all be satisfied.<sup>9</sup>

In *Export-Import Bank of the Republic of China v. Grenada*, the Second Circuit adopted the strict “used for” test applied by the Fifth and Ninth Circuits to determine whether property falls under Section 1610’s threshold immunity exception requirement that the property be “used for a commercial activity in the United States.”<sup>10</sup> Plaintiffs sought to satisfy a judgment against Grenada by executing on funds owed by third parties to Grenadian corporate entities, arguing that the funds’ origin from purportedly commercial activity meant that they were “used for” a commercial activity under Section 1610(a).<sup>11</sup> The Second Circuit, favoring the straightforward reading of the words “used for” adopted by the other circuits, held that the relevant inquiry under Section 1610(a)’s “used for” exception is not how the funds were generated but how the sovereign actively uses them, noting that this approach is consistent with the structure and purpose of the FSIA, which affords broader immunity from execution than from jurisdiction.<sup>12</sup>

In *Calderon-Cardona v. Bank of New York Mellon*, the Second Circuit considered, on first impression, whether an electronic fund transfer (EFT) blocked midstream qualifies as sovereign property subject to attachment under FSIA Section 1610(g).<sup>13</sup> The Court held that Section 1610(g) does not preempt New York state property law governing EFTs, with the result that the only entity with a property interest in a blocked EFT is the entity immediately preceding the blocking bank.<sup>14</sup> The Second Circuit remanded the case to determine whether a sovereign entity had transmitted any of the blocked EFTs directly to the blocking bank, thereby creating an attachable property interest in the funds.<sup>15</sup>

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4. *Id.* at 2259 (Ginsburg, J., dissenting).

5. 764 F.3d 129 (2d Cir. 2014).

6. *Id.* at 146, 144-48.

7. 378 F.3d 213, 217 (2d Cir. 2004).

8. *RJR Nabisco*, 764 F.3d at 145-48.

9. *Id.* at 146.

10. 768 F.3d 75, 79 (2d Cir. 2014).

11. *Id.* at 88-89.

12. *Id.* at 89-90.

13. 2014 WL 5368880 (2d Cir. 2014).

14. *Id.*

15. *Id.* at 7.

In *Sachs v. Republic of Austria*, the Ninth Circuit ordered rehearing en banc to clarify whether the commercial-activity exception applies when a state-owned commercial common carrier sells a passenger ticket through a travel agency in the United States.<sup>16</sup> Reversing the courts below it, the en banc panel held that the FSIA does not abrogate common law principles of agency and that, as a result, an authorized agent's commercial activity in the United States can be imputed to a foreign state.<sup>17</sup>

## II. International Service of Process

International service of process is governed by Rule 4(f) of the Federal Rules of Civil Procedure. Rule 4(f) requires that the means of international service of process comport with due process and not be prohibited by an international agreement.<sup>18</sup>

In *Freedom Watch, Inc. v. OPEC*,<sup>19</sup> the D.C. Circuit addressed international service of process in a case involving the Organization of the Petroleum Exporting Countries ("OPEC"). Freedom Watch, Inc., a political advocacy group, sued OPEC alleging that it violated United States antitrust laws by fixing gasoline prices. Freedom Watch attempted to serve OPEC by both hand delivering the complaint and mailing it through Austrian mail to OPEC's headquarters in Vienna, Austria. The district court dismissed the complaint for failure to effectuate service and denied Freedom Watch's retroactive request to allow service by alternative means under Rule 4(f)(3).<sup>20</sup>

The D.C. Circuit agreed with the district court that Freedom Watch did not substantially comply with Rule 4 and failed to effectuate service of process on OPEC because Rule 4(h), not Rule 4(f), governs service of process on a foreign unincorporated association such as OPEC, as opposed to an individual.<sup>21</sup> Rule 4(h) allows service abroad on a foreign business entity in any manner prescribed by Rule 4(f) except for personal delivery.<sup>22</sup>

The Court found that Rule 4(f)(1) could not apply in this case because there were no "internationally agreed [upon] means of service" between Austria and the United States.<sup>23</sup> The Court explained that there are no "internationally agreed [upon] means of service" with respect to OPEC since the United States and Austria are not signatories to any common international convention. The United States is not a party to the Hague Convention on Civil Procedure (although Austria is) and Austria is not a party to the Hague Conven-

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16. 737 F.3d 584, 589 (9th Cir. 2013).

17. *Id.* at 592-94.

18. See Fed. R. Civ. P. 4(f)(1) (an individual may be served outside of the United States "by any internationally agreed means of service that is reasonably calculated to give notice"); Fed. R. Civ. P. 4(f)(3) (allowing service "by other means not prohibited by international agreement").

19. 766 F.3d 74 (2014).

20. *Id.*

21. The Court also noted that OPEC could not be served under the service provision of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(a), because it was not "a political subdivision of a foreign state" but rather "an intergovernmental organization whose members are foreign sovereign states." *Freedom Watch*, 766 F.3d at 79.

22. See Fed. R. Civ. P. 4(h)(2).

23. See Fed. R. Civ. P. 4(f)(1).

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tion on Service Abroad of Judicial and Extrajudicial Documents (although the United States is).<sup>24</sup>

Similarly, the Court found that Rule 4(f)(2) was also unavailing. Rule 4(f)(2) provides that when there are “no internationally agreed means,” service may be accomplished (1) “as prescribed by the foreign country’s law for service in that country in its courts of general jurisdiction”; (2) as directed by foreign authority in response to a “letter rogatory or letter of request”; or (3) by personal service “unless prohibited by the foreign country’s law.”<sup>25</sup> According to the Court, Freedom Watch could not effectuate service “as prescribed by the foreign country’s law” because under Austrian law, service of process is a sovereign act that can only be done by a court unless an international convention provides otherwise.<sup>26</sup> Additionally, Rule 4(f)(2) did not apply because there were no letters rogatory or letters of request by Freedom Watch and personal service is not allowed under Rule 4(h).<sup>27</sup> The D.C. Circuit also noted that Freedom Watch’s attempts at service violated Austrian law which prohibits service on an international organization holding privileges and immunity and also bars service of legal process within OPEC’s headquarters without the express consent of OPEC’s Secretary General.<sup>28</sup>

However, unlike the district court, the D.C. Circuit found that it could be possible for Freedom Watch to effectuate service by serving OPEC’s United States counsel if accomplished by order of the court after a proper application under Rule 4(f)(3), which allows service “by other means not prohibited by international agreement, as the court orders.”<sup>29</sup> While the appeals court agreed with the district court that service on OPEC through counsel was barred under Rule 4(h), which allows service on an entity through an authorized agent, it found that service on counsel with court authorization could be effective under Rule 4(f)(3). The appeals court recognized that authorization of alternative means of service under Rule 4(f)(3) is at the court’s discretion (even if the proposed means would contravene foreign law), but because the district court had made no determination one way or the other, it remanded with the instruction that the lower court “must at least exercise its discretion under Rule 4(f)(3).”<sup>30</sup>

### III. Personal Jurisdiction

In early 2014, the Supreme Court issued a landmark decision in *Daimler AG v. Baumann*, arguably one of the most significant personal jurisdiction cases in years, which sharply clarified the boundaries of general jurisdiction.<sup>31</sup> In *Daimler*, Argentine plaintiffs filed suit in California against Daimler, a company headquartered in Germany, based on human rights violations allegedly committed by Daimler’s Argentine subsidiary in Argentina. The Ninth Circuit held that it had general jurisdiction by using the agency theory of

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24. *Freedom Watch*, 766 F.3d at 79.

25. Fed. R. Civ. P. 4(f)(2)(A)–(C).

26. *Freedom Watch*, 766 F.3d at 80.

27. *Id.*

28. *Id.*

29. The Circuit found that Freedom Watch’s other two proposed means of service under court authorization (email and fax) “would constitute a substantial affront to Austrian law.” *Id.* at 82 (citing *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 921 (11th Cir. 2003)).

30. *Id.* at 84.

31. 134 S. Ct. 746, 763 (2014).

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personal jurisdiction to attribute all the “contacts” between California and Daimler’s U.S. subsidiary to the German parent company.

The Supreme Court reversed, noting that “[t]he Ninth Circuit’s agency theory . . . would sweep beyond even the ‘sprawling view of general jurisdiction’ we rejected in *Goodyear*.”<sup>32</sup> The Court found it need not address the theory directly because even “assum[ing] [the subsidiary’s] contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California.”<sup>33</sup> The Court rejected the contention that a corporation is subject to general jurisdiction wherever it “engages in a substantial, continuous, and systematic course of business” as “unacceptably grasping.”<sup>34</sup> Rather, general jurisdiction over a foreign corporation is proper only when the corporation’s affiliations with the forum state are so “constant and pervasive” or “continuous and systematic” as to render it “essentially at home” in the forum state.<sup>35</sup> For a corporation, the paradigm forum for general jurisdiction is the place of incorporation and principal place of business. Because Daimler was not “at home” in California, the exercise of general jurisdiction did not comply with due process.<sup>36</sup>

Since the January 2014 decision, district courts in every circuit have applied *Daimler*’s narrow view of general jurisdiction, as have the Courts of Appeals of the Second, Fifth, and Seventh and Ninth Circuits.<sup>37</sup> The decision will have far-reaching consequences for defendants, such as manufacturers of widely sold products, who were previously believed to be subject to general jurisdiction in every state.

Cases resolving conflicts between *Daimler* and state long-arm statutes further illustrate the immediate impact of *Daimler* on the jurisdictional landscape. For instance, in *Brown v. CBS Corp.*, a plaintiff advocated the exercise of general jurisdiction based on the defendant’s registration to do business in Connecticut.<sup>38</sup> Although Connecticut’s long-arm statute expressly authorized the exercise of jurisdiction based on business registration, the court declined to exercise jurisdiction because the defendant was not “at home” in Connecticut under *Daimler*. Similarly, in *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*, a Delaware district court found that a defendant’s “compliance with Delaware’s registration statutes—mandatory for doing business within the state—cannot constitute consent to jurisdiction” in compliance with *Daimler*.<sup>39</sup>

The Supreme Court also issued a significant decision on specific jurisdiction in *Walden v. Fiore*, narrowing the prevailing effects test and reiterating that personal jurisdiction can only be found where the “defendant himself” creates contacts with the forum state.<sup>40</sup> “It is the defendant’s conduct that must form the necessary connection with the forum State,” and “mere injury to a forum resident is not a sufficient connection to the forum.”<sup>41</sup> Sub-

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32. *Id.* at 759-60 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011)).

33. *Id.*

34. *Id.* at 761.

35. *Id.*

36. *Id.* at 763.

37. See *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 223 (2d Cir. 2014); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 529 (5th Cir. 2014); *Snodgrass v. Berklee Coll. of Music*, 559 F. App’x 541, 542 (7th Cir. 2014); *Martinez v. Aero Caribbean*, 764 F.3d 1062 (9th Cir. 2014).

38. No. 3:12-cv-01495 (AWT), 2014 WL 1924469, at \*1 (D. Conn. May 14, 2014).

39. No. 14-696-GMS, 2014 WL 5780213, at \*5 (D. Del. Nov. 5, 2014).

40. 134 S. Ct. 1115, 1122 (2014).

41. *Id.* at 1122-23.

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sequently, courts of appeal applying *Walden* have come to different conclusions on the significance of whether the defendant initiated the contact. For example, in *CW Downer & Co. v. Bioriginal Food & Science Corp.*, the First Circuit held that *Walden* does not require courts to “focus too much on who initiated a particular contact.”<sup>42</sup> But the Fifth Circuit, in *Monkton Ins. Services, Ltd. v. Ritter*, declined jurisdiction because the defendant’s communications to the forum state were initiated by the plaintiff.<sup>43</sup>

#### IV. The Act of State Doctrine

The act of state doctrine is a prudential limitation on the exercise of judicial review. It requires U.S. courts to decline to pass judgment on the validity of official acts of a foreign state performed in its own territory.<sup>44</sup>

##### A. DEFINING OFFICIAL SOVEREIGN ACTS

In *Yale University v. Konowaloff*, the plaintiff claimed title to Vincent van Gogh’s painting *The Night Café*, which he alleged the Russian Soviet Federative Socialist Republic confiscated from his great-grandfather pursuant to a 1918 decree abolishing private property, and which subsequently came into the university’s possession.<sup>45</sup> Consistent with a 2012 decision of the Second Circuit involving the same plaintiff, the Connecticut district court held that the act of state doctrine precluded the court from making “an inquiry into the legal validity of the 1918 nationalization decree” since the successor state, the Russian Federation, had not renounced it.<sup>46</sup>

*Von Saher v. Norton Simon Museum of Art at Pasadena* also involved allegedly expropriated art, in this instance a claim by the heir of a Dutch art dealer whose inventory was looted by the Nazis.<sup>47</sup> The art works at issue were the subject of Dutch government proceedings and subsequent transfer to a third party, who later transferred them to the museum.<sup>48</sup> The Ninth Circuit reversed the district court’s dismissal on preemption grounds without resolving whether the case could survive the act of state doctrine.<sup>49</sup> The appeals court directed the district court to determine whether the process by which the

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42. No. 14–1327, 2014 WL 5861962, at \*6 (1st Cir. Nov. 12, 2014) (finding specific personal jurisdiction where parties’ contacts involved no physical presence in Massachusetts, but were by phone, e-mail, and internet over an international border, even though many of those contacts were initiated by the in-forum plaintiff).

43. 768 F.3d 429 (5th Cir. 2014).

44. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *Credit Suisse v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 130 F.3d 1342, 1346 (9th Cir. 1997). See also *W.S. Kirkpatrick & Co., Inc. v. Env’tl. Tectonics Corp., Int’l.*, 493 U.S. 400, 409 (1990) (doctrine “requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid”).

45. 5 F. Supp. 3d 237, 238–39 (D. Conn. 2014).

46. *Id.* at 241–42. See *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 145 (2d Cir. 2012). In contrast, in *Republic of Iraq v. ABB AG*, the Second Circuit held that Iraq’s claims that ABB conspired with the former Iraqi regime, even if they involved an official act, were not barred by the act of state doctrine because it does not “prevent the current government of a foreign state from repudiating the conduct of a prior government on the foreign state’s territory.” 768 F.3d 145, 176–77 (2d Cir. 2014).

47. 754 F. 3d 712 (9th Cir. 2014).

48. *Id.* at 718.

49. *Id.*

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Dutch government transferred the property should be considered a sovereign act and, if so, whether inquiry into its validity was required and would be barred by the act of state doctrine.<sup>50</sup>

In *Doe v. Exxon Mobil Corp.*, the D.C. district court held that the act of state doctrine did not bar claims by Indonesian citizens for grave injuries allegedly perpetrated by Indonesian soldiers employed by Exxon to provide security services. Exxon “made no showing that plaintiffs were injured pursuant to official military orders,”<sup>51</sup> and, even if the acts were sovereign, their “validity . . . as a matter of Indonesian law is not at issue in this case.”<sup>52</sup>

**B. VIOLATIONS OF INTERNATIONAL LAW**

In *Du Daobin v. Cisco Systems, Inc.*, the United States District Court for the District of Maryland addressed claims of Chinese political dissidents under the Alien Tort Statute that Cisco assisted the Chinese Communist Party, acting under color of law, in the design and implementation of a nation-wide surveillance program which was used “to identify and torture dissidents,” including plaintiffs.<sup>53</sup> The court held that the act of state doctrine barred adjudicating the plaintiffs’ claims because they “effectively ask[ed] the Court to decide that the Chinese government . . . has engaged in multiple violations of international law.”<sup>54</sup>

Conversely, in *Warfaa v. Ali*, the Virginia district court held that a Somali national’s claims under the Torture Victims Protection Act against a former colonel in the Somali National Army were not barred by the act of state doctrine because *jus cogens* violations, namely torture and attempted extrajudicial killing, are not “official sovereign acts” as contemplated by the doctrine.<sup>55</sup>

**V. International Discovery**

**A. OBTAINING U.S. DISCOVERY FOR USE IN FOREIGN PROCEEDINGS**

In 2014, several U.S. courts addressed the requirements for obtaining discovery for use in proceedings before foreign or international tribunals, pursuant to 28 U.S.C. § 1782(a)<sup>56</sup> and under the factors set out in *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>57</sup>

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50. *Id.* at 726.

51. No. 01-1357(RCL), 2014 WL 4746256, at \*5 (D.D.C. Sept. 23, 2014).

52. *Id.* at 6.

53. 2 F. Supp. 3d 717, 720 (D. Md. 2014).

54. *Id.* at 726.

55. No. 1:05-cv-701 (LMB/JFA), 2014 WL 3734121, at \*6 (E.D. Va. July 29, 2014).

56. See 28 U.S.C. § 1782(a) (“The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.”).

57. 542 U.S. 241, 243 (2004). In *Intel*, the Supreme Court noted three statutory requirements for invoking Section 1782(a): (1) the discovery must be sought from a person residing in the district of the court to which the application is made; (2) the discovery must be for use in a proceeding before a foreign tribunal; and (3) the applicant must be a foreign or international tribunal or an interested person. In addition, the Court noted several discretionary factors a court should consider in determining whether to grant discovery pursuant to Section 1782(a). These factors include: (1) whether the person for whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the proceedings and the “receptivity” of the foreign court to

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Several cases discussed whether discovery was being sought from a “participant” in a foreign proceeding. In *Intel*, the Supreme Court observed that “when the person from whom discovery is sought is a participant in a foreign proceeding, the need for § 1782(a) aid is generally not as apparent as . . . when evidence is sought from a non-participant.”<sup>58</sup> In *In re Owl Shipping LLC*<sup>59</sup> and *In re Request for Subpoena by Ryanair Ltd.*,<sup>60</sup> courts compelled discovery from non-participants, whereas in *In the Matter of Application of Leret*, the United States District Court for the District of Columbia upheld the denial of a discovery request on the grounds that the discovery target was “a party to two of the three foreign proceedings” and had “voluntarily offer[ed] to submit to [applicants’] discovery requests in Venezuela.”<sup>61</sup> Another court found that the mere fact that a defendant was a criminal suspect in a related foreign criminal and civil proceeding “would not render him a participant,” and granted the discovery request.<sup>62</sup>

Two courts addressed whether § 1782 requires that the material sought be located in the United States. The Southern District of New York suggested that § 1782 imposes a “threshold requirement” that documents sought be located in the United States, and noted it had not been “persuaded . . . that the documents sought are located in the United States.” However, it did not reach the issue because it found that the statutory requirements had not otherwise been met.<sup>63</sup> On the other hand, the U.S. District Court for the District of Delaware took a balancing approach, considering “comity and parity concerns,” and concluding that “while the four *Intel* factors favor granting discovery, the location of the remaining documents [abroad] . . . tilt[s] the overall balance towards quashing the discovery requests.”<sup>64</sup>

**B. OBTAINING DISCOVERY FROM ABROAD FOR USE IN U.S. PROCEEDINGS**

In 2014, several U.S. courts considered the discretionary factors in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa* in evaluating discovery requests for information located in foreign jurisdictions for use in U.S. proceedings.<sup>65</sup>

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United States federal court assistance; (3) whether the application is an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country; and (4) whether the request is unduly burdensome or intrusive. *Id.* at 264-65.

58. *Id.* at 244.

59. Case No. 14-5655 (AET), 2014 WL 5320192 (D.N.J. Oct. 17, 2014).

60. Case No. 5:14-mc-80270-BLF-PSG, 2014 WL 5088204 (N.D. Cal. Oct. 9, 2014).

61. Misc. Case No. 13-939(RCL-JMF), 2014 WL 1803573, at \*3 (D.D.C. June 20, 2014).

62. *In the matter of Application of Action & Prot. Found.*, No. C 14-80076 MISC EMC (LB), 2014 WL 2795832, at \*5 (N.D. Cal. June 19, 2014).

63. *In re Petition of Certain Funds, Accounts, and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC*, No. 14 Civ. 1801(NRB), 2014 WL 3404955, at \*4 (S.D.N.Y. July 8, 2014).

64. *Pmcbuk v. Chemstar Prods. LLC*, No. 13-mc-306-RGA, 2014 WL 2990416, at \*2 (D. Del. June 26, 2014).

65. 482 U.S. 522, 539 (1987) (holding that the Hague Convention is not the exclusive means for obtaining evidence located abroad); Restatement (Third) of Foreign Relations Law § 442(1)(c) (1987) (setting out five factors: “[1] the importance to the . . . litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] whether the information originated in the United States; [4] the availability of alternative means of securing the information; and [5] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located”). Courts in the Second

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Following what has become the general trend in these cases, courts have continued the trend toward ruling in favor of disclosure of foreign materials, even in the face of blocking statutes with potential sanctions. In *In re Activision Blizzard, Inc.*, the Delaware Court of Chancery ordered discovery in the face of a blocking statute, holding that “Delaware has a substantial interest in providing an effective forum for litigating disputes involving the internal affairs of Delaware corporations,” especially when the defendant had submitted to the jurisdiction of Delaware courts.<sup>66</sup> The Court also noted that the defendant had “chosen previously to sue in the United States to take advantage of . . . American-style discovery” and the decision “to disregard the Blocking Statute when advantageous undercut its ability to invoke the Blocking Statute now.”<sup>67</sup> Similarly, in *BrightEdge Techs., Inc. v. Searchmetrics, GmbH*, the court ordered production despite German and EU data privacy laws because those laws themselves stated that they did not apply to block discovery when the “subject has given . . . consent” or the transfer of information is necessary to the “exercise or defense of legal claims.”<sup>68</sup> And in *Wultz v. Bank of China Ltd.*, defendant obtained discovery of a non-party Israeli bank, despite a contrary earlier ruling in a related case,<sup>69</sup> because such discovery was “critically important in testing the veracity . . . of plaintiff’s [scinter] allegation.”<sup>70</sup>

By contrast, U.S. courts have shown more willingness to show comity in favor of restraining discovery of materials located abroad where a foreign regulator intervenes or otherwise informs a U.S. court that its own enforcement action would be impeded by U.S. discovery. For example, in *In re Cathode Ray Tube (CRT) Antitrust Litigation*, the court denied a request for production of a confidential European Commission decision in light of “the EU’s sovereign interest in governmental information produced within its borders.”<sup>71</sup> The court emphasized a letter supplied by the European Commission stating that while its antitrust investigation was over, disclosure could frustrate ongoing aspects of its cartel detection and enforcement initiatives.<sup>72</sup> The court added, “[t]he EC also relies on cooperation from U.S. law enforcement agencies, including the [Department of Justice], and . . . the cooperation of U.S. and E.U. agencies is an aspect of comity.”<sup>73</sup>

## VI. Extraterritorial Application of United States Law

### A. ALIEN TORT STATUTE

Federal courts continued to grapple with the meaning of the Supreme Court’s admonition in *Kiobel v. Royal Dutch Petroleum Co.* that a claim must “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against

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Circuit also consider “the hardship of compliance on the party or witness from whom discovery is sought . . . [and] the good faith of the party resisting discovery.” *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

66. 86 A.3d 531, 547 (Ch. Del. 2014).

67. *Id.* at 550.

68. No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062, at \*4 (N.D. Cal. Aug. 13, 2014).

69. *Limde v. Arab Bank, P.L.C.*, 706 F.3d 92, 112 (2d Cir. 2013).

70. 298 F.R.D. 91, 101 (S.D.N.Y. 2014).

71. No. C 07-5944 SC MDL, 2014 WL 1247770, at \*2 (N.D. Cal. Mar. 26, 2014).

72. *Id.*

73. *Id.* at \*3.

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extraterritorial application.”<sup>74</sup> Applying *Kiobel*, the Fourth Circuit refused to dismiss on extraterritoriality grounds claims concerning abuses at Abu Ghraib prison in Iraq, reasoning that the alleged torture was committed by United States citizens employed by an American corporation under a federal government contract, that the acts took place at a government-operated military facility, and that company managers in the United States allegedly attempted to cover up the misconduct.<sup>75</sup> Taken together, the court held, those factors displaced the presumption against extraterritoriality.<sup>76</sup>

In *Mastafa v. Chevron*, the Second Circuit articulated a two-step test for determining whether the extraterritoriality presumption has been overcome.<sup>77</sup> Drawing on the Supreme Court’s earlier decision in *Morrison v. National Australian Bank Ltd.*,<sup>78</sup> the Second Circuit held that the first step is to isolate from the complaint the alleged conduct that touches and concerns the United States to determine whether it is enough to displace the presumption. Then the court must ask whether that same conduct also involves a violation of the ATS. Applying that process, the Second Circuit determined that a claim that United States oil purchasers financed alleged human rights abuses by Saddam Hussein’s regime did touch and concern the United States. The complaint alleged that oil purchasers had paid illegal surcharges to Hussein’s regime, knowing that the extra payments were financing abuses. But the claim failed on the second step because it alleged that defendants acted “merely knowingly in aiding and abetting the underlying violations of the law of nations,” whereas Second Circuit precedent requires that the violation be purposeful.<sup>79</sup>

The Eleventh Circuit similarly determined that *Morrison’s* instruction about conduct should be used to interpret “touch and concern” in the first step of the *Morrison* analysis. In *Baloco v. Drummond Co.*, the court decided that murders of union members by guerillas in Colombia were extraterritorial, even though the union members worked for an American company, because the relevant conduct was outside the United States.<sup>80</sup>

**B. FOURTH AND FIFTH AMENDMENTS**

In *Hernandez v. United States*, the Fifth Circuit determined that a Mexican boy who was standing in Mexico when he was shot in the face and killed by an agent standing in Texas could not allege a violation of the Fourth Amendment by the agent.<sup>81</sup> The court, applying Supreme Court precedent,<sup>82</sup> held that the boy did not have sufficient connections with the United States to invoke the Fourth Amendment.<sup>83</sup> But the court decided that the “sufficient connections” test did not apply to the Fifth Amendment and applied factors derived

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74. 133 S. Ct. 1659, 1669 (2013).

75. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528-29 (4th Cir. 2014) (remanding on the political question issue).

76. *Id.* at 530-31.

77. 770 F.3d 170 (2d Cir. 2014).

78. 561 U.S. 247 (2010).

79. *Mastafa*, 770 F.3d at 191-94 (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260 (2d Cir. 2009)).

80. 767 F.3d 1229 (11th Cir. 2014).

81. 757 F.3d 249, *reh’g en banc granted*, 2014 WL 5786260 (5th Cir. 2014). The boy’s parents also brought a claim under the Alien Tort Statute, alleging that the shooting violated several treaties, but the court of appeals held that the United States had not consented to suit. *See id.* at 259.

82. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

83. *Id.* at 266.

from *Boumediene v. Bush*<sup>84</sup> to determine that the boy had Fifth Amendment rights. The court noted that while not an American citizen, the boy did not have an “enemy alien” status that militated against application of the Fifth Amendment.<sup>85</sup> Moreover, the nature of the sites where the alleged violation occurred, on the border of the United States and Mexico, suggested that the United States had some control over the area.<sup>86</sup> And the court noted that if the Fifth Amendment did not apply in this situation to protect against “arbitrary conduct that shocks the conscience,” no other sovereign would be able to force the agent to answer for his act committed in the United States.<sup>87</sup> The Fifth Circuit recently granted rehearing en banc of the decision.

#### C. SECURITIES LAW

In several cases, the Second Circuit refined its application of *Morrison*. In *City of Pontiac Policemen's & Firemen's Retirement System v. UBS AG*, it held that where foreign securities were purchased on foreign exchanges, the fact that the securities were cross-listed on domestic exchanges was not enough to displace the presumption against extraterritoriality.<sup>88</sup> In *Loginovskaya v. Batratchenko*, the Second Circuit decided that the rule of *Morrison* also barred extraterritorial application of the Commodities Exchange Act.<sup>89</sup> And in a case interpreting Dodd-Frank, the court held that its whistleblower provisions do not apply extraterritorially.<sup>90</sup>

#### D. RICO

The Second Circuit determined that the Racketeer Influenced and Corrupt Organizations Act (RICO) can apply extraterritorially, but only where the statute containing the relevant RICO predicate itself permits extraterritorial application.<sup>91</sup> The court acknowledged that its holding diverged from that of the Ninth Circuit in *United States v. Chao Fan Xu*, which found a general “presumption that RICO does not apply extraterritorially in a civil or criminal context.”<sup>92</sup>

### VII. Recognition and Enforcement of Foreign Judgments

In U.S. courts, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards, otherwise known as the “New York Convention,” governs the recog-

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84. 553 U.S. 723 (2008).

85. *Id.* at 268-69.

86. *Id.* at 269-70.

87. *Id.* at 270-71.

88. 752 F.3d 173 (2d Cir. 2014).

89. 764 F.3d 266 (2d Cir. 2014).

90. *Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014).

91. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014).

92. *Id.* at 139 n.6 (citing *United States v. Chao Fan Xu*, 706 F.3d 965, 974-75 (9th Cir. 2013)).

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tion and enforcement of most foreign arbitral awards.<sup>93</sup> However, State law governs the recognition and enforcement of foreign court judgments.<sup>94</sup>

A. FOREIGN ARBITRAL AWARDS

In *BG Group PLC v. Republic of Argentina*, the Supreme Court held 7-2 that arbitrators acted within their power in concluding that a bilateral investment treaty between the United Kingdom and Argentina did not obligate a private investor to bring its claims under the treaty before an Argentine court prior to arbitration.<sup>95</sup> The arbitrators had found that they had jurisdiction to decide the merits of a dispute arising under the treaty despite the fact that BG Group, by bringing its claims directly to arbitration, had bypassed the investment treaty's requirement that any dispute be brought first in Argentina and at least eighteen months prior to any arbitration.<sup>96</sup> The Supreme Court (Breyer, J.) agreed, holding that the arbitrators had jurisdiction to decide the issue because the local litigation requirement, which "determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate," was procedural rather than substantive.<sup>97</sup> The Court concluded that courts reviewing an arbitrator's decision as to whether it has jurisdiction in a dispute regarding a treaty with a local litigation provision must do so with "considerable deference."<sup>98</sup> Chief Justice Roberts and Justice Kennedy dissented, arguing that submitting the dispute to the courts is a "condition on consent to arbitrate" and therefore "whether an investor has complied with that requirement is a question a court must decide *de novo*, rather than an issue for the arbitrator to decide subject only to the most deferential judicial review."<sup>99</sup>

In *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, the District Court for the Southern District of New York revisited its 2011 judgment enforcing an arbitral award after the Malaysian High Court vacated that award in 2012.<sup>100</sup> The Government of the Lao People's Democratic Republic, which had succeeded in having the arbitral award vacated in Malaysia, moved to vacate the district court's judgment pursuant to Article V(1)(e) of the New York Convention.<sup>101</sup> Noting that a court may enforce "an arbitral award that has been nullified by a court in the state with primary jurisdiction over [it] . . . only when the foreign judgment setting aside the award is

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93. The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, is implemented in U.S. law through Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08 (2013). The Inter-American Convention on International Commercial Arbitration governs the recognition and enforcement of awards if a majority of the parties to an arbitration agreement are citizens of states that have ratified the convention, and this convention is implemented in U.S. law through Chapter 3 of the FAA, 9 U.S.C. §§ 301-07 (2013).

94. Many states have passed some version of the Uniform Foreign-Country Money Judgments Recognition Act.

95. 134 S. Ct. 1198, 1210 (2014).

96. *Id.* at 1204-05.

97. *Id.* at 1207.

98. *Id.* at 1210.

99. *Id.* at 1221 (Roberts, C.J., dissenting).

100. 997 F. Supp. 2d 214 (S.D.N.Y. 2014).

101. *Id.* at 215.

repugnant to fundamental notions” of decency and justice, the court declined to enforce the award.<sup>102</sup>

**B. FOREIGN COURT JUDGMENTS**

In *Commissions Import Export S.A. v. Republic of the Congo*, the D.C. Circuit joined the Second Circuit in holding that Chapter 2 of the Foreign Arbitral Awards Convention Act (“FAA”), which implements the New York Convention, does not preempt state law recognition of foreign court judgments.<sup>103</sup> Specifically, the D.C. Circuit considered whether the statute of limitations to enforce arbitral awards in FAA Chapter 2 preempted the longer period to enforce foreign money judgments under the D.C. Uniform Foreign-Country Money Judgments Recognition Act. The court concluded that Congress did not intend Chapter 2 of the FAA—which makes no mention of foreign court judgments—to preempt state law governing the issue.<sup>104</sup> Instead, section 207 of the FAA “applies specifically to the confirmation of ‘arbitral award[s] falling under the Convention.’”<sup>105</sup> The court reasoned that “it is unlikely that Congress would have intended its implementation of the New York Convention to cover both arbitral awards and judgments without mentioning the latter in FAA Chapter 2.”<sup>106</sup>

**VIII. Forum Non Conveniens**

In *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, the Supreme Court provided clarity on the proper mechanism for enforcing forum-selection clauses.<sup>107</sup> Although *Atlantic Marine* involved a domestic, rather than an international, forum dispute, the case answers important procedural questions concerning the enforcement of forum-selection clauses in both the domestic and international context. The court made two important holdings impacting *forum non conveniens* litigation: (1) a forum-selection clause electing a state or foreign forum should be enforced through *forum non conveniens*, and (2) a forum-selection clause alters the private and public interest analysis such that the private interest factors weigh entirely in favor of the forum designated by the forum-selection clause and the court may only consider the public interest factors.<sup>108</sup>

The contract between the parties was to be performed in Texas but included a forum-selection clause designating Virginia as the appropriate forum.<sup>109</sup> After a dispute arose and the plaintiff brought suit in the Western District of Texas, the defendant moved to dismiss on venue grounds.<sup>110</sup> The district court denied the motion, and the Fifth Circuit denied the defendant’s subsequent petition for a writ of mandamus, holding that where a forum-selection clause designates a non-federal forum, Rule 12(b)(3) provides the proper

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102. *Id.* at 223 (internal citations omitted).

103. 757 F.3d 321, 323 (D.C. Cir. 2014).

104. *Id.* at 326-29.

105. *Id.* at 327.

106. *Id.* at 332.

107. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013).

108. *Id.* at 580-82.

109. *Id.* at 575.

110. *Id.* at 576.



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avenue for dismissal.<sup>111</sup> The Supreme Court reversed, finding that *forum non conveniens*, rather than Rule 12(b)(3), is the appropriate enforcement mechanism when a forum-selection clause points to a state or foreign forum.<sup>112</sup>

The Fifth Circuit's holding in *Cotemar S.A. De C.V. v. Hornbeck Offshore Services, L.L.C.* illustrates how an atypical time bar can affect the *forum non conveniens* analysis.<sup>113</sup> *Cotemar* involved a limitation of liability proceeding—a procedure in maritime law by which a ship owner seeks to limit his liability to the value of his vessel.<sup>114</sup> In *Cotemar*, the parties' vessels collided forty-four miles off of the coast of Mexico.<sup>115</sup> Defendant filed two petitions in Mexican courts to limit liability.<sup>116</sup> Under Mexican limitation of liability procedure, claimants had to file their claims within a certain time.<sup>117</sup> The plaintiff failed to file a timely claim in the Mexico court and instead brought suit in federal district court in Texas after the deadline passed; the defendant filed a motion to dismiss on the basis of *forum non conveniens*.<sup>118</sup> After the district court granted the defendant's motion to dismiss, the Fifth Circuit remanded for more specific findings as to whether the district court's return jurisdiction clause adequately addressed the time bar presented by the plaintiff's failure to file a claim in the limitation of liability proceedings in Mexico.<sup>119</sup> It held that the district court must determine whether its return jurisdiction clause comports with the Fifth Circuit's prior holding that a plaintiff may not claim a private interest in a federal forum where unavailability of a foreign forum is a "plight of his own making."<sup>120</sup> The appeals court further observed that the district court's instruction to "waiv[e] any jurisdictional defenses" and to "'submit fully' to the Mexican judicial proceedings" could require "Appellees to waive any legitimate defenses relating to untimeliness that Appellees may have acquired based on Appellants' lack of diligence."<sup>121</sup> While not explicitly stated, the court alludes to the maritime law principle that a defendant's waiver of his right to limit liability as to one party impacts the rights of other parties, as the "'concurus' of claims compels all actions arising out of the casualty to be filed and disposed of in a single proceeding."<sup>122</sup>

### IX. Parallel Proceedings

In *Ace Arts, LLC v. Sony/ATV Music Publishing, LLC*, the Southern District of New York refused to stay a lawsuit involving the use of Beatles songs in a documentary about the band because of another pending lawsuit in English courts.<sup>123</sup> The court declined to depart from the general rule permitting simultaneous proceedings in the same *in personam*

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111. *Id.*

112. *Id.* at 580.

113. 569 F. App'x 187 (5th Cir. 2014).

114. See 2 Thomas J. Schoenbaum, Admiralty & Mar. Law § 15-1 (5th ed.).

115. *Cotemar S.A. De C.V.*, 569 F. App'x at 189.

116. *Id.*

117. *Id.* at 191.

118. *Id.* at 189.

119. *Id.* at 190.

120. *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1248 n.10 (5th Cir. 1983).

121. *Id.* at 191.

122. 2 Thomas J. Schoenbaum, Admiralty & Mar. Law § 15-5 (5th ed.).

123. No. 13-cv-7307, 2014 WL 4804465 (S.D.N.Y. Sept. 26, 2014).

claim, given that the parties and the claims in the two proceedings were not sufficiently the same, the English litigation was not sufficiently advanced, and the future preclusive effect of any judgment from that court was uncertain.<sup>124</sup>

In *Clientron Corp. v. Devon IT, Inc.*,<sup>125</sup> the U.S. District Court for the Eastern District of Pennsylvania similarly declined to stay an action to enforce a foreign arbitration award while defendant sought to set the award aside in a parallel proceeding in Taiwan. Applying the six-factor test of *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*,<sup>126</sup> the court concluded that arbitration's purpose of a speedy resolution of disputes counseled against a stay, that plaintiff properly filed its enforcement action in a U.S. court because defendant was a U.S. company, and that defendant did not provide security for the stay period.

The Eleventh Circuit in *GDG Acquisitions, LLC v. Belize*, addressed a comparatively rare case where plaintiff sought to apply international comity prospectively to dismiss or stay a case before the filing of any actual parallel foreign proceeding.<sup>127</sup> Holding that the district court improperly dismissed breach-of-contract claims against Belize in favor of litigation in that country's courts, the court of appeals noted that "[p]rospective international comity requires a serious problem that would be created by [domestic] proceedings but that would not be present if the matter were adjudicated abroad."<sup>128</sup> Distinguishing its 2004 decision in *Ungaro-Benages v. Dresdner Bank AG*,<sup>129</sup> the Eleventh Circuit emphasized that the United States had no significant interest in the foreign adjudication, and submitted no statement of interest, and that Belize's preference to handle the suit in its own courts was "not a cognizable prospective international comity interest."<sup>130</sup>

The Ninth Circuit, by contrast, affirmed the dismissal on prospective comity grounds of state-law personal injury claims brought by Colombian citizens against U.S. companies for alleged complicity in the bombing of plaintiffs' village by the Colombian military.<sup>131</sup> In *Mujica v. Airscan, Inc.*, the Ninth Circuit distinguished earlier precedent and held that a "true conflict between domestic and foreign law" is not required in instances of "adjudicatory comity."<sup>132</sup> Courts within the Ninth Circuit had previously found that comity is only proper where a true conflict existed.<sup>133</sup> The *Mujica* decision clarifies that the "true conflict" inquiry is a threshold issue only for prescriptive (or legislative) comity, and just "one factor in, rather than a prerequisite to, the application of [adjudicatory] comity."<sup>134</sup>

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124. *Id.* at \*4-\*5.

125. No. 13-05634, 2014 WL 940406 (E.D. Penn. March 10, 2014).

126. 156 F.3d 310 (2d Cir. 1998).

127. 749 F.3d 1024, 1030 (11th Cir. 2014).

128. *Id.* at 1031-34.

129. 379 F.3d 1227, 1239-41 (11th Cir. 2004) (abstaining from considering claims against German banks to recover assets stolen during the Nazi era in favor of a claims-resolution mechanism established under an agreement between the United States and Germany as the exclusive forum for such claims).

130. *GDG Acquisitions*, 749 F.3d at 1031-33.

131. *Mujica v. Airscan, Inc.*, 2014 WL 5839817 *Id.* at \*1, \*11-\*27.

132. 2014 WL 5839817 at \*15 (quoting *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998)).

133. *See, e.g., Oak Point Partners, Inc. v. Lessing*, No. 11-03328, 2013 WL 1703382 (N.D. Cal. Apr. 19, 2013). Indeed, the dissenting judge in *Mujica* disagreed that *In re Simon* was solely a prescriptive comity case. *See Mujica*, 2014 WL 5839817 at \*32 (Zilly, J., concurring in part and dissenting in part).

134. *Mujica*, 2014 WL 5839817 at \*16.

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## International Mediation

MATTHEW RAND\*

### I. The Refusal to Mediate in the United Kingdom Could Lead to the Imposition of Costs

In *Northrop Grumman Mission Systems Europe Ltd v. BAE Systems*,<sup>1</sup> the High Court of Justice in the United Kingdom, held that “[w]here a party to a dispute, which there are reasonable prospects of successfully resolving by mediation, rejects mediation on grounds which are not strong enough to justify not mediating, then that conduct will generally be unreasonable.”<sup>2</sup> In such circumstances, the party refusing to mediate is at risk of being financially penalized by the court for its refusal.<sup>3</sup>

BAE Systems (“BAE”) and Northrop Grumman Mission Systems Europe Ltd (“NGM”) are two major defense industry contractors that had a longstanding commercial relationship. That relationship was memorialized in two contracts, the Licence Agreement and the Enabling Agreement. BAE terminated the relationship, arguing that it had the right to do so under the Enabling Agreement, an interpretation disputed by NGM.<sup>4</sup> Prior to the commencement of the court action, the parties exchanged their views about the two contracts and how they should resolve the dispute through a series of letters, some of which were called “without prejudice” letters. In essence, the without prejudice letters provided that the parties were setting forth their positions “without prejudice save as to costs.”<sup>5</sup>

In these letters, NGM invited BAE to mediate their dispute. NGM believed mediation “would be the best forum to explore a sensible resolution to this matter.”<sup>6</sup> BAE rejected NGM’s invitation to mediate. BAE believed that the dispute was not amenable to mediation because it was “about contractual interpretation so that the outcome was ‘all or nothing.’”<sup>7</sup> That is, if NGM’s interpretation were correct, it would recover “in excess of £3 million,” but if NGM were wrong, “it would receive nothing.”<sup>8</sup> BAE was very confident

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1. *Northrop Grumman Mission Systems Europe Ltd v. BAE Systems Ltd.*, [2014] EWHC 3148 (U.K.).

2. *Id.* at para. 72.

3. *Id.* at paras. 73-75.

4. *See id.* paras. 1-37.

5. *Id.* at para. 37.

6. *Id.* (quotation omitted).

7. *Id.* at para. 12.

8. *Id.*

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in its legal position and saw NGM's mediation offer as an attempt to "pressure [BAE] to make a settlement payment with respect to a claim which BAE considered had no real prospect of success . . . even in the abstract."<sup>9</sup>

The court proceedings began on October 22, 2013. On January 20, 2014, BAE sent a without prejudice letter to NGM ("January 20 Letter"). The Letter stated:

This letter sets out the basis on which our client would be prepared to settle. Our client will agree to a full and final settlement of the claim above and any other claims your client may have arising out of or in connection with the Agreement for Deployment Licences and Associated Software Support dated 15 December 2010 and associated agreements, on the basis that no payment is made by our client to your client, but that each party bears its own costs associated with the on-going claim. Please note that this offer is not subject to negotiation.<sup>10</sup>

NGM rejected BAE's settlement offer two days later.<sup>11</sup>

The court held that BAE was not justified in refusing to mediate. To reach this conclusion, the court weighed its assessment of BAE's view of the merits of the underlying contract dispute against the likelihood that mediation would have successfully resolved the dispute. This weighing is necessary because a party's "reasonabl[e] belie[f] that it has a watertight case may well be sufficient justification for a refusal to mediate."<sup>12</sup> Though the court concluded "that this was a strong case by BAE,"<sup>13</sup> it found that BAE's refusal to mediate was outweighed by the fact that the case "was a classic case where [the] mediator could have brought the parties together."<sup>14</sup> The court explained:

In this case there were two parties who had a commercial relationship. One party, NGM, clearly felt aggrieved that BAE had terminated a contract [ ] when NGM had negotiated the Licence Agreement on the basis of the early commitment to buying licences at a lower price. The other party, BAE, clearly felt that it had the right to terminate in circumstances where it no longer needed any licences. I consider that this is just the situation where a mediator could assist the parties in resolving the dispute and avoid wasted management time and soured relationships even if as large commercial entities, the effect will not be serious or long lasting.<sup>15</sup>

BAE's refusal to mediate "ignore[d] the ability of the mediator to find middle ground by analyzing with each party its expressed position and making it reflect on that and the other parties' position." Further, BAE failed to consider the mediator's "skills of evaluation and facilitation to find solutions" to what appeared to disputants to be intractable problems.<sup>16</sup>

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9. *Id.* at para. 17.

10. *Id.* at para. 35.

11. *Id.* at para. 36.

12. *Id.* at para. 58.

13. *Id.*

14. *Id.* at para. 69.

15. *Id.* at para. 68.

16. *Id.* at para. 69. In reaching its conclusion, the court also considered the fact that total cost of mediation—approximately £500,000—could not "be said to be disproportionately high" when compared to the approximate total value of the claim, £3 million. *Id.* at para. 66.

Though the court found that NGM properly requested mediation and that BAE was not justified in refusing this request, the court rejected NGM's argument that BAE's fee request should be reduced because of its conduct. NGM contended that BAE's application for trial costs "should be reduced by 50% by reason of BAE's unreasonable refusal to mediate the dispute."<sup>17</sup> However, the court found that the January 20 Letter was an "offer to settle," and that "NGM's conduct in not accepting that offer is similarly a matter to be taken into account" when making an award of costs.<sup>18</sup> After considering all of the parties' conduct, the court came "to the conclusion that the fair and just outcome should be that neither party's conduct should be taken into account to modify what would otherwise be the general rule on costs."

## II. The Global Growth of Mediation

Over the past year, a number of countries and international organizations have taken various steps to make different forms of alternative dispute resolution—including mediation—easier to access. In particular, there are increased opportunities for parties to use mediation in a number of Asian states to resolve their disputes. For example, the Financial Mediation Bureau, an independent body set up in Malaysia, offers a way for consumers to resolve their disputes with financial service providers without having to go to court, engage a lawyer, or pay any fees. The Bureau mostly hears bank card related disputes, a category which includes bank card loss, compromised passwords, unauthorized online transactions, and cash advances.<sup>19</sup> Similarly, the Indian Department of Consumer Affairs has been debating proposing amendments to the Consumer Protection Act of 1986 that would facilitate mediation and arbitration. The amendments would create a mediation and arbitration "structure" at the "point of grievance," i.e., the place where the consumer is located. To achieve this goal, the Department of Consumer Affairs wants to empower local bodies such as the panchayats and gram sabhas to mediate disputes. It is only after this local mediation has been exhausted that a party may bring his or her dispute to court. According to the Department, the mediators will be trained to facilitate discussion between the parties, assist in identifying key issues, clarifying priorities, exploring areas of compromise, reducing misunderstandings, and emphasizing to the parties their role in causing the dispute.<sup>20</sup>

Mediation is also becoming increasingly popular in the Indian city of Bangalore. In 2006, the High Court of Karnataka, the Indian state in which Bangalore is located, issued a series of rules governing mediation. The following year, the High Court established the Bangalore Mediation Center. In the ensuing seven years, mediation has become an increasingly popular form of alternative dispute resolution. In 2014, the Center handled on average, 110 cases every day and, by August 2014, over sixty percent of all of the cases

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17. *Id.* at para. 2.

18. *Id.* at para. 7.

19. M. Mageswari, *FMB Way to End Disputes*, THE STAR ONLINE (Aug. 3, 2014), <http://www.thestar.com.my/News/Nation/2014/08/03/FMB-way-to-end-disputes-Channel-set-up-to-resolve-complaints-against-service-providers/>.

20. Sanjeeb Mukherjee, *Consumer Protection Act to be Amended to Ease Mediation*, BUSINESS STANDARD (July 30, 2014), [http://www.business-standard.com/article/economy-policy/consumer-protection-act-to-be-amended-to-ease-mediation-114073000042\\_1.html](http://www.business-standard.com/article/economy-policy/consumer-protection-act-to-be-amended-to-ease-mediation-114073000042_1.html).

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referred to the Center were resolved. To incentivize parties to mediate their disputes, all of the fees associated with the mediation are returned if the parties arrive at a settlement.<sup>21</sup>

Additionally, African countries have an increased number of mediation opportunities available to disputants. For example, in Kenya, a bank industry group set up a pilot mediation program in July 2014 for individuals who have grievances pertaining to loans that banks sold them. The program is housed at Strathmore Law School and, at least for the pilot period, involves Barclays, Equity, Family, Gulf, and Housing Finance Banks.<sup>22</sup> Similarly, on December 1, 2014, court-annexed mediation will begin in several magisterial districts across South Africa. If a party is interested in having his or her case heard by a mediator, the party must, either before or after the issuance of a summons, request that the court clerk invite the other party to a free conference where the possibility of mediation is discussed. If both parties agree, then they may begin formal mediation. If the mediation process is unsuccessful, the parties may resume their court case. Mediation does not compromise the parties' rights or the merits of their positions.<sup>23</sup>

Sovereign states were not the only entities that increased opportunities for mediation in 2014. The World Trade Organization's ("WTO") Sanitary and Phytosanitary Committee also added a mediation mechanism. This new mediation scheme—which hears disputes pertaining to food safety and animal and plant health—is designed to alleviate the perceived flaws with the prior dispute resolution process. Previously, WTO members with a disagreement had to raise it with the Committee before they could initiate the WTO's more formal dispute resolution mechanisms. However, disagreements brought before the Committee became politicized where the recommended resolution was based more on peer pressure than the merits. By putting the dispute before a mediator, the Committee's members hoped to address this problem. The mediation is voluntary, not legally binding, and it can be either confidential or public.<sup>24</sup>

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21. Shyama Krishna Kumar, *Mediation: A Big Success*, NEW INDIA EXPRESS (Aug. 4, 2014) <http://www.newindianexpress.com/cities/bangalore/Mediation-a-big-success/2014/08/04/article2364109.ece>.

22. Lola Okulo, *Banks Eye Mediation to Settle Loan Cases*, THE STAR ONLINE (July 11, 2014), <http://www.the-star.co.ke/news/article-176184/banks-eye-mediation-settle-loan-cases>.

23. Jacques Joubert, *Mediation Will Get Its Foot In A South African Door*, MEDIATE.COM (October 2014), <http://www.mediate.com/articles/JoubertJ9.cfm>.

24. Official Press Release, World Trade Organization, Steps Officially Agreed for Mediating Food Safety, Animal-Plant Health Friction, *available at* [http://www.wto.org/english/news\\_e/news14\\_e/sps\\_10sep14\\_e.htm](http://www.wto.org/english/news_e/news14_e/sps_10sep14_e.htm).

## Corporate Social Responsibility

UCHE EWELUKWA, SJD (HARVARD)\*

### I. Introduction

This article reviews important developments in 2014 in the field of corporate social responsibility as well as the field of business and human rights. Many of the developments in 2014 revolved around the *UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (the Guiding Principles).<sup>1</sup> In 2005, the United Nations Secretary General appointed Professor John Ruggie to serve as the Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises (SRSG).<sup>2</sup> In 2008, Ruggie submitted a *Framework for Business and Human Rights* (the UN Framework) to guide thinking about the relationship between business and human rights.<sup>3</sup> In the UN Framework, Ruggie observed that the root cause of the business and human rights predicament today “lies in the governance gaps created by globalization-between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.”<sup>4</sup> To Ruggie, these governance gaps “provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”<sup>5</sup> “How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge,” Ruggie concluded.<sup>6</sup> Noting that the business and human rights debate “currently lacks an authoritative focal point”<sup>7</sup> and that “claims and counter-claims proliferate”

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1. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*]

2. H. R. Comm'n Res. 2005/69 (Apr. 20, 2005), available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-69.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc).

3. *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 Apr 2008 [hereinafter “UN Framework Report”]. A/HRC/RES/8/7, 18 June 2008.

4. *Id.* at para. 3.

5. *Id.*

6. *Id.*

7. *Id.* at para. 5.



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erate, initiatives abound, and yet no effort reaches significant scale,”<sup>8</sup> Ruggie set out to identify a workable framework to guide understanding of the business and human rights linkages. Essentially, the UN Framework which “rests on differentiated but complementary responsibilities,”<sup>9</sup> comprises of three core principles: (1) “the State duty to protect against human rights abuses by third parties, including business;”<sup>10</sup> (2) “the corporate responsibility to respect human rights;”<sup>11</sup> and (3) “the need for more effective access to remedies.”<sup>12</sup> In June 2011, Ruggie presented the *Guiding Principles* for consideration by the Human Rights Council.<sup>13</sup> On 6 July 2011, the Human Rights Council unanimously endorsed the Guiding Principles.<sup>14</sup>

2014 saw much action by governments, corporations, industry groups and international organizations aimed at implementing the Guiding Principles. First, several countries (e.g. Denmark, Spain and Canada) announced national action plans aimed at implementing the Guiding Principles, and others (e.g. the United States) announced plans to implement specific aspects of the Guiding Principles. Second, several courts, tribunals and other grievance mechanisms issued decisions that bear, directly or indirectly, on the business and human rights linkage an indication that that the third principle in the UN Framework—“the need for more effective access to remedies” is becoming a strong focal point for action. Finally, 2014 saw several bar associations take concrete steps to either endorse the Guiding Principles and to offer guidance to lawyers and law firms on how to implement them.

## II. Normative Developments—National, Regional, and International

### A. INTERNATIONAL DEVELOPMENTS

#### 1. *The Committee on World Food Security*—The Principles for Responsible Investment in Agriculture and Food Systems

On October 15, 2014, at its forty-first session, the Committee on World Food Security endorsed and released the *Principles for Responsible Investment in Agriculture and Food Systems* (“Principles”).<sup>15</sup> The stated objective of the Principles is “to promote responsible investment in agriculture and food systems that contribute to food security and nutrition, thus supporting the progressive realization of the right to adequate food in the context of national food security.”<sup>16</sup> The purposes of the Principles are three-fold: (1) “[a]ddress the

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8. *Id.*

9. *Id.* at para. 9.

10. *Id.*

11. *Id.*

12. *Id.*

13. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and “*Protect, Respect and Remedy*” Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

14. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

15. Committee on World Food Security, *Principles for Responsible Investment in Agriculture and Food Systems*, CFS 2014/41/4 Rev.1.

16. *Id.* at para. 10.

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core elements of what makes investment in agriculture and food systems responsible;<sup>17</sup> (2) “[i]dentify who the key stakeholders are, and their respective roles and responsibilities with respect to responsible investment in agriculture and food systems;”<sup>18</sup> and (3) “[s]erve as a framework to guide the actions of all stakeholders engaged in agriculture and food systems by defining Principles which can promote much needed responsible investment, enhance livelihoods, and guard against and mitigate risks to food security and nutrition.”<sup>19</sup> The Principles take into account and build on existing guiding frameworks such as the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods, and Resources* and the *Voluntary Guidelines on the Progressive Realization of the Rights to Adequate Food in the Context of National Food Security*.

The Principles is in three parts: Introduction; The Principles; and Roles and Responsibility of Stakeholders. In all, ten principles are laid out in the document. Principle 1: Contribute to food security and nutrition; Principle 2: Contribute to sustainable and inclusive economic development and the eradication of poverty; Principle 3: Foster gender equality and women’s empowerment; Principle 4: Engage and empower youth; Principle 5: Respect tenure of land, fisheries, and forests and access to water; Principle 6: Conserve and sustainably manage natural resources, increase resilience, and reduce disaster risks; Principle 7: Respect cultural heritage and traditional knowledge, and support diversity and innovation; Principle 8: Promote safe and healthy agriculture and food systems; Principle 9: Incorporate inclusive and transparent governance structures, processes, and grievance mechanisms; and Principle 10: Assess and address impacts and promote accountability.

The Principles encourages business enterprises involved in agriculture and food systems, to “inform and communicate with other stakeholders, conduct due diligence before engaging in new arrangements, conduct equitable and transparent transactions, and support efforts to track the supply chain.”<sup>20</sup> Processors, retailers, distributors, input suppliers, and marketers are encouraged “to inform and educate consumers about the sustainability of products and services and respect national safety and consumer protection regulations.”<sup>21</sup> Furthermore, enterprises involved in the marketing of food products are encouraged “to promote the consumption of food which is balanced, safe, nutritious, diverse, and culturally acceptable, which in the context of this document is understood as food that corresponds to individual and collective consumer demand and preferences, in line with national and international law, as applicable.”<sup>22</sup>

The Principles also speaks to financing institutions, donors, foundations, and funds encouraging them “to apply the Principles when formulating their policies for loans and grants, in the articulation of country investment portfolios and in co-financing with other partners”<sup>23</sup> and to “take appropriate measures so that their support to investors does not lead to violations of human and legitimate tenure rights, and is in line with the Principles.”<sup>24</sup> Financial institutions are specifically encouraged “to develop innovative financial

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17. *Id.* at para. 11(1).

18. *Id.* at para. 11(2).

19. *Id.* at para. 11(3).

20. *Id.* at para. 51.

21. *Id.*

22. *Id.*

23. *Id.* at para. 45.

24. *Id.*

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mechanisms and insurance tools in support of investment in agriculture, especially appropriate solutions for smallholders, including those that are family farmers, that consider a long-term development perspective.”<sup>25</sup>

Although global in scope and developed to be universally applicable, the long-term impact of the Principles is not clear. The Principles are non-binding. The multi-stakeholder, holistic and consensus building approach to the development of the Principles may or may not foster global ownership and application. Much will depend on how widely the Principles are disseminated and the willingness of business enterprises involved in agriculture and food systems to embrace and apply them. Much will also depend on the extent to which other stakeholders involved in, benefitting from, or affected by investment in agriculture and food systems including States, smallholders and other organizations, communities, and civil society organizations, use the Principles.

The relationship between the Principles and bilateral investment treaties (BITs) and other international investment agreements (IIAs) is not entirely clear. Without more, the Principles do not override or displace the protection foreign investors typically enjoy under standard BITs and IIAs. Whether and how to reform the international investment law architecture to make it more sensitive and responsive to human rights and sustainable development goals and objectives thus remains a major challenge today.

2. *The United Nations Global Compact: Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group on 20 February 2014*

On 20 February 2014, the *United Nations Global Compact Human Rights and Labour Working Group* (Working Group) endorsed a *Good Practice Note on the Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent* (Good Practice Note).<sup>26</sup> Typically, Good Practice Notes of the Working group do not highlight specific practices of individual companies, but rather seek to identify general approaches that have been recognized by a number of companies and stakeholders as being good for business and good for human rights. The Good Practice Note *on the Indigenous Peoples' Rights* is in seven parts: Executive Summary (Part I); Human Rights Standard (Part II); The Business Case for FPIC (Part III); Challenges and Pitfalls (Part IV); Current Good Practice (Part V); Emerging Practices (Part VI) and Conclusion (Part VII). In Part III, the Good Practice Note *on the Indigenous Peoples' Rights* identifies four arguments for why businesses should respect the right to FPIC: gaining a social license to operate; avoiding reputational risks; avoiding legal risks; and engaging with marginalized groups.

Because companies have historically faced significant challenges when managing their engagement and interaction with indigenous peoples, this Good Practice Note is particularly timely and relevant. Across the globe, accounts of conflicts between corporations and indigenous people are growing.<sup>27</sup> The long-term impact of the Good Practice Note

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25. *Id.*

26. UNITED NATIONS GLOBAL COMPACT, INDIGENOUS PEOPLES' RIGHTS AND THE ROLE OF FREE, PRIOR AND INFORMED CONSENT—A GOOD PRACTICE NOTE ENDORSED BY THE UNITED NATIONS GLOBAL COMPACT HUMAN RIGHTS AND LABOUR WORKING GROUP (2014) (hereinafter “Good Practice Note”).

27. *Free, Prior and Informed Consent*, FOREST PEOPLES PROGRAMME, <http://www.forestpeoples.org/guiding-principles/free-prior-and-informed-consent-fpic> (last visited Mar. 10, 2015).

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is not clear. The Good Practice Note is not a treaty and is thus not binding. While lacking precise legal status under international law, the Good Practice Note will undoubtedly form part of “soft” international law that may increasingly shape corporate practice around the world.

Significantly, the Good Practice Note avoids the thorny question about the legal status of the FPIC and does not take a definitive viewpoint on the issue.<sup>28</sup>

**B. COUNTRY-LEVEL DEVELOPMENTS**

*1. United States*

*a. The U.S. Plans to Develop a National Action Plan to Promote Responsible Business Conduct*

On September 24, 2014, President Obama announced that the U.S. Government would develop a national action plan to promote responsible business conduct. The announcement was made at a meeting of the Open Government Partnership at the United Nations. According to a fact sheet released by the White House: “The United States will develop a National Action Plan to promote and incentivize responsible business conduct, including with respect to transparency and anticorruption, consistent with the U.N. Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises.”<sup>29</sup> The United States also plans to “continue to work with key allies and partners, including in the Open Government Partnership, the G-7, the G-20, and the OECD Working Group on Bribery, to improve transparency, integrity, and accountability worldwide”<sup>30</sup> and “will continue [its] support to promote the important role of civil society in providing accountability, including through non-government organizations, a robust and independent media, and the private sector.”<sup>31</sup>

*b. Department of Treasury - Customer Due Diligence Requirements for Financial Institutions*

On August 4, 2014, the Financial Crimes Enforcement Network (FinCEN) at the Department of the Treasury published in the Federal Register a notice of proposed rules under the Bank Secrecy Act (BSA)<sup>32</sup> to clarify and strengthen customer due diligence (CDD) obligations for banks; brokers or dealers in securities; mutual funds; and future commission merchants.<sup>33</sup> Written comments on the Notice of Proposed Rulemaking (NPRM) were due by October 3, 2014. According to FinCEN, more explicit rules with respect to CDD “are necessary to clarify and strengthen CDD within the BSA regime.”<sup>34</sup>

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28. Good Practice Note, *supra* note 26, at 3.

29. Fact Sheet: The U.S. Global Anticorruption Agenda, WHITEHOUSE.GOV, (Sep. 24, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>.

30. *Id.*

31. *Id.*

32. The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 18 U.S.C. 1956, 1957, and 1960, and 31 U.S.C. 5311–5314 and 5316–5332 and notes thereto, with implementing regulations at 31 CFR chapter X. See 31 CFR 1010.100(e).

33. Prop. Treas. Reg., 79 Fed. Reg. 45151 (Aug. 4, 2014), available at [http://www.fincen.gov/statutes\\_regs/files/CDD-NPRM-Final.pdf](http://www.fincen.gov/statutes_regs/files/CDD-NPRM-Final.pdf).

34. *Id.*

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Specifically, requiring financial institutions to perform effective CDD so that they know their customers—both who they are and what transactions they conduct—is a critical aspect of combating all forms of illicit financial activity, from terrorist financing and sanctions evasion to more traditional financial crimes, including money laundering, fraud, and tax evasion.<sup>35</sup>

The proposed rules will deal specifically with six elements that according to FinCEN comprise the minimum standard of CDD: (i) Identifying and verifying the identity of customers; (ii) identifying and verifying the identity of beneficial owners of legal entity customers (i.e., the natural persons who own or control legal entities); (iii) understanding the nature and purpose of customer relationships; and (iv) conducting ongoing monitoring to maintain and update customer information and to identify and report suspicious transactions.

c. U.S. Court of Appeals—D.C. Circuit and the Conflict Minerals Rules

On April 14, 2014, in the case of *Nat'l Assoc. of Manufacturers v. SEC*,<sup>36</sup> the United States Court of Appeals for the District of Columbia Circuit issued its decision on the legal challenge to the Conflict Minerals Rules which the Securities and Exchange Commission (SEC) promulgated in 2012. The Conflict Minerals Rules<sup>37</sup> were adopted pursuant to Section 13(p) of the Exchange Act.<sup>38</sup> The Conflict Minerals Rules affects companies who determine that any of the four conflict minerals - tin, gold, tungsten or tantalum - are necessary to the functionality or production of products that they manufacture and originate from the Democratic Republic of the Congo or specified adjoining countries.<sup>39</sup> Section 13(p) required affected issuers to submit a report to the SEC that *inter alia* includes a description of the products manufactured or contracted to be manufactured that are not “DRC conflict free,” the facilities used to process the conflict mineral, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin.<sup>40</sup>

The U.S. Chamber of Commerce and some industry groups brought suit in 2012 against the SEC seeking a review of the Conflict Minerals Rule (Exchange Act Rule 13p-1 and Form SD) and Section 1502. While upholding the conflict minerals rules against most of the challenges, the DC Circuit invalidated, on First Amendment grounds, some portions of the portion of the rules.

In a *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule* (Statement), Keith F. Higgins, Director, SEC Division of Corporation Finance, stated:

The Form SD, and any related Conflict Minerals Report, should comply with and address those portions of Rule 13p-1 and Form SD that the Court upheld. Thus, companies that do not need to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook. For those companies

35. *Id.*

36. *Nat'l Assoc. of Manufacturers v. SEC*, No. 13-5252 (D.C. Cir. April 14, 2014).

37. *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

38. Securities Exchange Act of 1934, 15 U.S.C. § 78a (2015).

39. *Fact Sheet: Disclosing the Use of Conflict Minerals*, U.S. SEC. AND EX. COMM'N (Jul. 29, 2014), <http://www.sec.gov/News/Article/Detail/Article/1365171562058#.VH8Gm3TTnoo>.

40. *Conflicts Minerals*, *supra* note 37.

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that are required to file a Conflict Minerals Report, the report should include a description of the due diligence that the company undertook. If the company has products that fall within the scope of Items 1.01(c)(2) or 1.01(c)(2)(i) of Form SD, it would not have to identify the products as “DRC conflict undeterminable” or “not found to be ‘DRC conflict free,’” but should disclose, for those products, the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin.<sup>41</sup>

According to the Statement:

No company is required to describe its products as “DRC conflict free,” having “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable.” If a company voluntarily elects to describe any of its products as “DRC conflict free” in its Conflict Minerals Report, it would be permitted to do so provided it had obtained an independent private sector audit (IPSA) as required by the rule. Pending further action, an IPSA will not be required unless a company voluntarily elects to describe a product as “DRC conflict free” in its Conflict Minerals Report.<sup>42</sup>

## 2. *Canada*

On November 14, 2014, Canada released its enhanced Corporate Social Responsibility (CSR) Strategy, “*Doing Business the Canadian Way: Advancing Corporate Social Responsibility in Canada’s Extractive Sector Abroad* (The Enhanced Strategy).”<sup>43</sup> The enhanced CSR Strategy is a follow-up to Canada’s first CSR strategy, “*Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad*” which was launched in 2009. The Enhanced Strategy “makes clear the Government’s expectation that Canadian extractive sector companies reflect Canadian values in all their activities abroad.”<sup>44</sup> The Enhanced Strategy also offers an overview of Canada’s approach to promoting and advancing CSR abroad.<sup>45</sup> In the Enhanced Strategy, the Canadian Government declare that it “will continue to be involved in the development, promotion and dissemination of widely-recognized international CSR performance and reporting guidelines, with the expectation that Canadian companies will align their practices as applicable.”<sup>46</sup> The Canadian Government also commit to promote several core international guidance to Canadian extractive companies operating abroad including: OECD Guidelines for Multinational Enterprises (MNEs), United Nations (UN) Guiding Principles, Voluntary Principles on Security and Human Rights (VPs), International Finance Corporation’s (IFC’s) Performance Standards on Social & Environmental Sustainability, OECD

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41. *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*, U.S. SEC. AND EX. COMM’N (Apr. 29, 2014), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370541681994#.VH8DunTTnoo>.

42. *Id.*

43. Press Release, Foreign Affairs, Trade and Development Canada, Harper Government Announces Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad, (Nov. 14, 2014), available at <http://www.international.gc.ca/media/aff/news-communiques/2014/11/14a.aspx?lang=eng>

44. *Canada’s Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad*, FOREIGN AFFAIRS, TRADE AND DEVELOPMENT CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (last visited Mar. 10, 2015).

45. *Id.*

46. *Id.*

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Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and Global Reporting Initiative (GRI). As part of the enhanced strategy, the Canadian Government plans to ensure that Canadian missions abroad “are given increased CSR-related training and materials to provide support to companies that are looking for opportunities to integrate corporate social responsibility into their practices.”<sup>47</sup>

3. *Denmark*

In March 2014, the Danish Government released the *Danish National Action Plan—Implementation of the UN Guiding Principles on Business and Human Rights* (Danish NPA).<sup>48</sup> Based largely on the recommendations from the Danish Council for Corporate Social Responsibility, the Danish NPA is a follow-up to the second National Action Plan for CSR, which was released in 2012. In the Preface, the Danish Government expresses its ambition regarding CSR that Denmark be “a global front-runner by ensuring that all players in society demonstrate social responsibility and create value both for their own organization and the surrounding society.” In publishing the National Program of Action, the intention of the Danish Government is “to give a complete overview on the implementation of UN Guiding Principles on Business and Human Rights in Denmark anno 2014.” Overall, the initiatives in the Danish NPA “are focused on preventing and mitigating adverse impacts on human rights by Danish companies at home and abroad.”<sup>49</sup>

The Danish NPA is divided into five sections structured around the three pillars in the UN Framework and the UN Guiding Principles: Introduction (Section 1), The State Duty to Protect Human Rights (Section 2), the Corporate Responsibility to Respect Human Rights (Section 3), Access to Remedy (Section 4) and UNPGs in Denmark Looking Ahead (Section 5). Appendix 1 is titled “Overview of the Implementation of the State Duty to Protect” and Appendix 2 is titled “Overview of the Implementation of the Access to Remedy.”

4. *Italy—The Italian Action Plan on the UN Guiding Principles*

On 20 March 2014, the Italian Government published *The Foundations of the Italian Action Plan on the United Nations “Guiding Principles on Business and Human Rights”*.<sup>50</sup> The 84-page document focuses primarily on first Pillar (The Duty of the State to Protect Human Rights) and the third Pillar (Access to Remedy Measures) of the UN Framework and the UN Guiding Principles. The document notes that “in Italy a role is emerging in the Public Administration which intends to promote a virtuous connection between company profit and human rights protection.”<sup>51</sup> Further, the document concludes that “it can

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47. *Id.*

48. DANISH NATIONAL ACTION PLAN—IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2014).

49. *Id.* at 2.

50. THE FOUNDATIONS OF THE ITALIAN ACTION PLAN ON THE UNITED NATIONS “GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS” (2014).

51. *Id.*, at 76.

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be said that the Government believes that what favors human rights is good for the enterprise and for the affirmation of the Country abroad.”<sup>52</sup>

### III. Grievance Mechanisms

It is increasingly recognized that effective grievance mechanisms “play an important role in the State duty to protect, in both its legal and policy dimensions, as well as in the corporate responsibility to respect.”<sup>53</sup> Guiding Principle 25 states that: “As part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure . . . . That when such abuses occur within their territory and/or their jurisdiction those affected have access to effective remedy.”<sup>54</sup> As part of their responsibility to respect human rights, businesses are required to provide “[p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”<sup>55</sup> UN Guiding Principle 22 stipulates that “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.” Grievance mechanisms (GMs) can exist at several and all levels in the supply chain including the project, company, industry, multi-industry, national, regional, and international levels. Examples of GMs at the international level are: the World Bank’s Inspection Panel; the International Finance Corporation/Multilateral Investment Guarantee Agency’s Compliance Advisor Ombudsman; and the National Contact Points established under the OECD Guidelines for Multinational Enterprises. Example of regional level GMs include: the African Development Bank’s Independent Review Mechanism;<sup>56</sup> the Asian Development Bank’s Accountability Mechanism;<sup>57</sup> the Inter-American Development Bank’s Independent Consultation and Investigation Mechanism;<sup>58</sup> and the European Bank for Reconstruction and Development’s Project Complaint Mechanism.<sup>59</sup> An example of a GM at the sectoral level is the Round Table on Sustainable Palm Oil Complaint System. Whatever the level, it is important that GMs are effective. Guiding Principle 31 sets forth seven effectiveness criteria for non-judicial GMs, both State-based and non-State-based. According to Guiding Principle 31, GMs should be: Legitimate; Accessible; Predictable; Equitable; Transparent; Rights Compatible; and a Source of Continuous Learning.

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52. *Id.*

53. UN Framework, *supra* note 3, at para. 82.

54. UN Guiding Principles, *supra* note 1.

55. *Id.*, at para. 15(3).

56. See *Independent Review Mechanism*, AFRICAN DEVELOPMENT BANK GROUP, <http://www.afdb.org/en/about-us/structure/independent-review-mechanism-irm> (last visited Mar. 10, 2015).

57. *Accountability Mechanism*, ASIAN DEVELOPMENT BANK <http://www.adb.org/site/accountability-mechanism/main> (last visited Mar. 10, 2015).

58. *Inter-American Development Bank’s Independent Consultation and Investigation Mechanism*, INTER-AMERICAN DEVELOPMENT BANK, <http://grievancemechanisms.org/grievance-mechanisms/regional-multilateral-development-banks/inter-american-development-bank2019s-independent-consultation-and-investigation-mechanism> (last visited Mar. 10, 2015).

59. *The European Bank for Reconstruction and Development’s Project Complaints Mechanism*, EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, <http://www.ebrd.com/pages/project/pcm.shtml> (last visited Mar. 10, 2015).

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A. THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

1. *The “Los Chancas” Mining Project and the Southern Peru Copper Mining Corporation-Peru*

On 24 July 2014, the Inter-American Commission of Human Rights (“the Commission” or “the IACHR”) ruled admissible a 2003 petition that was lodged by the National Coordinator of Peruvian Communities Affected by Mining (“the petitioner” or “CONA-CAMI”) on behalf of 54 inhabitants of Quishque-Tapayrihua, in the district of Tapayrihua, Apurímac department (“the alleged victims”) in Peru.<sup>60</sup> In the petition, the petitioner alleged that the Republic of Peru (“Peru,” or “the State”) violated several provisions of the American Convention on Human Rights (“the American Convention” or “the Convention”) when it granted Southern Peru Copper (SPC), a foreign mining corporation, a concession to prospect and mine on the lands traditionally inhabited by the Quishque community, causing serious harm to the ecosystem and to their lifestyle, which depends on those same lands. The petition alleged that SPC has been exploring and prospecting on Quishque community lands with the authorization of the State but absent any prior consultations with the affected communities.<sup>61</sup> The petition further alleged that SPC’s prospecting and mining activities have harmed the community’s access to drinking water and other natural resources and have destroyed crops, schools, and archaeological sites, in violation of the right to life, the right to humane treatment, the right to freedom of expression, the right to freedom of association, the rights of the family, the right to property, the right to freedom of movement, the right of equality before the law, and the right to judicial protection, as enshrined in Articles 4, 5, 13, 16, 17, 21, 22, 24, and 25 of the American Convention.<sup>62</sup> Peru requested that the petition be ruled inadmissible on grounds that domestic remedies have not been exhausted as required by Article 46(1)(a) of the Convention.

The Commission examined the parties’ positions in light of the admissibility requirements set out in Articles 46 and 47 of the American Convention. The Commission started by examining the different kinds of remedies the petitioner pursued in order to stop the prospecting and extractive activities, to secure compensation for the alleged damage caused, and to establish the criminal responsibility of the mining project’s directors. The Commission reiterated its position that “the requirement of exhausting domestic remedies does not mean that the alleged victims are obliged to exhaust every remedy available to them.”<sup>63</sup> According to the Commission, “the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means.”<sup>64</sup> To the Commission, “if the alleged victim raised the issue by way of any of the valid and suitable options under domestic law, and the State had the opportunity to correct the situation under its jurisdiction, the purpose of the international provision must be considered to have been

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60. IACHR, Report No. 62/14, Petition 1216-03 (July 24, 2014).

61. *Id.* at para. 2.

62. *Id.*

63. *Id.* at para. 30.

64. *Id.*

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accomplished.”<sup>65</sup> In the case at hand, the Commission noted that the alleged victims sought to halt the prospecting and mining activities through administrative and constitutional channels and to secure compensation, exhausting the civil and criminal remedies available. Ultimately, the Commission ruled the petition admissible concluding that although the alleged victims could have continued to exhaust other judicial channels, “they gave the State the opportunity to hear the claims made by the community and to remedy the alleged human rights violations,” and thus met the requirements of Article 46(1)(a) of the American Convention.

2. *The Marlin Mine I - Guatemala*

On April 3, 2014, the IACHR ruled admissible a petition lodged on December 11, 2007, by 13 communities of the Sipakepense Mayan people in the municipality of Sipacapa, Department of San Marcos (“petitioners”) against the State of Guatemala (“Guatemala,” “State,” or “Guatemalan State”).<sup>66</sup> Specifically, the petitioners alleged that the State authorized the Marlin Mine I project without prior, free, and informed consultation with the affected indigenous communities. Furthermore, the petitioners alleged that Guatemala did not take into account the negative outcome of a consultation that the communities themselves called. Specifically, complainants accused Guatemala of violating Articles 8 (right to a fair trial), 9 (freedom from ex post facto laws), 11 (right to privacy), 13 (freedom of thought and expression), 19 (rights of the child), 21 (right to property), 23 (right to participate in government), 24 (right to equal protection), 25 (right to judicial protection), and 26 (progressive development) of the American Convention, in relation to Articles 1.1 (obligation to respect rights) and 2 (obligation to adopt domestic measures) of the said treaty. Guatemala filed preliminary objections on the grounds *inter alia* of failure to exhaust domestic remedies and *res judicata*. The Commission examined the argument of the parties and concluded that “the IACHR is of the view that Guatemala did not provide the alleged victims with a remedy enabling them to protect the rights that were allegedly violated, which, pursuant to Article 46.2.a of the American Convention, is one of the exceptions to the exhaustion of domestic remedies rule.”<sup>67</sup> Significantly, the Commission noted that Article 46(2) of the American Convention, by its nature and purpose, “is a norm with autonomous content vis-à-vis the substantive norms of the Convention.” Given its autonomous nature, “the determination as to whether the exceptions to the exhaustion of domestic remedies rule are applicable to the case at hand should be made prior to, and separately from, the analysis of the merits, since it relies on a standard of assessment different from that used to determine the violation of . . . the Convention.”<sup>68</sup>

The *res judicata* argument arose because Article 46.1.c of the American Convention stipulates as a condition for admissibility that a case “is not pending in any other international proceeding for settlement.” Further, Article 47(d) of the American Convention

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65. *Id.*

66. IACHR, Report No. 20/14, Petition 1566-07, Admissibility, Communities of the Sipakepense and Mam Mayan People of the Municipalities of Sipacapa and San Miguel Ixtahuacán, Guatemala (April 3, 2014). Although the petition was originally filed by the affected community, subsequently, the municipal mayors of Sipacapa and San Miguel Ixtahuacán asked to join as petitioners on behalf of the communities of the Sipakepense Mayan people and the communities of the Mam Mayan people in their respective municipalities.

67. *Id.* at para. 41.

68. *Id.*

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prohibits the admission of any petition that is “substantially the same as any petition or communication previously examined by it or another international body.” Guatemala’s res judicata objection was based on a May 8, 2007, decision of the Guatemala Constitutional Court. The Commission rejected the objection because it was “based on the existence of a decision adopted by a domestic body whereas the requirement under the Convention refers to “international res judicata,” which assumes that the subject of the petition has been or is being considered by an ‘international body.’”<sup>69</sup>

**B. OECD NATIONAL CONTACT POINTS**

The *Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises* (Guidelines) are voluntary principles for responsible business conduct in areas including employment, human rights and the environment. Each OECD member government is required to maintain a National Contact Point (NCP) to promote the Guidelines and to consider complaints that multinational enterprises (MNEs) based in their country or operating there, have breached the Guidelines.<sup>70</sup> Complaints (called Specific Instance) can be lodged with any NCP.<sup>71</sup> The OECD complaint process is broadly divided into three key stages: Initial Assessment, Mediation, and Issuance of a Final Statement. First, an NCP with which a complaint is lodged has to make an initial assessment of the complaint to see if it merits further investigation.<sup>72</sup> Second, where a complaint is deemed to merit further examination, an NCP is required to “offer good offices to help the parties involved to resolve the issues.”<sup>73</sup> In addition to seeking advice from relevant authorities, and/or representatives of the business community, employee organizations and NGOs, the NCP is to “[o]ffer, and . . . and facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.”<sup>74</sup> Third, at the conclusion of the procedures and after consultation with the parties involved, NCPs are expected to make the results of the procedures publicly available, by issuing a statement when the NCP decides that the issues raised do not merit further consideration,<sup>75</sup> by issuing a report when the parties have reached agreement on the issues raised, or by issuing a statement when no agreement is reached or when a party is unwilling to participate in the procedures.

1. *WWF International v. Soco International PLC.*: UK NCP (February 2014)

This case relates to the oil exploration operations of Soco International plc. (SOCO) in an area of the Virungu National Park in the Democratic Republic of the Congo (DRC.). In October 2013, the World Wildlife Federation (WWF) filed a complaint with the United Kingdom NCP alleging that SOCO’s oil exploration activity in the Virungu National Park, a UNESCO-designated world heritage site, violated international agreements and domestic law and risked adverse impact on local environment and local communities

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69. *Id.* at para. 44.

70. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION 68 (2011).

71. *Id.* at 72.

72. *Id.*

73. *Id.*

74. *Id.* at 73.

75. *Id.*

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and thus violated several provisions of the OECD Guidelines including those pertaining to human rights and the environment.

In February 2014, the United Kingdom NCP published its Initial Assessment in connection with the complaint essentially deciding to accept some of the issues raised in the complaint for further investigation.<sup>76</sup> On June 11, 2014, as a result of the work of a mediator appointed by the UK NCP, an agreement was reached between the parties. In the Joint Statement by the parties, SOCO committed “not to undertake or commission any exploratory or other drilling within Virungu National Park unless UNESCO and the DRC government agree that such activities are not incompatible with its World Heritage status.”<sup>77</sup> SOCO also committed “not to conduct any operations in any other World Heritage site,” and promised to “Seek to ensure that any current or future operations in buffer zones adjacent to World Heritage sites, as defined by the national government and UNESCO, do not jeopardise the Outstanding Universal Value for which these sites are listed.”<sup>78</sup>

The WWF-SOCO agreement is significant because it is the first time a company has agreed to halt operations during NCP-facilitated mediation. The agreement which led to SOCO essentially abandoning its oil exploration plans in Virungu National Park been hailed one of conservationists’ “greatest successes in recent years.”<sup>79</sup> With the release of a Final Statement on July 15, 2014, the UK NCP concluded the process and closed the complaint.<sup>80</sup> In the Final Statement, the UK NCP congratulated both parties for their engagement with the NCP process and their efforts in reaching an agreement.

2. *Danish NCP—A Statement on the Retention of Employees’ Identification Papers*

On 14 August 2014, the Danish Mediation and Complaints-handling Institution for Responsible Business Conduct (“Institution”) released a *Statement on Retention of Employees’ Identification Papers* (“Statement”).<sup>81</sup> In the Statement, the Danish NCP emphasized that “it is a gross violation of the OECD Guidelines to retain employees’ passports.”<sup>82</sup> While recognizing that an employer may have legitimate reasons to require documentation (e.g. in order to pay salary in advance), the Statement stressed that that “this does not justify that a company can withhold employees’ identification papers.” Citing Article 8 of the International Covenant on Civil and Political rights (“no one shall be required to perform forced or compulsory labor”) and Article 12 of the same treaty (“everyone law-

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76. The UK National Contact Point, Initial Assessment by the UK National Contact Point for The OECD Guidelines for Multinational Enterprises—Complaint from WWF International Against SOCO international PLC (February 2014), available at <https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-against-soco-international-plc>.

77. Joint Statement by SOCO International PLC (‘SOCO’) and WWF. 11 June 2014.

78. *Id.*

79. David Vidal, *Soco halts oil exploration in Africa’s Virunga national park*, THE GUARDIAN (June 11, 2014), <http://www.theguardian.com/environment/2014/jun/11/soco-oil-virunga-national-park-congo-wwf>

80. *Final Statement Following Agreement Reached in Complaint from WWF International Against SOCO International PLC*, GOV.UK (July 2014), <https://www.gov.uk/government/publications/uk-ncp-final-statement-wwf-international-and-soco-international-plc-agreement-reached>

81. *Statement on Retention of Employees’ Identification Papers*, DANISH MEDIATION AND COMPLAINTS-HANDLING INSTITUTION FOR RESPONSIBLE BUSINESS CONDUCT (August 14, 2014), [http://businessconduct.dk/file/507301/aug\\_14\\_2014\\_general\\_statement.pdf](http://businessconduct.dk/file/507301/aug_14_2014_general_statement.pdf).

82. *Id.*

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fully within the territory of a State shall, within that have the right to move freely and freedom to choose his residence”), the Statement noted that retention of employees’ identification papers can create situations where these two rights are violated.

3. *Norwegian Support Committee for Western Sahara (NSCWS) v. Sjøvik AS*

On July 2, 2014, the Norwegian Support Committee for Western Sahara (NSCWS) and the Norwegian enterprise group Sjøvik AS, signed a joint statement in relation to a December 5, 2011 complaint that NSCWS filed with NCP Norway against Sjøvik AS.<sup>83</sup> In the complaint, NSCWS alleged that Sjøvik AS, through its subsidiaries Sjøvik Africa AS and Sjøvik Morocco S.A, breached the Guidelines by operating a fishing vessel and leasing or running a fish processing plant in the Non-Self-Governing Territory of Western Sahara. Specifically, NSCWS accused the company of breaching the human rights provision of the OECD Guidelines by having failed to respect the Sahrawi right to self-determination, including the right to be consulted in relation to the exploitation of natural resources. The Guidelines stipulate in Part IV (Human Rights) that: “Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>84</sup>

In 2013, both sides accepted the offer of Norway NCP to mediate the case. Former Supreme Court Judge Lars Oftedal Broch served as mediator. In the 2013 joint statement, Sjøvik AS expressed its support and respect for the protection of internationally recognized human rights. Both sides agreed that the UN Guiding Principles and human rights chapter in the OECD Guidelines “provide a good platform for efforts relating to human rights and the environment.”<sup>85</sup> According to the Joint Statement:

If the *de facto* authorities for any reason or at any time are prevented due to practical or legal concerns to fulfil their responsibility to protect, companies bear a particular responsibility for complying with international norms on the exploitation of resources and respect for human rights.<sup>86</sup>

While NSCWS took the position that Morocco “does not exercise internationally recognised sovereignty over Western Sahara,”<sup>87</sup> Sjøvik AS declined to take a position on the status of Western Sahara under international law. However, both sides agreed that the Norwegian authorities have not given a clear and consistent advice to businesses on whether business activity can be carried out in Western Sahara and what kinds of activities are permitted. Noting that states “should clearly express their expectations that businesses are to respect human rights in all their operations,”<sup>88</sup> both sides recommended that Norwegian authorities “give unambiguous advice to businesses operating in conflict areas.”<sup>89</sup>

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83. See JOINT STATEMENT BETWEEN THE NORWEGIAN SUPPORT COMMITTEE FOR WESTERN SAHARA AND SJØVIK AS (July 2, 2013) (hereinafter “Joint Statement”).

84. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011 EDITION, *supra* note 70 at 31.

85. Joint Statement, *supra* note 84, at para. 4(a).

86. *Id.*

87. *Id.* at para. 2(a).

88. *Id.* at para. 3(a).

89. *Id.* at para. 3(b).

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Given that the Parties interpret the information on Western Sahara published on the Government's website differently, they called on the Ministry of Foreign Affairs to "clarify what type of activities are included in the Government's advice and why."<sup>90</sup> According to the Joint Statement, "If the Government's view is that no business activities should be carried out in Western Sahara at all, the Parties request that this is expressed more clearly."<sup>91</sup>

Significantly, the Joint Statement included some major undertakings by Sjøvik AS. First, Sjøvik pledged that it "will carry out an environmental and social impact assessment for its activities in the territory based on the principles set out in the OECD Guidelines and the UN Guiding Principles."<sup>92</sup> Second, Sjøvik AS agreed that the impact assessment report will be published in accordance with chapter III of the OECD Guidelines.<sup>93</sup> Third, Sjøvik AS also agreed that when assessing what is material information concerning activities in Western Sahara, "special account must be taken of the status and vulnerability of the territory."<sup>94</sup> Fourth, Sjøvik AS agreed it will publish codes of conduct particularly those relating to human rights and the environment. Finally, Sjøvik AS also pledged to "maintain an internal grievance mechanism for dealing with both internal and external concerns and suggestions for improvements."<sup>95</sup>

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90. *Id.*

91. *Id.*

92. *Id.* at para. 4(b).

93. *Id.* at para. 4(c).

94. *Id.* at para. 4(d).

95. *Id.* at para. 5(a).

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## **International Intellectual Property Law**

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This article summarizes patent, trademark, domain name, and copyright international law developments in 2014.<sup>1</sup>

### **I. Patents\*\***

#### A. UNITED STATES

On June 30, 2014, the United States Patent and Trademark Office (USPTO) opened a permanent satellite office in Denver in continuation of a post-America Invents Act plan to open a permanent regional office in each continental U.S. time zone.<sup>2</sup> The Rocky Moun-

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\* Susan Brushaber, Reinhardt LLP, Denver, Colorado served as the editor for this 2014 review. Section editors are identified in each section.

1. For developments during 2013, see Melvyn J. Simburg et al., *International Intellectual Property Law*, 48 INT'L LAW. 213 (2014).

\*\* Patents section editor: Robin Fahlberg, Caterpillar, Inc., Dunlap, Illinois. Authors: Allison Cook, Reinhardt LLP, Denver, Colorado (on the United States); Benjamin Liu, The John Marshall Law School, Chicago, Illinois and Sophie Jiang, Howard B. Rockman, P.C., Chicago, Illinois (on China); Daniel Marugg, Carolina Keller Jupitz, Altenburger Ltd., Zurich, Switzerland (on Switzerland); Bruce McDonald, Buchanan, Ingersoll & Rooney, Arlington, Virginia (on Russia); Manish Dhingra, Mrityunjay Kumar, Sameep Vijayvergiya, Dhingra & Singh, Attorneys at Law, Delhi, India (on India); Uche Ewelukwa, University of Arkansas School of Law, Fayetteville, Arkansas (on Africa); and Carlos Eduardo Elizario de Lima, Danneman Siemsen Biger & Ipanema Moreira, Sao Paulo, Brazil (on Brazil). The International Intellectual Property Rights Committee dedicates this contribution to the memory of co-contributor and Committee Vice Chair (Policy) Benjamin Liu, who passed away shortly after it was submitted for editing, on December 2, 2014. He will be sorely missed.

2. Press Release 14-21, USPTO, U.S. Patent and Trademark Office Opens Permanent Satellite Office in Denver, Colorado (June 30, 2014), <http://www.uspto.gov/news/pr/2014/14-21.jsp>.



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tain Satellite Office, which will house 100 examiners and 20 administrative patent judges, is the first such office west of the Mississippi.<sup>3</sup>

The Supreme Court clarified the meaning of the definitiveness requirement in 35 U.S.C. §112 by holding that a patent is invalid for indefiniteness if its claims “fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.”<sup>4</sup> In a decision involving the patentability of software, the Supreme Court affirmed a Federal Circuit holding that implementation of abstract ideas on a computer is not enough to transform the idea into a patentable invention.<sup>5</sup> The Court invalidated Alice Corporation’s patent claims for a computer-implemented electronic escrow service platform, finding that the claims are “drawn to the abstract idea of intermediated settlement,” and thus patent-ineligible under 35 U.S.C. §101.<sup>6</sup>

**B. CHINA**

The State Council published *Several Opinions on Accelerating the Development of Technology and Services Industries*<sup>7</sup> (the Opinions) to support and encourage technology companies to expand their business outside of China. In particular, the State Council encouraged technology and services companies to form associations or leagues concerning technology, patents, and industrial standards in order to inspire innovation. The Opinions also encouraged foreign companies to set up branches or associate with local Chinese companies.

The number of patent lawsuits doubled in 2013 compared to 2006.<sup>8</sup> Seventy-five percent of foreign plaintiffs prevailed compared to 63 percent of domestic plaintiffs.<sup>9</sup> To assist judges of intellectual property cases, China is recruiting technology investigation officers to provide technology opinions to the judiciary.<sup>10</sup>

The country’s Patent Prosecution Highway Pilot Program with the United Kingdom, Iceland, and Sweden became effective on July 1, 2014, and will be in effect through June 30, 2016.<sup>11</sup>

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3. Michelle K. Lee, Deputy Under Secretary of Commerce for IP and USPTO Deputy Director, Denver Opening Remarks (June 30, 2014), [http://www.uspto.gov/news/speeches/2014/lee\\_denveropening.jsp](http://www.uspto.gov/news/speeches/2014/lee_denveropening.jsp); *Denver, Colorado*, U.S. PAT. & TRADEMARK OFF., <http://www.uspto.gov/about-us/uspto-locations/denver-colorado> (last modified Feb. 11, 2015).

4. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2124 (2014).

5. *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014).

6. *Id.* at 2352.

7. Guowuyuan Guanyu Jiakuai Keji Fuwuye Fazhan de Ruogan Yijian (国务院关于加快科技服务业发展的若干意见) [Several Opinions on Accelerating the Development of Technology and Services Industries] (promulgated by the St. Council, Oct. 9, 2014, effective Oct. 9, 2014), [http://www.gov.cn/zhengce/content/2014-10/28/content\\_9173.htm](http://www.gov.cn/zhengce/content/2014-10/28/content_9173.htm) (China).

8. Woguo Zhuanli Shenqingliang Quanjie Dafu Lingxian (我国专利申请量全球大幅领先) [China’s Patent Applications Ranking Top on Numbers World Wide] (promulgated by the St. Intell. Prop. Off. of the P.R.C., Nov. 5, 2014), [http://www.sipo.gov.cn/mtjj/2014/201411/t20141105\\_1027468.html](http://www.sipo.gov.cn/mtjj/2014/201411/t20141105_1027468.html) (China).

9. *Id.*

10. *Zhisibi Chuanquan Fayuan Bushenli Xingshi Anjian* (知识产权法院不受理刑事案件) [Intellectual Property Courts Will Not Hear Criminal Cases], CHINA INVENTION & PAT. (Nov.3, 2014), <http://www.fmyzl.com/index.php?m=content&c=index&a=show&catid=53&id=375> (China).

11. Zhongying, Zhongbing, Zhongrui Zhuanli Shencha Gaosulu Shidian Jiangyu 2014 Nian 7 yue 1 ri qidong (中英·中冰·中瑞专利审查高速路 (PPH) 试点将于2014年7月1日启动) [Britain, Iceland in the Swiss Patent Prosecution Highway (PPH) Pilot Will Start July 1, 2014] (promulgated by the St. Intell. Prop.

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C. SWITZERLAND

In its March 19, 2014, decision (*Duty of the Patent Infringer to Render Profits*),<sup>12</sup> the Swiss Federal Patent Court (FPC) held, consistent with established case law, that the plaintiff in a patent infringement case may claim for the disgorgement of the infringer's profits provided the infringer acted in bad faith.<sup>13</sup> Both Swiss literature and case law instruct that a person acts in bad faith if no inquiries are made despite the existence of doubts or suspicion that a defect of title exists.<sup>14</sup> The FPC held in this particular case that the patent infringer had acted in bad faith in purchasing the infringing products in Taiwan, where it is generally known that intellectual property rights are not respected, without inquiring as to the legitimacy of the intellectual property rights prior to introducing the infringing products to the Swiss market.<sup>15</sup>

D. RUSSIA

Patent practice in Russia, like other legal and political relations, was dominated in 2014 by hostilities in Ukraine and increasing control of the courts by the executive branch.

Russian inventors were increasingly confronted by the requirement to file an application in Russia before seeking protection for an invention abroad. The preference among Russian inventors is to patent an invention in the United States first, if possible, due to the broader scope of claims in U.S. patents. The laws of both countries require an invention to be patented first in that country before protection is sought abroad. In response to a U.S. patent application, however, a "foreign filing license" is automatically issued along with the filing receipt for a U.S. patent application.<sup>16</sup> If a foreign filing license is needed prior to the procurement of the filing receipt, or if a U.S. application is not contemplated, then there is an expedited procedure for issuance of a foreign filing license. In Russia, by contrast, investors reported in 2014 that enforcement of national security interests in sensitive technology appearing in patent applications was dominated by the state security apparatus and accompanied by the exercise of control and sometimes the appropriation of ownership in the invention.

E. BRAZIL

The Brazilian Patent and Trademark Office (BPTO) published Resolution 131/2014 on April 29, 2014, establishing the criteria for a new phase of a pilot program for fast-track examination of "green" inventions.<sup>17</sup> Both normal and Patent Cooperation Treaty (PCT)

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Off. of the P.R.C., June 6, 2014), [http://www.sipo.gov.cn/zscqgz/2014/201406/t20140627\\_972290.html](http://www.sipo.gov.cn/zscqgz/2014/201406/t20140627_972290.html) (China).

12. *WorldConnect AG v. Rusillon*, Tribunal federal da patentes [Federal Patent Court] Mar. 19, 2014, O2013\_007, available at [http://www.patentgericht.ch/fileadmin/entscheide/O2013\\_007\\_Urteil\\_140319.pdf](http://www.patentgericht.ch/fileadmin/entscheide/O2013_007_Urteil_140319.pdf) (Switz.).

13. *Id.* para. 4.3.

14. *Id.*

15. *Id.*

16. 37 C.F.R. § 5.12 (2014).

17. Resolução No. 131, de 19 de Fevereiro de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.2.2014 (Braz.).

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national phase applicants may participate in the fast-track examination process without restriction as to filing date, provided no substantive office actions have issued.

To be eligible for the fast-track procedure, the invention or utility model must be directed to alternative energy, transportation, energy conservation, waste management, or agriculture as defined in the World Intellectual Property Organization (WIPO) green inventory. Eligible applications will have a maximum of fifteen claims with no more than three independent claims. The deadline for requesting admission to the pilot program is April 16, 2015. A maximum of five hundred applications will be accepted for the pilot program on a first come, first served basis.

The BPTO revised the rules regarding the payment of patent annuities to provide for strict penalties in the event of non-payment. Previously, the BPTO would issue a notice of non-payment and permit the patentee to request restoration. Under the revised rules, when two or more annual fees are not paid, the patent will be definitively shelved or lapse without the opportunity to apply for restoration.

F. INDIA

The Supreme Court of India clarified that a party seeking revocation of a patent should not be allowed to raise the same issue before different adjudicating forums. In the event of such multiple filings, the appropriate adjudicating forum will depend upon the date of institution of proceedings before the respective forums.<sup>18</sup>

Refusing to interfere with an Intellectual Property Appellate Board order, the Bombay High Court affirmed the granting of a compulsory license to Natco Pharmaceuticals Ltd. for the drug Nexavar, patented by Bayer Corporation.<sup>19</sup> The Court held the evidence provided by Bayer did not satisfy the reasonable public requirement for the drug under section 84 of the Patents Act. Noting that “adequate extent” under the reasonable public requirement would vary from article to article, the Court reasoned “[so] far as luxury articles are concerned the meeting of [the] adequate extent test would be completely different from the meeting of [the] adequate extent test so far as medicines are concerned. In respect of medicines the adequate extent test has to be 100% i.e. to the fullest extent.”<sup>20</sup>

G. AFRICA

The African Intellectual Property Organization (OAPI) joined the International Union for the Protection of New Varieties of Plants (UPOV) on June 10, 2014, becoming the second intergovernmental organization to accede to the UPOV Convention. Seventeen countries in Africa are part of the OAPI.<sup>21</sup> The purpose of UPOV “is to provide and

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18. See *Wobben v. Mehra*, Civil Appeal No. 6718 of 2013 (India 2014), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41553>.

19. See *Bayer Corp. v. Union of India*, Writ Petition No. 1323 of 2013 (Bombay H.C.), available at <http://bombayhighcourt.nic.in/generatenewauth.php?auth=cGF0aD0uL2RhdGEvanVkZ2VtZW50cy8yMDE0LyZmbmFtZT1PU1dQMTEyODEzLnBkZiZzbWZsYWc9TG> (India).

20. *Id.* at 38.

21. The seventeen Member Countries are: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, and Togo. The headquarters of OAPI is in Yaoundé, Cameroon. See ORGANISATION AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE, <http://www.oapi.int> (last visited Mar. 29, 2015).

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promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.”<sup>22</sup> In a press release, Mr. Francis Gurry, the Secretary-General of UPOV, observed that “[t]he accession of OAPI is a milestone in the history of UPOV and promises to help strengthen the system of plant variety protection around the world and to broaden international cooperation in this area.”<sup>23</sup>

On April 25, 2014, the President of Seychelles assented to the country’s Industrial Property Act, 2014 (Act No. 7 of 2014).<sup>24</sup> The purpose of the Act is

[T]o provide for the adequate protection and enforcement of industrial property rights in order to encourage local inventive and innovative activities, stimulate transfer of foreign technology, promote foreign direct investment, create competitive business environment, discourage unfair practices, enhance free and fair practice and thereby foster socio economic development and for matters connected therewith or incidental thereto.<sup>25</sup>

On August 13, 2014, Gambia ratified the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (the Protocol).<sup>26</sup> The Protocol was adopted within the framework of the seventeen-member African Regional Intellectual Property Organization (ARIPO). In the Protocol, Member States expressed concern “at the gradual disappearance, erosion, misuse, unlawful exploitation and misappropriation of traditional knowledge and expressions of folklore.”<sup>27</sup> One of the goals of the Protocol is to “protect traditional knowledge holders against any infringement of their rights as recognized.”<sup>28</sup> The Protocol defines protection criteria for traditional knowledge (section 4), the formalities relating to protection of traditional knowledge (section 5), the beneficiaries of protection of traditional knowledge (section 6), and the rights conferred to holders of traditional knowledge (section 7). The Protocol also addresses issues such as assignment and licensing (section 8), equitable benefit-sharing (section 9), exceptions and limitations applicable to protection of traditional knowledge (section 11), compulsory licensing (section 12), duration of protection of traditional knowledge (section 13), administration and enforcement of protection of traditional knowledge (section 14), and access to traditional knowledge associated with genetic resources (section 15).

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22. INT’L UNION FOR PROTECTION NEW VARIETIES PLANTS, <http://www.upov.int/portal/index.html.en> (last visited Mar. 29, 2015).

23. Press Release, Union for the Protection of New Varieties of Plants, African Intellectual Property Organization (OAPI) Becomes Second Intergovernmental Organization to Join UPOV (June 10, 2014), <http://www.upov.int/export/sites/upov/news/en/pressroom/pdf/pr97.pdf>.

24. Industrial Property Act 7 of 2014 (S. Afr.).

25. *Id.*

26. *National Assembly Ratifies Swakopmund Protocol*, GAMBIA AFF. (Aug. 13, 2014), <http://gambiaaffairs.com/?p=1208>.

27. AFRICAN REG’L INTELLECTUAL PROP. ORG., SWAKOPMUND PROTOCOL ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF FOLKLORE pmbL (2010).

28. *Id.* sec. 1.1

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## II. Trademarks\*

### A. UNITED STATES

In a cancellation proceeding brought by five Native Americans, the Trademark Trial and Appeal Board (TTAB) cancelled six registrations containing the words “redskin” or “redskinettes” on grounds of disparagement under Section 2(a) of the Lanham Act.<sup>29</sup> The defendant failed to persuade the TTAB that the marks, owned by the Washington Redskins football team, had acquired secondary or alternate meaning denoting a football team. The trademark owner has filed an appeal.<sup>30</sup> The same trademarks were cancelled by the TTAB in 1999<sup>31</sup> but, on appeal, the D.C. Circuit Court of Appeals dismissed the case on the basis of the doctrine of laches, an affirmative defense rejected by the TTAB in the present case, without addressing the finding of disparagement on the merits.<sup>32</sup>

The Supreme Court resolved a split among the federal circuit courts regarding the proper test for assessing standing for false advertising claims under the Lanham Act.<sup>33</sup> The Court rejected three separate circuit court interpretations and instead adopted a “zone of interest” test with a proximate cause requirement.<sup>34</sup> The “zone of interest” test gives standing for a cause of action for false advertising under the Lanham Act to anyone who suffers injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentation.<sup>35</sup>

The Ninth Circuit Court of Appeals held that section 37 of the Lanham Act does not create an independent cause of action for cancellation of a trademark.<sup>36</sup> The court confirmed the holding below that Section 37 of the Act “creates a remedy for trademark infringement rather than an independent basis for federal jurisdiction.”<sup>37</sup>

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29. *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (T.T.A.B. 2014). Section 2(a) provides, in part, that a trademark which “[c]onsists of or comprises . . . matter which may disparage or falsely suggest a connection with persons, living or dead” is not entitled to registration. 15 U.S.C. § 1052(a) (2012).

30. Erik Brady & Megan Finnerty, *Washington Redskins Appeal Decision to Cancel Trademark*, USA TODAY (Aug. 14, 2014 4:54 PM), <http://www.usatoday.com/story/sports/nfl/redskins/2014/08/14/washington-redskins-appeal-federal-trademark-registrations/14066527/>.

31. *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999), *rev’d* 284 F. Supp. 2d 96 (D.D.C. 2003).

32. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005).

33. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

34. *Id.* at 1391–93.

35. *Id.* at 1395.

36. *Airs Aromatics, LLC v. Op. Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595 (9th Cir. 2014). Section 37 allows for a court to order cancellation “[i]n any action involving a registered mark.” 15 U.S.C. § 1119 (2012).

37. *Airs Aromatics*, 744 F.3d at 599 (quoting *Nike, Inc. v. Already, LLC*, 663 F.3d 89, 98 (2d Cir. 2011)).

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B. EUROPE

The Office for Harmonization in the Internal Market (OHIM) issued new guidelines regarding the time limit for providing evidence of proof of use requested of the opponent by the applicant in opposition proceedings.<sup>38</sup> The new guidelines provide OHIM with the discretion to accept evidence of use provided by the opponent even after the expiration of the two-month deadline, if the evidence “merely strengthens and clarifies” evidence of use filed before the deadline. But the OHIM has no discretionary power to accept evidence provided after this deadline if the opponent has not submitted any relevant evidence within the time limit.<sup>39</sup>

The Court of Justice of the European Union (CJEU) allowed registration of Apple Inc.’s store design as a trademark for its services, finding that a representation of the layout of a retail store is registrable even when the mark is depicted as a design without dimension measurements, provided the mark is a clear and precise graphical representation and that the store design itself has sufficiently distinctive character.<sup>40</sup>

In a case involving the validity of a Benelux trademark registration for the well-known Tripp Trapp children’s highchair, the CJEU provided guidance on the registrability of three-dimensional shape marks.<sup>41</sup> The court held that the prohibitions of Directive 2008/95/EC (the Trade Marks Directive) on the registration of shapes resulting from the nature of the goods themselves and of shapes that give substantial value to the goods extend (i) to “shapes with essential characteristics which are inherent to the generic function” of such goods,<sup>42</sup> and (ii) to circumstances where the shape provides significant aesthetic value to the goods, respectively.<sup>43</sup>

C. SWITZERLAND

In *Harry Potter v. Harry Popper*, the Cantonal Court of the Canton of Schwyz (Cantonal Court) established the invalidity of the trademark “Harry Popper” due to its infringement of the trademark “Harry Potter.”<sup>44</sup> Citing a lack of jurisdiction, however, the Cantonal Court refused to address the concurrent damage claim raised by the U.S. trademark owner.<sup>45</sup> The Swiss Federal Supreme Court (FSC) held that such a refusal was a violation of Swiss international private law and partially approved the claimant’s appeal. The FSC

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38. OFFICE FOR HARMONIZATION IN THE INT’L MKT. [OHIM], GUIDELINES FOR EXAMINATION IN THE OFFICE, pt. C, sec. 6, para 3.3.1 (2014).

39. *Id.*

40. Case C-421/13, *Apple Inc. v. Deutsches Patent-und Markenamt* (July 10, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=154829&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=323865>.

41. Case C-205/13, *Hauck GmbH & Co. KG v. Stokke A/S* (Sept. 18, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157848&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=326586>.

42. *Id.* at para. 25.

43. *Id.* at paras. 26–35.

44. *Harry Potter v. Harry Popper*, Bundesgericht [BGer] [Federal Supreme Court] Nov. 7, 2013, docket no. 4A\_224/2013 (Switz.), available at <http://www.bger.ch>.

45. *Id.*

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advised the Cantonal Court to take evidence of respondent's sales as well as distribution of the disputed products in the Canton of Schwyz without time limitation.<sup>46</sup>

In *UBS AG vs. Keytrade Bank SA*, the FSC established that although "Keytrader" is not an English term, it is descriptive because it evokes in the minds of the relevant public, namely the predominant part of the Swiss population with regard to services in the financial industry and related software, the connotation of a particular important financial trader.<sup>47</sup> The FSC concluded that "keytrader" is descriptive with regard to financial services in Switzerland.<sup>48</sup>

D. CHINA

The volume of trademark applications received by the China Trademark Office (CTMO) is increasing. According to the CTMO record, there were 426,372 trademark applications in the first quarter of 2014 compared to 349,875 trademark applications in the first quarter of 2013.<sup>49</sup> Applicants who wish to apply for a trademark in China must now follow the classes prescribed under the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (the revised 10th version), which came into effect in China on January 1, 2014.<sup>50</sup>

The Implementing Regulations of the Trademark Law of the PRC went into effect on May 1, 2014.<sup>51</sup> Key provisions include Article 78, which provides factors for the calculation of illegal business income including, inter alia, the selling price of infringing goods, the marked price of infringing goods unsold, the average selling price of confirmed sales of infringing goods, the middle market price of infringed goods, and the operating revenue received.<sup>52</sup>

The revised Provisions on the Identification and Protection of Well-Known Trademarks became effective on August 3, 2014. The definition of "relevant public" has been clarified to include consumers related to the commodities or services indicated by the

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46. *Id.* para. 2.3.

47. *UBS AG v. Keytrade Bank SA*, Bundesgericht [BGer] [Federal Supreme Court] June 27, 2014, docket no. 4A\_38/2014, para. 3.5.4 (Switz.), available at <http://www.bger.ch>.

48. *Id.*

49. See 2014nián Gèshěng, Zìzhìqū, Zhìxiáshì Shāngbiāo Shēnqǐng Yǔ Zhùcè Tǒngjì Biào (2014年各省、自治区、直辖市商标申请与注册统计表) [Statistics for Trademark Application and Registration in First Quarter of 2014], ST. ADMIN. FOR INDUSTRY & TRADEMARK OFF., <http://sbj.saic.gov.cn/tjxx/201404/W020140422489297071061.pdf> (last visited Mar. 29, 2015);

2013nián Gèshěng, Zìzhìqū, Zhìxiáshì Shāngbiāo Shēnqǐng Yǔ Zhùcè Tǒngjì Biào (2013年各省、自治区、直辖市商标申请与注册统计表) [Statistics for Trademark Application and Registration in First Quarter of 2013], ST. ADMIN. FOR INDUSTRY & TRADEMARK OFF., <http://sbj.saic.gov.cn/tjxx/201305/W020130702338644709662.pdf> (last visited Mar. 29, 2015).

50. See generally *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*, June 15, 1957, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=287532](http://www.wipo.int/treaties/en/text.jsp?file_id=287532).

51. *Zhōnghuá Rénmín Gònghéguó Shāngbiāo Fǎ Shíshí Tiáolì* (中华人民共和国商标法实施条例) [People's Republic of China Trademark Law Implementing Regulations] (promulgated by the St. Council, Apr. 29, 2014, effective May 1, 2014), [http://sbj.saic.gov.cn/sbyw/201405/t20140504\\_144622.html](http://sbj.saic.gov.cn/sbyw/201405/t20140504_144622.html).

52. *Id.* art. 78.

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trademark, manufacturers of the commodities, or other operators providing the relevant services, and the sellers and the related persons involved in the marketing channels.<sup>53</sup>

A key recent case related to a well-known trademark concerned the use of “Mingdian” (名典) and “Mingdian Coffee Yucha” (名典咖啡语茶) in the store operated by Jiangsu Rugao Mingdian Coffee Yucha Co., Ltd.<sup>54</sup> The Court rejected the defendants’ arguments that the characters and patterns they were using were different from those used by the trademark owner in terms of font, character pattern, design, color and letters. The court found that “Mingdian Coffee Yucha” could easily cause the relevant public to confuse the service provider with the trademark owner or establish a connection between the service provider and the trademark owner and that such use constituted infringement.<sup>55</sup>

The Supreme People’s Court of the PRC released *Provisions on the Jurisdiction of Intellectual Property Courts in Beijing, Shanghai, and Guangzhou*, which became effective on November 3, 2014.<sup>56</sup> Intellectual property courts will now be set up in Beijing, Shanghai, and Guangzhou for administrative actions related to copyrights, trademarks, and unfair competition, and civil cases involving the identification of well-known trademarks.

E. RUSSIA

Trademarks and unfair competition dominated the attention of the newly established Russian Court of Intellectual Property in 2014, and requests were distributed regularly by the Court to its sixty-seven-member Advisory Council (*nauchno-tekhnicheskii konsultativnii soviet*) requesting comments on the formulation of standards, guidelines, and interpretive rulings involving the definition of unfair competition and the measurement of damages under particular facts. The single American member of the Advisory Council submitted an analysis of the constitutional issues raised by the exercise of the judicial power in this manner.<sup>57</sup> In his analysis, the American member raised the following issues: (1) whether the “promulgation of interpretive rulings by the Court outside the confines of a particular case or controversy . . . [constitutes] a primarily legislative and rulemaking function for which the parliamentary and executive branches of the government are more uniquely enabled;” (2) whether the promulgation of such rulings may subsequently restrict the authority and discretion of the Court to decide a case based only on the application of laws passed by the parliament, and regulations issued by the executive branch, to the facts of that case;” and (3) whether the real or attempted exercise of such power by the judiciary was best calculated to “protect and preserve the authority of the Court within the framework of the constitutional government.”<sup>58</sup>

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53. Chímíng Shangbiao Rèndìng Hé Bǎohù Guīdìng (驰名商标认定和保护规定) [Provisions on the Identification and Protection of Well-Known Trademarks] (promulgated by St. Admin. for Industry & Commerce, July 3, 2014, effective Aug. 3, 2014) art. 2, [http://sbj.saic.gov.cn/sbyw/201407/t20140711\\_146664.html](http://sbj.saic.gov.cn/sbyw/201407/t20140711_146664.html).

54. Cite case

55. More on the case can be found at [http://www.legalstudio.com/site/subscriber\\_ipit/ipit\\_brief.aspx?ubrief\\_id=15091&lang=c](http://www.legalstudio.com/site/subscriber_ipit/ipit_brief.aspx?ubrief_id=15091&lang=c).

56. Linz (最高人民法院关于北京、上海、广州知识产权法院案件管辖的规定) [Provisions on the Jurisdiction of Intellectual Property Courts in Beijing, Shanghai, and Guangzhou] (promulgated by the Sup. People’s Ct., Oct. 27, 2014, effective Nov. 3, 2014) <http://www.chinacourt.org/law/detail/2014/10/id/147980.shtml>.

57. Memorandum, Bruce A. McDonald, Remedies for Intellectual Property Infringement (Dec. 1, 2014), <http://www.bipc.com/files/media/misc/ffae47106237ed52584e1556ecb7c748.pdf>.

58. *Id.*

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F. INDIA

In an important ruling concerning amendment of trademark applications, the Delhi High Court ruled that the Registrar of Trademarks shall decide the applications for amendment on a case-by-case basis and struck down the office order by the Controller General of Patents, Designs and Trademarks that made certain amendments impermissible.<sup>59</sup> The Court held that the powers vested in the Registrar of Trademarks are quasi-judicial in nature and that the Trademarks Act confers on the Registrar of Trademarks the power to permit the correction of “any error” in or in connection with the application or permit an amendment of the application. The Controller General cannot issue a general order in the nature of a guideline to define which amendments are impermissible.

Accepting the cross border notoriety of “Bloomberg,” the Delhi High Court enjoined defendants, who had incorporated approximately twenty companies using “Bloomberg” in their corporate names, from infringing Bloomberg’s trademark and passing off their goods and services as that of Bloomberg.<sup>60</sup> The Court said “[t]he fact that within a short span of time the Defendants went on a spree of registration of companies using BLOOMBERG as part of the corporate name shows that they were trying to encash on the goodwill and reputation attached that mark.”<sup>61</sup>

G. AFRICA

Plans are in the works for a framework for cooperation between the State Administration for Industry and Commerce (SAIC) of the Peoples’ Republic of China and the African Regional Intellectual Property Organization (ARIPO). On September 8, 2014, during a visit to ARIPO’s Headquarters, the Vice Minister of SAIC and the Director of ARIPO signed a Memorandum of Understanding to establish a general framework for bilateral cooperation between the Parties.<sup>62</sup>

On March 14, 2014, in the High Court of South Africa, Tiasho Pharmaceutical Co. prevailed in a trademark opposition hearing brought by Aloe Vera of America.<sup>63</sup> Aloe, an American company, is the proprietor in South Africa of a registered device trademark depicting an eagle in classes 5 and 32 in relation to various goods and services. Aloe’s mark was registered in 2007.<sup>64</sup> Tiasho, a Japanese company, applied for trademark registration in overlapping categories in South Africa in 2009. Tiasho’s trademark also depicted an eagle. On November 24, 2010, Tiasho’s trademark applications were published

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59. See Intellectual Prop. Att’y’s Ass’n v. Union of India, W.P.(C) No. 3679/2014 (Delhi H.C.), *available at* <http://lobis.nic.in/dhc/RSE/judgement/15-10-2014/RSE09102014CW36792014.pdf> (India).

60. Bloomberg Finance LP v. Saklecha, IA No. 17968/2012 (Delhi H.C.), *available at* <http://lobis.nic.in/dhc/SMD/judgement/11-10-2013/SMD11102013IA179682012.pdf> (India).

61. *Id.* para. 55.

62. Visit to ARIPO Office by the Honourable Liu Yuting, Vice Minister of the State Administration for Industry and Commerce, on September 8, 2014, AFRICAN REGIONAL INTELL. PROP. ORG., <http://www.aripo.org/index.php/news-events/press-room/343-visit-to-aripo-office-by-the-honourable-liu-yuting-vice-minister-of-the-state-administration-for-industry-and-commerce-on-september-8-2014> (last visited Mar. 30, 2015).

63. *Aloe Vera of Am. Inc. v. Tiasbo Pharm. Co.* 2014 ZAGPPHC 12 (GNP) (S. Afr.).

64. *Id.* para. 6.

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for opposition in the Patent Journal.<sup>65</sup> Aloe opposed the registration relying on section 10 (14) of the Trademarks Act No. 194 of 1993, which provides:

Subject to the provisions of Section 14, a mark which is identical to a registered trade mark belonging to a different proprietor or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which such trade mark is registered, would be likely to deceive or cause confusion, unless the proprietor of such trade mark consents to the registration of such mark.<sup>66</sup>

In deciding whether Tiasho's mark was likely to deceive or cause confusion, the court considered a number of factors, one of which was the visual and conceptual similarity of the marks. Ultimately, the court concluded that the two eagles were "not of such a degree of similarity as to give rise to the likelihood of consumer deception or confusion"<sup>67</sup>

The court's reasoning was supported with an overarching policy against monopolies. The court acknowledged that Aloe, a multi-billion dollar operation on a global scale and well-known in many countries, had acquired a significant reputation and goodwill in its mark, with five branches in South Africa and over 500,000 authorized distributors.<sup>68</sup> But the court concluded that these facts did not entitle it to monopolize the depiction of an eagle as its trademark. In its opinion, the court noted that Aloe "cannot claim a monopoly on the use of an eagle—irrespective of the manner in which it is depicted—within the classes in which [Aloe's] trade mark device is registered. To hold otherwise would . . . be tantamount to sanctioning the creating of a monopoly . . ."<sup>69</sup>

On July 2, 2014, a High Court of South Africa rendered an opinion in a passing-off claim in *Discovery Holdings Ltd. v. Sanlam Ltd.*<sup>70</sup> Discovery Holdings Ltd. (Discovery), which operates health and insurance, life insurance, financial services, and wellness, brought suit against Sanlam Ltd (Sanlam), a direct competitor, seeking to block Sanlam's application to register a mark that it claimed was confusingly similar to Discovery's registered mark, "ESCALATOR FUNDS" in class 36. Sanlam had filed an application to register "SANLAM ESCALATING FUND" in the same class. Sanlam brought a counter-application seeking to remove Discovery's trademark from the trademark register.<sup>71</sup>

After a thorough analysis of the words "escalator," "escalating," and "fund," the Court held that Discovery's mark "ESCALATOR FUNDS" "is devoid of any distinctive character," "is descriptive of the services in question," "is incapable of fulfilling the essential indication of origin function of a trade mark," and "had not acquired distinctiveness in relation to the services of the applicant."<sup>72</sup> Due to the descriptive nature of the industry to which both parties subscribe, "the applicant can . . . not claim a monopoly of these terms to the exclusion of other traders who are entitled to offer products with the same obvious

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65. *Id.* para. 9.

66. *Id.* para. 15 (quoting Trade Marks Act 194 of 1993 § 10(14) (S. Afr.)).

67. *Id.* para. 35.

68. *Id.* paras. 10–11.

69. *Id.* para. 38.

70. *Discovery Holdings Ltd. v. Sanlam Ltd.* 2014 ZAWCHC 109 (S. Afr.).

71. *Id.* para 9.

72. *Id.* para. 83.

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features,” the Court observed.<sup>73</sup> The Court subsequently ruled that Discovery’s mark be cancelled.

On April 25, 2014, the President of Seychelles assented to the country’s Industrial Property Act, 2014 (Act No. 7 of 2014).<sup>74</sup> Part VI of Act No. 7 of 2014 is titled “Mark, Certification Mark, Collective Mark, Trade Name and Geographical Indications,” and Part VII is titled “Unfair Competition and Undisclosed Information.” Part VI is divided into seven chapters: Acquisition of Exclusive Rights in a Trade Mark and its Registration (Chapter 1); Procedures for Registration of Mark (Chapter 2); Rights Conferred by Registration, Duration and Renewal of Registration (Chapter 3); Renunciation, Removal and Invalidation of a Registered Mark (Chapter 4); Collective Marks, Certification Marks and Trade Names (chapter 5); Special Provisions relating to Licenses and Assignments of Marks (Chapter 6); and Geographical Indications (Chapter 7).

#### H. BRAZIL

Following the release in 2013 by the Brazilian Patent and Trademark Office (BPTO) of a resolution regulating the recognition of highly renowned trademarks in Brazil, the Ministry of Development, Industry and Foreign Trade publicized the official fees that will be charged by the BPTO in connection with the requests for examination of potential highly renowned trademarks as of February 7, 2014.<sup>75</sup> The fees, which range from US \$14,500 to US \$16,000, are considerably higher than expected.<sup>76</sup> Pending applicants that confirmed their willingness to have their requests examined by June 11, 2014, were charged reduced fees of US \$300 to US \$400.

In Resolution No. 136/2014,<sup>77</sup> the BPTO announced that all trademark registration certificates, including renewal certificates, will issue in digital format only. For legal purposes, the digital certificate will have the same validity as the former paper certificates. The certificates will be made available online and will have a digital certificate to prove authenticity. Access will be limited to the registration owner and its attorney. Not only will the digitalization of registration certificates improve bureaucratic efficiency, it will reduce administrative costs and have a positive impact on the environment.

#### I. DOMAIN NAMES

2014 marks yet another pivotal year for the Internet, with the Internet Corporation for Assigned Names and Numbers (ICANN) achieving several key milestones, including the delegation of over 400 new generic Top Level Domains (gTLDs) more than five years after the inception of the new gTLD program by ICANN in June 2008.<sup>78</sup> Several key milestones were reached by the end of ICANN’s 49th Meeting in Singapore, including the approval of a Registry Agreement Specification 13 for .BRAND category of applicants

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73. *Id.* para. 85.

74. Industrial Property Act 7 of 2014 (S. Afr.).

75. Portaria No. 27, de 6 de Fevereiro de 2014 (Braz.).

76. The fees were also published in the schedule to Resolution 129, issued on March 10, 2014. Resolução No. 129, de 10 de março de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.3.2014 (Braz.).

77. Resolução No. 136, de 25 de abril de 2014 (Braz.).

78. See *Delegated Strings*, ICANN, <http://newgtlds.icann.org/en/program-status/delegated-strings> (last visited Mar. 30, 2015).

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and the publication of the long awaited first Community Priority Evaluation (CPE) results for four applications: .IMMO, .TAXI, .TENNIS, and .MLS (although none of these applications prevailed).<sup>79</sup>

Domain name registrations across all new gTLDs launched surpassed three million, with 3,095,956 domain name registrations at the time of writing. The top five gTLDs are: .XYZ, .BERLIN, .CLUB, .REALTOR and .WANG (“website” in Chinese).<sup>80</sup>

The number of domain name registrations continues to grow exponentially, with 276 million domain name registrations across all TLDs, representing a growth of 19.3 million or 7.5 per cent year over year, as reported by Verisign.<sup>81</sup> Of these 275 million registered domain names, 127.1 million domain names were country code Top Level Domains (ccTLDs).<sup>82</sup> According to the most recent statistics, the five top ccTLDs out of the 283 existing ccTLDs are .TK (Tokelau), .DE (Germany), .UK (United Kingdom), .CN (China), .RU (Russian Federation), and .NL (Netherlands).<sup>83</sup> The top ten ccTLDs together represent 65.8 percent of all ccTLD domain name registrations worldwide. Many registries are now allowing registration of domain names directly under the ccTLD.<sup>84</sup>

The introduction of the new gTLDs will have major implications for brand owners across the globe, particularly with regard to defining a suitable strategy to protect brands at the second level under each new gTLD. While the new gTLD initiative constitutes an invaluable opportunity for brand owners to promote their key brand and areas of business, it also provides abundant opportunities for cybersquatters. ICANN introduced Rights Protection Mechanisms (RPMs) that new gTLD registries are required to implement, such as the Trademark Clearinghouse (TMCH), the Uniform Rapid Suspension System (URS), and Post-Delegation Dispute Resolution Procedures (PDDRP).<sup>85</sup> As of September 16, 2014, 32,993 trademarks from 103 countries and covering 199 jurisdictions have been registered with the TMCH.<sup>86</sup> Since the first URS case was filed in 2013, over 150 URS complaints have been filed before the National Arbitration Forum (NAF), with over 80 percent cases resulting in a decision to suspend.<sup>87</sup>

The number of domain name disputes remains strong in 2014 though slightly down from previous years. Taking the WIPO as an example, since 2003 when only 1,100 cases were filed, the number of disputes filed since has been increasing year on year, with over

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79. See *Community Priority Evaluation (CPE)*, ICANN, <http://newgtlds.icann.org/en/applicants/cpe#invitations> (last updated Mar. 13, 2015); *Approval of Registry Agreement Specification 13 for Brand Category of Applicants*, ICANN, <https://features.icann.org/approval-registry-agreement-specification-13-brand-category-applicants> (last visited Mar. 30, 2015).

80. Roger Kay, *Why, Even after a Year, There's Still No Land Grab for New Internet Domains*, FORBES (January 22, 2015, 9:31 AM), <http://www.forbes.com/sites/rogerkay/2015/01/22/why-even-after-a-year-theres-still-no-land-grab-for-new-internet-domains>.

81. *The Domain Name Industry Brief*, VERISIGN, August 2014, at 2.

82. *Id.*

83. *Id.* at 4.

84. *Id.*

85. See *generally Rights Protection Mechanism Requirements Published*, ICANN (Sept. 30, 2013), <http://newgtlds.icann.org/en/announcements-and-media/announcement-30sep13-en>.

86. *TMCH Stats September 16th*, TRADEMARK CLEARINGHOUSE (Sept. 19, 2014), <http://www.trademark-clearinghouse.com/content/tmch-stats-september-16th>.

87. See *Domain Name Dispute Proceedings and Decisions*, FORUM, <http://www.adrforum.com/SearchDecisions> (last visited Mar. 30, 2015).

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2,000 cases filed every year for the last five years.<sup>88</sup> In 2012, the number of disputes filed reached an all-time high of 2,884 cases, compared to 2,585 cases in 2013, 2,764 cases in 2011, and 2,107 in 2009.<sup>89</sup> The number of disputes filed in 2014 may not reach similar heights, as only 2,226 cases had been filed at the time of writing (early November). Many trademark owners have opted to file URS cases, as opposed to UDRPs, although the remedy available under the URS is merely a suspension (as opposed to a transfer). In addition, many disputes under the UDRP do not even reach the filing stage, and so the number of disputes filed with dispute resolution service providers is only the tip of the iceberg. Cybersquatting thus remains a significant problem for rights holders, particularly now that over 400 new gTLDs have been delegated into the root and many of these have gone live.

### III. Copyright\*

#### A. UNITED STATES

In a stunning reversal, the Federal Circuit Court held that the lower court erred when it dismissed Oracle's claim of copyright infringement of its popular Java computer program by Google's Android software for smart phones.<sup>90</sup> The Federal Circuit Court determined that Google could have chosen any number of different ways to write the declaration lines of the source code,<sup>91</sup> but chose to copy them.<sup>92</sup> The Federal Circuit Court further held that the lower court erred in finding the Merger Doctrine applicable, insofar as it considered the options available to Google at the time of infringement rather than the options available to Oracle at the time of its creation.<sup>93</sup> Regarding the application programming interfaces (APIs), the Federal Circuit instructively noted that copyright protects "the *expression* of [a] process or method."<sup>94</sup> Thus, even if an API may be characterized as a "system or method of operation," it could embody copyrightable expression, and Google replicated the overall structure, sequence, and operation of the thirty-seven JAVA API packages.<sup>95</sup> The Federal Circuit found that Google's "interoperability" argument was not relevant to the issue of copyrightability, but rather to a fair use defense.<sup>96</sup> The Federal

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88. *Total Number of Cases per Year*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/amc/en/domains/statistics/cases.jsp> (last visited Mar. 30, 2015).

89. *Id.*

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90. *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1381 (Fed. Cir. 2014).

91. *Id.* at 1361.

92. *Id.* at 1353.

93. *Id.* at 1361 (citing *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 524 (9th Cir. 1984)).

94. *Id.* at 1366 (emphasis added) (quoting *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 839 (Fed. Cir. 1990)).

95. Protecting the "expression" of the idea does not violate the Copyright Act's prohibition of extending copyright protection for a "method of operation" as set forth at 17 U.S.C. Section 102(b).

96. *Oracle Am., Inc.*, 750 F.3d at 1368–72.

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Circuit concluded “that the declaring code and the structure, sequence, and organization of the 37 Java API packages at issue are entitled to copyright protection” and remanded the case to the district court for further consideration of Google’s fair use defense.<sup>97</sup>

In a case of first impression, the Supreme Court considered whether the equitable defense of laches may bar relief on a copyright infringement claim brought within the applicable statute of limitations.<sup>98</sup> In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the Supreme Court ruled that laches could not be used as a complete bar to a claim for injunctive and monetary damages brought within the Copyright Act’s three-year statute of limitations.<sup>99</sup> At issue was the motion picture *Raging Bull*, about former boxer Jake LaMotta, portrayed by Robert DeNiro. In 1963, Jake LaMotta and Frank Petrella wrote a screenplay about LaMotta’s career. In 1976, the pair assigned their rights, including renewal rights, which were ultimately acquired by Metro-Goldwyn-Mayer’s (MGM) subsidiary. Their work was subsequently adapted into the critically acclaimed motion picture in 1980. Because Frank Petrella died during the initial twenty-eight-year copyright term applicable under the pre-1976 Copyright Act, his rights reverted to his surviving daughter,<sup>100</sup> who timely filed renewals for the original work and became the sole owner thereof in 1991.<sup>101</sup>

**B. EUROPEAN UNION**

On February 26, 2014, the Directive on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market (Directive 2014/26/EU), proposed in 2012, was adopted, implementing part of the European Commission’s blueprint on intellectual property.<sup>102</sup> Directive 2014/26/EU now refers to a “collective management organizations” (instead of “collecting societies”), and adds the condition that such organization must be on a not-for-profit basis in order to fit the definition.<sup>103</sup> These are then distinguished from “independent management entities,” which are not owned or controlled by their right holders and are for-profit,<sup>104</sup> although still subject to certain transparency and other obligations when established in the EU.<sup>105</sup> The Directive provides additional rights to right holders, by comparison with the original proposal, such as the right to grant non-commercial licenses,<sup>106</sup> to receive payments sooner—within nine months from the end of the financial

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97. *Id.* at 1381.

98. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014).

99. *Id.* at 1978.

100. *Id.* at 1971.

101. *Id.*

102. Directive 2014/26, of the European Parliament and of the Council of 26 February 2014, 2014 O.J. (L 84) 72. For a discussion of the Proposal of this Directive see Melvyn J. Simburg et al., *International Intellectual Property Law*, 47 INT’L LAW. 213, 226–27 (2013).

103. Directive 2014/26, art. 3(a), at 82.

104. *Id.* art. 3(b), at 82.

105. *Id.* art. 2(4), at 82.

106. *Id.* art. 5(3), at 83.

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year when collected, rather than twelve months<sup>107</sup>—in addition to rights involving governance and non-discrimination.<sup>108</sup>

C. SWITZERLAND

In a matter involving a respondent who operates a document delivery service for scientific papers, the Commercial Court of the Canton of Zurich (CCZ) had to decide whether the complete or substantial copying of an article within a work (e.g., a scientific magazine or educational book) falls under the legal term “complete or substantial copying of a work” and was therefore not permitted under Article 19, paragraph 3, subsection a of the Federal Act on Copyright and Related Rights (FAC).<sup>109</sup> According to the article, the complete or substantial copying of a work obtainable commercially is not permitted other than for personal use of a work or use within a circle of persons closely connected to each other, such as relatives or friends.<sup>110</sup> The CCZ held that this legal term had to be interpreted along with the modern technical developments in media, and made an analogy to the music industry where it is common that users buy only one song out of a compilation.<sup>111</sup> The CCZ therefore held that the complete or substantial copying of a single (scientific) article out of a compilation obtainable commercially is not permitted.<sup>112</sup>

D. CHINA

The Copyright Law of the People’s Republic of China has not been revised since April 1, 2010. The third consultation draft is still pending. According to Article 3 of the second consultation draft, an author’s “works” include: writings, oral works, music, screenplays, quyi (traditional art), choreography, fine art, art, practical art, design, photography, video and audio, graphics, three-dimensional art, computer programs, literature, artwork, and scientific and technology works.<sup>113</sup>

A case involving comic strip artists who mailed over 1,300 pieces of comic strips for the Water Margin Sequel series to an art publishing house in 1986 is still significant.<sup>114</sup> The artists were informed that their comic strip could not be published as it was discovered that it had already been printed twice by the publishing house without their authorization.

107. *Id.* art. 13(1), at 87.

108. See Press Release, European Parliament, Collective Management of Copyright: EP and Council Strike a Deal (Nov. 5, 2013), <http://www.europarl.europa.eu/news/en/news-room/content/20131105IPR23815/html/Collective-management-of-copyright-EP-and-Council-strike-a-deal>.

109. Handelsgericht des Kantons Zürich [Commercial Court of the Canton of Zurich] Apr. 4, 2014, docket no. HG110271, available at [http://www.gerichte-zh.ch/fileadmin/user\\_upload/entscheide/oeffentlich/HG110271-O10.pdf](http://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/HG110271-O10.pdf) (Switz.).

110. See Urheberrechtsgesetz [Federal Act on Copyright and Related Rights], Oct. 9, 1992, SR 231.1, available at [http://www.admin.ch/ch/e/rs/231\\_1/index.html](http://www.admin.ch/ch/e/rs/231_1/index.html).

111. Handelsgericht des Kantons Zürich [Commercial Court of the Canton of Zurich] Apr. 4, 2014, docket no. HG110271, paras. 2.6.2.3.2, 2.6.2.3.3 (Switz.).

112. *Id.* paras. 2.6.2.4, 2.6.2.5.

113. Guānyú Zhōnghuá Rénmín Gònghéguó Zhù Zuò Quán Fǎ (Xiūgǎi Cǎo'àn dì èr Gǎo) Gōngkāi Zhēngqǐú Yìjiàn de Tōngzhī (关于《中华人民共和国著作权法》(修改草案第二稿)公开征求意见的通知) [Notice of Public Comment on the Copyright Law of the People’s Republic of China (modified second draft)], Nat’l Copyright Admin. PRC (July 6, 2012), <http://www.ncac.gov.cn/cms/html/309/3502/201207/759779.html> (China).

114. Case

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The Yangpu District People's Court ruled that the publishing house had infringed the artists' copyright and that the publishing house should compensate the authors for their economic losses of RMB 165,000 and for their legal fees, notarial fees and other reasonable litigation expenses of more than RMB 12,000.<sup>115</sup>

E. INDIA

The Delhi High Court held that the defense of "copyright misuse" was neither available in a suit for a permanent injunction from infringing a plaintiff's copyright nor in an action for damages for copyright infringement.<sup>116</sup> Refusing to accept American jurisprudence, the Court stated that the concept of "copyright misuse" had no statutory support under Indian law. The Court noted that recognizing the defense of copyright misuse would be "tantamount to making copyright a conditional right i.e. a right subject to being not misused and / or a right enforcement whereof can be suspended upon the right being found to be misused and which is not as per its definition in Section 14<sup>117</sup> and would further be tantamount to adding to / subtracting from the definition in Sections 51<sup>118</sup> and 52<sup>119</sup> of what constitutes and what does not constitute infringement."<sup>120</sup>

On June 30, 2014, India became the first country to ratify the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired, or otherwise print-disabled.<sup>121</sup> So far, seventy-nine WIPO member states have signed the Marrakesh Treaty, which will come into force once twenty countries have ratified it. The main goal of the Marrakesh Treaty is to create a set of mandatory limitations and exceptions for the benefit of the blind, visually impaired, and otherwise print-disabled (VIPs). It addresses the "book famine" by requiring its contracting parties to adopt national law provisions that permit the reproduction, distribution, and making available of published works in accessible formats—such as Braille—to VIPs and to permit exchange of these works across borders by organizations that serve those beneficiaries.

F. BRAZIL

Brazil enacted Law No. 12,965/2014 on April 23, 2014, establishing the Brazilian Internet Civil Regulatory Framework (BICRF).<sup>122</sup> In order to defend network neutrality and the competitive market in the Internet environment, the BICRF states that the party responsible for transmission, switching, or routing has the duty to process all data packages on an isonomic basis, regardless of content, origin and destination, service, terminal, or application. Rather than permitting an economic agent (competitor) to pay more for

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115. More on the case can be found at: [http://www.legalstudio.com/site/subscriber\\_ipit/ipit\\_brief.aspx?ubrief\\_id=15051&lang=c](http://www.legalstudio.com/site/subscriber_ipit/ipit_brief.aspx?ubrief_id=15051&lang=c).

116. *Tekla Corp. v. Ghosh*, CS(OS) 2414/2011 (Delhi H.C.), available at <http://lobis.nic.in/dhc/RSE/judgement/16-05-2014/RSE16052014S24142011.pdf> (India).

117. See Indian Copyright Act, No. 14 of 1957, sec. 14.

118. See *id.* sec. 51.

119. See *id.* sec. 52.

120. *Tekla Corp.*, para. 14.

121. See Press Release, World Intellectual Property Organization, India Is First to Ratify "Marrakesh Treaty" Easing Access to Books for Persons Who Are Visually Impaired (June 30, 2014), [http://www.wipo.int/pressroom/en/articles/2014/article\\_0008.html](http://www.wipo.int/pressroom/en/articles/2014/article_0008.html).

122. Lei No. 12.965, de 23 de Abril de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 24.04.2014 (Braz.).

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faster access by consumers to such competitor's content, under the BICFR, consumers must pay more for faster access to content provided by competitors (without discrimination of content/competitor), thereby requiring Internet Service Providers (ISPs) to offer data transmission services under non-discriminatory commercial conditions and refrain from anti-competitive practices. In the provision of an Internet connection, the entity responsible for the management of the autonomous system must maintain the confidentiality of the connection records, in a controlled and safe environment, for a term of one year, while the Internet application provider that is duly incorporated as a legal entity must keep the application access logs confidential, in a controlled and safe environment, for six months.<sup>123</sup>

In order to protect the privacy, private life, honor, and image of users, the provider responsible for the retention of the records shall only be obliged to provide such records (whether separately or in association with personal data or other information that may identify the user) or private communications pursuant to a judicial order. Notwithstanding the foregoing, the administrative authorities may request direct access to recorded data obtained for census purposes that includes a user's personal qualification, affiliation, and address. Users must expressly consent to the collection and use of their data. The purpose of the collection and use of data must be justified and the Internet application provider must facilitate the elimination of a user's data at any time upon the user's request.<sup>124</sup>

In order to ensure freedom of expression and prevent censorship, an ISP is protected from civil liability for damages resulting from content generated by third parties so long as, after receipt of a court order, the provider takes steps to remove content identified as unlawful, as required under the BICRF. But the Internet application provider may be held liable for the breach of privacy arising from the disclosure of images, videos, and other materials containing nudity or sexual activities of a private nature if, after receipt of notice from a participant in the content, the provider does not take steps to remove the content in a diligent manner. But, with respect to copyright infringement, the provider's liability for damages arising from third party content shall continue to be governed by applicable copyright legislation in force, namely Brazilian Law n° 9.610/98.<sup>125</sup>

**G. AFRICA**

On September 29, 2014, the Supreme Court of Kenya handed down a decision addressing problems associated with the switch from analog terrestrial broadcasting to digital terrestrial broadcasting.<sup>126</sup> Specifically, Royal Media Services Limited and others (RMS) sought an order to compel the Communications Commission of Kenya and others (CCK) to issue a Broadcasting Signal Distribution (BSD) license and an order restraining CCK from "switching off their analogue frequencies . . . pending the issuance of a BSD license."<sup>127</sup> The High Court (Majanja J) Nairobi held that RMS was not entitled to a

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123. *See id.* art. 9.

124. *See id.* arts. 13–15.

125. *See id.* art. 19.

126. *Comm'n of Kenya v. Royal Media Servs. Ltd.* Petition No. 14 of 2014, available at <http://kenyalaw.org/caselaw/cases/view/101689/> (S. Afr.).

127. *Id.* para. 2.

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license, that the digital migration implementation was not in violation of RMS's fundamental rights and freedoms, and that RMS's Intellectual Property Rights (IPR) were not infringed.<sup>128</sup> The Court of Appeals overturned the High Court's decision, and held that CCK was "not the independent body contemplated by Article 34(3)(b) and 34(5) of the Constitution" to grant BSD licenses.<sup>129</sup> The Supreme Court held that the CCK was the body contemplated by the Constitution under Article 34, "having been in existence before the date of promulgation, CCK had a lawful existence, and its actions were not unconstitutional."<sup>130</sup> The Court further held that general statements of policy cannot be interpreted as a promise to grant a license<sup>131</sup> and that RMS's IPRs were not infringed by CCK, as the "Fair Dealings" defense meant that broadcast of copyrighted material was consistent with the requirements of fairness.<sup>132</sup> The Court was motivated by public policy, finding that the rule was consistent with several Articles of the Constitution.

Kenya's Cabinet Secretary in the Ministry of Sports, Culture and the Arts, Dr. Hassan Wario, recently appointed a ten-person committee to finalize work on Kenya's National Music Policy. Among other objectives, the policy aims

To articulate the rights and obligations of players in the Music Industry; [t]o spearhead the preservation and development of indigenous and other music styles; [t]o support the process of music education and training at all levels; [ ] [t]o facilitate the harnessing of creative and economic potential within the Music Industry; [and] [t]o promote effective music management and use for national development.<sup>133</sup>

On April 15, 2014, the President of Seychelles assented to the Copyright Act, 2014 (Act No. 5 of 2014),<sup>134</sup> whose goal is to "consolidate and amend the Law relating to Copyrights, so as to give effect to the provisions of the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 and to repeal and replace the Copyright Act and for matters connected therewith or incidental thereto."<sup>135</sup>

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128. *Id.* para. 4.

129. *Id.* para. 7.

130. *Id.* para. 206.

131. *Id.* para. 290.

132. *Id.* at para. 249.

133. REPUBLIC OF KENYA, MINISTRY OF STATE FOR NAT'L HERITAGE & CULTURE, MUSIC POLICY (2012), available at <https://cipitlawstrath.files.wordpress.com/2014/07/music-policy-final.pdf>.

134. Copyright Act 5 of 2014 (S. Afr.).

135. *Id.*

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## International Procurement

STEVEN D. TIBBETS\*

This article reviews international law developments in 2014 in the field of international procurement.

### I. Canada's "Integrity Framework" Drastically Expands Geographic Consequences for Violating Anti-Corruption Laws

On March 1, 2014, Public Works and Government Services Canada ("PWGSC"), the department of the government of Canada with responsibility for the government's internal servicing and administration, updated its "Integrity Framework" regulation.<sup>1</sup> The Integrity Framework establishes eligibility criteria for contractors that relate to compliance with anti-corruption and procurement ethics laws around the world. The following discussion summarizes the Integrity Framework, compares and contrasts the Integrity Framework with comparable U.S. laws, and highlights some practical concerns the Integrity Framework creates for companies selling goods and services to the Canadian Government.

**Overview of Integrity Framework Changes.** The March 1, 2014 revisions made a number of significant changes to the Integrity Framework. First, the Framework now specifies that suppliers who have received a conditional or absolute discharge related to certain fraud or corruption charges (i.e., a mechanism similar to a "plea bargain" that resolves criminal charges with an acknowledgment of guilt in the United States) are ineligible to do business with PWGSC. The scope of legal issues that can make contractors ineligible has expanded to include offenses of the contractor and any affiliates in foreign countries regardless of whether such offenses have any connection to Canada. Contractors that are ineligible under the Integrity Framework will be disqualified for ten years. Even after the ten years expires, contractors must certify that preventive measures are in place to avoid re-occurrence of the convictions or reprehensible actions that led to the disqualification.

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\* Steven D. Tibbets of CA Technologies was the editor of the International Procurement Committee's Year in Review for 2014.

1. The Integrity Framework revisions were issued under Policy Notification No. PN-107U1. See *ARCHIVED Integrity Provisions -PN-107U1*, BUYANDSELL.GC.CA (March 1, 2014), <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1>.

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**Comparison of PWGSC Integrity Framework and comparable U.S. laws.** Similar to the PWGSC Integrity Framework is the legal regime applied to United States government contractors. The United States' standards cover a greater range of conduct, but impose less harsh penalties, whereas the Canadian Integrity Framework covers a narrower range of conduct (though it is greater in geographic scope), but imposes harsher penalties. The following discussion summarizes the United States' analogous laws and lists the main distinctions between United States law and Canada's Integrity Framework.

Under United States procurement statutes and regulations, a contractor must be found "responsible" to be eligible to win federal contracts. Among other things, a contractor must have "a satisfactory record of integrity and business ethics" to be considered "responsible."<sup>2</sup> Generally, contractors must provide responses to specific questions and agencies use those responses to determine whether the contractor is responsible.<sup>3</sup> Contractors are required to provide that information via a United States government contractor information clearinghouse ([www.sam.gov](http://www.sam.gov)) and update it at least twice per year. Contractors are also often required to provide the same information—or certify that the information in the clearinghouse is current—in connection with specific proposals.

The information contractors provide relates to criminal convictions and charges, as well as civil judgments and proceedings, involving: (i) fraud committed in connection with government procurement contracts in the United States, whether those contracts are at the federal, state, or local level; (ii) violations of federal or state antitrust laws in connection with the submission of offers; and (iii) commission of embezzlement, theft, forgery, bribery, and similar offenses, regardless of whether they were committed in connection with a public contract. Contractors must also report delinquent U.S. federal taxes and whether any federal contracts have been terminated for default. The information contractors must provide typically covers the preceding three or five years and covers the actual entity, affiliates, and high-level employees. While these requirements focus on U.S. law, United States contractors must also report convictions or charges relating to violations of the Foreign Corrupt Practices Act—which prohibits U.S. persons from bribing foreign officials—and such violations could, and often do, involve corruption related to procurements conducted by other countries.

In the United States, agencies have discretion to determine whether or not a contractor is responsible. Generally speaking, there is no "black and white" response, or set of responses, to responsibility questions that will make a contractor either responsible or non-responsible. However, if a contractor is suspended (temporarily disqualified from Government contracting during the pendency of an investigation and ensuing legal proceedings) or debarred (excluded from Government contracting for some specified period of time) that will generally prevent the contractor from winning any contracts regardless of whether different agencies have different views regarding the contractor's responsibility. When contractors have been suspended or debarred, often they will make changes to personnel and internal policies and procedures to resolve the issues that led to the suspension or debarment and become eligible to win and perform contracts again. Contractors are not required to be suspended or debarred for any minimum amount of time, and

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2. Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 9.104-1(d) (2015).

3. See *id.* at §§ 52.209-5, 52.209-7.

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contractors often become eligible for contracts quickly by showing that they are “presently responsible” despite recent problems.<sup>4</sup>

The main differences between United States responsibility principles and the Integrity Framework are:

- The United States Government’s version of these eligibility criteria covers only violations of United States law (though contractors can violate United States law in connection with actions they take in winning or performing contracts in other countries), whereas the PWGSC rules cover both violations of Canadian law *and* similar violations of other countries’ laws;
- United States standards provide that violations of law that create both *criminal and civil* liability may make contractors ineligible, whereas the Framework focuses solely on violations of criminal laws; and
- The United States standards are flexible regarding the duration of penalties and allow contractors to rehabilitate themselves rather quickly, whereas the Framework imposes a strict 10-year ban on any contractors that lose eligibility (there is a limited “public interest” exception for situations where not imposing the 10-year ban is in the government’s best interest, but commentary from ITAC suggests this exception will be used sparingly, if at all).

**Practical Concerns for Government Contractors.** An obvious concern is that, in the event that a company that sells, or wishes to sell, to the PWGSC becomes involved in a criminal matter relating to a government contract somewhere in the world, it could lead to a 10-year ban from government contracts in Canada and immediate termination of any Canadian government contracts the company has already won. This ban and termination will result regardless of the merits of charges brought against the company and does not take into account whether foreign government officials have incentives to harm the company (e.g., because they are partial to a competitor). In addition, enforcing the Framework could sharply reduce competition, particularly in sectors with only a handful of vendors, and thereby raise the costs of goods and services for Canadian taxpayers. The Integrity Framework is especially harsh in this regard because it does not allow a contractor to remedy its integrity profile by, for example, terminating all employees responsible for a violation of anticorruption law, enhancing internal controls, and/or paying for and submitting to the oversight of an independent monitor.

Canada’s Integrity Framework imposes severe penalties for violations of anti-corruption laws regardless of where those violations occur. While there are always obvious incentives for contractors to avoid violation of criminal anti-corruption laws, Canada’s PWGSC has raised the stakes for failing to comply with such laws anywhere in the world.

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4. In recent years, Congress has considered a proposed statute called the “SUSPEND Act” meant to impose longer and harsher punishments for contractors that engage in certain types of behavior, but that legislation has not been enacted. See Scott H. Amey, *Chairman Issa’s SUSPEND Act: Pros and Cons*, POGO (July 25, 2013), <http://www.pogo.org/blog/2013/07/20130725-chairman-issas-suspend-act-pros-and-cons.html>. Generally speaking, however, prime contractors must determine that their subcontractors are responsible, and prime contractors may not subcontract with suspended or debarred companies.

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## International Secured Transactions and Insolvency

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### I. New Developments in Sovereign Insolvency: *NML Capital, Ltd. v. Republic of Argentina*, 727 F. 3d 230 (2d Cir. 2013), *cert. den.*, 134 S.Ct. 2819 (2014)

On June 16, 2014, the U.S. Supreme Court denied the Republic of Argentina's petition for *certiorari*<sup>1</sup> challenging the Second Circuit Court of Appeals' (the "Second Circuit's") decision<sup>2</sup> upholding the right of plaintiff-appellee NML Capital ("NML Capital" or "the plaintiff") to the equal treatment of its Fiscal Agency Agreement ("FAA") bonds that had not been tendered in either bond exchange offered by the Republic of Argentina in 2005 and, again, in 2010. Bonds issued in the bond exchanges are called the "Exchange Bonds." NML Capital, a hedge fund, argued successfully that its FAA bonds had to be paid ratably if the Exchange Bonds were paid.

At its core, the case was a contract law dispute. NML Capital sought enforcement of the express contract language set forth in its bonds. The operative language is the *pari passu* or equal treatment clause<sup>3</sup> which stated in pertinent part:

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1. Republic of Argentina v NML Capital, Ltd., 134 S. Ct. 2819 (2014). On the same day, the Supreme Court issued a decision in the same case holding that the U.S. Foreign Sovereign Immunities Act does not limit the power of a court to order worldwide post-judgment discovery. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014).

2. NML Capital, Ltd. v Republic of Argentina, 727 F.3d 230, 237 (2d Cir. 2013).

3. A great deal has been written about NML Capital, Ltd. v. Republic of Argentina, *supra* n. 1. See, e.g., W. Mark C. Weidemeyer and Anna Gelpert, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REG. 189 (2014); Brett Neve, NML Capital, Ltd. v. Republic of Argentina: *an Alternative to the Inadequate Remedies Available Under the Foreign Sovereign Immunities Act*, 39 N.C. J. INT'L & COM. REG. 631 (2014) (providing a



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The Securities will constitute the direct, unconditional, unsecured and un-subordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and un-subordinated External Indebtedness. . .<sup>4</sup>

The Second Circuit upheld the literal meaning of the *pari passu*/equal treatment clause which required that the Argentine government pay those bonds held by the plaintiff on the same basis as it pays those bondholders holding the Exchange Bonds. The impact, said the Court, was that the plaintiff had a ratable right to payment of its bonds, plus accumulated interest, just as the Exchange Bond holders had a right to their payments.

Although \$1.4 billion in debt held by NML and over \$50 billion in Exchange Bond debt were at issue,<sup>5</sup> the Second Circuit rejected the Argentine government's urging that it take into account the systemic problems that its decision might create for sovereign debtors. It held that the Argentine government had failed to produce sufficient evidence that these problems would occur, and that in any event, in its case the systemic problems were "almost entirely of [its] own making."<sup>6</sup> The Court, therefore, issued an injunction that essentially gives the Argentine government a choice: it can pay NML all or a portion of its FAA bond obligations and pay the Exchange Bonds ratably, or it can continue in default on NML's FAA bonds and default on the Exchange Bonds.<sup>7</sup>

The Argentine government has vowed not to pay the Exchange Bonds, but third parties involved in paying them risk liability for abetting contempt of court if they participate in paying the Exchange Bonds without payment of NML's bonds.<sup>8</sup> Consequently, Argentina has gone into default on virtually all of its bonds since the decision.<sup>9</sup>

There is no clear resolution to the dispute in sight. The hold-out bondholders have not been willing to settle. The Argentine government has a duty to the citizens who elected it into office to avert economic ruin if possible, but the effect of nonpayment on the Argentine economy is projected to be a significant economic contraction.<sup>10</sup>

The implications of *NML Capital, Ltd. v. Republic of Argentina* for the systemic problems of sovereign state insolvency are not limited to Argentina.<sup>11</sup> The case can be understood as a wake-up call to governments that legal defenses are no panacea for fiscal irresponsibility.

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good detailed summary of the underlying facts); Gregory Day, *Market Failure, Pari Passu, and the Law and Economics Approach to the Sovereign Debt Crisis*, 22 TULANE J. INT'L & COMP. L. 226 (2014).

4. *NML Capital, Ltd. v. Republic of Arg.*, 699 F.3d 246, 251 (2d Cir. 2012); cf. Lee C. Buchheit and Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869, 873 (2004).

5. Weidemeyer and Gelpern, *supra* n. 3 at 215.

6. *NML Capital, Ltd. v. Republic of Argentina*, *op. cit.*, at 246.

7. *NML Capital, Ltd. v. Republic of Argentina*, *op. cit.*, at 237.

8. Day, *supra* n. 3 at 243.

9. *Argentina Default Spreads To PAR Bonds, Risking Payment Demands*, REUTERS (October 31, 2014,) available at <http://www.reuters.com/article/2014/10/31/us-argentina-debt-idUSKBN0IK16W20141031>.

10. *Id.* (projecting a 2.6% contraction in Argentine GDP if the default is not cleared before October 2015 presidential elections).

11. See, e.g., Philip R. Wood, *How the Greek Debt Reorganisation of 2012 Changed the Rules of Sovereign Insolvency*, 14 BUS. L. INT'L 3 (2013); Christian Hofmann, *Sovereign-Debt Restructuring in Europe Under the New Model Collective Action Clauses*, 49 TEX. INT'L L.J. 385 (2014).

## **II. Mexican Developments in Secured Transactions and Insolvency: the 2014 Financial Reform**

The 2014 Mexican Financial Reform,<sup>12</sup> part of a series of reforms intended to promote investment and economic growth, encompassed the amendment of more than 30 statutes, as well as issuance of a new Financial Groups Law (*Ley para Regular a las Agrupaciones Financieras*). This part will focus on the provisions of the Financial Reform pertaining to secured transactions and bankruptcy.

### **A. NEW SUMMARY MEANS OF ENFORCING SECURED TRANSACTIONS**

Before the Financial Reform, the Mexican Commercial Code recognized certain documents with executory character allowing creditors to claim payment through a summary commercial action if those documents were issued by a notary public, granting the possibility of enforcing them as executory instruments. However, unless these documents met certain formalities required by article 1166, the creditor could not commence the summary action. Although article 1166 is still in full force and effect, the Financial Reform effectively eliminated the need for these formalities by providing in article 1391 that a notarized public deed showing a past due liquidated amount shall suffice for bringing a summary action.

Another provision of the Financial Reform amended the General Negotiable Instruments and Credit Operations Act to authorize the enforcement of a guaranteed obligation against cash of the debtor in the possession of the creditor without the necessity of filing a claim or commencing an enforcement proceeding. Prior to the Financial Reform, it was possible to pledge cash to guarantee payment of a debt, but the pledge could not be enforced without an enforcement proceeding. Now, it is deemed that the cash was transferred upon prior agreement of the parties for paying the debt rather than as pledge enforcement.

An additional change in the Financial Reform concerned a decentralized consumer financial protection agency named *Comisión Nacional para la Protección y Defensa de los Usuarios Financieros* (“CONDUSEF”). CONDUSEF has authority to act as an arbitrator between financial institutions and their customers and to resolve controversies by issuing an award. The Financial Reform rendered these awards binding executory documents. In addition, CONDUSEF is entitled to issue opinions if it deems that the customer has grounds for prevailing on its claim, which now are considered binding executory documents as well; previously they were merely considered evidence in subsequent proceedings.

### **B. BANKRUPTCY LAW REFORMS**

Under prior law, major reorganization (*concurso*) proceedings were conducted indefinitely by the courts and with a lack of transparency and improper conduct, which led to uncertainty about the debtor’s real financial situation for unsecured creditors, and therefore to a lack of confidence in the proceedings. The Financial Reform amended the Bankruptcy Law to protect creditors, as follows:

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12. Published in the Mexican Federal Official Gazette on January 10, 2014, and effective the following day.

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- Limiting the mediation phase to 185 calendar days following the last publication of the extract of the *concurso mercantil* ruling in the Federal Official Gazette;
- Implementing an electronic filing system;
- Making it possible for a business group to file for *concurso mercantil* of different entities, whenever they respectively control or are under control of a holding company subject to *concurso*; in that case each corporation shall keep its corresponding estate independent from the others;
- Making it possible to file for *concurso mercantil* if a general default is imminent within 90 days after filing.
- Making it possible to file for *concurso mercantil* directly at the bankruptcy stage, without having to exhaust the mediation stage;
- Expressly authorizing the court to issue interim measures at any stage of the proceedings;
- Making it possible for the insolvent entity to execute new credit agreements whenever they are deemed and approved as indispensable for its regular operation and its cash-sufficiency during the course of the proceedings;
- Making it possible to extend the retroactive period up to three years.
- Creating a new type of creditors with subordinated character, in which are included all those credits executed as inter-company debt; and
- Including new sanctions and criminal conducts against officers and “relevant” employees.

### III. International Secured Transactions Update

In addition to the Mexican reforms discussed above, the following are changes in secured transactions laws of non-U.S. countries in the past year:

#### A. RUSSIA

The new Russian Pledge Law,<sup>13</sup> parts of which became effective on July 1, 2014, was drafted with assistance from the European Bank for Reconstruction and Development and UNCITRAL. It includes the following features: (1) registration of non-possessory pledges by notaries, with registration conferring priority over conflicting claims to the collateral; (2) notice filing, with no need to register the pledge agreement or specifically describe the collateral; (3) syndication of secured loans; and (4) extra-judicial enforcement of creditors’ rights in the collateral.

Russia is one of the last former Soviet Union and “Eastern Bloc” countries to modernize its laws regarding secured transactions. Other countries to have done so include Albania, Armenia, Azerbaijan, Bosnia, Bulgaria, Czech Republic, Estonia, Hungary, Kosovo, Latvia, Lithuania, Macedonia, Poland, Romania, Serbia & Montenegro, Slovak Republic, and Ukraine.<sup>14</sup>

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13. Federal Law No. 367-FZ “On Amendments to Part I of the Civil Code of the Russian Federation and Repeal of Certain Legal Acts (Provisions of Legal Acts) of the Russian Federation,” signed by the President of the Russian Federation on 21 December 2013.

14. For a helpful comparison of the secured transactions laws of some of the former Soviet Union and “Eastern Bloc” countries, see Tibor Tajti, Post-1990 Secured Transaction Law Reform in Central and Eastern

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**B. LATIN AMERICA AND THE CARIBBEAN**

Apart from Mexico, discussed elsewhere in this article, several other Latin American and Caribbean countries have had new developments in secured transactions law during the past year.

Costa Rica enacted a new secured transactions law based largely on the Organization of American States Model Interamerican Law on Secured Transactions (“OAS Model Law”) on May 20, 2014, but has yet to implement it.<sup>15</sup> Colombia and El Salvador enacted similar laws in 2013, and Colombia’s secured transactions registry, the *Registro de Garantías Mobiliarias*, became operational in May 2014. At this writing (late 2014), Ecuador and Nicaragua are also considering adoption of the OAS Model Law.

The Colombian law<sup>16</sup> permits all types of movable assets, present and future, to be used as collateral. It provides for notice filing in a unified collateral registry. It regulates legal instruments that are the functional equivalents of traditional security interests, such as seller’s retention of title. It establishes the rights and priority of secured claims within bankruptcy proceedings, and allows non-judicial enforcement of secured creditors’ interests in collateral.

Jamaica also adopted a new secured transactions law<sup>17</sup> in 2013, but unlike Colombia did not quickly proceed with implementation. Rather, in 2014 it initiated with the OAS a process of determining how the law would be implemented. Like Colombia’s, the Jamaican law is based on the OAS Model Law. It broadens the range of assets usable as collateral, allows a general description of the collateral and notice filing, and establishes a modern, unified collateral registry.

Panama made similar changes<sup>18</sup> and also allowed non-judicial enforcement of secured creditors’ interests in collateral.

Brazil enacted reforms in its secured transactions enforcement laws, allowing secured creditors for the first time to enforce their interests in movable property without resort to judicial process. However, Brazil made no other changes, leaving in place what otherwise has been regarded as a dysfunctional system in need of reform.

Trinidad and Tobago in 2014 expanded the range of assets that can be used as collateral.

**C. EUROPE**

One of the most interesting new developments in international secured transactions law in 2014 took place in Belgium, long one of the least hospitable countries for secured transactions in movable property. With the enactment of new legislation,<sup>19</sup> Belgium is now poised to modernize its secured transactions legal regime by implementing a new

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Europe, Szegedi Közjegyzői Közlöny. 2013;II(3-4):1-18, available at <http://publications.ceu.hu/sites/default/files/publications/2-only-tajti-article-szkozolony-3-4-2013-english.pdf> (last visited December 5, 2014).

15. *Ley de Garantías Mobiliarias del 20 de mayo de 2014*.

16. *Ley No. 1676 del 20 de agosto de 2014*, “Por la cual se promueve el acceso al crédito y se dictan normas sobre garantías mobiliarias.”

17. Security Interests in Personal Property Act (2013).

18. *Ley 129 de 31 de diciembre de 2013*.

19. “Loi modifiant le Code Civil en ce qui concerne les sûretés réelles mobilières et abrogeant diverses dispositions en cette matière,” 11 July 2013. See I Peeters and M de Muynck, *Belgium moves to modernity but only half way: the introduction of new legislation on security interests in movable assets*, 29 JIBFL 75 (2014).

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system to some extent influenced by the UCC Article 9 system that would require registration of non-possessory pledges of movable property, both tangible and intangible, in a national online registry. Pledges would be subject to written security agreements describing the collateral, and priority would be according to a first-to-register rule. However, registration would have to be accomplished through a notary.

Elsewhere in Europe, the Czech Republic amended its Civil Code<sup>20</sup> to make it possible to register pledges of receivables at its Pledge Registry. It also made it possible for the parties to a security agreement to agree to non-judicial enforcement of the secured creditor's interest in the collateral. Hungary also expanded the range of assets that can be used as collateral and made other changes in its secured transactions laws.<sup>21</sup>

D. ASIA

The Lao PDR (Laos) established a modern notice-based collateral registry in November 2013 pursuant to 2005 legislation and a 2011 decree.<sup>22</sup> The registry is online, available to financial institutions, and can be used to register any kind of security interest in movable property, including functional equivalents of security interests such as financial lease agreements, assignments of receivables, fiduciary transfers of title and sales with retention of title.

Afghanistan adopted a new secured transactions law in 2013.<sup>23</sup> The law was based on the Albanian secured transactions law, which in turn had been modelled on the Canadian Personal Property Security Act (PPSA).

E. AFRICA

Malawi, Rwanda and Liberia have all enacted modern secured transactions laws based in part on the UCC or the New Zealand or Canadian Personal Property Security Acts ("PPSA"s), which themselves were derived directly or indirectly from the pre-1999 version of UCC Article 9. Malawi enacted its PPSA in July 2013. All of these countries recently implemented new collateral registries with the help of the International Finance Corporation. In 2014 Rwanda also strengthened the rights of secured creditors in reorganization proceedings.

F. PACIFIC ISLANDS

As of mid-2014, several of the 13 Pacific island nations have already reformed their secured transactions laws based on the UCC model, with assistance from the Asian Development Bank and the International Finance Corporation. These include Vanuatu, Micronesia, the Solomon Islands, Palau, Tonga, and the Marshall Islands. Papua New Guinea and Samoa have enacted new secured transactions laws but are currently awaiting imple-

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20. Law No. 89/2012 Coll. Civil Code, Part V, Section 3, eff. January 1, 2014.

21. Civil Code of 2013, Act V, Fifth Book, Part V, Title VII, Chapters XXI-XXVIII, *available at* [http://ptk2013.hu/wp-content/uploads/2013/03/uj\\_ptk\\_szov.html](http://ptk2013.hu/wp-content/uploads/2013/03/uj_ptk_szov.html).

22. Registry Office For Security Interests In Movable Property, LAOTIAN MINISTRY OF FINANCE, [http://www.mof.gov.la/str/file/Information\\_Guide\\_English.pdf](http://www.mof.gov.la/str/file/Information_Guide_English.pdf).

23. *Law For Secured Transactions On Movable Property In Banking Transactions*, [http://dab.gov.af/Content/Media/Documents/Secured\\_Transaction\\_Law\\_English\\_06Jan102412201318485013553325325.pdf](http://dab.gov.af/Content/Media/Documents/Secured_Transaction_Law_English_06Jan102412201318485013553325325.pdf).

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mentation of modern registries. A new secured transactions law is under consideration in Fiji.

G. CAPE TOWN CONVENTION

The Cape Town Convention on International Interests in Mobile Equipment<sup>24</sup> came into force in 2001 as to its protocol on aircraft, covering large aircraft equipment.<sup>25</sup> Two other protocols, on railway rolling stock and space assets, were drafted but have not been ratified by a sufficient number of states to come into force. In 2014, development of a fourth protocol, on agricultural, construction and mining equipment, was pending.<sup>26</sup>

H. EFFECT OF MODERNIZATION OF SECURED TRANSACTIONS LAWS

Where a country has modernized its secured transactions laws according to the UCC or PPSA model, or where its laws otherwise satisfy the standards set in UCC § 9-307(c), a creditor extending secured credit to a person residing in that country or a non-U.S. entity maintaining its chief executive office in that country may have to register its security interest under the laws of that country for its security interest to have a priority that would be recognized in a U.S. court.<sup>27</sup> If the debtor's country's secured transactions laws do not satisfy the § 9-307(c) standards, the secured creditor normally would perfect its security interest in accordance with the laws of the District of Columbia, as the debtor is deemed, under the last sentence of that section, to be located there, and perfection in most types of collateral is governed by the law of the location of the debtor under UCC § 9-301(1).

**IV. Technology Patent Cross-Licensing: *Jaffe v. Samsung Electronics Co., Ltd., et al.***

In October 2014, the United States Supreme Court denied a petition for a writ of *certiorari* in *Jaffé v. Samsung Electronics Co.*,<sup>28</sup> letting stand the December 2013 decision by the United States Court of Appeals for the Fourth Circuit that had held that the protections afforded to intellectual property licensees by § 365(n) of the Bankruptcy Code<sup>29</sup> apply in Chapter 15 cases.

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24. Convention On International Interests In Mobile Equipment (2001), available at <http://www.unidroit.org/instruments/security-interests/cape-town-convention>.

25. Protocol To The Convention On International Interests In Mobile Equipment On Matters Specific To Aircraft Equipment (2001), available at <http://www.unidroit.org/instruments/security-interests/aircraft-protocol>.

26. See <http://www.unidroit.org/work-in-progress-studies/current-studies/mac-protocol>.

27. See Arnold S. Rosenberg, *Where to File Against Non-U.S. Debtors: Applying UCC §9-307(c)[Rev] to Foreign Filing, Recording and Registration Systems*, 39 U.C.C. L.J. 109 (2006); *idem.*, *Classification of Foreign Filing Systems*, in PRACTICE UNDER ARTICLE 9 OF THE U.C.C. (2012); Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A., Inc., 269 P.3d 709 (Ariz. Ct. App. 2012).

28. *Jaffé v. Samsung Electronics Co.*, 737 F.3d 14 (4th Cir. 2013), *cert. denied*, No. 13-1324 (Oct. 6, 2014).

29. 11 U.S.C. §§ 101, *et seq.* (as amended, the "Bankruptcy Code").

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Under U.S. bankruptcy law, a debtor generally has a right to reject executory contracts that the debtor, in its business judgment, determines are burdensome.<sup>30</sup> That right is not unlimited. In certain circumstances, the debtor's rejection right may be restricted or conditioned. In the area of intellectual property, Section 365(n) provides that where a debtor licensor of intellectual property elects to reject that license, nevertheless the licensee may elect "to retain its rights (including a right to enforce any exclusivity provision of such contract) under such contract" subject to making any required ongoing payments.<sup>31</sup> So under U.S. bankruptcy law, even where a debtor rejects an intellectual property license, the licensee has an opportunity to retain its rights under that rejected license.

By contrast, under German insolvency law, an insolvency administrator who determines that an intellectual property license is burdensome may not only elect not to continue to perform under the license (akin to a decision to reject the license), but may also terminate the licensee's right to use the intellectual property.<sup>32</sup>

Qimonda AG ("Qimonda") is a semiconductor manufacturer, whose principle assets are approximately 10,000 patents, 4,000 of which are U.S. patents. Qimonda instituted a German insolvency proceeding, which was recognized as a foreign main proceeding under Chapter 15. In the German proceeding, Qimonda declared, under German law, that its patent licenses were no longer enforceable. In its Chapter 15 case, Qimonda then sought discretionary relief to terminate and relicense its U.S. patents.

Weighing the interests of Qimonda and the licensees, the bankruptcy court concluded that "the balancing of debtor and creditor interests required by § 1522(a), weighs in favor of making § 365(n) applicable to Dr. Jaffe's administration of Qimonda's U.S. patents."<sup>33</sup>

Section 1506 of the Bankruptcy Code allows a court to deny a foreign representative's request if granting the request would be 'manifestly contrary to . . . public policy.'<sup>34</sup> Commentary to both Chapter 15 and the UNICITRAL Model Law on Cross-Border Insolvency advise that the public policy exception applies only in circumstances where a 'fundamental policy' is threatened. The bankruptcy court reasoned:

That the right of a non-bankrupt licensee to continue using a patent license was deemed by Congress to be of great public importance can scarcely be doubted. The legislative history is clear that Congress believed that allowing patent licenses to be terminated in bankruptcy would "impose[ ] a burden on American technological development." Moreover, the alacrity with which Congress acted [in adding section 365(n) to the Bankruptcy Code] following the *Lubrizol* decision is ample evidence of the seriousness with which it viewed the "threat to American Technology" raised by the holding of that case. The question before the court, however, is whether the policy that § 365(n) seeks to promote is *fundamental*.<sup>35</sup>

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30. Bankruptcy Code § 365(a) does not explicitly require burdensomeness. The determination whether rejection of an executory contract is advantageous to the estate is left to the business judgment of the trustee or debtor in possession. See *in re Orion Pictures, Inc.*, 4 F. 3d 1095, 1099 (2d Cir. 1993).

31. 11 U.S.C. § 365(n).

32. German Insolvency Code § 103 is similar to Bankruptcy Code § 365 but lacks an exception for licenses like § 365(n) that would limit their rejection.

33. *Id.* at 182.

34. 11 U.S.C. § 1506.

35. *Id.* at 184.

The bankruptcy court held that the preservation of intellectual property licensee rights is a fundamental right, and concluded that for purposes of § 1506, “deferring to German law, to the extent it allows cancellation of the U.S. patent licenses, would be manifestly contrary to U.S. public policy.”<sup>36</sup>

On appeal, the Fourth Circuit affirmed the bankruptcy court’s decision, stating:

[I]n weighing the respective interests of the Licensees and the debtor under § 1522(a), [the bankruptcy court] found that without the protection of § 365(n), the risk of harm to the Licensees would be very real, impairing the “design freedom provided [them] by the cross-license agreements.” . . . And as the bankruptcy court otherwise found, this potential harm to the Licensees would, in turn, threaten to “slow the pace of innovation” in the United States, to the detriment of the U.S. economy. . . . Thus, the court’s findings, which were, to be sure, focused on the Licensees’ interests, nonetheless necessarily furthered the public policy underlying § 365(n).<sup>37</sup>

The Fourth Circuit refrained from holding that failing to apply § 365(n) would be “manifestly contrary” to U.S. public policy in all circumstances. “In this case,” the court held,

it is sufficient for us to affirm the bankruptcy court, based on its application of § 1522(a). But in doing so, we understand that, by affirming the bankruptcy court’s application of § 365(n) following its balancing analysis under § 1522(a), we also indirectly further the public policy that underlies § 365(n). The Senate Report accompanying the bill that became § 365(n) explicitly recognized that licensees have a strong interest in maintaining their right to use intellectual property following the licensor’s bankruptcy and that to deny them that right would ‘impose[ ] a burden on American technological development that was never intended by Congress.’<sup>38</sup>

In *Jaffe*, the Fourth Circuit struck the balance between the interests of the parties that § 1522 requires, granting relief to a foreign representative, but only when and to the extent that the interests of other parties (including the debtor and creditors) are sufficiently protected. As policy, the decision supports innovation by refusing to unsettle the expectations on which the parties made their investment decisions. As law, the protective balancing required by § 1522 avoids an overly-specific, itemization of mandatory protections that would favor some and perhaps omit others.

#### **V. Bankruptcy Code Section 550 Cannot Be Used to Recover Foreign Transfers to Foreign Subsequent Transferees**

Following the December 11, 2008 arrest of Bernard L. Madoff for his operation of a Ponzi scheme through Bernard L. Madoff Investment Securities LLC (“BLMIS”),<sup>39</sup> liqui-

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36. *Id.* at 185.

37. *Jaffe v. Samsung Electronics Co., Ltd.*, 737 F.3d 14, 30 (4th Cir. 2013).

38. *Id.* at 32.

39. *See Picard v. Merkin et al.*, 515 B.R. 117, 117 (Bankr. S.D.N.Y. 2014) (giving detailed background of BLMIS in connection with decision on motion to dismiss third amended complaint against certain fraudulent transfer defendants).



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dation proceedings were initiated pursuant to the Securities Investor Protection Act (“SIPA”). BLMIS.<sup>40</sup> At the time of Madoff’s arrest, BLMIS managed approximately \$65 billion in customer funds, from which Madoff would make distributions to BLMIS customers from money invested by other BLMIS customers, claiming that such distributions were on account of investments in the stock market that ultimately proved to be fictitious.<sup>41</sup> Since the commencement of the SIPA proceeding, Irving H. Picard, as Trustee for the liquidation of BLMIS (the “Trustee”), has aggressively sought recovery of funds on behalf of the SIPA estate from customers who received fictitious profits, i.e., more on their investments than the original principal they invested.<sup>42</sup> As of October 15, 2014, the Trustee had successfully collected approximately \$9.84 billion of the nearly \$20 billion in stolen investments.<sup>43</sup>

Notwithstanding the Trustee’s successful recovery strategies to date, three important decisions were issued in 2014 that suggest the litigation environment may be shifting in favor of the remaining BLMIS customers and away from the Trustee. At least one of those decisions had significant implications for international insolvency practitioners.

On July 6, 2014, the District Court for the Southern District of New York issued a decision rejecting the Trustee’s “unprecedented” attempt to expand U.S. bankruptcy law across borders when he sought to recover allegedly fraudulent transfers made from BLMIS’s offshore feeder funds to those funds’ institutional investors overseas.<sup>44</sup>

A. BACKGROUND

Historically, so-called “feeder funds” pooled their own customers’ assets for investment in BLMIS.<sup>45</sup> As those feeder funds received distributions or withdrew money from BLMIS, they would, in turn, subsequently transfer such money to their own customers and managers. Many of these feeder funds had invested all or nearly all of their assets in BLMIS, so when BLMIS collapsed in late 2008, those funds similarly entered into liquidation proceedings in each of their home jurisdictions.<sup>46</sup>

In addition to seeking to recover the allegedly avoidable transfers BLMIS made to its feeder funds, the Trustee sought to recover the subsequent transfers made by those feeder funds to their investors, as mediate or immediate transferees.<sup>47</sup> Defendant subsequent transferees moved to dismiss the Trustee’s complaints, based on the argument that Section

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40. See generally *Sec. Inv. Prot. Corp. v. BLMIS*, Adv. Pro. No. 08-01789-SMB (Bankr. S.D.N.Y.).

41. *Id.*

42. The Bankruptcy Code permits the Trustee to recover or avoid prepetition transfers that “wrongfully reduce the pool of assets available to creditors.” *Picard v. Fairfield Greenwich Ltd., et al.*, 762 F.3d 199, 208 (2d Cir. 2014).

43. See generally <http://www.madofftrustee.com/> (Nov. 4, 2014).

44. *Sec. Inv. Prot. Corp. v. BLMIS*, 513 B.R. 222 (S.D.N.Y. 2014).

45. *Id.* at 225.

46. *Id.*

47. As a specific example, one defendant in the action, CACEIS Bank, a French *société anonyme* operating in France, invested funds with Fairfield Sentry Limited, a British Virgin Islands (“BVI”) company, and Harley International (Cayman) Limited, a Cayman Islands company. Both Fairfield Sentry and Harley were BLMIS feeder funds that are now in liquidation proceedings in the BVI and Cayman Islands, respectively. The Trustee alleged that he was entitled to recover approximately \$50 million from CACEIS, which CACEIS had received in recoverable subsequent transfers as a customer of Fairfield Sentry and Harley. *Id.* at 225-26.

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550 of the Bankruptcy Code does not apply extraterritorially and therefore does not reach the foreign subsequent transfers made by foreign feeder funds.<sup>48</sup>

**B. APPLICABLE LAW**

Section 550(a) of the Bankruptcy Code permits the Trustee to recover “the property transferred [by a debtor] . . . to the extent that a transfer is avoided” under one of the Bankruptcy Code’s avoidance provisions.<sup>49</sup> Section 548(c) of the Bankruptcy Code allows a transferee who “takes for value and in good faith . . . [to] retain any interest transferred . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer.”<sup>50</sup>

As held by the Supreme Court of the United States,<sup>51</sup> there is a presumption against extraterritorial application of federal statutes, in order to “protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>52</sup> “In determining whether the presumption against extraterritoriality applies, the Court must apply the following two-part test:

- i) Determine whether the factual circumstances at issue require an extraterritorial application of the relevant statutory provision; and
- ii) If so, determine whether Congress intended for the statute to apply extraterritorially.<sup>53</sup>

**C. DISTRICT COURT HOLDING**

The District Court held that the presumption against extraterritorial application was not rebutted in this case.<sup>54</sup>

With respect to the first step in the analysis, the Court rejected the Trustee’s argument that “the application of any of the incorporated provisions of the Bankruptcy Code is inherently domestic,” and, instead, found that “a mere connection to a U.S. debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic.”<sup>55</sup> The Court stated that a straightforward reading of Section 550(a) requires a focus on “‘the property transferred’ and the fact of its transfer, not the debtor.”<sup>56</sup> Similarly, Section 548 also focuses on “the nature of the transaction in which property is transferred, not merely the debtor itself.”<sup>57</sup> Finally, the Court noted that the

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48. *Id.* at 226.

49. 11 U.S.C. § 550(a); *see, e.g.*, 11 U.S.C. § 548(a)(1) (permitting a trustee to recover any fraudulent transfer made within two years before the petition date to the extent (A) such transfer was made with actual intent to defraud creditors, or (B) the debtor received less than reasonably equivalent value for such transfer and was insolvent or made insolvent by the transfer).

50. 11 U.S.C. § 548(c).

51. *See, e.g.*, *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 2877, 177 (2010).

52. *BLMIS*, 513 B.R. at 226 (quoting *EEOC v. Arabian American Oil Co. (“Aramco”)*, 499 U.S. 244, 248, 111 S.Ct. 1227 (1991)).

53. *Id.* (citing *Morrison*, 130 S.Ct. at 2877-88; *In re Maxwell Comm’n Corp. (“Maxwell F”)*, 186 B.R. 807, 816 (S.D.N.Y. 1995)).

54. *Id.*

55. *Id.* at 227.

56. *Id.*

57. *Id.*

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“transfers and transferees are predominantly foreign: foreign feeder funds transferring assets abroad to their foreign customers and other foreign transferees.”<sup>58</sup>

When looking to the Congressional intent behind Section 550(a), the Court looked first to the language of the statute and noted that nothing therein suggested an intent for such statute to apply to foreign transfers.<sup>59</sup> The Court then rejected the Trustee’s arguments that Congressional intent may be implied because (i) the clear extraterritorial intent in Section 541(a)(1)<sup>60</sup> reflects that Congress could have clearly shown the same extraterritorial intent in Section 550(a) if it had so chosen,<sup>61</sup> (ii) the relevant sections of SIPA were likewise unhelpful because “SIPA’s predominantly domestic focus suggests a lack of intent by Congress to extend its reach extraterritorially,”<sup>62</sup> and (iii) while the Trustee’s policy argument that declining to apply 550(a) to foreign transfers would create a loophole in the law that “would allow a U.S. debtor to fraudulently transfer all of his assets offshore and then retransfer those assets to avoid the reach of U.S. bankruptcy law,” the Court noted that such a potential loophole must be balanced against the presumption against extraterritoriality and that the “Trustee here may be able to utilize the laws of the countries where such transfers occurred to avoid such an evasion while at the same time avoiding international discord.”<sup>63</sup>

Finally, the Court held that, even if Section 550(a) could be applied extraterritorially, given the circumstances in this case, such an application would be inappropriate under the theory of international comity,<sup>64</sup> which requires that each applicable foreign jurisdiction be entitled to apply its “own rules concerning on what bases the recipient of a transfer from a debtor should be required to disgorge it.”<sup>65</sup>

D. IMPLICATIONS

Judge Rakoff’s decision effectively precludes recovery by the Trustee in this case of billions of dollars in claims against foreign subsequent transferees. Moreover, his decision suggests that the presumption against extraterritoriality and considerations of international comity will preclude recovery in cases of transfers made on foreign soil between foreign non-debtors, particularly if the transferors are the subject of their own foreign insolvency proceedings. Although this may create a “loophole” inviting fraud on the part of U.S. debtors, it also protects foreign investors who may not otherwise have anticipated the application of U.S. law to their dealings with non-U.S. investment funds.

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58. *Id.*

59. *Id.* at 228.

60. Section 541(a)(1) of the Bankruptcy Code defines property of a debtor’s estate to include certain specified property “wherever located and by whomever held.” 11 U.S.C. § 541(a)(1).

61. *BLMIS*, 513 B.R. at 229-30.

62. *Id.* at 230.

63. *Id.* at 231.

64. *Id.* at 231 (noting, “Comity ‘is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws’”) (quoting *In re Maxwell Comm’n Corp.* (“*Maxwell II*”), 93 F.3d at 1036, 1046 (2d Cir. 1996)).

65. *Id.* at 232.

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**VI. Other Significant U.S. Insolvency Cases**

A. OTHER MADOFF CASES

Two other Madoff cases should be noted. In one, *Picard v. Fairfield Greenwich Ltd., et al.*,<sup>66</sup> the Trustee for BLMIS attempted unsuccessfully to block settlements of investor class action lawsuits against feeder funds on the theory that the lawsuits were stayed by the automatic stay of Bankruptcy Code § 362(a). Notwithstanding the risk that the investor claims might conflict with the Trustee's recovery on his fraudulent transfer claims against the feeder funds, the Court held that the automatic stay would not apply. The Court observed that a fraudulent transfer claim is dependent on a finding of the debtor's fraud, while the legal bases for the investors' class actions, which consisted largely of claims under federal securities statutes, were independent of any liability of Madoff or BLMIS for fraud and wholly dependent on the fraud of the managers of the non-debtor feeder funds.<sup>67</sup> The class actions therefore were not disguised fraudulent transfer claims, and they did not seek property of the estate. Consequently, the stay did not apply.

In the other Madoff case, *Sec. Inv. Prot. Corp. v. BLMIS*,<sup>68</sup> in accordance with Sections 548(c) and 550(a)(2) of the Bankruptcy Code, and relying on securities laws policies regarding marketplace stability and investor confidence, the Court ruled that the Trustee must sufficiently plead a transferee's lack of good faith in order to survive a motion to dismiss in a SIPA proceeding.

Sections 548(c) and 550(b) provide defenses in fraudulent transfer actions to good faith transferees who meet certain other requirements, but do not define "good faith."<sup>69</sup> The Court rejected the Trustee's argument that the defendants "failed to act in good faith because they were aware of suspicious circumstances that should have led them to investigate the possibility of . . . fraud," and held that "in a SIPA proceeding such as this, a lack of 'good faith' requires a showing that a given defendant acted with "willful blindness' to the truth,' that is, he 'intentionally [chose] to blind himself to the 'red flags' that suggest a high probability of fraud."<sup>70</sup> "The Trustee's approach," noted the Court, "would impose a burden of investigation on investors totally at odds with the investor confidence and securities market stability that SIPA is designed to enhance. . . ."<sup>71</sup>

The decision will affect hundreds of fraudulent transfer actions pending or to be brought by the Trustee, for which parties doubt the Trustee possesses the necessary evidence to adequately plead a lack of good faith.

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66. 762 F.3d 199 (2d Cir. 2014). Co-author David L. Barrack represents Ralph C. Dawson, as Receiver for appellee Ascot Partners, L.P., in this case.

67. *Id.* at 208-211.

68. 516 B.R. 18 (S.D.N.Y. 2014).

69. *Id.*

70. *Id.* at 21, quoting *Picard v. Katz*, 462 B.R. 447 (S.D.N.Y. 2011).

71. *Id.* at 22.

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- B. MAKE-WHOLE PREMIUMS AND INTEREST RATES IN CHAPTER 11: *IN RE MPM SILICONES, LLC*, CASE NO. 14-22503 (BANKR. S.D.N.Y. SEPTEMBER 9, 2014)

This bench ruling on a Chapter 11 plan of reorganization is noteworthy because the Court held that the debtors were not required to pay senior noteholders a make-whole premium provided for in their notes and that the debtors could satisfy the cramdown provisions of Bankruptcy Code Section 1129(b) without providing a market rate of interest.

The holders of \$1.0 billion of First Lien Notes and \$250 million of so-called 1.5 Lien Notes were oversecured and asserted that they were entitled to a “make whole” premium—a type of call provision on a bond allowing the borrower to pay off remaining debt prior to maturity subject to payment of the premium—in addition to unpaid principal and accrued interest. The noteholders objected to confirmation of the plan, arguing they were entitled to receive the make-whole payments and that their treatment under the plan, which denied them the payments, was not “fair and equitable” as required by Section 1129(b) of the Bankruptcy Code.

1. *Make-Whole Provisions*

The Court held that the noteholders were not entitled to receive make-whole payments because the indentures did not expressly provide for the make-whole premium upon the automatic acceleration of debt as a result of a bankruptcy filing. The Court further held that by agreeing to the automatic acceleration provision in the indentures, the noteholders had voluntarily forfeited their right to the make-whole premium based on the debtors’ bankruptcy filing. The Court left open the possibility that a future agreement might provide for a make-whole payment as part of a bankruptcy claim, but stated that this language must be expressly set forth in the contract.

The Court also dismissed the argument that the noteholders should be able to decelerate the notes and thus increase their bankruptcy claim. While liquidating a securities contract is permissible under Section 555 of the Bankruptcy Code notwithstanding the automatic stay under Section 362(a), in the Court’s view it was doubtful that the indenture itself is a securities contract under Section 741(7)(A) of the Bankruptcy Code, and deceleration of the notes to permit the increase of a claim against the debtors through the make-whole premium is not a “liquidation” as contemplated by Section 555.

2. *Below Market Interest Rate*

The Court rejected the noteholders’ assertion that their plan treatment was not fair and equitable because the interest rate was below market and therefore, did not satisfy Section 1129(b) of the Bankruptcy Code. Its decision focused on two cases: *Till v. SCS Credit Corp.*, and *In re Valenti*, both of which analyzed the proper interest rate to apply to replacement notes distributed to secured creditors under Chapter 13 of the Bankruptcy Code, which contains a cramdown provision substantially similar to that in Chapter 11.<sup>72</sup> In *Till*, a plurality of the U.S. Supreme Court held that the cramdown interest on replacement

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72. *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); *In re Valenti*, 105 F.3d 55 (2d Cir. 1997).

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notes should be the “formula” method, which is calculated by using the prime rate and adjusting upward to reflect credit and collateral risk. Courts applying this method typically set a risk premium of between 1.0% and 3.0% over the prime rate. In Footnote 14 in *Till*, however, the plurality opinion stated that the cramdown interest in a Chapter 11 might be calculated differently because, unlike the Chapter 13 context, there was a free market of willing cramdown lenders and thus it “might make sense to ask what rate an efficient market would produce.”<sup>73</sup>

The Court in *MPM* determined that no such effective market of willing cramdown lenders existed in that case. The Court then adopted the *Till* formula approach for calculating the interest rate on the replacement notes but held that, as in *Till*, the prime rate, not the treasury rate, was the appropriate benchmark. It thus extended the Supreme Court’s reasoning in *Till* from Chapter 13 cramdown rates to Chapter 11 cramdown rates, which the Court stated should likewise “not contain any profit or cost element.”

While *MPM* illustrates the requirement for careful drafting if lenders plan to argue for a make-whole payment, it concludes that such payments constitute unmatured interest and are not allowable in bankruptcy cases in any event. It also rejects an expansive view of what constitutes a “liquidation” and a “securities contract” under Sections 555 and 741 of the Bankruptcy Code, respectively. *MPM* also stands as further authority extending the cramdown interest rate analysis of *Till* to the Chapter 11 context.

The *MPM* ruling is currently on appeal.

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73. *Till v. SCS Credit Corp.*, 541 U.S. 465, 476 (2004).

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## International Investment and Development

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This article reviews important developments in 2014 in the field of international investment and development.

### I. International Investment Policy Making\*

2014 saw considerable activity in the area of investment policy making. At least eight bilateral investment treaties (BITs) were concluded in 2014.<sup>1</sup> In addition, about thirteen other international investment agreements (IIAs) were also concluded.<sup>2</sup> The BITs concluded in 2014 include: Israel-Myanmar BIT,<sup>3</sup> Azerbaijan–Russia Federation BIT,<sup>4</sup> Canada-Serbia BIT,<sup>5</sup> Burkina Faso-Singapore BIT,<sup>6</sup> Cote d'Ivoire-Singapore BIT,<sup>7</sup> Columbia-Turkey BIT,<sup>8</sup> Colombia-France BIT,<sup>9</sup> and Georgia-Switzerland BIT.<sup>10</sup> Two BITs were also concluded late in 2013: Japan-Myanmar BIT<sup>11</sup> and India-United Arab Emirate BIT.<sup>12</sup> Regarding other IIAs, the following were concluded in 2014: Canada-

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1. See generally, United Nations Conference on Trade and Development (UNCTAD), International Investment Agreement Monitor, <http://investmentpolicyhub.unctad.org/IIA>.

2. *Id.*

3. Concluded 5 October 2014.

4. Concluded 29 September 2014.

5. Concluded 5 September 2014.

6. Concluded 27 August 2014.

7. Concluded 27 August 2014.

8. Concluded 28 July 2014.

9. Concluded 10 July 2014.

10. Concluded 3 June 2013.

11. Concluded 15 December 2013.

12. Concluded 12 December 2013.



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Korea Free Trade Agreement (FTA),<sup>13</sup> ASEAN–India Services and Investment Agreement,<sup>14</sup> ECOWAS–USA TIFA,<sup>15</sup> Japan–Mongolia Economic Partnership Agreement (EPA),<sup>16</sup> Australia–Japan EPA,<sup>17</sup> European Union–Georgia Association Agreement,<sup>18</sup> EU–Moldova Association Agreement,<sup>19</sup> EU–Ukraine Association Agreement,<sup>20</sup> Canada–Republic of Korea FTA,<sup>21</sup> the Treaty on Eurasian Economic Association,<sup>22</sup> Malaysia–Turkey FTA,<sup>23</sup> Australia–Republic of Korea FTA,<sup>24</sup> Mexico–Panama FTA,<sup>25</sup> and Protocol Pacific Alliance.<sup>26</sup>

A. REFORM OF INTERNATIONAL INVESTMENT LAW: THE BRICS PERSPECTIVE ON INTERNATIONAL INVESTMENT AGREEMENTS

On 13 July 2014, the Trade Ministers of Brazil, Russia, India, China and South Africa (hereinafter “the BRICS”) meeting on the eve of the 6th BRICS Summit, adopted a Communiqué in which they “reaffirmed the importance of a continued dialogue on international investment agreements.”<sup>27</sup> The following day, on 14 July 2014, the BRICS nations released a document titled “*BRICS Perspective on International Investment Agreements* (“BRICS Perspective on IIA”).<sup>28</sup> The *BRICS Perspective on International Investment Agreements* is to date the boldest statement yet from the BRICS regarding their views about the international investment law regime and their position regarding needed reform. The document serves as a voluntary reference for countries to advance a more balanced approach to investment treaties.<sup>29</sup> While acknowledging that FDI “can make a positive contribution to sustainable development when integrated into national development strategies,” BRICS Member States take the position that IIAs “should strike a balance between the protection of investors and the Government’s sovereign right to regulate in the public interest”<sup>30</sup> and specifically call for further improvements of IIAs, including in their dispute settlement mechanisms.<sup>31</sup> Individually, and collectively, the BRICS nations appear to be opening up considerable space for serious discussion about the future of international investment law and the investor–State dispute settlement (ISDS) system. Although more spaces for dialogue and debate are emerging, whether there is enough political will to push needed reform through is quite another matter. Whether other

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13. Concluded 22 September 2014.

14. Concluded 8 September 2014. ASEAN stands for the Association of South-East Asian Nation.

15. Concluded 5 August 2014. ECOWAS stands for Economic Community of West Africa States.

16. Concluded 22 July 2014.

17. Concluded 8 July 2014.

18. Concluded 27 June 2014.

19. Concluded 27 June 2014.

20. Concluded 27 June 2014.

21. Concluded 13 June 2014.

22. Concluded 29 May 2014.

23. Concluded 17 April 2014.

24. Concluded 8 April 2014.

25. Concluded 3 April 2014.

26. Concluded 10 February 2014.

27. See Communiqué of the Meeting of Trade Ministers on the eve of the VI Summit. 14 July 2014.

28. See *BRICS Perspective on International Investment Agreements*, 14 July 2014.

29. See *BRICS Perspective on International Investment Agreements*, 14 July 2014.

30. *Id.*, ¶ 2.

31. *Id.*, ¶ 3.

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developing countries, particularly countries in Africa, will seize this new opportunity to push the BRICS nations to introduce meaningful changes to the system also remains to be seen. The role of the BRICS nations as both capital-importers and capital exporters means that the road to reform will undoubtedly be complicated, difficult, and potentially treacherous.

The expressed position of BRICS that “[i]t is . . . important International Investment Agreements serve the purpose of sustainable development,” will be tested in the coming years. It remains to be seen whether BRICS Member States will build common approaches on international investment policy and whether they will, individually and collectively, push for improvement in the international investment law architecture. Undoubtedly, more is needed from the BRICS nations than statements and declarations at high-profile meetings. Many old generation BITs between some BRICS members and other developing countries remain in force and will need to be addressed now or in the future.

## **II. Africa\***

### **A. CHINA-~~AFRICA~~ INVESTMENT AND DEVELOPMENT RELATIONS**

In July 2014, the Information Office of the State Council of the People’s Republic of China issued China’s second white paper on foreign aid.<sup>32</sup> The first Chinese Aid White Paper was released in 2011. The second white paper offers an overview of China’s foreign assistance from 2010 to 2012. Information in the white paper points to the emergence of China as a significant aid donor and to China’s influence in the South-South cooperation framework. Overall, China’s aid program is growing and the number of countries receiving Chinese aid is also growing. Countries in Africa appear to be the main beneficiaries. According to the white paper, from 2010 to 2012, China appropriated approximately 89.34 billion yuan (14.41 billion U.S. dollars) for foreign assistance in three types: grant (aid gratis), interest-free loan, and concessional loan.<sup>33</sup>

The stated goal of China’s development aid is “to reduce poverty and improve livelihoods.”<sup>34</sup> According to the white paper, “China prioritizes supporting other developing countries to develop agriculture, enhance education level, improve medical and health services and build public welfare facilities, and provide emergency humanitarian aid when they suffer severe disasters.” Economic infrastructure features strongly in China’s foreign assistance program in general and China’s assistance to Africa in particular. In terms of the distribution of China’s foreign assistance fund, according to projected fields, 44.8% went to economic infrastructure, 27.6% to social and public infrastructure, 15.0% to goods and materials, 5.8% to human resource development cooperation, 3.6% to industry, and 2% to agriculture.<sup>35</sup>

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32. Information Office of the State Council, The People’s Republic of China, China’s Foreign Aid (2014).

33. *Id.*

34. *Id.*

35. *Id.*

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In terms of the distribution of China's Foreign Assistance Funds according to the income level of recipient countries, from 2010 to 2012, least-developed countries (LDC) received 52.1% of China's foreign assistance.<sup>36</sup> Countries in Africa feature strongly in China's foreign assistance—a fact that is generating considerable debate and controversy in and outside Africa. Of the 121 countries that were the beneficiaries of China's assistance, 51 are in Africa, 30 in Asia, 19 in Latin America and the Caribbean and 12 in Europe.<sup>37</sup> 51.8% of the distribution from China's foreign assistance fund between 2010 and 2012 went to Africa, 30.5% to Asia, 8.4% to Latin America and the Caribbean, 4.2% to Oceania, 1.7% to Europe, and 3.4% to Others.

Growth in China's foreign assistance to countries in Africa is matched by phenomenal growth in China-Africa investment relations. According to the China-Africa Economic and Trade Cooperation White Paper (2013), "[f]rom 2009 to 2012, China's direct investment in Africa increased from US\$1.44 billion to US\$2.52 billion, with an annual growth rate of 20.5%." Also from 2009 to 2012, "China's accumulative direct investment in Africa increased from US\$9.33 billion to US\$21.23 billion, 2.3 times the 2009 figure."<sup>38</sup>

China's rising prominence in development aid poses significant challenges for traditional aid donors and for the international development assistance infrastructure. To what extent is China changing the very notion of development and development aid? What does Chinese foreign assistance mean for the poorest of the poor in recipient countries? Is China reaching development "aid orphans" ignored by traditional donors? Is China guided by established standards and norms pertaining to development aid and aids effectiveness or is China charting its own course and creating its own rules? How does China respond to accusations that its aid supports rogue states and undermines rule of law in recipient countries? According to the white paper,

China will continue to increase the input in foreign assistance, further optimize assistance structure, highlight key aspects, innovate assistance means, raise the efficiency of capital utilization, effectively help recipient countries improve their people's well-being and enhance their capability of independent development. China is willing to work with the international community to share opportunities, meet challenges, strive to realize the world's dream of lasting peace and common prosperity, and make greater contribution to the development of mankind.<sup>39</sup>

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36. *Id.* Lower-middle-income countries received 21.2%; upper-middle-income countries, 12.3%, other low-income countries 9.0%, and others, 5.4%.

37. *Id.*

38. The Information Office of the State Council, The People's Republic of China, China-Africa Economic and Trade Cooperation (2013) (August 2013). <http://www.scio.gov.cn/zxbd/wz/Document/1344818/1344818.htm>

39. *Id.*

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B. SOUTH AFRICA

1. *The Promotion and Protection of Investment Bill*

Action is still awaited on South Africa's *Promotion and Protection of Investment Bill* ("Act") which was published for broader comments on October 29, 2013.<sup>40</sup> The Act was open for public comment until January 31, 2014. The Bill has generated considerable controversy in South Africa. The Act is under discussion at the National Economic Development & Labour Council and will be referred to Parliament soon.<sup>41</sup>

The broad aims of the Act are to "promote and protect investment in a manner that is consistent with public interest and a balance between the rights and obligations of investors," and to ensure equal treatment between foreign investors and South African citizens. Very similar to traditional BITs, investment is defined in the Bill to include intellectual property rights such as copyrights, patents, utility model patents, registered designs, trade-marks, trade-names, trade and business secrets and technical processes.<sup>42</sup> However to qualify for protection, the investment must "relate[ ] to a material economic investment or significant underlying physical presence in the Republic, such as operational facilities."<sup>43</sup> Another qualifier is found in Article 5 which states that the investment protection under this Act applies to investors and their investments "where those investments have been-(a) made in accordance with applicable legislation; and (b) acquired and used in the expectation, and for the purpose, of economic activity or other business purposes."<sup>44</sup> Furthermore, the Act states explicitly that "the protection of foreign investment is subject to compliance with applicable domestic legislation and international agreements."<sup>45</sup>

With a view to achieving necessary policy coherence, the Act offers interpretive guidance that is clearly intended to constrain the discretion of future arbitral tribunals. Article 2 provides that the "Act must be interpreted and applied with due regards to . . . (a) the Constitution; (b) international law consistent with the Constitution; (c) customary international law consistent with the Constitution; and (d) any other relevant convention or international agreement to which [South Africa] is or becomes a party."

Unlike traditional BITs, the South African government retains considerable policy space under the new Act. For example, the preamble explicitly reaffirms "the Government's right to regulate in the public interest in accordance with the law." Furthermore, Article 4(3) states:

This Act does not preclude or affect the duty of the Government of the Republic or any organ of State, to take the measures contemplated in section 10, including but not limited to, the operation of-  
(a) any existing taxation legislative measures or provisions;

40. Promotion and Protection Investment Bill, 2013, General Notice 1087 in GG36995 of 1 Nov. 2013 (S. Afr.) available at [http://www.greengazette.co.za/documents/national-gazette-36995-of-01-november-2013-vol-581\\_20131101-GGN-36995.pdf](http://www.greengazette.co.za/documents/national-gazette-36995-of-01-november-2013-vol-581_20131101-GGN-36995.pdf).

41. Jena Marias, New-look protection bill will not chase away foreign investment-DTI, Business Day Live. 28 September 2014. <http://www.bdlive.co.za/businessimes/2014/09/28/new-look-protection-bill-will-not-chase-away-foreign-investment---dti>

42. Article 1(e).

43. *Id.*

44. *Id.*, Article 5(1)(a) and (b).

45. *Id.*, Article 5(1)(e).

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(b) subsidies or grants provided by the Government of the Republic or any organ of State as defined in section 239 of the Constitution;

...

(e) any special advantages accorded by the Republic to development finance institutions established for the purpose of development assistance or the development of small and medium businesses or new industries.

Article 10 of the Bill is titled, "Sovereign right to regulate in the public interest." Article 10 permits the Government of South Africa and any organ of State to take measures to, inter alia, "redress historical, social and economic inequalities;" "uphold the values and principles espoused in section 195 of the Constitution;" "uphold the rights guaranteed in the Constitution;" and "promote and preserve cultural heritage and practices, indigenous knowledge and biological resources related thereto."

Other notable differences between the Act and traditional BITs that South Africa concluded in the past can be found in the provisions relating to national treatment, expropriation and dispute settlement. The Act details government measures that are excluded from the provision on expropriation. Compulsory license enjoys immunity under the Act. Actions that do not amount to expropriation include: (i) "A measure or series of measures taken by the government of the Republic that have an incidental or indirect adverse impact on the economic value of an investment;" and (ii) "a measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health or safety, environmental protection or state security." Also excluded is: "the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property."

## 2. *Advertising Regulation and Food Companies*

On 29 May 2014, South Africa's Department of Health published *The draft Regulations Relating to the Labelling and Advertising of Foods (R. 429)*, and supporting guidelines.<sup>46</sup> R. 429 is based on the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No. 54 of 1972) and addresses the commercial marketing of foods and non-alcoholic beverages to children of school-going age (up to Grade 12). R. 429 affects persons who manufacture, import, sell, donate or offer for sale any pre-packed food. R. 429 joins existing laws in the area including: R.246 of 11 February 1994: Regulations governing the maximum limits for pesticide residues that may be present in foods; R.1809 of 3 July 1992: Regulations governing the maximum limits for veterinary medicine and stock remedy residues that may be present in foods; R.500 of 30 April 2004: Regulations relating to Maximum Levels for Metals in Foods; R.491 of 27 May 2005: Regulations relating to Marine Biotoxins; R.1145 of 8 October 2004: Regulations governing tolerances for fungus produced toxins in foods (mycotoxins); and R.911 of 28 September 2001: Regulations governing certain solvents in foods (benzene and methanol).

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46. Republic of South Africa, Regulation Gazette No. 37695 (29 May 2014).

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C. THE MINING SECTOR IN AFRICA

The mining industry in East African countries—Kenya, Tanzania and Uganda—is in its nascent stage. Large-scale mining projects are only just beginning, or about to begin, in the three countries. Not surprisingly, the last two years have seen a spate of changes to the regulatory framework.

On 28 January 2014, the Kenyan Cabinet approved *The Mining Bill, 2014* (“The Bill”), and authorized its submission to parliament for debate.<sup>47</sup> The Bill was introduced to the National Assembly on 17 March 2014. In October, the National Assembly passed The Mining Bill, 2014.<sup>48</sup> The fate of The Mining Bill is uncertain, however. The Kenyan Senate is threatening legal action because it was not consulted. The Mining Bill, which is intended to replace the Mining Act (Cap. 306) of 1 October 1940, gives effect to to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals.

Article 6 of the Mining Bill declares that all minerals: “(a) in its natural state in, under or upon land in Kenya; (b) in or under a lake, river, stream, or water courses in Kenya; (c) in the exclusive economic zone and an area covered by the territorial sea or continental shelf, is the property of the Republic and is vested in the National Government in trust for the people of Kenya.”<sup>49</sup> The Bill creates several bodies and institutions including, a state-owned National Mining Corporation (NMC)<sup>50</sup> and the Mining Tribunal.<sup>51</sup>

The Bill has drawn sharp criticisms in some quarters. Critics point to the wide discretionary powers held by the Cabinet Secretary, the fact that the Bill does not explicitly provide for the principle of Prior Full Informed Consent, and does not include provisions adequately dealing with consultation with communities in relation to mining activities

The Bill is arranged into XVI parts: Part I- Preliminary; Part II—Ownership of Minerals; Part III—General Principles; Part IV—Administration; Part V—Mining Institutions and Bodies; Part VI—General Provisions on Mineral Rights; Part VII—Mineral Agreements; Part VIII—Surrender, Suspension and Revocation of Mineral Rights; Part IX—Surface Rights, Compensation and Disputes; Part X—Dealings in Minerals; Part XI—Health, Safety and Environment; Part XII—Financial Provisions; Part XIII—Records and Registration of Mineral Rights; and Part XIV—Monitoring, Compliance and Enforcement.<sup>52</sup>

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47. The Presidency, *Cabinet Brief at State House, Nairobi*, 28 January 2014. <http://www.president.go.ke/cabinet-brief-at-state-house-nairobi/>

48. The Mining Bill, 2014, Kenya Law, National Assembly Bills 2014. <http://kenyalaw.org/kl/index.php?id=4250>

49. *Id.*, Article 6.

50. *Id.*, Article 22.

51. *Id.*, Article 30.

52. *Id.*

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**III. *Asia-China*: New Rules Streamline Administrative Approval Procedures for Outbound Investment\***

2014 saw major changes to the principal administrative measures that shape the regulation of overseas direct investment activities by Chinese entities.<sup>53</sup>

**A. NEW ADMINISTRATIVE MEASURES FOR VERIFICATION AND RECORD-FILING OF OUTBOUND INVESTMENT PROJECTS**

On April 8, 2014, the National Development and Reform Commission (“NDRC”) promulgated new Administrative Measures for the Verification and Record-Filing of Outbound Investment Projects (“NDRC Measures”). The new NDRC Measures replaced the Interim Measures on Approving Outbound Investment Projects (“NDRC Interim Measures”), previously promulgated in October 2004.<sup>54</sup> The new NDRC Measures took effect on May 8, 2014.<sup>55</sup>

Under the new NDRC Measures three types of projects are subject to NDRC approval, including: 1) projects with Chinese investment of more than US \$ 1 billion ; 2) projects in a sensitive country/region; and 3) projects in a sensitive industry.<sup>56</sup>

For projects with over US \$2 billion in Chinese investments which are either in a sensitive country/region or a sensitive industry, initial review by the NDRC together with a final approval by the State Council of the People’s Republic of China is required.<sup>57</sup> Other overseas investment projects need only file with the NDRC at the central or provincial level—an application for project approval is no longer needed.<sup>58</sup> The NDRC Measures define a “sensitive country/region” as a state having no diplomatic relations with China, a state/region currently subject to international sanctions, or a state/region currently in war or unrest.<sup>59</sup> “Sensitive industries” include telecommunications (operations and infrastructure), cross-border water resource development, large-scale land development, main power transmission lines, power grids and news media, etc.<sup>60</sup>

The NDRC Measures significantly relaxed the pre-approval requirements as compared with the 2004 NDRC Interim Measures.<sup>61</sup> Previously, overseas investments projects with a Chinese investment amount of over US \$ 10 million (or US \$ 30 million for natural

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\* Qingqing Miao, Ellis, Li & McKinstry PLLC, Seattle, WA.

53. See, Karl P. Sauvart & Zitian Chen, *China’s Regulatory Framework for Outward Foreign Direct Investment* (2.1 The Current Framework is Enabling- but Still Cumbersome), *China Economic Journal*, 7(1), 141-163 (2014).

54. Zhonghua Renmin Gongheguo Guojia Fazhan he Gaige Weiyuanhui Ling Di Jiu Hao (中华人民共和国国家发展和改革委员会令第九号) [The National Development and Reform Commission of the People’s Republic of China Order No. 9] (promulgated by the National Development and Reform Commission of the People’s Republic of China, April 8, 2014), available at [http://www.sdpc.gov.cn/zcfb/zcfbl/201404/t20140410\\_606600.html](http://www.sdpc.gov.cn/zcfb/zcfbl/201404/t20140410_606600.html) [hereinafter NDRC Measures].

55. *Id.*

56. NDRC Measures art. 7.

57. *Id.*

58. *Id.* art. 8.

59. *Id.* art. 7.

60. *Id.*

61. Laney Zhang, *China: New Rules Relax Government Approvals for Overseas Investment*, *Global Legal Monitor* (July 3, 2014), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_1205404056\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205404056_text).

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resources-based projects) needed to be approved by the NDRC.<sup>62</sup> The old rule further required approval from the State Council of the People's Republic of China for projects exceeding US \$ 50 million (or US \$ 200 million for natural resource-based projects).<sup>63</sup> Most other projects were subject to the approval of the NDRC at the provincial level.<sup>64</sup>

**B. ADMINISTRATIVE MEASURES ON OUTBOUND INVESTMENT**

On September 6, 2014, the Ministry of Commerce of the People's Republic of China ("MOFCOM") announced revised Administrative Measures for Outbound Investment ("the Revised MOFCOM Measures"), effective on October 6, 2014.<sup>65</sup> The Revised MOFCOM Measures replaced the previous measures that were promulgated in 2009. The Revised MOFCOM Measures are the governing measures for overseas investment activities by non-financial Chinese enterprises.<sup>66</sup>

This marks further efforts by the Chinese government to simplify application procedures following the December 2013 promulgation of the Revised Catalogue of Investment Projects Subject to Government Verification and Approval.

Similar to the NDRC Measures, the Revised MOFCOM Measures are intended to encourage and facilitate overseas investment activities.<sup>67</sup> The MOFCOM Measures also make record-filing, as opposed to approval, the default rule for overseas investment projects.<sup>68</sup> Additionally, the Revised MOFCOM Measures shortened processing time for filing and approval.<sup>69</sup> Under the Revised MOFCOM Measures, only projects involving sensitive region/country or sensitive industries must obtain approval from the MOFCOM or its provincial level equivalent.<sup>70</sup> The definition of sensitive country/region remains the same as in the old Measures.<sup>71</sup> It is also worth noting that these definitions are quite different from the definitions in the NDRC Measures.

For the first time, the MOFCOM Measures introduced criminal liabilities for certain conduct, such as bribery, fraud in obtaining approval, and falsifying the Certificate of Overseas Investment issued under these Measures, etc.<sup>72</sup>

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62. See, Jingwai Touzi Xiangmu Hezhun Zanxing Guanli Banfa (境外投资项目核准暂行管理办法) [Interim Measures on Approving Outbound Investment Projects] (promulgated by the National Development and Reform Commission of the People's Republic of China, October 9, 2014), *available at* [http://www.gov.cn/gongbao/content/2005/content\\_64245.htm](http://www.gov.cn/gongbao/content/2005/content_64245.htm), arts. 4-5. [hereinafter Interim Measures]

63. *Id.*

64. Interim Measures arts. 5-6.

65. Jingwai Touzi Guanli Banfa (《境外投资管理办法》) [Administrative Measures for Outbound Investment] (promulgated by the Ministry of Commerce, September 6, 2014), *available at* <http://www.mofcom.gov.cn/article/b/c/201409/20140900723361.shtml> [hereinafter MOFCOM Measures].

66. *Id.* art. 2.

67. *Id.* art. 1.

68. *Id.* art. 6.

69. *Id.* art. 9 & 12.

70. *Id.* arts. 6-7.

71. *Id.* art. 7.

72. MOFCOM Measures arts. 29, 31 & 33; See also, Laney Zhang, China: Rules Revised to Facilitate Overseas Investment, *Global Legal Monitor* (October 31, 2014), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205404181\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404181_text).

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**IV. *Europe*\***

**A. KAZAKHSTAN INVESTMENT DEVELOPMENT IN 2014**

In early 2014 President Nazarbayev pledged to improve investment climate in the country, and in April he appointed a new Prime Minister with that clear mandate<sup>73</sup>. Legislative reforms followed shortly. During the 27th session of the Foreign Investors' Council held on 12 June 2014 the President announced the unilateral visa-free regime for investors and laborers of 10 countries that invest in Kazakhstan the most: the UK, Germany, Italy, Malaysia, the Netherlands, the UAE, the Republic of Korea, the USA, France, and Japan.<sup>74</sup>

The same day, President Nazarbayev signed the "Law for Introducing Amendments to Various Legislative Acts on Issues Relating to the Improvement of the Investment Climate"<sup>75</sup>, which made changes in the Tax Code, the Land Code, the Law on Investments, and the Law on Employment of Population. Among other things, investment reform improved legal and regulatory aspects for investors and created a new Investment Ombudsman institution. It created direct preferences for investors implementing the "priority investment project", introduced "investment subsidy" (state reimbursement of investor's construction expenses), introduced new procedures aimed at expediting property transfer and registration, and exempted investors in certain cases from corporate income and land tax up to 10 years, and from the property tax—up to 8 years<sup>76</sup>.

Another reform was introduced by the Law of 7 March 2014 ? 177-V<sup>77</sup>, in order to improve the insolvency processes by "permitting accelerated business reorganization proceedings, extending the period for rehabilitation or reorganization, and expanding the powers of—and making more stringent the qualification requirements to become—insolvency administrators."<sup>78</sup> Bankruptcy filing became less bureaucratic. This fact brought Kazakhstan to the 63rd spot<sup>79</sup> for ease of resolving insolvency in the World Bank's latest "Doing Business" report<sup>80</sup>, with an overall rank of 77th place for ease of doing business in Kazakhstan. However, Kazakhstan did not improve its overall ranking this year due to tax reform (in force from 1 January 2015), which, on one hand, provides

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\* Irina Feofanova, a 2008 graduate of the University of Arkansas School of Law LL.M. Program.

73. See Prime Minister Karim Massimov, <http://www.primeminister.kz/page/biography>

74. Rustem M., 16 June 2014, *Kazakhstan Establishes Visa-Free Regime for 10 Countries*, <http://www.astanatimes.com/2014/06/kazakhstan-establishes-visa-free-regime-10-countries/>.

75. Закон Республики Казахстан от 12 июня 2014 года № 209-V «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам совершенствования инвестиционного климата», [http://online.zakon.kz/Document/?doc\\_id=31565328](http://online.zakon.kz/Document/?doc_id=31565328)

76. See Investments to Kazakhstan: they were, are and will be, 31.10.2014, <http://www.invest.gov.kz/?option=news&Itemid=137>

77. Закон Республики Казахстан от 7 марта 2014 года «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам реабилитации и банкротства, налогообложения», [http://online.zakon.kz/Document/?doc\\_id=31518781](http://online.zakon.kz/Document/?doc_id=31518781).

78. Bureau Of Economic and Business Affairs: *2014 Investment Climate Statement—Kazakhstan*, <http://www.state.gov/e/eb/rls/othr/ics/2014/228884.htm>

79. <http://www.doingbusiness.org/data/exploreeconomies/kazakhstan#resolving-insolvency>.

80. Doing Business 2015. Economy Profile 2015: Kazakhstan, <http://www.doingbusiness.org/reports/global-reports/~media/giawb/doing%20business/documents/profiles/country/KAZ.pdf>

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optional exemptions, but, on another hand, introduces a mandatory contribution to the National Chamber of Entrepreneurs and increases the vehicle and environmental taxes<sup>81</sup>

B. RUSSIA

Russia climbed 30 positions, from 92nd place in 2013 to 62nd in 2015, according to the World's Bank ease of "Doing Business" ranking.<sup>82</sup> The two major reforms Russia enacted in the last year were: 1) "eliminate the requirement for a company's founder to deposit the charter capital before incorporation" (in force from September 1, 2014<sup>83</sup>), and 2) "Russia has made transferring property smoother by speeding up property registration as well as axing the need for notarization."<sup>84</sup> It also axed the requirement for companies to notify authorities before opening a bank account."<sup>85</sup> However, the same report shows that, even though starting business in Russia has improved, such areas as getting credit, protecting minority investors, paying taxes, trading across borders, and resolving insolvency have dropped in ranking.<sup>86</sup>

Regardless of legal improvements, another World Bank report shows only 0.8% percent economy growth due to "structural problems", "wait-and-see attitude on the part of both businesses and consumers", and "increased geopolitical tensions and an uncertain policy environment."<sup>87</sup>

Crisis in Ukraine led to several limitations in foreign trade and investment law in Russia. President Putin passed a presidential order of 6 August 2014 "banning or limiting" imports of agricultural products from "all countries that have imposed sanctions on Russia."<sup>88</sup> On October 14, 2014 he signed a new law that forbids foreign persons from owning or holding more than 20% of shares in Russian media business.<sup>89</sup> This new media law

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81. Business Reforms in Kazakhstan, <http://www.doingbusiness.org/reforms/overview/economy/kazakhstan>.

82. #62: Russia jumps record 30 places in 'Doing Business' ranking, <http://www.ved.gov.ru/eng/general/news/19/18324.html>

83. Federal Law of 5 May 2014 No. 99-FZ, "On Introduction of Changes to Chapter 4 of the First Part of the Civil Code of the Russian Federation and Invalidation of Certain Provisions of Legislation"; *See also* Russian Civil Code reform in the field of corporate law, [http://www.cms-russia.info/legalnews/2014/09/cms\\_client\\_alert\\_2014\\_09\\_12.html#3](http://www.cms-russia.info/legalnews/2014/09/cms_client_alert_2014_09_12.html#3)

84. Amendments to Federal Law of 21 July 1997 ? 122-FZ "On government registration of rights to real estate and transactions involving real estate" (in force since 21 December 2013); *See also* Federal Law N 379-FZ "On amending part one of the Civil code of the Russian Federation and the annulment of certain legislative acts (provisions of legislative acts) of the Russian Federation" (in force since 1 July 2014).

85. *See also* Business Reforms in Russian Federation, <http://www.doingbusiness.org/reforms/overview/economy/russia>, and Doing Business 2015. Economy Profile 2015: Russian Federation, <http://www.doingbusiness.org/reports/global-reports/-/media/giawb/doing%20business/documents/profiles/country/RUS.pdf>.

86. *See* Ease of Doing Business in Russian Federation, <http://www.doingbusiness.org/data/exploreconomies/russia>.

87. Russia Economic Report 32: Policy Uncertainty Clouds Medium-Term Prospects, September 24, 2014, <http://www.worldbank.org/en/news/press-release/2014/09/24/russia-economic-report-32>.

88. Delphine d'Amora, Putin Strikes Back Against Sanctions With Food Import Bans, <http://www.themoscowtimes.com/business/article/putin-orders-agricultural-import-bans-on-countries-that-sanctioned-russia/504675.html>.

89. Federal Law of October 14 2014 № 305-ФЗ "О внесении изменений в Закон Российской Федерации "О средствах массовой информации",

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will come in force 1 January 2016, though media owners will have until 1 February 2017 to bring their businesses in compliance.

In the Permanent Court of Arbitration 18 July 2014, Russia lost three cases and was ordered to pay the largest damages award yet known, over US \$50 billion, in compensation for the indirect expropriation of OAO Yukos Oil Company<sup>90</sup> According to the Court, even though the owners of Yukos were Russian nationals, they were still protected as investors, since their companies were created under the laws of a contracting party to the Energy Charter Treaty (Cyprus).

Among positive legislative changes, the Federal law “On investment activities in Russian Federation” was amended as part of a procurement contract system reform<sup>91</sup> According to amendments (in force from 1 January 2014), a new order for competitions and auctions is established with a requirement of no conflict of interests between participants; antitrust regulations regarding auctions, prices, and offers are corrected; and a new united information system for government purchases is in the process of formation.

Investment partnership regulation was amended on 2 August 2014<sup>92</sup> to eliminate omissions and provide more options and flexibility,<sup>93</sup> which involve: 1) deposit of common property by managing partner and providing loans out of such funds; 2) individuals ceasing their ability to be parties to agreements; 3) broadening of contract provisions that are not mandatory by law; 4) requirements for dealing with third parties; 5) creation and transfer of common property of a partnership by its members; 6) liability of partners in case of fault and relevant obligation; 7) allocation of property after termination; and 8) partnership transparency.

The newest amendments to the Federal Law 57-FZ on foreign investments in strategic sector (in force since 4 December 2014<sup>94</sup>) specify additional requirements and procedures of foreign investments in areas of strategic importance, filling legislative gaps and formalizing custom practices. For instance, the scope of business activities, which do not require preliminary consent of the Government Commission on Monitoring Foreign Investment, is broadened, significantly decreasing the administrative burden for investors.<sup>95</sup>

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<http://publication.pravo.gov.ru/Document/View/0001201410150012>; *see also* HRW: Russia: Drop New Media Law, <http://www.hrw.org/news/2014/10/01/russia-drop-new-media-law>.

90. Brauch M. D., *Yukos v. Russia: Issues and legal reasoning behind US\$50 billion awards*, September 4, 2014, <http://www.iisd.org/itm/2014/09/04/yukos-v-russia-issues-and-legal-reasoning-behind-us50-billion-awards/>.

91. *See* Federal Law of 28 December 2013 No. 396-FZ “On Amendments of Certain Legislative Acts of Russian Federation” (text and annotation), [http://base.garant.ru/70552632/#block\\_8](http://base.garant.ru/70552632/#block_8)

92. The Federal Law of 21 July 2014 No. 220-FZ “On Amendments to the Federal Law ‘On Investment Partnerships’”.

93. Liniya Prava: Review on Key Novelties in Investment Partnership Regulation, <http://lp.ru/en/analitics/specialalerts/novelli-v-regulirovanii-investicionnogo-tovarishhestva/>; *See also* Федеральный закон Российской Федерации от 21 июля 2014 г. N 220-ФЗ “О внесении изменений в Федеральный закон “Об инвестиционном товариществе”, <http://www.rg.ru/2014/07/30/investicii-dok.html>.

94. Federal Law of 4 November 2014 No 343-FZ, <http://www.pravo.gov.ru/laws/acts/87/5152514510601047.html>

95. Глазунов Д., Коростелева Н., Казак Е., Барышев М., *Иностранные инвестиции в стратегические отрасли российской экономики: новые правила*, <http://epam.ru/files/documents/legal-updates/54636d6c42f5.pdf>.

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**V. Mexico: Comprehensive Energy Reform in Mexico: Innovation and Uncertainty\***

Since 1938, Mexico's energy market has been closed to private investment. In March of that year, the Mexican government expropriated all resources and facilities of foreign-owned oil companies; ever since then, the state-owned petroleum company, *Petróleos Mexicanos* ("PEMEX"), has been the only oil producer and oil field explorer in Mexico.<sup>96</sup>

All of this changed in August 2014. For the first time in seventy-six years, the Mexican energy sector is open to foreign and private investment. This article explores the constitutional amendments and implementing legislation that has enabled this comprehensive energy reform, and provides an overview of the reform's expected challenges and opportunities.

Prior to the comprehensive energy reform, Mexican energy prices for industrial users were the highest in North America by a significant margin. Users in the United States paid US\$6.60/Mwh and Canadian users paid US\$7.50/Mwh, while the price in Mexico was US\$11.40/Mwh.<sup>97</sup> This disparity was largely due to PEMEX's monopoly over state energy resources. As one commentator notes, "PEMEX lacked the technology and financial capacity to profitably extract more complicated shale and deepwater deposits [ , which] led to depressed production and economic stagnation."<sup>98</sup>

Recognizing an area ripe for reform, Mexican President Enrique Peña Nieto championed the modernization of his nation's energy sector. Constitutional amendments in December 2013 paved the way for implementing legislation that was signed into law in August 2014.

This legislation does not privatize Mexico's energy resources; rather, it opens the nation's energy sector to outside investment. Divided into 21 parts, the legislation includes details on the fiscal regime, anti-corruption provisions, contract terms, and government regulation involved in the reform.<sup>99</sup> Its aim is to attract foreign capital, which would increase energy output, lower energy prices and create "an estimated 2.5 million jobs by 2025."<sup>100</sup> One international energy affairs expert asserts that this reform will transform Mexico into "a major energy and industrial power."<sup>101</sup>

Perhaps most notably, the legislation simplifies PEMEX's formerly complex fiscal regime, decreasing its tax burden by as much as 36 percent. The tax savings aim to en-

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96. David Goldwyn, Neil Brown, & Megan Cayten, *Mexico's Energy Reform: Ready to Launch*, ATLANTIC COUNCIL 6 (Aug. 25, 2014), [http://www.atlanticcouncil.org/images/files/MexEnRefReadytoLaunch\\_FINAL\\_8.25\\_1230pm\\_launch.pdf](http://www.atlanticcouncil.org/images/files/MexEnRefReadytoLaunch_FINAL_8.25_1230pm_launch.pdf).

97. Everett Rosenfeld, *Mexico to receive major economic jolt, experts say*, CNBC (Aug. 26, 2014), <http://www.cnbc.com/id/101948520>.

98. Peter Schechter and Jason Marczak, *Comprehensive energy reform is a new dawn for Mexico*, THE HILL (Sept. 17, 2014), <http://thehill.com/blogs/congress-blog/energy-environment/217898-comprehensive-energy-reform-is-a-new-dawn-for-mexico>.

99. Diana Negroponte, *Mexico's Energy Reforms Become Law*, BROOKINGS (Aug. 14, 2014), <http://www.brookings.edu/research/articles/2014/08/14-mexico-energy-law-negroponte>.

100. Rosenfeld, *supra* note 97.

101. *Mexico's Energy Reform: Fact Sheet*, ATLANTIC COUNCIL 1 (Aug. 25, 2014), [http://www.atlanticcouncil.org/images/files/Energy\\_Reform\\_Fact\\_Sheet.pdf](http://www.atlanticcouncil.org/images/files/Energy_Reform_Fact_Sheet.pdf).

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courage PEMEX to increase its oil production by investing in resources that would otherwise be too costly; these savings will offset the expenses incurred for investments challenged by insufficient technology, training and equipment.<sup>102</sup> This opportunity for innovation responds to the limitations PEMEX has faced in developing challenging regions of Mexico's energy sector. The reform further facilitates PEMEX's efforts by "allowing private companies to complement PEMEX's investment through contracts or licenses for the exploration and extraction of oil and gas" and has the potential to "[m]odernize the country's refining, transportation and storage infrastructure."<sup>103</sup>

Additionally, the timing of Mexico's reform may allow it to integrate the lessons learned and best practices developed by other countries' major energy reforms that have already transitioned through implementation. For example, the reform establishes the Mexican Petroleum Fund to handle contract payments and oil revenue and further specifies a 25 percent domestic content minimum for incoming companies by 2015, growing to 35 percent by 2025.<sup>104</sup> These requirements are in line with those specified by other countries under comparable energy reforms. Commentators reflect that this will be progress toward ensuring "international standards of efficiency, transparency and accountability."<sup>105</sup>

Proponents of the reform expect the prospective influx of private investment to diversify Mexico's energy landscape and promote competition and innovation, and many experts believe that this reform will lead to a significant lowering of the cost of energy throughout Mexico.<sup>106</sup> This potential decrease in energy prices could result in greater domestic economic prosperity throughout the country and facilitate an increase in global competitiveness, ultimately decreasing unemployment and increasing development across Mexico. For example, one Washington, D.C.-based policy organization projects that the reform will add "1 percent to economic growth by 2018 and 2 percent by 2025."<sup>107</sup> A senior economist for Mexico confirms this projection and asserts that "Mexican firms have gained in past years because of an improvement in human capital. . .but energy costs have kept them from being more competitive."<sup>108</sup> The GDP boost will be due to the changes in electricity costs as well as foreign investment in the energy sector.<sup>109</sup>

However, not all aspects of this reform are certain. Notably, PEMEX faces an unprecedented degree of insecurity regarding its future role. While the reform appears favorable for PEMEX's tax status, the Mexican government retains the right to draw on the state oil company's profits for national purpose, as the Ministry of Finance has not relinquished the right to adjust tax rates to ensure sufficient revenue for public expenditure.<sup>110</sup>

Additionally, security remains a concern for private investors; this is particularly the case in the northern region of Mexico, known to be natural gas-rich.<sup>111</sup> Experts assert that the Mexican Government "needs to publicly describe how it will secure pipelines,

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102. Negroponte, *supra* note 99.

103. ATLANTIC COUNCIL, *supra* note 96.

104. Negroponte, *supra* note 99.

105. ATLANTIC COUNCIL, *supra* note 96.

106. Schechter, *supra* note 98.

107. ATLANTIC COUNCIL, *supra* note 96.

108. Rosenfeld, *supra* note 97.

109. *Id.*

110. Negroponte, *supra* note 99.

111. Rosenfeld, *supra* note 97.

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areas of onshore exploration and land bases for deep water development.<sup>112</sup> Furthermore, although certain contracts can include arbitration clauses, any termination as a result of administrative rescission (*rescisión administrativa*) cannot be submitted to arbitration.<sup>113</sup> And perhaps most importantly, the timetable for decisions and developments is unknown, which increases uncertainty about the impact of this reform.

Mexico's 2014 comprehensive energy reform has the potential to impact the cost of energy throughout Mexico and ultimately influence Mexico's global competitiveness. While a decrease in the cost of energy likely will provide significant benefits, these benefits are coupled with uncertainties that may influence investor decisions. As the implementation legislation goes into full effect and uncertainties are resolved, the international focus on the Mexican energy landscape is expected to sharpen. Foreign and private investors alike are poised to take advantage of the expected opportunities attendant to this unprecedented reform.

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112. ATLANTIC COUNCIL, *supra* note 96.

113. *Mexico Approves Energy Reform*, NORTON ROSE FULBRIGHT 4 (Sept. 2014), <http://www.nortonrosefulbright.com/files/mexico-approves-energy-reforms-pdf-54kb-119538.pdf>.

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## International Energy and Natural Resources Law

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### I. Angola

With Executive Decree 97/14 dated April 8, 2014, the Ministry of Petroleum enacted new regulations on the management of operational discharges, repealing the prior rules on this matter. The new statute, amongst other rules, requires operators to prepare a Chemical Products Management Plan and to prepare and maintain an Operational Discharge Management Plan. These regulations apply to new and existing facilities—both onshore and offshore—as of April 8, 2014. Failure to comply with the new statute may trigger fines of up to USD 500,000.<sup>1</sup>

During 2014, the Ministry of Petroleum also approved (i) Technical Regulations on Design, Construction and Operation of Gasoline and Diesel Filling Stations for road vehicles (Executive Decree 282/14 of September 22, 2014);<sup>2</sup> (ii) Technical Regulations on Design, Construction, Operation and Maintenance of Liquefied Petroleum Gas (“LPG”) Storage Facilities with a storage capacity of up to 200m<sup>3</sup> (Executive Decree 295/14 of September 29, 2014);<sup>3</sup> (iii) Technical Regulations on Design, Construction, Operation and Maintenance of Storage Facilities of LPG with a capacity exceeding 200m<sup>3</sup> (Executive

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\* Quinn Smith and Kristin Drecktrah served as committee editors of this Article. Quinn Smith is a partner with Gomm & Smith in Miami, Florida, and Kristin Drecktrah is an associate with the firm. The following Authors submitted contributions: Mariana Ardizzone is a partner at the law firm Maciel Norman & Asociados in Buenos Aires, Argentina. She contributed the section on Argentina. Ricardo Silva is a partner at Miranda Alliance’s Lisbon Headquarters, and he contributed the sections on Angola, Cameroon, Cape Verde, Gabon, Guinea-Bissau, Mozambique, Republic of the Congo, and Timor-Leste, with the assistance of associate Sara Frazão. Timur Bondaryev, partner of the law firm Artzinger, and Maryna Ilchuk, associate with the firm, contributed the section on Ukraine. Sergio Casinelli is a partner, and María Consuelo Geigel is an associate, at the law firm of Norton Rose Fulbright, S.C. in Caracas, Venezuela. They contributed the section on Venezuela.

1. See, e.g., *New Regulations on Management of Operational Discharges Enacted*, ANGOLA LEGAL NEWS (Sept. 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140807\\_b248d3.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140807_b248d3.pdf).

2. *New Rules on Service Stations*, ANGOLA LEGAL NEWS (Sept., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20141104\\_f5f2be.pdf](http://www.mirandalawfirm.com/uploadedfiles/20141104_f5f2be.pdf).

3. *LPG Facilities with Capacity of up to 200M3*, ANGOLA LEGAL NEWS (Sept., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20141104\\_f5f2be.pdf](http://www.mirandalawfirm.com/uploadedfiles/20141104_f5f2be.pdf).



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Decree 283/14 of September 22, 2014);<sup>4</sup> and (iv) the new Regulations on Specifications for Petroleum Products Traded in Angola (Executive Decree 288/14 of September 25, 2014).<sup>5</sup>

Moreover, the Ministers of Finance and Petroleum enacted Joint Order 1522/14 on September 22, 2014, which declares that the Petroleum Products System Logistic Supervision Concessionaire, as well as the entities holding licenses for the retail sale of petroleum products, must make an annual contribution to the budget of the Petroleum Products Regulatory Institute in the amount of 0.0004 percent of the previous year's global turnover.<sup>6</sup>

## II. Argentina

### A. SETTLEMENT BETWEEN REPSOL AND ARGENTINA OVER YPF EXPROPRIATION

Less than two years after expropriating and taking over the control of YPF S.A.,<sup>7</sup> the Argentine Government signed an Amicable Settlement and Compromise of Expropriation<sup>8</sup> with Repsol (the "Agreement") on February 27, 2014, in Buenos Aires.<sup>9</sup> On May 4, 2012, the Argentine Government had expropriated controlling equity interests in the Argentinean oil company YPF S.A. and its natural gas affiliate Repsol YPF Gas, S.A., both owned by Spanish multinational Repsol.<sup>10</sup> As grounds for the expropriation, Argentina's President cited declining hydrocarbons reserves and production, Repsol's failure to invest in exploration and production (E&P), and its heavy distribution of dividends.<sup>11</sup>

Following expropriation, initial ministerial reactions in Argentina were against payment of compensation to Repsol,<sup>12</sup> while Repsol's initial claim for expropriation was allegedly

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4. *LPG Facilities with Capacity Exceeding 200M3*, ANGOLA LEGAL NEWS (Sept., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20141104\\_f5f2be.pdf](http://www.mirandalawfirm.com/uploadedfiles/20141104_f5f2be.pdf).

5. *New Petroleum Products Specifications Approved*, ANGOLA LEGAL NEWS (Sept., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20141104\\_f5f2be.pdf](http://www.mirandalawfirm.com/uploadedfiles/20141104_f5f2be.pdf).

6. *Annual Contribution for the Petroleum Products Regulatory Institute*, ANGOLA LEGAL NEWS (Sept., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20141104\\_f5f2be.pdf](http://www.mirandalawfirm.com/uploadedfiles/20141104_f5f2be.pdf).

7. See 47 ABA/SIL YIR (n.s.) 295, 297-299 (2013).

8. Press Release, National Ministry of Economy and Public Finance, Convenio de Solución Amigable y Avenimiento de Expropiación entre Argentina y Repsol [Amicable Settlement and Compromise of Expropriation Among Argentina and Repsol], (Feb. 27, 2014), <http://www.mecon.gov.ar/el-gobierno-argentino-y-repsol-firman-el-acuerdo-de-compensacion-por-la-expropiacion-de-ypf>.

9. Convenio de Solución Amigable y Avenimiento de Expropiación [Amicable Settlement and Compromise of Expropriation], National Ministry of Economy and Public Finance (Feb. 27, 2014), available at [http://www.mecon.gov.ar/wp-content/uploads/2014/02/acuerdo\\_FINAL\\_27-02-2014.pdf](http://www.mecon.gov.ar/wp-content/uploads/2014/02/acuerdo_FINAL_27-02-2014.pdf).

10. Law No. 26,741, May 4, 2012 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/buscarNormas.do>.

11. Discurso de la Presidenta de la Nación, Cristina Fernández de Kirchner, en el Acto de Anuncio del Envío al Congreso del Proyecto de Ley de Expropiación de YPF [Speech from the President of the Nation, Cristina Fernandez de Kirchner, on the Announcement of the Expropriation Bill of YPF] (Apr. 16, 2012), available at <http://www.presidencia.gov.ar/discursos/25810-anuncio-del-proyecto-de-ley-de-expropiacion-de-ypf-discurso-de-la-presidenta-de-la-nacion>.

12. See, e.g., Kicilloff: *No Vamos a Pagarles lo que Dicen* [Kicilloff, *We Shall Not Pay What They Are Saying*], LA NACIÓN (Apr. 18, 2012), <http://www.lanacion.com.ar/1465945-kicilloff-no-vamos-a-pagarles-lo-que-dicen>.

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over USD 10.5 million.<sup>13</sup> Legal actions initiated by Repsol<sup>14</sup> against Argentina<sup>15</sup> and against prospective partners of YPF S.A. planning joint ventures with YPF to invest in the newly discovered shale deposits in Vaca Muerta were followed by settlement discussions.

Ultimately, Argentina and Repsol settled for USD 5 billion,<sup>16</sup> which the government deemed fair and equitable.<sup>17</sup> The Argentine government advanced the agreed compensation by tendering a portfolio of government bonds<sup>18</sup> to Repsol *pro solvendo*<sup>19</sup> to optimize their liquidity. Repsol sold the government bonds on the market promptly after settlement.<sup>20</sup> Validity of the Agreement was conditioned on satisfaction of the following conditions precedent fully and unconditionally:<sup>21</sup> (i) the ratification of the Agreement by the General Shareholders' Meeting of Repsol on or before April 7, 2014 (which was satisfied on March 28, 2014<sup>22</sup>); and, (ii) subsequently, ratification of the Agreement by the Honorable National Congress of Argentina on or before May 1, 2014. The National Congress of Argentina ratified the Agreement on April 28, 2014.<sup>23</sup>

**B. AMENDMENT OF HYDROCARBON LAW**

In 2014, YPF's CEO—appointed by the federal government after the expropriation of Repsol's controlling stake in YPF—voiced his criticism over the carried interest provided under the bidding conditions tendered by many provincial states to grant exploration per-

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13. *Repsol Exige una Compensación de al Menos 8.000 Millones por YPF* [Brufau: Repsol Demands Compensation of at Least 8,000 for YPF], EL MUNDO (Apr. 17, 2012, 1:18 PM), <http://www.elmundo.es/elmundo/2012/04/17/economia/1334646693.html>.

14. *Repsol Demanda a Argentina en Estados Unidos por la Expropiación de YPF* [Repsol Sues Argentina in United States for YPF Expropriation], RTVE (May 16, 2012), <http://www.rtve.es/noticias/20120516/repsol-demanda-argentina-nueva-york-expropiacion-ypf/527187.shtml>.

15. See, e.g., *Repsol Demandó a la Argentina ante el CLADI por la "Expropiación Discriminatoria"* [Repsol Files Claim against Argentina with ICSID for "Discriminatory Expropriation"], LA NACIÓN (Dec. 3, 2012, 6:21 PM), <http://www.lanacion.com.ar/1532938-repsol-demando-a-la-argentina-ante-el-ciadi-por-la-expropiacion-discriminatoria-de-ypf>.

16. Amicable Settlement and Compromise of Expropriation Among Argentina and Repsol, *supra* note 8, at art. 1.

17. Press Release, National Ministry of Economy and Public Finance, Kicillof, *Este Convenio nos Deja una Empresa con Inmenso Futuro, Como Motor del País, de la Distribución del Ingreso y del Crecimiento con Equidad* [Kicillof, *This Agreement Leaves Us a Company with an Immense Future as an Engine of the Country, of Income Distribution and of Equitable Growth*] (Apr. 8, 2014), <http://www.mecon.gov.ar/wp-content/uploads/2014/04/08-04-2014.pdf>.

18. See Press Release, National Ministry of Economy and Public Finance, *Convenio de Solución Amigable y Avenimiento de Expropiación* [Amicable Settlement and Compromise of Expropriation] (May 8, 2014), <http://www.mecon.gov.ar/convenio-de-solucion-amigable-y-avenimiento-de-expropiacion-entre-argentina-y-repsol/>; see also *Argentina Paga a Repsol por YPF* [Argentina Pays Repsol for YPF], EL MUNDO (Aug. 5, 2014, 4:00 PM), <http://www.elmundo.es/economia/2014/05/08/536b8dfe268e3e4e438b457a.html>.

19. Amicable Settlement and Compromise of Expropriation, *supra* note 8, arts. 3, 4.

20. See, e.g., *Repsol se Desvincula por Completo de Argentina con su Salida de YPF* [Repsol Breaks Away Completely from Argentina with Its Exit from YPF], EL PAÍS, (May 23, 2014 11:59 AM), [http://economia.elpais.com/economia/2014/05/23/actualidad/1400839173\\_922748.html](http://economia.elpais.com/economia/2014/05/23/actualidad/1400839173_922748.html).

21. Amicable Settlement and Compromise of Expropriation, *supra* note 8, art.7.

22. See, e.g., Press Release See *Convenio de Solución Amigable y Avenimiento de Expropiación* [Amicable Settlement and Compromise of Expropriation], National Ministry of Economy and Public Finance National Ministry of Economy and Public Finance, 05/8/2014 *supra* note 18.

23. Law No. 26.932, April 28, 2014 (Arg.), available at <http://www.infoleg.gob.ar/infolegInternet/verNorma.do?id=229282>.

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mits.<sup>24</sup> He argued that this carried interest compromised the feasibility of mining the vast unconventional Vaca Muerta resources.

As a result, during the second quarter of 2014, YPF worked on a proposal to amend Argentina's Hydrocarbons Law No. 17.319.<sup>25</sup> The federal government promoted this proposal within the oil producing states, and after reaching a consensus with these states, introduced a bill to the National Congress.<sup>26</sup> The bill was enacted into Law No. 27.007 on October 31, 2014.<sup>27</sup>

Regarding exploration bids, Law 27.007<sup>28</sup> provides that the Secretary of Energy and all provincial hydrocarbons enforcement authorities shall draft and agree on model competitive bidding terms to be followed by all provincial governments in future bidding rounds.<sup>29</sup> Blocks shall be awarded to the bidders offering the highest investments or exploration activities.<sup>30</sup> Moreover, provincial governments may not reserve additional open acreage for their state-owned companies. Such companies may set up joint ventures with private investors, but they are bound to bear their respective participating interests in all project development costs.<sup>31</sup>

Law No. 27.007 also incorporates and regulates unconventional hydrocarbon concessions initially introduced by National Decree 929/2013 on July 15, 2013.<sup>32</sup> Unconventional exploitation of hydrocarbons means lifting liquid and/or gaseous hydrocarbons through unconventional stimulation techniques applied in reservoirs located in shale rock formations (shale gas or shale oil), tight sands (tight sands, tight gas, tight oil), and coal layers (coal bed methane), and/or characterized generally by the presence of low permeability rocks.<sup>33</sup>

Without prejudice to the validity of existing exploitation concessions, concessionaires may (i) request the grant of a new unconventional hydrocarbon exploitation concession over the area of their preexisting concession(s), (ii) or subdivide the area of their existing concession(s), with new concessions granted on new areas of exploitation of unconventional hydrocarbons. Preexisting concessions will remain in effect under the previously existing conditions and term. Finally, unconventional hydrocarbon exploitation concessionaires with a preexisting concession adjacent to a new concession may apply for the unification of both areas as one unconventional exploitation concession so long as the two areas are proven contiguous. The granting authority may set the boundaries of these adjacent areas.

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24. See, e.g., Galuccio: "El País se Debe una Discusión sobre el Sistema Regresivo de Acarreo" [*Galuccio: "The Country Owes Itself a Discussion over the Regressive Carried Interest System"*], TELAM (May 21, 2014, 10:04 PM), <http://www.telam.com.ar/notas/201405/64137-galuccio-el-pais-se-debe-una-discusion-sobre-el-sistema-regresivo-de-acarreo.html>.

25. Law 17.319, June 30, 1967 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/verNorma.do?id=16078>.

26. Presidential Introduction of the Hydrocarbons Law Amendment Bill to Congress (Sept. 16, 2014), available at [http://www.senado.gov.ar/bundles/senadoportal/noticias/pe\\_316\\_14.pdf](http://www.senado.gov.ar/bundles/senadoportal/noticias/pe_316_14.pdf).

27. Law 27.007, October 31, 2014, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/235000-239999/237401/norma.htm>.

28. *Id.*

29. *Id.* at art. 12.

30. *Id.* at art. 13.

31. *Id.* at art. 18.

32. See, e.g., Caryl C. Ben Basat et. al., *Int'l Energy & Natural Law*, 48 INT'L LAW. 291, 292 (2014).

33. Law 27.007, *supra* note 27, at art.5.

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A key aspect of unconventional hydrocarbon exploitation concessions is that the length of these contracts is thirty-five years<sup>34</sup>—ten years longer than the twenty-five year term applicable to conventional hydrocarbons, and five longer than the thirty-year term applicable to offshore projects.

National Executive Decree 929/2013 paved the way for YPF S.A. and Chevron Corporation to execute a joint venture agreement to develop shale oil and gas resources from the Vaca Muerta shale formation located in the Neuquén province.

Driven by the needs and demands of prospective investors, Decree 929/2013 also approved a set of incentives that initially had been available only to companies who submitted a “Hydrocarbon Exploitation Investment Project” to the government, which required direct investments in foreign currency of no less than USD 1 billion calculated at the time of submission of the project to be invested during the first five years of the project. Subsequently, Law No. 27.007 instructed the national government to incorporate into the promotional regime hydrocarbon exploitation investment projects involving direct investments in foreign currency of at least USD 250 million calculated at the time of submission of the project and to be invested during the first three years of the project (Section 19, Hydrocarbons Law Amendment No. 27.007).<sup>35</sup> Thus, the scope of projects eligible for this promotional regime increased considerably.

Applicable incentives under Decree 929/2013 include the following: (a) when the domestic market is fully satisfied, the right to freely export a percentage of the hydrocarbon production from these projects (twenty percent for onshore conventional and unconventional projects or sixty percent for offshore projects) without any export duty, coupled with a right to freely dispose of all foreign currency proceeds obtained therefrom; and (b) when national hydrocarbon production is insufficient to meet domestic demands, the right to receive the same percentage of hydrocarbon production from such projects at a price in Argentine Pesos no lower than the applicable export price (before export duties), coupled with access to the foreign exchange market to convert the proceeds into foreign currency.<sup>36</sup>

### III. Cameroon

Order 2014/001, dated July 7, 2014, introduced clarifications and amendments to the General Tax Code, including a reduction of the Special Tax on Petroleum Products (“TSPP”) rates as follows: (i) XAF 80 (roughly USD 0.15) per liter for premium petrol; and (ii) XAF 60 (roughly USD 0.11) per liter for diesel.<sup>37</sup>

### IV. Cape Verde

During 2014, Decree-Law 1/2011 of January 3, 2011 was amended by means of Decree-Law 18/2014, on March 10, 2014. This law regarding independent and self-generated electrical power from renewable sources governs incentives, licensing procedures,

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34. *Id.* at art. 9.

35. *Id.* at art.198

36. *Id.*

37. *Reduction of Special Tax on Petroleum Products (“TSPP”), CAMEROON LEGAL NEWS* (May-July, 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140820\\_d2e85b.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140820_d2e85b.pdf).

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and requirements for conducting such activities, among other rules. The new statute (i) clarifies which government authorities are responsible for each stage of the licensing procedure, (ii) maintains the General Energy Directorate in charge of such procedure, and (iii) establishes that a license can only be issued following consultation with the Economic Regulation Agency.<sup>38</sup>

**V. Gabon**

Order 00563/MPERH/DGH/DAEJF of April 8, 2013—approved last year yet made available in 2014—lists the charges due on making available petroleum data and fees relating to certain administrative formalities carried out by the Hydrocarbons Administration. This order sets forth the rates applicable to making available and selling petroleum data, processing oil equipment importation files, fiscal metering, granting authorizations, and re-pressurizing gas cylinders.<sup>39</sup>

Moreover, Gabon has enacted Law 11/2014 dated August 28, 2014, which regulates the hydrocarbons sector in the country. The new law applies to all operators and subcontractors carrying out upstream and downstream activities in Gabon, and it repeals all former statutes on this matter.

**VI. Guinea-Bissau**

In 2014, Petroleum Law 4/2014 (April 15, 2014) was approved by the National Assembly, which regulates liquid and gaseous hydrocarbon prospecting, exploration, production, and their transport and supervision. This statute introduces new rules governing exploration & production rights, types of petroleum contracts, the National Oil Company's (PETROGUIN) participation in petroleum concessions, and limits to the number of licenses, or blocks, that can be awarded to each contractor group or operator. The law also sets forth a new tax and customs regime applicable to the petroleum sector and a mandatory local content rule.<sup>40</sup>

**VII. Mozambique**

The Government approved two new concessions for power generation projects to be carried out as public private partnerships (“PPPs”). First, Project Chókwè (construction of a 40 MW natural gas-fired power plant in the province of Gaza) was approved through Ministerial Statute 26/2014 of February 12, 2014. Second, the Moatize coal-fired Project, with a design capacity of up to 660 MW, was approved by Decree 10/2014 of March 14, 2014.<sup>41</sup>

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38. *Amendments to the Special Renewable Energy Regime*, CAPE VERDE LEGAL NEWS (Feb.–Apr., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140807\\_caa77b.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140807_caa77b.pdf).

39. *Setting up of a Pricing List for the Oil Sector*, GABON LEGAL NEWS (Mar. 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140401\\_417948.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140401_417948.pdf).

40. *New Petroleum Law*, GUINEA-BISSAU LEGAL NEWS (Apr.–June, 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20141113\\_343721.pdf](http://www.mirandalawfirm.com/uploadedfiles/20141113_343721.pdf).

41. *Award of Power Generation Concessions*, MOZAMBIQUE LEGAL NEWS (Feb.–Apr., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140821\\_618411.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140821_618411.pdf).

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Additionally, through Resolutions 12/2014 and 13/2014, both dated March 14, 2014, the Council of Ministers authorized the negotiation of two PPP concessions for hydro-power projects. The first project will be located in the province of Tete with a nominal capacity of 215 MW, and its sponsors will be the national electricity company, Electricidade de Moçambique, EP (“EDM”), and private companies Sonipal, Lda. and Rutland Holding, Ltd. The second project, to be implemented in the Zambezi River in the provinces of Manica and Tete, will have a 600 MW nominal capacity. EDM and Sonipal, Lda. are also sponsors, along with the foreign companies Cazembe Holding, Ltd. and Hydroparts Holding, Ltd.<sup>42</sup>

On March 19, 2014, the Ministry of Energy approved the Regulations on the Licensing of Petroleum Technicians with Ministerial Order 31/2014. These regulations apply to technicians working in petroleum facilities covered by the downstream activities regime (as set forth in Decree 45/2002 of December 28, 2012).<sup>43</sup>

Also, the new Petroleum Operations Tax Law<sup>44</sup> sets forth a specific taxation and fiscal regime for petroleum operations. Effective January 1, 2015, this law applies to all persons conducting petroleum operations under a concession contract. Petroleum contracts executed under the prior legislation remain governed by the previous law unless interested companies apply for coverage under the new legislation within sixty days of entry into force of the new rules.<sup>45</sup>

The new statute provides (i) a fifty percent reduction in the petroleum production tax whenever production targets development of local industries; (ii) production sharing shall be according to a sliding scale with reference to an R-factor, the sharing percentages being set in the new statute; (iii) recoverable costs are subject to a statutorily defined cap; (iv) an amortization table is included, under which all depreciable assets are to be amortized; (v) petroleum activities are subject to a ring-fencing principle on a concession basis, applying not only for corporate tax purposes, but also for determining production-sharing plateaus; and (v) capital gains arising from transfers of any interests or rights involving upstream assets located in Mozambique are always taxable, irrespective of the location of the transaction.

### **VIII. Republic of the Congo**

The Congolese Government approved Order 19031, dated December 19, 2013, which provides a statutory framework for the performance of activities at sea by certain contractors. Contractors supplying sea-related services—such as removal or collection of exploration waste and/or waste from ships or oilrig cargos, resulting in discharges of hydrocarbons and other waste in Congolese territorial waters—are now subject to the

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42. *Negotiations of PPPs for Hydroelectric Projects Authorized*, MOZAMBIQUE LEGAL NEWS (Feb.–Apr., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140821\\_618411.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140821_618411.pdf).

43. *Rules on Licensing of Petroleum Technicians*, MOZAMBIQUE LEGAL NEWS (May–July, 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140829\\_e5fef4.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140829_e5fef4.pdf).

44. Law No. 27/2014, Sept. 23, 2014 (Moz.).

45. *Taxation and Fiscal Benefits for Petroleum Operations with New Specific Regime*, MOZAMBIQUE LEGAL NEWS (Aug.–Oct., 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20141204\\_843d7f.pdf](http://www.mirandalawfirm.com/uploadedfiles/20141204_843d7f.pdf).

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provisions of the order, which includes rules on waste removal or collection by ships and oilrigs at port, as well as mooring or docking in Congolese territorial waters.<sup>46</sup>

**IX. Timor-Leste**

In 2014, the National Petroleum Authority (ANP) issued Regulation 1/2014 of January 15, 2014, which sets forth the quality standards and specifications to be met by fuel, biofuels and lubricants used in Timor-Leste.<sup>47</sup> The regulation aims at reducing the environmental impact.

**X. Ukraine**

Ukraine's unique geographical location and gas storage capabilities give the country a specific role in European and global fuel and energy markets. While Ukraine is an energy-dependent country with no sufficient volumes of its own conventional energy sources (oil and gas), it is important for global energy market as a critical transit centre for exports of Russian oil and natural gas to Eastern and Western Europe.

The annexation of Crimea by the Russian Federation and unrest in the southeast are current hot topics in Ukraine, which affect companies operating in the energy sector. At this time of drastic change, companies are looking for solutions to their problems, and energy policy has also faced certain challenges. Due to the suspension of gas supplies from Russia, Ukraine is taking all possible measures to diversify supplies and to stimulate local gas extraction. And since the state is no longer able to subsidize households and artificially restrain the growth in energy prices, the government has had to revise utility tariffs. Improving energy efficiency has become a necessity.

**A. OIL AND GAS**

One of the main targets of today's government's policy is diversification of gas supply and exploration of new energy sources. On June 16, 2014, Russia cut off Ukraine's gas supply because of its debt to Gazprom. After Ukraine and Russia agreed upon debt restructuring and terms for gas supply until April 1, 2015, the gas supplies were resumed on October 31, 2014. At the same time in 2014, Ukraine received gas supplies in reverse flow from neighboring Slovakia,<sup>48</sup> Hungary,<sup>49</sup> and Poland,<sup>50</sup> where supplies were suspended from time to time.

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46. *Regulations Regarding Contractor's Waste Removal and Collection Activities at Sea*, REPUBLIC OF CONGO LEGAL NEWS (Nov. 2013–Jan.2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140228\\_95c1ed.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140228_95c1ed.pdf).

47. *Regulations on Fuel, Biofuel and Lubricant Quality Standards and Specifications Approved*, TIMOR-LESTE LEGAL NEWS (Dec. 2013–Feb. 2014), available at [http://www.mirandalawfirm.com/uploadedfiles/20140821\\_917d55.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140821_917d55.pdf).

48. See *Ukraine, Slovakia Working on Expansion of Technical Possibilities for Gas Reverse Supplies, Says Ukrtransgaz*, INTERFAX—UKRAINE (Nov. 27, 2014, 2:35 PM), <http://en.interfax.com.ua/news/economic/236650.html>.

49. See *Hungary Halts Flow of Gas to Ukraine*, FINANCIAL TIMES (Sept. 26, 2014, 9:30 AM), <http://www.ft.com/cms/s/0/7c5d2bf0-4552-11e4-ab86-00144feabdc0.html#axzz3KHgLpsCL>.

50. See *Poland Stops Reverse Gas Flow to Ukraine, Kiev Blames Russia*, RT (Sept. 10, 2014, 5:43 PM), <http://rt.com/business/186792-ukraine-poland-gas-reverse/>.

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In addition, in August 2014, in order to stimulate an increase in domestic oil and gas production and to strengthen Ukraine's energy security, the government provided a two-year grace period for each new well that will be drilled or where production of oil and gas has started.<sup>51</sup>

**B. GAS AND ELECTRICITY MARKET REFORM**

On August 14, 2014, the Parliament of Ukraine passed legislation to reform the Unified Gas Transportation System of Ukraine (UGTS).<sup>52</sup> This legislation will reform the National Joint Stock Company, Naftogaz of Ukraine,<sup>53</sup> and the legislation aims to align Ukraine's oil and gas industry with relevant EU legislation and with the Energy Community.<sup>54</sup> Pursuant to this legislation, the operations of UGTS may be assigned to an enterprise founded or owned exclusively by the State or by a joint venture comprised of the State (owning at least fifty-one percent of participation rights) and a legal entity or entities owned and controlled by residents of Member States of the EU, the United States, or the Energy Community.<sup>55</sup> As a result, the legislation aims to attract foreign investment and increase gas flow through Ukraine.

On September 17, 2014, Ukraine's Cabinet of Ministers revised Decree No. 864-?,<sup>56</sup> the government's plan for implementation of the Protocol on the Accession of Ukraine to the Energy Community Treaty. This Decree provides for developing a reform program for the National Joint Stock Company, Naftogaz of Ukraine, to comply with the requirements of Directive 2009/73/EC,<sup>57</sup> for starting implementation of the reform by January 1, 2015; and for aligning the Procedure for access and connection to UGTS with EC Regulation No. 715/2009<sup>58</sup> by January 1, 2015.

Ukraine's legislature passed a law on operating principles of the electricity market<sup>59</sup> aimed at creating greater transparency and fostering competition in the energy market.<sup>60</sup>

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51. Law of Ukraine on Amendments to the Tax Code of Ukraine and Certain Other Legislative Acts of Ukraine (to improve certain provisions), Law No.1621-VII (July 31, 2014) (Ukr.), *available at* <http://zakon2.rada.gov.ua/laws/show/1621-18>.

52. Draft Law No. 4116a on Amendments to Certain Laws of Ukraine on Reforming the Management System of the Unified Gas Transportation System of Ukraine (June 18, 2014) (Ukr.), *available at* [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=51386](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=51386).

53. Naftogaz is a vertically integrated gas-and-oil company performing the full operation cycle on gas and oil exploration and development, operational and test well-drilling, gas and oil transport and storage, and consumer supply of natural and liquefied gas. Over 90 percent of gas and oil in Ukraine have been produced by enterprises of Naftogaz.

54. Treaty establishing the Energy Community (Oct. 25, 2014), *available at* [http://www.energy-community.org/portal/page/portal/ENC\\_HOME/ENERGY\\_COMMUNITY/Legal/Treaty](http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Legal/Treaty).

55. See Draft Law No. 4116a, *supra* note 52.

56. Decree No. 864-p On Amendments to the Plan of Measures to Meet Obligations Within the Framework of the Treaty Establishing the Energy Community (Sept. 17, 2014) (Ukr.), *available at* <http://zakon1.rada.gov.ua/laws/show/864-2014-%D1%80>.

57. Directive 2009/73/EC of the European Parliament and of the Council (July 13, 2009), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0094:0136:en:PDF>.

58. Regulation (EC) No 715/2009 of the European Parliament and of the Council (July 13, 2009), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0036:0054:en:PDF>.

59. Draft Law No. 0916 on Operating Principles of the Electricity Market (Dec. 12, 2012) (Ukr.), *available at* [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=45062](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=45062).

60. *Id.* art 3.

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This legislation intends to operate Ukraine's electricity market operation through direct agreements, "day-ahead" contracts, and a balancing market, all of which will regulate the imbalance in electricity generation.

C. RENEWABLE ENERGY

On October 1, 2014, the Cabinet of Ministers of Ukraine approved a decree on renewable energy and its implementation up to 2020.<sup>61</sup> This decree aims to ensure that by 2020, the share of electricity generated in Ukraine from renewable sources should be at least eleven percent of the total energy consumption. This document stipulates that by 2020, the capacity of wind power plants in Ukraine should be 5.6 times greater. With this decree, Ukraine has again confirmed its objective to increase the share of renewables, which will consequently aid in attracting investors and commissioning new renewable power capacities.

In 2014, a resolution of Ukraine's National Energy Regulation Commission (NERC) made it possible for not only businesses, but also households producing electricity using alternative energy sources, to receive economic incentives known as "green" tariffs. The resolution became effective on June 10, 2014.<sup>62</sup>

D. ENERGY EFFICIENCY

To demonstrate its intention to meet one of International Monetary Fund's (IMF) most important requirements for obtaining a stabilization loan, i.e., raising gas prices to the general public to the economically justified level, NERC increased gas prices for households by forty percent.<sup>63</sup> In addition, NERC increased electricity costs to the general public as of June 1, 2014 by ten to forty percent depending on the amount of electricity consumption.<sup>64</sup> By July 1, 2014, heating costs had risen twenty-five to forty percent.<sup>65</sup>

With such dramatic increases, there is a high probability of the adoption of legislation for energy service companies (ESCOs) in budgetary institutions. This legislation concerns energy service contracts between beneficiaries and providers (normally an ESCO) of an energy efficiency improvement measure, in which investments in that measure are paid for in relation to a contractually agreed level of energy efficiency improvement.<sup>66</sup> In 2014, two different draft laws regulating these issues were registered. The documents aim to provide a legal basis for the procurement of energy services; solve the problem of financing of energy efficiency measures through savings on utilities in budget institutions;

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61. Ordinance No. 902-p of the Cabinet of Ministers of Ukraine on the National Action Plan for Renewable Energy for the Period up to 2020 (Oct. 1, 2014).

62. NERC Resolution No. 170 On Approval of the Sale, Accounting and Payments for Electricity Produced from Solar Energy by Power Facilities (Generating Units) of Private Households (Feb. 27, 2014), available at <http://zakon4.rada.gov.ua/laws/show/z0539-14>.

63. NERC Resolution No. 420 on Establishing Retail Prices for Natural Gas Used for Public Consumption (Apr. 3, 2014), available at <http://zakon2.rada.gov.ua/laws/show/z0388-14>.

64. CMU Resolution No. 149 on Improving State Policy Regulating the Tariffs for Electricity Supplied to the Population and to Other Consumers (May 21, 2014), available at <http://zakon2.rada.gov.ua/laws/show/149-2014-%D0%BF>.

65. NERC Resolution No. 146 (Oct. 17, 2014), available at <http://www.nerc.gov.ua/index.php?id=12218>.

66. Directive 2006/32/EC of the European Parliament and of the Council (Apr. 5, 2006), available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEX:32006L0032>.

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and guarantee of payment for services ESCO delivers pursuant to energy service contracts.

## **XI. Venezuela**

### **A. OIL & GAS AGREEMENTS**

The Bolivarian Republic of Venezuela (Venezuela) and the national oil company Petróleos de Venezuela, S.A. (PDVSA) entered into several agreements with strategic partners on oil and gas matters throughout 2014. These include several agreements aimed at furthering the development of oil projects and increasing production in Venezuela, with particular focus on the Orinoco Oil Belt, home to vast oil reserves. Other agreements entered into by Venezuela or PDVSA involve the long-term supply of oil and oil products, infrastructure and construction of facilities, and provision of oilfield services.

In addition to oil projects undertaken in the Orinoco Oil Belt, Venezuela has sought to expand the exploitation and distribution of natural gas. As part of its attempt to achieve this goal, PDVSA entered into agreements this year for the development of production of condensates (natural gas liquids) in projects such as the Perla 3X offshore gas reservoir located off the western coast of Venezuela.<sup>67</sup>

In terms of gas, Venezuela is currently ranked as having the eighth largest proven natural gas reserves in the world and the largest in Latin America.<sup>68</sup>

### **B. RELEVANT ICSID ARBITRATION AWARDS ON ENERGY MATTERS**

On September 22, 2014, an ICSID tribunal awarded Canadian mining company Gold Reserve USD 740.3 million in connection with claims filed against Venezuela arising out of several mining concessions and rights.<sup>69</sup>

On October 9, 2014, an ICSID tribunal issued its award at the conclusion of the *Exxon Mobil Corp. v. Venezuela* case, one of the largest claims filed against Venezuela before the ICSID. In its decision, the tribunal ordered Venezuela to pay Exxon USD 1.6 billion in compensation for the 2007 expropriation of the company's investment in oil projects in the country.<sup>70</sup> A deduction of USD 907 million will apply to this award since PDVSA already owes Exxon this sum pursuant to a 2012 ICC tribunal decision in connection with a related case. On October 24, 2014, Venezuela filed an application for review of the ICSID award that resulted in a temporary stay of its enforcement.<sup>71</sup>

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67. See *PDVSA Signs Agreements with ENI, Repsol*, EL UNIVERSAL (June 5, 2014 8:47 AM), <http://www.eluniversal.com/economia/140605/pdvs-signs-agreements-with-eni-repsol>.

68. See Programa Educación y Soberanía Petrolera. Aspectos Técnicos: Gas Natural [Programo on Education and Oil Sovereignty: Natural Gas], PETRÓLEOS DE VENEZUELA S.A., [http://www.pdvs.com/PESP/Pages\\_pesp/aspectostecnicos/gasnatural/reservas\\_gasiferas.html](http://www.pdvs.com/PESP/Pages_pesp/aspectostecnicos/gasnatural/reservas_gasiferas.html).

69. Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Procedural Details (Sept. 22, 2014), *available at* <https://icsid.worldbank.org/ICSID/FrontServlet>.

70. Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award (Oct. 9, 2014), *available at* <http://italaw.com/cases/713>.

71. Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Procedural Details (Oct. 24, 2014), *available at* <https://icsid.worldbank.org/ICSID/FrontServlet>.

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In another proceeding, an ICSID tribunal's decision on damages regarding the claim of ConocoPhillips against Venezuela remains pending. The ICSID tribunal is now overseeing the quantum phase of the case after its decision on jurisdiction and merits, in which the tribunal found Venezuela to be in breach of its obligation to negotiate in good faith for compensation for its taking of Conoco's assets in three oil projects in accordance with Article 6(c) of the Netherlands-Venezuela Bilateral Investment Treaty.<sup>72</sup>

C. SHALE GAS EXPLORATION AND EXTRACTION

Venezuela is ranked as having the seventh largest technically recoverable oil shale resources worldwide,<sup>73</sup> but the government has said that it disagrees with the extraction of these resources using fracking technology. In this regard, while PDVSA announced it would undertake the first shale gas exploration in the country in May 2014,<sup>74</sup> more recently President Nicolás Maduro and the Venezuelan National Assembly (the latter through a National Assembly Accord) expressed their opinions on what they consider are the negative effects and environmental impact of the fracking method for exploiting shale oil and gas.<sup>75</sup>

D. OTHER RELEVANT MATTERS

Other relevant topics in the oil and gas industry have been changes in public officials appointed to coordinate the oil and gas sector in Venezuela,<sup>76</sup> new rules on exchange control matters applicable to energy projects, and the possibility of Venezuela divesting some of its offshore assets, including the potential sale of the offshore company CITGO.<sup>77</sup>

In the mining sector, President Nicolás Maduro recently approved the Decree with Rank and Force of Organic Law Reserving to the State the Activities of Exploration and Exploitation of Gold, as well as Related and Ancillary Activities, whereby the Venezuelan

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72. See ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits (Sept. 3, 2013), available at <http://italaw.com/cases/321>.

73. See Press Release, US Energy Information Administration (EIA), Technically Recoverable Shale Oil and Shale Gas Resources: An Assessment of 137 Shale Formations in 41 Countries Outside the United States (June 13, 2013), <http://www.eia.gov/analysis/studies/worldshalegas/>.

74. See AFP, *Venezuela to Venture into Shale Gas Exploration*, NEWS 24 (May 22, 2014, 9:45 AM), <http://www.news24.com/Green/News/Venezuela-to-venture-into-shale-gas-exploration-20140522>.

75. See Agreement in Support of the Statements of the Constitutional President of the Bolivarian Republic of Venezuela, Nicolás Maduro Moros, Related to the Rejection and Condemnation of Oil Extraction via the Fracking Method, Issued by the Venezuelan National Assembly, Published in Venezuelan Official Gazette No. 40.534 (Nov. 5, 2014) (Spanish).

76. See Kejal Vyas & Ezequiel Minaya, *Venezuelan President Replaces Oil Minister Rafael Ramírez*, WALL STREET J. (Sept. 3, 2014, 12:24 AM), <http://online.wsj.com/articles/venezuelan-president-replaces-oil-minister-rafael-ramirez-1409713741>.

77. See Erwin Seba, *Exclusive: Potential Buyers Checking Out Two Citgo Refineries—Sources*, REUTERS (Nov. 6, 2014, 4:57 PM), <http://www.reuters.com/article/2014/11/06/us-refinery-sale-citgo-pete-idUSKBN0IQ2AH20141106>.

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government regulates all aspects related to gold mines and reservoirs; the reserve to the State of the primary, ancillary and accessory activities related to such mineral; and the creation of companies and strategic alliances for the performance of such activities.<sup>78</sup>

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78. See Decree with Rank and Force of Organic Law Reserving to the State the Activities of Exploration and Exploitation of Gold, as Well as Related and Ancillary Activities, published in Special Official Gazette No. 6150 (Nov. 18, 2014) (Spanish), *available at* <http://issuu.com/diariopanorama6/docs/6150/1?e=0/10353807>.

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## **International Transportation Law**

GERALD F. MURPHY, CATHERINE A. PAWLUCH AND STEVEN J. SEIDEN\*

### **I. U.S. Aviation Legal Developments**

#### A. DOT PROPOSES THIRD CONSUMER PROTECTION RULE

Building on its December 2009<sup>1</sup> and April 2011<sup>2</sup> rules that significantly expanded the rights of airline passengers, the U.S. Department of Transportation (DOT), on May 23, 2014, unveiled a controversial third set of consumer rules, this time focusing on enhanced disclosure of fee information for “basic ancillary services” to Global Distribution Systems (GDSs) and proposing additional disclosure and reporting requirements on airlines and ticket agents. With the issuance of its “Transparency of Airline Ancillary Fees and Other Consumer Protection Issues” Notice of Proposed Rulemaking (NPRM or “Proposal”),<sup>3</sup> DOT voiced its concern that “some consumers may be unable to understand the true cost of travel while searching for airfares” due to “insufficient information concerning fees for ancillary services.”<sup>4</sup>

The NPRM, if made final, would: (1) require airlines and ticket agents to disclose fees for first and second checked bags, one carry-on item, and advance seat selection at all points of sale; (2) expand the pool of carriers required to report information regarding on-time performance, oversales, and mishandled baggage rates; (3) codify DOT’s definition of a “ticket agent” to encompass GDSs and other entities that offer a flight search tool displaying fare, schedule, and availability information (e.g., Kayak and Google), and require them to provide specific disclosures to consumers; (4) prohibit undisclosed biasing by airlines and ticket agents on websites that display multiple carriers’ fare and schedule information; and (5) establish a new category of “large ticket agents” that would be re-

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1. See *Enhancing Airline Passenger Protections*, 74 Fed. Reg. 68,983 (Dec. 30, 2009).

2. See *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110 (Apr. 25, 2011).

3. 79 Fed. Reg. 29,970 (May 23, 2014).

4. *Id.*

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quired to adopt minimum customer service standards.<sup>5</sup> These requirements would generally apply to all carriers and ticket agents that do business in the U.S.<sup>6</sup>

The NPRM generated over 700 comments from a wide spectrum of stakeholders. Consumer advocates lauded the Proposal as a necessary measure to enhance airfare pricing transparency and consumers' ability to "comparison shop" when making purchasing decisions.<sup>7</sup> Lamenting what they perceive as the airlines' "deceptive" practice of "dismantl[ing] the airfares into components parts" and then publishing "what are in effect partial prices for airline transportation," these groups urged DOT to promptly issue a final rule.<sup>8</sup> The airlines, meanwhile, stood united in opposition to the Proposal, assailing it as unnecessary, beyond DOT's statutory authority, and too costly in comparison to any benefits the requirements might provide.<sup>9</sup> In addition to the "massive" compliance costs that the Proposal would impose on carriers—which Airlines for America (A4A) estimates to be \$7.21 million for each of the affected 167 carriers—airlines stressed that existing DOT regulations and competitive market pressures are already providing consumers sufficient access to the fee information DOT is proposing to further regulate.<sup>10</sup> Although the comment period closed in August 2014, the debate will likely continue well into 2015 or until the final rule is issued.

Beyond the third consumer rulemaking, DOT's consumer protection efforts are expected to continue in full force in 2015 with its anticipated issuance of: (1) a final rule requiring large certificated air carriers to report more detailed revenue information on ancillary fees collected from passengers and changing the way mishandled baggage rates are computed and reported;<sup>11</sup> (2) a final rule banning smoking of electronic cigarettes on aircraft;<sup>12</sup> (3) new requirements regarding the accessibility of airports, covering subjects including service animal relief areas, closed captioning of televisions, and audio-visual displays for airports;<sup>13</sup> and (4) a proposal to restrict voice communications on passengers' mobile wireless devices on scheduled flights to and from the U.S.<sup>14</sup>

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5. *Id.* at 29,984-85.

6. *Id.* at 30,001.

7. *Comments of Travelers United, Inc. and National Consumers League*, Docket DOT-OST-2014-0056 (Sept. 29, 2014), at 3.

8. *Id.* at 4, 43.

9. *See, e.g., Comments of Airlines for America*, Docket DOT-OST-2014-0056-0726 (Sept. 29, 2014).

10. *Id.* at 2.

11. *See Reporting Ancillary Airline Passenger Revenues*, 76 Fed. Reg. 41,726 (July 15, 2011). The comment period on this proposal ended September 13, 2011. *Id.* A final rule is expected in June 2015. *See Report on DOT Significant Rulemakings* (Dec. 2014), at 96.

12. *Smoking of Electronic Cigarettes on Aircraft*, 76 Fed. Reg. 57,008 (Sept. 14, 2011). The comment period on this proposal ended November 14, 2011. *Id.* A final rule is expected in March 2015. *See Report on DOT Significant Rulemakings* (Dec. 2014), at 90.

13. *Accessibility of Airports*, 76 Fed. Reg. 60,426 (Sept. 29, 2011). The comment period on this proposal ended November 28, 2011. *Id.* A final rule is expected in May 2015. *See Report on DOT Significant Rulemakings* (Dec. 2014), at 89.

14. *Use of Mobile Wireless Devices for Voice Calls on Aircraft*, 79 Fed. Reg. 10,049 (Feb. 24, 2014). The comment period on this ANPRM ended March 26, 2014. *Id.* An NPRM is expected in May 2015. *See Report on DOT Significant Rulemakings* (Dec. 2014), at 95.

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B. FEDERAL AVIATION ADMINISTRATION AUTHORIZES FIRST COMMERCIAL DRONE FLIGHTS; PROPOSES REGULATIONS FOR SMALL UNMANNED AIRCRAFT SYSTEMS

Drones continued to grab headlines in the United States in 2014, as proponents of the technology heralded the vast economic and commercial potential of these so-called unmanned aircraft systems (UAS), while critics expressed concerns about privacy and potential collisions with manned aircraft. Although the Federal Aviation Administration (FAA) was then still years away from issuing final regulations governing the widespread use of civil UAS, on September 25, 2014, the agency took the first concrete step toward accommodating them commercially in the national airspace system (NAS) when it exercised its authority under Section 333 of the FAA Modernization and Reform Act of 2012 (FMRA),<sup>15</sup> coupled with its authority to grant relief from its rules via issuance of exemptions,<sup>16</sup> to grant regulatory exemptions to six aerial photo and video production companies belonging to the Motion Picture Association of America (the “MPAA Exemptions”).

The MPAA Exemptions authorized these firms to operate small, less than fifty-five pound UAS in a scripted, closed-set filming environment for the motion picture and television industry.<sup>17</sup> To ensure their UAS operations would not adversely affect safety or would provide at least an equivalent level of safety compared to the current regulatory structure that applies to manned aircraft, the petitioners agreed to require their UAS pilots to hold private pilot certificates, keep the UAS within line of sight at all times, and restrict flights to the sterile area on the set.<sup>18</sup> Between September 2014 and March 2015, FAA granted over sixty additional, similarly restrictive Section 333 exemptions—to utilize UAS in commercial film production; aerial surveying and photography; construction site monitoring; oil rig, utility, flare stack, and roof inspections; precision agriculture; and more.<sup>19</sup>

The MPAA Exemptions and the dozens that came in the months thereafter were a welcome development for a burgeoning UAS community in the United States that is growing increasingly impatient with FAA’s methodical approach to UAS integration. Despite a Congressional directive requiring FAA to, among other things, issue regulations for the operation of small UAS (sUAS) by August 2014 and complete the safe integration of UAS into the NAS by September 2015,<sup>20</sup> insufficient agency resources, political gridlock, and cautious regulatory oversight conspired to derail this schedule. Indeed, a June 2014 DOT Inspector General’s audit report revealed that FAA has missed deadlines for the

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15. FAA Modernization and Reform Act of 2012 (FMRA), Pub. L. No. 112-95, §§ 331-336, 126 Stat. 11 (2012). Section 333 requires FAA to determine if certain safe, low-risk UAS operations may be conducted in the NAS prior to other UAS-related rulemakings required by the FMRA. *Id.* § 333. See *Report on DOT Significant Rulemakings* (Dec. 2014), at 9.

16. See generally 14 C.F.R. §§ 11.81-11.103 (2015).

17. See, e.g., *FAA Grant of Exemption No. 11062*, Docket FAA-2014-0352 (Sept. 25, 2014), at 23-29.

18. *Id.*

19. FAA, *Authorizations Granted Via Section 333 Exemptions* (rev. Mar. 30, 2015), available at [https://www.faa.gov/uas/legislative\\_programs/section\\_333/333\\_authorizations/](https://www.faa.gov/uas/legislative_programs/section_333/333_authorizations/).

20. FMRA, § 332.

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majority of the FMRA's 17 UAS-related provisions, and concluded that such delays will prevent FAA from meeting Congress's September 30, 2015, integration deadline.<sup>21</sup>

FAA finally published the sUAS NPRM on February 23, 2015.<sup>22</sup> Among other things, the proposed rule would require sUAS operators to obtain a newly established "unmanned aircraft operator certificate," and limit flights to daylight hours, below 500 feet, and within visual line of sight of the operator or a visual observer.<sup>23</sup> As of this writing, the NPRM had already garnered over 2,000 public comments<sup>24</sup> and is expected to attract tens of thousands more—covering an unprecedented range of constituencies—that FAA must consider and address before making it final.

In the interim, FAA remains committed to vigorously enforcing its rules against unauthorized or hazardous UAS users. Citing its statutory responsibility to protect the safety of the American people in the air and on the ground, the agency has adopted an aggressive enforcement posture with respect to "anyone who operates a UAS in a way that endangers the safety of the [NAS]."<sup>25</sup> Remarkably, FAA's authority to enforce this policy was briefly called into question when an NTSB Administrative Law Judge (ALJ) dismissed a \$10,000 FAA fine against an individual for operating a five-pound Ritewing Zephyr to film the University of Virginia campus in 2011 on the basis that FAA had not issued enforceable regulations regarding such "model" aircraft.<sup>26</sup> But the ALJ's decision was decisively overturned on November 18, 2014, by a four-member NTSB panel.<sup>27</sup> Concluding that model aircraft and UAS are, indeed, aircraft and thus subject to FAA regulations and enforcement, the panel affirmed FAA's authority to take enforcement action against anyone who operates such an aircraft in a careless or reckless manner and remanded the case to the ALJ to make a factual determination on whether Pirker's operation was, in fact, "careless or reckless."<sup>28</sup>

C. DOT REFUSES TO GRANT NORWEGIAN AIR SHUTTLE AN EXEMPTION TO OPERATE TO THE U.S.

On December 3, 2013, discount airline Norwegian Air Shuttle AS (hereinafter "Norwegian") ignited one of the most complex and hotly-contested proceedings to come before DOT in years when its new affiliate, Norwegian Airlines International Limited (NAI), applied for a foreign air carrier permit and interim exemption authority to inaugurate scheduled flights between Europe and the United States.<sup>29</sup> NAI's business model would be the first of its kind to serve the United States: the airline would be wholly-owned by Norwegian but base its operations in Ireland despite operating no flights from that coun-

21. See DOT, Office of Inspector General Audit Report: *FAA Faces Significant Barriers to Safely Integrate Unmanned Aircraft Systems into the National Airspace System*, Report No. AV-2014-061 (June 26, 2014).

22. See *Operation and Certification of Small Unmanned Aircraft Systems; Notice of Proposed Rulemaking*, 80 Fed. Reg. 9544 (Feb. 23, 2015).

23. *Id.*

24. See Docket No. FAA-2015-0150, <http://www.regulations.gov/#!docketDetail;D=FAA-2015-0150>.

25. Press Release, *FAA Statement on Texas Equusearch UAS Court Decision* (July 18, 2014).

26. *FAA v. Pirker*, Decisional Order, Docket No. CP-217 (N.T.S.B. Mar. 6, 2014).

27. *FAA v. Pirker*, Opinion and Order, Docket No. CP-217 (N.T.S.B. Nov. 18, 2014).

28. *Id.*

29. Application of Norwegian Air International Limited for an Exemption and Foreign Air Carrier Permit, Docket DOT-OST-2013-0204-0001 (Dec. 3, 2013).

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try, hire pilots and other employees from Europe, Asia, and the U.S.—and compete with U.S. and European airlines on major transatlantic routes.

In support of its proposal, NAI stated that its U.S.-EU flights would serve the public interest by increasing transatlantic competition, opening new nonstop routes, and “provid[ing] competitive, low-fare, high-quality service with new Boeing 787 Dreamliner aircraft.”<sup>30</sup> But Norwegian’s decision to establish NAI in Ireland instead of Norway (or elsewhere) raised questions about the company’s business objectives, and the ensuing public debate quickly mushroomed into a full-scale referendum on international airline competition and labor policy.

Norwegian insisted that it established NAI in Ireland because: (1) Norway is not a member of the EU and the airline needed a foothold there to operate routes to Asia, Africa, and South America under the expansive air traffic rights permitted under the U.S.-EU open skies agreement; and (2) a base in Ireland offered favorable aircraft financing conditions.<sup>31</sup> But U.S. and European airlines and labor organizations were skeptical; they insisted that Norwegian was simply forum shopping for the most favorable regulatory framework, and that it engineered the NAI model to evade European labor laws and gain a competitive advantage over other airlines operating transatlantic routes.<sup>32</sup>

Norwegian’s critics further asserted that in addition to being contrary to the public interest, the application was inconsistent with the U.S.-EU open skies agreement.<sup>33</sup> They cited a provision in the Agreement, Article 17 *bis*, that recognizes the importance of “high labour standards” and cautions that “[t]he opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties’ respective laws.”<sup>34</sup> Airlines and labor groups, in particular, argued that NAI’s so-called “flag of convenience” strategy was incongruous with Article 17 *bis* which, according to them, was included in the Agreement “to prevent exactly what NAI is trying to do.”<sup>35</sup>

NAI, supported by the Irish Civil Aviation Authority, select travel associations, consumer groups, U.S. airports, and cargo carriers, countered these arguments by maintaining that Article 17 *bis* does not provide a basis for DOT to unilaterally deny its application and urged DOT not to “bow to the overt political pressure from special interests, who seek to block a new competitor on transatlantic air routes.”<sup>36</sup>

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30. *Consolidated Reply of NAI*, Docket DOT-OST-2013-0204 (Dec. 31, 2013), at 3.

31. *Reply of NAI*, DOT-OST-2013-0204 (Feb. 21, 2014), at 7-8.

32. See, e.g., *Joint Reply of Delta Air Lines, Inc., United Airlines, Inc., American Airlines, Inc. and US Airways, Inc.*, Docket DOT-OST-2010-0204 (Dec. 20, 2013); *Joint Reply of Air France and KLM*, Docket DOT-OST-2013-0204 (Feb. 21, 2014); *Joint Reply of ALPA, TTD, AFL-CIO, and the European Cockpit Association*, Docket No. OST-2013-0204 (Feb. 21, 2014).

33. *Air Transport Agreement between the U.S. and the European Community and its Member States*, DOT-OST-2013-0204 (Apr. 30, 2007), as amended (the “Agreement”).

34. *Id.*, art. 17 *bis*.

35. *Joint Reply of Delta Air Lines, Inc. United Airlines, Inc., American Airlines, Inc. and US Airways, Inc.*, Docket DOT-OST-2010-0204 (Dec. 20, 2013), at 3. To inform DOT’s consideration of this issue, Secretary of Transportation Anthony Foxx initiated a July 14, 2014 U.S.-EU government-to-government meeting in Brussels to hear the EU’s views on the legal meaning and applicability of Article 17, *bis*. See *DOT Notice* (Aug. 4, 2014).

36. *Reply of NAI* (Aug. 25, 2014), at 14.

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After nine months of heated debate in the public docket, DOT dismissed the exemption request on procedural grounds pending further examination of the more significant permit request, stating that DOT “typically reserves its exemption powers in awarding foreign air carrier authority to situations where the circumstances of a case are sufficiently clear-cut.”<sup>37</sup> DOT reached this decision despite eleventh-hour pleas of support for NAI’s application from three former DOT Secretaries<sup>38</sup> and the two former Chairmen of the U.S. and EU delegations who led the negotiation of the Agreement.<sup>39</sup> While DOT’s denial of the exemption was a setback for Norwegian, the airline will continue to operate flights to the U.S. under its existing authority pending DOT’s decision on the substantive merits of the NAI formal permit application.

Controversial open skies issues are primed to spill over into 2015. In addition to the NAI proceeding, three major U.S. airlines—American, United, and Delta—have launched a full-scale political campaign in Washington against Middle East rivals Emirates, Etihad, and Qatar Airways, decrying their rapid expansion into U.S. markets and what they perceive to be the Gulf carriers’ unfair advantage over U.S. airlines fueled, they say, by billions of dollars in subsidies and other relief from the UAE and Qatar governments.<sup>40</sup> The three U.S. airlines have asked the Obama administration to confront the Gulf states about the fair-competition provisions in the open skies agreements and, if necessary, modify or annul the agreements to level the playing field.<sup>41</sup> In response, the Gulf carriers assailed the U.S. airlines’ campaign as “protectionist,” steadfastly denied that they receive subsidies or exploit other unfair advantages, and cited what they believe to be their superior aircraft and service as the reasons for their success.<sup>42</sup>

Whether these growing fissures in the open skies framework can be mended remains to be seen. It goes without saying that these two open skies disputes will be worth watching in 2015.

## II. Canadian International Transportation Law Developments

### A. REVIEW OF THE CANADA TRANSPORTATION ACT

A confluence of factors has prompted the Canadian government to launch a comprehensive statutory review of the *Canada Transportation Act*<sup>43</sup> one year earlier than expected. The review will assess a range of issues including infrastructure, regulatory harmonization, and transportation safety and environmental regulation.<sup>44</sup> It is anticipated that the statutory review will lead to a number of significant amendments affecting virtually all modes of transport and carriers operating in, to, and from Canada.

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37. *Order Dismissing Exemption*, Order 2014-9-1 (Sept. 2, 2014) at 3.

38. See Andrew Card, Norman Mineta and Mary Peters, *An Open Letter to the U.S. Congress*. . . , OPEN OUR SKIES (July 15, 2014), <http://www.openourskies.com/an-open-letter-to-the-u-s-congress/>.

39. See *Joint Declaration of John Byerly and Daniel Calleja*, Docket No. OST-2013-0204 (Aug. 25, 2014).

40. See Susan Carey, *U.S. Airlines Clash over Rivals from Persian Gulf*, WALL ST. J. (Feb. 23, 2015), <http://www.wsj.com/articles/u-s-airlines-clash-over-rivals-from-persian-gulf-1424737494>.

41. See *id.*

42. See *id.*

43. S.C. 1996, c. 10 (Can.).

44. S.C. 1996, c. 10, art. 53 (Can.).

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**B. RAIL REGULATORY REFORM**

The transportation of hazardous fuels by rail has expanded exponentially in North America. In July 2013, more than forty people were killed when an unattended freight train carrying Bakken formation crude oil ran away and derailed resulting in multiple explosions in Lac-Mégantic, Quebec.<sup>45</sup> As a result, the Transportation Safety Board of Canada has recommended sweeping changes, including a new regulatory scheme to govern the transport of hazardous fuels by rail.<sup>46</sup> Greater oversight in key areas such as car design, operating procedures, classification and description requirements, carrier accountability, safety response planning, and audit requirements is expected. These changes will require an extensive review of regulatory compliance by Canadian and U.S. rail carriers, many of which transport shipments to and from Canada.

**C. UNMANNED AERIAL VEHICLES**

Perhaps the most interesting technological development affecting transportation in Canada is the proliferation of unmanned aerial vehicles (UAVs). Canadian regulators have begun to adapt existing aviation laws to these new applications and have taken a bold step forward in easing restrictions, with a view to promoting growth and innovation in this important sector. In November 2014, Transport Canada announced two new exemptions that are expected to make it easier for businesses to fly small UAVs.<sup>47</sup> Under the new exemptions, very small (under 2 kg) and small (between 2 kg and 25 kg) UAVs will no longer require a Special Flight Operations Certificate (SFOC), as long as the conditions set out in the *Canadian Aviation Regulations*<sup>48</sup> are met at all times.<sup>49</sup>

For sUAS between 2 kg and 25 kg, the exemption requires the operator to comply with fifty-nine conditions that relate to height restrictions, minimum distances from aerodromes and other hazards, pilot training conditions, insurance requirements, as well as flight within specific airspace, and visual line-of-sight.<sup>50</sup> For sUAS under 2 kg, the exemption requires the operator to comply with fewer conditions, thirty-seven in all, that relate to aspects similar to those identified above.<sup>51</sup>

The exemptions are in effect until December 21, 2016, unless the conditions are breached by the operator.<sup>52</sup> The Minister of Transport has reserved the right to cancel the exemptions “*where she is of the opinion that the exemption is no longer in the public interest, or is likely to adversely affect aviation safety.*”<sup>53</sup>

Operators that use UAVs over 25 kg for work or research must apply for an SFOC, which Transport Canada issues under the *Canadian Aviation Regulations*.<sup>54</sup> Special certifi-

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45. *Lac-Mégantic Train Explosion: Three Charged in Quebec*, BBC (May 13, 2014), [www.bbc.com/news/world-us-canada-27387287](http://www.bbc.com/news/world-us-canada-27387287).

46. See *Railway Investigation Report*, R13D0054 (Can.).

47. See *Exemption From Sections 602.41 and 603.66 of the Canadian Aviation Regulations* (Nov. 26, 2014), available at [www.tc.gc.ca/civilaviation/regserv/affairs/exemptions/docs/en/2879.html](http://www.tc.gc.ca/civilaviation/regserv/affairs/exemptions/docs/en/2879.html).

48. SOR/96-433.

49. See *Exemption From Sections 602.41 and 603.66 of the Canadian Aviation Regulations*, *supra* note 44.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

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ates must generally be obtained prior to each flight. In some cases certificates have been granted for a prescribed location for as long as one year. Certificates are subject to a number of conditions, including the requirement that the operator maintain visual contact with the UAV.<sup>55</sup> Restrictions on the weight of the UAV and limitations on flights in or near urban areas apply.<sup>56</sup>

The focus of the next regulatory initiative will be on operations beyond visual line of sight and larger UAV systems.

**D. NEW INTERLINE BAGGAGE RULES FOR CANADA**

The Canadian Transportation Agency, established under the *Canada Transportation Act*, is an independent, quasi-judicial agency, that makes decisions concerning air, rail, and marine matters and whose jurisdiction extends to economic regulation and consumer protection.<sup>57</sup> The Agency is the main regulator in transport law.

It has introduced new interline baggage rules for Canada, with a view to creating harmonization and consistency.<sup>58</sup> Foreign-based and Canadian international airlines are expected to apply the rules defined by the Agency to interline itineraries with a point of origin or ultimate destination in Canada. The Rules will be enforced for tickets issued on or after April 1, 2015.<sup>59</sup> Amendments to carrier tariffs must be filed forty-five days before the amendments take effect, i.e. before February 15, 2015.<sup>60</sup>

The Agency has essentially adopted the U.S. approach,<sup>61</sup> although preserving one element of IATA Resolution 302.<sup>62</sup> The basic thrust of the new regime is that for applicable interline itineraries, a single set of baggage rules should apply throughout, regardless of the complexities of the itinerary.

International air carriers that operate flights to and from Canada are advised to review their tariffs on file with the Agency to ensure that these indicate how they will select the applicable baggage rules, apply the rules selected by another carrier where necessary, and comply with passenger disclosure requirements.

Defined information must be disclosed on each e-ticket itinerary/receipt. In the case of online purchases, defined information must be disclosed on the summary page that is presented to the passenger at the end of the purchase transaction.<sup>63</sup> Specific disclosures include: (i) the identification of the applicable rules, i.e., which carrier's rules apply; (ii) baggage free allowance and fees, size and weight limits; (iii) special terms applicable to frequent flyers; (iv) any applicable embargoes; and (v) how any charges are applied, e.g., once per direction or at each stopover point.<sup>64</sup> There is a general obligation that requires

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55. See *Exemption From Sections 602.41 and 603.66 of the Canadian Aviation Regulations*, *supra* note 44.

56. *Id.*

57. *Our Organization and Role*, Canadian Transportation Agency, <https://www.otc-cta.gc.ca/eng/our-organization-and-role> (last visited Mar. 28, 2015).

58. See *Decision No. 144-A-2014* (Apr. 16, 2014), and *Order No. 2014-A-158* (Aug. 22, 2014).

59. *Order No. 2014-A-158* (Aug. 22, 2014).

60. *Id.*

61. As exemplified by 14 C.F.R. § 399.87 (2012).

62. See *Decision No. 144-A-2014* (Apr. 16, 2014).

63. *Id.*

64. See Canadian Transportation Agency, *Interline Baggage Rules for Canada: Interpretation Note*, at 6.

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an international airlines to have all of its tariff rules, including those affecting the carriage of passenger bags, on its website.

E. CANADA PROPOSES NEW DRINKING WATER REGULATIONS FOR COMMON CARRIERS

In May 2014, the Public Health Agency of Canada published new draft regulations, the *Potable Water on Board Trains, Vessels, Aircraft and Buses Regulations* (hereinafter “Regulations”),<sup>65</sup> to modernize the regime governing the safety and quality of drinking water on federally regulated airplanes, trains, ships and buses. The changes were made due to potential public health risks associated with water and to protect the traveling public.

The proposed Regulations will be much more specific with respect to applicability, quality control, sampling, testing, and recordkeeping. The Regulations will apply to “operators” (meaning persons or entities that carry on a business of transporting passengers) of “conveyances” (meaning all aircraft, vessels, buses, and trains used for interprovincial or international transportation of passengers and authorized under a Canadian or foreign law to transport at least twenty-five persons).<sup>66</sup> “Passenger” is defined as a person who is carried on board a conveyance under a contract, but excludes the master, pilot or driver, or a crew member working on board.<sup>67</sup> Under the Regulations, requirements in relation to potable water will be extended beyond drinking water to apply also to water used for the preparation of food and for hand washing or oral hygiene.<sup>68</sup> While the Regulations are generally consistent with comparable international standards, they impose sampling and record-keeping requirements that may be more stringent in certain important respects; for example, eight annual E. coli tests per aircraft will be required.<sup>69</sup> International operators need to be aware of how the new Regulations may impose requirements more onerous than other national and international drinking water safety regimes such as the WHO Guide to Hygiene and Sanitation in Aviation, the U.S. Aircraft Drinking Water Rule, and European Union Council Directive 98/83/EC.

Following a public comment period, publication of the revised regulations is targeted for Spring 2015, and they are expected to come into force in late 2015. That said, Ebola has pushed many other initiatives to the back-burner at the Public Health Agency of Canada.

F. SUPREME COURT UPHOLDS EXCLUSIVITY OF *Montreal Convention*

In a recent decision, the Supreme Court of Canada considered a claim for damages by two passengers on the basis that Air Canada had breached its obligation to supply services in French under the *Official Languages Act* on international flights.<sup>70</sup> The complainants’ appeal to the Supreme Court was supported by the Commissioner of Official Languages

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65. *Potable Water on Board Trains, Vessels, Aircraft, and Buses Regulations*, C. Gaz. (Vol. 148, No. 19, May 10, 2014).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at s. 9(1).

70. *Thibodeau v. Air Canada*, 2014 SCC 67 (Oct. 28, 2014).

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of Canada. The Court (in a 5-2 split decision) held that the *Montreal Convention's* uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air.<sup>71</sup> The Court judicially recognized that the *Montreal Convention* (which was made law in Canada under the *Carriage by Air Act*) provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air.<sup>72</sup>

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71. *Id.*  
72. *Id.*

## The Status of Women in 2014: A Global Snapshot

SHARON JAMES, JESSICA THERKELSEN, SHELBY QUAST, TANYA SUKHIIJA,  
RONG KOHTZ, & CHHAYA PRASAD PHATARPEKAR\*

This article covers some of the events that had a particular impact on women in 2014. While not an exhaustive list of all issues affecting women during 2014,<sup>1</sup> it offers a glimpse into a few of the stories that caught our attention this year.

The article begins with an update on the Convention on the Elimination of All Forms of Discrimination against Women, followed by a section on female genital mutilation. Since these topics have a broad impact on women globally, they are set apart from the rest of the article. The remainder of the article comprises submissions received from Women's Interest Network members that are specific to a country or region of the world.

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1. For example, two of the most prominent headlines during 2014 that are not covered here were the deadly Ebola outbreak in Western Africa, which had a particularly harsh impact on women and girls in that region, and the kidnapping of hundreds of school girls in Nigeria by Boko Haram. *See As Front-Line Caretakers in Ebola Crisis, Women and Girls Need Gender-Based Humanitarian Response, Gender Alert Says*, UN WOMEN (Sept. 26, 2014), <http://www.unwomen.org/en/news/stories/2014/9/gender-alert-ebola-west-africa>; Eyder Peralta, *Reports: Boko Haram May Have Kidnapped Dozens More Girls In Nigeria*, NPR (Oct. 27, 2014), <http://www.npr.org/blogs/thetwo-way/2014/10/27/359360236/reports-boko-haram-may-have-kidnapped-dozens-more-girls-in-nigeria>.



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## I. CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>2</sup> had 188 parties by the end of 2014, with one new accession by the State of Palestine during the year. Though the United States signed the CEDAW in July 1980, the treaty has yet to be ratified.<sup>3</sup>

On November 5, 2014, the CEDAW Committee issued General Recommendation 32,<sup>4</sup> addressing the specific rights, needs, and challenges faced by women in situations of displacement and statelessness. The General Recommendation notes that “[d]isplacement arising from armed conflict, gender related persecution and other serious human rights violations that affect women compounds existing challenges to the elimination of discrimination against women.”<sup>5</sup>

The Committee suggests that States allow women to lodge independent asylum claims and be heard separately from their families, as persecution under the refugee definition is often understood through the male lens. The General Recommendation further specifies that “violence against women . . . is one of the major forms of persecution experienced by women in the context of refugee status and asylum,” and reiterates that such violence is recognized as legitimate grounds for international protection.<sup>6</sup>

The Committee also asks States to treat trafficking as part of gender-related persecution, noting that trafficked persons should know about their right to seek asylum, and should have equal access to domestic immigration processes and procedures.<sup>7</sup>

## II. Female Genital Mutilation

Increased attention has been given to the need to protect women and girls from female genital mutilation (FGM)<sup>8</sup> in practicing countries and countries with diaspora communities from countries with a high prevalence of FGM practice. In Kenya, several government agencies have been working to better implement and enforce legislative prohibitions

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2. Convention on the Elimination of All Forms of Discrimination Against women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 12 (entered into force Sept. 3, 1981).

3. *Status of the Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION (November 26, 2014), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

4. *General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CEDAW/C/GC/32, Nov. 5, 2014.

5. *Id.* at para.14.

6. *Id.* at para.15.

7. *Id.* at paras. 44-46.

8. FGM is a harmful practice that involves the partial or total removal of the female genitalia. The practice of FGM ranges from the partial or total removal of the clitoris (clitoridectomy), to the removal of the entire clitoris and the cutting of the labia minora (excision), to its most extreme form, the removal of all external genitalia and the stitching together of the two sides of the vulva (infibulation). FGM is generally performed without anesthetic, and can have lifelong health consequences including chronic infection, psychological trauma, and severe pain during urination, menstruation, sexual intercourse, and childbirth. *Protecting Girls From Undergoing FGM in Kenya and Tanzania*, EQUALITY NOW (2011), available at [equalitynow.org/sites/default/files/Protecting%20Girls\\_FGM\\_Kenya\\_Tanzania.pdf](http://equalitynow.org/sites/default/files/Protecting%20Girls_FGM_Kenya_Tanzania.pdf).

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against FGM, the Prohibition of FGM Act<sup>9</sup> and the Children's Act.<sup>10</sup> The 2011 Prohibition of FGM Act constituted an Anti-FGM Board, and designates it as responsible for public awareness raising on FGM and designing programs aimed at the eradication of FGM. In December 2013, the Honorable Dr. Linah Jebii Kilimo was appointed as the chairperson of the Board.<sup>11</sup>

Kenya's Director of Public Prosecutions (DPP) has also taken steps to more effectively enforce the Prohibition of FGM Act. In April 2014, the DPP established a twenty-member Anti-FGM Prosecution Unit.<sup>12</sup> The unit has completed a roll-out program nationwide, and published a draft report of its assessment of FGM cases.<sup>13</sup> The unit has already brought several cases to court. The Office of the DPP also recently launched a hotline to rescue girls from FGM and child marriage, and to prosecute these crimes. While these are positive developments, girls are still at risk of FGM in Kenya and there are many reports of girls running away to rescue centers. Civil society organizations such as Equality Now and Tasaru Ntonomok Initiative have actively been engaging with the Honorable Dr. Kilimo and the DPP to support their work and refer FGM cases.

This year Egypt saw its first prosecution of an FGM case. A doctor, Raslan Fadl, performed FGM on thirteen-year-old Soheir Mohamed el-Batea on June 6, 2013. Soheir died during the procedure. Several civil society organizations including the Center for Egyptian Women's Legal Assistance, the Egyptian Coalition for Children's Rights, and Equality Now called on the government to prosecute Dr. Fadl and Mohamed al-Bata'a, Soheir's father.<sup>14</sup> The Attorney General charged the doctor and father in Soheir's death. The trial began on May 22, 2014. Unfortunately, however, on November 20, 2014, the judge acquitted both the doctor and father. Civil society groups responded quickly by protesting the decision. The General Prosecutor of Aga submitted a request to appeal on November 21.

The United Kingdom and United States, where there are diaspora groups from FGM-practicing communities, have also been paying more attention to FGM. The United Kingdom organized the first ever Girl Summit in July 2014<sup>15</sup> to mobilize domestic and international efforts to end FGM, and child, early, and forced marriage within a generation. The U.K. government committed to strengthening existing legislation to better protect women and girls at risk of FGM.<sup>16</sup> On March 21, 2014, the Crown Prosecution

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9. Prohibition of Female Genital Mutilation Act No. 32, (2011) (Kenya), available at [www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2062B](http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2062B).

10. Children's Act No. 8, (2001) art. 14 (Kenya), available at [www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2](http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2).

11. THE KENYA GAZETTE, Vol. CXV-No. 182 (27 Dec. 2013), available at [kenyalaw.org/kenya\\_gazette/gazette/volume/Nzcw/Vol.%20CXV-No.%20182](http://kenyalaw.org/kenya_gazette/gazette/volume/Nzcw/Vol.%20CXV-No.%20182).

12. Office of the Director of Public Prosecutions Anti-FGM Prosecution Unit, Draft Report on Sensitization of Prohibition of FGM Act 2011 (Nov. 2014), available at [www.scribd.com/doc/246975950/Final-FGM-Report](http://www.scribd.com/doc/246975950/Final-FGM-Report).

13. Office of the Director of Public Prosecutions Anti-FGM Prosecution Unit, *Draft Report on Sensitization of Prohibition of FGM Act 2011* (Nov. 2014), available at [www.scribd.com/doc/246975950/Final-FGM-Report](http://www.scribd.com/doc/246975950/Final-FGM-Report).

14. *Egypt: Enforce FGM law & properly investigate Soheir al-Batea's death*, EQUALITY NOW (Dec. 10, 2013), available at [www.equalitynow.org/take\\_action/egypt\\_action385](http://www.equalitynow.org/take_action/egypt_action385).

15. See [www.gov.uk/government/topical-events/girl-summit-2014](http://www.gov.uk/government/topical-events/girl-summit-2014).

16. *Girl Summit 2014 Commitments*, available at [www.girlsummit2014.org/Commitment/Show](http://www.girlsummit2014.org/Commitment/Show).

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Service announced its first two prosecutions under the FGM law.<sup>17</sup> In advance of the Girl Summit, Equality Now and the City University London released a new study on the number of women and girls affected by FGM in England and Wales.<sup>18</sup>

In the United States, with support from Equality Now, FGM survivor and activist Jaha Dukureh recently launched a Change.org petition<sup>19</sup> which has gained over 200,000 signatures. The petition calls on President Barack Obama to develop a comprehensive strategic plan to end the practice in the United States, and to provide services to those who have already been subjected to FGM. The U.S. government made several commitments to address FGM, including to undertake a nationwide study on FGM to determine how many women and girls are living with the consequences of FGM or are at risk of FGM, and to set forth guidance for all U.S. Attorney Offices on investigating and prosecuting cases of FGM.<sup>20</sup> In response to advocacy by civil society and FGM survivors, the U.S. Department of Health and Human Services hosted a consultation in October on how to best address FGM in the United States. At the state level, twenty-three states currently have laws against FGM,<sup>21</sup> with Arizona being the newest to pass its law in April 2014.<sup>22</sup>

The Global End FGM Social Change Campaign, “The Girl Generation: Together to End FGM” launched in Nairobi, Banjul, and London on the International Day of the Girl, October 10, 2014. The Campaign’s founding members include Equality Now, Options Consultancy Services and Ogilvy & Mather-Africa, and FORWARD.<sup>23</sup> The Campaign seeks to mobilize a critical mass of people speaking out and acting against FGM. The Open Working Group for Sustainable Development Goals has been preparing for a new development agenda to replace the Millennium Development Goals which will expire in 2015. The Open Working Group’s report<sup>24</sup> includes a goal to achieve gender equality, including a target to eliminate harmful practices such as FGM. While this is a positive step, civil society groups continue to advocate for UN member states to retain and strengthen this language.

### III. China

We will soon celebrate the 20th Anniversary of the Beijing Declaration and Platform for Action. During the past two decades, China made much progress in promoting gen-

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17. Crown Prosecution Service, *First prosecutions for female genital mutilation* (Mar. 21, 2014), available at [www.cps.gov.uk/news/latest\\_news/first\\_prosecutions\\_for\\_female\\_genital\\_mutilation/](http://www.cps.gov.uk/news/latest_news/first_prosecutions_for_female_genital_mutilation/).

18. *Female Genital Mutilation in England and Wales: Updated Statistical Estimates of the Numbers of Affected Women Living in England and Wales and Girls at Risk*, EQUALITY NOW (July 21, 2014), available at [www.equalitynow.org/sites/default/files/FGM%20EN%20City%20Estimates.pdf](http://www.equalitynow.org/sites/default/files/FGM%20EN%20City%20Estimates.pdf).

19. *End Female Genital Mutilation in the U.S.*, CHANGE.ORG, [www.change.org/p/end-fgm-now-protect-girls-from-getting-cut-and-support-victims-of-female-genital-mutilation-in-the-usa](http://www.change.org/p/end-fgm-now-protect-girls-from-getting-cut-and-support-victims-of-female-genital-mutilation-in-the-usa) (last visited Mar. 5, 2015).

20. *Female Genital Mutilation in the U.S. Factsheet*, EQUALITY NOW, available at [www.equalitynow.org/sites/default/files/EN\\_FAQ\\_FGM\\_in\\_US.pdf](http://www.equalitynow.org/sites/default/files/EN_FAQ_FGM_in_US.pdf) (last visited Mar. 5, 2015).

21. *Id.*

22. ARIZ. REV. STAT. ANN. §§ 12.513, 13-705, 13-1214, 13-3620 (2014), available at [www.azleg.gov/DocumentsForBill.asp?Bill\\_Number=SB1342&Session\\_ID=112](http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1342&Session_ID=112).

23. See [www.thegirlgeneration.org/](http://www.thegirlgeneration.org/).

24. Report of the Open Working Group of the General Assembly for Sustainable Development Goals, U.N. Doc. A/68/970 (12 Aug. 2014), available at [www.un.org/ga/search/view\\_doc.asp?symbol=A/68/970&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/68/970&Lang=E).

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der equality and protection of women and children in China.<sup>25</sup> As of 2014, China has established a rather comprehensive body of legislation for protection of women's rights and promotion of gender equality.<sup>26</sup> But underneath the well-crafted legislation, sexism against Chinese women and girls at home and in the workplace persists. Single, highly-educated women over twenty-seven years old are commonly denigrated as "leftover women."<sup>27</sup> Sexual harassment and violence against young women factory workers are widespread.<sup>28</sup> "Women are often 'the last hired and the first fired[.]'"<sup>29</sup> Job advertisements often state "women need not apply" or "male only." Audaciously, the Hunan Province government requires female applicants for civil servant positions "to have symmetric breasts with no lumps, and have no genital inflammation."<sup>30</sup> Amidst this state of affairs, however, the last year marked Chinese women's first set of court victories against gender discrimination in recruitment.<sup>31</sup>

On November 19, 2014, the *People's Daily*, the Chinese government's propaganda mouthpiece, praised the first Chinese court order against gender discrimination in recruitment in *Huang Rong (Alias) v. Hangzhou Dongfang Culinary School*, and called for elimination of gender discrimination against highly-educated women in employment. The *People's Daily* editorial declared that employers may prefer to employ men for financial reasons, but that private firms' maximization of profits should not come at the cost of social equality.<sup>32</sup> In the *Huang Rong* case, Xihu District People's Court in Hangzhou City, Zhejiang Province entered decision in favor of Ms. Huang, who sued the culinary school after it denied her job application because of her gender. The court found that the school had violated Ms. Huang's right to equal employment and awarded her RMB 2,000 (approximately USD 326) in damages.<sup>33</sup>

Ms. Huang, a twenty-one-year-old college graduate and a social work major, had responded to an advertised clerical vacancy at Dongfang Culinary School in Hangzhou, China's fourth largest city with a population of 21.1 million. The school rejected her application with written notice stating that the job vacancy was open only to male candidates. Ms. Huang repeatedly appealed to the school in person and requested an interview based on her credentials. The school refused to interview Ms. Huang and insisted that the

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25. Periodic Report on Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women by the People's Republic of China (2014), available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CHN&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=CHN&Lang=EN).

26. *Id.* at page 15.

27. *Netizens Debate on Highly-Educated "Leftover Women"*, ALL-CHINA WOMEN'S FEDERATION (Jan. 21, 2014), <http://www.womenofchina.cn/womenofchina/html1/opinion/16/9208-1.htm>.

28. THE SEXUAL HARASSMENT OF WOMEN FACTORY WORKERS IN GUANGZHOU, SUNFLOWER WOMEN WORKERS CENTRE (2014), available at [http://www.clb.org.hk/en/sites/default/files/Image/research\\_report/sexual%20harassment%20survey%20sunflower%20centre.pdf](http://www.clb.org.hk/en/sites/default/files/Image/research_report/sexual%20harassment%20survey%20sunflower%20centre.pdf).

29. Crystal Roberts, *Far From a Harmonious Society: Employment Discrimination in China*, 52 SANTA CLARA L. REV. 1531, 1539 (2012).

30. Hunan Province State Civil Servant Recruitment Physical Examination Interim Guidelines (2003), Article 22 (on file with the author). See also Yu Hua, *Power is Arrogant*, N.Y. TIMES, May 8, 2013.

31. *Woman Celebrates Victory in Milestone Gender Discrimination Case*, ALL-CHINA WOMEN'S FEDERATION (Nov. 13, 2014), <http://www.womenofchina.cn/womenofchina/html1/news/china/1411/1609-1.htm>.

32. Qiye Bushi Zaochang, Jing Ren Xiakan Nannu? [Workplace Is Not a Bathhouse, Inspecting Gender at the Entrance?], PEOPLE'S DAILY (Nov. 19, 2014).

33. Chinese Woman Wins Sexual-Discrimination Case, PEOPLE'S DAILY (Nov. 13, 2014), <http://english.peopledaily.com.cn/n/2014/1113/c90882-8808679.html>.

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job was for men only.<sup>34</sup> Ms. Huang then sued Dongfang Culinary School. Xihu District People's Court found that the school violated the Law on Promotion of Employment, which provides that "women enjoy equal right to work as men" and an employer shall not refuse to employ women based on their gender, except where the type of occupation or job duty is specifically designated as unsuitable for women by state law or regulations.<sup>35</sup> The court held that women are able to do the clerical position offered by the school and the school's action to recruit only men for the job was therefore unlawful.<sup>36</sup>

China's first lawsuit on gender discrimination in employment, *Cao Ju (Alias) v. Junren Academy*, was settled in December 2013 in Haidian District People's Court in Beijing. Ms. Cao, a new college graduate, applied for a position as an office assistant at Juren Academy in Beijing. Juren Academy rejected Ms. Cao's application because the position was open only to male candidates. Ms. Cao brought an action against Juren Academy in June 2012.<sup>37</sup> However, the court first refused to hear her case. Only after the case was widely publicized and Ms. Cao received tremendous public support did the court accept the suit. The lawsuit was settled through mediation.<sup>38</sup>

Ms. Huang and Ms. Cao's successes are no small victories for Chinese girls and women who wish to advance their education and career. Their victories are nevertheless limited as both lawsuits were against companies in the private sector. Chinese courts have not changed the previous rulings that the courts do not have jurisdiction to review employment practices of state-owned enterprises and government agencies, which employ the majority of white-collar workers in China.

Chinese women continue to face immense challenges in the pursuit for equality, liberty and freedom. Many of these challenges may be insurmountable until China achieves true democracy and rule of law for all Chinese people.

#### IV. India

Used as a method to control population growth, men and women undergo involuntary sterilizations in different parts of the world. Throughout history, sterilizations have been coerced upon ethnic minorities,<sup>39</sup> prison inmates,<sup>40</sup> the mentally ill,<sup>41</sup> and sometimes as a part of eugenics studies.<sup>42</sup> In the Bilaspur district of Chattisgarh, a state in India, the botched tubectomies that led to the death of thirteen women and hospitalization of sixty

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34. Faliu Meiyou Rang Ta Ku [The Law Did Not Leave Her Crying], CHINA WOMEN'S NEWS (Nov. 16, 2014), <http://paper.cnwomen.com.cn/content/2014-11/16/010752.html>.

35. Law of the People's Republic of China on Promotion of Employment, Article 27. The English translation of it is available at the website of the National People's Congress of the People's Republic of China, [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471590.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm).

36. See *supra* note 32.

37. *First Gender Discrimination Lawsuit in China*, ALL-CHINA WOMEN'S FEDERATION (July 25, 2012), <http://www.womenofchina.cn/womenofchina/html1/14/3321-1.htm>.

38. *China's First Workplace Gender Discrimination Lawsuit Closes*, ALL-CHINA WOMEN'S FEDERATION (Dec. 19, 2013), <http://www.womenofchina.cn/womenofchina/html1/news/china/16/8270-1.htm>.

39. Rosalind Pollack Petchesky, *Reproduction, Ethics, and Public Policy: The Federal Sterilization Regulations*, 9 HASTINGS CENTER REP. 29, 30 (1979).

40. Mark A. Largent, "The Greatest Curse of the Race": *Eugenic Sterilization in Oregon, 1909-1983*, 103 OREGON HISTORICAL Q. 188, 202 (2002).

41. *Id.*

42. *Id.*

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others (rendering over a dozen in serious condition) made headlines all over the world.<sup>43</sup> The news once again aroused anger and frustration, and put the spotlight on India's disregard towards woman's health issues.<sup>44</sup> With a population of over 1.18 billion,<sup>45</sup> the Indian government has been trying to stem the continuing population growth by developing and aggressively implementing family planning schemes. The kinds of governmental schemes seen in Chattisgarh state have a long history in India. Setting targets for sterilizations, providing monetary incentives, and forcing men and women into sterilization during the Emergency period of 1975-77 tarnished Prime Minister Indira Gandhi's regime to some extent.<sup>46</sup>

Article 21 of the Indian Constitution guarantees to every individual the protection of life, health, and personal liberty; these guarantees encompass the right to make decisions with respect to one's reproductive health.<sup>47</sup> After receiving reports of injuries to women due to negligence by doctors while performing tubectomies from various Indian states, the Supreme Court of India in *Ramakant Rai v. Union of India*, issued an interim order in March 2005.<sup>48</sup> The order required all the Indian states to comply with uniform procedures while performing sterilizations on patients.<sup>49</sup> The order specified the doctor's qualification performing the sterilizations, a checklist seeking information of the patient's age, health, number of children, consent forms from patients, compliance with established guidelines of running pathological tests before surgeries to detect any health issues, and medical facilities with proper equipment and sanitized conditions to avoid infections to patients.<sup>50</sup> Under the order, the states were also required to record the number of sterilizations performed, the type of procedure used, and the number of individuals incapacitated or dead as a result of the sterilizations.<sup>51</sup> Furthermore, the order spelled out the compensation to families of victims in the amount of rupees 1,00,000 (\$1,790.00) in case of death and rupees 30,000, (\$537.00) in case of incapacitation of the victim because of improper sterilization procedures.<sup>52</sup> Another public interest litigation case filed in 2012 by a health activist Devika Biswas, pertaining to unsafe sterilizations performed on women, awaits hearing in the Supreme Court of India.<sup>53</sup>

Using the guidelines provided by the National Rural Health Mission (NRHM) in 2005, the state of Chattisgarh laid out a comprehensive health policy for its towns and villages. The policy makers provided for monetary incentives to health workers, also called

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43. See, e.g., *India Sterilization Deaths: Chhattisgarh Protests as Toll Climbs*, BBC NEWS INDIA (Nov. 12, 2014), <http://www.bbc.com/news/world-asia-india-30015752>.

44. Ashutosh Bharadwaj, *Chhattisgarh Sterilisation Tragedy: Besides Medical Negligence, Guidelines For Operations Also Violated*, THE INDIAN EXPRESS (Nov. 12, 2014), <http://indianexpress.com/article/india/india-others/bilaspur-8-women-dead-20-others-in-a-serious-condition/>.

45. CENSUS OF INDIA, <http://censusindia.gov.in/> (last updated Nov. 18, 2014).

46. See Davidson R. Gwatkin, *Political Will and Family Planning: The Implications of India's Emergency Experience*, 5 POPULATION & DEVELOPMENT REV., 29, 38 (1979).

47. INDIA CONST. art. 21, available at <http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Ro m8Fsss%286%29.pdf>; *Mandal v. Deen Dayal Harinagar Hosp. & Ors.*, (2010) W.P.C 8853/2008 (India).

48. See *Ramakant Rai & Anr v. Union of India & Ors.*, (2005) W.P.C. 209/2003.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See *Devika Biswas vs. Union of India and Ors.*, (2012) W.P.C. 81/2012.

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“Mitanins”<sup>54</sup> who convince individuals to use the governmental and non-governmental health centers for cataract surgeries, vasectomies, laparoscopic tubectomies, to obtain contraceptives, children’s immunization, and so on.<sup>55</sup> The government pays men and women who undergo sterilization, an amount that serves as a financial enticement.<sup>56</sup> The question raised here is whether the women who undergo the tubectomies receive enough information about the consequences of the procedures, the risks associated, the non-reversible nature of the procedure, and the other options for birth control.

In the Bilaspur district between April 2013 and March 2014, the number of women who underwent sterilization as compared to men shows a shocking gender disparity. Thirty-three thousand three hundred eighty-seven (33,387) females were sterilized while only 764 males underwent sterilization.<sup>57</sup> The trend of men refusing to undergo sterilization in rural India seems to have changed a little in the past few years; hence, a premium is placed on convincing a man into undergoing a vasectomy. According to the 2012-13 Chattisgarh Sterilization Policy, a Mitanin receives 100 rupees (\$1.79) for every female she convinces to undergo a tubectomy and 125 rupees (\$2.24) for every man whom she convinces to undergo a vasectomy.<sup>58</sup>

The prevalence of well-publicized prior incidents involving botched sterilizations should have served as an eye-opener to the Chattisgarh government to take immediate steps to avoid any similar future incident.<sup>59</sup> However, within a few days of the November 2014 Chattisgarh tragedy where the doctor performed eighty-three tubectomies in five hours and the huge public outcry thereafter, twenty-six tubectomies were performed at another sterilization camp in Bilaspur district, leaving twenty women with surgical complications and one dead.<sup>60</sup> What could be the reason for such a callous attitude shown by the government? Why is this mad rush for sterilizing the women? Instead of letting the women take control of their reproductive health and giving them options for fertility limitation, they are unnecessarily dragged into invasive surgeries.

Violence against women continues in India. Rapes of women and girls are a common occurrence, even after the gang rape of Nirbhaya in December 2012 that made headlines around the world.<sup>61</sup> Not only do family members still physically punish adult daughters

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54. A “Mitanin” is trained female community health worker/volunteer in rural towns and villages of India who works very closely with the medical staff at the health centers recruited by the community health center. See also PROD, <http://hsprodindia.nic.in/searnum.asp?PNum=49> (last visited Mar. 5, 2015).

55. See Project Implementation Plan for Chattisgarh 2012-13 at 252 & 253, <http://cg.nic.in/health/programonitoring/PIPHHealthFinancing/PIP201213.pdf>.

56. Jason Burke, *India’s Population Policies, Including Female Sterilization, Beset By Problems*, THE GUARDIAN (Nov. 13, 2014), <http://www.theguardian.com/world/2014/nov/13/india-population-growth-policy-problems-sterilisation-incentives-coercion>.

57. See *Monthly Cumulative Reports of Family Planning (Permanent Method)*, CHATTISGARH GOVERNMENT HEALTH AND FAMILY WELFARE, <http://cg.nic.in/health/programonitoring/Reports/rptfamilyplanning.aspx> (last visited Mar. 5, 2015).

58. Project Implementation Plan for Chattisgarh 2012-13 at 252, *supra* note 55.

59. Shoumojit Banerjee, *Kaparfora Tubectomies: NGO Blacklisted, Surgeon Sacked*, THE HINDU (Feb. 12, 2012), <http://www.thehindu.com/todays-paper/tp-miscellaneous/tp-others/kaparfora-tubectomies-ngo-blacklisted-surgeon-sacked/article2884530.ece>.

60. Bharadwaj, *supra* note 44.

61. Rama Lakshmi, *Two Years After Infamous Delhi Gang Rape, India Isn’t Any Safer*, WASH. POST WORLDVIEWS (Dec. 16, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/12/16/two-years-after-infamous-delhi-gang-rape-india-isnt-any-safer/>.

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for having relationships with boys from a lower caste, they frequently go to the extent of killing the girl or the boy who has dared to defy the caste-based marriage system.<sup>62</sup> Even today, Indians yearn for a male offspring causing female infanticide to be a rising concern.<sup>63</sup> On one hand, the Government of India touts the launch of Mangalyaan, the Mars Orbiter Mission, as a mark of India's technological prowess to the world,<sup>64</sup> while on the other, hundreds of women face deadly consequences for undergoing a simple sterilization procedure.

## V. Europe

The Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention, was adopted by the Council of Europe Committee of Ministers on April 7, 2011.<sup>65</sup> After its ratification by Andorra on April 22, 2014, the Istanbul Convention went into effect on August 1, 2014.<sup>66</sup> As of this writing, the following nations have ratified the convention: Albania, Andorra, Austria, Bosnia & Herzegovina, Denmark, France, Italy, Malta, Monaco, Montenegro, Portugal, Serbia, Spain, Sweden, and Turkey.<sup>67</sup>

The Convention centers on preventing violence against women, protecting victims, prosecuting perpetrators of violence against women, and monitoring how governments comply with the convention.<sup>68</sup> It covers not only physical and psychological abuse and sexual violence, but it is also intended to extend to stalking, sexual harassment, forced marriage, and forced sterilization.<sup>69</sup> The convention is focused primarily on eliminating violence against women; however, all parties to the convention are encouraged to apply the framework to others who are affected by family violence, including men, children, and the elderly.<sup>70</sup>

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62. See, e.g., Carlin Carr, *In Urban India, Inter-Caste Couples Hide Out in a Network of Secret Shelters*, NEW CITY (Sept. 17, 2014), <http://nextcity.org/daily/entry/in-urban-india-inter-caste-couples-hide-out-in-a-network-of-secret-shelters>.

63. See, e.g., Alex Sangha, *Domestic Violence in the South Asian Community Needs to Stop*, HUFF. POST (Nov. 27, 2014), [http://www.huffingtonpost.ca/alex-sangha/domestic-violence-south-asian-surrey\\_b\\_6222520.html](http://www.huffingtonpost.ca/alex-sangha/domestic-violence-south-asian-surrey_b_6222520.html).

64. *2014: The Year of Narendra Modi, Mars Mission and Kashmiri*, IBN LIVE (Dec. 30, 2014), <http://ibnlive.in.com/news/2014-the-year-of-narendra-modi-mars-mission-and-kashmir-floods/520494-3.html>.

65. *Historical Background*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/standardsetting/convention-violence/background\\_en.asp](http://www.coe.int/t/dghl/standardsetting/convention-violence/background_en.asp) (last visited Mar. 5, 2015).

66. *Id.*

67. *Treaty Office*, COUNCIL OF EUROPE, <http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=&DF=&CL=ENG> (last visited Mar. 5, 2015).

68. *Convention in Brief*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/standardsetting/convention-violence/brief\\_en.asp](http://www.coe.int/t/dghl/standardsetting/convention-violence/brief_en.asp) (last visited Mar. 5, 2015).

69. *About the Istanbul Convention*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/standardsetting/convention-violence/about\\_en.asp](http://www.coe.int/t/dghl/standardsetting/convention-violence/about_en.asp) (last visited Mar. 5, 2015).

70. *Id.*

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The convention is binding law on the nations that have ratified it, and those governments can be held accountable under the treaty.<sup>71</sup> Independent experts are expected to be appointed in 2015 to begin monitoring compliance with the convention.<sup>72</sup>

## VI. United Kingdom

Malala Yousafzay's fight for the education of girls gained worldwide attention when she was targeted for her activism and was brutally shot by a member of the Taliban in her native country of Pakistan. Instead of silencing Malala, the act brought overwhelming international support for her and her cause.<sup>73</sup> In 2014, the Nobel Peace Prize was awarded jointly to Malala Yousafzay and Indian activist Kailish Satyarthi for their work in fighting for the rights of children and young people to education and to be free from exploitation and suppression.<sup>74</sup>

Malala currently resides in Birmingham, England, where she is attending high school.<sup>75</sup> In addition to publishing a memoir,<sup>76</sup> Malala has set up a fund to support efforts to educate girls around the world.<sup>77</sup>

## VII. Canada

The Canadian House of Commons convened a Special Committee on Violence Against Indigenous Women to study the disproportionate number of abused, missing, and murdered indigenous women in Canada. The Committee's mandate was to "conduct hearings on the critical matter of missing and murdered Indigenous women and girls in Canada, and to propose solutions to address the root causes of violence against Indigenous women."<sup>78</sup>

According to the Native Women's Association of Canada, the homicide rate of Indigenous women was almost seven times higher than the rate for non-Indigenous women

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71. *Istanbul Convention Enters into Force*, COUNCIL OF EUROPE (Jan. 8, 2014), <http://www.coe.int/t/dghl/standardsetting/convention-violence/>.

72. *Id.*; see also Gauri van Gulik, *Dispatches: A Step Forward Today in Ending Violence Against Women in Europe*, HUMAN RIGHTS WATCH (Aug. 1, 2014), <http://www.hrw.org/news/2014/08/01/dispatches-step-forward-to-day-ending-violence-against-women-Europe>.

73. *Malala Yousafzai*, BIO, <http://www.biography.com/people/malala-yousafzai-2136225> (last visited Mar. 5, 2015).

74. Press Release, The Nobel Peace Prize for 2014, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2014/press.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2014/press.html) (last visited Mar. 5, 2015).

75. Nsikan Akpan, *What Will Malala's Nobel Peace Prize Mean For Girls' Education?*, NPR (Oct. 15, 2014), <http://www.npr.org/blogs/goatsandsoda/2014/10/15/355160473/what-will-malalas-nobel-peace-prize-mean-for-girls-education>.

76. MALALA YOUSAFZAI, *I AM MALALA: THE GIRL WHO STOOD UP FOR EDUCATION AND WAS SHOT BY THE TALIBAN* (2013).

77. Akpan, *supra* note 75.

78. *Invisible Women: A Call To Action: A Report On Missing And Murdered Indigenous Women In Canada*, PARLIAMENT OF CANADA, <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6469851&Language=E&Mode=1&Parl=41&Ses=2&File=21> [hereinafter Committee Report] (last visited Mar. 5, 2015).

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between 1997 and 2000.<sup>79</sup> Additionally, Indigenous women aged fifteen and older are 3.5 times more likely to be victims of violence.<sup>80</sup>

The Committee issued its report in March of 2014. The report included several recommendations to the Canadian government, such as strengthening the criminal justice system to ensure that violent and repeat offenders receive appropriate sentences; developing the Canadian Victims Bill of Rights; implementing a national DNA-based missing person's index; and encouraging "Aboriginal organizations, the Canadian Police College and municipal, provincial, and territorial governments to improve police officer training, including continuing education, to foster cultural understanding and sensitivity."<sup>81</sup>

The Canadian government issued a response to the recommendations in which it recognized the importance of the Committee's work and affirmed its commitment to address the issues identified in the report.<sup>82</sup> The government cited its plan to set aside \$25M over the next five years, and in response to that economic plan and to the Committee's report, it developed an action plan focused on the following:

- Preventing violence by supporting action and solutions at the community level.
- Supporting Aboriginal victims by providing appropriate services.
- Protecting Aboriginal women and girls by investing in shelters and continuing to improve the criminal justice and police response.<sup>83</sup>

The Committee's report came under scrutiny for failing to make recommendations for concrete actions, such as implementing an independent national inquiry or addressing police misconduct.<sup>84</sup> The issue is not likely to go away, particularly when brutal attacks against Indigenous women continue to make headlines in Canada.<sup>85</sup>

### VIII. United States

#### A. EQUAL PAY FOR WOMEN

Women in the United States make on average only 78% of the wages earned by their male counterparts.<sup>86</sup> The federal government has taken steps to address this disparity, such as passing the Lilly Ledbetter Fair Pay Restoration Act in 2009. On April 8, 2014, President Obama signed an Executive Order to ensure equal pay for women, in part by prohibiting retaliation against employees who discuss their compensation with cowork-

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79. *Fact Sheet: Violence Against Aboriginal Women*, NATIVE WOMEN'S ASSOCIATION OF CANADA, [http://www.nwac.ca/files/download/NWAC\\_3E\\_Toolkit\\_e.pdf](http://www.nwac.ca/files/download/NWAC_3E_Toolkit_e.pdf) (last visited Mar. 5, 2015).

80. *Id.*

81. Committee Report, *List of Recommendations*, PARLIAMENT OF CANADA, <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6469851&Language=E&Mode=1&Parl=41&Ses=2&File=84> (last visited Mar. 5, 2015).

82. *Government Response*, PARLIAMENT OF CANADA (Sept. 15, 2014), <http://www.parl.gc.ca/committeebusiness/ReportsResponses.aspx?Cmte=IWFA&Language=E&Mode=1&Parl=41&Ses=2>.

83. *Id.*

84. See, e.g., *Canada: Parliament Panel Fails Indigenous Women*, HUMAN RIGHTS WATCH (Mar. 7, 2014), <http://www.hrw.org/news/2014/03/07/canada-parliament-panel-fails-indigenous-women>.

85. See Celine Cooper, *Violence Against Aboriginal Women Has To Stop*, MONTREAL GAZETTE (Nov. 24, 2014), <http://montrealgazette.com/news/national/celine-cooper-violence-against-aboriginal-women-has-to-stop>.

86. *The Simple Truth about the Gender Pay Gap*, AAUW, <http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/> (last visited Mar. 5, 2015).

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ers.<sup>87</sup> The Executive Order applies to federal contractors and aims to increase wage transparency so that employers are not able to hide pay discrepancies between their male and female employees. Information about pay rates will give women more negotiating power at the outset and alert them if they have a potential cause of action for gender discrimination.<sup>88</sup>

**B. REPRODUCTIVE RIGHTS VS. RELIGIOUS FREEDOM**

Women's reproductive rights have been in the forefront of U.S. legal news in 2014. In addition to challenges to state legislative curtailments on abortion rights,<sup>89</sup> a case dealing with the requirements of the federal Affordable Care Act (ACA) (also somewhat disparagingly referred to as "Obamacare") gained national attention for its potential impact on women's access to contraceptives and reproductive services.

The case, *Burwell v. Hobby Lobby*,<sup>90</sup> was one of two consolidated cases in which for-profit corporations sought to be excused from the ACA's requirement that their medical plans cover certain contraceptive services. The closely-held corporations<sup>91</sup> argued that requiring them to provide this coverage was in contravention of their religious beliefs, and as such, a violation of the federal Religious Freedom Restoration Act of 1993 (RFRA).<sup>92</sup>

RFRA provides that the government may not substantially burden a person's free exercise of religion unless the government has a compelling government interest and the burden is the least restrictive means of accomplishing that interest.<sup>93</sup> A primary issue in this case was whether closely-held corporations could exercise religion, and if so, whether they have a right to be free from substantial burdens on that free exercise.

The ACA provision at issue was a requirement that employers with fifty or more employees offer health coverage that provides "minimum essential coverage"<sup>94</sup> unless an exception applies. Essential care includes "preventive care and screenings" for women without "any cost sharing requirements." Federal guidelines specified that this includes "[a]ll Food and Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling."<sup>95</sup> Some of the FDA-approved methods of contraception were felt to be particularly offensive to the employers because they "may have the effect of preventing an already fertilized egg from developing any

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87. *Fact Sheet: Expanding Opportunity for All: Ensuring Equal Pay for Women and Promoting the Women's Economic Agenda*, WHITEHOUSE.GOV (Apr. 8, 2014), <http://www.whitehouse.gov/the-press-office/2014/04/08/fact-sheet-expanding-opportunity-all-ensuring-equal-pay-women-and-promot>.

88. *Id.*

89. *See, e.g.*, *Whole Women's Health v. Lakey*, 135 S.Ct. 399 (2014) (vacating stay of Texas's admitting privilege requirement and ambulatory surgical center requirements for abortion providers).

90. 134 S.Ct. 2751 (2014).

91. According to the Internal Revenue Service (IRS), "closely-held" corporations are those that have more than half the value of outstanding stock owned, either directly or indirectly, by five or fewer individuals and are not personal service corporations. *See Help & Resources*, IRS.GOV (last visited Mar. 5, 2015), <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5>.

92. 107 Stat. 1488, 42 U. S. C. §2000bb et seq.

93. 42 U.S.C. § 2000bb-1.

94. 26 U. S. C. §5000A(f)(2); §§4980H(a), (c)(2).

95. 77 Fed. Reg. 8725.

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further by inhibiting its attachment to the uterus.” Nevertheless, employers who did not provide this coverage could be subject to penalties under the ACA.<sup>96</sup>

A majority of the U.S. Supreme Court agreed that the requirement substantially burdened the religious beliefs of the business owners, and held the provision violated the RFRA.<sup>97</sup> The majority recognized that the requirement may serve a compelling government interest, but they felt it was not the least restrictive means of accomplishing the government’s goal of ensuring reproductive services for women. This was because the government had an opt-out provision for private religious entities, and the majority thought that this could fairly easily be extended to these closely-held corporations.<sup>98</sup>

Although the female employees of these employers may still have access to contraceptives through other options under the ACA, that may not always hold true, particularly if the ACA is amended or repealed in the future. As the dissent pointed out, the Court has previously recognized the importance of access to contraceptives on women’s economic and social well-being: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>99</sup> The dissent and many critics of the opinion contend that the majority ignored that wisdom and incorrectly placed more importance on the rights of corporations than on the rights of the women they employ.<sup>100</sup>

The ultimate effect of the opinion may be limited by the fact that it was based on the federal RFRA and not on the First Amendment of the Federal Constitution. Since the Court has previously determined that the RFRA cannot be applied to the states,<sup>101</sup> the decision does not directly affect states’ regulation of closely-held corporations in this regard (although some states have passed similar provisions<sup>102</sup>). On the other hand, the decision is predicted to lead to many challenges on religious grounds to other federal actions and legislation.<sup>103</sup> We shall see in the next year or two how far federal courts are willing to extend RFRA protections to employers, and at what cost to their employees.

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96. *Hobby Lobby*, 134 S.Ct. 2751 (2014).

97. *Id.*

98. *Id.*

99. *Id.* at 2787-88 (Ginsburg, J., dissenting) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 856 (1992)).

100. *Id.*; see also *What Does the Hobby Lobby Decision Mean?* AAUW (July 3, 2014), <http://www.aauw.org/2014/07/03/what-hobby-lobby-means/>.

101. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

102. See Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>.

103. See, e.g., David Masci, *The Hobby Lobby impact: A Q&A [with Robert Tuttle]*, PEW RESEARCH (July 2, 2014), <http://www.pewresearch.org/fact-tank/2014/07/02/the-hobby-lobby-impact-a-qa/>, predicting that “the next wave of disputes is likely to involve employers who object on religious grounds to paying benefits to the same-sex spouses of employees.”

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## Cross-Border Real Estate Practice

TRACIE R. PORTER, WOJCIECH BAGINSKI, TIMUR BONDARYEV, NATALIA KLOCHUN,  
AND SVITLANA TEUSH<sup>1</sup>

This article reviews selected developments in the area of cross-border real estate practice during 2014.<sup>2</sup>

### I. Introduction

As many countries struggle to re-emerge from the financial collapse that affected world markets, countries have implemented, or attempted to implement, laws to address past problems and to encourage investment in the real estate markets. The legislatures in the United States, Ukraine, and Mexico have passed, or attempted to pass, laws that (1) require lenders to do more rigorous risk assessment of new loans or (2) bring more transparency and order to the real estate market by giving public access to the property register that contains pertinent information on real property title and encumbrances.

### II. New Qualified Mortgage Regulations in the United States

The United States Congress issued new statutory requirements governing mortgage practices with the intent of restricting the practices that contributed to and exacerbated the 2007 financial crisis.<sup>3</sup> Effective January 10, 2014, the Consumer Financial Protection Bureau's (CFPB) new mortgage regulations created fundamental changes in all aspects of the residential mortgage business.<sup>4</sup> The new regulations resulted from the enactment of

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1. The editors of this article are Tracie R. Porter of Western State College of Law (California) and Wojciech Baginski of The Law Office of Wojciech Baginski, Attorney & Counselor at Law (New York & Poland); contributing authors are Tracie R. Porter (United States), Timur Bondaryev, Natalia Klochun, and Svitlana Teush of Arzinger (Ukraine).

2. For developments during 2013, see Tracie R. Porter and Benjamin C. Rosen, *Cross-Border Real Estate Practice*, 48 *INT'L LAW* 319 (2013).

3. *Summary of Final Rules*, Bureau of Consumer Financial Protection, at 1, 6, [http://files.consumerfinance.gov/f/201307\\_cfpb\\_final-rule\\_titlexiv.pdf](http://files.consumerfinance.gov/f/201307_cfpb_final-rule_titlexiv.pdf) (last visited Mar. 10, 2015) [hereinafter *Bureau of Consumer Financial Protection*].

4. Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedure Act (Regulation X) and the Truth in Lending Act (Regulation Z), 12 C.F.R. Parts 1024 and 1026 (2013).

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the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010<sup>5</sup> in response to the financial crisis of 2007 and the collapse of the mortgage markets. The new regulations provide additional protections for consumers and require all industry participants to follow new lending and servicing standards.

Under the new regulations, lenders can make Qualified Mortgage (“QM”) loans or non-QM loans. The CFPB has deemed QM loans particularly “safe” for consumers. As a result, those loans have special protections, or a safe-harbor, from legal challenges, providing lenders with a presumption of compliance if they meet the Ability-to-Pay criteria. Thus, the Ability-to-Pay rule is another pertinent aspect of these new regulations because it helps define the QM criteria. The Ability-to-Pay Rule creates transparency of true mortgage costs by prohibiting lenders from offering low- or no-documentation mortgage loans that mask those costs.<sup>6</sup>

The Ability-to-Pay Rules also create a new category of mortgage known as the Qualified Mortgage,<sup>7</sup> which is defined by various features associated with mortgages. Lenders making Qualified Mortgages must adhere to six specific criteria.<sup>8</sup> First, the QM must not have an interest-only period. This feature is meant to avoid the payments-increase shock caused when the interest-only period ends and payment on the principal is added to the interest-only payment, making the mortgage unaffordable for borrowers.<sup>9</sup>

Second, the QM must not have negative amortization. Negative amortization means the mortgage principal balance increases with payments rather than decreases because the payment fails to cover the interest due on the mortgage.<sup>10</sup> Lenders, therefore, add the interest to the principal balance, which ultimately causes borrowers to owe more money on the outstanding balance than they originally borrowed.

Third, the QM must not have more than a thirty-year repayment term. This feature affords borrowers a ceiling on repaying the loan and prevents lenders from taking advantage of borrowers by adding extra years of interest on the mortgage loan.<sup>11</sup>

Fourth, the QM must not have balloon payment at the end of the term, with the exception of mortgages made to borrowers in rural and under-served areas.<sup>12</sup>

Fifth, the QM must not exceed forty-three percent of a borrower’s monthly gross, or pre-tax, income. This ratio is an improvement in some respects from past income ratios as

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5. Pub. L. No. 111-203, 124 Stat. 1376 (2010). Section 1402 of the Dodd-Frank Act amended the Truth In Lending Act, Pub L. No. 90-321, 82 Stat. 146 (1968); see also CCH, *Dodd-Frank Wall Street Reform and Consumer Protection Act: Law, Explanation and Analysis* 581 (2010).

6. Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z) (2013 ATR Final Rule), 78 FR 6407 (Jan. 30, 2013). Bureau of Consumer Financial Protection, *supra* n. 3 at 2, 4.

7. Truth In Lending Act, Pub L. No. 90-321, 82 Stat. 146 (1968). See 15 U.S.C.A. § 129C(b) (West 2012).

8. See 12 C.F.R. § 1026.43 (with relevant subparts).

9. *Id.*

10. *Id.* Negative Amortization is also known as NegAm, deferred interest, or graduated payment mortgage. See 12 C.F.R. §§ 1026.18(s)(2)(ii) & (s)(7)(v).

11. See 12 C.F.R. § 1026.43 (with relevant subparts).

12. The regulations are not clear on what constitutes rural or under-served areas. *Underwriting Guidelines: USDA Rural Development Guaranteed Rural Housing Loan Program*, USDA, available at <http://www.rd.usda.gov/files/CA-SFHUnderwritingGuide.pdf>. In the author’s opinion, both these areas may still need this protection given the low-income levels of many Americans who might reside in rural and under-served areas.

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high as fifty percent of a borrower's gross income, which made many borrowers expend a significant amount of their actual take-home pay on housing costs.<sup>13</sup>

Sixth, and last, lenders must verify borrowers' proof of income or assets before making the mortgage loan.<sup>14</sup> This feature aims to guarantee a borrower's ability to pay as well as to prevent fraud in mortgage lending, such as past abuses by lenders who made loans to borrowers with no proof of employment, income, or assets, which ultimately resulted in large mortgage loan defaults.

Some industry participants have criticized these new regulations. The American Bankers Association has noted that the new rules are extraordinarily complicated and are subject to ongoing and extensive amendments.<sup>15</sup> Furthermore, the volume and complexity of the rules have created uncertainty for banks that, after the financial collapse, had been reluctant to issue new mortgage loans.<sup>16</sup>

In conclusion, the QM and Ability-to-Repay rules have highly technical and complex features given the various levels of legal protection for lenders and the combination of product pricing, loan features, and other factors that provide regulatory exemptions to minimize lenders' liability exposure. To minimize the risk of litigation for non-compliance or abusive lending practices under the new regulations, some banks may curtail residential mortgage lending until they have confidence that their origination and compliance systems provide greater certainty with respect to how the regulators, individuals, and state attorneys general will enforce the new rules.<sup>17</sup>

### III. The Emerging Real Estate Market in the Ukraine

The current situation in the Ukrainian real estate market has been emulating the general dramatic deterioration of the national economy since the beginning of 2014, which was due to the unprecedented challenges faced by the Ukrainian People and the State, including the political toppling, territorial woes, and continued military tension in the eastern regions of Ukraine. On the positive side, during the last year, both presidential and parliamentary elections took place in Ukraine, resulting in the realignment of power toward more democratic pro-Western forces.<sup>18</sup> High expectations for the recovery of Ukraine's national economy rest on the prospects of a free-trade zone with the European Union (EU), which is to be progressively implemented pursuant to the EU-Ukraine Association Agreement signed in 2014.<sup>19</sup>

The Ukrainian real estate market is being eyed by investors with interest, given the ample unexplored opportunities in the agricultural sector, under saturation of the com-

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13. See Bureau of Consumer Financial Protection, *supra* n. 3 at 64. The Bureau notes that the specific 43 percent debt-to-income requirement applies only to qualified mortgages under 12 C.F.R. § 1026.43(e)(2).

14. See 12 C.F.R. § 1026.43 (with relevant subparts).

15. American Bankers Association, *Mortgage Reform in 2014* (March 2014), <http://www.aba.com/Press/Documents/MortgageReform2014.pdf>.

16. *Id.*

17. *Id.*

18. See *Ukraine's New Pro-Western Parliament Holds First Session*, EURONEWS (Nov. 27, 2014) <http://www.euronews.com/2014/11/27/ukraine-s-new-pro-western-parliament-holds-first-session>.

19. Complete text of the Agreement is available at: [http://eeas.europa.eu/ukraine/assoagreement/assoagreement-2013\\_en.htm](http://eeas.europa.eu/ukraine/assoagreement/assoagreement-2013_en.htm).

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mercial real estate market, and a pressing demand for investment into the energy and infrastructure segments.<sup>20</sup>

A number of improvements in the legislative and operational environment have been implemented, such as granting public access to the data of the property register and master plans, and facilitation of registration of rights *in rem*. At the same time, certain outdated laws and restrictive practices, such as the land moratorium, which prohibits alienation of many agricultural lands, impede the inflow of investment into the Ukrainian real estate market.<sup>21</sup> Although originally viewed as being of a temporary nature, the moratorium is qualified as permanent under the most recent governmental draft law,<sup>22</sup> with the focus shifting toward reforming and liberalizing land lease. In particular, according to the draft law, regardless of the form of ownership and category of land, land lease rights may be alienated by the leaseholder without the lessor's consent.<sup>23</sup>

The property register containing information on real property title and encumbrances became publicly accessible, which marked a crucial, long-awaited shift toward bringing more transparency and order to the real estate market.<sup>24</sup> Also, the amendments to the Law "On the Urban Planning" envisaged that all master (development) plans, including those that have been kept restricted since the Soviet times, are now to be opened to the public.<sup>25</sup> Access to the property register as well as to the master plans should be made publicly available on-line.

Over the past year, a new registration system enacted in 2013 has been undergoing further changes and improvements aimed at facilitating the registration procedure, namely shortening the procedure of ownership registration and simplifying registration of derivative rights *in rem*.<sup>26</sup> By the end of 2015, the government plans to carry through the transfer of the records from the previously existing land registers into the new register of property rights.<sup>27</sup>

To increase budget revenues, the government has taken certain unpopular measures across various segments of the economy, including in the real estate field. The taxation

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20. Investment market In Ukraine: H1 2014, DTZ (Aug. 3, 2014), [http://www.dtz.com/Ukraine/Media\\_Centre/Latest\\_news/Investmentmarkt+Ukraine+H1+2014](http://www.dtz.com/Ukraine/Media_Centre/Latest_news/Investmentmarkt+Ukraine+H1+2014).

21. Land Moratorium was first introduced in 2011 and was extended most recently on December 20, 2012. The 2012 law will take effect "On the Introduction of Amendments to the Land Code of Ukraine (With Respect to Agricultural Land Transactions)," *available at*: <http://zakon2.rada.gov.ua/laws/show/5494-17/print1329903557142087>.

22. On Amendments to Certain Legislative Acts of Ukraine Aimed at Improvement of Procedures for the Sale of Lease Rights to Agricultural Land (Jul. 18, 2014), <http://land.gov.ua/zakonotvorcha-diialnist/633.html>.

23. *Id.*

24. The Property Register opened on November 25, 2014, with the coming into force of the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine on Determining Ultimate Beneficiaries of Legal Entities and Public Figures" *available at* <http://zakon4.rada.gov.ua/laws/show/1701-vii>.

25. All master plans were opened based on the Law of Ukraine No. 1170-VII "On amendments to some legislation acts of Ukraine due to the adoption of the law of Ukraine On Information and the Law of Ukraine On Access to Public Information (Apr. 18, 2014), *available at* <http://zakon4.rada.gov.ua/laws/show/1170-18>.

26. Procedural rules were amended with the enactment on February 12, 2014 of the "Procedure of State Registration of Real Estate Rights and their Encumbrances" as approved by the Resolution of the Cabinet of Ministers No.868 (Oct. 17, 2013), <http://zakon4.rada.gov.ua/laws/show/868-2013-%D0%BF>.

27. *Id.*

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basis for the purpose of levying tax on residential buildings (premises) was extended so as to cover not only the living area, but also the total area of property.<sup>28</sup>

In 2014, important state reforms have been launched, aimed at downsizing bureaucracy, decentralizing power, enhancing local self-government, and supporting anti-corruption and lustration initiatives. The above measures give a dawning beacon of hope to the public society and business, while a tremendous amount of work still remains to be done.

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28. Respective amendments to the Tax Code of Ukraine were introduced by the Law of Ukraine No.1166 “On Prevention of the Financial Disaster and Creation of Preconditions for the Economic Growth in Ukraine”, <http://zakon4.rada.gov.ua/laws/show/1166-18>. Commercial property has not yet become taxable, but lawmakers are discussing this prospect. See [http://arzinger.ua/files/file/Real%20Estate%20Legal%20Alert\\_23\\_September%202014\\_eng.pdf](http://arzinger.ua/files/file/Real%20Estate%20Legal%20Alert_23_September%202014_eng.pdf).

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## Immigration and Naturalization

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### I. Introduction

2014 was undoubtedly a busy year for immigration law and policy. Both the United States and Europe saw surges in the number of intending immigrations attempting to enter, fleeing violence, poverty, and other factors making life in their home countries difficult. The United States has struggled to find a unified approach to respond to the influx of migrants, largely from Central America. Accordingly, President Obama responded with Executive Action, which likely will be challenged in the courts in the upcoming year. Jihan Hassan considers the surge and the executive response in her contribution to this edition of the *Year in Review*.

While the United States addresses its unlawful migrant dilemma, other countries have been looking for ways to attract more lawful migrants. Marina Bugallal Garrido and Melanie Glover dig into new attempts by the Spanish Government to attract foreign entrepreneurs to help reinvigorate their struggling economy. And Sergio Karas leads off this issue with an exploration of the work permit process for specialized knowledge workers in Canada. The Committee's contribution to this edition of the *Year in Review* reflects the need to continually modify immigration law to address its constantly changing patterns and practice around the world.

#### A. MAJOR CHANGES FOR SPECIALIZED KNOWLEDGE WORKERS IN CANADA\*\*\*

On June 9, 2014, the Federal Government published Operational Bulletin (OB) 575, which expands guidelines for immigration officers assessing Work Permit applications for

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Intra-Company Transferees with Specialized Knowledge. The OB provides direction to the officers as to how to evaluate the criteria under which those workers are granted Work Permits. The OB also makes it more difficult to use this exemption from the Labour Market Opinion (LMO) process as it now requires a higher threshold of advanced proprietary knowledge to qualify.<sup>1</sup>

Intra-Company Transferees admitted under the Specialized Knowledge category are LMO exempt. Following the federal government scrutiny of the Temporary Foreign Worker Program, applicants and their counsel have increasingly looked at ways to bring to Canada temporary foreign workers avoiding the cumbersome LMO process. One of the ways this often is done is by using the Intra-Company Transferee category, which allows the transfer of Senior Managerial and Executive personnel as well as Specialized Knowledge workers who comply with the prescribed criteria and are performing services for an employer in Canada that is a related entity to their employer abroad. Effective immediately, immigration officers are directed to use the new criteria to determine if the applicant possesses a high standard of specialized knowledge and is receiving wages consistent with the Canadian prevailing wage for that occupation.<sup>2</sup>

To have “Specialized Knowledge” and to meet the requirements of the new policy, an Intra-Company Transferee Specialized Knowledge applicant would be required to demonstrate, on a balance of probabilities, a high degree of *both* proprietary knowledge and advanced expertise. Proprietary knowledge alone, or advanced expertise alone, does not qualify the applicant under this exemption. The onus is on the applicant to provide evidence that he or she meets this standard. Documentary evidence to substantiate this expanded level of knowledge may include the following: a resume, reference letters, letter of support from the employer, job descriptions outlining the level of training acquired, years of experience in the field, degrees or certifications obtained that are related to the field of work, list of publications and awards received by the applicant, and a detailed description of the work to be performed in Canada.<sup>3</sup>

The new definition articulates the elements of “Specialized Knowledge” as the following:

“Proprietary Knowledge” is company-specific expertise related to a company’s product or services. It implies the company has not divulged specifications that would allow other companies to duplicate the product or service.

“Advanced proprietary knowledge” would require an applicant to demonstrate uncommon knowledge of the firm’s products or services and its application in international markets, or an advanced level of expertise or knowledge of the enterprise’s processes and procedures such as its production, research, equipment, techniques, or management.

“Advanced level of expertise” is also necessary, which would require specialized knowledge gained through significant and recent experience with the organization and used by the individual to contribute significantly to the employer’s productivity. “Significant” is not defined and is not always a meaningful indicator, but it relates to the length of experience possessed by the foreign worker. “Recent” is defined as experience obtained within the last five years.

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1. CANADIAN CITIZEN. & IMMIG. CANADA, Op. Bulletin 575 (2014).

2. *Id.*

3. *Id.*

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In assessing the “Advanced level of expertise,” officers must consider the following:

1. abilities that are unusual and different from those generally found in a particular industry and that cannot be easily transferred to another individual in the short-term;
2. the knowledge or expertise must be highly unusual both within the industry and within the host firm;
3. it must be of a nature such that the applicant’s proprietary knowledge is critical to the business of the Canadian branch and a significant disruption of business would occur without the applicant’s expertise;
4. the applicant’s proprietary knowledge of a particular business process or methods of operation must be unusual, not widespread across the organization, and not likely to be available in the Canadian labour market.<sup>4</sup>

It must be noted that skill in implementing an off-the-shelf product would not by itself be considered to be specialized knowledge, unless the product has suffered significant modifications to the point that it has become quite unique. So, for example, if an individual is very skilled at customizing a commonly available computer program, that, by itself, would not be sufficient to qualify the person as a Specialized Knowledge worker. However, if the product is combined with other products to achieve a customized and unique solution that is proprietary to the employer, that may be considered as a qualifying degree of expertise.

The new criteria will require Specialized Knowledge to be “unique and uncommon,” held by only a small number or small percentage of employees of a given enterprise. Under the new criteria, Specialized Knowledge workers must demonstrate that they are key personnel, not simply highly skilled.<sup>5</sup>

In addition, Specialized Knowledge workers will have to demonstrate that:

- they are employed by and under the direct and continuous supervision of the host company;
- they will not normally require training at the host company related to the area of expertise; and
- the specialized knowledge will not be readily available within the Canadian labour market, and cannot be readily transferred to another individual.

It must be noted that, where a treaty such as the NAFTA, or the Canada-Chile Free Trade Agreement (CCFTA), or the Canada-Peru Free Trade Agreement provides a different definition of Specialized Knowledge, that definition will still apply.<sup>6</sup>

1. *Introduction of Mandatory Wage Floor*

A completely new element in the Specialized Knowledge category has been introduced. The policy now requires that the employee claiming to possess Specialized Knowledge be remunerated at a level commensurate with the position. In order to introduce some objectivity to the definition of a mandatory wage floor, the new criteria requires that the foreign worker should receive, as a minimum, the prevailing wage for the specific occupa-

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4. *Id.*

5. *Id.*

6. *See id.*

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tion and region of work as listed in the Employment and Skills Development Canada “Working in Canada” Website tool to determine prevailing Canadian Wage.<sup>7</sup>

While the authorities have been using wage levels as an indication of specialization for some time, this is the first attempt to codify its use.

Non-cash payments such as hotel, transportation, and other benefits cannot be taken into consideration when evaluating the prevailing wage. Only allowances compensated in monetary form and paid directly to the employee can be included.<sup>8</sup>

The mandatory wage policy does not apply to Specialized Knowledge workers entering Canada pursuant to NAFTA or to other international free trade agreements. Nevertheless, officers still must consider wages as an indicator of specialization in their overall assessment.<sup>9</sup>

These important changes restrict the use of the Intra-Company Transferee Specialized Knowledge category and make it more difficult for employers to transfer technical personnel involved in Canadian projects. Changes to the Temporary Foreign Worker Program are ongoing, and it is expected that further restrictions may be introduced in the future. Given the evolving nature of the program, employers are encouraged to discuss specific cases with legal counsel to ensure applications are made based on current and timely analysis of existing policies and programs.

**B. UPDATE: ONE YEAR AFTER THE PASSING OF SPAIN’S LAW IN SUPPORT OF FOREIGN-NATIONAL ENTREPRENEURS<sup>10</sup>**

In the fall of 2013, Spain passed the Law in Support of Foreign-National Entrepreneurs (“Law”)<sup>11</sup> to entice foreign nationals to invest in Spain in exchange for residency permission. According to the latest information from the Spanish Ministry of Economy (“Ministry”), the granting of visas associated with this Law’s provisions recently increased in 2014. From September 2013 to September 2014, the Ministry granted 3,266 visas, whereas in the month of March 2014, when the Spanish Ministry of Economy released data on visas issued through that month, only 818 visas had been granted.<sup>12</sup>

Of the visas issued through September 2014, 285 have been granted to foreign nationals to invest in Spain for residency (“investment visa”). This includes those foreign investors who opt for the purchase of real estate in Spain, the purchase of Spanish public debt, or the launching of an entrepreneurial project—all of which are investment options for foreign nationals as presented in the Law in exchange for residency permission in Spain.<sup>13</sup>

Considering these 285 visas, 260 of them related to the purchase of property by foreign investors; 17 related to the acquisition of capital by foreign investors; and eight related to

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7. See *Explore Careers by Wages*, GOV’T CAN., [http://www.jobbank.gc.ca/wage-outlook\\_search-eng.do?reportOption=wage](http://www.jobbank.gc.ca/wage-outlook_search-eng.do?reportOption=wage) (last visited Mar. 30, 2015).

8. Op. Bulletin 575, *supra* note 1.

9. *Id.*

10. Marina Bugallal Garrido (Mariscal Abogados & Asociados, Madrid, Spain) and Melanie Glover (Altacor, Inc., Ada, Michigan, U.S.A.).

11. Law to Support Entrepreneurs and Their Internationalization, (B.O.E. 2013, 14/2013) (Spain).

12. Carlos Molina, *Los visados para atraer capital y empleo extranjero se multiplican por cuatro (Visas to Attract Capital and Foreign-National Workers by Four)*, CINCO DIAS (Sept. 29, 2014), [http://cincodias.com/cincodias/2014/09/26/economia/1411748251\\_823690.html](http://cincodias.com/cincodias/2014/09/26/economia/1411748251_823690.html).

13. *Id.*

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foreign investors' entrepreneurial projects in Spain. According to the first estimations of the Ministry, the investment in these projects is already rising to 497 million euros, and the labor associated with these projects has resulted in 4,446 jobs.<sup>14</sup>

Unlike the investment associated with property and financial assets, entrepreneurial projects are facing gradual implementation. According to the predictions for these businesses, an investment of 226 million euros and the creation of 2,410 jobs are predicted. If the growth continues, entrepreneurial projects could become the most significant investment option under the Law, in addition to foreign investment in Spanish property, for which the expense of 218 million euros is predicted. To apply for the investment visa and obtain residency in Spain, a foreign national must carry out a "significant investment of capital" in Spain.<sup>15</sup>

A "significant investment of capital" is an initial investment:

- of an amount equal to or greater than two million euros in Spanish public debt securities, or of an amount equal to or greater than one million euros in shares, company shares of Spanish businesses, or bank deposits in Spanish financial entities;
- of a value equal to or greater than 500,000 euros in the acquisition of property in Spain;
- or,
- an entrepreneurial project for development in Spain that is considered and recognized as pertaining to "general interest."<sup>16</sup>

For the creation of an entrepreneurial project of general interest, the completion of at least one of the following conditions will be valued: the creation of jobs; the performing of an investment with socio-economic impact of relevance in the geographic environment in which the activity is going to be developed; and support relevant to the scientific and/or technologic innovation.

To demonstrate eligibility for the investment visa, a foreign national must confirm that he or she:

- i. is not present in Spain for any unlawful reason;
- ii. is of legal age (at least 18 years of age);
- iii. has no previous criminal record in Spain or in the countries in which he or she has resided for the last five years;
- iv. is not listed as objectionable in the Schengen countries;
- v. has public or private medical insurance;
- vi. has sufficient economic resources for himself or herself as well as for the members of his or her family for the period of residence in Spain.<sup>17</sup>

The investment visa allows a foreign national to reside in Spain for at least one year. If the foreign national is interested in living in Spain for more than one year, he or she may apply for the Authorization of Residence for foreign investors. This Authorization lasts two years, and it is renewable for two additional years. For this application, a foreign national must have first obtained the investment visa. Alternatively, a foreign national

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14. *Id.*

15. *Id.*

16. *Id.*

17. Commission Regulation 265/2010, 2010 O.J. (L 85) 1 (EU).

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may apply for the Authorization within 90 days of the expiration date of the investment visa in addition to proving that the foreign national has:

- i. travelled to Spain at least once during the authorized period of residence to confirm that the investment has maintained a value of equal or greater value than that originally invested, and
- ii. complied with Spanish tax and Social Security obligations.<sup>18</sup>

The investment visa does not allow foreign nationals to work, but the Authorization does. If the foreign national proves a continued residence for five years in Spain, he or she may apply for a residence of a longer duration.

Considering the visa options and current market conditions in Spain, investment in Spain is attractive. Costs of housing have fallen by 40 percent, and according to the analysis gathered by Bankinter, property investment in Spain has increased by 15.5 percent in the first nine months of 2014 from the figure of 2013. In 2013, the cost of property investments rose 112 percent, until it reached 3,800 million euros. Currently, the total cost of the investments until September 2014 is 10,400 million euros. Of this figure, 4,900 million euros come from non-commercial assets; 1,500 million euros come from the investment in offices; and 1,150 million euros come from commercial assets. Madrid holds 55 percent of foreign investment for the year 2013, which is a total of 8,635 million euros.<sup>19</sup>

According to the Commercial Spanish Secretary of State, Jaime García-Legaz, Spain is the “country of the euro zone that [has] attracted most direct foreign investment.” He added that the attraction of Spain came from the fact that it allows access to the European market, the largest in the world ahead of either the U.S. or China. Five-hundred million consumers form the country with rent per capita of about 25,810 euros (about US\$32.00) and a “powerful network of free commerce” with countries from all over the world.<sup>20</sup>

Investing in Spain is becoming profitable. Spain is an attractive European country in which to invest in the property market, after the United Kingdom and Germany, and Madrid is placed as the second most-preferred European city for investing in property assets.<sup>21</sup> Barcelona also finds itself among the ten most-preferred cities for foreign nationals to invest in property assets.<sup>22</sup>

In summary, Europe seems to be attracting foreign investors once again. According to the CBRE report,<sup>23</sup> 70% of the foreign investors choose Western Europe as the most attractive global region to invest in property assets.

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18. Law to Support Entrepreneurs and Their Internationalization, *supra* note 11.

19. See *Investor Presentation*, COMUNIDAD DE MADRID (Feb. 27, 2015), <http://www.madrid.org/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadertype=Content-disposition&blobheadername2=cadena&blobheadervalue1=filename%3D2015++FEBRUARY+27++Investor+Presentation.pdf&blobheadervalue2=language%3Des%26site%3DInversor&blobkey=id&blobtable=MungoBlobs&blobwhere=1352867180536&ssbinary=true>.

20. See *Spanish Secretary of State “Now is the time to invest in Spain”*, ESADE (Feb. 8, 2013), <http://www.esade.edu/web/eng/about-esade/today/news/viewelement/277141/1/spanish-secretary-of-state-for-trade-jaime-garcia-legaz-now-is-the-time-to-invest-in-spain>.

21. *European Real Estate Investor Intentions 2014*, CBRE <http://www.cbrecapitalmarkets.com/EN/KnowledgeCentre/Pages/European-Real-Estate-Investor-Intentions-2014.aspx> (last visited Mar. 30, 2015).

22. *Id.*

23. *Id.*

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C. DEVELOPMENTS IN THE UNITED STATES

1. *U.S. Supreme Court Considers Limits of Executive Power in Immigration Cases, but Questions Remain over Naturalization*<sup>24</sup>

In 2014, two U.S. Supreme Court immigration cases highlighted the tension between executive supremacy and judicial oversight of U.S. immigration law decision-making. The Supreme Court's decisions to weigh-in on the question of executive power over immigration power is important and timely in light of President Obama's November 20, 2014, announcement of broad immigration reform through executive action.<sup>25</sup>

a. *Scialabba v. Cuellar de Osorio*

First, in June 2014, the Supreme Court exhibited deference to the Executive Branch's interpretation of immigration law in *Scialabba v. Cuellar de Osorio*,<sup>26</sup> maintaining the Board of Immigration Appeals' (BIA) interpretation of the Child Status Protection Act (CSPA).<sup>27</sup> Specifically, the Supreme Court upheld the agency's interpretation that CSPA only safeguards the priority dates of a small subset of children who are listed as derivative beneficiaries on their parents' family-based immigrant visa petitions, but who turn twenty-one years old and "age out" while waiting for visas to become available.

Rosalina Cuellar de Osorio and her family, natives of El Salvador, waited seven years for immigrant visas to permit them to come to the United States to join Rosalina's U.S.-citizen mother.<sup>28</sup> When the family was informed that they were next in line for immigrant visas, they were told that the applicant's son, who had turned twenty-one while waiting for a visa to become available and, therefore, was no longer a "child" under U.S. immigration law and was not eligible for a visa, and thus could not immigrate with his family to the United States.<sup>29</sup> The Ninth Circuit, in an *en banc* decision, found that because the plain language of the CSPA unambiguously granted automatic conversion and priority date retention to aged-out derivative beneficiaries in all family visa categories, and the BIA's narrow interpretation of CSPA was not entitled to deference.<sup>30</sup>

In reviewing the case, Supreme Court focused on the following questions: (1) whether CSPA's automatic conversion and priority date retention provision<sup>31</sup> grants relief to all noncitizens who qualify as "child" derivative beneficiaries when a visa petition is filed but

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24. Jihan M. Hassan is an attorney with the Chicago office of Fragomen, Del Rey, Bernsen, & Loewy LLP, a global corporate immigration law firm.

25. President Barack Obama, Address to the Nation on Immigration Reform (Nov. 20, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

26. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

27. *Matter of Xiuyi Wang*, 25 I. & N. Dec. 28 (BIA 2009) (holding that automatic conversion and priority date retention applied to some family-based visa categories but did not apply to individuals who "age out" of eligibility as the derivative beneficiary of a fourth-preference family petition).

28. Kevin Johnson, *Opinion Analysis: Another Stop at the Chevron Station & Deference to the BIA*, SCOTUS-BLOG (Jun. 9, 2014, 3:26 PM), *available at* <http://www.scotusblog.com/2014/06/opinion-analysis-another-stop-at-the-chevron-station-and-deference-to-the-bia/>.

29. *Id.*

30. *De Osorio v. Mayorkas*, 695 F.3d 1003 (9th Cir. 2012), *reversed by Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014).

31. Section 203(h) of the Immigration and Nationality Act provides that, "[i]f the age of an alien is determined . . . to be 21 years of age or older . . . , the alien's petition shall automatically be converted to the

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age out of qualification by the time the visa becomes available to the primary beneficiary; and (2) whether the BIA reasonably interpreted the statute.<sup>32</sup>

Justice Kagan, announcing the judgment of the Court and delivering the plurality opinion, reversed the Ninth Circuit decision, finding the statute ambiguous and that the BIA's interpretation was reasonable and consistent with the statute's purpose.<sup>33</sup> The plurality held that most children who are listed as derivative beneficiaries<sup>34</sup> on their parents' family-based immigrant petitions, but who turn twenty-one years old and "age out" while waiting for visas to become available, will not be able to retain their original priority dates and be granted permanent residency along with their parents.<sup>35</sup> Rather, they will need to start the process anew by having their parents file a new immigrant petition once they become lawful permanent residents.<sup>36</sup>

The Supreme Court decision resolves a three-way circuit split over the statutory construction of our nation's complex immigration laws.<sup>37</sup> Additionally, it represents the latest in a long line of Supreme Court cases giving broad discretion to the executive branch in the interpretation and execution of U.S. immigration law.<sup>38</sup> Commenting more broadly

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appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition."

32. *Cuellar de Osorio*, 134 S. Ct. at 2191.

33. *Id.*

34. A "principal beneficiary" is an individual who has a qualifying relationship with a U.S. citizen or Lawful Permanent Resident ("LPR") petitioner, who files a visa petition on behalf of the principal beneficiary. Derivative beneficiaries, defined as the spouse or minor child of the principal beneficiary, may also be named in the principal beneficiary's visa petition, and are entitled to the same preference status, and the same priority date, as the principal alien. U.S. Dep't of State, Foreign Affairs Manual, 9 FAM § 42.31 n. 2.

35. *Cuellar de Osorio*, 695 F.3d at 2191.

36. *Id.*

37. *Compare Mayorkas*, 695 F.3d at 1003 (holding that the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries in all family visa categories), *and Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011), *abrogated by Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (concluding that Congress plainly made automatic conversion and priority date retention available to derivative beneficiaries in all family-based preference categories), *with Li v. Renaud*, 654 F.3d 376 (2d Cir. 2011) (finding the CSPA's "automatic conversion" clause was unambiguous but coming to the same conclusion as the BIA that an earlier family preference priority date could not apply to a later family preference petition made by a different petitioner). The three circuit courts applied a two-part analysis set forth in the influential Supreme Court decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 853 (1984). First, the reviewing court determines whether the statute's language is clear on its face. If Congress has directly answered the question at issue, the analysis ends there. If, on the other hand, the language or congressional intent is ambiguous, a reviewing court proceeds to the second step of analysis and defers to the agency's interpretation, assuming it is reasonable. Charles Wheeler, *Automatic Conversion and Retention of Priority Date for Aged-Out Derivatives: Circuit Courts Only Add to the Confusion*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., available at <http://cliniclegal.org/sites/default/files/Automatic%20Conversion%20and%20Retention%20of%20Priority%20Date%20for%20Aged.pdf> (last visited June 27, 2014).

38. *See, e.g., Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 628 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."), *citing* *Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016 (1893); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512 (1952); *see also Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) ("The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other

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on the proper scope of executive power over immigration, Justice Kagan stated that, “judicial deference to the Executive Branch is especially appropriate in the immigration context, where decisions about a complex statutory scheme often implicate foreign relations.”<sup>39</sup>

The Supreme Court decision in *Cuellar de Osorio* is disappointing for many “aged out” derivative beneficiaries who had hoped to retain the priority dates of their earlier petitions. These “aged out” young people sometimes wait decades for a visa to become available only to lose their place in line upon turning twenty-one years old. However, there may still be hope for a remedy to this restrictive rule in the future through legislative or administrative action.

One possibility is that Congress could redraft the CSPA to clarify that all “aged out” derivative beneficiaries are entitled to priority date retention. This was part of the comprehensive immigration reform bill passed by the Senate, which ultimately stalled in the House of Representatives, making it unlikely that comprehensive immigration reform will be passed soon or in its current form.<sup>40</sup> Alternatively, even in the absence of comprehensive reform, Congress could amend the rule through piece-meal legislation.

A final option is that the current rule may be reversed through administrative action. The plurality in *De Osorio* agreed that a narrow reading of INA § 203(h) was not compelled by the statute, but rather that its meaning was ambiguous and, therefore, subject to administrative deference.<sup>41</sup> Therefore, the BIA may change course and reverse its position in *Matter of Wang*.<sup>42</sup> Moreover, since the BIA acts on behalf of the Attorney General, the Attorney General may push back against *Matter of Wang* and adopt a broader interpretation of INA § 203(h).<sup>43</sup>

b. *Kerry v. Din*

More recently, on October 2, 2014, the Supreme Court granted certiorari in a second immigration case involving the struggle between executive and judicial power, *Kerry v. Din*.<sup>44</sup> The Supreme Court’s decision to hear the case represents an opportunity for the Court, for the first time in more than forty years,<sup>45</sup> to rethink the long-standing doctrine

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realities. Agencies in the Department of Homeland Security play a major role in enforcing the country’s immigration laws.”).

39. *Cuellar de Osorio*, 134 S. Ct. at 2203, citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439 (1999) (internal quotes omitted); see also *INS v. Abudu*, 485 U.S. 94, 110, 108 S.Ct. 904 (1988).

40. Austin T. Fragomen, Jr., Careen Shannon, & Daniel Montalvo, *Prospects for Immigration Reform in 2014*, IMMIGR. LEGIS. HANDBOOK § 1:1 (April 2014).

41. See *Cuellar de Osorio*, 134 S.Ct. at 2206 (noting that “we hold only that §1153(h)(3) permits—not that it requires—the Board’s decision to so distinguish among aged out beneficiaries”).

42. Cyrus D. Mehta & David A. Isaacson, *Scialabba v. Cuellar De Osorio: Does The Dark Cloud Have a Silver Lining?*, ILW (June 10, 2014), available at <http://discuss.ilw.com/content.php?3214-Article-Scialabba-V-Cuellar-De-Osorio-Does-The-Dark-Cloud-Have-a-Silver-Lining-By-Cyrus-D-Mehta-and-David-A-Isaacson>, citing *Nat’l Cable & Telecomm. Ass’n. v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (finding that where a statute is ambiguous and entitled to *Chevron* deference, the agency may reconsider its interpretation even after the courts have approved of it).

43. See *id.*

44. *Kerry v. Din*, 135 S. Ct. 44 (2014), from *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013), cert. granted, 82 U.S.L.W. 3712 (U.S. Oct. 2, 2014) (No. 13-1402).

45. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972); see also Gary Endelman & Cyrus D. Mehta, *Kerry v. Din: An Opportunity for the Supreme Court to Reconsider the Doctrine of Consular Nonreviewability*, *Insightful*

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of consular non-reviewability, which prevents courts from reviewing decisions of U.S. Department of State consular officers regarding immigration law.<sup>46</sup> Specifically, the Court will review whether a consular official's refusal of a visa to a U.S. citizen's non-citizen spouse impinges upon a constitutionally protected interest of the citizen.

Ms. Din, a U.S. citizen, filed a visa petition on behalf of her husband, Mr. Berashk, an Afghan citizen. His visa was denied under INA section 212(a)(3)(B), the terrorism-related inadmissibility grounds.<sup>47</sup> The Consulate added, "it is not possible to provide a detailed explanation of the reasons for the denial," citing INA section 212(b)(3), which indicates that the requirement under INA section 212(b)(1) that an alien be notified of the reason for a visa denial does not apply to any alien inadmissible under criminal activity or terrorist grounds. Subsequently, the Ninth Circuit held that the government had not offered a facially legitimate and bona fide reason for the visa denial.<sup>48</sup>

The government appealed the Ninth Circuit decision to the Supreme Court, arguing that the court "erred in ruling that Din has a liberty interest in her marriage, protected under the Due Process Clause, that is implicated by denial of a visa to her alien spouse abroad."<sup>49</sup> Ms. Din argues that she is entitled to challenge the refusal of a visa to her husband and that to sustain the refusal, the government must identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.<sup>50</sup>

Oral arguments in *Kerry v. Din* took place in February 2015 and a decision is expected later this year. The pending Supreme Court case is important not only because it allows the Court to weigh in on the controversial doctrine of consular non-reviewability<sup>51</sup> but also because whatever the outcome, the case will almost certainly produce additional discussion regarding the scope of executive authority and judicial review over immigration matters.

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Immigration. Blog: Commentaries on Immigration Policy, Cases & Trends (Oct. 6, 2014), available at <http://blog.cyrusmehta.com/2014/10/kerry-v-din-opportunity-for-supreme.html>.

46. Stephen H. Legomsky, *Fear & Loathing in Congress & the Courts: Immigration & Judicial Review*, 78 Tex. L. Rev. 1615, 1616-17 (2000).

47. In general, any individual who is a member of a "terrorist organization" or who has engaged or engages in terrorism-related activity as defined by INA § 212(a)(3)(B) is "inadmissible" (not allowed to enter) the United States and is ineligible for most immigration benefits. The definition of terrorism-related activity is relatively broad and may apply to individuals and activities not commonly thought to be associated with terrorism. *Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CIS (Oct. 1, 2014), available at <http://www.uscis.gov/laws/terrorism-related-inadmissibility-grounds/terrorism-related-inadmissibility-grounds-trig>.

48. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013), cert. granted, 135 S. Ct. 44 (2014). The Ninth Circuit cited the Supreme Court in *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972), recognizing a limited exception to the doctrine of consular non-reviewability in cases where the visa denial implicates the constitutional rights of an American citizen. In such cases, courts exercise "a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason."

49. Petition for Writ of Certiorari, *Kerry v. Din*, 135 S. Ct. 44 (2014) (No. 13-1402).

50. Respondent Brief in Opposition, *Kerry v. Din*, 135 S. Ct. 44 (2014) (No. 13-1402); see also 91 No. 39 Interpreter Releases 1807, 1808.

51. See Brief for Professors & Academics as Amici Curiae Supporting Petitioners, *Cardenas v. U.S.*, No. 13-35957, 2014 WL 1878645 ("The doctrine of consular non-reviewability has never had a cogent justification. To the contrary, Supreme Court case law allows for significant, if not robust, judicial review of consular decisions. Such review—including at least review to ensure that the consular officer follows the governing statutes and regulations, that there is some factual basis for findings made by the consular office, and that fundamentally fair procedures are used—is essential to ensure that the laws passed by Congress are followed.")

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2. *Executive Authority and Judicial Review of Naturalization Denial*

*Cuellar de Osorio* and *Din* bring attention to a third, yet-unresolved legal question involving the conflict between executive authority and judicial oversight—judicial review of naturalization denials. The unsettled legal question concerns the availability and scope of judicial review in cases where U.S.CIS denies an applicant’s naturalization application and then places the applicant in removal proceedings. Under INA § 310(c), if an application for naturalization is denied by the agency, the applicant has the right to de novo review in a district court “after a hearing before an immigration officer.”<sup>52</sup> However, under INA § 318, when removal proceedings are pending against an applicant for naturalization, the agency is prohibited from considering her application.<sup>53</sup> Thus, where the agency denies an applicant’s request for naturalization and then initiates removal proceedings, the agency has relied on INA § 318 to refuse to provide the applicant with an administrative hearing. As no administrative hearing has taken place, the applicant has not “exhausted” her administrative remedies, and many courts have held that the applicant no longer has a statutory right to judicial review of the denial in a district court. In other words, the agency effectively strips *itself* of jurisdiction over the person’s naturalization application and prevents the applicant from obtaining an administrative appeal.<sup>54</sup>

The question of whether the commencement of removal proceedings strips district courts of jurisdiction to review naturalization denials has recently become the subject of a four-way circuit split. Specifically, nine circuit courts have considered the issue and have come to four separate conclusions over whether and how the initiation of removal proceedings affects judicial jurisdiction to review naturalization applications. The Fourth, Fifth, and Eleventh Circuits concluded that the right to judicial review granted by INA § 310(c) is limited by INA § 318 once removal proceedings begin.<sup>55</sup> In contrast, the Tenth Circuit, in an unpublished decision, held that INA § 318 “does not strip district courts of jurisdiction over petitions regarding naturalization applications.”<sup>56</sup> However, the court found that as soon as removal proceedings begin, the judicial proceeding becomes moot and the suit must be dismissed for lack of a case or controversy.<sup>57</sup> The Second, Sixth, and Ninth Circuits held that INA § 318 does not deprive courts of jurisdiction, but does prevent the courts from providing a remedy, so judgment must go for the agency

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52. INA § 310(c) provides that “[a] person whose application for naturalization [ . . . ] is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court [ . . . ] in accordance with [the Administrative Procedure Act.] Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.”

53. INA § 318 provides in relevant part that “no application for naturalization shall be considered by the Attorney General if there is pending against the applicant a removal proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act.”

54. INA § 318.

55. *Barnes v. Holder*, 625 F.3d 801, 806 (4th Cir. 2010); *Saba-Bakare v. Chertoff*, 507 F.3d 337, 339-40 (5th Cir. 2007); *Huang v. Sec’y U.S. Dep’t of Homeland Sec.*, 468 Fed.Appx 932, 935 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1460 (U.S. 2013).

56. *Awe v. Napolitano*, No. 11-5134, 2012 WL 3553721, at \*4 (10th Cir. Aug. 20, 2012) (unpublished opinion).

57. *Id.*

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on the merits.<sup>58</sup> Most recently, the Third and Seventh Circuits reached a different conclusion. According to these courts, district courts not only retain jurisdiction over the cases before them, but also retain the ability to provide a remedy—a declaratory judgment of entitlement to citizenship.<sup>59</sup>

Despite the existence of a wide circuit split, the Supreme Court thus far has refused to weigh in on the issue and resolve confusion in federal courts over the proper application of INA § 310(c) and INA § 318.<sup>60</sup> Supreme Court review of the issue would clear up confusion between circuits as to the judiciary's role in naturalization. It also would provide an opportunity for the Court to prevent the agency from using the statutes protective provisions, INA §§ 310(c) and 318, to create “a mechanism for the government to deny immigrants their day in court.”<sup>61</sup>

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58. *Ajlani v. Chertoff*, 545 F.3d 229 (2d Cir. 2008); *Zayed v. United States*, 368 F.3d 902 (6th Cir. 2004); *Bellajaro v. Schiltgen*, 378 F.3d 1042 (9th Cir. 2004).

59. *Klene v. Napolitano*, 697 F.3d 666, 670 (7th Cir. 2012); *Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 259 (3d Cir. 2012).

60. *See Hong Huang v. Napolitano*, 133 S. Ct. 1460 (2013) (denying Petition for Writ of Certiorari).

61. *Petition for Writ of Certiorari, Huang v. Secretary U.S. Dept. of Homeland Sec.*, 2012 WL 5884899 (U.S.), \*10.

## Anti-Corruption

LESLIE A. BENTON, STUART H. DEMING, ELENA HELMER,  
MIKHAIL REIDER-GORDON AND JOHN MAGRUDER\*

### I. United States Developments

Many of the cases in 2014 involving violations of the Foreign Corrupt Practices Act (FCPA) related to follow-on aspects of cases previously charged.<sup>1</sup> But of particular significance in the public pronouncements by the U.S. Department of Justice (“DOJ”) and U.S. Securities and Exchange Commission (“SEC”) were myriad cases where a more favorable resolution was attributed to the level of cooperation, including self-disclosure, extensive remediation, and enhancement of compliance programs and internal controls.

#### A. MAJOR ENFORCEMENT ACTIONS

A sampling of the more significant enforcement actions includes the following cases:<sup>2</sup>

##### 1. *Alcoa*

Stemming from a complex series of transactions involving an alumina supply contract for Bahrain, Alcoa World Alumina LLC, a majority-owned and controlled sales company of Alcoa Inc. (“Alcoa”), pleaded guilty to a violation of the FCPA’s anti-bribery provisions.<sup>3</sup> In that case, a London-based middleman with ties to certain royal family members was inserted “as a sham sales agent,” at the request of members of Bahrain’s royal family who

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1. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2014)).

2. More complete information on enforcement actions is available on the DOJ website, *FCPA and Related Enforcement Actions*, JUSTICE.GOV, <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html> (last visited Mar. 13, 2015), and the SEC website, *SEC Enforcement Actions: FCPA Cases*, SEC.GOV, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Mar. 13, 2015).

3. Press Release, U.S. Dept. of Justice, *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture* (Jan. 9, 2014), *available at* <http://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and>.



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controlled the tender process, and was paid “a corrupt commission intended to conceal bribe payments.”<sup>4</sup> Alcoa entered into a settlement with the SEC for violations of the FCPA’s accounting and record-keeping provisions based on these facts and the SEC’s reference to the lack of due diligence as to the business purpose of the middleman.<sup>5</sup>

2. *Bio-Rad Laboratories, Inc.*

A United States-based issuer and medical manufacturer, Bio-Rad Laboratories Inc. (Bio-Rad”), agreed to pay a fine and entered into a non-prosecution agreement (“NPA”) with the DOJ to resolve allegations that it violated the FCPA by falsifying its books and records and failing to implement adequate internal controls in connection with sales in Russia.<sup>6</sup> Of particular note was the use of intermediaries who lacked the capacity to carry out the services to be performed. Bio-Rad also agreed to a settlement with the SEC for similar violations in Russia, Thailand, and Vietnam relative to the sales practices of its subsidiaries.<sup>7</sup>

3. *Hewlett-Packard Company*

The DOJ resolved its investigation into violations of the FCPA by Hewlett-Packard Company (HP) in the form of a plea with its Russian subsidiary, a deferred prosecution agreement (“DPA”) with its Polish subsidiary, and an NPA with its Mexican subsidiary.<sup>8</sup> Record-keeping and internal controls violations were alleged to have facilitated the improper payments to foreign officials. The SEC’s settlement with HP was premised upon similar violations.<sup>9</sup> The DOJ only charged the Russian subsidiary with a violation of the anti-bribery provisions.<sup>10</sup>

4. *PetroTiger Ltd.*

Arising out of a voluntary disclosure by PetroTiger Ltd. (“PetroTiger”), a British Virgin Islands oil and gas company with operations in Colombia and offices in New Jersey, its two former co-CEOs and general counsel were charged with violating the FCPA’s anti-

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4. *Id.*

5. Press Release, Sec. & Exch. Com’n, SEC Charges Alcoa With FCPA Violations (Jan. 9, 2014), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936#.VHxZLdbSCEs>.

6. Press Release, U.S. Dept. of Justice, Bio-Rad Laboratories Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$14.35 Million Penalty (Nov. 3, 2014), *available at* <http://www.justice.gov/opa/pr/bio-rad-laboratories-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1435>.

7. Press Release, Sec. & Exch. Com’n, SEC Charges California-Based Bio-Rad Laboratories With FCPA Violations (Nov. 3, 2014), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543347364#.VHssItbSCEs>.

8. Press Release, U.S. Dept. of Justice, Hewlett Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), *available at* <http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery>.

9. Press Release, Sec. & Exch. Com’n, SEC Charges Hewlett-Packard With FCPA Violations, (Apr. 9, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075#.VHslZdbSCEu>.

10. United States v. ZAO Hewlett-Packard A.O., No. CR-14-201 DLJ (N.D. Cal., Apr. 9, 2014), *available at* <http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-zao/hp-russia-information.pdf>.

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bribery provisions, defrauding PetroTiger, and laundering the proceeds of crime.<sup>11</sup> Payments were made from PetroTiger's U.S. bank account to the official's bank account in Colombia to secure approval from Colombia's state-owned and state-controlled oil company for an oil services contract. All three individuals were also charged with attempting to secure kickbacks at the expense of PetroTiger in connection with PetroTiger's acquisition of another company.

5. *Alstom*

Alstom S.A. (Alstom), a French power and transportation company, pleaded guilty and agreed to pay a \$772,290,000 fine to resolve charges related to violations of the Foreign Corrupt Practices Act (FCPA). The plea agreement cites many factors considered by the Department of Justice (DOJ) in reaching the appropriate resolution, including: Alstom's failure to voluntarily disclose the misconduct even though it was aware of related misconduct at a U.S. subsidiary that previously resolved corruption charges with the DOJ in connection with a power project in Italy; Alstom's refusal to fully cooperate with the Department's investigation for several years; the breadth of the companies' misconduct, which spanned many years, occurred in countries around the globe and in several business lines, and involved sophisticated schemes to bribe high-level government officials; Alstom's lack of an effective compliance and ethics program at the time of the conduct; and Alstom's prior criminal misconduct, including conduct that led to resolutions with various other governments and the World Bank.<sup>12</sup>

6. *Avon*

Avon Products (China) Co. Ltd. (Avon China), the wholly owned subsidiary of New York-based Avon Products Inc. (Avon), pleaded guilty to accounting provisions of the FCPA. Avon entered into a deferred prosecution agreement with the DOJ, admitting its role in a conspiracy to conceal in excess of \$8 million in bribes paid to Chinese government officials. Cumulatively, the Avon entities will pay over \$67 million in criminal penalties and retain a monitor for 18 months.<sup>13</sup> Avon also settled a related FCPA matter with the U.S. Securities and Exchange Commission (SEC) and will pay an additional \$67,365,013 in disgorgement and prejudgment interest, bringing the total amount of U.S. criminal and regulatory penalties paid by Avon and Avon China to \$135,013,013.

B. SIGNIFICANT RULINGS

In upholding a broad interpretation of what constituted an "instrumentality" under the FCPA's anti-bribery provisions, the U.S. Court of Appeals for the Eleventh Circuit held

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11. Press Release, U.S. Dept. of Justice, Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company (Jan. 6, 2014), *available at* <http://www.justice.gov/opa/pr/2014/May/14-crm-489.html>.

12. Press Release, U.S. Dept. of Justice, Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (December 22, 2014), *available at* <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery>

13. Press Release, U.S. Dept. of Justice, Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (December 22, 2014), *available at* <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery>

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that the FCPA intended to “reach the type of officials the United States agreed to stop domestic interests from bribing when it ratified the OECD Convention.”<sup>14</sup> As part of its analysis, it looked to the OECD Convention and its commentaries in identifying the factors that would determine whether an entity was an instrumentality of government.

C. NONPROFITS

Employees of International Adoption Guides Inc. (“IAG”), an adoption services provider, were indicted for conspiring to defraud the United States in connection with its adoption services in Ethiopia.<sup>15</sup> The scheme involved submitting fraudulent contracts of adoption to Ethiopian courts, submitting fraudulently procured adoption decrees to U.S. officials, creating counterfeit U.S. immigration forms, and paying bribes to Ethiopian officials. No substantive violations of the FCPA or any other law were charged.

D. TRAVEL ACT

Emanating from actions taken by a complex series of transactions by a number of entities associated with an international conglomerate, six foreign nationals were charged with participating in an international racketeering conspiracy involving bribes of government officials in India to allow the mining of titanium minerals.<sup>16</sup> The separate charges included conspiracy to violate the Travel Act,<sup>17</sup> the FCPA, and U.S. money laundering laws and two substantive Travel Act violations.

E. OPINION PROCEDURE RELEASES

In a late 2013 opinion procedure release involving a partner of a U.S. law firm handling arbitrations for a foreign country, his payment for the medical expenses for the daughter of an official of the foreign agency that retained the law firm was permitted.<sup>18</sup> The recusal practices involving the official and the law firm and the express permission of the official’s agency were critical to the DOJ’s analysis. Similarly, in the first opinion procedure release for 2014,<sup>19</sup> an extensive recusal regime and an independent mechanism for establishing the value of the buyout were critical to a U.S. issuer being permitted to acquire the minority interest of its majority-owned foreign company from a businessman who was to be appointed to a senior government position in that country.

In the other 2014 opinion procedure release, a foreign acquisition by a United States issuer did not lead to successor liability, despite evidence of questionable payments and

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14. *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014).

15. Indictment, *United States v. Harding*, No. 9-14-cr-00054-SB (D.S.C., Jan. 21, 2014).

16. Press Release, U.S. Dept. of Justice, Six Defendants Indicted in Alleged Conspiracy to Bribe Government Officials in India to Mine Titanium Minerals (Apr. 2, 2014), *available at* <http://www.justice.gov/opa/pr/six-defendants-indicted-alleged-conspiracy-bribe-government-officials-india-mine-titanium>.

17. 18 U.S.C. § 1952 (2013).

18. Opinion Procedure Release 13-01, U.S. Dep’t of Justice (Dec. 19, 2013), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2013/13-01.pdf>.

19. Opinion Procedure Release 14-02, U.S. Dep’t of Justice (Mar. 17, 2014), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-01.pdf>.

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inadequate controls disclosed in pre-acquisition due diligence.<sup>20</sup> The critical factor was the absence of a jurisdictional basis for a violation at the time the questionable payments were made.

F. PURSUING THE PROCEEDS OF CORRUPTION

As part of the largest forfeiture action ever brought under the Kleptocracy Asset Recovery Initiative, the DOJ froze corruption proceeds hidden in bank accounts around the world by former Nigerian dictator Sani Abacha and his cohorts.<sup>21</sup> The civil forfeiture complaint seeks more than \$550 million, including from bank accounts and investment portfolios in the Bailiwick of Jersey, France, and the United Kingdom. In another matter stemming from the Initiative, formal action was also taken to forfeit the assets traceable to Chun Doo Hwan, the former president of the Republic of Korea.<sup>22</sup>

As part of an unrelated initiative, Alfonso Portillo, the former President of Guatemala was fined and sentenced to over five years of imprisonment for taking bribes from Taiwan in exchange for promising that Guatemala would continue to recognize Taiwan diplomatically.<sup>23</sup> Though the offense took place between 2000 and 2004, Portillo was extradited to the United States in 2013 and pleaded guilty to attempting to launder the illegal money through U.S. banks.

**II. Enforcement Actions Abroad**

A. CASES

1. *Austria*

On October 3, 2014, the regional criminal court for Vienna found two executives of Oesterreiche Banknoten und Sicherheitsdruck GmbH (“OeBS”), the Austrian central bank’s banknote-printing arm, guilty of having bribed Syrian and Azeri officials to obtain contracts for OeBS<sup>24</sup> Johannes Miller and Michael Wolf each received a two-year suspended sentence for funneling bribes totaling approximately \$14 million to the officials.

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20. Opinion Procedure Release 14-02, U.S. Dep’t of Justice (Nov. 7, 2014), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-02.pdf>.

21. Press Release, U.S. Dept. of Justice, U.S. Freezes More Than \$458 Million Stolen by Former Nigerian Dictator in Largest Kleptocracy Forfeiture Action Ever Brought in the U.S. (Mar. 5, 2014), *available at* <http://www.justice.gov/opa/pr/us-freezes-more-458-million-stolen-former-nigerian-dictator-largest-kleptocracy-forfeiture>.

22. Press Release, U.S. Dept. of Justice, Justice Department Seizes an Additional \$500,000 in Corrupt Assets Tied to Former President of Republic of Korea, (Sept. 3, 2014), *available at* <http://www.justice.gov/opa/pr/justice-department-seizes-additional-500000-corrupt-assets-tied-former-president-republic>.

23. Press Release, U.S. Attorney’s Office, S.D.N.Y., Former President Of Guatemala, Alfonso Portillo, Sentenced In Manhattan Federal Court For Laundering Millions Of Dollars Through United States Banks (May 22, 2014), *available at* <http://www.justice.gov/usao/nys/presreleases/May14/PortilloSentencingPR.php>.

24. See *Austria Banknote Unit’s Ex-Managers Guilty in Kickback Scandal*, BLOOMBERG BUSINESS (Oct. 3, 2014), <http://www.bloomberg.com/news/articles/2014-10-03/austria-banknote-unit-s-ex-managers-guilty-in-kickbacks-scandal>

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2. *Canada*

On May 23, 2014, an Ottawa court sentenced Nazir Karigar to three years in prison for his role in a corruption case involving Canadian company CryptoMetrics.<sup>25</sup> Karigar was the first individual to be convicted under Canada's recently amended Foreign Public Officials Act ("CFPOA").<sup>26</sup>

3. *China*

China's Central Commission for Discipline Inspection of the Communist Party of China announced in November 2014<sup>27</sup> that it had concluded an investigation of two FAW-Volkswagen Automotive Co Ltd executives for corruption. Subsequently FAW-Volkswagen severed business ties with more than a dozen vendors, all of whom were involved in advertising and public relations for the company.<sup>28</sup>

On August 8, 2014, a court in Shanghai found two former investigators guilty of stealing and selling personal information. The investigators, Briton Peter Humphrey and his American-national wife, Yu Yingzeng, worked as vendors to multinational pharmaceutical company GlaxoSmithKline ("GSK") in China and were caught up in a larger corruption investigation launched by Chinese authorities against GSK.<sup>29</sup> Humphrey was sentenced to two and a half years in prison. His wife was sentenced to two years, and both were fined.<sup>30</sup> The same court found GSK guilty of bribing hundreds of doctors and state hospital personnel over a period of years. GSK was fined \$490 million and its former chief executive of the China division, Mark Reilly (another British national), was given a suspended three-year prison sentence.

4. *Cuba*

Canadian businessman Cy Tokmakjian was sentenced in October 2014 by a Cuban court to fifteen years in prison for bribing Cuban officials.<sup>31</sup> The Cuban government seized US \$100 million dollars in assets belonging to his sugar industry company, Tokmakjian Group. Tokmakjian was found guilty of bribery as well as trafficking in Cuban currency, tax evasion, and fraud.<sup>32</sup>

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25. *R. v. Karigar*, 2014 ONSC 3093 (Can. Ont. Sup. Ct. J.), available at <http://canlii.ca/t/g6zz0>.

26. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/C-45-2/page-1.html>; for discussion of amendments, see Benton et. al, *supra* note 5.

27. CENTRAL COMMISSION FOR DISCIPLINE INSPECTION DEPARTMENT, [www.12388.gov.cn](http://www.12388.gov.cn) (last visited Mar. 15, 2015).

28. Yang Jian, *FAW bribe scandal should be wake-up call for Beijing*, AUTOMOTIVE NEWS EUROPE (November 28, 2014), <http://europe.autonews.com/article/20141128/BLOG15/141129866/faw-bribe-scandal-should-be-wake-up-call-for-beijing>.

29. *GSK-linked investigators confessed to trafficking personal data*, XINGHUANET (Aug. 9, 2014), [http://news.xinhuanet.com/english/china/2014-08/09/c\\_133544162.htm](http://news.xinhuanet.com/english/china/2014-08/09/c_133544162.htm).

30. *Id.*

31. Daniel Trotta, *Gifts for Cubans end in 15-year sentence for Canadian CEO*, REUTERS (October 3, 2014), <http://www.trust.org/item/20141003110022-3ee3r/?source=fiHeadlineStory>.

32. *Id.*

5. *Germany*

On May 9, 2014, the German *Bundesgerichtshof* ruled that, in instances where a payment of bribes has influenced a purchase agreement between two commercial entities, the purchase agreement can be invalidated.<sup>33</sup> It further reasoned that claims for compensation were valid under the increased liability for unjust enrichment.<sup>34</sup>

In August 2014, a German court halted the trial of Formula 1 executive Bernie Ecclestone. German state prosecutors dropped criminal charges pending against Ecclestone in return for a payment of a \$100 million fine.<sup>35</sup> Ecclestone had been accused of bribing a former German banker related to the sale of a majority interest in Formula 1 nearly a decade ago. The payment represents the largest sum ever paid in Germany for a criminal trial of this nature.<sup>36</sup>

6. *Greece*

Rheinmetall Defence Electronics GmbH (RDE), a Bremen-based subsidiary of Rheinmetall AG, a German defense conglomerate, agreed to pay a .37 million (\$46 million) fine to end a criminal investigation of suspected bribery payments by a company representative in connection with arms deals in Greece.<sup>37</sup>

7. *Hong Kong*

On August 5, 2014, Luk Kin Peter Joseph, chief executive of Brockman Mining, a listed company in Australia, was convicted of bribery by the District Court of Hong Kong Special Administrative Region.<sup>38</sup> The conviction resulted in Mr. Luk's immediate resignation from the company.<sup>39</sup>

8. *Italy*

On October 9, 2014, an Italian court cleared two former executives of Finmeccanica of corruption but found them guilty of lesser charges for falsifying invoices. The two were given suspended sentences of two years' jail time. The case arose out of charges of bribes

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33. BUNDESGERICHTSHOF [BGH] [FEDERAL COURT OF JUSTICE] May 9, 2014, Urteil des V. Zivilsenats vom 9.5.2014-V ZR 305/12 (Germany), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2014&Seite=45&nr=68078&pos=1366&anz=2538>.

34. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL. I], §§ 812(1), 818(4), 819(1), 285(1) [Germany], available at [http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/).

35. Geir Moulson, *Formula One: How The Ecclestone Bribery Charges Deal Went Down*, ASSOCIATED PRESS (August 7, 2014), <http://www.theglobeandmail.com/globe-drive/news/motorsports/formula-one-how-the-ecclestone-bribery-charges-deal-went-down/article19929380/>.

36. *Id.*

37. Ioanna Zikakou, *Rheinmetall Fined for Greek Armament Deals*, GREEK REPORTER (December 11, 2014), <http://greece.greekreporter.com/2014/12/11/rheinmetall-fined-for-greek-armament-deals/>.

38. *Hong Kong Special Administrative Region v. Luk Kin Peter Joseph*, DCC 851/2013 (D.C. Aug. 5, 2014) (Legal Reference System) (H.K.).

39. Brockman Mining, Announcement (1) Pursuant to Rule 13.09(1) and Rule 13.51B(2) of the Listing Rules and (2) Resignation of Executive Director and Chief Executive Officer (August 5, 2014), available at <http://www.brockmanmining.com/media/E1407204%20Ann%20final.pdf>.

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paid to Indian defense officials relating to the sale of helicopters. India's investigation continues.<sup>40</sup>

In March, 2014, the Treasury department of the Italian government issued a letter to numerous state-owned companies (SOEs) instructing them to remove from their boards any director charged of financial crimes, including bribery.<sup>41</sup> It also stated that managers who have been indicted for crimes against the public administration or financial crimes should be barred from sitting on the board of state-owned companies even before a first guilty verdict.<sup>42</sup>

9. *Japan*

On July 15, 2014, a Tokyo district court imposed a suspended sentence on former Deutsche Bank AG ("DBK") salesman Shigeru Echigo as punishment for bribing former Japanese pension-fund executive Yutaka Tsurisawa, who, under Japanese law, was considered a civil servant.<sup>43</sup> Tsurisawa was convicted of accepting bribes from Echigo in June 2014 and was given an eighteen-month suspended prison sentence and ordered to make restitution.<sup>44</sup> Echigo was given a three-year suspended ten-month prison sentence.<sup>45</sup> During the trial, Echigo protested that he was only following orders and that the bank's culture promoted bribery. Following on the conviction of Tsurisawa, Japan's Financial Services Agency ordered compliance improvements at Deutsche Bank's Japanese securities unit.

10. *Multilateral Investment Banks*

In total, the World Bank debarred and cross-debarred 101 individuals and firms in 2014.<sup>46</sup>

On March 21, 2014, the African Development Bank ("AfDB") stated that it had reached Negotiated Resolution Agreements with Kellogg Brown & Root LLC, Technip S.A., and JGC Corp. following the companies' admission of corrupt practices by affiliated companies in bank-financed projects in Nigeria. The companies will pay fines of US \$6.5 million, US \$5.3 million and US \$5.2 million, respectively.<sup>47</sup>

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40. Emilio Parodi, *Finmeccanica Looks to Rebuild India Ties After Former Head Convicted*, REUTERS (October 9, 2014), <http://in.reuters.com/article/2014/10/09/finmeccanica-india-idINKCN0HY14Y20141009>.

41. *Italy seeks to clean up boards of state-controlled companies*, REUTERS (March 27, 2014), <http://www.reuters.com/article/2014/03/27/italy-companies-reform-idUSL5N0MO3M220140327>.

42. *Id.*

43. *To Those Who Operate Fund Related Businesses in Japan*, FINANCIAL SERVICES AGENCY, (Nov. 19, 2007), <http://www.fsa.go.jp/en/news/2007/20071119.html#main>.

44. Richard L. Cassin, *Judge Suspends Prison Sentence for Deutsche Bank Salesman in Japan Bribe Case*, THE FCPA BLOG (July 18, 2014), <http://www.fcpablog.com/blog/2014/7/18/judge-suspends-prison-sentence-for-deutsche-bank-salesman-in.html#>.

45. *Id.*

46. *See World Bank Listing of Ineligible Firms & Individuals*, WORLD BANK, <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984> (last visited Mar. 10, 2015).

47. Press Release, African Development Bank, AfDB Levies US \$17 Million in Financial Penalties in Corruption Case (March 21, 2014), available at <http://www.afdb.org/en/news-and-events/article/afdb-levies-us-17-million-in-financial-penalties-in-corruption-case-12923/>.

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On May 28, 2014, the AFDB reached a Negotiated Resolution Agreement with Snamprogetti Netherlands B.V. (“Snamprogetti”) related to the company’s corrupt acts in Nigeria between 1995-2004 with respect to AFDB-funded projects. Snamprogetti agreed to pay US \$5.7 million to the AFDB.<sup>48</sup>

11. *Netherlands*

On November 12, 2014, it was announced that Dutch-domiciled SBM Offshore NV (SBM) would pay \$193 million in fines to the Dutch prosecutor’s office to settle a bribery investigation.<sup>49</sup> The investigation focused on allegations that sales agents for SBM had made improper payments to government officials in Angola, Brazil, and Equatorial Guinea between 2007 and 2011. The U.S. DOJ agreed to close its parallel investigation although authorities in Brazil indicated that they would continue their inquiries into the company’s activities in that country.<sup>50</sup>

12. *Norway*

The National Authority for Investigation and Prosecution of Economic and Environmental Crime announced on January 15, 2014, that it had found global fertilizer firm Yara International ASA (“Yara”) guilty of bribery and fined the company 295 million kroner (\$48 million) for corruption involving deals the company made in Libya, Russia, and India.<sup>51</sup> Yara admitted that between 2004 and 2009, it had paid bribes totaling more than 70 million kroner (\$12 million). Three former senior executives of Yara were also indicted.<sup>52</sup>

13. *Oman*

On February 27, 2014, the Oman Court of First Instance in Muscat sentenced Ahmad al-Wahaibi, the CEO of state-owned Oman Oil Company, to a prison term of twenty-three years. His former aide, Adel al-Raisi, was sentenced to ten years. Both were convicted of accepting bribes, money laundering, and abuse of office. Korean national Myung Jao Yoo, CEO of Korea-based company LGI, paid US \$8 million in bribes to Wahaibi and al-Raisi.<sup>53</sup> Yoo was sentenced to ten years in prison.<sup>54</sup>

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48. Press Release, African Development Bank, AfDB charges Snamprogetti Netherlands B.V. US \$5.7 million in monetary sanction for corrupt practices (May 28, 2014), *available at* <http://www.afdb.org/en/news-and-events/article/afdb-charges-snamprogetti-netherlands-b-v-us-5-7-million-in-monetary-sanction-for-corrupt-practices-13233/>.

49. *Dutch SBM Offshore sticks to outlook after settlement*, REUTERS, (November 13, 2014), <http://in.reuters.com/article/2014/11/13/sbm-offshore-results-idINL6N0T30OK20141113>.

50. Fred Pals, *SBM Pays \$240 Million to Settle Case With Dutch Prosecutor*, BLOOMBERG NEWS (November 12, 2014), <http://www.businessweek.com/news/2014-11-12/sbm-pays-240-million-to-settle-case-with-dutch-prosecutor>.

51. Press Release, Økokrim [National Authority for Investigation and Prosecution of Economic and Environmental Crime], *Forelegg til Yara på 295 millioner krone [Yara fined \$295 million kroner]* (January 15, 2014), *available at* <http://www.okokrim.no/artikler/www-9fdaqu>.

52. Press Release, Økokrim [National Authority for Investigation and Prosecution of Economic and Environmental Crime], *Fire tidligere ledere tiltalt i Yara-saken [Four Former Executives Indicted in Yara Case]*, (January 17, 2014), *available at* <http://www.okokrim.no/artikler/www-9ffe3v>.

53. *Omani CEO jailed for 23 Years in Graft Case: Court*, REUTERS (February 27, 2014), <http://www.reuters.com/article/2014/02/27/us-oman-corruption-sentences-idUSBREA1Q1OW20140227>.

54. *Id.*

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On March 3, 2014, the Court of First Instance in Muscat sentenced Egyptian nationals Fatihi Alaadeen and Rizq Mustafa, executives with Consolidated Contractors Company (“Consolidated”) to three years in jail and imposed fines of OMR500,000 and OMR300,000 respectively.<sup>55</sup> Convicted alongside them were two Omani government officials who were sentenced to three years in prison, fined, and banned from holding government office for thirty years.<sup>56</sup>

On March 9, 2014, an Omani court sentenced Indian national Mohammed Ali, the former managing director of Galfar Engineering and Contracting, with respect to five counts of bribery in exchange for contracts from state-owned enterprise Petroleum Development Oman (“PDO”). Only two months prior, Ali had been sentenced to three years in prison over different bribes made to PDO. Ali was also fined 1.774 million rials (\$4.61 million).<sup>57</sup>

More than twenty civil servants and businessmen have gone on trial in Oman since last year; several of these individuals have been foreign nationals.<sup>58</sup>

14. *Poland*

On October 10, 2014, the Polish Centralne Biuro Antykorupcyjne<sup>59</sup> convicted a Poland-based executive of Swiss pharmaceutical company Novartis of bribery.<sup>60</sup>

15. *Switzerland*

On October 1, 2014, the Swiss Federal Crime Court accepted a negotiated plea deal between Riadh Ben Aissa, a former Canada-based SNC-Lavalin executive, and the Swiss Attorney General’s office.<sup>61</sup> Aissa was accused of fraud, corruption, and money laundering. He pleaded guilty in exchange for a reduced sentence and will serve twenty-nine months in jail. He has been ordered to pay millions in restitution to SNC-Lavalin. Aissa is likely to be extradited to Canada to stand trial for fraud now that the Swiss plea deal has been concluded.<sup>62</sup>

16. *United Kingdom*

On July 22, 2014, Australian Bruce Hall, former CEO of state-owned Bahraini company, Aluminum Bahrain B.S.C. (“Alba”) was sentenced to sixteen months in prison for conspir-

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55. *Oman Hands Down More Sentences in Oil Corruption Case*, GULF NEWS (March 3, 2014), <http://gulfnews.com/news/gulf/oman/oman-hands-down-more-sentences-in-oil-corruption-case-1.1298303>.

56. *Id.*

57. *Oman Court Jails Businessman to 15 Years Over Bribes*, REUTERS (March 9, 2014), <http://www.reuters.com/article/2014/03/09/oman-corruption-sentences-idUSL6N0M60E520140309>.

58. *Id.*

59. CENTRALNE BIURO ANTYKORUPCYJNE [CENTRAL ANTI-CORRUPTION BUREAU], <http://www.cba.gov.pl/en?dzial=> (last visited Mar. 10, 2015).

60. *Novartis Employee Pleaded Guilty in Polish Bribery Case*, REUTERS (October 10, 2014), <http://www.reuters.com/article/2014/10/09/pharmaceuticals-poland-corruption-novart-idUSL6N0S43RZ20141009>.

61. *Former SNC Executive Pleads Guilty in Switzerland*, THE STAR (October 1, 2014), [http://www.thestar.com/business/2014/10/01/former\\_snc\\_executive\\_pleads\\_guilty\\_in\\_switzerland.html](http://www.thestar.com/business/2014/10/01/former_snc_executive_pleads_guilty_in_switzerland.html).

62. Allan Woods, *Former SNC-Lavalin Executive Strikes Plea Deal With Swiss Authorities*, THE STAR (August 18, 2014), [http://www.thestar.com/news/canada/2014/08/18/former\\_snc\\_lavalin\\_executive\\_strikes\\_plea\\_deal\\_with\\_swiss\\_authorities.html](http://www.thestar.com/news/canada/2014/08/18/former_snc_lavalin_executive_strikes_plea_deal_with_swiss_authorities.html).

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acy to corrupt.<sup>63</sup> Hall was ordered to pay a confiscation order of £3,070,106.03 in seven days or face serving an additional term of imprisonment of ten years.<sup>64</sup>

On August 4, 2014, the Serious Fraud Office announced the sentencing of three British nationals and one Greek national<sup>65</sup> (Dennis Kerrison, Paul Jennings, David Turner and Miltiages Papachristos) for their roles in bribing state officials in Indonesia and Iraq on behalf of Innospec. Kerrison, Jennings, and Papachristos all received prison terms; Turner received a suspended sentence.<sup>66</sup> Innospec itself pleaded guilty in March 2010 to bribing state officials in Indonesia and was fined \$12.7 million.<sup>67</sup> In February 2014, the SFO was granted the power to enter into deferred prosecution agreements with companies charged with bribery.<sup>68</sup>

On December 22, 2014, Smith and Ouzman Ltd and two employees were convicted of bribery of foreign officials,<sup>69</sup> the first trial convictions for the SFO. Christopher J. Smith, chairman of the company, and Nicholas C. Smith, its sales and marketing director, were convicted of “corruptly agreeing to make payments.” The two had made over £395,000 in corrupt payments to win contracts in Kenya and Mauritania.<sup>70</sup>

Scotland based International Tubular Services Limited (ITS), which supports activities for petroleum and natural gas extraction disgorged £172,200, the total of profit it earned under a contract secured via bribery. ITS self-reported and agreed to the disgorgement not under the UKBA but under the UK’s Proceeds of Crime Act.<sup>71</sup>

**B. ANTI-CORRUPTION LEGISLATION AND INITIATIVES**

**1. Australia**

On February 18, 2014, the Australian Securities & Investments Commission issued guidance on its approach to dealing with whistleblowers and whistleblower reports.<sup>72</sup> Only

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63. See Press Release, Serious Fraud Office, Bruce Hall Sentenced to 16 Months in Prison (July 22, 2014) available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/bruce-hall-sentenced-to-16-months-in-prison.aspx>.

64. *Id.*

65. Press Release, Serious Fraud Office, Four Sentenced for Role in Innospec Corruption (August 4, 2014) available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/four-sentenced-for-role-in-innospec-corruption.aspx>.

66. *Id.*

67. Press Release, Serious Fraud Office, Innospec Judgment (March 26, 2014), available at <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/innospec-judgment.aspx>.

68. Press Release, Serious Fraud Office, Deferred Prosecution Agreements: New Guidance for Prosecutors (February 14, 2014) available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/deferred-prosecution-agreements-new-guidance-for-prosecutors.aspx>.

69. Prevention Corruption Act, 1906, 6 Edw.7, c.34 (Eng.).

70. Press Release, Serious Fraud Office, U.K. printing company and two men found guilty in corruption trial (December 22, 2014) available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/uk-printing-company-and-two-men-found-guilty-in-corruption-trial.aspx>.

71. Press Release, Crown Office & Procurator Fiscal Service, Aberdeen company pays over £170,000 after admitting bribery and corruption in Kazakhstan, (December 18, 2014), available at <http://www.copfs.gov.uk/media-site/media-releases/935-aberdeen-company-pays-over-170-000-after-admitting-bribery-and-corruption-in-kazakhstan>.

72. *Whistleblowers and Whistleblower Protection*, AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION (February 18, 2014), <http://www.asic.gov.au/for-business/running-a-company/company-officeholder-duties/whistleblowers-company-officeholder-obligations/whistleblowers-and-whistleblower-protection/>.

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officers and employees of the company about whom the disclosure is made, and the company's current contractors (including employees thereof) qualify as whistleblowers. The person making the report to ASIC must have reasonable grounds to suspect that the company in question or one of its officers has breached the Corporations Act.<sup>73</sup>

2. *Canada*

In March 2014, the Canadian federal government promulgated new rules under the existing "integrity framework."<sup>74</sup> The expanded rules now require companies seeking to do business with the federal government to disclose if they have been found to have violated anti-corruption laws as well as those involving fraud. Companies debarred in other jurisdictions would also be precluded from bidding on Canadian government tenders for a period of ten years.<sup>75</sup>

3. *China*

On November 3, 2014, China's legislature issued draft amendments<sup>76</sup> to China's Criminal Code, strengthening penalties for corruption and bribery. The amendments include lowering the exemptions from prosecution; making the offering of bribes to relatives of government officials a crime; adding a provision for monetary fines for corruption-related crimes; broadening sentencing criteria standards and imposing employment bans on those convicted of corruption crimes.<sup>77</sup> In March of 2015, China's legislature announced that improvements and advances to national anti-corruption law would be developed "as quickly as possible."<sup>78</sup>

4. *European Union*

On April 15, 2014, the European Parliament passed a new law making it mandatory for companies with more than 500 employees to disclose, in annual-report form, information on their compliance with anti-corruption laws, human rights, and certain other social responsibility issues.<sup>79</sup>

5. *India*

Effective January 1, landmark Indian legislation aimed at combating corruption by creating an anti-graft ombudsman with broad powers to prosecute all offending politicians,

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73. *Australian Securities and Investments Commission Act 2001* (Austl.).

74. *Integrity Framework*, PUBLIC WORKS AND GOVERNMENT SERVICES CANADA (PWGSC), available at <http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html> (last visited Mar. 10, 2015).

75. *Id.*

76. *Draft Criminal Law Ninth Amendment Provisions*, THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA (Nov. 3, 2014), [http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-11/03/content\\_1885029.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-11/03/content_1885029.htm).

77. *Id.*

78. *China to Speed Up Drafting Anti-Corruption Law*, THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA (Mar. 9, 2015), [http://www.npc.gov.cn/englishnpc/Special\\_12\\_3/2015-03/09/content\\_1917309.htm](http://www.npc.gov.cn/englishnpc/Special_12_3/2015-03/09/content_1917309.htm).

79. *See Non-Financial Reporting*, EUROPEAN COMMISSION BANKING AND FINANCE, [http://ec.europa.eu/finance/accounting/non-financial\\_reporting/index\\_en.htm](http://ec.europa.eu/finance/accounting/non-financial_reporting/index_en.htm) (last visited Mar. 10, 2015).

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ministers, and senior civil servants, came into effect.<sup>80</sup> The new laws amend the Prevention of Corruption Act.<sup>81</sup>

6. *Ireland*

On July 8, 2014, a comprehensive whistleblower protection law went into effect in Ireland.<sup>82</sup> The Protected Disclosures Act 2014 provides legal protections for all employees, contractors, agency workers, and members of the police and the military who report concerns about fraud or corruption in private, public, or non-profit entities.<sup>83</sup>

7. *Multilateral Investment Banks*

In May 12, 2014, Ukraine signed an anti-corruption pact with the European Bank for Reconstruction and Development.<sup>84</sup> The pact will establish an independent and independently-funded Business Ombudsman Institution. The Institution will be the first point of contact for companies seeking redress against corrupt practices in the country.<sup>85</sup>

8. *United Kingdom*

In order to comply with certain European Union accounting rules, the UK government published draft legislation<sup>86</sup> requiring all extraction-related and logging companies to disclose<sup>87</sup> any payments made to governments in countries where they operate. UK-registered companies will have up to eleven months after the end of their financial year to report payments under the new rule.<sup>88</sup>

In February 2014, the SFO was granted the power to enter into deferred prosecution agreements with companies charged with bribery.<sup>89</sup>

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80. The Prevention of Corruption Act, No. 49 of 1988, INDIA CODE (1988).

81. The Lokpal and Lokayuktas Bill, 2013, signed into law January 1, 2014, *available at* [http://www.prsindia.org/uploads/media/Lok%20Pal%20Bill%202011/Lokpal\\_Bill\\_as\\_passed\\_by\\_both\\_Houses.pdf](http://www.prsindia.org/uploads/media/Lok%20Pal%20Bill%202011/Lokpal_Bill_as_passed_by_both_Houses.pdf)

82. Protected Disclosures Act 2014 (Act No. 14/2014) (Ir.), *available at* <http://www.irishstatutebook.ie/2014/en/act/pub/0014/>.

83. *Id.*

84. European Bank for Reconstruction and Development, *Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative*, (May 12, 2014)

85. Press Release, European Bank for Reconstruction and Development, Ukraine and EBRD Launch Initiative to Combat Corruption (May 12, 2014), *available at* <http://www.ebrd.com/news/2014/ukraine-and-ebrd-launch-initiative-to-combat-corruption.html>.

86. REPORTS ON PAYMENTS TO GOVERNMENT REGULATIONS (2014) [United Kingdom], *available at* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/346331/bis-14-1019-draft-statutory-instrument-reports-on-payments-to-governments-regulations-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346331/bis-14-1019-draft-statutory-instrument-reports-on-payments-to-governments-regulations-2014.pdf).

87. Goes into effect January 1, 2015.

88. *Consultation Outcome*, GOV.UK (Mar. 28, 2014), <https://www.gov.uk/government/consultations/extraction-industries-reporting-implementing-the-eu-accounting-directive>.

89. Press Release, Serious Fraud Office, Deferred Prosecution Agreements: new guidance for prosecutors (February 14, 2014), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/deferred-prosecution-agreements-new-guidance-for-prosecutors.aspx>.

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**III. Treaties and International Organizations**

A. INTERNATIONAL CONVENTIONS

The eleven-year-old United Nations Convention Against Corruption (“UNCAC”)<sup>90</sup> added four new members in 2014—Germany, Oman, State of Palestine, and Sudan—and now has 173 state parties.<sup>91</sup> Germany’s ratification came eleven years after its signature of the Convention, delayed by the lack of legislation punishing members of parliament for bribery, which is a requirement for ratification.<sup>92</sup> There are only twenty-one countries remaining that have not ratified UNCAC, including Japan and New Zealand.

In 2014, the UNCAC Implementation Review Group adopted country reviews for Argentina, Austria, Botswana, Canada, El Salvador, Iran, Italy, Jamaica, Latvia, Netherlands, Nigeria, Norway, Philippines, Republic of Korea, Serbia, Solomon Islands, Sweden, Tanzania, Trinidad & Tobago, and Vanuatu (in June)<sup>93</sup> and Colombia, Dominica, Malta, Netherlands, Paraguay, Poland, Sweden, and Uruguay (in October).<sup>94</sup> A total of sixty-eight country reviews have been completed to date. Key findings from those reviews were used to prepare thematic and regional overviews of the implementation of Chapters III (Criminalization and Law Enforcement) and IV (International Cooperation) of the Convention.<sup>95</sup>

Efforts under the Inter-American Convention against Corruption<sup>96</sup> also concentrated on reviewing member countries’ implementation of the Convention. At its Twenty-Third and Twenty-Fourth meetings, held in March and September 2014 respectively, the Committee of Experts of the Follow-up Mechanism for the Implementation of the Inter-American Convention against Corruption (“MESICIC”) adopted its first report on Haiti as well as reports on Belize, Canada, the Dominican Republic, Ecuador, Guyana, Jamaica, Nicaragua, Saint Vincent and the Grenadines, and Suriname.<sup>97</sup> The MESICIC continues its project, the Responsibility of the Private Sector in Preventing and Combating Corruption, and plans to adopt a set of guidelines on the basic principles or fundamental rules that could be incorporated in domestic legislation in order to promote, strengthen and ensure accountability of this sector in the fight against corruption.<sup>98</sup>

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90. Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

91. UNCAC Signatories and Ratification Status as of 12 November 2014, UNODC, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Nov. 18, 2014).

92. Press Release, Transparency International, 11 Years After Signing, German Parliament Approves Global Corruption Agreement (Sept. 25, 2014), [http://www.transparency.org/news/pressrelease/11\\_years\\_after\\_signing\\_german\\_parliament\\_approves\\_global\\_corruption\\_agreeme](http://www.transparency.org/news/pressrelease/11_years_after_signing_german_parliament_approves_global_corruption_agreeme).

93. *Implementation Review Group of the U.N. Convention against Corruption, Third Session*, UNODC, <http://www.unodc.org/unodc/en/treaties/CAC/IRG-session5.html> (last visited Mar. 15, 2015).

94. *Implementation Review Group of the U.N. Convention against Corruption, Resumed Fifth Session*, UNODC, <http://www.unodc.org/unodc/en/treaties/CAC/IRG-session5-resumed.html> (last visited Mar. 15, 2015).

95. See *supra* note. 86.

96. Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 727, available at [http://www.oas.org/juridico/english/corr\\_bg.htm](http://www.oas.org/juridico/english/corr_bg.htm).

97. Organization of American States, *Country Reports*, DEPARTMENT OF LEGAL COOPERATION, [http://www.oas.org/juridico/english/mesicic4\\_rep.htm](http://www.oas.org/juridico/english/mesicic4_rep.htm) (last visited Mar. 10, 2015).

98. Organization of American States, *OAS Anti-Corruption Mechanism to Hold XXIV Meeting*, DEPARTMENT OF LEGAL COOPERATION, [http://www.oas.org/juridico/newsletter/nl\\_en\\_183.htm](http://www.oas.org/juridico/newsletter/nl_en_183.htm) (last visited Mar. 10, 2015).

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The Organization for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD” Convention)<sup>99</sup> added its 41st member, Latvia, in May 2014.<sup>100</sup> The OECD Working Group on Bribery in International Business Transactions conducted peer reviews and adopted Phase 3 reports on Brazil, Chile, Estonia, Slovenia, South Africa, and Turkey.<sup>101</sup> It has also updated its Compilation of Recommendations Made in the Phase 3 Reports.<sup>102</sup>

The Council of Europe’s Group of States against Corruption (“GRECO”), the group that monitors implementation of the Council of Europe’s Criminal Law Convention on Corruption, published fourth evaluation round reports, which focus on prevention of corruption by members of parliament, judges, and prosecutors, for Albania, Belgium, Croatia, Denmark, Ireland, Norway, and the Slovak Republic.<sup>103</sup> Third Evaluation Round Compliance Reports, concentrating on transparency in the funding of political parties and electoral campaigns were completed for Italy, Monaco, and the Russian Federation.<sup>104</sup> Bulgaria, Macedonia, Serbia, and Turkey were evaluated in the second round,<sup>105</sup> and Belarus received the Joint First and Second Evaluation Rounds Report.<sup>106</sup>

In its 2014 annual report,<sup>107</sup> GRECO expressed concern about the little progress made by a significant number of European countries in implementing its recommendations on transparency of political funding, due in part to the political sensitivity of party and campaign funding, and to the fact that, by evaluating states in this field, GRECO’s monitoring has extended to areas beyond direct governmental control and under the influence of political parties and parliaments themselves.<sup>108</sup>

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99. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm> (last visited Mar. 10, 2015).

100. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, OECD, <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf> (last visited Mar. 10, 2015).

101. *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countryreportsonteimplementationoftheoecdanti-briberyconvention.htm> (last visited Mar. 10, 2015).

102. Working Group on Bribery in International Business Transactions, *Compilation of Recommendations Made in the Phase 3 Reports. Implementation and Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendations on Further Combating Bribery*, last update June 2014, available at <http://www.oecd.org/corruption/anti-bribery/CompilationofRecommendationsP3ReportsEN.pdf>.

103. GRECO, *Fourth Evaluation Round, Evaluation and Compliance Reports*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp) (last visited Mar. 10, 2015).

104. GRECO, *Third Evaluation Round, Evaluation and Compliance Reports*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3_en.asp) (last visited Mar. 10, 2015).

105. GRECO, *Second Evaluation Round, Evaluation and Compliance Reports*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports\(round2\)\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports(round2)_en.asp) (last visited Mar. 10, 2015).

106. *Id.*

107. *14th General Activity Report (2013) of the Group of States against Corruption*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/monitoring/greco/documents/2014/Greco\(2014\)1\\_General%20Activity%20Report%202013\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/2014/Greco(2014)1_General%20Activity%20Report%202013_EN.pdf) (last visited Mar. 10, 2015).

108. Press Release, Group of States Against Corruption, Little Progress on Political Funding Transparency—Council of Europe Anti-Corruption Group Concerned (June 19, 2014), available at [http://www.coe.int/t/dghl/monitoring/greco/news/News\(20140618\)Act.Rep.2013\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/news/News(20140618)Act.Rep.2013_en.asp).

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**B. INTERNATIONAL ORGANIZATIONS**

At the 2014 G20 Summit in November 2014, the leaders of the world's largest economies endorsed the 2015-16 G20 Anti-Corruption Action Plan.<sup>109</sup> G20 efforts will concentrate on building cooperation and networks, including enhancing mutual legal assistance, recovery of the proceeds of corruption, and denial of safe haven to corrupt officials.<sup>110</sup> The G20 also reiterated its commitment to improving public and private sector transparency, and the transparency of beneficial ownership by implementing the G20 High-Level Principles on Beneficial Ownership Transparency.<sup>111</sup>

The G20 Anti-Corruption Working Group ("ACWG") held three meetings in 2014. Among ACWG's achievements are the development of the G20 High-Level Principles on Beneficial Ownership Transparency (2014),<sup>112</sup> High-Level Principles on Corruption and Growth,<sup>113</sup> and the Compendium of Good Practices for Integrity in Public Procurement.<sup>114</sup> ACWG has also secured a commitment by all G20 countries to complete a self-assessment of their domestic foreign bribery frameworks and to provide annual updates to the ACWG on their progress as part of the annual ACWG Accountability Report questionnaire.<sup>115</sup>

The Arab Forum on Asset Recovery ("AFAR") convened its third meeting in Geneva, Switzerland, in November 2014. Over two hundred fifty delegates from forty governments and jurisdictions and six regional and international organizations agreed on the need to pursue and strengthen international cooperation to support Arab countries in transition with their respective processes of recovering illicit assets. As part of the forum, Austria, British Virgin Islands, Bailiwick of Jersey, Lebanon, and Hong Kong announced the publication of comprehensive asset recovery guides.<sup>116</sup>

Following the ouster of former Ukrainian President Victor Yanukovich in February 2014, the new government of Ukraine began efforts to recover assets stolen by Yanukovich and his cronies. The Ukraine Forum on Asset Recovery ("UFAR"), with partners from over thirty countries and territories as well several international organizations, was held in London in April 2014. UFAR participants pledged to ensure that technical assistance is on-going and continues to be available to assist Ukraine in its efforts to recover the proceeds of corruption.

In December 2014, the World Bank Group's International Corruption Hunters Alliance ("ICHA") held its Third Biennial Meeting in Washington, D.C. The meeting

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109. 2015-16 G20 ANTI-CORRUPTION ACTION PLAN (2014), *available at* [https://www.g20.org/sites/default/files/g20\\_resources/library/2015-16%20\\_g20\\_anti-corruption\\_action\\_plan\\_0.pdf](https://www.g20.org/sites/default/files/g20_resources/library/2015-16%20_g20_anti-corruption_action_plan_0.pdf).

110. G20 LEADERS' COMMUNIQUÉ, BRISBANE SUMMIT, (2014), *available at* [https://www.g20.org/sites/default/files/g20\\_resources/library/brisbane\\_g20\\_leaders\\_summit\\_communique.pdf](https://www.g20.org/sites/default/files/g20_resources/library/brisbane_g20_leaders_summit_communique.pdf).

111. *Id.*

112. THE G20 HIGH-LEVEL PRINCIPLES ON BENEFICIAL OWNERSHIP TRANSPARENCY (2014), *available at* [https://www.g20.org/sites/default/files/g20\\_resources/library/g20\\_high-level\\_principles\\_beneficial\\_ownership\\_transparency.pdf](https://www.g20.org/sites/default/files/g20_resources/library/g20_high-level_principles_beneficial_ownership_transparency.pdf).

113. THE G20 HIGH-LEVEL PRINCIPLES ON CORRUPTION AND GROWTH (2014), *available at* [https://www.g20.org/g20\\_priorities/g20\\_2014\\_agenda/fighting\\_corruption](https://www.g20.org/g20_priorities/g20_2014_agenda/fighting_corruption).

114. THE G20 COMPENDIUM OF GOOD PRACTICES FOR INTEGRITY IN PUBLIC PROCUREMENT (2014), *available at* [https://www.g20.org/g20\\_priorities/g20\\_2014\\_agenda/fighting\\_corruption](https://www.g20.org/g20_priorities/g20_2014_agenda/fighting_corruption).

115. G20 FIGHTING CORRUPTION (2014), *available at* [https://www.g20.org/g20\\_priorities/g20\\_2014\\_agenda/fighting\\_corruption](https://www.g20.org/g20_priorities/g20_2014_agenda/fighting_corruption).

116. *Id.*

brought together senior officials of corruption-investigating bodies and prosecuting authorities from over one hundred thirty countries. The meeting focused on fighting corruption—and the vast illicit outflows generated by corruption—by sharing know-how and experiences in the use of both traditional and alternative corruption-fighting approaches.

The 5th Global Focal Point Conference on Asset Recovery was held in Vienna, Austria, in September 2014. The event, organized by INTERPOL's Anti-Corruption and Financial Crimes unit and the Stolen Asset Recovery Initiative ("StAR"), brought together more than 170 anti-corruption investigators and prosecutors from seventy-nine countries to discuss operational issues related to asset recovery using examples of recent international cases to highlight challenges and possible solutions.<sup>117</sup>

StAR also published two new reports in 2014. *Public Wrongs, Private Actions* discusses how civil lawsuits can provide an effective complement to more commonly-used criminal approaches.<sup>118</sup> *Few and Far: The Hard Facts on Stolen Asset Recovery* reports on how OECD countries are performing on asset recovery, provides recommendations and best practices, and suggests specific actions for development agencies.<sup>119</sup>

In June 2014, the World Bank Office of Suspension and Debarment ("OSD") released its first public report.<sup>120</sup> The report provides case processing and other performance metrics related to two hundred twenty-four sanctions imposed by the Bank on firms and individuals from 2007 through June 30, 2013.<sup>121</sup>

#### IV. Civil Society Efforts

##### A. TRANSPARENCY INTERNATIONAL

In 2014, Transparency International (TI) released its tenth annual report on OECD Convention enforcement.<sup>122</sup> *Exporting Corruption: Progress Report 2014* uses statistics from 2010-2013 to rank forty countries according to enforcement activity: active, moderate, limited, and little or no enforcement<sup>123</sup> Latvia was not included because it had not joined the OECD until 2014,<sup>124</sup> and countries that joined the Convention after 2010 had their

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117. Press Release, INTERPOL, INTERPOL-StAR Conference Aims to Increase Cooperation in Asset Recovery Investigations (Sept. 11, 2014), available at <http://www.interpol.int/News-and-media/News/2014/N2014-167>.

118. JEAN-PIERRE BRUN, *et al.*, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (2014), available at <http://star.worldbank.org/star/publication/public-wrongs-private-actions>.

119. LARISSA GRAY, *ET AL.*, *FEW AND FAR: THE HARD FACTS ON STOLEN ASSET RECOVERY* (2014), available at <http://star.worldbank.org/star/publication/few-and-far-hard-facts-stolen-asset-recovery>.

120. THE WORLD BANK OFFICE OF SUSPENSION AND DEBARMENT: REPORT ON FUNCTIONS, DATA AND LESSONS LEARNED 2007-2013 (2014), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23584747~menuPK:9601822~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.html>.

121. Press Release, The World Bank, World Bank Publishes Data and Lessons Learned on All Debarment Cases since 2007 (June 25, 2014), available at <http://www.worldbank.org/en/news/press-release/2014/06/25/world-bank-publishes-data-lessons-learned-debarment-cases-2007>.

122. FRITZ HEIMANN *ET AL.*, *EXPORTING CORRUPTION—PROGRESS REPORT 2014: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY* (2014), available at [http://files.transparency.org/content/download/1573/11296/file/2014\\_ExportingCorruption\\_OECDProgressReport\\_EN.pdf](http://files.transparency.org/content/download/1573/11296/file/2014_ExportingCorruption_OECDProgressReport_EN.pdf).

123. *Id.* at 10-11.

124. *Id.* at 4.



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requirements reduced proportionately.<sup>125</sup> Again this year, only the United States, Germany, the United Kingdom, and Switzerland were listed as active enforcers.<sup>126</sup> Canada joined last year's group of Italy, Australia, Austria, and Finland in the moderate enforcement group.<sup>127</sup> The other twenty-nine member countries rank in the bottom two categories.<sup>128</sup>

In December, TI issued its 2014 Corruption Perceptions Index,<sup>129</sup> ranking one hundred seventy-five countries and territories using expert opinions of public corruption.<sup>130</sup> Denmark ranked at the top of the Index followed by New Zealand and Finland. At the bottom, Sudan ranked 173d while North Korea and Somalia tied for last.<sup>131</sup>

Among its new tools, TI released the EU Integrity Watch database of European parliament members' ("MEPs") financial interest declarations.<sup>132</sup> As of July of 2014, all MEPs were required to submit financial interest declarations, including information on outside revenue, board memberships, and financial holdings.<sup>133</sup> The database provides a method of identifying MEPs with potential conflicts of interest.<sup>134</sup>

TI's U.S. chapter released *Verification of Anti-Corruption Compliance Programs*, which covers research relating to compliance verification and consultations.<sup>135</sup> The report included five methods of verification: public reporting by companies, verification work carried out by accountants, lawyers, and consulting firms, certification of compliance programs, compliance reviews performed by government-mandated monitors, and certification efforts in the social and environmental areas.<sup>136</sup> Organizations completing an internal review were encouraged to use a risk-based approach with a focus on the company's geographic locations, business sectors, business partners, nature of transactions, and the degree to which company agents interact with public officials.<sup>137</sup>

**B. EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE**

As of this year, forty-eight countries have implemented the Extractive Industries Transparency Initiative ("EITI") standards to ensure disclosure of taxes and other payments

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125. *Id.* at 8-9.

126. *Id.*

127. *Id.*

128. *Id.*

129. *2014 Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/cpi2014> (last visited Mar. 10, 2015).

130. Press Release, Transparency International, Corporate Secrecy, Global Money Laundering Makes It Harder for Emerging Economies to Fight Corruption (Dec. 3, 2014), *available at* <http://www.transparency.org/cpi2014/press>.

131. *2014 Corruption Perceptions Index Results*, TRANSPARENCY INTERNATIONAL, *available at* <http://www.transparency.org/cpi2014/results> (last visited Mar. 10, 2015).

132. *About EU Integrity Watch*, TRANSPARENCY INTERNATIONAL, EU OFFICE (Nov. 10, 2014), <http://www.integritywatch.eu/about.html>.

133. *Id.*

134. *Id.*

135. FRITZ HEIMANN ET AL., *VERIFICATION OF ANTI-CORRUPTION COMPLIANCE PROGRAMS* (2014), *available at* [http://www.transparency-usa.org/documents/TI-USA\\_2014\\_verificationreportfinal.pdf](http://www.transparency-usa.org/documents/TI-USA_2014_verificationreportfinal.pdf).

136. *Id.* at 6.

137. *Id.*

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made by oil, gas, and mining companies to governments.<sup>138</sup> Among the group, thirty-nine are compliant with EITI requirements having disclosed \$1.3 trillion in extractive revenues this year.<sup>139</sup> Chad, Guatemala, Sierra Leone, Indonesia, Guinea and the Democratic Republic of Congo all became compliant in 2014.<sup>140</sup>

As of 2014, EITI countries are required to produce an annual activity report as part of compliance with the EITI requirements.<sup>141</sup> Each report should describe objectives achieved in the countries' work plan from the prior year.

EITI also started a pilot program on beneficial ownership, which requires disclosure of ownership of oil, gas, and mining companies in EITI implementing countries.<sup>142</sup> The pilot program now includes eleven countries.<sup>143</sup>

C. WORLD JUSTICE PROJECT

The World Justice Project ("WJP") released its fourth annual *Rule of Law Index* ranking ninety-nine countries and jurisdictions based on over 100,000 household and expert surveys.<sup>144</sup> The index ranks countries using forty-seven sub-factors organized into nine aggregate categories: 1) constraint on government powers; 2) absence of corruption; 3) open government; 4) fundamental rights; 5) regulatory enforcement; 7) civil justice; 8) criminal justice; and 9) informal justice.<sup>145</sup> The "absence of corruption" category considers bribery, improper influence by public or private interests, and misappropriation of public funds.<sup>146</sup> Within the category, Denmark, Norway, and Sweden took the top three spots, while Nigeria, Cameroon, and Afghanistan occupied the bottom of the rankings.<sup>147</sup>

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138. *EITI Fact Sheet 2014*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, [https://eiti.org/files/EITI\\_Factsheet\\_EN\\_0.pdf](https://eiti.org/files/EITI_Factsheet_EN_0.pdf) (last visited Mar. 10, 2015).

139. *Id.* at 1.

140. *EITI Countries*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <https://eiti.org/countries> (last visited Mar. 10, 2015).

141. *Highlighting Activities in EITI Countries*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE <https://eiti.org/blog/highlighting-activities-eiti-countries#> (last visited Mar. 10, 2015).

142. *Pilot Project: Beneficial Ownership*, EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <https://eiti.org/pilot-project-beneficial-ownership> (last visited Mar. 10, 2015).

143. Those countries are: Burkina Faso, Cameroon, the Democratic Republic of Congo, Honduras, Kyrgyz Republic, Liberia, Niger, Tajikistan, Tanzania, Togo, and Zambia. Other countries are working to accomplish similar goals outside the pilot program: Myanmar, Norway, the Philippines, Sierra Leone, and the United Kingdom. Iraq, Nigeria and Trinidad and Tobago originally signed up for the pilot, but have put it on hold.

144. WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2014 (2014), available at <http://data.worldjusticeproject.org/assets/report/wjp-rule-of-law-index-2014.pdf>.

145. *Id.* at 8.

146. *Id.* at 16.

147. *Id.* at 16-17.

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## **International Art and Cultural Heritage**

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AND KATHLEEN A. NANDAN\*

### **I. Conflict Preemption in Restitution Claims: *Von Saher v. Norton Simon Museum of Art***

On June 6, 2014, the U.S. Court of Appeals for the Ninth Circuit delivered the latest chapter in Marei von Saher's battle to reclaim a 16th-century diptych by Lucas Cranach the Elder.<sup>1</sup> The two wooden panels depicting Adam and Eve were confiscated by Nazis in World War II from Von Saher's relatives and are now in the collection of the Norton Simon Museum in Pasadena, California. In 2010, the Ninth Circuit had previously affirmed the lower court's dismissal of the action, holding that the California Code of Civil Procedure section 354.3, on which Von Saher had relied, was unconstitutional on the basis of field preemption.<sup>2</sup> In its second appearance in the Ninth Circuit, Von Saher's action to recover the art work has had more success, and this summer the Ninth Circuit reversed the district court's decision, which had dismissed Von Saher's claims for replevin and conversion as conflicting with the United States's express federal policy on recovery of Nazi-looted art and, thus, were barred by conflict preemption.<sup>3</sup> The Ninth Circuit ruled that Von Saher's claim that she was the rightful owner of the work was not preempted as conflicting with federal foreign policy and remanded to the district court to address,

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1. *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712, 714 (9th Cir. 2014) [hereinafter *Von Saher II*].

2. Cal. Civ. Proc. Code § 354.3 (West 2002); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 957 (9th Cir. 2010) [hereinafter *Von Saher I*].

3. *Von Saher v. Norton Simon Museum of Art*, 862 F. Supp. 2d 1044, 1053 (C.D. Cal. 2012).

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among other issues, the issue of whether the case implicated the act of state doctrine.<sup>4</sup> The museum submitted a petition for rehearing *en banc*, which was denied, and has since filed a petition for *writ of certiorari* to the Supreme Court of the United States.<sup>5</sup>

Painted in 1530, the Cranach diptych at issue in this case hung in the Church of the Holy Trinity in Kiev, Ukraine until its removal by Soviet authorities in 1927.<sup>6</sup> In 1931, Dutch-Jewish art dealer Jacques Goudstikker purchased the diptych at a Soviet-sponsored auction of works previously owned by the Stroganoff family.<sup>7</sup> Goudstikker, along with his wife, Desi, and son, Edo, fled the Nazis in 1940, leaving behind over 1,200 artworks.<sup>8</sup> Goudstikker died in transit, and his heirs inherited the collection.<sup>9</sup> Back in the Netherlands, however, the artworks were transferred to Nazi officials Herman Göring and Alois Miedl in a forced sale and under illegal contracts executed by unauthorized gallery employees.<sup>10</sup>

At the end of the war, the United States returned the recovered Goudstikker collection to the Dutch government to be held in trust for Goudstikker's heirs.<sup>11</sup> When Desi Goudstikker returned to the Netherlands in 1946, however, she was informed that the Dutch government had characterized the war-time sale of the works as "voluntary," barring her recovery under the government's post-war Restitution of Legal Rights Decree and requiring her to pay for the return of the recovered property.<sup>12</sup> Desi ultimately settled with the Dutch government to recover certain property sold to Miedl but did not make an official claim for the paintings sold to Göring, viewing the proceedings as unfair and stacked against her.<sup>13</sup>

In 1966, the Dutch government transferred the paintings to George Stroganoff-Scherbatoff, who claimed that the Soviet Union had wrongly seized the works from his family during the Bolshevik seizure in the 1920s and had unlawfully sold the works to Goudstikker in 1931.<sup>14</sup> Norton Simon, founder of the Norton Simon Museum of Art, purchased the Cranach paintings from Stroganoff-Scherbatoff in 1971.<sup>15</sup> Marei von Saher, who married Goudstikker's son Edo, is Goudstikker's sole living heir.<sup>16</sup>

The litigation began in May 2007 when Von Saher sued the museum for return of the artwork under California Code of Civil Procedure section 354.3, which provided a right

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4. Von Saher II, 754 F.3d at 727.

5. Email from Leslie C. Denk, Dir. of Pub. Affairs, Norton Simon Museum, to author (Nov. 13, 2014, 5:30 P.M. EST) (on file with author).

6. Von Saher II, 754 F.3d at 715.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 716.

12. Von Saher v. Norton Simon Museum of Art, 754 F.3d 712, 714 (9th Cir. 2014).

13. *Id.* at 716-17; Advisory Comm. on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, General research findings (2002) (A report issued by the Ekkart Committee, established in 1999 by the Dutch government to investigate the provenance of art in the custody of the Netherlands, confirmed that the Dutch postwar restitution process for Jewish claimants was "legalistic, bureaucratic, cold and even callous").

14. Von Saher II, 754 F.3d at 718. See also Stroganoff-Scherbatoff v. Weldon, 420 F.Supp 18, 19 (S.D.N.Y. 1976).

15. Von Saher II, 754 F.3d at 718.

16. *Id.* at 717.

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of action for recovery of artwork from museums or galleries if such artwork was confiscated during the Holocaust and set a deadline for claims of December 31, 2010.<sup>17</sup> In that initial case, the district court dismissed Von Saher's claim on the basis of field preemption, holding that section 354.3 of the California Code unconstitutionally violated the federal government's exclusive authority in the area of foreign affairs.<sup>18</sup> On appeal, the Ninth Circuit affirmed this decision also on the basis of field preemption.<sup>19</sup> Von Saher appealed the dismissal to the U.S. Supreme Court, but was denied *certiorari*. In February 2010, the California legislature amended section 338(c) of the California Code of Civil Procedure, regarding the statute of limitations for civil actions, extending the statute of limitations from three to six years after actual discovery by the claimant for claims concerning the recovery of fine art from "a museum, gallery, auctioneer, or dealer," and made this amendment specifically retroactive.<sup>20</sup> The amended statute notably removed reference to the Holocaust.<sup>21</sup> On this basis, Von Saher filed an amended complaint in November 2011 in the district court. The museum answered by arguing exclusively that the claims are barred on the basis of conflict preemption, *i.e.* that the state law was in conflict with federal foreign policy. The district court again agreed with the museum and dismissed the action in March 2012.<sup>22</sup> Von Saher appealed this decision to the Ninth Circuit.

This time the Ninth Circuit reversed the district court's decision, in a 2–1 opinion authored by Judge Dorothy Nelson, holding that the matter was a dispute between private parties and not barred by the foreign affairs doctrine on the basis of conflict preemption.<sup>23</sup> The museum had asserted that "Von Saher's claims for replevin and conversion" were in conflict with federal policy on the restitution of Nazi-looted art.<sup>24</sup> Under this theory, the museum argued state power must yield to federal government policy to ensure uniformity in the area of foreign affairs, particularly where there is clear conflict between the state and the federal policy.<sup>25</sup>

In evaluating the museum's claim of conflict preemption, the Ninth Circuit looked to the 1998 Washington Conference Principles on Nazi Confiscated Art and the 2009 Terезin Declaration on Holocaust Era Assets and Related Issues, both of which the United States and the Netherlands signed, indicating the U.S. foreign policy "commitment to respect the finality of 'appropriate actions' taken by foreign nations to facilitate" restitution of Nazi-looted art.<sup>26</sup> The Ninth Circuit held that such foreign policy was inapplicable in this instance because the artwork at issue was never subject "to postwar internal restitution proceedings in the Netherlands."<sup>27</sup> Because Desi Goudstikker never initiated

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17. Civ. Proc. § 354.3.

18. *Von Saher v. Norton Simon Museum of Art*, No. CV 07-2866 JFW, 2007 WL 4302726, at \*3 (C.D. Cal. Oct. 18, 2007).

19. *Von Saher I*, 592 F.3d at 957.

20. Cal. Civ. Proc. Code §§ 338(c)(3)(A), (B) (West 2010).

21. Compare Civ. Proc. § 354.3, with Civ. Proc. §§ 338(c)(3)(A), (B).

22. *Von Saher*, 862 F. Supp. 2d at 1053.

23. *Von Saher II*, 754 F.3d at 725.

24. *Id.* at 720.

25. *Id.* at 721–23, 719 (quoting *Am. Ins. Ass'n v. Garamendi*, 531 U.S. 396, 421 (2003)).

26. *Id.* at 721. The Ninth Circuit's ruling in this case is the first to consider that the Washington Principles constitute U.S. foreign policy and that private restitution claims "are consistent with that policy[.]" *Von Saher v. Norton Simon Museum of Art*, 82 U.S.L.W. 1944, 1 (U.S. June 17, 2014).

27. *Von Saher II*, 754 F.3d at 721.

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recovery claims for “Adam” and “Eve,” the paintings were never subject to Dutch restitution proceedings and therefore Von Saher’s legal claims do not interfere with the finality of any foreign proceedings. Nor, according to the Ninth Circuit, did Von Saher’s claims conflict with the internal restitution proceedings conducted by the Netherlands in 1998–99 and 2004–06, because the Netherlands had already divested itself of the diptych by then when it transferred the paintings to Stroganoff-Scherbatoff in 1971.<sup>28</sup>

The significance of this case, which follows the Ninth Circuit’s similar December 2013 decision in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, is that, where it had previously found that the statute of limitations under section 354.3 of the California Code of Civil Procedure—providing a right of action for recovery of art confiscated during the Holocaust—was preempted by federal foreign policy, it did not find the revised statute of limitations for claims for recovery of art—which excluded reference to the Holocaust—as preempted; although both statutes arguably have a similar effect.<sup>29</sup> The decision in *Von Saher II* also indicates the Ninth Circuit’s reluctance to consider claims for restitution of artwork allegedly seized by the Nazis as preempted by American foreign policy interests, and could have significant implications for future, similar restitution claims.

The battle, however, is not yet over for Von Saher. The Ninth Circuit remanded the case to the district court to decide whether the case implicates the act of state doctrine, under which the activities of one nation within its own borders cannot be challenged in another nation’s courts.<sup>30</sup> If the Dutch government’s 1966 “restitution” of the works to the Stroganoff heir “constituted an official act of a sovereign” state, the district court may find that Von Saher’s claims are barred by the act of state doctrine.<sup>31</sup> While the U.S. Supreme Court has held that an exception to the act of state doctrine may exist in the context of “purely commercial acts . . . where foreign governments . . . exercise only those powers that can be exercised by private citizens,”<sup>32</sup> the Ninth Circuit has never reached the question of whether a commercial exception applies in cases of restitution claims and declined to do so here.<sup>33</sup>

In its decision, the Ninth Circuit also referenced the Hickenlooper Amendment, which “provides that the act of state doctrine does not apply to” confiscations “after January 1, 1959, by an act of state in violation of international law.”<sup>34</sup> Therefore, if the district court finds that the Dutch government’s 1966 transfer of the diptych constituted a confiscation of Desi Goudstikker’s property, the act of state doctrine may not be appropriate, under application of the Hickenlooper Amendment. The act of state doctrine and the applicability of any possible exceptions will be developed on remand to the district court.<sup>35</sup>

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28. *Id.*

29. See *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613 (9th Cir. 2013).

30. *Von Saher II*, 754 F.3d at 725 (quoting *Undershill v. Hernandez*, 168 U.S. 250, 252 (1897); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918)).

31. *Id.* at 726.

32. *Id.* at 726–27 (quoting *Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682, 695 (1976)).

33. *Id.* at 727.

34. *Id.* (citing 22 U.S.C. § 2370(e)(2)).

35. For an argument that Dutch property law gave Stroganoff-Scherbatoff good title to the diptych, see Bert Demarsin, *The Third Time is Not Always A Charm: The Troublesome Legacy of a Dutch Art Dealer: The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ARTS & ENT. L.J. 255, 310–12 (2010).

## II. Preserving a Faltering Arts Institution: The Corcoran Gallery of Art

In August 2014, a D.C. Superior Court judge approved a controversial plan by the Corcoran Gallery of Art (Corcoran) to merge with the National Gallery of Art (National Gallery) and George Washington University (GWU), to save it and its art school from closure due to on-going financial struggles.

Founded in 1869, the Corcoran was the oldest art museum in the District of Columbia, and one of the oldest art museums in the United States.<sup>36</sup> Financier and industrialist William Corcoran formed the Corcoran as a charitable trust.<sup>37</sup> A few years after the gallery was established, the trustees created the Corcoran College of Art (later renamed the Corcoran College of Art + Design). Although the Corcoran's deed of trust did not mention an art school, Mr. Corcoran approved of the change, and provided additional funding in support of the art school's creation.<sup>38</sup> The Corcoran's endowment and fundraising had never been robust.<sup>39</sup> As its financial condition worsened, its trustees discussed a possible move of the institution to Alexandria, Virginia, which added to community concerns regarding the institution's finances. In 2013, the trustees "announce[d] a plan to explore a partnership with University of Maryland."<sup>40</sup> The University of Maryland proposal failed when it became clear that the university would not assume the Corcoran's debts, but preferred to establish a partnership with the Corcoran and planned instead to extend a loan to it.<sup>41</sup>

The Corcoran first proposed a plan to partition the art gallery from the art school in February 2014.<sup>42</sup> Under the proposal, the Corcoran would contribute the greater part of its collection to the National Gallery, and contribute the art school (along with the Flag Building, where it is located, and certain artworks in its collection) to George Washington University (GWU).<sup>43</sup> On June 17, 2014, the Corcoran trustees filed a Petition for Cy Pres Determination,<sup>44</sup> seeking authorization to enter into agreements with the National Gallery and GWU to carry out this plan. On July 2, certain faculty, current and former students, and donors of the Corcoran College of Art + Design filed a Complaint and Petition to Intervene in Cy Pres Proceedings.<sup>45</sup> The intervenors objected to the proposed agreements with the National Gallery and GWU, and instead proposed two alternatives—the former University of Maryland proposal, and a proposal providing for an aggressive

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36. Petition for Cy Pres Determination, at 2, Tr. Of the Corcoran Gallery of Art v. District of Columbia, No. 14-0003745, (D.C. Super. Ct. filed June 17, 2014) [hereinafter Cy Pres Petition].

37. *Id.*

38. *Id.* at 3–4.

39. See David Montgomery, *Corcoran Gallery: Why Don't Donors Give?*, WASH. POST (July 20, 2012), [http://www.washingtonpost.com/entertainment/museums/corcoran-gallery-why-dont-donors-give/2012/07/19/gJQAJkNGyW\\_story.html](http://www.washingtonpost.com/entertainment/museums/corcoran-gallery-why-dont-donors-give/2012/07/19/gJQAJkNGyW_story.html); see also Lonnae O'Neal Parker & Jacqueline Trescott, *A Corcoran Gallery of Art Timeline*, WASH. POST (Feb. 19, 2014), [http://www.washingtonpost.com/entertainment/museums/a-corcoran-gallery-of-art-timeline/2014/02/19/b5d54c70-998e-11e3-80ac-63a8ba7f7942\\_story.html](http://www.washingtonpost.com/entertainment/museums/a-corcoran-gallery-of-art-timeline/2014/02/19/b5d54c70-998e-11e3-80ac-63a8ba7f7942_story.html).

40. Parker, *supra* note 37, at 4.

41. Cy Pres Petition, *supra* note 35, at 9–10.

42. Parker, *supra* note 37, at 4.

43. Cy Pres Petition, *supra* note 35, at 11; Parker, *supra* note 37, at 4.

44. Cy Pres Petition, *supra* note 35, at 14–15.

45. Save the Corcoran's Partially Opposed Motion to Intervene in Cy Pres Proceedings, at 18–19, Tr. of the Corcoran Gallery of Art v. District of Columbia, No. 2014 CA 003745 B (D.C. Super. Ct. filed July 2, 2014).



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fundraising campaign. The intervenors argued that either alternative would be closer to the Corcoran's charitable purpose in forming the institution, because it would preserve the independence of the Corcoran.

The terms of a charitable trust may be modified via either of two equitable doctrines, *cy pres* and equitable deviation. "*Cy pres*" is an abbreviation of "*cy pres comme possible*" (as near as possible), and alters the substantive purposes of a charitable trust.<sup>46</sup> "Equitable deviation," by contrast, allows a court only to modify the administrative provisions of a trust under changed circumstances.<sup>47</sup> In the District of Columbia, petitions to modify or terminate a charitable trust under the doctrine of *cy pres* are governed by Uniform Trust Code section 19-1304.13, which provides, in pertinent part, "[t]he court may apply *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes."<sup>48</sup>

In this case, the court required the Corcoran trustees to show both that the trust's charitable purpose has become impracticable or impossible to achieve, and that the proposed modification is "as near as possible to the settlor's original charitable purpose."<sup>49</sup> Although "impracticable" is not defined, the court required the trustees to demonstrate that "it would be unreasonably difficult, and that it is not viable or feasible, to carry out the current terms and conditions of the trust."<sup>50</sup> In the court's view, the trustees met this burden "because the Corcoran (i) had been operating at a deficit for a majority of the prior thirteen years, (ii) had incurred deficits even while deferring spending on maintenance of the Flagg Building, . . . (iii) cannot not alleviate its financial state by deaccessioning artworks from the collection (without risking Association of Art Museum Directors (AAMD) sanctions and loss of American Alliance of Museums (AAM) accreditation), and (iv) cannot within a reasonable time period, succeed with alternative fundraising."<sup>51</sup>

The court concluded that the GWU/National Gallery proposal was "consistent with Mr. Corcoran's intent and effectuates that intent as nearly as possible in light of the Corcoran's current financial condition."<sup>52</sup> The court explained:

[u]nder the GW[U]/NGA proposal, the Flagg Building will be renovated, the school will continue and be strengthened by its partnership with a financially sound university, both the school and a significant portion of the collection will remain in the Flagg Building, and a gallery, although smaller, will remain open to the public in the Flagg Building, all results that are consistent with Mr. Corcoran's intent.<sup>53</sup>

Although the dissolution of "the Corcoran as an independent institution is far from Mr. Corcoran's original charitable purpose, the court emphasized that the result was nevertheless nearer to that purpose than what other available options would have afforded."<sup>54</sup>

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46. See Alberto B. Lopez, *A Reevaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307, 1308 (2010).

47. *Id.*

48. D.C. Code § 19-1304.13 (2004).

49. Trustees of the Corcoran Gallery of Art v. Dist. of Columbia, No. 14-CA-3745 B, slip op. at 35 (Super. Ct. D.C. Aug. 18, 2014) (mem. op.).

50. *Id.* at 38-39.

51. Kevin P. Ray, *When A Museum Falters: The Corcoran Gallery of Art*, GREENBERG TRAURIG (Nov. 4, 2014), <http://www.gtlaw-culturalassets.com/2014/11/when-a-museum-falters-the-corcoran-gallery-of-art/>.

52. Trustees of the Corcoran Gallery of Art, No. 14-CA-3745 B at 84.

53. *Id.* at 71-72.

54. Ray, *supra* note 51.

### III. Museum Due Diligence and Repatriation Efforts: Museum of Fine Arts, Boston Returns Cultural Objects to Nigeria

In June 2014, the Museum of Fine Arts, Boston (MFA) reached an agreement with Nigeria's National Commission of Museums and Monuments Nigeria (NCMM) to voluntarily repatriate eight objects from its collection.<sup>55</sup> The agreement, as well as the initiative taken by the MFA to uncover the provenance of the objects, put the museum at the forefront of institutions as part of a growing trend to exercise due diligence around acquisitions.

Based on proactive research conducted by MFA's provenance curator, Victoria Reed, of more than 300 objects bequeathed to the MFA by museum benefactors William and Bertha Teel, the MFA concluded that at least eight objects were illegally removed from Nigeria before entering the United States.<sup>56</sup> The objects include terracotta figures that are generally known to be at high risk for theft and looting, as well as other figures that were likely stolen and illegally exported.<sup>57</sup>

The Teels' gift to the MFA included access to the Teels' papers regarding the objects' ownership histories, and the museum consistently emphasized that there was no reason to doubt that the Teels acquired all of these objects in good faith, and were not implicating the Teels in any wrongdoing.<sup>58</sup> In her research, Reed focused on documents authorizing sales and transfers of the objects, and determined, with the help of Nigerian authorities, that "several documents which purportedly authorized their sale and export were forged."<sup>59</sup> Reed also relied on the International Council of Museums "Red List,"<sup>60</sup> which highlights works at high risk for looting and illegal sales, to identify two specific works in the collection acquired from the Teels.<sup>61</sup> Once it was determined that the eight works had been acquired under dubious title and authority, the MFA contacted the NCMM to ask for permission to acquire the works, despite their unclear history.<sup>62</sup> After the NCMM refused, the NCMM and MFA entered into negotiations to repatriate the objects to Nigeria.<sup>63</sup> Unique to the MFA's approach in this case is that the museum's efforts to uncover

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55. *Museum of Fine Arts, Boston, Transfers Eight Antiquities to Nigeria*, RUTGERS SCHOOL OF ARTS AND SCIENCES (June 26, 2014), <http://chaps.rutgers.edu/news/news/201-mfa-boston-repatriation-nigeria.html> [hereinafter RUTGERS]. "The objects include (1) Head, African, Edo peoples, Nigeria, Benin kingdom, about 1750; (2) Memorial screen (duen fubara), African, Ijaw Kalabari peoples, Nigeria, late 19th century; (3) Head, African, Nok peoples, Nigeria, About 500 B.C.–A.D. 200; (4) Head of an Oba Edo peoples, Benin Kingdom, Nigeria, 19th century; (5) Male Figure, African, Nok peoples. Nigeria, About 500 B.C.–A.D. 200; (6) Portrait head, African, Yoruba peoples, Ife Kingdom, Nigeria, 12th–14th century; (7) Oron Ancestral Figure (Ekpu), Oron peoples, southeastern Nigeria; (8) Altar figure, Benin peoples, Nigeria." *Id.*

56. *See id.* *See also* Geoff Edgers, *Museum of Fine Arts Returns 8 Artifacts to Nigeria*, THE BOSTON GLOBE (June 26, 2014), <http://www.bostonglobe.com/lifestyle/style/2014/06/26/museum-fine-arts-returns-artifacts-nigeria/z2RenPtuhh9qyPoSi05fRO/story.html>; Tom Mashberg, *Museum of Fine Arts in Boston Returns Art to Nigeria*, N.Y. TIMES (June 26, 2014, 4:26 PM), [http://artsbeat.blogs.nytimes.com/2014/06/26/museum-of-fine-arts-in-boston-returns-art-works-to-nigeria/?\\_r=0](http://artsbeat.blogs.nytimes.com/2014/06/26/museum-of-fine-arts-in-boston-returns-art-works-to-nigeria/?_r=0).

57. RUTGERS, *supra* note 55.

58. *See id.*

59. Mashberg, *supra* note 56.

60. *See Red List, the Looting of African Archaeological Objects*, INT'L COUNCIL OF MUSEUMS (2000), [http://icom.museum/fileadmin/user\\_upload/images/Redlists/Africa/Red\\_List\\_Africa2.pdf](http://icom.museum/fileadmin/user_upload/images/Redlists/Africa/Red_List_Africa2.pdf).

61. Edgers, *supra* note 56.

62. Andrea Shea, *The Boston MFA Returns 8 Looted Antiquities to Nigeria*, THE ARTERY (June 26, 2014), <http://artery.wbur.org/2014/06/26/mfa-returns-antiquities-nigeria>.

63. *Id.*

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the provenance of the objects did not follow a legal claim by the Nigerian government to repatriate the objects, but was instead undertaken voluntarily.

Laws governing the repatriation of looted or impermissibly exported art objects, artifacts, and antiquities can be found under both international treaties and domestic acts implementing those treaties.<sup>64</sup> While Nigeria is a party to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO's National Program Officer of Culture has recently warned that Nigeria, in particular, must protect its cultural property from looting by taking steps to ensure implementation and enforceability of international convention protections within Nigeria's legal framework.<sup>65</sup> Notably, Nigeria has not applied for import restrictions for cultural property under the United States's Convention on Cultural Property Implementation Act.<sup>66</sup>

While there has been a shift in recent decades at art museums and institutions toward repatriating objects to their countries of origin when the provenance of those objects are dubious, the MFA's actions in voluntarily examining the provenance of objects, especially prior to any legal claim, are a rare example of the provenance research being undertaken by acquiring museums. Museums that take these proactive steps safeguard the integrity of their collections,<sup>67</sup> and voluntarily take responsibility for protecting and respecting heritage from cultures across the globe.<sup>68</sup>

#### **IV. Regulating Trafficking in Ivory Objects Through Director's Order 210 Under the Endangered Species Act of 1973**

On February 25, 2014, in an effort to limit trade in African elephant ivory in the United States and combat the ongoing poaching crisis in Africa, Director Daniel M. Ashe of the United States Fish and Wildlife Service (Service) issued Director's Order No. 210 (Order 210).<sup>69</sup> Order 210 prohibits the commercial importation of objects containing African elephant ivory, and allows for the continued importation of non-commercial shipments of

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64. See generally Carol A. Roehrenbeck, *Repatriation of Cultural Property—Who Owns the Past? An Introduction to Approaches and Selected Statutory Instruments*, 38 INT'L J. OF LEGAL INFO. 185-200 (Summer 2010), <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1216&context=ijli>.

65. See *id.*; *Nigeria: UNESCO Warns Nigeria Against Cultural Extinction*, DAILY INDEPENDENT (LAGOS) (July 8, 2014), <http://allafrica.com/stories/201407090081.html> (noting that UNESCO's National Program Officer of Culture told Nigerian news outlet that Nigeria needed to take efforts to domesticate conventions that would help Nigeria in protecting cultural artifacts and heritage, stating that "[a]lthough, it is a collective responsibility, but government must do what it takes by domesticating the convention that will preserve the country's works").

66. *Eight Teel Gifts Returned to Nigeria by MFA Boston*, COMMITTEE FOR CULTURAL POLICY, <http://committeeforculturalpolicy.org/eight-teel-gifts-returned-to-nigeria-by-mfa-boston/> (last visited Jan. 16, 2015).

67. In addition to forged export documents and looting, there is also a robust forgery market for African antiquities. See Michael Brent, *Faking African Art*, 54 ARCHEOLOGY 1 (Jan./Feb. 2001), <http://www.coupdefoudre.com/CurrentArticle/TerracottaForgeries.html>.

68. There are counter-voices to repatriation, arguing that some nations cannot safeguard the artifacts (due to war and/or lack of preservation equipment and expertise) and/or use these artifacts to bolster nationalist fervor. See James Cuno, *Culture Wars: The Case Against Repatriating Museum Artifacts*, FOREIGN AFFAIRS (Nov./Dec. 2014), <http://www.foreignaffairs.com/articles/142185/james-cuno/culture-war>.

69. DEP'T OF THE INTERIOR, DIRECTOR'S ORDER NO. 210, GUIDANCE ON THE ANTIQUE EXCEPTION UNDER THE ENDANGERED SPECIES ACT (ESA) at App. A (2014).

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objects that fit within certain designated exceptions (i.e., musical instruments legally acquired prior to February 26, 1976).<sup>70</sup> In doing so, Order 210 reversed a thirty-two-year interpretation of the exception for antique articles (Antiques Exception) in the Endangered Species Act of 1973 (ESA)<sup>71</sup> by re-interpreting the designated port requirement in ESA Section 10(h), a provision that prohibits the importation of objects other than through certain designated ports, and banned the interstate sale and transport of objects containing ESA-listed species that were either (a) made in the United States, or (b) imported prior to the establishment of the designated port system in 1982.<sup>72</sup>

The Endangered Species Preservation Act (ESPA), the predecessor to the ESA, was passed in 1966 to provide a means for listing native animal species as endangered and giving them limited protection.<sup>73</sup> The ESPA allowed the Departments of Interior, Agriculture, and Defense to protect listed species and preserve the species' habitats.<sup>74</sup> In 1969, Congress amended the ESPA through the Endangered Species Conservation Act of 1969 (ESCA).<sup>75</sup> The ESCA's purpose was to provide additional protection for species in danger of worldwide extinction by prohibiting their importation and subsequent sale in the United States. The designated port requirement was first enacted into legislation in Section 4(d) of the ESCA, which provides that, "importation of such fish or wildlife into any port in the United States, except those . . . designated, shall be prohibited after the effective date of such designations . . ." <sup>76</sup> Section 4(d) applied prospectively to imports into a designated port and not to materials imported prior to the effective date of designation or to domestically made materials.<sup>77</sup>

During a 1973 conference in Washington, D.C., eighty nations signed the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>78</sup> CITES's purpose is to monitor, and in some cases restrict, international commerce in species of plants and animals believed to be harmed by trade. In response to this international effort, Congress passed the ESA in 1973 to strengthen the regulatory regime started in the ESCA. However, the ESA as passed in 1973 did not contain an exception for the trade in antiques. On September 19, 1978, the House Subcommittee on Fisheries and Wildlife Conservation and the Environment considered a bill in an open markup session to amend the ESA. According to the transcript of the Open Session, the Antique Exception was introduced with the intent to exempt articles manufactured before 1830, such as jewelry, that contained materials from endangered species.<sup>79</sup> When adopted, Section

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70. *Id.*

71. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (current version at 16 U.S.C. § 1531 (2002)).

72. *Id.* at 257.

73. See Endangered Species Preservation Act, Pub. L. No. 89-669 (1966) (amended 1969).

74. *Id.*

75. See Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

76. *Id.* § 4(d).

77. See *id.*

78. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

79. *Endangered Species Act Amendments of 1978: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. of Merchant Marine and Fisheries*, 1978 Leg., 95th Sess. (transcript of Open Session, Sep. 19, 1978).

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7(h)(1) of the Endangered Species Act Amendments of 1978 (ESAA-78)<sup>80</sup> created what is now known as the Antiques Exception, which excluded from the ESA in Section 10(h) any article which: (a) was made before 1830; (b) is composed in whole or in part of any listed endangered or threatened species; (b) has not been repaired or modified with any part of any such species after the date of the Act; and (d) is entered at a designated port.<sup>81</sup> Later, the Endangered Species Act Amendments of 1982 replaced the 1830 test date with a rolling 100-year test and defines antique materials as those “not less than 100 years of age,” in order to harmonize the Antiques Exception with the U.S. Tariff Schedule’s definition of ‘antique.’<sup>82</sup>

Order 210 was issued to curtail the Service’s practice of exempting antiques containing African elephant ivory from the moratorium on imports imposed by the African Elephant Conservation Act of 1989 (AECA).<sup>83</sup> In issuing Order 210, the Service took the view that allowing the continued importation of antique African elephant ivory contributed to the continued threat against African elephants because forged paperwork and other abuses created a “loophole” for unscrupulous traders.<sup>84</sup> Order 210 also shifted the burden to sellers of objects in interstate commerce to prove that objects containing African elephant ivory were purchased before the AECA import moratorium was instituted 1990 or that the object containing Asian elephant ivory and other endangered species fall within the Antique Exception under the ESA. Given that these documentation requirements are a new practice, Order 210 caused significant public outcry, particularly among musicians, antique dealers, gun collectors, and others.<sup>85</sup>

Following discussions with art market stakeholders, the Service amended Order No. 210 on May 15, 2014 (Amended Order). The Amended Order provides that the Service, in its enforcement discretion, will not enforce the designated port requirement against bona fide antiques imported prior to 1982 and articles that were created in the United States and never imported. The FAQs and other materials accompanying the Amended Order state that the Service’s revised position on the Antiques Exception is based on the view that, among other things, the limited exception for the trade in certified antiques does not contribute to the demand for freshly poached elephant ivory.

## **V. International Art Smuggling: Update on Subhash Kapoor**

Events following Subhash Kapoor’s 2011 arrest in Germany and 2012 extradition to India continued to unfold in 2014.<sup>86</sup> Kapoor is alleged to have illegally trafficked in stolen

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80. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) (current version at 16 U.S.C. § 1531 et seq.).

81. 16 U.S.C. § 1539(h) (1980) (prior to 1982 amendment).

82. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6, 96 Stat. 1412 (1982) (current version at 16 U.S.C. § 1531 et seq.).

83. *Fish and Wildlife Service Tightens Restrictions on Imports Under the Endangered Species Act*, COVINGTON (Apr. 1, 2014), [http://www.cov.com/files/Publication/acc367b7-60ac-47cf-b8fa-b7e35a331b8f/Presentation/PublicationAttachment/99f1169b-83e1-4808-b416-b89427bccd19/Fish\\_and\\_Wildlife\\_Service\\_Tightens\\_Restrictions\\_on\\_Imports\\_Under\\_Endangered\\_Species\\_Act.pdf](http://www.cov.com/files/Publication/acc367b7-60ac-47cf-b8fa-b7e35a331b8f/Presentation/PublicationAttachment/99f1169b-83e1-4808-b416-b89427bccd19/Fish_and_Wildlife_Service_Tightens_Restrictions_on_Imports_Under_Endangered_Species_Act.pdf).

84. *See generally id.*

85. *See id.*

86. Kapoor’s arrest and extradition as well as the United States authorities’ 2012 seizures of cultural property valued in excess of \$100 million USD has generated substantial press, largely outside of the United States, which provides a useful background and introduction to the allegations against Kapoor and his associ-

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antiquities looted from temples throughout India, through both his Manhattan gallery and import business, Art of the Past and Nimbus Import/Export.<sup>87</sup>

In December 2013, Art of the Past's manager, Aaron Freedman, pleaded guilty to multiple counts of possession of stolen property in Manhattan Supreme Court and admitted that he, on behalf of Kapoor, arranged for the shipment of stolen antiquities and manufactured false provenances for illicit cultural property.<sup>88</sup> Freedman, who agreed to cooperate with the investigation against Kapoor, has not yet been sentenced.<sup>89</sup>

Kapoor's trial in India, which was scheduled to begin in March 2014, has been repeatedly adjourned.<sup>90</sup> Although Kapoor continues to maintain his innocence, to date, three of the museums that purchased antiquities from Kapoor—the Australia National Gallery, the Art Gallery of New South Wales, and the Toledo Museum of Art—have returned those antiquities to the Indian government, conceding that the objects in question appear to have been stolen.

Australian Prime Minister Tony Abbott returned the two idols that were held by Australian museums to the Indian government in September 2014. In 2008, the Australia National Gallery, located in Canberra, purchased a bronze statue known as Shiva as Lord of the Dance (Nataraja) from Kapoor for US\$5 million.<sup>91</sup> The statue, originating from the Chola dynasty (11–12th century) and from Tamil Nadu in India is now believed to be that of Shiva Nataraja, stolen between 2005 and 2006 from the Brihadeeswara Temple in Sripurathan (approximately 300 km from Chennai).<sup>92</sup> A civil lawsuit filed by the Australia National Gallery against Kapoor is still pending.<sup>93</sup> Prime Minister Abbott also re-

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ates. See, e.g., Damayanti Datta, *Mystery of The Missing Gods*, INDIA TODAY (April 11, 2014), <http://indiatoday.intoday.in/story/brihadeeswara-temple-sripurathan-shiva-nataraja/1/355127.html>; Adam Matthews, *The Man Who Sold the World*, GQ INDIA (Dec. 5, 2013), <http://www.gqindia.com/get-smart/pop-culture/man-who-sold-world>; Narayan Lakshman, *Exposing a Multidecade Smuggling Operation*, THE HINDU (Nov. 11, 2012), <http://www.thehindu.com/news/national/exposing-a-multidecade-smuggling-operation/article4085700.ece>; Jason Felch, *Shiva Goes Home: Australia's Prime Minister Returns Looted Kapoor Idols to India* (Sept. 4, 2014), <http://chasingaphrodite.com/tag/subhash-kapoor/>. For an update on the collection of artwork found in the possession of German national, Cornelius Gurlitt, see the 2014 ABA YIR Europe article.

87. Like many countries with a rich archaeological heritage, India has enacted laws governing trade in its cultural patrimony. Specifically, Indian law prohibits the export of cultural property created more than 100 years ago. See Antiquities and Art Treasures Act of 1972, Act. No. 52 of 1972, available at [http://asi.nic.in/pdf\\_data/8.pdf](http://asi.nic.in/pdf_data/8.pdf)

88. Tom Mashberg, *Assistant to Accused Antiquities Smuggler Pleads Guilty*, N.Y. TIMES (Dec. 3, 2013, 10:09 PM), [http://artsbeat.blogs.nytimes.com/2013/12/04/assistant-to-accused-antiquities-smuggler-pleads-guilty-to-possession-looted-items/?\\_r=1](http://artsbeat.blogs.nytimes.com/2013/12/04/assistant-to-accused-antiquities-smuggler-pleads-guilty-to-possession-looted-items/?_r=1).

89. See *id.*

90. See Michaela Boland, *Subhash Kapoor's Dancing Shiva Plea to Attorney General George Brandis*, THE AUSTRALIAN (Oct. 28, 2014 12:00 AM), <http://www.theaustralian.com.au/arts/visual-arts/subhash-kapoors-dancing-shiva-plea-to-attorneygeneral-george-brandis/story-fnm1cx8m-1227104068555>; see also *Australia Returns Two Stolen Ancient Priceless Idols to India*, IBN LIVE, (Sept. 5, 2014 10:59 AM), <http://ibnlive.in.com/news/australia-returns-two-stolen-ancient-priceless-idols-to-india/496426-62-128.html>.

91. *India Asks Australian Gallery to Return Stolen Nataraja Idol*, THE HINDU (Mar. 26, 2014), <http://www.thehindu.com/news/international/world/india-asks-australian-gallery-to-return-stolen-nataraja-idol/article5834817.ece>.

92. See Damayanti Datta, *Mystery of The Missing Gods*, INDIA TODAY (Apr. 11, 2014), <http://indiatoday.intoday.in/story/brihadeeswara-temple-sripurathan-shiva-nataraja/1/355127.html>.

93. Shortly before the Indian government's March 2014 request for repatriation of the statues, in February 2014, the National Gallery commenced a civil action against Art of the Past, Kapoor, and Freedman in New York State Supreme Court. *National Gallery of Australia v. Art of the Past, Inc.*, 650395/2014 (Sup. Ct.

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turned to India a stone Ardhanarishvara, purchased by the Art Gallery of New South Wales from Kapoor in 2004.<sup>94</sup> The statue, which depicts Shiva in half female form, dates to the 10th century and, like the Shiva Nataraja, is alleged to have been stolen from a temple in Tamil Nadu.<sup>95</sup>

In October 2014, the Toledo Museum of Art announced that it would return to the Indian government a bronze statue of Ganesha, a Hindu deity, purchased from Kapoor in 2006. The museum stated that it began an inquiry into the Ganesha's provenance upon its July 2013 receipt of an Indian police report with photographs of idols stolen from Sripuranthan Village in Tamil Nadu, including an image of a Ganesha figure that closely resembled the Ganesha purchased by the museum from Art of the Past.<sup>96</sup> The museum noted that the Ganesha's provenance, as well as the provenance of other items acquired from Kapoor, appeared to have been falsified.<sup>97</sup> The investigation into Kapoor and his activities continues both in the United States and abroad.

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N.Y.C.). The complaint, which includes claims of fraud, unjust enrichment, and breach of contract in connection with the Museum's purchase of the Shiva Nataraja statue, remains pending. *Id.* According to the electronic docket, none of the defendants have answered the complaint: the plaintiff was granted additional time to serve Kapoor, who remains incarcerated in an Indian prison pending trial, and Freedman's time to answer has been extended several times by stipulation. *Id.*

94. See Sid Maher, *Narendra Modi Says India Deeply Grateful for Return of Stolen Shivas*, THE AUSTRALIAN (Sept. 6, 2014), <http://www.theaustralian.com.au/arts/visual-arts/narendra-modi-says-india-deeply-grateful-for-return-of-stolen-shivas/story-fn9d3avm-1227049811026>; see also *Australian PM Tony Abbott Returns 11th Century Stolen Idols to Modi*, THE TIMES OF INDIA (Sept. 5, 2014), <http://timesofindia.indiatimes.com/india/Australian-PM-Tony-Abbott-returns-11th-century-stolen-idols-to-Modi/articleshow/41807643.cms>.

95. See *Australian PM Tony Abbott Returns 11th Century Stolen Idols to Modi*, *supra* note 94.

96. See *Kapoor Acquisitions*, TOLEDO MUSEUM OF ART, <http://www.toledomuseum.org/provenance/kapoor-acquisitions/>.

97. *Id.*; see also M. Kalyanaraman, *Stolen Ganesha in US to Return Soon*, THE TIMES OF INDIA (Oct. 4, 2014 7:05 AM), <http://timesofindia.indiatimes.com/city/chennai/Stolen-Ganesha-in-US-to-return-soon/articleshow/44279190.cms>; Roneisha Mullen, *Bronze Statue on Display at Toledo Museum of Art Being Returned to Government of India*, TOLEDO BLADE (Oct. 2, 2014), <http://www.toledoblade.com/Art/2014/10/02/1-000-year-old-statue-on-display-at-Toledo-Museum-of-Art-being-returned-to-Government-of-India.html>; Jason Felch, *Trouble in Toledo: Feds Investigate Stolen Ganesha, Other Objects from Kapoor at Toledo Museum*, CHASING APHRODITE (Feb. 24, 2014), <http://chasingaphrodite.com/2014/02/24/trouble-in-toledo-documents-show-museum-bought-stolen-ganesh-from-kapoor/>.

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## **International Environmental Law**

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### **I. Atmosphere and Climate**

#### A. CLIMATE

Heads of state gathered at the United Nations in New York in September for a global summit to address climate change.<sup>1</sup> While the meeting did not lead to legally-binding commitments, numerous countries' pledges helped shift the momentum towards multilateral collaboration at the Twentieth Session of the Conference of the Parties to the U.N. Framework Convention on Climate Change (UNFCCC) (COP-20) and its associated bodies, which met in December.<sup>2</sup> COP-20 advanced efforts to secure a new climate agreement in 2015, principally by garnering agreements to work from a draft text as the basis of

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\* Any views or opinions expressed in this report are those of the authors in their personal capacities and do not represent the views of their organizations, including the Department of State or the U.S. Government. This report is jointly submitted on behalf of the International Environmental Law Committee of the ABA Section on International Law (SIL) and the International Environmental and Resources Law Committee of the Section on Environment, Energy, and Resources Law (SEER) by Vice-Chairs and Co-Editors Kristen Hite, who also contributed to the climate change section and Joseph W. Dellapenna, Professor of Law, Villanova University, who also contributed the section on water resources. Stephanie Altman, Attorney Advisor in the Office of General Counsel, International Law Section, National Oceanic and Atmospheric Administration (NOAA), contributed on marine environmental protection. Derek Campbell, Attorney-Advisor, Office of General Counsel, International Law Section, NOAA, contributed on marine conservation and trade and the environment. David N. Cassuto, Professor of Law, Pace University, contributed on biodiversity and wildlife. Royal Gardner, Professor of Law and Director, Institute for Biodiversity Law and Policy, Stetson University College of Law, contributed on the Ramsar Convention. David Gravalles, Attorney-Advisor in the Office of the Legal Adviser, U.S. Department of State, contributed on ozone. Richard A. Horsch, a Partner with White & Case LLP, contributed on hazardous waste. Thomas Parker Redick, with Global Environmental Ethics Counsel, contributed on international regulation of biotechnology. R. Justin Smith, Assistant Chief, Law and Policy Section, Environment and Natural Resources Division, U.S. Department of Justice, contributed on international environmental litigation.

1. *UN Climate Summit 2014*, UNITED NATIONS (Sept. 23, 2014), <http://www.un.org/climatechange/summit/>.

2. *Lima Climate Change Conference – December 2014*, UNITED NATIONS (Dec. 2014), [http://unfccc.int/meetings/lima\\_dec\\_2014/meeting/8141.php](http://unfccc.int/meetings/lima_dec_2014/meeting/8141.php).



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negotiations. Countries made additional agreements regarding the scope of “intended nationally determined contributions” on adaptation and mitigation efforts for the years following 2020.<sup>3</sup> Discussions on loss and damage are also advancing, and countries are now in the process of identifying activities, needs, best practices, and analytical tools to address those climate impacts for which adaptation measures are insufficient. In terms of climate finance, a total of \$10 billion has now been pledged to the Green Climate Fund,<sup>4</sup> which is formally constituted with a secretariat based in South Korea and whose governing policies are becoming operational.

**B. OZONE**

At the Twenty-sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (MOP-26)<sup>5</sup> in Paris, the Parties again considered a proposal by the United States, Canada, and Mexico to amend the Protocol to phase down the production and consumption of hydrofluorocarbons (HFCs). HFCs are potent greenhouse gases used as alternatives to chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), which are being phased out under the Montreal Protocol. The proposed HFC phase-down would take place in gradual steps between 2018 and 2035 for developed countries, and between 2020 and 2045 for developing countries.<sup>6</sup> The phase-down would have large climate mitigation potential—more than ninety billion metric tons of CO<sub>2</sub>-equivalent through 2050, or roughly two years of current anthropogenic emissions of all greenhouse gases.<sup>7</sup>

At MOP-26, proponents of the phase-down amendment sought establishment of a contact group, the mechanism typically used by Parties to negotiate significant issues. Despite high-level diplomatic efforts by the United States and its partners, strong opposition by Pakistan, Iran, and India prevented the Parties from reaching consensus on the formation of a contact group. During the debate, opponents expressed a range of concerns, including the availability of alternatives to HFCs in high ambient temperature conditions, the difficulty of taking on a phase-down of HFCs while simultaneously phasing out HCFCs, and the availability of financial assistance. Some also argued that HFCs must be addressed only under the UNFCCC and its Kyoto Protocol, and not under the Montreal Protocol, because HFCs are not ozone-depleting substances.<sup>8</sup> Proponents countered that Article 2(b)(2) of the Vienna Convention for the Protection of the Ozone Layer, to which the Montreal Protocol is attached, states that “Parties shall . . . co-operate in harmonizing

3. *What Is An INDC?*, World Resources Institute, <http://www.wri.org/indc-definition>.

4. Mat Hope, *Briefing: Country Pledges to the UN's Green Climate Fund*, THE CARBON BRIEF (Dec. 10, 2014), <http://www.carbonbrief.org/blog/2014/11/briefing-country-pledges-to-the-green-climate-fund/>.

5. U.N. Environment Programme, *Report of the Tenth Meeting of the Conference of the Parties to the Vienna Convention for the Protection of the Ozone Layer and the Twenty-Sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, ¶ 113, U.N. Doc. UNEP/OzL.Conv.10/7 (Dec. 10, 2014) [hereinafter *Joint Meeting Report*].

6. *Id.* at 3.

7. . . *Id.*

8. See Joint Tenth Meeting of the Conference of the Parties to the Vienna Convention and Twenty-Sixth Meeting of the Parties to the Montreal Protocol, Paris, France, Nov. 17-21, 2014, Report for the Protection of the Ozone and on Substances that Deplete the Ozone Layer, ¶¶ 124-26, 131-32, U.N. Doc. UNEP/OzL.Conv.10/7-UNEP/OzL.Pro.26/10 [hereinafter *Joint Meeting Report*].

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appropriate policies” associated with controlling ozone depleting substances.<sup>9</sup> They argued that such harmonization can include managing substitutes for CFCs and HCFCs, such as HFCs. Proponents also pointed to Article III of the proposed amendment, which explicitly states that the amendment would not exempt HFCs from the coverage of the UNFCCC or the Kyoto Protocol.<sup>10</sup>

In the end, the Parties agreed to hold a special Open-Ended Working Group meeting on all issues related to HFC management and a two-day technical workshop focused on HFC alternatives in high ambient temperature conditions in April 2015 in Bangkok, Thailand. The Parties also approved the full critical use exemption requested by the United States for methyl bromide, an ozone-depleting substance that is used as an agricultural fumigant.<sup>11</sup>

## **II. Marine Environment and Conservation**

### **A. MARINE ENVIRONMENTAL PROTECTION**

In 2014, efforts to improve the conservation of sharks continued in international fisheries fora, with mixed results. At the global level, the U.N. General Assembly, through its 2014 Sustainable Fisheries Resolution, renewed calls for action to conserve sharks.<sup>12</sup> Accordingly, a number of regional fisheries management organizations (RFMOs) considered requiring such actions. In November, the Northeast Atlantic Fisheries Commission (NEAFC) became the first RFMO to adopt a measure to prohibit the removal of shark fins at sea.<sup>13</sup> Other RFMOs (the Commission for the Conservation of Arctic Marine Living Resources, Indian Ocean Tuna Commission, International Commission for the Conservation of Atlantic Tunas, Inter-American Tropical Tuna Commission, and Northwest Atlantic Fisheries Organization), however, could not reach agreement on the adoption of similar proposed requirements.

On April 3, the U.S. Senate agreed to resolutions of advice and consent to ratification of four international fisheries agreements: (1) the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing,<sup>14</sup> the first binding global instrument specifically designed to combat such fishing; (2) the Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries,<sup>15</sup> which will bring the Convention in line with modern international fisheries governance approaches through provisions for the application of the precautionary ap-

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9. Vienna Convention for the Protection of the Ozone Layer art. 2 (2)(b), Sept. 22, 1988, 1513 U.N.T.S. 293.

10. U.N. Environment Programme, *Proposed Amendment to the Montreal Protocol Submitted by Canada, Mexico, and the United States of America: Frequently Asked Questions*, ¶ 2-3, U.N. Doc. UNEP/OzL.Pro/26/INF/6 (Nov. 4, 2014) [hereinafter *Amendments*].

11. *Joint Meeting Report*, *supra* note 9, at Dec. XXVI/6.

12. G.A. Res. 68/71, ¶ 15, U.N. Doc. A/RES/68/71 (Feb. 25, 2014).

13. . See Report of the 33rd Annual Meeting of the NEAFC: Annexes, Recommendation 10:2015: Recommendation on Conservation of Sharks Caught in Association with Fisheries Managed by the North-East Atlantic Fisheries Commission (Nov. 10-14, 2014).

14. S. Treaty Doc. No. 112-4 (2011). Agreement on Port State Measures to Prevent, Deter, & Eliminate Illegal, Unreported, & Unregulated Fishing, Nov. 22, 2009, S. TREATY DOC. NO. 112-4 (2011).

15. S. Treaty Doc. No. 113-3 (2013). Amendment to the Convention on Future Multilateral Cooperation in the Nw. Atl. Fisheries, Sept. 28, 2007, S. TREATY DOC. NO. 113-3 (2013); *see also* Convention on Future

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proach and ecosystem approaches; (3) agreements establishing the North Pacific Fisheries Commission;<sup>16</sup> and (4) the South Pacific Regional Fisheries Management Organisation,<sup>17</sup> which fill gaps in international management over a broad range of species on the high seas in the Pacific and which provide a framework to protect vulnerable marine ecosystems on biodiverse seamounts.

On June 17, U.S. President Barack Obama issued a Presidential Memorandum on *Establishing a Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud*.<sup>18</sup> The Memorandum states that it is U.S. policy to combat such activities by improving the transparency and traceability of the seafood supply chain. Through the memorandum, President Obama established a Presidential Task Force of interested federal agencies that shall report to the President “with recommendations for the implementation of a comprehensive framework of integrated programs to combat IUU fishing and seafood fraud,” by identifying opportunities to address these issues at the international level through the RFMOs, as well as bilateral efforts, such as technical assistance and capacity building for foreign countries.<sup>19</sup>

In June, the U.S. State Department hosted the “Our Ocean” Conference,<sup>20</sup> an international two-day conference that brought together heads of state, scientists, policy makers, and entrepreneurs from almost ninety countries. Led by Secretary of State John Kerry, the conference focused on three principal threats to the ocean—marine pollution, acidification, and overfishing—and resulted in an array of outcomes valued at over \$3.8 billion as well as new commitments to protect more than three million square miles of the ocean.<sup>21</sup>

In response to the changing environment and increase of shipping in the Arctic and Antarctic, in November, the International Maritime Organization (IMO) adopted Part I (safety measures) of the International Code for Ships Operating in Polar Waters (Polar Code), an agreement intended to govern all aspects of polar shipping, including safety, crewing, navigation, voyage planning, and environmental protection.<sup>22</sup> Part II of the Polar Code, which focuses on pollution prevention from ships, is scheduled to be adopted by the IMO’s Marine Environmental Protection Committee in May 2015. Under the IMO’s tacit amendment process, the Polar Code is scheduled to enter into effect on January 1, 2017, through amendments to existing IMO Conventions, namely the Safety of Life at

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Multilevel Cooperation in Northwest Atlantic Fisheries, NAFO, *available at* <http://www.nafo.int/about/overview/governance/convention.pdf>.

16. S. Treaty Doc. No. 113-2 (2013). Convention on the Conservation & Mgmt. of High Seas Fisheries Res. in the N. Pac. Ocean, May 2, 2012, S. TREATY DOC. NO. 113-2 (2013); *Background*, N. Am. Fisheries Comm’n, <http://nwpbfo.nomaki.jp/> (last visited Feb. 13, 2015).

17. S. Treaty Doc. No. 113-1 (2013). Convention on the Conservation & Mgmt. of High Seas Fishery Res. in the S. Pac. Ocean, Nov. 14, 2009, S. TREATY DOC. NO. 113-1 (2013); S. PAC. REG’L FISHERIES MGMT. ORG., <http://www.southpacificrfmo.org/> (last visited Feb. 15, 2015).

18. . Press Release, Office of the Press Secretary, The White House, Presidential Memorandum—Comprehensive Framework to Combat Illegal, Unreported, and Unregulated Fishing and Seafood Fraud (June 17, 2014).

19. *Id.*

20. Press release, Office of the Spokesperson, U.S. State Dep’t, Secretary Kerry’s State Department Ocean Conference Results in \$1.8 Billion in Pledges (June 17, 2014).

21. *Id.*

22. Press Release, IMO, IMO Adopts Mandatory Code for Ships Operating in Polar Waters (Nov. 21, 2014).

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Sea Convention and the International Convention for the Prevention of Pollution from Ships. Notably, both the environment and safety chapters of the Polar Code include a number of regulations intended to protect and preserve polar marine ecosystems from the impacts of international shipping activities. Chief among these include: (1) a ban on the discharge of oil and oily mixtures and noxious liquid substances into the sea from ships—with some exceptions; (2) heightened regulations for the discharge of garbage and sewage; and (3) enhanced voyage planning criteria that consider local ecology and wildlife.<sup>23</sup>

B. MARINE CONSERVATION

1. *Antarctic Marine Protected Areas*

The Commission for the Conservation of Antarctic Marine Living Resources, at its October annual meeting in Australia, once again rejected two proposals to establish marine protected areas (MPAs) in waters around Antarctica, namely the Ross Sea Region MPA and the East Antarctic Representative System of MPAs. The first was for the Ross Sea Region MPA, intended to establish 1.34 million square kilometers “to conserve living marine resources; maintain ecosystem structure and function; protect vital ecosystem processes and areas of ecological significance; and establish reference areas that will promote scientific research.”<sup>24</sup> The second was a proposal to establish the East Antarctic Representative System of MPAs.<sup>25</sup> Although both proposals were widely supported, several members requested additional time to consider issues associated with the sizes of the proposed areas and the proposed duration of the MPAs.

2. *Caspian Sea*

The Protocol for the Conservation of Biological Diversity to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Ashgabat Protocol) was adopted and signed at the Fifth Meeting of the Conference of the Parties in Ashgabat, Turkmenistan, on May 30.<sup>26</sup> As the first regional legally-binding instrument

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23. Press Release, IMO, Draft Polar Code Approved by IMO's Marine Environment Protection Committee (Oct. 20, 2014).

24. A Proposal for the Establishment of a Ross Sea Region Marine Protected Area, from the Delegations of New Zealand and the United States to the Commission for the Conservation of Antarctic Marine Living Resources, CCAMLR Doc. No. CCAMLR-XXXIII/21 (2014). *See also* A Proposal for the Establishment of a Ross Sea Region Marine Protected Area, from the Delegations of New Zealand and the United States to the Commission for the Conservation of Antarctic Marine Living Resources, CCAMLR Doc. No. CCAMLR-SM-II/04 (2013).

25. Proposal for a Conservation Measure Establishing an East Antarctic Representative System of Marine Protected Areas, from the Delegations of Australia, France, and European Union to the Commission for the Conservation of Antarctic Marine Living Resources, at 1, CCAMLR Doc. CCAMLR-XXXIII/23 (2014); *see also* Proposal for a Conservation Measure Establishing an East Antarctic Representative System of Marine Protected Areas, from the Delegations of Australia, France, and European Union to the CCAMLR, at 1, CCAMLR Doc. No. CCAMLR-XXXII/34 Rev. 1 (2013) (a system of seven marine protected areas to, among other things, “(i) conserv[e] areas of biodiversity that help meet objectives for comprehensiveness, adequacy and representativeness, (ii) provid[e] reference areas for determining the effects of fishing and for estimating change[s] in productivity and dynamics of Southern Ocean ecosystems, and (iii) provid[e] refuge for larval krill and juvenile toothfish”).

26. . The Protocol for the Conservation of Biological Diversity (“Ashgabat Protocol”), May 30, 2014, [hereinafter *Ashgabat Protocol*].

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signed by all five Caspian littoral states, the Framework Convention for the Protection of the Marine Environment of the Caspian Sea serves as an overarching framework setting forth the general requirements and the institutional mechanism for environmental protection in the Caspian region. The objective of the Ashgabat Protocol is to protect, preserve, and restore the health and integrity of the biological diversity of the Caspian Sea by (1) safeguarding “threatened species, and vulnerable ecosystems, to ensure their long-term viability and diversity;” (2) preventing the “decline, degradation, and damage to species, habitats and ecological systems, directed by the precautionary principle;” and (3) protecting and conserving “those areas that best represent the high range of species, special habitats [and] ecological systems.”<sup>27</sup> Contracting Parties are required to designate protected areas in the marine environment that are critical to the survival, reproduction, and recovery of biological diversity in the Caspian Sea.<sup>28</sup>

3. *Sargasso Sea*

In March 2014, the governments of the United States, United Kingdom, Monaco, and Azores and Bermuda gathered in Bermuda to sign the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea,<sup>29</sup> a non-binding political statement aimed at conserving the Sargasso Sea ecosystem—a vast patch of mid-Atlantic Ocean known for its unique floating seaweeds that harbor rich biodiversity. The first of its kind, the declaration establishes the Sargasso Sea Commission, a stewardship body intended to encourage and facilitate future efforts to protect the Sargasso Sea ecosystem from human impacts such as shipping, overfishing, and marine pollution. The agreement seeks protection for the Sargasso Sea—a large patch of the mid-Atlantic Ocean known for its floating Sargassum seaweed—using existing international bodies that regulate areas beyond national jurisdiction, such as regional fisheries management organizations, the International Maritime Organization, and the Convention on Migratory Species.<sup>30</sup> The parties agreed to hold a regular Meeting of Signatories and to endorse the establishment of a Sargasso Sea Commission to encourage and facilitate voluntary collaboration toward the conservation of the Sargasso Sea.<sup>31</sup> The Sargasso Sea Commission has no management authority but will exercise a stewardship role and will keep the region’s health, productivity, and resilience under continual review.

### III. International Hazard Management

#### A. TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE

Building on the “Geneva Statement,” which articulated an approach to implementing the Basel Convention in conjunction with the Rotterdam<sup>32</sup> and Stockholm Conventions,<sup>33</sup>

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27. *Id.* at art. 2.

28. *Id.* at art. 9 (1).

29.

30. *Id.*

31. *Id.* at ¶ 5.

32. U.N. Environment Programme, *Conference on the Plenipotentiaries on the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, U.N. Doc. UNEP/FAO/PIC/CONF/5 (Sept. 17, 1988)

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the bureaus for the three conventions met to prepare for the meetings of all three conventions, which will take place in Geneva, Switzerland in May 2015.<sup>34</sup>

The intercessional work of the Basel Convention also saw developments on environmentally sound management (ESM), progress on the development of guidelines for the management of wastes containing or contaminated with persistent organic pollutants (POPs), and the issuance for comment of revised draft technical guidelines on e-waste.

At its second meeting in Jakarta, Indonesia from May 29 to 31, the Basel Convention's Expert Working Group on ESM<sup>35</sup> approved three pilot projects in Egypt, Madagascar, and Tanzania; made progress on the development of waste stream fact sheets; and advanced the compilation of training material and information on ESM as well as the compilation of information on private sector incentives.<sup>36</sup> The Parties continued to express differing views as to the best approach for ESM; some Parties favored the establishment of some level of minimum criteria to assist developing countries in building capacity, while others expressed concern that the establishment of minimum criteria will remove incentives for the Parties to exceed the minimum.<sup>37</sup>

Work continued on the development of new technical ESM guidelines for wastes containing or contaminated with POPs.<sup>38</sup> On February 28, the Small Intercessional Working Group on POP Wastes promulgated draft technical guidelines that are intended to supersede existing technical guidelines.<sup>39</sup> On November 20, revised draft technical guidelines on e-waste, focusing especially on the distinction of between waste and non-waste—with used equipment being a particularly challenging matter—were issued for comment, with adoption of the final proposed guidelines to be considered during COP-12.<sup>40</sup>

#### B. INTERNATIONAL REGULATION OF AGRICULTURAL BIOTECHNOLOGY

As the rise of biotech crops continued,<sup>41</sup> Member Parties to the 2003 Cartagena Protocol on Biosafety (CPB) to the Convention on Biological Diversity (CBD) adopted regula-

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33. U.N. Environment Programme, *Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants*, UNEP/POPS/CONF/4 (June 4, 2001).

34. Basel Convention, *Preparation of the Reports on Credentials for the Ordinary Meetings of the Conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions* in 2015, U.N. Doc. UNEP/FAO/CHW/RC/POPS/JCOPBUR.4-4 (Nov. 11-12, 2014), available at <http://synergies.pops.int/Decisionmaking/JointBureaux/JointBureauxMeetings/JointBureauxMeeting2014/Overview/tabid/4134/mctl/ViewDetails/EventModID/8751/EventID/527/xmid/12634/language/en-US/Default.aspx>.

35. Basel Convention, *Report of the Expert Working Group on Environmentally Sound Management on the Work of its Second Meeting*, U.N. Doc. UNEP/CHW/CLI-EWG.2/2 (June 5, 2014).

36. *Id.*

37. *Id.*

38. Basel Convention, *General Technical Guidelines for the Environmentally Sound Management of Wastes Consisting of, Containing or Contaminated with Persistent Organic Pollutants (POPs)*, Draft U.N. Doc. UNEP/CHW/POPS/SUBM/Canada, (Feb. 28, 2014) [hereinafter *POP Guidelines*].

39. *Id.*

40. Basel Convention, *Draft Technical Guidelines on Transboundary Movements of Electronic and Electrical Waste and Used Electrical and Electronic Equipment, in Particular Regarding the Distinction Between Waste and Non-waste Under the Basel Convention*, U.N. Doc. UNEP/CHW/EWASTE/TGs/Draft (Nov. 20, 2014) (For options on used equipment, see ¶ 26.).

41. *ISAAA Brief 44-2012: Executive Summary - Global Status of Commercialized Biotech/GM Crops: 2013*, INT'L SVC. FOR THE ACQUISITION OF AGRICULTURAL BIOTECH APPLICATIONS (2014), <http://www.isaaa.org/resources/publications/briefs/46/executivesummary/default.asp>.

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tory approval requirements (both for planting and food-feed-processing import approvals). The CPB now has 169 parties, while the 2010 Nagoya-Kuala Lumpur Supplemental Protocol (NKLS Protocol), with twenty-seven parties on liability, remains short of the ratifications needed to enter into force.<sup>42</sup>

Since November 2013, trade in corn from the United States to China has been disrupted, costing several billion dollars. China's decision to stop U.S. corn shipments due to an unapproved genetic event produced by Syngenta has led to filing of litigation in the United States by grain traders and growers (the latter in class actions).<sup>43</sup>

#### IV. Chemicals

As of November, the Minamata Convention on Mercury<sup>44</sup> has ten parties and 128 signatures.<sup>45</sup> The treaty's purpose is to control products, processes, and industries using mercury, as well as mercury mining, international trade, and safe storage and disposal of mercury waste. Minamata Convention Article 13 addresses financial resources and includes a mechanism that the parties established to provide "adequate, predictable, and timely financial resources" to developing country parties and country parties with economies in transition.<sup>46</sup> In addition, each party agreed, within its capabilities, to provide resources for national activities.<sup>47</sup> The new U.N. Special Rapporteur on Human Rights and Toxics, Baskut Tuncak, pressed nations to ratify the Minamata Convention without delay.<sup>48</sup>

Europe's regulation of chemicals under its Registration, Evaluation, Authorization, and Restriction of Chemicals law added nine new substances. The European Union (EU) updated directives on waste electrical and electronic equipment, with an expected five-fold increase in e-waste collections. Depending on which goal member states choose to adopt, they must collect forty-five percent in 2016, sixty-five percent of equipment sold or eighty-five percent of electronic waste generated by 2019.<sup>49</sup>

The EU is also adding more types of equipment covered under the disclosure-reduction mandate under its Reduction of Hazardous Substance 2 (RoHS 2). Additional categories

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42. *Parties to the Protocol and Signature and Ratification of the Supplementary Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://bch.cbd.int/protocol/parties/#tab=1> (last visited Feb. 13, 2015).

43. . Mae-Wan Ho, *Syngenta Sued for \$1 Billion Damages over China's Rejection of GM Corn as China Halts Its GM Rice and Corn Programmes*, THE PERMACULTURE RESEARCH INSTITUTE (Oct. 14, 2014) <http://permaculturenews.org/2014/10/14/syngenta-sued-1-billion-damages-chinas-rejection-gm-corn-china-halts-gm-rice-corn-programmes/>.

44. *Minamata Convention on Mercury, Texts and Annexes*, UNITED NATIONS ENVIRONMENT PROGRAMME, Oct. 2013 [hereinafter *Minimata Convention*].

45. *Minamata Convention on Mercury*, UNITED NATIONS ENVIRONMENT PROGRAMME, <http://www.mercuryconvention.org/Countries/tabid/3428/Default.aspx> (last visited Nov. 25, 2014).

46. 46. *Id.*

47. *Id.*

48. John Knox, *Special Rapporteur on Toxics Urges Governments to Ratify Minamata Convention*, UNITED NATIONS MANDATE ON HUMAN RIGHTS AND THE ENVIRONMENT (Oct. 31, 2014), <http://ieenvironment.org/2014/10/31/1967/> (Mr. Tuncak stated, "A delay in ratifying the Convention means that people and the environment will continue to suffer the human rights impacts of mercury pollution." *Id.*

49. James Murray, *EU Revamps E-waste Rules with Demanding New Recovery Targets*, THE GUARDIAN (Oct. 14, 2012), <http://www.theguardian.com/environment/2012/aug/14/eu-waste>.

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(such as medical devices and control equipment) took effect in July of 2014.<sup>50</sup> The implementation of these laws by member states may result in stricter RoHS laws, complicating compliance and impacting trade.

## V. Natural Resources

### A. WATER

Global water problems have been brewing for several years and a full-blown global water crisis emerged in 2014, with at least one-third of the planet suffering severe water shortages.<sup>51</sup> The crisis is driven, to some extent, by increasing climate disruption.<sup>52</sup> More frequent international disputes and talk of water “conflicts”—ranging from minor criticisms to the possibility of all-out war—abound.<sup>53</sup> International law provides an essential, but insufficient and only partial response; whether international law is up to the challenge is an open question.<sup>54</sup>

Potentially the most important development in international water law occurred on May 19, when Vietnam deposited its ratification of the UN Convention on the Law of Non-Navigational Uses of International Watercourses<sup>55</sup> with the Secretary-General of the United Nations,<sup>56</sup> enabling the Convention to enter into force some seventeen years after its approval by the U.N. General Assembly. Many view this convention as a reflection of customary international water law.

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50. Victoria Fraza Kickham, *RoHS 2 Creeps Up on the Industry*, GLOBAL PURCHASING (Feb. 8, 2013), <http://globalpurchasing.com/features/rohs-2-creeps-industry>.

51. See, e.g., *Central America Hit by Severe Drought*, N.Y. TIMES, Aug. 30, 2014, at A9; J.S. Famiglietti, *The Global Groundwater Crisis*, 4 NATURE CLIMATE CHANGE 945 (2014); Michael Field, *Pacific Nations Facing Drought*, PRESS (N.Z.), Sept. 25, 2014, at 6; Ian Lovett, *Forceful Steps Amid a Severe Drought*, N.Y. TIMES, July 16, 2014, at A16; Jim Malewitz, *Drought Hastens End of a Region's Hydropower Era*, N.Y. TIMES, Mar. 8, 2014, at A29A; Caroline Stauffer, *Water Shortage Takes Toll on Brazil*, CHI. TRIB., Nov. 2, 2014, at 22; Michael Wines, *West's Drought and Growth Intensify Conflict over Water Rights*, N.Y. TIMES, Mar. 17, 2014, at A1.

52. See, e.g., Arun Rana et al., *Impact of Climate Change on Rainfall over Mumbai Using Distribution -Based Scaling of Global Climate Model Projections*, 1 J. HYDROLOGY: REGIONAL STUD. 107 (2014); Furat A.M. Al-Faraj et al., *Sensitivity of Surface Runoff to Drought and Climate Change: Application for Shared River Basins*, 6 WATER 3033 (2014); Tribeni C. Sharma & Umed S. Panu, *Modeling of Hydrological Drought Durations and Magnitudes: Experiences on Canadian Streamflows*, 1 J. HYDROLOGY: REGIONAL STUD. 92 (2014).

53. See, e.g., BENJAMIN POHL ET AL., *THE RISE OF HYDRO-DIPLOMACY: STRENGTHENING FOREIGN POLICY FOR TRANSBOUNDARY WATERS* (2014); WATER AND POST-CONFLICT PEACEBUILDING (Erika Weinthal, Jessica Troell, & Mikiyasu Nakayama eds. 2014); Jason Bart, *Weaponizing Water: Water and Energy as Sources of Conflict among the Central Asian Soviet Successor States*, 22 MICH. ST. INT'L L. REV. 409 (2013); Bellie Sivakumar, *Water Crisis: From Conflict to Cooperation—An Overview*, 56 HYDROLOGICAL SCI. J. 531 (2011); John Vidal, *Water Supply Key to Outcome of Conflicts in Iraq and Syria, Experts Warn*, THE GUARDIAN, (July 2, 2014), <http://www.theguardian.com/environment/2014/jul/02/water-key-conflict-iraq-syria-isis>; Thomas Bernauer & Tobias Böhmelt, *Can We Forecast Where Water Conflicts Are Likely to Occur?*, NEW SECURITY BEAT (Oct. 27, 2014), <http://www.newsecuritybeat.org/2014/10/forecast-water-conflicts-occur/>.

54. Joseph W. Dellapenna et al., *Thinking about the Future of Global Water Governance*, 18 ECOLOGY & SOC'Y 28 (2013).

55. *UN Convention on the Law of Non-Navigational Uses of International Watercourses*, G.A. Res. 51/229/Report of the Sixth Committee Convening as the Working Group of the Whole, approved by the General Assembly, May 21, 1997, U.N. Doc. No. A/51/869, reprinted in 36 INT'L LEGAL MAT'LS 700 (1997).

56. *UN Convention on the Law of Non-Navigational Uses of International Watercourses: Viet Nam Accession*, G.A. Res. 51/229, U.N. Doc. A/51/49, Ref. C.N.270.2014.TREATIES-XXVII-21 (May 19, 2014).

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Regarding international litigation, Costa Rica and Nicaragua have continued their ongoing disputes before the International Court of Justice (ICJ) over riparian rights and activities centering on the San Juan River. In 2014, the ICJ declined to issue provisional measures to preserve the status quo based on the absence of proof of threat of irreparable harm to Nicaragua from Costa Rica's activities.<sup>57</sup>

Waters along the U.S.-Canada border were the focus of considerable legal attention in 2014. Negotiations resulting from the reopening of the Columbia River Treaty continued.<sup>58</sup> The International Joint Commission grappled with issues on the quantity and quality of the Great Lakes. Algae blooms poisoning the water supply for Toledo, Ohio<sup>59</sup> received considerable attention.<sup>60</sup> Litigation failed to protect the lakes from the impending arrival of Asian carp and has left local officials with few options.<sup>61</sup> Meanwhile, the alarming decline in the water levels seems to have reversed, in part because of prolonged freezing that lasted until June in some areas.<sup>62</sup>

On the other U.S. border, drought is emptying Lake Mead and challenging existing arrangements within the United States and Mexico.<sup>63</sup> Despite tensions associated with a partially successful suit by the Navajo Nation over the tribe's water rights in the Colorado basin,<sup>64</sup> California and Mexico signed a memorandum of understanding to cooperate on energy and climate disruptions.<sup>65</sup>

In the Nile basin, Egypt, Ethiopia, and Sudan turned towards negotiations,<sup>66</sup> although the ultimate outcome still remains uncertain.<sup>67</sup> Egypt was pressured toward negotiations not only by its internal problems, but also by the slow but steady consolidation of mutual support in the upper basin states through the Cooperative Framework Agreement on the

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57. Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), 2013 I.C.J. 39 (Dec. 13).

58. See, e.g., Sonya Baskerville et al., *The Columbia River Treaty at 50: Looking Back, Looking Ahead*, 45 Trends 13 (July/Aug. 2014), available at [http://www.americanbar.org/publications/trends/2013-14/july-august-2014/the\\_columbia\\_river\\_treaty\\_50\\_looking\\_back\\_looking\\_ahead.html](http://www.americanbar.org/publications/trends/2013-14/july-august-2014/the_columbia_river_treaty_50_looking_back_looking_ahead.html); *The Columbia River Treaty: Salmon en Route*, THE ECONOMIST (June 7, 2014).

59. See Emma G. Fitzsimmons, *Tap Water Ban Continues for Toledo Residents*, N.Y. TIMES, Aug. 4, 2014, at A12.

60. See Int'l Joint Comm'n, A Balanced Diet for Lake Erie (: REDUCING PHOSPHORUS LOADINGS AND HARMFUL ALGAL BLOOMS, A REPORT OF THE Lake Erie Ecosystem Priority (2014), available at <http://www.ijc.org/files/publications/2014%20IJC%20LEEP%20REPORT.pdf>; Josh Knights, *Solving Phosphorous Woes in Lake Erie Is Within Reach*, CLEVE. PLAIN DEALER, Aug. 17, 2014, at E8; Michael Wines, *EPA Unveils Second Phase of Plan to Reverse Great Lakes Drainage*, N.Y. TIMES, Sept. 25, 2014, at A27.

61. See Jim Lynch, *State Debates Next Steps against Asian Carp after Law Suit to Raise Barrier Is Dismissed*, DET. NEWS, July 16, 2014, at A6.

62. See, e.g., Leslie Armstrong, *Bitter Winter a Boon for the Lakes*, TOR. STAR, Aug. 15, 2014, at A6; Julie Bosman, *Creeping up on Unsuspecting Shores: The Great Lakes in a Welcome Turnaround*, N.Y. TIMES, June 29, 2014, at A16.

63. See, e.g., Michael Wines, *Colorado River Drought Forces a Painful Reckoning for States*, N.Y. TIMES, Jan. 6, 2014, at A1.

64. Julie Turkewitz, *Navajos to Get \$554 Million to Settle Suit against U.S.*, N.Y. TIMES, Sept. 25, 2014, at A16.

65. Chris Megerian, *Brown Signs Climate Pact with Mexico*, L.A. TIMES, July 29, 2014, at 1.

66. *Egyptian-Ethiopian Cooperation Continues*, AL-AHRAM WEEKLY (EGYPT) (Nov. 7, 2014 *Where Did Egypt's "We Are Happy" Stance Come from All of a Sudden?*), available at <http://www.thereporterethiopia.com/index.php/opinion/viewpoint/item/2548-where-did-egypts-%E2%80%9Cwe-are-happy%E2%80%9D-stance-come-from-all-of-a-sudden>.

67. Jacey Fortin, *Dam Rising in Ethiopia Stirs Hope and Tensions*, N.Y. TIMES, Oct. 12, 2014, at A14.

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Nile<sup>68</sup> as well as the splitting of Sudan. The new nation of South Sudan is not committed to the Egyptian-Sudanese partnership on the Nile.<sup>69</sup> Egypt completed a newly negotiated agreement with Chad, Libya, and Sudan on the waters of their shared Nubian Sandstone Aquifer.<sup>70</sup> Jordan, facing increasing demand and limited water supplies,<sup>71</sup> joined Israel and Palestine to obtain funding from the World Bank for Phase 1 of the Red Sea-Dead Sea Water Conveyance.<sup>72</sup> Phase 1 is to provide desalinated water for Jordan; it is unclear if Phases 2 and 3 will ever be authorized.

In the absence of effective international cooperation among the central Asian states, the Aral Sea is now virtually gone.<sup>73</sup> Meanwhile, the Mekong Commission continues to be ineffectual, with potentially disastrous results.<sup>74</sup>

**B. BIOLOGICAL RESOURCES AND WILDLIFE**

*1. Invasive and Alien Species*

On October 22, the EU Parliament enacted legislation aiming to prevent and manage the introduction and spread of invasive alien species.<sup>75</sup> The new law prohibits the possession, breeding, transportation, and release of invasive alien species.<sup>76</sup> The act also directs member states to take all necessary steps to prevent the unintentional introduction or spread of invasive alien species.<sup>77</sup>

*2. Migratory Species*

The Eleventh Meeting of the Conference of the Parties to the Convention on Migratory Species (CMS)<sup>78</sup> adopted thirty-one proposals to add species to the CMS's two appendices, significantly improving the conservation status of endangered species such as the polar bear, red-fronted gazelle, Cuvier's beaked whale, hammerhead shark, and reef manta

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68. See, e.g., *Tanzanian Cabinet Ratifies Nile Deal*, NEWSTIME AFRICA (Oct. 7, 2014), <http://www.newstimeafrica.com/archives/35754>. Tanzania became the third to ratify, joining Ethiopia and Rwanda; four are necessary to make the agreement legally binding. *Id.*

69. See Charles L. Katz, *Another Cup at the Nile's Crowded Spigot: South Sudan and Its Nile Water Rights*, 44 GEO. J. INT'L ENVTL. L. 1249 (2013).

70. *Sudan: Chad, Egypt, Libya, and Sudan Agree on Use of Nubian Sandstone Aquifer System*, available at <http://allafrica.com/stories/201309200107.html>.

71. Saad Merayyan & Salwa Mrayyan, *Jordan's Water Resources: Increased Demand with Unreliable Supply*, 3 COMPUTATIONAL WATER, ENERGY, & ENVTL. ENG'NG 48 (2014).

72. Isabel Kershner, *A Rare Middle East Agreement, on Water*, N.Y. TIMES (Dec. 9, 2013).

73. See Anna Nemtsova, *The Aral Sea's Disappearing Act*, THE DAILY BEAST (Oct. 4, 2014), <http://www.thedailybeast.com/articles/2014/10/04/how-russia-destroyed-the-aral-sea.html>.

74. See, e.g., David Roberts, *No More Dams on the Mekong*, N.Y. TIMES (Sept. 3, 2014), <http://www.nytimes.com/2014/09/04/opinion/no-more-dams-on-the-mekong.html?referrer=&r=0>.

75. Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the Prevention and Management of the Introduction and Spread of Invasive Alien Species, 2014 O.J. (L 317/35).

76. *Id.* at art. 7.

77. *Id.*

78. *Press Release*, Convention on the Conservation of Migratory Species of Wild Animals [CMS], Governments Commit to Step up Action for Migratory Animals at UN Wildlife Conference (Nov. 9, 2014) (on file with CMS).

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ray.<sup>79</sup> Additionally, CMS approved Species Action Plans for the Argali sheep, the Pacific loggerhead turtle, and the saker falcon.<sup>80</sup> Beyond these listings, the most substantial agreement adopted at the convention was the Central Asia Migratory Mammal Initiative (CAMI), intended to protect fifteen species<sup>81</sup> from development threats in fourteen countries.<sup>82</sup> Under CAMI, countries and stakeholders must commit to measures designed to eliminate barriers to migration, protect habitat from degradation, and fight poaching and illegal trade.<sup>83</sup>

C. CONVENTION ON BIOLOGICAL DIVERSITY

The Twelfth Meeting of the Conference of the Parties to the CBD (COP-12) was held from October 6-17 in Pyeongchang, South Korea. The focus of the convention was on a midterm review of the implementation of the Strategic Plan for Biodiversity 2011–2020 and the achievement of the Aichi Biodiversity Targets.<sup>84</sup> CBD's review concluded with the adoption of the Gangwon Declaration and Pyeongchang Roadmap, which outline the efforts needed to achieve the Aichi Targets and reaffirms the need for scientific and technical partnerships.<sup>85</sup> Additionally, the Korean Government launched the Forest Ecosystem Restoration Initiative (FERI) to support implementation of Aichi Targets for restoration of protected areas.<sup>86</sup> COP-11 parties also reaffirmed to double total biodiversity-related international financial resource flows to developing countries by 2015 and maintain this level until 2020.<sup>87</sup>

In November, the CBD announced a Memorandum of Understanding with the Pacific Regional Environment Programme for joint implementation of the Pacific Region's Framework for Nature Conservation and Protected Areas in the Pacific Island Region 2014–2020, the CBD Strategic Plan for Biological Diversity 2011–2020 and its Aichi Bi-

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79. *Id.*

80. *Id.*

81. U.N. ENVTL. PROGRAM, CENTRAL ASIAN MAMMALS INITIATIVE: SAVING THE LAST MIGRATIONS occurring in the region).

82. *Id.* at 3 (Eight nations have ratified the Convention (India, Iran, Kazakhstan, Kyrgyzstan, Mongolia, Pakistan, Tajikistan, and Uzbekistan), and another six countries are not yet Parties to CMS (Afghanistan, Bhutan, China, Nepal, Russian Federation, Turkmenistan)).

83. *Id.*

84. Draft Decisions for the Twelfth Meeting of the Conference of the Parties to the Convention on Biological Diversity, U.N. EP/CBD/COP/12/1/Add.2/Rev.1 (Oct. 5, 2014).

85. *Id.*; Conference of the Parties to the Convention on Biological Diversity, Pyeongchang, S. Kor., Oct. 15–16, 2014, *Gangwon Declaration on Biodiversity for Sustainable Development*, available at <http://www.thegef.org/gef/sites/thegef.org/files/gangwon-declaration-revised-13-oct-en.pdf>.

86. Forest Ecosystem Restoration Initiative, U.N. EP/CBD/COP/12/INF/19 (Sept. 29, 2014) [hereinafter "FERI"] (FERI aims to assess the costs and benefits of restoration, identify degraded areas with potential for restoration, fund the implementation of restoration activities, and support the protection of the rights of different forest users).

87. *Press Release*, Secretariat of the Convention on Biological Diversity, Governments Commit to Significant Funding Increase and Accelerated Action to Achieve Biodiversity Targets and Sustainable Development, U.N. Press Release (Oct. 17, 2014).

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odiversity Targets.<sup>88</sup> At the meeting in Korea, the CPB made key decisions relating to testing of shipments for unapproved varieties and socioeconomic risk assessment.

The CBD's 2010 Nagoya Protocol on access to genetic resources entered into force in late 2014 and held its first meeting of the parties in conjunction with the CPB and CBD meetings in Pyeongyang, Korea.

Parties to the CBD and its associated conventions will reconvene in Los Cabos, Mexico in October 2016.

D. WORLD HERITAGE COMMITTEE

In June, the World Heritage Committee (WHC) held its thirty-eighth session in Doha, Qatar. The committee added three natural properties to the World Heritage List: the Okavango Delta, Botswana; the Great Himalayan National Park Conservation Area, India; and the Mount Hamiguitan Range Wildlife Sanctuary, Philippines.<sup>89</sup> In addition, the committee approved extensions to the following listed properties: Bialowiez'a Forest, Wadden Sea, and the protected tropical forests of Calakmul.<sup>90</sup>

Additionally, the International Union for Conservation of Nature held its quadrennial World Parks Congress in November, resulting in pledges from nearly 100 countries. Australia pledged AUD \$14 million for conservation. China pledged to increase land designated as protected areas by twenty percent, Brazil committed to protect five percent of its marine territory, and Madagascar to triple its marine protected areas.<sup>91</sup>

E. RAMSAR CONVENTION

The Ramsar Convention added five new wetlands to its list, the largest of which encompasses over a million hectares.<sup>92</sup> Wetlands included in the list acquire a new status at the national level and are recognized by the international community as having significant value not only for the country (or countries) in which they are located, but for humanity as a whole.

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88. Press Release, *SPREP and CBD Strengthen Commitments to Biodiversity Conservation in the Pacific*, CBD <http://www.cbd.int/doc/press/2014/pr-2014-11-15-sprep-en.pdf>. (last visited Nov. 15, 2014) (on file with UNEP).

89. Convention Concerning the Protection of the World Cultural and Natural Heritage, Doha, Qatar, June 15-25, 2014, *World Heritage Committee Thirty-Eighth Session*, U.N.T.S. 151, 38 COP U.N. ESCO, Doc. WHC-14/38.com/16 (July 7, 2014) [hereinafter "WHC"].

90. WHC, 38 COP U.N. ESCO, WHC-14/38.com/16 (July 7, 2014).

91. *IUCN World Parks Congress 2014 Concludes with 'The Promise of Sydney'*, 2015), <http://biodiversity-lisid.org/news/iucn-world-parks-congress-2014-concludes-with-the-promise-of-sydney/>.

92. See Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11,084, 996 U.N.T.S. 245 (entered into force Dec. 21, 1975) [hereinafter Ramsar Convention]; see also Ramsar Convention, *List of Wetlands of International Importance* (Sept. 11, 2014) (adding Parque Natural Comunal de los Valles del Comapedrosa, Andorra (1,543 ha); Complejo Barra de Santiago, El Salvador (11,519 ha); Les Lacs du Grand Sud neéo-calédonien, France (43,970 ha); Archipel Bolama-Bijagoés, Guinea-Bissau (1,046,950 ha); Songdo Tidal Flat, Republic of Korea (611 ha)).

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F. CITES

At the Sixteenth Meeting of the Conference of Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the parties adopted a new decision requiring permits and certificates confirming the legal and sustainable harvest for the international trade of five shark species and all manta ray species, including their meat, gills, and fins.<sup>93</sup> A listing under CITES Appendix II is designed to ensure that commercial international trade is strictly regulated to ensure its sustainability, legality, and traceability for the long-term survival of the species in the wild.<sup>94</sup> Under CITES, exports and re-exports of the listed species will not be allowed from any of the 180 states parties unless they have been authorized by the designated national authorities.<sup>95</sup>

In 2014, twenty new terrestrial species were added to Appendix III.<sup>96</sup> Appendix III is a list of species included at the request of a Party that already has regulations restricting the import and export of the species, and needs the cooperation of other countries to prevent unsustainable or illegal exploitation.<sup>97</sup> International trade in specimens of species listed in this Appendix is allowed only with the appropriate permits or certificates.<sup>98</sup>

**VI. Litigation**

In March 2014, the ICJ released its much-anticipated decision in the *Whaling in the Antarctic* case.<sup>99</sup> In this dispute, Australia took the position that Japan's take of whales pursuant to its scientific research program in the vicinity of the Antarctic exceeded the scope permissible under Article VIII of the International Convention for the Regulation of Whaling (ICRW).<sup>100</sup>

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93. Appendix II lists species and specimens that are not yet threatened with extinction but which "may become" so if trade in them is not controlled. Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora, *Entry into Force of Amendments to Appendix II*, Notification to the Parties, No. 2014/042 (Sept. 12, 2014) (adding the oceanic whitetip shark (*Carcharhinus longimanus*), scalloped hammerhead shark (*Sphyrna lewini*), great hammerhead shark (*Sphyrna mokarran*), smooth hammerhead shark (*Sphyrna zygaena*), porbeagle shark (*Lamna nasus*), and manta rays (*Manta spp.*)).

94. Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 993 U.N.T.S. 243, art. 2, ¶ 2 [hereinafter CITES].

95. For a list of member countries, visit <http://cites.org/eng/disc/parties/alphabet.php>.

96. CITES, *supra* note 94. *Amendments to Appendix III*, Notification to the Parties, No. 2014/014 (Mar. 26, 2014) (adding Rosewood (*Dalbergia tucurensis*), Blackbuck (*Antelope cervicapra*), Nilgai (*Boselaphus tragocamelus*), Goat (*Capra bircus aegagrus*), Siberian ibex (*Capra sibirica*), Chinkara (*Gazella bennettii*), Bharal (*Pseudois nayaaur*), Indian hog deer (*Axis porcinus*), Indian gray mongoose (*Herpestes edwardsi*), Small Asian mongoose (*Herpestes javanicus*), Striped hyena (*Hyaena byaena*), Kalij pheasant (*Lophura leucomelanos*), Indian peafowl (*Pavo cristatus*), Koklass pheasant (*Pucrasia macrolopha*), Mongolian oak (*Quercus mongolica*) and Manchurian ash (*Fraxinus mandshurica*)); CITES, *Amendment to Appendix III*, Notification to the Parties, No. 2014/051 (Nov. 7, 2014) (Species of Legumes added to Appendix III: *Dalbergia calycina*, *Dalbergia cubilquitzensis*, *Dalbergia glomerata* and *Dalbergia tucurensis*).

97. CITES, *supra* note 94, at art. II, ¶ 3.

98. *Id.* at art. V.

99. *Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening)*, Judgment, 2014 I.C.J. No. 148, at 9 (Mar. 31, 2014). For more information, see Section VII, *infra*.

100. *Id.* ¶¶ 24-25.

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The ICJ held Japan's continued pursuit of a large-scale whaling program under the Second Phase of its Japanese Whale Research Program (JARPA II) was a breach of its obligations under the ICRW.<sup>101</sup> Specifically, the ICJ found that the special permits granted by Japan in connection with JARPA II do not fall within the provisions for scientific research programs established by Article VIII of the Convention.<sup>102</sup> In reaching this conclusion, the ICJ was careful to state that it was not assessing the merit of Japan's scientific objectives, but instead was analyzing whether the elements of the research program's "design and implementation are reasonable in relation to its stated scientific objectives."<sup>103</sup> The ICJ found that Japan had devoted little attention to analyzing nonlethal alternatives that would produce similar data, and that Japan had expanded its sample size without awaiting pertinent results from previous research.<sup>104</sup> The ICJ stated that Japan's research program suffered from a number of design flaws,<sup>105</sup> that there were indications that Japan had selected its sample size based on a desire to take a predetermined number of whales, and that "the scientific output [of the program] to date appears limited."<sup>106</sup> The ICJ concluded that "the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives."<sup>107</sup> The ICJ invalidated Japan's Antarctic research program, while leaving open the possibility that Japan could "take account of the reasoning and conclusions contained in this Judgment" and grant a permit for a different future program.<sup>108</sup>

Following the decision, Japan agreed to revoke any extant authorization, permit, or license to kill, take, or treat whales in relation to JARPA II and refrain from granting any further permits in pursuance of that program.<sup>109</sup> The International Whaling Commission adopted the criteria used by the ICJ in a new resolution at its sixty-fifth meeting in September.<sup>110</sup> Despite these decisions, Japan has announced its intentions to restart its scientific whaling program in 2015.<sup>111</sup>

The International Tribunal for the Law of the Sea (the Tribunal) issued provisional measures in the *Arctic Sunrise* case, a dispute relating to the detention of a Greenpeace vessel by the Russian Federation.<sup>112</sup> The vessel had been detained while protesting oil drilling in the Arctic, and the crew was held by Russia for criminal investigation. The Netherlands invoked arbitral remedies under the Law of the Sea Convention, asserting,

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101. *Id.* ¶ 1.

102. . *Id.* ¶ 227.

103. *Id.* ¶ 88.

104. *Id.* ¶ 156.

105. *Id.* ¶¶ 180-181.

106. *Id.* ¶¶ 195, 219.

107. *Id.* ¶ 227.

108. *Id.* ¶¶ 245-46.

109. *Id.* ¶ 245. See also *Press Release*, Chief Cabinet Secretary, the Government of Japan, on the International Court of Justice "Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening)" (Mar. 31, 2014).

110. Int'l Whaling Comm'n, *Resolution on Whaling under Special Permit*, Annex E, Res. 2014-5 (Oct. 31, 2014).

111. See Martin Fackler, *Japan Plans to Resume Whaling Program, With Changes to Address Court Concerns*, N.Y. TIMES, Apr. 18, 2014.

112. *The Arctic Sunrise (Netherlands v. Russian Federation)*, Provisional Measures, Nov. 22, 2013, I.T.L.O.S. Reports 2013, [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/Order/C22\\_Ord\\_22\\_11\\_2013\\_orig\\_Eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf) ¶ 1.

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inter alia, that the detentions violated the rights of the Netherlands as a flag state.<sup>113</sup> The Tribunal issued provisional measures directing Russia to release the vessel and crew, subject to posting of a bond by the Netherlands.<sup>114</sup> An act of the Russian parliament subsequently granted amnesty to the crew members, and the vessel was released the following year.<sup>115</sup>

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113. *Id.* ¶ 33.

114. *Id.* ¶ 105. See also *The Arctic Sunrise and NGOs in International Judicial Proceedings*, 18 ASIL INSIGHTS 1 (Jan. 3, 2014) (discussing the Tribunal's agreement to accept a submission by Greenpeace, although "[t]he Tribunal decided not to include the brief as part of the case file").

115. *Greenpeace Arctic Sunrise: Russia Frees Protest Ship*, BBC NEWS EUROPE (June 6, 2014).

## International Human Rights

CLEVELAND FERGUSON III,\* LAWRENCE G. ALBRECHT, JENNIFER L. BOGER,  
RYAN McCLURE, MARGARET SPICER, AND LEANN DANA STANICK

This article focuses on significant developments in human rights work, the newest resolutions enacted, and an update on jurisprudence in the capital punishment area from around the world.

### I. Human Trafficking and Migrant Smuggling

Human trafficking is on the rise globally,<sup>1</sup> with an estimated \$7 billion in annual profits.<sup>2</sup> The United Nations, International Organization for Migration (IOM),<sup>3</sup> and other international organizations have coordinated efforts to combat this complex problem by addressing the interrelated issue of migrant smuggling. For example, on October 18, 2014, designated as European Anti-Trafficking Day, a group of high-level human rights experts called for a global response to trafficking in persons and particularly noted the relationship between trafficking and migrant smuggling.<sup>4</sup> One of the most difficult aspects of addressing human trafficking is that thousands of people undertake the migration process in hopes of better lives, only to discover that the smugglers have misled them into perilous journeys or unsafe working conditions.<sup>5</sup> The IOM's Missing Migrants Project estimated that the number of migrants who died while in transit to Europe has increased each year.<sup>6</sup>

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\* Committee Editor and Vice Chair, ABA Section of International Law, International Human Rights Committee. Margaret Spicer (Human Trafficking and Migrant Smuggling); Leann Dana Stanick (International Criminal Tribunals); Ryan McClure and Jennifer L. Boger (United Nations Human Rights Council Update); and Lawrence G. Albrecht (Capital Punishment).

1. See *Poverty, Inequality, Discrimination—Let's Stop Human Trafficking at the Roots*, UNITED NATIONS HUMAN RIGHTS (Oct. 18, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15182&LangID=E>. (estimating 800,000 people per year are trafficked not including intra-border).

2. *Human Trafficking a \$7-Bln Business along Main Routes: UN*, YAHOO NEWS (Oct. 6, 2014, 11:21 AM), <http://news.yahoo.com/human-trafficking-7-blb-business-along-main-routes-152120057.html>.

3. See *generally Counter-Trafficking*, INT'L ORG. FOR MIGRATION, <http://www.iom.int/cms/countertrafficking> (last visited Feb. 5, 2015).

4. See *Poverty, Inequality, Discrimination—Let's Stop Human Trafficking at the Roots*, *supra* note 1.

5. See *id.*

6. See, e.g., *IOM Says New Witnesses Provide Further Details of Mediterranean Shipwreck Tragedy*, INT'L ORG. FOR MIGRATION (Sept. 16, 2014), <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-brief>.



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The link between migrant smuggling and human trafficking creates the need for an integrated approach by international agencies, and state and local governments. Agencies like the IOM have started treating the trafficking-in-persons issue within the overall context of migration, and they have begun partnering with governmental institutions,<sup>7</sup> non-governmental organizations (NGOs), and other international organizations to implement strategies to address the issue.<sup>8</sup> For example, the Association of Southeast Asian Nations (ASEAN)-U.S. Seminar on Trafficking in Persons in October 2014 focused on addressing all forms trafficking, whether inter- or intra-state.<sup>9</sup> The seminar also supported the forthcoming finalization and adoption of the ASEAN Convention on Trafficking in Persons sometime in 2015.<sup>10</sup>

## II. International Criminal Tribunals

### A. INTERNATIONAL CRIMINAL COURT

Last year, the International Criminal Court (ICC or the Court), celebrated the tenth anniversary of the Rome Statute's entry into force.<sup>11</sup> The Office of the Prosecution is currently conducting preliminary investigations in a number of countries and recently announced the opening of a second investigation into the Central African Republic.<sup>12</sup>

Notably, in March 2014, the Court found German Katanga, alleged commander of the Force de résistance patriotique en Ituri (FRPI), guilty of being an accessory to one count of crimes against humanity for murder and of four counts of war crimes for murder, attacking a civilian population, destruction of property, and pillaging, on the village of Bogoro in Ituri in the Democratic Republic of Congo (DRC).<sup>13</sup> On May 23, 2014, Katanga was sentenced to a total of twelve years imprisonment based on the Chamber's finding that Katanga contributed to the commission of the crimes by the Ngiti militia with knowledge of the common plan to target Bogoro.<sup>14</sup> Following this decision, the international community urged the Prosecutor of the ICC to continue investigations in the DRC, sending a clear warning to human rights abusers.<sup>15</sup>

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ing-notes/pbn-2014b/pbn-listing/iom-says-new-witnesses-provide-f.html (noting as many as 500 migrants involved).

7. See, e.g., *IOM Aids Prosecutor's Office to Combat Human Trafficking and Smuggling in Dominican Republic*, INT'L ORG. FOR MIGRATION (Oct. 28, 2014), <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2014b/pbn-listing/iom-iom-aids-prosecutors-office.html>.

8. See *id.*

9. See *ASEAN, US Tackle Human Trafficking at a Seminar in Myanmar*, ASS'N SOUTHEAST ASIAN NATIONS (Oct. 9, 2014), <http://www.asean.org/news/asean-secretariat-news/item/asean-us-tackle-human-trafficking-at-a-seminar-in-Myanmar>.

10. See *id.*

11. See Richard Dicker, *ICC: The Court of Last Resort*, HUM. RTS. WATCH (June 29, 2012), <http://www.hrw.org/news/2012/06/29/icc-court-last-resort>.

12. See Memoranda, Prosecutor of the International Criminal Court, Situation in the Central African Republic II, Article 53(1) Report (Sept. 24, 2014), available at <http://www.icc-cpi.int/iccdocs/otp/SAS-CARII-Art53-1-Executive-Summary-24Sept2014-Eng.pdf>.

13. See *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgement (Mar. 7, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1744366.pdf> (Fr.).

14. See *id.*

15. See, e.g., *ICC: Congolese Rebel Leader Found Guilty*, HUM. RTS. WATCH (Mar. 7, 2014), <http://www.hrw.org/news/2014/03/07/icc-congolese-rebel-leader-found-guilty>.

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Accordingly, on June 9, 2014, the Pre-trial Chamber II unanimously confirmed charges against Congolese warlord Bosco Ntaganda.<sup>16</sup> The charges included thirteen counts of war crimes and five counts of crimes against humanity for crimes committed in Ituri Province, DRC.<sup>17</sup> The former alleged Deputy Chief of Staff and commander of operations of the Patriotic Forces for the Liberation of Congo voluntarily surrendered himself to the Court on March 22, 2013, and is now being specifically charged with murder, attempted murder, attacking civilians, rape, sexual slavery, pillaging, displacement of civilians, enlistment of child soldiers, and persecution, among other crimes.<sup>18</sup>

#### B. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

This year marks the twentieth anniversary of the 1994 Rwandan Genocide against the Tutsis, which necessitated the establishment of the International Criminal Tribunal for Rwanda. Throughout the course of its existence, this international criminal tribunal has indicted ninety-three leading figures—sixty-one of which were convicted of genocide, crimes against humanity, or war crimes; fourteen which were acquitted at trial or on appeal; ten who have had their cases referred to national jurisdictions; and three more are held in reserve for trial.<sup>19</sup> Chief Prosecutor Justice Hassan B. Jallow is optimistic about the court's ability to prevent such atrocities from reoccurring but made it clear that nine fugitives remain at large and much justice needs to be done before the scheduled closure of the Court in 2015.<sup>20</sup>

On June 30, 2014, the Appeals Chamber affirmed in part the Trial Chamber's conviction of Augustin Bizimungu, the appointed commander of military operations for Ruhengeri Sector, who was later promoted to the rank of major general and appointed Chief of Staff of the Rwandan army.<sup>21</sup> The Court affirmed Bizimungu's convictions of genocide, extermination, murder, and rape as crimes against humanity; and his convictions of murder and rape as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II based on attacks at various locations.<sup>22</sup> But the Appeals Chamber found that the Trial Chamber erroneously assessed the evidence of killings and rapes at multiple locations and reversed his convictions as to those events.<sup>23</sup> Additionally, the Appeals Chamber reversed the convictions based on the Trial Chamber's faulty rulings on

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16. See Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision on the Charges of the Prosecutor against Bosco Ntaganda (June 9, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1783301.pdf>.

17. See *id.*

18. See *id.*

19. Statement by Justice Hassan B. Jallow, Prosecutor UN-ICTR & UN-MICT to the United Nations Security Council, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR RWANDA (June 5, 2014), <http://unictr.org/en/news/statement-justice-hassan-b-jallow-prosecutor-un-ictr-un-mict-united-nations-security-council>.

20. See *id.*; see also Statement by Justice Hassan B. Jallow, Chief Prosecutor, ICTR & MICT on the Commemoration of the 20th Anniversary of the Rwandan Genocide, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR RWANDA (Apr. 10, 2014), <http://www.unictr.org/en/news/statement-justice-hassan-b-jallow-chief-prosecutor-ictr-mict-commemoration-20th-anniversary>.

21. See Press Release, International Criminal Tribunal for Rwanda, Appeals Chamber Delivers Judgement in the Bizimungu Case, ICTR/INFO-9-2-755.EN (June 30, 2014), <http://www.unictr.org/en/news/appeals-chamber-delivers-judgement-bizimungu-case>.

22. See Prosecutor v. Bizimungu, Case No. ICTR-00-56B-A, *Judgement* (June 30, 2014).

23. See *id.*

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his exercise of superior responsibility over the *Interahamwe*.<sup>24</sup> In light of the serious nature of the remaining convictions, however, the Court affirmed Bizimungu's thirty-year prison sentence.<sup>25</sup>

In other cases, the Appeals Chamber reversed the convictions of Augustin Ndindiliyimana and François-Xavier Nzuwonemeye, and partially reversed the sentence of Innocent Sagahutu, reducing his sentence from twenty to fifteen years imprisonment in the *Military II* case.<sup>26</sup> The Court found that the Trial Chamber erred in concluding that Ndindiliyimana exercised effective control over the gendarmes who participated in certain attacks, and the Court noted the Prosecution's concession that no evidence supported Ndindiliyimana's conviction for murder as a crime against humanity.<sup>27</sup> Furthermore, the Appeals Chamber held that Sagahutu was not criminally responsible for ordering the killings of two UNAIR peacekeepers, Nzuwonemeye was not responsible as a superior, and neither Appellants were criminally responsible for the killing of Prime Minister Agathe Uwilingiyimana.<sup>28</sup> The Appeals Chamber also delivered judgments in the rulings concerning Édouard Karemera and Matthieu Ngirumpatse, Idephonse Nizeyimana, and Calixte Nzabonimana, reducing Nizeyimana's sentence to thirty-five years and affirming life sentences for the three other men.<sup>29</sup>

C. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Since its commencement in 1993, the International Criminal Tribunal for the Former Yugoslavia (ICTY or the Tribunal) has concluded trial proceedings against 141 persons for serious violations of international humanitarian law and has indicted a total of 161 persons.<sup>30</sup> The ICTY is currently concluding the crux of its remaining appellate cases and is expected to come to a close fairly soon. In President Theodor Meron's presentation of the twenty-first annual report to the UN General Assembly, he stated that fewer than ten trials and appeals remain unfinished.<sup>31</sup> He further shared that according to current forecasts, by the end of 2015, only one—the appeal of the Mladic and Prlic et al. case—will be ongoing.<sup>32</sup>

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24. *See id.*

25. *Id.*

26. Augustin Ndindiliyimana v. Prosecutor, Case No. ICTR-00-56-A, *Judgement* (Feb. 11, 2014), <http://unictr.org/sites/unictr.org/files/case-documents/ict-00-56/appeals-chamber-judgements/en/140211.pdf>; *see also* Press Release, International Criminal Tribunal for Rwanda, Appeals Chamber Delivers Judgement in Military II Case, ICTR/INFO-9-2-752.EN (Feb. 11, 2014), <http://www.unictr.org/en/news/appeals-chamber-delivers-judgement-military-ii-case>.

27. *See id.* ¶¶ 61, 81.

28. *See id.* ¶¶ 312, 323, 388.

29. Press Release, International Criminal Tribunal for Rwanda, ICTR Appeals Chamber Delivers Judgements in Three Cases, ICTR/INFO-9-2-759.EN (Sept. 29, 2014), <http://www.unictr.org/en/news/ict-appeals-chamber-delivers-judgements-three-cases>.

30. Press Release, International Criminal Tribunal for the Former Yugoslavia, Mladic Prosecution Allowed to Reopen Its Case-in-Chief to Present Evidence from Tomašica Mass Grave, CS/PR1611e (Oct. 23, 2014), <http://www.icty.org/sid/11561>.

31. Press Release, International Criminal Tribunal for the Former Yugoslavia, President Meron's Address before the United Nations General Assembly, CS/PR1610e (Oct. 14, 2014), <http://www.icty.org/sid/11556>.

32. *Id.*

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On January 27, 2014, the Appeals Chamber issued a judgment reducing the sentence of Nikola Sainović from twenty-two to eighteen years, Streten Lukić from twenty-two to twenty years, and Vladimir Lazarević from fifteen to fourteen years.<sup>33</sup> Nebojsa Pavoković's twenty-two year sentence was affirmed. These senior Serbian officials held offices as Deputy Prime Minister of the FRY (Sainović), Commander of the 3rd Army of the Army of Yugoslavia (Pavoković), Commander of the VJ Priština Corps (Lazarević), and head of the Serbian Ministry of the Interior (MUP) staff (Lukić) in Priština while Kosovo Albanians were killed, forcibly displaced, assaulted, and suffered the intentional destruction of their mosques.<sup>34</sup> While affirming some charges, the Appeals Chamber vacated the convictions of all four Appellants with regard to crimes of deportation and other inhuman acts. The Court found that those specific instances were not pled in the indictment and therefore led to prejudice and impairment of the defendants' ability to prepare for trial. The Appeals Judges further held that the defendants were not necessarily behind displacement efforts and named an assortment of grounds for disagreeing with the Trial Chamber's findings.<sup>35</sup>

Markedly, President Meron granted the early release of two high-level political figures this year. Ranko Češić, a member of the Bosnian Serb Territorial Defense and member of the Intervention Platoon of the Bosnian Serb Police Reserve Corps, was granted early release due to demonstrated signs of rehabilitation and cooperation with the Office of the Prosecutor.<sup>36</sup> Češić had been charged with murder, humiliating and degrading treatment, rape, and other forms of sexual assault.<sup>37</sup> Likewise, Meron granted the early release of Dario Kordic, a leading political figure of the Bosnian Croat community who was convicted of murder, unlawful attacks on civilians, inhuman treatment, and persecutions on political, racial or religious grounds, in addition to other charges.<sup>38</sup> Kordic was also released on grounds of demonstrated signs of rehabilitation and cooperation with the Office of the Prosecution.<sup>39</sup>

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33. Press Release, International Criminal Tribunal for the Former Yugoslavia, Convictions for Kosovo Crimes Upheld for Four Senior Serbian Officials, MS/CS/1594e (Jan. 23, 2014), <http://www.icty.org/sid/11443>.

34. See *Prosecutor v. Šainović*, Case No. IT-05-87-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014), <http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf>; see also Press Release, Vlastimir Đorđević's Responsibility for Crimes in Kosovo Confirmed on Appeal, MS/CS/1595e (Jan. 27, 2014), <http://www.icty.org/sid/11445> (reducing the sentence of Vlastimir Đorđević).

35. See *Prosecutor v. Šainović*, Case No. IT-05-87-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014), <http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf>.

36. See *Prosecutor v. Ranko Češić*, Case No. MICT-14-66-ES, Public Redacted Version of the 30 April 2014 Decision of the President on the Early Release of Ranko Češić (May 28, 2014), <http://unmict.org/sites/default/files/casedocuments/mict-14-66/president%E2%80%99s-decisions/en/140528.pdf>.

37. See *Prosecutor v. Ranko Češić*, Case No. IT-95-10/1-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2004), <http://www.icty.org/x/cases/cesic/tjug/en/ces-tj040311e.pdf>.

38. See *Prosecutor v. Dario Kordic*, Case No. MICT-14-68-ES, Public Redacted Version of the 21 May 2014 Decision of the President on the Early Release of Dario Kordic (June 6, 2014), <http://unmict.org/sites/default/files/casedocuments/mict-14-68/president%E2%80%99s-decisions/en/140606.pdf>.

39. See *id.*

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### III. United Nations Human Rights Council Update

In 2014, the United Nations Human Rights Council (UNHRC or the Council) held its twenty-fifth, twenty-sixth, and twenty-seventh sessions. It also held special sessions on the situation of human rights,<sup>40</sup> with forty-three countries undergoing the Universal Periodic Review process.

#### A. COUNTRY SPECIFIC RESOLUTIONS

Over the course of the year, the UNHRC adopted a number of resolutions that expressed concern over the human rights situations in several countries. The countries addressed in these resolutions include the following: Sri Lanka, the Syrian Arab Republic, the Islamic Republic of Iran, the Democratic People's Republic of Korea, Myanmar, the Occupied Palestinian Territory (including East Jerusalem and the Occupied Syrian Golan), Guinea, the Republic of Mali, Libya, Eritrea, Belarus, Ukraine, South Sudan, Côte d'Ivoire, Yemen, the Democratic Republic of the Congo, the Central African Republic, and Sudan. A few are highlighted here.

##### 1. *Sri Lanka*

In response to the grave violations of human rights that occurred during the Sri Lankan civil war, the UNHRC called upon Sri Lanka to end continuing incidents of human rights violations and abuses, to conduct an independent investigation into violations of international human rights law and international humanitarian law, to release the results of its investigations into alleged violations by security forces, and to hold accountable those responsible for violations.<sup>41</sup>

##### 2. *The Syrian Arab Republic*

The UNHRC has continued to monitor the situation in the Syrian Arab Republic. The Council demanded that Syrian authorities fully cooperate with the Commission of Inquiry on the Syrian Arab Republic and called upon all groups in the country to refrain from retaliation and violence.<sup>42</sup>

##### 3. *Myanmar*

The UNHRC welcomed the positive developments in Myanmar and the government's commitment to political and economic reform, democratization, national reconciliation, and the promotion and protection of human rights. But the Council also expressed its concern about the remaining human rights violations and abuses in Myanmar, including

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40. See Human Rights Council Res. S-20/1, U.N. Doc. A/HRC/RES/S-20/1 (Jan. 21, 2014); Human Rights Council Res. S-21/1, U.N. Doc. A/HRC/RES/S-21 (July 24, 2014); Human Rights Council Res. S-22/1, U.N. Doc. A/HRC/RES/S-22/1 (Sep. 3, 2014).

41. See Human Rights Council Res. 25/1, U.N. Doc. A/HRC/RES/25/1 (Apr. 9, 2014).

42. See Human Rights Council Res. 25/23, U.N. Doc. A/HRC/RES/25/23 (Apr. 9, 2014); Human Rights Council Res. 26/23, U.N. Doc. A/HRC/RES/26/23 (July 17, 2014); Human Rights Council Res. 27/16, U.N. Doc. A/HRC/RES/27/16 (Oct. 3, 2014).

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instances of arbitrary arrest and detention; forced displacement; rape and sexual violence; torture; cruel, inhumane and degrading treatment; and arbitrary deprivation of property.<sup>43</sup>

4. *Ukraine*

In response to escalating tensions in Eastern Ukraine, the UNHRC called upon the government to continue its reform efforts aimed at strengthening human rights protections of all citizens, the rule of law, and democracy.<sup>44</sup> In particular, the Council highlighted the importance of protecting the human rights of residents of the Autonomous Republic of Crimea and the city of Sevastopol.

5. *Yemen*

The UNHRC called upon the Yemeni government to release persons arbitrarily detained and to end the practice of unlawful detention of persons.<sup>45</sup> It also called upon the international community to provide financial support for the Yemen humanitarian response plan of 2014.

6. *Sudan*

The UNHRC commended the government of Sudan for reinforcing human rights education at the basic and secondary levels and for its efforts in combating human trafficking.<sup>46</sup> The Council, however, expressed serious concern over the excessive use of force in response to demonstrations in September 2013 and in March 2014 and called upon the government to establish an independent inquiry into those matters.

B. TRENDS AND NOTEWORTHY RESOLUTIONS

1. *Children*

The UNHRC adopted two resolutions focused on the rights of the child. To effectuate access to justice, in resolution 25/6,<sup>47</sup> the Council called upon States to ensure that national legal systems provide access and effective remedies to children for violations of their rights. In resolution 25/10, it issued a global call to make the invisible visible and also advocated for the rights of children.<sup>48</sup>

The Council passed two children's rights resolutions to address concerns over the more than 6.3 million children under five years of age that die each year.<sup>49</sup> In response, the Council called upon States to adopt a human-rights-based approach to reduce and eliminate preventable mortality and morbidity of children. In resolution 27/15,<sup>50</sup> the UNHRC

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43. See Human Rights Council Res. 25/26, U.N. Doc. A/HRC/RES/25/26 (Apr. 15, 2014).

44. See Human Rights Council Res. 26/30, U.N. Doc. A/HRC/RES/26/30 (July 15, 2014).

45. See Human Rights Council Res. 27/19, U.N. Doc. A/HRC/RES/27/19 (Oct. 3, 2014).

46. See Human Rights Council Res. 27/29, U.N. Doc. A/HRC/RES/27/29 (Oct. 7, 2014).

47. Human Rights Council Res. 25/6, U.N. Doc. A/HRC/RES/25/6 (Apr. 14, 2014).

48. Human Rights Council Res. 25/10, U.N. Doc. A/HRC/RES/25/10 (Apr. 14, 2014).

49. See Human Rights Council Res. 27/14, U.N. Doc. A/HRC/RES/27/14 (Oct. 2, 2014).

50. Human Rights Council Res. 27/15, U.N. Doc. A/HRC/RES/27/15 (Oct. 3, 2014).

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encouraged States to promote recreational and play activities that benefit the growth and development of children.

2. *Environment*

The UNHRC recognized that international human rights law sets out certain procedural and substantive obligations and urged States to comply with these obligations when developing and implementing their environmental policies.<sup>51</sup>

The UNHRC reiterated its concern that adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of all human rights and that the effects of climate change will be felt most acutely by individuals and communities around the world that are already in vulnerable situations.<sup>52</sup>

3. *Business*

The UNHRC addressed the issue of illicit business practices, corruption, and human trafficking.<sup>53</sup> It called upon States to accede to the UN Convention Against Corruption. It further addressed business and human rights in the twenty-sixth session<sup>54</sup> by establishing an open-ended, intergovernmental working group, the mandate of which is to create a legally binding international instrument that will seek to regulate the activities of transnational corporations and other business enterprises<sup>55</sup> in relation to international human rights law.

4. *Terrorism*

In resolution 25/7,<sup>56</sup> the Council called upon States to ensure that measures taken to combat terrorism comply with international law, provide some remedy for those claiming violations, and safeguard the right to privacy. In resolution 25/22,<sup>57</sup> it urged States to ensure that any measures employed to counter terrorism comply with international law, and it called upon States to ensure transparency in their records on the use of remotely piloted aircraft or armed drones and conduct prompt, independent, and impartial investigations wherever violations of international law are indicated.

5. *Women*

In 2014, the UNHRC adopted several resolutions specifically addressing women's rights and empowerment, including Resolution 26/5, aimed at eliminating discrimination;<sup>58</sup> Resolution 26/15, aimed at eliminating violence;<sup>59</sup> and Resolution 27/11, aimed at

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51. See Human Rights Council Res. 25/21, U.N. Doc. A/HRC/RES/25/21 (Apr. 15, 2014).

52. See Human Rights Council Res. 26/27, U.N. Doc. A/HRC/RES/26/27 (July 15, 2014).

53. See Human Rights Council Res. 23/9, U.N. Doc. A/HRC/RES/23/9 (June 20, 2013).

54. See Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

55. See also Human Rights Council Res. 26/22, U.N. Doc. A/HRC/RES/26/22 (July 15, 2014).

56. Human Rights Council Res. 25/7, U.N. Doc. A/HRC/RES/25/7 (Apr. 11, 2014).

57. Human Rights Council Res. 25/22, U.N. Doc. A/HRC/RES/25/22 (Apr. 15, 2014).

58. Human Rights Council Res. 26/5, U.N. Doc. A/HRC/RES/26/5 (July 14, 2014) (eliminating discrimination).

59. Human Rights Council Res. 26/15, U.N. Doc. A/HRC/RES/26/15 (July 11, 2014) (eliminating violence).

improving mental health.<sup>60</sup> In Resolution 27/22,<sup>61</sup> the UNHRC urged States to increase education about the harmful effects of female genital mutilation, encourage men and boys to become more involved in information and awareness campaigns about the issue, and develop and implement policies to eliminate the practice.

C. SPECIAL RAPPORTEUR ON THE RIGHTS OF PERSONS WITH DISABILITIES

Finally, the Council adopted a resolution<sup>62</sup> establishing a new Special Rapporteur position with a mandate to raise awareness of the rights of persons with disabilities and gather information concerning violations of such rights.

#### IV. Capital Punishment

A. AFGHANISTAN

In one of his last official acts as president of Afghanistan, Hamid Karzai ordered the public hanging of five men for rape following a trial that was internationally condemned as a travesty. In that trial, which lasted only two hours, numerous judicial procedural irregularities—including assertions that the defense lawyers had received death threats, that the defendants confessed after being tortured, and that the victims were publicly shamed by being paraded in front of the media—prevented any semblance of a fair trial.<sup>63</sup> Ashraf Ghani, Karzai's successor as president, refused to stay the executions. Instead, the government invited the media, attorneys, and others to attend, although the jailers then killed the men out of public view.<sup>64</sup>

B. BANGLADESH

Death penalty convictions arising from the 1971 War of Independence from Pakistan, during which up to 3,000,000 persons were killed, continued to roil the legal and political structures of Bangladesh.<sup>65</sup> A leader of Jamaat-e-Islami, the main Islamic party, who was convicted of atrocities in the 1971 war, was hanged upon order of Bangladesh's International Crimes Tribunal; another Jamaat-e-Islami leader's death sentence was reduced to

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60. Human Rights Council Res. 27/11, U.N. Doc. A/HRC/RES/27/11 (Oct. 3, 2014) (improving maternal health).

61. Human Rights Council Res. 27/22, U.N. Doc. A/HRC/RES/27/22 (Oct. 2, 2014) (eliminating gender mutilation).

62. See Human Rights Council Res. 26/20, U.N. Doc. A/HRC/RES/26/20 (July 14, 2014).

63. See Rod Nordland, *In a Final Act, Karzai Orders Execution of 5 Men in Rape Case*, N.Y. TIMES, Sept. 28, 2014, at A14, available at <http://www.nytimes.com/2014/09/28/world/asia/in-a-final-act-karzai-orders-execution-of-5-men-in-rape-case-.html>.

64. See Editorial, *Grim Executions in Afghanistan*, N.Y. TIMES, Oct. 10, 2014, at A26, available at <http://www.nytimes.com/2014/10/10/opinion/grim-executions-in-afghanistan.html>; *Afghan Executions: Five Hanged for Paghman Gang-Rape*, BBC NEWS (Oct. 8, 2014, 10:08 ET), <http://www.bbc.com/news/world-asia-29537738>; *Afghanistan Executes Five Men for Gang-Rape*, GUARDIAN (Oct. 8, 2014, 8:08 EDT), <http://www.theguardian.com/world/2014/oct/08/afghanistan-executes-five-men-gang-rape>.

65. See *Bangladesh Islamist Abdul Kader Mullah Hanged for War Crimes*, BBC NEWS (Dec. 12, 2013, 15:23 ET), <http://www.bbc.com/news/world-asia-25356034>; Gardiner Harris, *Opposition Leader's Execution Spurs Protests in Bangladesh*, N.Y. TIMES, Dec. 13, 2013, at A14, available at <http://www.nytimes.com/2013/12/13/world/asia/execution-for-71-war-crimes-spurs-protests-in-bangladesh.html>.



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life imprisonment by order of the Supreme Court;<sup>66</sup> and two associates of the pro-Pakistani Al-Badr militia aligned with Jamaat-e-Islami were sentenced to death in absentia.<sup>67</sup> Also, 152 former members of the Bangladesh Rifles, a paramilitary border security force, were sentenced to death in a single judicial proceeding in connection with a 2009 mutiny that resulted in seventy-four killings.<sup>68</sup>

C. CHINA

China's Supreme Peoples' Court continued to exert increasing influence over the administration of capital punishment in China. The Court issued a broad directive that barred confessions obtained through torture and also barred death penalty sentences in cases in which material evidence was suspect.<sup>69</sup> This directive raised the hope that ancient Confucian moral precepts of *chuli ruxing* (applying lesser punishment when warranted) and *da she* (great mercy) may again have legal significance.<sup>70</sup> But China continued to apply the death penalty in a wide array of criminal cases.<sup>71</sup> Political unrest and violence in Xinjiang resulted in thirteen executions in June 2014.<sup>72</sup> Three persons, including two Uighurs from Xinjiang, were sentenced to death in connection with a fatal car crash in Beijing's Tiananmen Square.<sup>73</sup> After a terrorist attack blamed on Uighur separatists in Xinjiang caused dozens of civilian casualties, a court in Kashgar prefecture issued death

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66. See *Bangladesh: Islamist Leader's Death Penalty Dropped*, N.Y. TIMES, Sept. 18, 2014, at A13, available at <http://www.nytimes.com/2014/09/18/world/asia/bangladesh-islamist-leaders-death-penalty-dropped.html>.

67. See Ellen Barry, *Bangladesh Sentences 2 Expatriates to Death for War Crimes*, N.Y. TIMES, Nov. 4, 2013, at A5, available at <http://www.nytimes.com/2013/11/04/world/asia/bangladesh-sentences-2-to-death-for-war-crimes.html>.

68. See Julfikar Ali Manik & Ellen Barry, *152 Bangladeshi Border Guards Get Death Penalty over Revolt*, N.Y. TIMES, Nov. 6, 2013, at A8, available at <http://www.nytimes.com/2013/11/06/world/asia/152-soldiers-given-death-penalty-over-revolt-in-bangladesh.html>; *Bangladesh to Execute 152 Soldiers for Mutiny Crimes*, BBC NEWS (Nov. 5, 2013, 12:20 ET), <http://www.bbc.com/news/world-asia-24817887>; *Mutiny and Revenge*, ECONOMIST, Nov. 9, 2013, at 43, available at <http://www.economist.com/news/asia/21589496-mass-conviction-mutineers-comes-politically-delicate-moment-mutiny-and-revenge>.

69. See Chris Buckley, *China: Court Seeks to Curtail Abuses*, N.Y. TIMES, Nov. 22, 2013, at A12, available at <http://www.nytimes.com/2013/11/22/world/asia/chinas-highest-court-seeks-to-curtail-abuses-of-justice.html>.

70. See Mara Hvistendahl, Op-Ed., *China Rethinks the Death Penalty*, INT'L N.Y. TIMES, July 9, 2014, available at <http://www.nytimes.com/2014/07/09/opinion/china-rethinks-the-death-penalty.html>. But see CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS AND PUBLIC OPINION (Roger Hood & Surya Deva eds., 2013) (reviewing resistance throughout Asia to human rights pressure regarding administration of capital punishment).

71. See *China: Death Row Inmate Freed after Six Years of Trials and Appeals*, AMNESTY INT'L (Aug. 22, 2014), <http://www.amnesty.org/en/news/china-death-row-inmate-freed-after-six-years-trials-and-appeals-2014-08-22> (reporting rare acquittal of "placing dangerous materials"); Leila Haddou, *Death Penalty Statistics 2013: Country by Country*, GUARDIAN (Mar. 27, 2014, 3:30 EDT), <http://www.theguardian.com/world/datablog/2014/mar/27/death-penalty-statistics-2013-by-country> (indicating that data on use of the death penalty in China is a state secret, but that there are a minimum of 778 deaths).

72. Michael Forsythe, *China: 13 Executed after Attacks*, N.Y. TIMES, June 17, 2014, at A12, available at <http://www.nytimes.com/2014/06/17/world/asia/china-executes-13-in-xinjiang-region-after-attacks.html>.

73. *Death Penalty in Xinjiang for China Tiananmen Crash*, BBC NEWS (June 16, 2014, 12:03 ET), <http://www.bbc.com/news/world-asia-china-27864060>.

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sentences for twelve convicted terrorists and for fifteen others whose executions were suspended for two years.<sup>74</sup>

D. EGYPT

Following two brief court sessions, a judge sentenced to death 529 Islamist supporters of deposed president Mohamed Morsi for the murder of a police officer—a judgment widely condemned internationally.<sup>75</sup> Subsequently, the same judge recommended the death penalty for 683 people, including Muslim Brotherhood leader Mohammed Badie, following another brief police murder trial that was boycotted by defense counsel who condemned the proceedings as “farcical,” although the judge commuted to life terms 492 of the prior 529 death sentences.<sup>76</sup> Another twenty-six persons convicted of forming a terror group to attack the Suez Canal were sentenced to death.<sup>77</sup> Under Egyptian law, all capital sentences must be reviewed by the state-appointed grand mufti, may also be appealed, and are subject to retrial if sentencing was ordered in absentia.<sup>78</sup> Subsequently, grand mufti Shawqi Allam issued an advisory opinion that rejected the death penalty imposed on senior leaders of the Muslim Brotherhood because of the lack of evidence; but a panel of judges requested the mufti to reconsider, resulting in legal uncertainty about potential death penalty sentences in multiple pending criminal prosecutions arising from political upheaval in Egypt.<sup>79</sup>

E. GAZA

The Hamas government’s ongoing use of capital punishment to punish collaboration with Israel resulted in eighteen public executions on August 21, 2014—one day after an Israeli airstrike killed three top commanders of Hamas’s armed wing.<sup>80</sup>

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74. *China Sentences 12 to Death for South Xinjiang Attacks*, BBC NEWS (Oct. 13, 2014, 8:43 ET), <http://www.bbc.com/news/world-asia-china-29592882>; Chun Han Wong, *China Sentences 12 to Death over Deadly Xinjiang Attack*, WALL ST. J., Oct. 14, 2014, at A11, available at <http://www.wsj.com/articles/china-sentences-12-to-death-over-deadly-xinjiang-attack-1413208917>.

75. Patrick Kingsley, *Egypt Sentences to Death 529 Supporters of Mohamed Morsi*, GUARDIAN (Mar. 24, 2014, 6:52 EDT), <http://www.theguardian.com/world/2014/mar/24/egypt-death-sentence-529-morsi-supporters>; Editorial, *Egypt’s Miscarriage of Justice*, N.Y. TIMES, Mar. 25, 2014, at A26, available at <http://www.nytimes.com/2014/03/25/opinion/egypts-miscarriage-of-justice.html>.

76. *Egypt: Brotherhood’s Badie among Mass Death Sentences*, BBC NEWS (Apr. 28, 2014, 12:49 ET), <http://www.bbc.com/news/world-middle-east-27186339>.

77. *Egypt: 26 Sentenced to Death over Suez ‘Terror Plot’*, BBC NEWS (Feb. 26, 2014, 7:24 ET), <http://www.bbc.com/news/world-middle-east-26350601>.

78. *See Of Judges and Generals*, ECONOMIST, Mar. 29, 2014, at 48, available at <http://www.economist.com/news/middle-east-and-africa/21599769-will-abdel-fattah-al-sisi-soon-be-president-be-harsh-his-judges>.

79. *See Hang Them All?*, ECONOMIST, May 3, 2014, at 45, available at <http://www.economist.com/news/middle-east-and-africa/21601577-mass-death-sentences-may-not-be-carried-out-horrify-all-same-hang-them>; *Of Judges and Generals*, supra note 78.

80. Fares Akram & Jodi Rudoren, *Executions in Gaza Are a Warning to Spies*, N.Y. TIMES, Aug. 23, 2014, at A10, available at <http://www.nytimes.com/2014/08/23/world/middleeast/israel-gaza.html>; *Gaza: Hamas Says 18 Suspected Informants Executed*, BBC NEWS (Aug. 22, 2014, 12:56 ET), <http://www.bbc.com/news/world-middle-east-28896346>.

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F. INDIA

The legal and political debate over capital punishment intensified in 2014, following the resumption of executions in 2012, as public attention focused on the Supreme Court's decision to commute the death sentences imposed on three of the seven men convicted of assassinating Prime Minister Rajiv Gandhi in 1991.<sup>81</sup>

G. IRAN

In 2014, Iran continued its practice of hanging people for heresy, which includes making "innovations in religion."<sup>82</sup> Under Iran's Islamic justice system, convicted murderers awaiting execution can, however, purchase their freedom from the victim's family, as occurred in a highly publicized case involving payment of \$50,000 for the release of a young man who was seventeen years old when he threw his knife at a rival and killed him.<sup>83</sup> Public hangings at the notorious Evin prison in Tehran continued and included the hanging of a billionaire businessman convicted of banking fraud and embezzlement.<sup>84</sup> Reyhaneh Jabbari, an Iranian woman convicted of murder, despite her contention that the victim had tried to rape her, was hanged under Iran's "eye-for-an-eye" law, in a case that drew widespread condemnation by human rights groups and even resulted in efforts by President Hassan Rouhani's government to commute the death sentence.<sup>85</sup>

H. IRAQ

U.N. condemnation of the "conveyor belt of executions" in Iraq continued in 2014 following the mass hanging of twenty-six people and the subsequent hanging of another eleven people convicted of terrorism-related offenses.<sup>86</sup> The ongoing sectarian strife in Iraq was reported to have resulted in the summary executions of 255 Sunni prisoners by the Iraqi government, which the government denied.<sup>87</sup> Human Rights Watch issued a detailed report on the pervasive abuse of women in Iraq's criminal justice system, includ-

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81. Nilanjana S. Roy, Op-Ed., *Politics Stalks India's Death Row*, INT'L N.Y. TIMES, Feb. 28, 2014, available at <http://www.nytimes.com/2014/02/28/opinion/politics-stalks-indias-death-row.html>.

82. See Saeed Kamali Dehghan, *Iran Executes Man for Heresy*, GUARDIAN (Sept. 29, 2014, 13:15 EDT), <http://www.theguardian.com/world/2014/sep/29/iran-executes-man-heresy-mohsen-amir-aslani>.

83. See Thomas Erdbrink, *Mercy and Social Media Slow the Noose in Iran*, N.Y. TIMES, Mar. 9, 2014, at A1, available at <http://www.nytimes.com/2014/03/09/world/middleeast/mercy-and-social-media-slow-the-noose-in-iran.html>.

84. See *Iran Billionaire Hanged for Fraud*, N.Y. TIMES, May 25, 2014, at A11, available at <http://www.nytimes.com/2014/05/25/world/middleeast/iran-billionaire-hanged-for-fraud.html>.

85. See Thomas Erdbrink, *Rights Groups Condemn Execution of Iranian Woman*, N.Y. TIMES, Oct. 26, 2014, at A10, available at <http://www.nytimes.com/2014/10/26/world/middleeast/rights-groups-condemn-iranian-execution-.html>.

86. Raheem Salman, *Iraq Hangs 11 Convicted of Terrorism-Related Offenses*, WASH. POST, Jan. 23, 2014, [http://www.washingtonpost.com/world/iraq-hangs-11-convicted-of-terrorism-related-offenses/2014/01/23/0f0aae1c-846c-11e3-bbe5-6a2a3141e3a9\\_story.html](http://www.washingtonpost.com/world/iraq-hangs-11-convicted-of-terrorism-related-offenses/2014/01/23/0f0aae1c-846c-11e3-bbe5-6a2a3141e3a9_story.html).

87. Alissa J. Rubin, *Rift with Kurds Widens as Iraqi Leader Replaces the Foreign Minister*, N.Y. TIMES, July 12, 2014, at A4, available at <http://www.nytimes.com/2014/07/12/world/middleeast/maliki-replaces-zebari-as-kurds-seize-oil-plants.html>.

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ing the psychological torture inflicted on women by their proximity to prison executions.<sup>88</sup>

I. JAPAN

Japan's capital punishment practices came under increased public scrutiny, spotlighted by the release of seventy-eight-year-old Iwao Hakamada, who is perhaps the world's longest living death row inmate. Hakamada's 1968 conviction and death sentence were widely condemned as based on fabricated evidence.<sup>89</sup> Although in 2009, a jury system was implemented for most criminal cases, Japan's conviction rate remains at over ninety-nine percent, and executions have increased under the current government of Shinzo Abe.<sup>90</sup>

J. NORTH KOREA

The U.N. Human Rights Council Commission of Inquiry released a detailed report in 2014 regarding, *inter alia*, the vast network of secret prison camps, known as *kwanliso*, where hundreds of thousands of North Koreans have died due to execution, torture, starvation, and disease.<sup>91</sup> The U.N. Security Council, which has the authority to refer countries to the ICC, convened a special session to consider the report and possible remedial actions.<sup>92</sup>

K. PAKISTAN

The Lahore High Court of Appeals upheld the death sentence of a Pakistani Christian woman in a high-profile blasphemy case arising from a dispute with Muslim co-workers who alleged she insulted the Prophet Muhammad. The woman asserted the co-workers verbally abused her when they refused to drink water from bowls she touched.<sup>93</sup>

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88. See HUMAN RIGHTS WATCH, NO ONE IS SAFE: ABUSES OF WOMEN IN IRAQ'S CRIMINAL JUSTICE SYSTEM (2014), available at <http://www.hrw.org/sites/default/files/reports/iraq0214webwcover.pdf>

89. See Hiroko Tabuchi, *Soul-Searching as Japan Ends a Man's Decades on Death Row*, N.Y. TIMES, Mar. 28, 2014, at A1, available at <http://www.nytimes.com/2014/03/28/world/asia/freed-after-decades-on-death-row-man-indicts-justice-in-japan.html>.

90. See *id.*; see Justin McCurry, *Japan Condemned for 'Secret' Executions*, GUARDIAN (Dec. 12, 2013, 3:31 EST), <http://www.theguardian.com/world/2013/dec/12/japan-condemned-secret-executions>.

91. See Human Rights Council, *Rep. of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, ¶¶ 59-61, U.N. Doc. A/HRC/25/63 (Feb. 7, 2014); see also UN's North Korea Report: *Main Findings*, BBC NEWS (Feb. 17 2014, 14:42 ET), <http://www.bbc.com/news/world-asia-26223180>; Peter Walker, *North Korea Human Rights Abuses Resemble Those of the Nazis, Says UN Inquiry*, GUARDIAN (Feb. 18, 2014, 02:54 EST), <http://www.theguardian.com/world/2014/feb/17/north-korea-human-rights-abuses-united-nations>.

92. See Rick Gladstone, *U.N. Council Takes up Question of Rights in North Korea*, N.Y. TIMES, Apr. 18, 2014, at A3, available at <http://www.nytimes.com/2014/04/18/world/asia/un-council-takes-up-question-of-rights-in-north-korea.html>.

93. See Waqar Gillani & Salman Masood, *Pakistan: Death Sentence Is Upheld in Blasphemy Case*, N.Y. TIMES, Oct. 17, 2014, at A11, available at <http://www.nytimes.com/2014/10/17/world/asia/pakistan-christian-blasphemy-death-penalty.html>.

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L. SAUDI ARABIA

Judicial authorities beheaded at least nineteen people in August 2014—many of whom were convicted of non-violent offenses. These beheadings were consistent with Saudi Arabia's long-standing legal culture, which imposes the death penalty for non-lethal crimes such as adultery, apostasy, sorcery, and witchcraft.<sup>94</sup> A prominent cleric was sentenced to death by Riyadh's Specialized Criminal Court, which heard terrorism cases following mass anti-government protests in the Shia majority Eastern Province in 2011. Prosecutors demanded execution by "crucifixion," which involves beheading followed by public display of the decapitated body.<sup>95</sup> Four family members were executed for possession of hashish, following confessions reportedly extracted after torture, beatings, and sleep deprivation.<sup>96</sup> Indonesia agreed to pay \$1.8 million in blood money to prevent the beheading of a domestic maid in Saudi Arabia who was convicted of killing her employer, despite her claim of self-defense following an assault.<sup>97</sup>

M. SINGAPORE

In a landmark ruling following legislative amendments to Singapore's capital punishment laws, the death sentence of a Malaysian man convicted of drug trafficking was commuted to life imprisonment and fifteen strokes of the cane; other death row inmates' death sentences were similarly commuted.<sup>98</sup>

N. SUDAN

In a 2014 case that drew wide international focus, a Sudanese appeals court overturned a death sentence imposed under *sharia* law for apostasy and released a woman who refused to renounce her Orthodox Christian faith.<sup>99</sup> Sudan's 1991 penal code prescribes the death penalty for a sweeping range of non-Islamist religious belief, based on a harsh interpretation of *sharia* law, which is rarely challenged in the legal system.<sup>100</sup>

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94. See Rick Gladstone, *Saudi Arabia: Executions Draw Rebukes*, N.Y. TIMES, Aug. 22, 2014, at A10, available at <http://www.nytimes.com/2014/08/22/world/middleeast/saudi-arabia-executions-draw-rebukes.html>.

95. See *Saudi Shia Cleric Nimr Al-Nimr 'Sentenced to Death'*, BBC NEWS (Oct. 15, 2014, 13:33 ET), <http://www.bbc.com/news/world-middle-east-29627766>; *The Sword Unsheathed*, ECONOMIST, Oct. 18, 2014, at 49, available at <http://www.economist.com/news/middle-east-and-africa/21625868-protests-break-out-after-shia-cleric-sentenced-death-sword-unsheathed>.

96. See *Saudi Arabia Executes Four for Hashish Possession*, BBC NEWS (Aug. 19, 2014, 06:39 ET), <http://www.bbc.com/news/world-middle-east-28851512>.

97. *Blood Money Spares Indonesian Maid from Saudi Execution*, BBC NEWS (Apr. 3, 2014, 09:32 ET), <http://www.bbc.com/news/world-asia-pacific-26872447>.

98. See *Singapore Lifts Death Sentence for Drug Trafficker*, BBC NEWS (Nov. 14, 2013, 07:05 ET), <http://www.bbc.com/news/world-asia-24940568>.

99. See Charlotte Allen, *Meriam Ibrahim and the Persecution of Christians*, WALL ST. J., June 27, 2014, at A11, available at <http://online.wsj.com/articles/charlotte-allen-meriam-ibrahim-and-the-persecution-of-christians-1403822908>; *Sudan Death Sentence Woman 'Freed'*, BBC NEWS (June 23, 2014, 12:18 ET), <http://www.bbc.com/news/world-africa-27979782>.

100. See *Islam and Apostasy: Show Who's Boss*, ECONOMIST, June 7, 2014, at 55, available at <http://www.economist.com/news/middle-east-and-africa/21603509-death-sentence-issued-sudanese-court-has-stirred-up-controversy-show-whos>.

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O. UNITED STATES

In the widely followed case of *Hall v. Florida*,<sup>101</sup> the U.S. Supreme Court held (5-4) that a Florida statute, which required evidence of an I.Q. score of seventy or below before additional evidence of intellectual disability was admissible to avoid execution, violated the Eighth Amendment ban on cruel and unusual punishment.<sup>102</sup> The Supreme Court found that no legitimate penological purpose was advanced by executing an intellectually disabled person and that the prohibition of such executions protects the integrity of judicial proceedings because an intellectually disabled person is less likely to fully understand and participate in his or her own defense—an inherent judicial concern present in several states with rigid rules for determining intellectual disability.<sup>103</sup> But in an analogous capital case, *Kansas v. Cheever*,<sup>104</sup> the Supreme Court ruled unanimously that the Fifth Amendment proscription against self-incrimination was not violated when the accused offered expert testimony of diminished mental capacity and the prosecution sought to present rebuttal evidence from a court-ordered expert who examined the accused. The Court reasoned that because the accused initiated the testimony on mental state, the proffered rebuttal evidence did not violate the Constitution.

In *Hinton v. Alabama*,<sup>105</sup> the Supreme Court held that a death row inmate's Sixth Amendment right to legal counsel<sup>106</sup> was violated because trial counsel mistakenly concluded that additional capital defense funds were unavailable to retain a more qualified expert to replace an expert whom counsel deemed inadequate. The Supreme Court ordered the state court to reconsider whether the attorney's deficient performance was prejudicial.

Two lower federal courts granted habeas petitions that were reversed by the Supreme Court. In *White v. Woodall*,<sup>107</sup> the Supreme Court reversed the Sixth Circuit's grant of habeas relief, instead holding that the Kentucky Supreme Court's decision on the trial court's failure during the death penalty phase to mandate a "no adverse inference" jury instruction regarding the defendant's decision not to testify was reasonable. In *Lopez v. Smith*,<sup>108</sup> the Supreme Court reversed and admonished the Ninth Circuit, which had granted habeas relief under the Antiterrorism and Effective Death Penalty Act

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101. *Hall v. Florida*, 134 S. Ct. 1986 (2014).

102. *Hall*, 134 S. Ct. at 2001; *see also* *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Constitution forbids the execution of intellectually disabled persons who have a reduced capacity for understanding, reasoning, and impulse control).

103. *Hall*, 134 S. Ct. at 1992-93; *see also* Lizette Alvarez & John Schwartz, *On Death Row with Low I.Q., and New Hope for a Reprieve*, N.Y. TIMES, May 31, 2014, at A1, available at <http://www.nytimes.com/2014/05/31/us/on-death-row-with-low-iq-and-new-hope-for-a-reprieve.html>; Adam Liptak, *Justices Reject a Rigid I.Q. Rule for Executions*, N.Y. TIMES, May 28, 2014, at A1, available at <http://www.nytimes.com/2014/05/28/us/court-rules-against-florida-iq-rule-in-death-cases.html>; Editorial, *The Shrinking Death Penalty*, N.Y. TIMES, May 28, 2014, at A20, available at <http://www.nytimes.com/2014/05/28/opinion/the-shrinking-death-penalty.html>.

104. *Kansas v. Cheever*, 134 S. Ct. 596, 603 (2013).

105. *Hinton v. Alabama*, 134 S. Ct. 1081, 1088, 1090 (2014) (per curiam).

106. *See generally* *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding that the Sixth Amendment is violated if counsel's representation is not objectively reasonable and if there is a reasonable probability that the trial outcome would otherwise have been different).

107. *White v. Woodall*, 134 S. Ct. 1697, 1706-07 (2014).

108. *Lopez v. Smith*, 135 S. Ct. 1, 5 (2014) (per curiam).

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(AEDPA),<sup>109</sup> because Ninth Circuit cited only its own precedent rather than clearly established Supreme Court precedent. Thus, the Ninth Circuit violated the AEDPA standard for determining whether constitutional rights (here the Sixth Amendment and due process right to fair notice of the prosecution's murder theory considered by the jury) were clearly established.

In October 2014, the Supreme Court agreed to hear a 1989 California death penalty case in which all of the African-American and Hispanic potential jurors were struck in a 1989 murder trial.<sup>110</sup>

Although the Supreme Court declined to hear two cases concerning whether death row inmates have a constitutional right to specific information about the chemicals the states planned to use in their executions,<sup>111</sup> lower courts continued to address a variety of analogous constitutional challenges. In *Wood v. Ryan*,<sup>112</sup> the Ninth Circuit held that an Arizona death row inmate had a First Amendment right to receive details about the prescribed lethal injection drugs and the professional qualifications of the execution team. This decision conflicts with other federal and state court rulings in Louisiana, Missouri, Georgia, Oklahoma, and Texas—all of which have rejected similar challenges and allowed executions to proceed with secrecy about the lethal drugs and manufacturers.<sup>113</sup>

A federal district court<sup>114</sup> found that California's death penalty system was so arbitrary and plagued with delay that the entire system violated the Eighth Amendment. This decision impacts over 740 death row inmates, about 40 percent of whom have languished on death row for at least twenty years.<sup>115</sup> The governor of the state of Washington suspended the death penalty because of systemic flaws and unequal application and promised to issue a reprieve if any of the nine death penalty sentences awaiting execution moved

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109. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (1996) (codified as amended at 28 U.S.C. § 2254(d)(1) (2006)).

110. See Chappell v. Ayala, 135 S. Ct. 401 (2014) (mem.); see also *Supreme Court to Review Impact of Eliminating Black and Hispanic Jurors in Capital Case*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/node/5913> (last visited Feb. 20, 2015).

111. See Sepulvado v. Jindal, 729 F.3d 413 (5th Cir. 2013), cert. denied, 134 S. Ct. 1789 (2014) (mem.); *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014), cert. denied, 134 S. Ct. 1790 (2014) (mem.).

112. *Wood v. Ryan*, 759 F.3d 1076, 1088 (9th Cir. 2014), vacated, 135 S. Ct. 21 (2014).

113. See Ed Pilkington, *Oklahoma Execution Misstep Sets up Legal Assault against US Drug Secrecy*, GUARDIAN (Apr. 30, 2014, 15:53 EDT), <http://www.theguardian.com/world/2014/apr/30/oklahoma-execution-misstep-legal-assault-drug-secrecy>.

114. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1069 (C.D. Cal. 2014).

115. Erik Eckholm & John Schwartz, *California Death Penalty System Unconstitutional, Federal Judge Rules*, N.Y. TIMES, July 17, 2014, at A11, available at <http://www.nytimes.com/2014/07/17/us/california-death-penalty-unconstitutional-federal-judge-says.html>; see also Mark Berman, *Federal Judge Says California's Death Penalty System Is 'Unconstitutional'*, WASH. POST (July 16, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/07/16/federal-judge-says-californias-death-penalty-system-is-unconstitutional/>.

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forward.<sup>116</sup> The overall legal trend, informed by public opinion, may be slowly moving towards the demise of capital punishment in the United States.<sup>117</sup>

P. VIETNAM

Thirty defendants in a heroin smuggling trial conducted at a prison were sentenced to death and joined over 500 other convicts on death row awaiting execution.<sup>118</sup>

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116. See Ian Lovett, *Executions Are Suspended by Governor in Washington*, N.Y. TIMES, Feb. 12, 2014, at A12, available at <http://www.nytimes.com/2014/02/12/us/washington-governor-jay-inslee-suspends-death-penalty.html>; Kristen Millares Young, *Washington State to Suspend Death Penalty by Governor's Moratorium*, GUARDIAN (Feb. 11, 2014, 21:13 EST), <http://www.theguardian.com/world/2014/feb/11/washington-state-death-penalty-governor-inslee-suspends>. See generally *The Slow Death of the Death Penalty*, ECONOMIST, Apr. 26, 2014, at 27, available at <http://www.economist.com/news/united-states/21601270-america-falling-out-love-needle-slow-death-death-penalty>.

117. See Mark Berman & Robert Barnes, *Everything You Need to Know about Executions in the United States*, WASH. POST (May 1, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/05/01/everything-you-need-to-know-about-executions-in-the-united-states/>.

118. See *Vietnam Sentences 30 to Death over Drug Smuggling*, BBC NEWS (Jan. 20, 2014, 5:25 ET), <http://www.bbc.com/news/world-asia-25806353>.

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## National Security Law

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This article surveys 2014 developments in National Security Law relevant to international lawyers.<sup>1</sup>

### I. Russia, Ukraine, and Hybrid Warfare

The use of proxy military actors in today's international conflicts requires detailed analyses of both methodology and the use of "Hybrid Warfare" in obfuscating the lines of legal attribution and responsibility under international law. Direct Russian military engagement in, and the failure to restrain incursions emanating from its territory into Ukraine, may underscore Russia's breach of its international legal obligations.<sup>2</sup>

#### A. EVIDENCE OF THE FEDERATION'S MILITARY INTERVENTION IN THE UKRAINE

According to Ukrainian sources, approximately twelve hours prior to the invasion of the Crimea in late February 2014, a Ukrainian correspondent traveling along the Black Sea

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\* The committee editor of this article was Captain James D. Carlson, Judge Advocate, U.S. Coast Guard. Captain Carlson contributed "International Response to Iran's Nuclear Program" and "Islamic State of Iraq and the Levant;" Guy C. Quinlan, President, Lawyers Committee on Nuclear Policy, contributed "Nuclear Arms Control," and First Lieutenant Sergio L. Suarez, U.S. Army, J.D. Candidate, Seton Hall University School of Law, contributed "Information and Intelligence." The section on Russia, Ukraine, and Hybrid Warfare was contributed by Jonathan Michael Meyer, Attorney-at-Law. The section on Cybersecurity Developments was contributed by Geoffrey M. Goodale, Attorney, Trade Law Advisors PLLC. The views expressed herein by the military officers are those of the authors personally and are not official or reflective of the views of the Army Chief of Staff, Coast Guard Commandant, U.S. Army, or U.S. Coast Guard.

1. For developments during 2013, see James D. Carlson et al., *National Security Law*, 48 INT'L LAW. 471 (2014).

2. The Commentary to the United Nations Legislative Series states: "The general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State." United Nations Legislative Series, MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 27, Doc. No. ST/LEG/SER B/25, available at <http://legal.un.org/legislativeseries/documents/Book25/Book25.pdf>. It is further noted "as a corollary, that [the] conduct of private persons is not as such attributable to the State . . ." *Id.* However, "the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects." *Id.* at 28.

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Highway from Sevastopol to Yalta spotted two Russian military lorries with tightly closed tents headed in the direction of the Russian military base in Sevastopol.<sup>3</sup> The correspondent followed the lorries until they stopped at a Russian military sanitarium in Yalta. There he observed a serviceman exiting the lorry wearing full military garb with no military insignia. This was the debut of the “Little Green Men”<sup>4</sup> in Ukraine.

Russia’s initial statement about this incident provides further evidence of its direct involvement. The treaty between Ukraine and Russia regarding Russia’s Black Sea Fleet<sup>5</sup> requires Russia to provide Ukraine with preliminary notification when military convoys move between Russian military installations in Crimea.<sup>6</sup> Absent notification, the Ukrainian military command requested a written explanation pursuant to the treaty. The Russian Black Sea Fleet allegedly responded that “there is a very unstable situation in Ukraine and as a result, a limited military regiment was sent for better protection of sanitarium visitors.”<sup>7</sup>

Thereafter, according to the same source,<sup>8</sup> at midnight lorries left the sanitarium in Yalta and moved to the Crimean capital, Simferopol. These lorries contained groups of servicemen from the highly trained Airborne Brigade from Toljatty, Russia, which, according to Ukrainian sources, were administratively attached to the main department of military intelligence of the Russian army and fleet.<sup>9</sup> At approximately 14:00 hours, the forces arrived at the Crimean Parliament, disarmed the Ukrainian militia, and captured and exercised full military control over the area. Early the next morning, forces conducted a full-scale invasion, with “Little Green Men” occupying all airports and seaports, and surrounding Ukrainian military bases and other key tactical and strategic installations.<sup>10</sup> These forces were portrayed by the Russian media as self-organized, local self-defense organizations.<sup>11</sup>

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3. *Id.*

4. Steve Pifer, *Opinion: Watch Out for Little Green Men*, DER SPIEGEL, July 7, 2014, <http://www.spiegel.de/international/europe/nato-needs-strategy-for-possible-meddling-by-putin-in-baltic-states-a-979707.html> (explaining the etymology of the term, “little green men”).

5. Partition Treaty on the Status and Conditions of the Black Sea Fleet Russ.-Ukr., art. 15, para. 2, May 28, 1997, *available at* <https://archive.today/ue0rj> (translated through Google translator) [hereinafter Black Sea Fleet Agreement].

6. *Commentary of the MFA of Ukraine concerning the unilateral breach of the Russian Federation the Ukraine-Russia accords, laid down in the Agreements on the Black Sea Fleet*, <http://greece.mfa.gov.ua/en/press-center/news/18552-komentar-mzs-ukrajini> (Mar. 2, 2014); Black Sea Fleet Agreement, *supra* note 5.

7. According to Ukrainian sources to whom the author has access, this reply was posted together with a video on Feb. 26, 2014, and subsequently removed.

8. *Id.*

9. Confidential sources at the Ukrainian Ministry of Internal Affairs (to whom the author’s sources have access).

10. David McHugh & Greg Keller, *Hundreds of Gunmen Surround Ukraine Military Base in Crimea*, BUSINESS INSIDER INDONESIA (Mar. 2, 2014, 9:43PM), [http://www.businessinsider.co.id/hundreds-of-gunmen-surround-ukraine-military-base-in-crimea-2014-3/#.VHv\\_nNLF-So](http://www.businessinsider.co.id/hundreds-of-gunmen-surround-ukraine-military-base-in-crimea-2014-3/#.VHv_nNLF-So).

11. Corey Flintoff, *Russian Media Accused of Using Propaganda in Ukraine Reporting*, NAT’L PUBLIC RADIO (Apr. 15, 2014, 5:17AM), <http://www.npr.org/2014/04/15/303172312/russian-media-accused-of-feeding-propaganda-on-ukraine-crisis>; Oleg Sulkov, *The Media War Behind the Ukraine Crisis*, THE MOSCOW TIMES, Mar. 11, 2014, <http://www.themoscowtimes.com/news/article/the-media-war-behind-the-ukraine-crisis/495920.html>.

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Russian "Hybrid Warfare" may also involve the use of recently retired military and Russian Secret Service officers.<sup>12</sup> Such personnel may possess experience in past intense military conflict. This ensures the inability to directly attribute any military activity to official organs of the Russian Federation.

On February 28, 2014, more than 150 "Little Green Men" on four lorries attacked and captured the main Crimean civilian airport in Simferopol.<sup>13</sup> They were headed by Colonel Igor "Strelkov" Gyrkin, who retired from the Russian Federal Security Service before the attack. Throughout his career, he participated in numerous military and paramilitary conflicts, including those in Transnistria in Bosnia (on the side of Serbian Army), and in the two Chechnya wars.<sup>14</sup> In early April, he crossed the Russian-Ukrainian border in the Donetsk region with a special assault unit and declared himself the "Defense Minister of the Donetsk Peoples' Republic."<sup>15</sup>

In a recent interview in the Moscow newspaper "Tomorrow,"<sup>16</sup> Colonel Gyrkin explicitly recognized his role in initiating activities in Ukraine. He stated, "In a certain way, the war trigger was pushed by me. If my unit did not cross the border, everything would have finished as in Kharkiv and Odessa. Some people would have been killed, some—arrested, but nothing would have happened."<sup>17</sup>

Hybrid warfare may also involve circumvention of international legal obligations, while at the same time maintaining the utility of same. This is exemplified by the Russian Federation's apparent circumvention of its agreement with the Ukraine concerning the prohibition of intelligence operations by and between the organs of the Russian and Ukrainian Foreign and Military Intelligence Services.<sup>18</sup> Russian President Vladimir Putin created the Fifth Main Intelligence Department, a new organization inside the Federal Security Services under the title "Department of Actual Information about International Coopera-

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12. Путин отрицает наличие у России планов аннексии или дестабилизации восточной Украины [Putin denies that Russian has plans for annexation or destabilize Eastern Ukraine], <http://www.golos-ameriki.ru/content/rutin-russia-has-no-plans-to-annex-or-destabilize-ukraine/1929789.html> (Jun. 4, 2014).

13. Shaun Walker et al., *Russian 'invasion' of Crimea fuels fear of Ukraine conflict*, *GUARDIAN* (UK), Feb. 28, 2014, 19:27PM, <http://www.theguardian.com/world/2014/feb/28/russia-crimea-white-house>.

14. Noah Sneider, *Shadowy Rebel Wields Iron Fist in Ukraine Fight*, *N.Y. TIMES* (July 10, 2014); Peter Leonard, *Meet Igor Strelkov, The Face of the Insurgency in Eastern Ukraine*, *THE HUFFINGTON POST* (Apr. 29, 2014), [http://www.huffingtonpost.com/2014/04/29/igor-strelkov-ukraine\\_n\\_5235368.html](http://www.huffingtonpost.com/2014/04/29/igor-strelkov-ukraine_n_5235368.html).

15. *Id.* See also Gianluca Mezzofiore, *Igor Strelkov admits Russia FSB affiliation in Kremlin-censored interview*, *INT'L BUSINESS TIMES*, Dec. 2, 2014, <http://www.ibtimes.co.uk/igor-strelkov-admits-russia-fsb-affiliation-kremlin-censored-interview-1477713>.

16. Спусковой крючок войны все-таки нажал я. Если бы наш отряд не перешел границу, в итоге все бы кончилось, как в Харькове, как в Одессе. Было бы несколько десятков убитых, обожженных, арестованных. И на этом бы кончилось [Girkin Triggered War], *KIEVSMI.NET*, <http://www.microsofttranslator.com/BV.aspx?ref=IE8Activity&a=http%3A%2F%2Fkievsmi.net%2Fnovosti%2Fukraina%2F53203-strelkov-spuskovoj-kryuchok-vojni-vse-taki-nazhal-ya.html> (Nov. 20, 2014).

17. Диверсант Гиркин взял на себя ответственность за начало войны [Saboteur Girkin took responsibility for starting the war], *LIGA.NET*, [http://news.liga.net/news/politics/4124022-diversant\\_girkin\\_vzjal\\_na\\_sebya\\_otvetstvennost\\_za\\_nachalo\\_voynny.htm](http://news.liga.net/news/politics/4124022-diversant_girkin_vzjal_na_sebya_otvetstvennost_za_nachalo_voynny.htm) (Nov. 20, 2014); Anna Dolgov, *Russia's Igor Strelkov: I Am Responsible for War in Eastern Ukraine*, *THE MOSCOW TIMES*, Nov. 21, 2014, <http://www.themoscowtimes.com/news/article/russias-igor-strelkov-i-am-responsible-for-war-in-eastern-ukraine/511584.html>.

18. TV News Channel 24, *Москаль, В Луганске сидит Пятое Главное управление ФСБ России [Moscal: In Lugansk Sits The fifth Main Control the FSB of Russia]*, (Nov. 4, 2014), <http://24tv.ua>, [http://24tv.ua/home/showSingleNews.do?v\\_luganske\\_sidit\\_pyatoe\\_glavnoe\\_upravlenie\\_fsb\\_rf\\_\\_moskal&objectId=505414&lang=ru](http://24tv.ua/home/showSingleNews.do?v_luganske_sidit_pyatoe_glavnoe_upravlenie_fsb_rf__moskal&objectId=505414&lang=ru).

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tion.<sup>19</sup> This department does not have any agreements with the Ukrainian Security Service and conducts intelligence activities in the Ukraine, Moldova, and Georgia.<sup>20</sup>

## II. International Response to Iran's Nuclear Program<sup>21</sup>

Over the past year, the so-called P5+1 and Iran,<sup>22</sup> facilitated by the European Union, have been negotiating towards a permanent, comprehensive agreement to ensure peaceful use of Iran's nuclear program. Efforts through the year included six rounds of technical meetings between the International Atomic Energy Agency (IAEA or Agency) and Tehran,<sup>23</sup> as well as seven rounds of political-level meetings between the parties.<sup>24</sup> The parties ultimately failed to come to a final agreement for the second time in the past year but agreed to a seven-month extension of the interim foundational agreement, the Joint Plan of Action (JPOA).<sup>25</sup> The JPOA is a six-month interim agreement between Iran and the P5+1 signed on November 23, 2013. It lays out an approach towards a long-term solution to address international concerns over Iran's nuclear program and is renewable by mutual agreement.<sup>26</sup> This second extension extends the deadline for a permanent agreement to June 30, 2015, with an interim deadline of March 31, 2015 for a general framework.

The additional extension was not a surprise. Despite recurring reports of earnest discussions as the year progressed, the negotiations are obviously complex, complicated,<sup>27</sup> and, in various aspects, "interdependent."<sup>28</sup> After the second extension, and similar to last year when the JPOA was announced, some in the United States Senate felt increased

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19. *Id.*

20. *Id.*

21. This brief overview should be read in conjunction with the last two Year-in-Review articles from the National Security Law Committee, *National Security Law*, 48 INT'L LAW 474 (2014) and *National Security Law*, 47 INT'L LAW 456 (2013).

22. The P5+1 was coined to signify the five permanent members of the U.N. Security Council plus Germany. The group is also referred to as the E3/EU+3, signifying the three involved EU nations (i.e., United Kingdom, France, and Germany) plus the United States, Russia, and China.

23. *IAEA and Iran: Chronology of Key Events*, INT'L ATOMIC ENERGY AGENCY, <http://www.iaea.org/newscenter/focus/iran/chronology-of-key-events> (last visited Nov. 21, 2014).

24. See *Timeline of Nuclear Diplomacy with Iran*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/factsheet/Timeline-of-Nuclear-Diplomacy-With-Iran> (noting six rounds of political-level discussions, plus the November rounds leading up to the second JPOA extension).

25. EUROPEAN EXTERNAL ACTION SERV., [http://eeas.europa.eu/statements/docs/2013/131124\\_03\\_en.pdf](http://eeas.europa.eu/statements/docs/2013/131124_03_en.pdf).

26. EUROPEAN EXTERNAL ACTION SERV., Factsheet, *E3/EU+3 Nuclear Negotiations with Iran: Terms of the Agreement on a Joint Plan of Action, Including Measures to be Taken by the European Union*, Doc. No. 131219/02, Jan. 17, 2014, [http://www.eeas.europa.eu/statements/docs/2013/131219\\_02\\_en.pdf](http://www.eeas.europa.eu/statements/docs/2013/131219_02_en.pdf).

27. Undersecretary of State Wendy Sherman, Remarks at a Symposium on P5+1 Iran Nuclear Negotiations, Center for Strategic and International Studies (Oct. 23, 2014), available at <http://www.state.gov/p/us/rm/2014/233306.htm>.

28. Louis Charbonneau & Justyna Pawlak, *Six Powers, Iran Enter Crunch Phase of Nuclear Diplomacy*, REUTERS (May 14, 2014), <http://www.reuters.com/article/2014/05/14/iran-nuclear-idUSL6N0NZ62E20140514>.

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sanctions were in order to compel an agreement.<sup>29</sup> However, Tehran posited increased sanctions would be a deal breaker.<sup>30</sup>

The reporting period started out optimistically in November 2013 with the signing of the JPOA. On January 12, 2014, the P5+1 and Iran followed up by agreeing to technical understandings to implement the JPOA.<sup>31</sup> The technical understandings “create[d] space and time to negotiate a comprehensive resolution to this issue”<sup>32</sup> and are primarily for the IAEA, which is tasked with implementing the agreement.<sup>33</sup> The understandings establish what IAEA officials should be looking for when they visit facilities, what information IAEA officials can expect from Iran, and when to expect it.<sup>34</sup> This information will enable IAEA officials to carry out managed access to new facilities they had not visited as part of their regular monitoring activities. Additionally under the JPOA, Iran is required to halt enrichment of uranium over 5% and to take tiered actions to dilute 20% enriched uranium hexafluoride (UF<sub>6</sub>), such that it will be eliminated at the end of the six-month-agreement period.<sup>35</sup> According to the IAEA, Iran has met these obligations, though it has continued to enrich UF<sub>6</sub> up to 5%.<sup>36</sup>

Cynicism against Iran’s efforts gained traction after the announcement by IAEA Director General Yukiya Amano, on the eve of the November 2014 political talks between the P5+1 and Iran, that he was “still unable to provide ‘credible assurance’ Iran had no undeclared nuclear material and activities.”<sup>37</sup> The Agency cited concerns over construction activity at the Parchin military installation “likely to have further undermined the Agency’s ability to conduct effective verification. It remains important for Iran to provide answers to the Agency’s questions and access to the Parchin military facility.”<sup>38</sup>

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29. Niels Lesniewski, *Republicans Push for More Iran Sanctions as Talks are Extended*, ROLL CALL (Nov. 24, 2014), <http://blogs.rollcall.com/wgdb/republicans-push-for-more-sanctions-on-iran-as-talks-are-extended/>.

30. Matthew Lee & George Jahn, *Iran Nuclear Talks Extended Until July but Threatened by Potential Sanctions*, DENVER POST (Nov. 25, 2014), [http://www.denverpost.com/nationworld/ci\\_27005717/iran-nuclear-talks-extended-until-july-but-threatened](http://www.denverpost.com/nationworld/ci_27005717/iran-nuclear-talks-extended-until-july-but-threatened).

31. *Background Briefing on the Implementation Plan of the P5+1 and Iran’s First Step Nuclear Agreement*, U.S. DEP’T OF STATE, <http://www.state.gov/r/pa/prs/ps/2014/01/219571.htm> (last visited Jan. 15, 2014).

32. *Id.*

33. *Id.*

34. INT’L ATOMIC ENERGY AGENCY, MONITORING AND VERIFICATION IN THE ISLAMIC REPUBLIC OF IRAN IN RELATION TO THE JOINT PLAN OF ACTION ¶ 6, GOV/2014/2 (Jan. 17, 2014), available at <http://www.iaea.org/sites/default/files/gov2014-2.pdf>.

35. U.S. DEP’T OF STATE, *Background Briefing on the Implementation Plan of the P5+1 and Iran’s First Step Nuclear Agreement*, <http://www.state.gov/r/pa/prs/ps/2014/01/219571.htm>, visited Jan. 15, 2014.

36. INT’L ATOMIC ENERGY AGENCY, IMPLEMENTATION OF THE NPT SAFEGUARDS AGREEMENT AND RELEVANT PROVISIONS OF SECURITY COUNCIL RESOLUTIONS IN THE ISLAMIC REPUBLIC OF IRAN ¶¶ 12-14, Doc. No. GOV/2014/58 (Nov. 7, 2014), available at <http://www.iaea.org/sites/default/files/gov2014-58.pdf>.

37. Frederick Dahl, *Iran Still Stalling as Nuclear Deadline Looms—U.N. Agency*, REUTERS (Nov. 21, 2014), <http://in.reuters.com/assets/print?aid=INKCN0J41BF20141120>.

38. INT’L ATOMIC ENERGY AGENCY, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran* ¶ 59, IAEA Doc. GOV/2014/58 (Nov. 7, 2014), <http://www.iaea.org/sites/default/files/gov2014-58.pdf> (internal citations omitted).

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### III. Nuclear Arms Control

In its 2014 Compliance Report<sup>39</sup> the U.S. State Department declared the Russian Federation to be “in violation of its obligations under the INF [Intermediate Nuclear Forces] Treaty<sup>40</sup> not to possess, produce, or flight-test a ground-launched cruise missile (GLCM) with a range capability of 500 km to 5,500 km, or to possess or produce launchers of such missiles.”<sup>41</sup> The United States called for immediate talks on the reported violation and for prompt steps by Russia to cure it. The Russian Foreign Ministry denied the missile in question violated the treaty and repeated earlier claims (which the United States has denied) that the United States is violating the treaty with some of the missiles used in missile defense tests and with the development of some armed drones.<sup>42</sup> As of late November 2014, the disputes remained unresolved, but both parties expressed a desire to continue talks and preserve the treaty.<sup>43</sup>

In April 2015, the next Review Conference on the Nuclear Non-Proliferation Treaty (NPT)<sup>44</sup> will begin at the United Nations in New York. The United Nations’ 2014 NPT Preparatory Committee was unable to agree on a final statement.<sup>45</sup> There was sharp disagreement<sup>46</sup> between the nuclear-weapons states recognized by the NPT<sup>47</sup> and a majority of the non-nuclear weapons states over the pace of progress under Article VI of the NPT.<sup>48</sup> Article VI provides all parties agree “to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament.”<sup>49</sup> During the United Nations’ First Committee debate on nuclear weapons in October 2014,<sup>50</sup> 155 non-nuclear weapons states submitted a joint statement

39. U.S. DEP’T OF STATE, <http://www.state.gov/documents/organization/230108.pdf>.

40. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles U.S.-Russ., *available at* <http://www.state.gov/t/avc/trty/102360.htm>.

41. U.S. DEP’T OF STATE, <http://www.state.gov/documents/organization/230108.pdf>.

42. *US Statements that Russia Breaks INF Treaty Unfounded—FM*, TASS RUSSIAN NEWS AGENCY (July 30, 2014), <http://en.itar-tass.com/russia/742972>.

43. Statement by Rose Gottemoeller, U.S. Dep’t of State, Under Secretary for Arms Control and International Security, *America’s Commitment to Ballistic Missile Defense and the European Phased Adaptive Approach* (Nov. 18, 2014), *available at* <http://www.state.gov/t/us/2014/234157.htm>.

44. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

45. Stockholm Int’l Peace Research Institute, 2014 NPT PrepComm: Day 10, <http://www.sipri.org/research/disarmament/2014-npt-prepcomm/day-10> (last visited Nov. 29, 2014).

46. *See, e.g.*, Women’s Int’l League for Peace and Freedom, NPT News in Review, Vol. 12, No. 11, *available at* <http://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/NIR2014/No.11.pdf>.

47. United States, Russia, United Kingdom, France, and China, which are also the Permanent Members of the U.N. Security Council, frequently referred to as “the P5.”

48. Compare, *e.g.*, Statement by Mikhail I. Uliyanov, Head of Delegation of the Russian Federation to the Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Nuclear Non-Proliferation of Nuclear Weapons (Cluster 1: Disarmament) (Apr. 30, 2014), with Statement by Amb. Patricia O’Brien on behalf of the New Agenda Coalition. Both statements are available at <http://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/2014/statements> (click on the respective statements under “Cluster One, Wednesday 30 April 2014”).

49. NPT, Art. VI.

50. The First Committee, consisting of all U.N. member states, “considers all disarmament and international security matters within the scope of the [U.N.] Charter.” *Disarmament and International Security*, Gen. Assembly of the U.N., <http://www.un.org/en/ga/first>. First Committee resolutions are normally adopted as a matter of course by the General Assembly when it meets in plenary session.

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citing the “catastrophic humanitarian consequences of nuclear weapons” and calling for their “total elimination.”<sup>51</sup>

On April 24, 2014, the Republic of the Marshall Islands (RMI) filed applications<sup>52</sup> in the International Court of Justice (ICJ) against the nine nuclear-weapons states<sup>53</sup> seeking declaratory judgment that the Respondents have breached obligations, recognized by the ICJ in a 1996 advisory opinion, “to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>54</sup> The RMI’s claims against the five NPT signatories rely on both the NPT and customary international law. The RMI’s claims as to the non-signatory states are based solely on customary international law. The United Kingdom, India, and Pakistan have accepted the compulsory jurisdiction of the ICJ in cases where the other party has also accepted compulsory jurisdiction, which the RMI has. None of the remaining six nuclear states has agreed to jurisdiction in this case, and China has already stated it will not do so. The RMI has also filed a parallel case in federal district court in San Francisco, California, against the United States alone. The Department of Justice has filed a motion to dismiss on justiciability grounds.<sup>55</sup>

One current dispute between the P5 and non-nuclear weapons states relates to the modernization of nuclear arsenals. In response to concerns that such modernization was inconsistent with progress toward nuclear disarmament, the parties to the NPT agreed at the 2010 NPT Review Conference to recognize “the interests of non-nuclear weapons states in the constraining by the nuclear weapons states of the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons.”<sup>56</sup> In 2014, however, all of the nuclear-weapons states are proceeding with the modernization and qualitative enhancement of their nuclear arsenals (and, in the cases of India and Pakistan, with quantitative increases as well).<sup>57</sup> For example, the U.S. Air Force, in addition to a new penetration bomber, is seeking an enhanced air-launched cruise missile that will provide “lower yield options” and “more targeting flexibility.”<sup>58</sup> The United States, however, has declared its modernization program is not intended to

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51. [http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com14/statements/20Oct\\_NewZealand.pdf](http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com14/statements/20Oct_NewZealand.pdf).

52. Press Release, Int’l Court of Justice, No. 2014/18 (Apr. 25, 2014), available at <http://www.icj-cij.org/presscom/files/0/18300.pdf>.

53. China, France, Russia, United Kingdom, United States of America, and India, Pakistan, Israel, and North Korea.

54. 1996 Advisory Opinion of the International Court of Justice, para.105(2)F

55. Marshall Islands v. United States, U.S. District Court, Northern District of California, Case No. 3:2014-cv-01885.

56. 2010 NPT Review Conference Final Document I(b)(4).

57. Hans M. Kristensen & Robert S. Norris, *Slowing Nuclear Weapons Reductions and Endless Nuclear Weapons Modernizations: a Challenge to the NPT*, BULL. OF THE ATOMIC SCIENTISTS 2014, <http://bos.sagepub.com/content/70/4/94.full>.

58. Hans M. Kristensen, Fed’n of American Scientists, *W80-1 Warhead Selected for New Nuclear Cruise Missile*, Oct.10, 2014, [http://fas.org/blogs/security/2014/10/w80-1\\_lrso/](http://fas.org/blogs/security/2014/10/w80-1_lrso/).

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develop new nuclear warheads, missions, or capabilities,<sup>59</sup> and repeated these assurances in the 2014 U.N. debates.<sup>60</sup>

The government of Austria announced it would host an international conference on December 8-9, 2014, in Vienna, on the humanitarian consequences of nuclear explosions.<sup>61</sup> The United States, although it had joined a P5 boycott of earlier conferences on the same subject,<sup>62</sup> announced in November that the United States would participate in the Vienna Conference but would not treat it as a forum for arms control negotiations.<sup>63</sup>

#### **IV. Information and Intelligence Developments**

##### **A. INTELLIGENCE CASES IN U.S. COURTS**

Several high profile cases made their way through the U.S. courts regarding the extent to which the National Security Agency's (NSA's) surveillance program comports with the Fourth Amendment of the U.S. Constitution. In *Klayman v. Obama*, Judge Richard J. Leon of the U.S. District Court of the District of Columbia ruled that the counterterrorism program that collects telephone metadata violated the Fourth Amendment. He barred the government from collecting any data associated with the plaintiff.<sup>64</sup> The court reasoned that the database never truly served the purpose of rapidly identifying terrorist in time-sensitive investigations.<sup>65</sup> Although the government publicly asserted that the NSA's surveillance program has prevented fifty-four terrorist attacks, no evidence was submitted to back the claim.<sup>66</sup>

On appeal, the government argued the collection of the metadata did not amount to a search under the Fourth Amendment because individuals voluntarily shared the data with a third party provider, namely, telephone companies.<sup>67</sup> The government further stated that there was no protected constitutional interest that had been violated by the collection of business records from a telephone company.<sup>68</sup>

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59. E.g., U.S. DEP'T OF DEFENSE, NUCLEAR POSTURE REVIEW REPORT (April 2010), available at <http://www.defense.gov/npr/docs/2010%20Nuclear%20Posture%20Review%20Report.pdf>.

60. Statement by Ambassador Robert Wood to the U.N. General Assembly, *Thematic Debate on Nuclear Weapons* (Oct. 20, 2014).

61. Republic of Austria, Vienna Conference on the Humanitarian Impact of Nuclear Weapons, <http://www.bmeia.gv.at/en/european-foreign-policy/disarmament/weapons-of-mass-destruction/nuclear-weapons-and-nuclear-terrorism/vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons/> (last visited Dec. 7, 2014).

62. Joint Statement of China, France, the Russian Federation, the United Kingdom, and the United States, available at [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/oslo-2013/P5\\_Oslo.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/oslo-2013/P5_Oslo.pdf); <http://opencanada.org/features/the-think-tank/comments/the-humanitarian-side-of-nuclear-non-proliferation/>.

63. Press Release, U.S. Dep't of State, Office of the Spokesperson, *United States Will Attend the Vienna Conference on the Humanitarian Impact of Nuclear Weapons*, (Nov. 7, 2014), available at <http://www.state.gov/r/pa/prs/ps/2014/11/233868.htm>.

64. *Klayman v. Obama*, 957 F. Supp. 2d 1, 67 (D.D.C. 2013).

65. *Id.* at 62-66.

66. *Id.*

67. Josh Gerstein, *Anti-NSA ruling in Jeopardy*, POLITICO (Nov. 4 2014), <http://www.politico.com/blogs/under-the-radar/2014/11/antinsa-ruling-in-jeopardy-198151.html>.

68. *Id.* A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments on November 2, 2014.

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*Klayman* stands in stark contrast to *ACLU v. Clapper*, which was heard in the U.S. District Court for the Southern District of New York. Judge William H. Pauley III upheld the NSA's bulk telephone metadata collection program.<sup>69</sup> The court reasoned that although the program vacuums up virtually all telephone calls to and from the United States, it is still subject to executive and congressional oversight.<sup>70</sup> The court further explained there is no evidence the government used the information gathered from the bulk telephone metadata collection program for any purpose other than investigating and disrupting terrorist attacks.<sup>71</sup>

Like *Klayman*, the ACLU case is also on appeal. The Court of Appeals for the Second Circuit heard arguments regarding the constitutionality of the program on September 2, 2014, and raised questions regarding the statutory scheme under which the program operates, specifically Section 215 of the USA PATRIOT Act.<sup>72</sup> This provision enables intelligence organizations to request that the FISA Court order the production of documents or other tangible things relevant to an authorized national security investigation.<sup>73</sup>

The ACLU argued that Section 215 does not apply to telephone metadata and therefore the program is not statutorily allowed.<sup>74</sup> The government stressed the protections that surround the information collected in the program and argued that the gathering of routine information, such as time and duration of phone calls, falls squarely within the Fourth Amendment.<sup>75</sup>

This circuit split may well find its way to the United States Supreme Court.

**B. INTELLIGENCE AND THE U.S. EXECUTIVE**

On January 17, 2014, President Barack Obama issued Presidential Policy Directive/PPD-28 concerning Signal Intelligence Activity.<sup>76</sup> The directive seeks to advance the United States' national security and foreign policy interests and to protect its citizens, and the citizens of its allies and partners, from harm, while also protecting legitimate privacy interests.<sup>77</sup>

The directive makes clear that all signals collection must be authorized by and conducted pursuant to legislation, executive order, or proclamation. Collection of signals intelligence shall not be used to suppress or burden criticism or dissent or to disfavor

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69. *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013).

70. *Id.* at 757.

71. *Id.*

72. Oral Argument at 19:57, American Civil Liberties Union, et al., v. James Clapper, et. al. No. 13 Civ. 3994 (WHP), available at <http://www.c-span.org/video/?321163-1/aclu-v-clapper-oral-argument-phone-record-surveillance>.

73. Section 215 of the Foreign Intelligence Surveillance Act, available at <http://icontherecord.tumblr.com/topics/section-215>

74. Oral Argument at 21:51, American Civil Liberties Union, et al., v. James Clapper, et. al. No. 13 Civ. 3994 (WHP), available at <http://www.c-span.org/video/?321163-1/aclu-v-clapper-oral-argument-phone-record-surveillance>.

75. Oral Argument at 1:34:31, American Civil Liberties Union, et al., v. James Clapper, et. al. No. 13 Civ. 3994 (WHP), available at <http://www.c-span.org/video/?321163-1/aclu-v-clapper-oral-argument-phone-record-surveillance>.

76. Available at <http://www.gpo.gov/fdsys/pkg/DCPD-201400031/pdf/DCPD-201400031.pdf>.

77. Presidential Policy Directive 28—Signals Intelligence Activities, DAILY COMP. PRES. DOC. 201400031

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persons based on their ethnicity, race, gender, sexual orientation, or religion.<sup>78</sup> The order limits the collection of signals intelligence exclusively to foreign intelligence or counter-intelligence purposes that support national and departmental missions. In so doing, it specifies that privacy and civil liberties shall be an integral consideration when planning signals intelligence activities.<sup>79</sup>

Following this guidance, the NSA announced the creation of a Civil Liberties and Privacy Officer to provide advice to the director and to oversee the NSA's civil liberties and privacy-related activities. The officer also is expected to develop measures to further strengthen the NSA's privacy protections.<sup>80</sup>

Finally, the presidential directive further refines the process for collecting signals intelligence and directs the intelligence community to establish policies and procedures that are reasonably designed to minimize the dissemination and retention of personal information collected.<sup>81</sup>

C. INTELLIGENCE CASES IN THE EUROPEAN UNION COURT OF JUSTICE

On April 8, 2014, the Grand Chamber of the Court of Justice of the European Union issued a judgment<sup>82</sup> on two combined cases from Ireland and Austria considering the validity of a directive issued by the European Parliament and the Council on March 15, 2006—Directive 2006/24/EC.<sup>83</sup> The directive requires:

telecommunications companies to keep EU citizens' data for between six months and two years '[b]ecause retention of data has proved to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organized crime and terrorism, it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period.'<sup>84</sup>

The Court was asked to address the validity of the directive in light of two liberties found in the Charter of Fundamental Rights of the European Union: the fundamental right to respect for private life and the fundamental right to the protection of personal data.<sup>85</sup> The Court struck down the directive, concluding that it "entails a wide-ranging

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78. *Id.*

79. *Id.*

80. Press Release, U.S. Nat'l Security Agency, *NSA Announces New Civil Liberties and Privacy Officer* (Jan. 24, 2014), available at [https://www.nsa.gov/public\\_info/press\\_room/2014/civil\\_liberties\\_privacy\\_officer.shtml](https://www.nsa.gov/public_info/press_room/2014/civil_liberties_privacy_officer.shtml).

81. Presidential Policy Directive 28—Signals Intelligence Activities, DAILY COMP. PRES. DOC. 201400031

82. *Digital Rights Ireland, Ltd. v. Ireland*, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=127299> [hereinafter EU Court of Justice Judgment].

83. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF>.

84. Andrea Germanos, *Victory for Defenders of Privacy: Top EU Court Smacks Down Surveillance Law*, COMMON DREAMS, <http://www.commondreams.org/news/2014/04/08/victory-defenders-privacy-top-eu-court-smacks-down-surveillance-law>.

85. Charter of Fundamental Rights of the European Union, Arts. 7, 8, [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

and particularly serious interference with those fundamental rights in the legal order of the EU,” and that such interference is not “precisely circumscribed . . . to ensure that it is actually limited to what is strictly necessary.”<sup>86</sup> The Court found “particularly serious” the perception of a constant surveillance state that is created when data is retained without the knowledge of the registered user.<sup>87</sup>

## V. Cybersecurity Developments

Several important U.S. cybersecurity developments occurred during the past year. As discussed below, these included: (i) the promulgation by the National Institute of Standards and Technology (NIST) of a Framework for Improving Critical Infrastructure Cybersecurity; (ii) the indictment of five members of the Chinese People’s Liberation Army (PLA) by a grand jury in federal district court in Pennsylvania on charges of cyber espionage and related crimes brought by the Department of Justice (DOJ); and (iii) the failure of Congress to pass any cybersecurity legislation.

In February 2014, NIST issued Version 1.0 of the Framework for Improving Critical Infrastructure Cybersecurity (Framework).<sup>88</sup> Mandated to develop a voluntary Framework pursuant to Executive Order 13636 of February 12, 2013, NIST facilitated useful collaboration between government and private industry that resulted in the creation of a Framework that uses a common language to address and manage cybersecurity risk in a cost-effective way based on business needs without placing additional regulatory requirements on businesses.<sup>89</sup>

The Framework consists of three parts: the Framework Core, the Framework Profile, and the Framework Implementation Tiers.<sup>90</sup> The Framework Core contains a set of cybersecurity activities, outcomes, and informative references that are common across critical infrastructure sectors, providing the detailed guidance for developing individual organizational Framework Profiles.<sup>91</sup> Through use of the Framework Profiles, entities are able to align their cybersecurity activities with their business requirements, risk tolerances, and resources. The Framework Tiers provide a mechanism for businesses to view and understand the characteristics of their approach to managing cybersecurity risk.<sup>92</sup> Collectively, the Framework is intended to allow organizations of any size and with any degree of cybersecurity sophistication to apply the principles and best practices of risk management to develop organization-specific solutions that will help them reduce and better manage cybersecurity risks.<sup>93</sup> Recognizing that the Framework will need to be updated to keep pace with changes in technology, threats, and other factors, and in order to incorporate lessons learned from its use, NIST intends for the Framework to be a “living docu-

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86. EU Court of Justice Judgment, ¶ 65.

87. EU Court of Justice Judgment, ¶ 37.

88. NAT’L INST. OF STANDARDS AND TECH., FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY, <http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf> (2014).

89. *Id.* at 1.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 2.

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ment” that will be revised on a regular basis. This is why the initial Framework document is designated, “Version 1.0.”<sup>94</sup>

NIST’s Framework was the subject of considerable discussion during a panel program on “Private Contractors, Snowden, and Cybersecurity” that took place during the ABA Section of International Law’s Spring Meeting in New York City on April 3, 2014. During the program, one of the speakers, Joel Brenner, a former Inspector General of the NSA under President George W. Bush and currently a Robert Wilhelm Fellow at the Massachusetts Institute of Technology’s Center for International Studies, acknowledged that NIST’s Framework was a good starting point. He further recommended that law firms, companies, and government agencies also review the Critical Security Controls that were originally developed under the auspices of the SANS Institute<sup>95</sup> and are now administered and updated by the Council on CyberSecurity, a not-for-profit organization committed to the security of the open Internet.<sup>96</sup> Another speaker, Evan Bayh, former Senator and former Governor of Indiana, echoed Mr. Brenner’s recommendation and urged Congress to pass necessary cybersecurity legislation, although he stated that he did not think Congress would take such action until a cyber-attack significantly debilitates a corporate or government computer system.<sup>97</sup>

Revelation of significant cyber-attacks on the computer systems of several large U.S. companies was disclosed when the DOJ unsealed a grand jury indictment against five members of the Chinese PLA on May 19, 2014. In the DOJ press release issued in connection with the indictment, Attorney General Eric Holder stated, “This is a case alleging economic espionage by members of the Chinese military and represents the first ever charges against a state actor for this type of hacking,” and that “[t]he range of trade secrets and other sensitive business information stolen in this case is significant and demands an aggressive response.”<sup>98</sup>

In the unsealed indictment, the following companies were identified as being the victims of the crimes allegedly perpetrated between 2006 and 2014 by the five members of the Chinese PLA who were indicted: Alcoa, Inc.; Westinghouse Electric Co.; United States Steel Corp. (U.S. Steel); Allegheny Technologies Inc. (ATI); the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW); and various U.S. subsidiaries of SolarWorld AG.<sup>99</sup> The charges in the indictment included, among other things: economic espionage; trade secret theft; aggravated identity theft; and conspiracy to commit computer fraud.<sup>100</sup>

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94. *Id.*

95. See, e.g., SANS Institute, *Critical Security Controls*, <https://www.sans.org/critical-security-controls/> (last visited Dec. 1, 2014).

96. See Council on CyberSecurity, *Critical Cybersecurity Controls (Vers. 5.1)*, <http://www.counciloncybersecurity.org/critical-controls/> (last visited Nov. 30, 2014).

97. See Stephen Joyce, *Congress Won’t Approve Cybersecurity Law Until Attack Compels It to Act*, Bayh Says, BLOOMBERG BNA (Apr. 7, 2014), <http://www.bna.com/congress-wont-approve-n17179889411/> (last visited Nov. 30, 2014).

98. Press Release, U.S. Dep’t. of Justice, *U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage* (May 9, 2014), available at <http://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor>.

99. *Id.*

100. *Id.*

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Notwithstanding the significant cyber-attacks referenced in the unsealed indictment against the five members of the Chinese PLA, or several other large-scale attacks perpetrated in 2014 against J.P. Morgan and numerous U.S. government agencies by entities believed to be supported by the Russian government or the Chinese government, Congress failed to pass any cybersecurity legislation in 2014.

**VI. Islamic State of Iraq and the Levant<sup>101</sup>**

June 2014 saw the rise to international prominence of the Islamic State of Iraq and the Levant (ISIL) in its current form<sup>102</sup> when it swept across northern Iraq, capturing Mosul and the Beiji oil refinery in Iraq. Seizing swaths of Sunni-controlled territory across northeast Syria and northern Iraq<sup>103</sup> and imposing its harsh brand of governance, the group declared a caliphate called the Islamic State, and named Abu Bakr al-Baghdadi as Caliph.

Retribution is swift and brutal against anyone who opposes its harsh theocratic rule. The Independent International Commission of Inquiry on the Syrian Arab Republic<sup>104</sup> investigated the treatment of Syrians living under ISIL control. The investigation,<sup>105</sup> based on over 300 first-hand victim and witness statements, “documents shocking accounts of the armed group’s use of terror to subjugate Syrians living in its areas of control, as well as the use of extreme violence against both civilians and captured fighters.”<sup>106</sup>

ISIL also works to build its version of a state and citizenry. It follows a standard methodology. Once it establishes military control, “it takes over power plants, factories, bakeries, and food supplies,”<sup>107</sup> as well as oil fields.<sup>108</sup> “Its lawyers draft modern contracts that spell out Islamic responsibilities of local organizations that want to work with the dis-

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101. Various entities refer to the group alternately as ISIS, ISIL, the Islamic State, Al Nasra Front, DAISH, and DAESH. Ray Sanchez, *ISIS, ISIL, or the Islamic State*, CNN (Sept. 9, 2014), <http://www.cnn.com/2014/09/09/world/meast/isis-isil-islamic-state/>. This contribution refers to the group as ISIL.

102. ISIL is an evolved form of Al Qa’ida in Iraq, an Al Qa’ida offshoot organization founded in 2004 by Al Abu Mus’ab al-Zarqawi, who pledged his allegiance to bin Laden. For a quick history of ISIS, see Address by the Honorable Matthew G. Olsen, Director, National Counterterrorism Center, Brookings Institution (Sept. 3, 2014), available at <http://www.dni.gov/files/documents/2014-09-03%20Remarks%20for%20the%20Brookings%20Institution.pdf>.

103. See, e.g., CNN Library, *ISIS Fast Facts*, CNN, <http://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html>.

104. See the overview available at <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>.

105. U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, *RULE OF TERROR: LIVING UNDER ISIS IN SYRIA*, (Nov. 14, 2014), available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC\\_CRP\\_ISIS\\_14Nov2014.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC_CRP_ISIS_14Nov2014.pdf) [hereinafter IICI Report].

106. United Nations Human Rights, *UN Commission of Inquiry: Syrian Victims Reveal ISIS’s Calculated Use of Brutality and Indoctrination* (Nov. 14, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15295&LangID=E#sthash.0xLvFuGx.dpuf> <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15295&LangID=E>.

107. Thanassis Cambanis, *The Surprising Appeal of ISIS*, BOSTON GLOBE (Jun. 29, 2014).

108. RT.com, *Islamic State Seeks Crisis Manager to Save Ailing Oil Revenues—report*, <http://rt.com/news/201623-islamic-state-oil-manager/> (Nov. 2, 2014).

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placed.”<sup>109</sup> ISIL asks the governed to actively participate in “spreading the call to God.”<sup>110</sup>

The U.N. Security Council passed a resolution recognizing ISIL as a terror group and calling for action against it,<sup>111</sup> as well as a second resolution addressing foreign terror fighters assisting ISIL.<sup>112</sup> In response, President Obama announced a three-pronged approach focused on expanding a U.S. air campaign; drawing on a full range of counterterrorism tools to stem the tide of foreign fighters; and increasing support for friendly foreign ground forces.<sup>113</sup> The asserted domestic legal authority<sup>114</sup> for taking action against ISIL is the 2001 Authorization for Use of Military Force (AUMF), which was passed as a joint resolution by both houses of the U.S. Congress shortly after the 2001 terror attacks.<sup>115</sup> However, it was later reported that the President would be seeking a new authorization to use military force.<sup>116</sup> Arguably, the AUMF does not cover training moderate rebel forces in Syria.<sup>117</sup>

As for the plan’s international law basis, Iraq expressly requested “the United States . . . to lead international efforts to strike ISIL sites and military strongholds, with [its] express consent.”<sup>118</sup> To this end, sixty nations announced their intent to cooperate in coordinated action against ISIL.<sup>119</sup> The U.S.-led coalition met in Brussels to set up the structure by which it will coordinate actions. The participating states agreed to five lines of effort to defeat ISIL:

- Supporting military operations, capacity building, and training;
- Stopping the flow of foreign terrorist fighters;
- Cutting off ISIL’s access to financing and funding;
- Addressing associated humanitarian relief and crises; and

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109. Thanassis Cambanis, *The Surprising Appeal of ISIS*, BOSTON GLOBE, Jun. 29, 2014.

110. *Id.*

111. S.C. Res. 2701, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

112. S.C. Res. 2701, U.N. Doc. S/RES/2178 (Sep. 24, 2014).

113. Press Release, The White House, *Background Conference Call on the President’s Address to the Nation* (Sept. 10, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/09/10/background-conference-call-presidents-address-nation> [hereinafter White House Press Release].

114. *Id.* See also Letter from President Obama to the Speaker of the House of Representatives and President Pro Tempore of the Senate, *War Powers Resolution Regarding Iraq* (Sept. 23, 2014), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201400698/pdf/DCPD-201400698.pdf>.

115. Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. 107-40, 115 Stat. 224 (2001). However, critics of this theory for authorization point to the disavowal of ISIS by Al-Qa-ida; see *Liz Sly, Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST (Feb. 3, 2014).

116. Karen DeYoung, *Obama to Seek New Authorization for Fight Against Islamic State*, WASH. POST (Nov. 5, 2014), [http://www.washingtonpost.com/world/national-security/obama-to-seek-new-authorization-for-fight-against-islamic-state/2014/11/05/67bb0998-652c-11e4-bb14-4cfea1e742d5\\_story.html](http://www.washingtonpost.com/world/national-security/obama-to-seek-new-authorization-for-fight-against-islamic-state/2014/11/05/67bb0998-652c-11e4-bb14-4cfea1e742d5_story.html); Karen DeYoung, *President and Congress Play Waiting Game on Authorization for Islamic State Action*, WASH. POST (Dec. 4, 2014), [http://www.washingtonpost.com/world/national-security/president-and-congress-play-waiting-game-on-authorization-for-islamic-state-action/2014/12/04/0f37339c-7bec-11e4-9a27-6fdb612bff8\\_story.html](http://www.washingtonpost.com/world/national-security/president-and-congress-play-waiting-game-on-authorization-for-islamic-state-action/2014/12/04/0f37339c-7bec-11e4-9a27-6fdb612bff8_story.html).

117. White House Press Release, *supra* note 113.

118. Letter from The Permanent Representative of Iraq to the United Nations to the President of the United Nations Security Council (Sep. 20, 2014), available at [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2014\\_691.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf).

119. Joint Statement by Coalition Partners at Counter-ISIL Meeting (Dec. 3, 2014), available at <http://iipdigital.usembassy.gov/st/english/texttrans/2014/12/20141203311598.html#axzz3Kzz7OMHv>.

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- Exposing ISIL's true nature (ideological de-legitimization).<sup>120</sup>

Iran has asserted its role in helping to defeat ISIL. Iran has also said, however, that it will not coordinate with the United States or the U.S.-led coalition, which Ayatollah Ali Hosseini Khamenei dismissed as an alternate way to subvert the Muslim world.<sup>121</sup> Iranian F-4 aircraft were sighted bombing ISIL positions in December.<sup>122</sup> Commander of the Quds Force, Qassem Suleimani, has seen increased media coverage in the latter part of 2014, to include coverage for his Quds Force assisting the Kurdish Peshmerga in the fight against ISIL.<sup>123</sup>

Turkey is in a tenuous position as it tries to balance ongoing tensions with Kurds while also providing support for Kurds battling ISIL.<sup>124</sup> Media reports indicate that Turkey and the United States have struck a deal that will result in greater involvement by Turkey.<sup>125</sup> In exchange for a buffer zone inside Syria along the entirety of the Syria-Turkey border, the United States will get access to the air base at Incirlik.<sup>126</sup> However, "part of the [United States'] risk assessment is whether Syrian President Bashar al-Assad will continue to allow overflights of his territory without activating Syrian air defenses, as he has with U.S. aircraft now striking the Islamic State in areas largely to the east of the proposed new front."<sup>127</sup>

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120. *Id.*

121. <http://english.al-akhbar.com/node/22642>; Ayatollah Ali Khamenei Twitter Post (Nov. 25, 2014), [https://twitter.com/khamenei\\_ir/status/537169493282529280](https://twitter.com/khamenei_ir/status/537169493282529280). See also Tim Arango & Thomas Erdbrink, *U.S. and Iran Both Attack ISIS, but Try Not to Look Like Allies*, N.Y. TIMES, Dec. 3, 2014.

122. Ian Black, *Iranian Air Force Bombs Targets in Iraq, Says Pentagon*, THE GUARDIAN (Dec. 3, 2013), <http://www.theguardian.com/world/2014/dec/03/iran-bombs-isis-in-iraq-says-us>, Julian Borger, *Iran Air Strikes Against ISIS Requested by Iraqi Government, Says Tebran*, THE GUARDIAN (Dec. 5, 2014), <http://www.theguardian.com/world/2014/dec/05/iran-conducts-air-strikes-against-isis-extremists-iraq>.

123. *Quds Force Chief Suleimani Reportedly Helped Peshmerga Defeat IS In Diyala*, RADIO FREE EUROPE/RADIO LIBERTY (Nov. 25, 2014), <http://www.rferl.org/content/irgc-isis-suleimani-kurdish-iraq-islamic-state-fighting/26709813.html>.

124. Gönül Tol, *Turkey's Tough Choice: Take on ISIS or the PKK?*, CNN (Oct. 9, 2014), <http://www.cnn.com/2014/10/07/opinion/turkey-isis-pkk/index.html>.

125. Karen DeYoung, *U.S. Considers Opening a New Front Against Islamic State to Create a Safe Zone in Syria*, WASH. POST (Dec. 1, 2014), [http://www.washingtonpost.com/world/national-security/us-weighs-a-new-front-to-create-safe-zone-in-syria/2014/12/01/1aae1bb0-796b-11e4-9a27-6fdb6c12bfff\\_story.html](http://www.washingtonpost.com/world/national-security/us-weighs-a-new-front-to-create-safe-zone-in-syria/2014/12/01/1aae1bb0-796b-11e4-9a27-6fdb6c12bfff_story.html).

126. *Id.*

127. *Id.*

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## International Organizations: The Work of the United Nations in 2014

JAVIER ETCHEVERRY BONEO, CINDY G. BUYS, JEFFREY LING AND LUCÍA REPETTO\*

### I. The United Nations Security Council Resolutions of 2014: The Necessity to Properly Enforce Current Security Council Regulatory Framework

Some of the most important issues that the world faced in terms of international affairs in 2014 were arguably the annexation of Crimea by Russia, the Ukrainian Eastern Provinces conflict, the rise of the Islamic State (“IS”), the Ebola epidemic, and the Syrian conflict. However, a review of the United Nations Security Council (hereinafter, “SC” or “the Security Council”) Resolutions of 2014<sup>1</sup> may lead one to think otherwise, as such issues generated very few or limited resolutions, if any.

Our review of the Resolutions of 2014 suggests that the SC exercises a form of self-censorship when it comes to sensitive issues, especially those involving the interests of the five permanent members of the SC (“P5”). This behavior leads to a disconnect between the formal power and the actual power of the SC, as such issues are eventually dealt with by another group of States outside the UN framework.

This first section will analyze under paragraph A the Resolutions of 2014 in an attempt to classify them first from a geographical perspective, and then from a content perspective. Paragraph B will take a look at the major issues of the international agenda in 2014 and the overlap (or lack thereof) between the SC Resolutions of 2014 and the international agenda. Paragraph C will analyze the application of the UN Charter and the SC’s rules of procedure in 2014 and how self-censorship, the exaggerated presence of invited Member States to the SC meetings, and the lack of a reasonable understanding of the only exemption to the concurring vote provided by the UN Charter undermine the authority of the SC.

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1. *Security Council Resolutions*, UN, <http://www.un.org/en/sc/documents/resolutions/2014.shtml> (last visited Mar. 30, 2015). This article reviews all sixty-three United Nations (“UN”) Security Council resolutions for 2014 (the “Resolutions” or the “Resolutions of 2014”), except S.C. Res. 2195, U.N. Doc. S/RES/2195 relating to threats to international peace and security, which was unavailable at the time of the writing of this article (Dec. 19, 2014).

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A. OUTLINE OF SECURITY COUNCIL RESOLUTIONS IN 2014

Of all of the meetings convened by the Security Council in 2014, 239 were open (on the record), and twenty-two were closed (off the record).<sup>2</sup> Only sixty-three meetings resulted in resolutions being issued, the majority of which were passed by vote unanimously.<sup>3</sup>

1. *Geographical Perspective*

Looking at the Resolutions of 2014, the great majority of them concern issues relating to Africa.<sup>4</sup> Specifically, of the sixty-three Resolutions of 2014, twenty-three were related to sub-Saharan Africa and twenty-six were related to Central Asia, the Middle East and Northern Africa.<sup>5</sup> The rest of the resolutions consisted of: seven that were not region-specific, five related to Europe, and one resolution each for East Asia and the Caribbean, respectively.<sup>6</sup> While these issues are obviously important, the scarcity of resolutions related to Ukraine, for both the Crimean Annexation<sup>7</sup> (0) and the Ukrainian Eastern Provinces conflict<sup>8</sup> (1), Ebola<sup>9</sup> (2), Syria<sup>10</sup> (5) and the IS<sup>11</sup> (2), issues that dominated the international agenda in 2014, is glaring. Aside from the geographical distribution of Resolutions, the length of the Resolutions is also telling. While the resolutions pertaining to Africa and Central Asia are quite lengthy (some of them up to seventeen pages long),<sup>12</sup> resolutions related to more controversial issues were considerably shorter.<sup>13</sup> This pattern seems to suggest that the SC has a tendency to thoroughly engage only when it comes to issues that do not involve a P5 member's interests or main strategic concerns.

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2. See generally *Meetings Record*, UN, <http://www.un.org/en/sc/meetings/records/2014.shtml>. The authors reviewed all 261 SC Meeting Minutes for 2014 with the exception of the Meeting Minutes related to Afghanistan (S.C. Meeting Minutes, 7347th meeting, December 18, 2014, U.N. Doc. S/PV.7347) and Non-proliferation (S.C. Meeting Minutes, 7350th meeting, December 18, 2014, U.N. Doc. S/PV.7350) because they were unavailable at the time of the writing of this article (Dec. 19, 2014), and the ones related to the International Tribunals of Yugoslavia and Rwanda (S.C. Meeting Minutes, 7348th meeting, December 18, 2014, U.N. Doc. S/PV.7348) and the situation in the Central African Republic (S.C. Meeting Minutes, 7349th meeting, December 18, 2014, U.N. Doc. S/PV.7349) because they were under embargo at the time of the writing of this article (Dec. 19, 2014).

3. *Id.*

4. See *supra* note 1.

5. *Id.*

6. *Id.*

7. Note that a draft SC resolution related to the Crimean referendum was vetoed by Russia at the SC meeting on March 15, 2014. S.C. Meeting Minutes, 7138th meeting, March 15, 2014, U.N. Doc. S/PV.7138. Subsequently on March 27, 2014, the UN General Assembly ("GA") adopted a two-page resolution regarding the Crimean Annexation, which unlike Security Council resolutions, are non-binding. G.A. Res. 68/262, U.N. Doc. A/RES/68/262 (Mar. 27, 2014).

8. See S.C. Res. 2166, U.N. Doc. S/RES/2166 (Jul. 21, 2014).

9. See S.C. Res. 2188, U.N. Doc. S/RES/2188 (Dec. 9, 2014) and S.C. Res. 2190, U.N. Doc. S/RES/2190 (Dec. 15, 2014).

10. See S.C. Res. 2139, U.N. Doc. S/RES/2139 (Feb. 22, 2014), S.C. Res. 2163, U.N. Doc. S/RES/2163 (Jun. 25, 2014), S.C. Res. 2165, U.N. Doc. S/RES/2165 (Jul. 14, 2014), S.C. Res. 2191, U.N. Doc. S/RES/2191 (Dec. 17, 2014) and S.C. Res. 2192, U.N. Doc. S/RES/2192 (Dec. 18, 2014).

11. S.C. Res. 2170, U.N. Doc. S/RES/2170 (Aug. 15, 2014) and S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sep. 24, 2014).

12. The resolution that is 17 pages long actually pertains to Afghanistan.

13. See *supra* note 1.

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2. *Doctrinal vs. Substantive Perspective*

Another way to classify the Resolutions is from a content perspective. They can be placed in two categories: substantive and doctrinal. The first type of resolution refers to one that addresses State-specific issues and in some way require follow up (e.g. action from a government or other UN-designated body) or that executes some sort of active conduct (e.g. decides to extend a mandate or applies sanctions).<sup>14</sup> The second refers to a resolution addressing a more general issue (e.g., threats to international security, terrorism, or UN peacekeeping operations in general).<sup>15</sup> Reviewing the Resolutions of 2014, it is interesting to note that of the Resolutions relating to Europe, only one is a State-specific—a condemnation of the tragic downing of Malaysian Airlines flight MH17 in Ukraine—and the rest of them are continuations of peacekeeping operations already in place.<sup>16</sup> On the other hand, the majority of those relating to Africa, the Middle East, and Central Asia are substantive and much more dynamic in their requests and language.<sup>17</sup>

B. MAJOR ISSUES OF 2014

1. *Ukraine*

A list of the key 2014 international affairs issues should prioritize the Crimean Annexation,<sup>18</sup> the Ukrainian Eastern Provinces conflict, and the downing of Malaysia Airlines Flight 17 in Ukraine.<sup>19</sup> However, there is limited discussion of Ukraine in the Resolutions.<sup>20</sup> For example, the only mention of the Ukrainian conflict was in the two-page long Resolution 2166, in which the Security Council “[stressed] the need for a full, thorough and independent international investigation into the [downing of flight MH17]. . .”<sup>21</sup> The Security Council issued no resolution with regard to the Crimean Annexation or the Ukrainian Eastern Provinces conflict.<sup>22</sup> There was also no mention of Crimea and Ukraine in any of the SC Presidential statements in 2014.<sup>23</sup> There was, however, a clear attempt to issue a resolution on March 15, 2014 rejecting the validity of the Crimean referendum, the draft of which was vetoed by Russia (the “7138 Meeting”).<sup>24</sup>

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14. See, e.g., S.C. Res. 2188, U.N. Doc. S/RES/2188 (Dec. 9, 2014).

15. See, e.g., S.C. Res. 2185, U.N. Doc. S/RES/2185 (Nov. 20, 2014).

16. See S.C. Res. 2135, U.N. Doc. S/RES/2135 (Jan. 30, 2014), S.C. Res. 2166, U.N. Doc. S/RES/2166 (Jul. 21, 2014), S.C. Res. 2168, U.N. Doc. S/RES/2168 (Jul. 30, 2014) and S.C. Res. 2183, U.N. Doc. S/RES/2183 (Nov. 11, 2014).

17. See *supra* note 1.

18. Slideshow, *The biggest news stories of 2014*, MSN NEWS, Slide 14, Mar. 12: Annexation of Crimea, <http://www.msn.com/en-us/news/featured/the-biggest-news-stories-of-2014/ss-BBgnPrN#image=14>. (last visited Mar. 30, 2015).

19. Slideshow, *The biggest news stories of 2014*, MSN NEWS, Slide 34, July 17: Malaysia Airlines Flight 17 Shot Down, <http://www.msn.com/en-us/news/featured/the-biggest-news-stories-of-2014/ss-BBgnPrN#image=34> (last visited Mar. 30, 2015).

20. See *supra* note 1.

21. See *supra* note 8.

22. See *supra* note 1.

23. *Presidential Statements*, UN, <http://www.un.org/en/sc/documents/statements/>. Note that we reviewed all 28 SC Presidential Statements for 2014.

24. See *supra* note 7.

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2. *The IS and Syria*

Two other important developments were the rise of the IS in Iraq and the Syrian conflict.<sup>25</sup> The intent of the IS to create an Islamic state is of great concern to the global community given its brutal tactics involving high-profile executions of hostages, extortion and robbery.<sup>26</sup> The IS was briefly discussed in Resolutions 2170 and 2178,<sup>27</sup> where the SC resolved to implement financial, travel, and arms sanctions on the Al Qaida splinter group as part of its counter-terrorism initiative.<sup>28</sup> The conflict in Syria, on the other hand, was addressed in Resolutions 2139, 2163, 2165, 2191 and 2192 where the SC “strongly condemned” the human rights violations and violence taking place there, “called on Member States” to help in the resolution of the conflict, and established a monitoring mechanism for the conflict.<sup>29</sup>

The only other example of a lack of a concurrent P5 vote noted in the 2014 meetings is where a draft SC Resolution related to the referral of the Syrian conflict to the International Criminal Court was vetoed by China and Russia at the SC meeting on May 22, 2014.<sup>30</sup> It is also interesting to note that China, the other party that vetoed the draft Resolution on Syria, abstained from voting on the 7138 Meeting.<sup>31</sup>

3. *Ebola*

The Ebola epidemic that hit Western Africa in March of 2014 continues to ravage the region to this date.<sup>32</sup> The first reported case of the epidemic was in Sierra Leone, later spreading to Liberia, and later on to Senegal, Mali, and Guinea.<sup>33</sup> Since the UN health agency declared an “international public health emergency” in August, the global community has been on high alert in a concerted effort to contain the virus.<sup>34</sup> Outside of the African continent, there have been confirmed cases of the virus in the US (10) and in Europe (12).<sup>35</sup> The SC issued a resolution related to the Ebola outbreak only in the context of its effects on the stability of Liberia.<sup>36</sup>

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25. *See Battle for Iraq & Syria in maps*, BBC (Dec. 3, 2014, 12:19 GMT), <http://www.bbc.com/news/world-middle-east-27838034>; *see also ISIS fast facts*, CNN (Nov. 17, 2014, Updated 17:14 GMT), <http://edition.cnn.com/2014/08/08/world/isis-fast-facts/>.

26. *Id.*

27. *See supra* note 11.

28. *Id.*

29. *See supra* note 10.

30. S.C. Meeting Minutes, 7180th meeting, May 22, 2014, U.N. Doc. S/PV.7180. *See also Russia and China veto UN move to refer Syria to ICC*, BBC NEWS (May 22, 2014 15:59 GMT), <http://www.bbc.com/news/world-middle-east-27514256>. Both China and Russia have historically abstained from voting with regard to issues related to intervention of non-involved states in regional conflicts. *See Saira Mohamed, Shame in the Security Council*, 90 WASH. U.L. REV. 1191, 1196-97 (2013).

31. *See supra* notes 2 and 7.

32. At the time of the writing of this article (Dec. 19, 2014). *See Ebola: Mapping the outbreak*, BBC NEWS (Dec. 16, 2014, 09:41 GMT), <http://www.bbc.com/news/world-africa-28755033>; *see also WEST AFRICA - EBOLA OUTBREAK - FACT SHEET #11 (FY 15)*, USAID (Dec. 10, 2014, Updated 17:14 GMT), <http://www.usaid.gov/ebola/fy15/fs11>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *See supra* note 9.

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C. FLAWED CONSTRUCTION OF PROCEDURAL MATTERS UNDERMINE THE SECURITY  
COUNCIL'S AUTHORITY

2014 witnessed three notable SC behaviors: a trend toward self-censorship with respect to sensitive issues; a continued use of invitations to non-SC members to participate in SC meetings that particularly affect an SC member's interest, and a lack of enforcement of the abstention rule in SC voting.

1. *The Security Council's Self-Censorship*

As can be seen from the above, it appears there is a tendency to sidestep sensitive issues within the SC that seems to be related to what may be called self-censorship to avoid the exercise of the veto power. In 2014, the Security Council was unable to issue a resolution or take any substantive action (e.g. sanctions) with regard to the annexation of Crimea by Russia.<sup>37</sup> After the 7138 Meeting, the issue of Crimea was not materially discussed again in the SC<sup>38</sup> despite actions by the Russian Federation that arguably warranted a SC response, namely, the Russian decree issued on March 21, 2014 finalizing the legal process of annexing Crimea to the Russian Federation.<sup>39</sup> This action probably should have merited an SC response, but instead was discussed in meetings that never led to another draft resolution on the matter.<sup>40</sup>

This is not to say that no international sanctions were imposed on Russia. In fact, the United States and the European Union have both passed a number of sanctions entailing travel bans and asset freezes for certain Russian and Crimean nationals.<sup>41</sup> Collective international action was taken, but it was done so outside of the UN context, and in this way, formal power and actual power drifted apart in 2014.

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37. The goal of this section is not to judge the dispute on Crimea nor the Russian actions in this regard. In fact, this section refers to the Crimean annexation only because it is incidentally one of the most crucial geopolitical bilateral disputes of 2014, but the procedural weakness arising from the conflict of interest in the construction of paragraph 3 of Article 27 of the Charter of the United Nations, the resulting self-censorship and the abuse of invitations of Member States discussed in this article are probably applicable to other past cases related to different P5 members.

38. *Meetings Record*, UN, <http://www.un.org/en/sc/meetings/records/2014.shtml> (last visited Mar. 30, 2015). The authors reviewed all 261 SC Meeting Minutes for 2014 to the extent available at the time of the writing of this article (Dec. 19, 2014), noting some mentions of the Crimean Annexation, but no further SC actions after the 7138 Meeting. The only UN action on the issue was the issuance of a non-binding resolution was passed in General Assembly. Sangwon Yoon, *Crimea Resolution Backed by U.S. Barely Gets UN Majority*, BLOOMBERG NEWS (Mar. 27, 2014), <http://www.bloomberg.com/news/articles/2014-03-27/crimea-resolution-backed-by-west-barely-gets-un-majority>. See also *supra* notes 2 and 7.

39. *Crimea, Sevastopol officially join Russia as Putin signs final decree*, RT (March 21, 2014 09:10), <http://rt.com/news/russia-parliament-crimea-ratification-293/>.

40. See *supra* note 38.

41. See, e.g., *Ukraine crisis: Russia & sanctions*, BBC NEWS (Dec. 19, 2014), <http://www.bbc.com/news/world-europe-26672800>; see also David Francis & John Hudson, *White House on the Fence on New Ukraine Sanctions*, FOREIGN POLICY (Dec. 15, 2014 4:03pm), <http://foreignpolicy.com/2014/12/15/white-house-on-the-fence-on-new-ukraine-sanctions/>.

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2. *The Invitation of other Member States to Participate in SC Meetings*

Rules 37 and 38 of the Provisional Rules of Procedure of the SC<sup>42</sup> provide a mechanism that allows the SC to invite non-SC parties or Member States to participate in SC meetings and draft resolutions. The year 2014 shows significant participation from Member States through invitations to the SC. Such participation is standard and probably is grounded in a desire to promote transparency in the SC. However, it is not always clear that it is advantageous to have a large number of participants at SC meetings. In fact, there is a perception that in certain instances, such as in the 7138 Meeting, the presence of non-SC members was not arranged in good faith.

Of the 261 total SC meetings in 2014, 142 included at least one non-SC member under Security Council Rules of Procedure 37 and 38, generally the State that was the topic of the meeting.<sup>43</sup> Of those 142 meetings, twenty-nine meetings had more than fifteen non-SC members present, including those instances where the veto was used, such as in the 7138 Meeting.<sup>44</sup> However, those instances where the veto was not used can be distinguished from those where it was used in that they addressed very broad issues which truly deserve the presence of invited non-SC members such as the protection of civilians, children and armed conflict, and non-proliferation of weapons of mass destruction. Thus, it can be inferred that in those meetings related to very specific matters where the vetoes were used, the non-SC members were probably invited in order to generate a form of public derision upon the exercise of a given P5 member's veto.<sup>45</sup>

To avoid abuse, use of the mechanism allowing the participation of other member States pursuant to Rule 37 may need to be more restricted in the future. However, it should be retained for its usefulness in incorporating relevant non-SC party opinions in order to make the discussion more thoughtful (e.g. Germany in the context of the 2014 Ukrainian Crisis).

3. *The Right to a Concurring Vote*

Article 27, paragraph 3, of the Charter of the United Nations provides that a party to a dispute under consideration by the SC must abstain from voting on matters relating to that dispute.<sup>46</sup> The Resolutions underline the intrinsic conflict of interest of the veto power in the context of a bilateral conflict between a P5 member and any other Member State, as opposed to a situation when a concurring vote is denied in the context of a global or regional conflict. Looking at the vetoes exercised in 2014, it is notable that there were two of a very different nature: the one used by Russia in the case of the draft resolution on the referendum on Crimean Annexation<sup>47</sup> and the vetoes used by China and Russia on the

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42. *Provisional Rules of Procedure of the Security Council*, R. 37-38, U.N. Doc. S/96/Rev.7 (Dec. 21, 1982), available at <http://www.un.org/Docs/sc/scrules.htm>.

43. See *supra* note 1.

44. *Id.*

45. See Adam Hehir, *World Order, Human Rights, and the Security Council Veto*, E-INTERNATIONAL RELATIONS (Sep. 2, 2014), <http://www.e-ir.info/2014/09/02/world-order-human-rights-and-the-security-council-veto/>.

46. See *supra* note 44 and Draft S.C. Res. 189, U.N. Doc. S/2014/189 (Mar. 15, 2014).

47. *Id.*

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draft resolution related to Syria.<sup>48</sup> Aside from the fact that the Russian Federation was the only P5 member that exercised its veto power twice in 2014, a distinction can be made between the two issues. The first case is clearly one in which Russia has a direct interest, and thus falls into the previously-delineated category of an issue predominantly involving a P5 member's interests, while the second involves the fate of a third party (Syria) in the context of a regional conflict, as well as the jurisdiction of an international court such as the International Criminal Court. The first case deals with the issue of legitimacy<sup>49</sup> since the SC as a whole failed to pass a resolution solely because of an interested veto of a P5.

Reviewing the SC meetings of 2014 and the criticisms of how the SC functions we noted that a lot of time is devoted to discussions on reforms to the right of a concurring vote pursuant to the UN Charter and the expansion of the permanent membership of the SC in order to reform the SC's role within the international community.<sup>50</sup> Rather than focusing on reform, time might be better spent focusing on properly enforcing certain existing regulations within the SC's framework; in particular, the application of the restriction on voting provided under paragraph 3 of Article 27 of the UN Charter and the restraint in the use of Rule 37 of the Provisional Rules of Procedure of the Security Council so as to avoid its abuse that damages the relevance of SC membership.

## II. The UN General Assembly

During its 68th and 69th sessions spanning calendar year 2014, the UN General Assembly (GA) adopted resolutions on a wide range of issues. Some of those issues were similar to those under consideration by the SC, such as the Ebola outbreak in West Africa,<sup>51</sup> the territorial integrity of Ukraine,<sup>52</sup> and the human rights situation in Syria.<sup>53</sup> However, the GA's work was naturally far more wide-ranging than that of the SC and included resolutions relating to nuclear weapons and weapons of mass destruction,<sup>54</sup> space activities,<sup>55</sup> migrant children,<sup>56</sup> the death penalty,<sup>57</sup> and the drug problem,<sup>58</sup> among many other issues. It also considered country-specific and regional matters, including the status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia,<sup>59</sup> UN operations and peacekeeping missions in Côte d'Ivoire, Cyprus, Congo, Timor-Leste, Haiti, Kosovo, Liberia, Lebanon, Sudan, South Sudan, Syria, Dafur and the Central African Republic,<sup>60</sup> and the peaceful settlement of the

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48. See *supra* note 44 and Draft S.C. Res. 348, U.N. Doc. S/2014/348 (May 22, 2014).

49. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 A.J.I.L. 552, 558 (Oct. 2003).

50. See Caron, *supra* at 566-88.

51. See, e.g., A/RES/69/1. UN General Assembly resolutions may be found on its website here: <http://www.un.org/en/ga/69/resolutions.shtml>.

52. See, e.g., A/RES/68/262.

53. See, e.g., A/RES/69/189.

54. See, e.g., A/RES/69/39.

55. See, e.g., A/RES/69/38.

56. See, e.g., A/RES/69/187.

57. See, e.g., A/RES/69/186.

58. See, e.g., A/RES/69/200 and 201.

59. See, e.g., A/RES/68/274.

60. See, e.g., A/RES/68/285-299.

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question of Palestine.<sup>61</sup> Finally, the UN GA approved one new convention in 2014, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration,<sup>62</sup>

### III. The Work of the International Law Commission (ILC)

The International Law Commission (ILC) held its sixty-sixth session in 2014 at the United Nations European Headquarters from May through August. Highlights of the session included: (1) adoption of articles on the expulsion of aliens; (2) adoption of articles on the protection of persons in the event of disasters; and (3) conclusion of the ILC's work on the obligation to extradite or prosecute.<sup>63</sup> In addition, the ILC voted to include the topics of "crimes against humanity" and "jus cogens" in its program of work.<sup>64</sup> The ILC also continued work on the following topics:

- The ILC considered the third report of the Special Rapporteur (A/CN.4/673) on "Immunity of State officials from foreign criminal jurisdiction" and referred two draft articles to the Drafting Committee;
- The ILC provisionally adopted five draft conclusions from the Special Rapporteur's second report (A/CN.4/671) regarding the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties";
- The ILC reconstituted the Study Group on the "Most-favored-nation clause";
- The ILC debated the second report of the Special Rapporteur (A/CN.4/675) on the "Provisional application of treaties";
- After considering the second report of the Special Rapporteur (A/CN.4/672) on "Identification of customary international law," the ILC referred eleven draft conclusions to the Drafting Committee;
- The ILC debated the preliminary report of the Special Rapporteur (A/CN.4/674) on "Protection of the environment in relation to armed conflicts"; and
- The ILC considered the first report of the Special Rapporteur (A/CN.4/667) on the "Protection of the atmosphere," but deferred the draft guidelines until next year.<sup>65</sup>

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61. See, e.g., A/RES/69/23.

62. A/RES/69/116 (Dec. 10, 2014).

63. *Report of the International Law Comm'n, Summary of the work of the Commission at its sixty-sixth session*, Supp. No. 10, A/69/10 (2014), <http://www.un.org/law/ilc/>.

64. *Id.*

65. *Id.*

## International Law Practice Management

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### I. Introduction

This article reviews law practice management developments during 2014, from North and South America (Canada, the United States, Brazil and several other Latin American countries) to China, Southeast Asia, Africa, and the United Kingdom. The overarching theme is one of challenge to traditional concepts of law firm management, whether it involves the prospect of non-lawyer ownership (already in effect in the United Kingdom and possibly beginning in Canada); the impact on the law business of regional trade negotiations and of new trading communities (U.S. and Southeast Asia); the tidal wave of globalization affecting emerging regions of the world (China, Latin America, Southeast Asia, and Africa); or the work-in-progress of bringing traditional law practices into the modern age of commercial enterprises (Latin America). The consensus seems to be that the transformation of law practices around the world is accelerating into perhaps, as Shakespeare would have it, “a sea-change, into something rich and strange.”<sup>1</sup>

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1. William Shakespeare, *The Tempest*, Act 1, Scene 2.

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## II. The United States

International trade agreements have the potential to affect law firm structures and practice and thus law practice management issues.<sup>2</sup> During 2014, the Office of the U.S. Trade Representative (USTR) was handling four different sets of trade negotiations that included legal services within their ambit. These were: (1) the ongoing World Trade Organization negotiations about the General Agreement on Trade in Services (GATS); (2) the Trade in Services Agreement (TISA) negotiations, which involve a subset of WTO Members interested in making faster progress with respect to services; (3) the Trans-Pacific Partnership (TPP) negotiations among twelve countries that are located on or near the Pacific Ocean; and (4) the Transatlantic Trade and Investment Partnership (T-TIP) negotiations between the U.S. and the European Union.<sup>3</sup>

A number of U.S. lawyers and bar associations have been paying close attention to the T-TIP negotiations. If successful, these will create the largest bilateral trade agreement in the world. The USTR has stated that T-TIP “aims to bolster that already strong relationship in a way that will help boost economic growth and add to the more than 13 million American and EU jobs already supported by transatlantic trade and investment.”<sup>4</sup> It has also stated that T-TIP will increase the \$458 billion in goods and private services the United States exported in 2012 to the EU, our largest export market.<sup>5</sup> At the time of writing, there had been seven rounds of T-TIP negotiations.<sup>6</sup>

One of the reasons U.S. legal profession representatives have been paying particularly close attention to the T-TIP negotiations is the well-established relationship between the ABA and the Council of Bars and Law Societies of Europe (CCBE). The ABA and the CCBE met in August 2013 and in August 2014 to discuss the T-TIP negotiations. During this latter meeting, the CCBE transmitted to the ABA its T-TIP “requests.”<sup>7</sup> These include that a lawyer with a title from any EU member state should be able to undertake certain specified activities in all U.S. states, without running the risk of the illegal practice

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2. See generally Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875 (2010); Council for Trade in Services, *Note by the Secretariat: Legal Services, S/C/W/318* (June 14, 2010).

3. See Office of the U.S. Trade Representative, Free Trade Agreements, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (linking to T-TIP and TPP); Office of the U.S. Trade Representative, WTO & Multilateral Affairs, <http://www.ustr.gov/trade-agreements/wto-multilateral-affairs>.

4. See Office of the U.S. Trade Representative, Transatlantic Trade and Investment Partnership (T-TIP), <http://www.ustr.gov/ttip>.

5. See Office of the U.S. Trade Representative, White House Fact Sheet: Transatlantic Trade and Investment Partnership (T-TIP), <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip>.

6. See Office of the U.S. Trade Representative, Opening Remarks by U.S. and EU Chief Negotiators for T-TIP Round Seven Press Conference (Oct. 3, 2014), <http://www.ustr.gov/about-us/press-office/speeches/2014/October/Opening-Remarks-by-US-and-EU-Chief-Negotiators-for-TTIP-Round-Seven-Press-Conference>.

7. In the context of trade negotiations, a country’s “offer” indicates the changes that it is prepared to make, and its “requests” state the changes that a country would like its trading partner to implement. Although governments are the only entities that have the official power to issue requests or offers, the CCBE developed a set of requests in order to stimulate discussion among the U.S. and EU legal professions and their regulators.

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of law.<sup>8</sup> The specified activities include both temporary transactional practice, sometimes referred to as FIFO (fly in-fly out), and practicing as a foreign legal consultant (FLC), both of which would include the right to provide services in home [foreign] law, EU law, international law, and third country law. The requests also include serving in international arbitration or mediation as counsel or as a neutral, as well as “association rights,” which includes the right of a European lawyer to partner with, employ, or be employed by a U.S. lawyer.<sup>9</sup>

ABA policy is consistent with all of the CCBE’s requests, with the exception of lawyers serving as neutrals.<sup>10</sup> (The ABA does not have any policy on this latter point since, in the U.S., non-lawyers may serve as neutrals in arbitration and mediation). Many U.S. states, however, do not have rules that are consistent with these ABA policies or the CCBE’s requests.<sup>11</sup> These state rules are likely to receive increased attention not only as a result of the CCBE’s requests and actions, but because of the recently-issued IBA Global Regulation report, which contains information about all U.S. states with respect to the practice rights of foreign lawyers and law firms. The IBA Report has been circulated to the trade negotiators for a number of governments<sup>12</sup> and has been the subject of discussions among state regulators.<sup>13</sup> Because the T-TIP trade negotiations create pressure to change the U.S. lawyer regulation rules, they are relevant to those interested in law practice management.

### III. Canada

Growth in the Canadian legal market has flattened out, as more companies insource legal work or direct it to lower-cost providers. As consumer clients start reducing or putting off legal expenditures in a tighter economy, work previously being directed to law firms is no longer being directed there at the same rate. These are clear signs that the conventional assumptions about law practice in Canada are fading away. Here are three of the most significant developments in the Canadian legal market in 2014.

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8. Council of Bars and Law Societies of Europe’s, CCBE request to the United States in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations, [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/European\\_Legal\\_Profe1\\_1415787235.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/European_Legal_Profe1_1415787235.pdf).

9. *Id.* This sentence paraphrases the CCBE’s requests. For a fuller discussion of these requests, see Laurel S. Terry, *Admitting Foreign-Trained Lawyers in States Other than New York: Why It Matters*, 83(4) THE BAR EXAMINER 38 (December 2014) [hereinafter *Admitting Foreign Lawyers*].

10. See Terry, *supra* note 9; see also ABA Task Force on International Trade in Legal Services, *available at* [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/promoting\\_international\\_rule\\_law/internationaltradetf/policy.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/internationaltradetf/policy.html).

11. For information on the state adoption of the ABA’s policies on foreign lawyer practice rights, see Laurel S. Terry, *Summary of State Foreign Lawyer Practice Rules*, *available at*: [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_8\\_9\\_status\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf) and the underlying data which this chart and the map summarize.

12. See International Bar Association, IBA Global Regulation and Trade in Legal Services Report 2014, *available at*: <http://www.ibanet.org/Document/Default.aspx?DocumentUId=1D3D3E81-472A-40E5-9D9D-68EB5F71A702>; Terry and Silver, *supra* note 7, at 2 (discussing circulation of this report).

13. See Terry, *supra* note 9.

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A. THE FALL OF HEENAN BLAIKIE

The Canadian legal profession was badly rattled when one of the country's biggest and most highly respected firms unraveled and collapsed early in 2014 in what seemed like a matter of weeks, setting off alarms in law firms across the country.<sup>14</sup> From its origins in Montreal in 1973 as a premier labor, employment and litigation firm, Heenan Blaikie had grown into a nearly 2,000-person behemoth (600 lawyers, 1,300 staff) in ten offices, including a Paris location and a representative presence in Singapore.<sup>15</sup>

Post-mortems on the firm in the business and legal press identified several factors contributing to Heenan Blaikie's downfall, none of which would have done the job alone but all of which, in combination, proved fatal. Canadian Lawyer magazine published the definitive treatment of the collapse in its July 2014 issue,<sup>16</sup> identifying no fewer than nine elements that damaged the firm in one way or another:

- unbridled growth;
- poor financial controls;
- compensation jealousies;
- succession issues;
- firm infighting and rivalries;
- weak partnership governance structure;
- lack of leadership and oversight;
- opportunistic competitors; and
- a poor economy.<sup>17</sup>

That list helps explain much of the subsequent concern throughout the Canadian profession, because many partners recognized at least some of those elements as being present within their own firms. In contrast to high-profile law firm flameouts south of the border such as Dewey & LeBoeuf, the culprits in Heenan's demise were unsettlingly mundane. Many firms struggle with compensation and leadership, or with governance and competitiveness; this forced partners in other firms to ask—could they be next in line for a fall?

The short answer is no. At the time of this writing, no large or midsize Canadian law firm showed any signs of structural weakness or potential collapse. The speed and relative ease with which many ex-Heenan partners were absorbed into other large firms suggests both that the industry remains healthy and that the overall market remains robust.<sup>18</sup> But Heenan's fall served as a wake-up call to many Canadian lawyers that law firms are more fragile than they often appear, and that undiagnosed or untreated problems, even mundane ones, can metastasize quickly. That might help explain the speed with which other potential changes to the Canadian legal profession advanced in 2014.

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14. Middlemiss, Jim, 2014. *Frankenstorm brings down Heenan Blaikie*. CANADIAN LAWYER, July 7, 2014 available at <http://www.canadianlawyer.com/5194/Frankenstorm-brings-down-Heenan-Blaikie.html>.

15. *Id.*

16. Middlemiss, Jim, 2014. *Frankenstorm brings down Heenan Blaikie*. CANADIAN LAWYER, July 7, 2014 available at: <http://www.canadianlawyer.com/5194/Frankenstorm-brings-down-Heenan-Blaikie.html>.

17. *Id.*

18. *Canada: Legal Market Overview*, THE LEGAL 500, <http://www.canadianlawyer.com/5194/Frankenstorm-brings-down-Heenan-Blaikie.html> (last visited Mar. 25, 2015).

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**B. THE CBA'S FUTURES REPORT**

During its annual meeting in August 2014, the Canadian Bar Association dropped another bombshell on the country's legal profession. The Report of its Legal Futures Initiative<sup>19</sup> contained twenty-two recommendations, many of them relatively uncontroversial (e.g., new approaches to law school admission and curriculum, new compliance and reporting standards for diversity). But the first recommendation garnered almost all the attention that "lawyers should be allowed to practice in business structures that permit fee-sharing, multidisciplinary practice, and ownership, management, and investment by persons other than lawyers or other regulated legal professionals."<sup>20</sup>

This recommendation, along with a related recommendation that referral fees and fee-sharing with non-lawyers be permitted, raised the possibility of a fundamental reordering of how lawyers could conduct their business in Canada. Drawing heavily on the provisions of the Legal Services Act 2007 in England and Wales, the CBA's Report constituted the first time that any lawyers' professional body in any country had suggested authorizing non-lawyer ownership of law firms (previous reforms in Australia and England and Wales had occurred at the instigation of government, and at the cost of lawyers' independent self-regulation).<sup>21</sup> The Report also suggested a detailed ethical framework by which "Alternative Business Structures" (even the name was borrowed from England & Wales) should be regulated, similar to the British model.<sup>22</sup>

The Report's release has already generated extensive commentary and debate within the Canadian legal profession. Proponents hail its recommendations as forward leaps for both innovation and access to justice, while skeptics question the benefits when balanced against the potential cost to lawyer independence and professionalism. It seems certain that the recent experiments with non-lawyer involvement in legal service delivery in Australia and England and Wales will be cited by both sides in the months leading up to the Report's consideration by the CBA's governing Council.

If Council approves the Report, or at least its most controversial recommendations, that approval still would have no binding effect on any lawyer regulatory body in the country. But it likely would have at least a persuasive effect because the Canadian Bar Association is the largest legal organization in Canada and its policies do influence the content and tone of the conversation on current issues.

**C. POTENTIAL REGULATORY CHANGE**

While the Canadian Bar Association was preparing and writing its Futures Report, a number of Canadian law societies (statutorily created but independently operated self-regulators of the legal profession) were pursuing remarkably similar paths.

In Ontario, Canada's largest province and home to a plurality of its lawyers and most large-firm headquarters, the Law Society of Upper Canada is awaiting the final report of its ABS Working Group, which is grappling with questions very similar to those that

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19. *CBA Legal Futures Initiative*, CBA (Aug., 2014), available at <http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf>.

20. *Id.* at 35.

21. *Id.* at 33.

22. *Id.* at 41-42.

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occupied the CBA. In its interim report,<sup>23</sup> the Working Group floated the prospect of allowing full-scale non-lawyer ownership of law firms and non-lawyer participation in the legal market. A final report is expected sometime in 2015, which might fully endorse such structures and would presumably then go before the law society's benchers (elected governors, most of them lawyers) for approval. Given Ontario's size and influence within the Canadian legal profession, either its approval or rejection of Alternative Business Structures would resonate throughout the country, even more so than the CBA's Futures Report.

Elsewhere in Canada, other regulatory changes are under consideration. For example, the Barristers' Society of Nova Scotia has been making steady progress towards a regulatory overhaul that would replace the traditional system of reactive, rules-based, lawyer-focused regulation with the proactive, principles-based, entity-focused approach that has already been adopted in Australia and England & Wales.<sup>24</sup> Meanwhile, the three "Prairie provinces" of Alberta, Saskatchewan and Manitoba have been collaborating on a common approach to both these issues.

The regulation of Canadian legal services takes place at the provincial rather than the national level.<sup>25</sup> Given that the various provinces have different economic environments and different political interests, formal coordination of reform efforts is not feasible. Informally, however, each of the provincial law societies and the national CBA are taking note of what the other entities are doing, which seems likely to affect the actions and deliberations of each. While it is impossible to predict where change will first occur, when, and by what means, the odds are increasing daily that regulation of legal services in Canada will undergo change, and soon.

This year's developments have now set the stage for 2015 to be a year of decisive action in the Canadian legal market.

#### IV. South East Asia

The end of 2015 will see the formation of the Asian Economic Community, perhaps the most significant milestone in the close working relationship between ASEAN member states, and the most significant macroeconomic development in the region for a long time.<sup>26</sup> The creation of the AEC—effectively a single economic community which moves towards the free flow of investment, goods and labor between member states—hopefully presages a period of unprecedented cooperation and integration between countries in a

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23. *Professional Regulation Committee*, THE LAW SOCIETY OF UPPER CANADA (Feb. 27, 2014) available at [http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2014/convfeb2014\\_PRC%281%29.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC%281%29.pdf).

24. See generally *Transforming Regulation and Governance in the Public Interest*, BARRISTER'S SOCIETY OF NOVA SCOTIA (Oct. 15, 2013), available at <http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>.

25. See Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 SASKATCHEWAN L. REV. 146, 157 (2013), available at [http://www.americanbar.org/content/dam/aba/events/professional\\_responsibility/2014/05/40th-aba-national-conference-on-professional-responsibility/session1\\_23\\_terry\\_canada\\_trends\\_lawyer\\_regulation.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2014/05/40th-aba-national-conference-on-professional-responsibility/session1_23_terry_canada_trends_lawyer_regulation.authcheckdam.pdf).

26. *ASEAN Economic Community 2015: A real opportunity that should not be over-hyped*, SPIRE, <http://www.spiresearch.com/spire-journal/yr2013/q4/asean-economic-community-2015-a-real-opportunity-that-should-not-be-over-hyped/> (last visited March 27, 2015).

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region experiencing exceptionally high levels of economic development, albeit from widely different bases.<sup>27</sup>

The creation of the AEC provides unique opportunities for companies doing business in the ASEAN region. Although this is true of multinational companies investing in this dynamic region, it is even more the case with major regional investors who are busily preparing themselves to explore new opportunities in the member states—Thailand, Singapore, Indonesia, Philippines, Malaysia, Myanmar, Lao PDR, Cambodia, Vietnam, and Brunei.<sup>28</sup>

Law firms providing advice and support to these companies are similarly bracing themselves for the opportunities provided by—and the impact of—the formation of AEC. A key challenge for Southeast Asia’s law firms is ensuring they have the capacity and geographic spread to properly service the ASEAN region effectively. With one or two notable exceptions, most leading regional firms have historically focused on and located only in Singapore or Kuala Lumpur; only in recent years have those firms sought a presence in the more challenging markets, first in Thailand and possibly Vietnam, and in the last year or two, in rapidly developing markets like Cambodia, Lao PDR, and, especially, Myanmar.<sup>29</sup>

Acquiring that geographical coverage is a significant challenge. New offices are expensive, and planning such expansions takes time and significant management resources. This has led to many regional firms taking the easier approach of forming loose-knit alliances with domestic firms in those markets to get geographical coverage. This approach brings about all kinds of concomitant management challenges including ensuring that clients experience the same level of client relationship management from a local partner firm as it does from the “head office.” If an “affiliated” office in a less developed market fails to deliver, it can affect the entire client-firm relationship.

Another challenge with this approach is that despite the best will in the world, a loose collection of affiliate offices is just that—an affiliation. It is not a single firm, and as such there will be numerous integration issues to manage. A single integrated firm is in a better position to provide a consistently high level of service.

Southeast Asia is sometimes erroneously seen as a cohesive geographical and economic entity. It is an incredibly diverse region with numerous cultures, races, languages, political systems, levels of development, and approaches to doing business. The economic hub of Southeast Asia is, of course, the city-state of Singapore, a world financial center that regularly tops surveys relating to transparency and ease of doing business.<sup>30</sup> At the other end of the spectrum, it has countries like Myanmar and Cambodia where the challenges of doing business are greater, socialist states like Lao PDR and Vietnam, and challenging markets like the Philippines and Thailand, both beset by varying degrees of opacity and political turmoil. It also features the world’s largest Islamic democracy in Indonesia. Southeast Asia has great wealth and great poverty; democracies, single-party countries and

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27. See generally *id.*

28. See generally *id.*

29. See *Law Firms Seeking ASEAN Opportunities*, LAW FUEL (Jan. 12, 2015) <http://www.lawfuel.com/law-firms-seeking-asean-opportunities>.

30. See generally *Here’s what makes Singapore the top financial hub in Southeast Asia*, SINGAPORE BUSINESS (Jul. 30, 2013), <http://sbr.com.sg/financial-services/news/heres-what-makes-singapore-top-financial-hub-in-southeast-asia#sthash.56QAFkKi.dpuf>.

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military juntas; regions that are technologically advanced and economies with minimal infrastructure.<sup>31</sup>

Understanding the significant differences across the region is critically important, and law firm managers must make “adaptability” one of their central themes. While a regional firm may have a clear strategy around talent management, for example—including recruiting, retaining and rewarding the best lawyers and support people the region has to offer—management must understand that a one size fits all approach will fail in Southeast Asia.<sup>32</sup> Instead, each local office will need to adapt its approach to implementing the regional strategy. A recruitment strategy developed in a sophisticated market like Singapore cannot be replicated exactly in Cambodia or Laos. Similarly, the varying quality of professional education across the region means on-the-job development programs and training will need to be adapted to suit local circumstances.

The same considerations apply to information technology and communications. As the management team of a firm with offices in countries where power shortages and blackouts are common and where telecommunications infrastructure is rudimentary at best, the authors are keenly aware that IT support strategy needs to be flexible, innovative and adaptable.

Working with multinational clients across very different regulatory and legislative environments is also a significant challenge. A common complaint from clients—particularly those from outside the region who mistakenly see Southeast Asia as a single region—is the different levels of complexity of dealing with regulatory issues and authorities in different countries.<sup>33</sup> A client more accustomed to dealing with authorities in the New York, London, Sydney, or Tokyo might be pleasantly surprised that his or her experiences in Singapore are as easy—if not easier—than “back home”. It could be easy for that client to assume that experience will be replicated across the region on a cross-border transaction; managing the client’s expectations when dealing with officialdom in some of the more developing markets is an important part of client management approach. What might take hours or days to achieve in Singapore, could take weeks or even months to achieve in Indonesia, Lao PDR, or Myanmar.

The creation of the AEC and its critical role in furthering ASEAN integration is expected to boost the attractiveness of Southeast Asia as an investment destination even further, and will hopefully continue to drive economic growth for the region and lift millions out of poverty and into a new powerful middle class.<sup>34</sup> This is an exciting time for the region and it is understandable that almost every week sees the announcement of yet another international law firm opening offices in Singapore to take advantage of those new opportunities. These firms will need to learn how to do business and manage both

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31. See generally *ASEAN Business Outlook Survey*, U.S. DEPT. OF COMM. (2014), available at <https://www.uschamber.com/sites/default/files/legacy/international/files/ASEAN%20Survey%202014.pdf>.

32. See generally David M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* (Dec. 2008) at 9, available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.law.wisc.edu%2Fgls%2Fdocuments%2Fnped\\_law\\_nov\\_2008\\_dave\\_trubek.doc&ei=fBQWVebEM4G\\_ggTmloGIBA&usg=AFQjCNHMaYsmzWZbUPlktkF8e-2SS9f3UA](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.law.wisc.edu%2Fgls%2Fdocuments%2Fnped_law_nov_2008_dave_trubek.doc&ei=fBQWVebEM4G_ggTmloGIBA&usg=AFQjCNHMaYsmzWZbUPlktkF8e-2SS9f3UA).

33. See generally *id.* at 8-9.

34. See generally *ASEAN Economic Community 2015: A real opportunity that should not be over-hyped*, SPIRE, <http://www.spiresearch.com/spire-journal/yr2013/q4/asean-economic-community-2015-a-real-opportunity-that-should-not-be-over-hyped/> (last visited March 27, 2015).

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their firm and their clients in this diverse region. The Southeast Asian firms already on the ground are likely better placed to prosper in this environment, but they too will only succeed if they understand how important it is to be adaptable in this part of the region, in virtually every aspect of management.

**V. China**

The China legal services market can be viewed through a matrix consisting of two sets of factors: the foreign law firms versus the rising domestic law firms, and the traditional inbound practice versus the emerging outbound practice. The foreign and domestic law firms are both competitors and cooperation partners in each of the inbound and outbound sectors.

Foreign law firms in China remain subject to certain regulatory limitations on their scope of services in respect of inbound practice (for example, foreign law firms are not licensed to practice Chinese law but can advise on international law and practice in the context of the Chinese legal environment).<sup>35</sup> However, in practice these restrictions are not rigidly enforced and the boundary between permitted and prohibited services has blurred, providing the foreign law firms with ample scope to flourish.

Market factors, including competition from rising Chinese firms, are in many respects a more important constraint on the prospects for the China offices of foreign law firms with respect to the traditional inbound practice. Chinese law firms present an increasingly competitive value proposition for foreign multi-national clients, with a growing number of dual-qualified bilingual Chinese lawyers, often with many years of practice experience in top foreign law firms, providing an improving quality of service at lower cost.

In addition, only local firms may interface directly with many Chinese regulatory agencies, and as a result local firms have advantages not only in terms of access but also in almost all cases in terms of depth of expertise.<sup>36</sup> In parallel, many major MNCs are setting up larger in-house legal teams in China, principally made up of local Chinese lawyers who are well connected to the local law firms.<sup>37</sup> These two trends will have the effect of further dis-intermediation, as foreign MNCs engage local counsel in China directly (or, in some cases, through representative or marketing offices some Chinese firms have opened in some of the major Western commercial and financial centers) for a wider range of domestic legal services, without the need to go through foreign law firms.<sup>38</sup>

At the same time, the comparative advantages of local Chinese firms also drive opportunities for cooperation with foreign law firms, which have their own competitive advantages in cross-border projects involving substantial offshore elements. It is common for foreign and local firms to work side-by-side as co-counsel on more complex cross-border deals. As Chinese companies become more international in terms of their operations and activities, the offshore elements of China-based transactions will continue to expand, pro-

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35. Mark A. Cohen, *International Law Firms in China: Market Access and International Risk*, 80 *FORDHAM L. REV.* 2569 (2012), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4802&context=flr>.

36. *Id.* at 2570.

37. Caroline Lim, Keir Macintosh and Aya Iinuma, *Scales tip in favor of local legal talent in Asia*, *HEIDRICK & STRUGGLES* 1, 3, [http://www.heidrick.com/~media/Publications%20and%20Reports/HS\\_ScalesLocalLegalTalentAsia.pdf](http://www.heidrick.com/~media/Publications%20and%20Reports/HS_ScalesLocalLegalTalentAsia.pdf) (last visited Mar. 28, 2015).

38. *See id.* at 3

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viding increasing scope for both the foreign law firms and their domestic law firm counterparts to work together.<sup>39</sup>

As the market transitions from the traditional inbound practice to more outbound work for Chinese clients, the China offices of foreign law firms often find themselves in competition with the leading Chinese law firms for many of these outbound projects. For higher value outbound projects, the foreign firms have had a clear advantage, but to date there have been relatively few outbound investment projects with a value of more than US \$1 billion each year.<sup>40</sup>

Foreign law firms will also have advantages over the domestic law firms for certain other categories of mid-cap outbound work based on preferences of the Chinese company, the nature of the transaction or industry, or the location of the project (sophisticated jurisdiction versus emerging market). Even for these projects, price competition among competing foreign firms can be intense as central level state-owned enterprises typically put all such projects out for tender to a short list of foreign firms, all of which will have more than sufficient expertise and experience. This leads many foreign firms to bid low to build up their outbound deal lists.

The competition between local firms and foreign firms for mid-cap outbound projects often comes down to relationships and client preferences. Some of the top local firms have a very high percentage of foreign clients so do not have deep trusted adviser relationships with a significant number of Chinese clients doing outbound projects, while other Chinese firms with good client resources do not have international capabilities.<sup>41</sup> This latter group would include the top regional domestic firms. While these firms have very close ties to the leading regional companies in their home provinces, they typically are not viewed by their clients as credible when it comes to outbound projects, and so these clients will often look to the leading domestic firms or sometimes to a foreign firm.

The mid-cap outbound market for regional companies can be quite challenging. Many of these companies have substantial capital to invest abroad and have formulated some strategy to go abroad, but they typically are inexperienced with outbound projects, do not have a clear concept of how to identify targets or manage more sophisticated international deals, and can be extremely price sensitive and slow to pay professional fees. These same challenges also exist to one degree or another at the top end of the outbound market in China and apply to both foreign law firms and the domestic law firms.

Outbound work for Chinese clients now constitutes a key element of the business plan for the China offices of foreign law firms and the top Chinese law firms, even though the fees generated by the top domestic law firms from outbound work still represent only a small percentage of their total revenues. Many in the China legal market expect that the outbound market will mature in the next five to ten years, so many are playing a long game. Others will find it difficult to stay in the game without better near-term results.<sup>42</sup>

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39. See generally *id.* at 3

40. Xueyao Li and Sida Liu, *The Learning Process of Globalization: How Chinese Law Firms Survived the Financial Crisis*, 80 *FORDHAM L. REV.* 2847, 2854 (2012), Available at <http://ir.lawnet.fordham.edu/flr/vol80/iss6/17> ("Large Chinese law firms are also becoming increasingly ambitious in their global reach".)

41. See generally Caroline Lim, Keir Macintosh and Aya Inuma, *Scales tip in favor of local legal talent in Asia*, *HEIDRICK & STRUGGLES* 1, 3, [http://www.heidrick.com/~media/Publications%20and%20Reports/HS\\_ScalesLocalLegalTalentAsia.pdf](http://www.heidrick.com/~media/Publications%20and%20Reports/HS_ScalesLocalLegalTalentAsia.pdf) (last visited Mar. 28, 2015).

42. *The Learning Process of Globalization*, *supra* note 40, at 80.

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The China outbound market is understood to have been a key driver for the King & Wood Mallesons tie-up and the subsequent addition of SJ Berwin.<sup>43</sup> So far, no other top Chinese firm has followed suit, although there have been reports that some of them may be open to such a merger. Other top Chinese firms have pursued a more traditional independent law firm strategy, forging closer cooperation relationships with other leading independent law firms around the world to develop non-exclusive reciprocal referral relationships. In any event, Chinese firms can be expected to continue to find new and creative ways to enhance their presence in the international legal market.

## VI. England and Wales

Besides the changes generally being wrought in most developed legal services markets by increased client cost sensitivity, technology and changes to supply and demand dynamics, the most important developments in law practice management in the United Kingdom in 2014 were probably those driven most by two very different issues:

- the ongoing impact of the Legal Services Act,<sup>44</sup> and responses of law firms to the recovery in the economy, and
- Increased focus of U.S. law firms on London.

Since 2012, the first full year that Alternative Business Structures (ABSs) were licensed by the Solicitors Regulation Authority (SRA), the number and diversity of businesses selling legal services to consumers has increased markedly.<sup>45</sup> They varied from conventional law firms wanting to make “C” level business services executives and non-legal professionals into partners, to banks and insurance companies, amongst others. In late 2014, the SRA unveiled plans to dispense with the separate business rule that prevents law firms from having links with businesses offering non-reserved legal services.<sup>46</sup> This, according to the SRA, will “level the playing field” between traditional law firms and ABSs or unregulated providers of legal services.<sup>47</sup>

Strategically, perhaps the most significant development with regard to ABSs in 2014 was the announcements made by the “Big 4” global advisory firms concerning their future intent with legal services. Of the “Big 4”, Deloitte is the only firm that, for the present at least, has announced that it will not be applying for an ABS license.<sup>48</sup> The others are moving quite aggressively into legal services, which will likely be bundled with other related transactional and other services into integrated offerings that clients may well find

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43. See Julie Friedman, *The Inside Story of Dentons' Combination with Dacheng*, THE AMERICAN LAWYER (March 2, 2015), available at <http://www.americanlawyer.com/id=1202718495607/The-Inside-Story-of-Dentons-Combination-with-Dacheng#ixzz3ViqFE31t>.

44. The Legal Services Act 2007 aims to liberalize and regulate the market for legal services in England and Wales, to encourage competition and to provide a new route for consumer complaints. Legal Services Act, 2007, 29 c. 29 (U.K.).

45. 72 ABS licenses were granted in 2012 and 169 in 2013. *Fee policy 2014/2015*, SOLICITORS REGULATION AUTHORITY (June 26, 2014), <http://www.sra.org.uk/mysra/fees/fee-policy-2014-2015.page>; *Annual report 2012: Moving forward*, SOLICITORS REGULATION AUTHORITY (2013), <http://www.sra.org.uk/sra/how-we-work/reports/moving-forward.page/>.

46. John Hyde, *SRA Earmarks 'Level Playing Field' Between [Law] Firms and ABSs*, LAW SOC'Y GAZETTE, 22 Nov. 2014.

47. *Id.*

48. See *EY granted ABS licence*, ECONOMIA (Dec. 1, 2014) <http://economia.icaew.com/news/december-2014/ey-granted-abs-licence>.

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appealing. For mid-tier business law firms, the “Big 4” advisory firms are likely to become very significant competitors in most markets in which they choose to compete. Their move into more direct competition with law firms is expected to make law firms more circumspect about sharing management information for legal services surveys produced by the “Big 4” and also threaten the advisory services that the “Big 4” provide to law firms. Scale, a more process-driven approach to practice, global reach (especially into emerging markets) and the ability to bundle legal services into a portfolio of related services are expected to be key areas of competitive advantage for the “Big 4.”

Slater & Gordon, the Australian publicly owned law firm, continued its successful penetration of UK legal markets with further law firm acquisitions in 2014, taking its number of offices across the United Kingdom to eighteen.<sup>49</sup> Its service offering has expanded from plaintiffs personal injury work and the firm is now well regarded in the league tables in employment law and other areas of practice.

Among conventional U.K. law firms, 2014 saw intensifying competition with the U.S.-based law firms in London and Europe. A recovering U.S. economy and strengthening dollar, together with an increasing appetite on the part of U.S. law firms for focused international expansion, saw increased recruitment of partners by premium U.S. law firms from their British counterparts.<sup>50</sup> Most of the high profile lateral hires in London in 2014 have been by American law firms. This, together with a desire to grow their practices in the USA, led “Magic Circle” law firm Freshfields to amend its venerated lockstep compensation system with the reputed addition of a super pointer group, adding between 10 and 30 per cent extra room to the plateau; and more recently also to Linklaters considering similar changes as part of a renewed focus on the U.S. market.<sup>51</sup> For some U.S. law firms, London is proving a bonanza. For others, though, poor strategic thinking and haphazard hiring decisions have yielded lackluster performance in their London offices.

While 2014 did not see any further transatlantic mergers, it did see a number of British firms bulk up their presence in the USA and the partners of Eversheds voted overwhelmingly in favor of seeking a merger with an American law firm, to be pursued in 2015.<sup>52</sup> For other British firms, the focus for geographic expansion in 2014 has been on mainland Europe and on Africa.

A final development worth noting is that as part of the lead-up to the Global Legal Summit to be held in London in February 2015, coinciding with the 800th anniversary of the Magna Carta, the Law Society of England and Wales has commissioned a landmark research project to explore the value that legal services add to the United Kingdom’s economy. At roughly \$43 billion p.a.<sup>53</sup> the UK legal services market is the second largest in the world, after the USA.<sup>54</sup> This work has also been considering the role of London’s

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49. *About Us*, SLATER GORDON, <http://www.slatergordon.co.uk/about-us/> (last visited Mar. 28, 2015)

50. *See Trends and Conclusions: Mergers & Acquisitions 2014*, WWL (March 2014), <http://whoswholegal.com/news/analysis/article/31143/research-trends-conclusions-mergers-acquisitions-2014/>.

51. *See generally* Chris Jonson, *Freshfields, Linklaters Consider Lockstep Review*, AMLAW DAILY (Aug. 5, 2011), <http://amlawdaily.typepad.com/amlawdaily/2011/08/freshfieldslinklaterslockstepreview.html>.

52. Neasa MacEarlean, *Eversheds seeks US merger partner*, GLOBAL LEGAL POST (Nov. 20, 2014), <http://www.globallegalpost.com/global-view/eversheds-seeks-us-merger-partner-931840/>.

53. £26 billion in 2012 reckoned at GBP1.00=USD1.65.

54. *See* Hodgart Associates, *Key Challenges facing the UK Legal Market, 5 available at* <http://www.hodgartassociates.com/files/Key%20Challenges%20-%20UK%20Law%202014.pdf>

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global preeminence as a financial center and the United Kingdom's membership of the European and drivers of legal services in the United Kingdom.

**VII. Latin American Legal Markets**

Any general discussion of the legal profession in Latin America must first acknowledge the enormous differences in the structure and role of the legal profession, the qualification of lawyers, and the incorporation of law firms existing amongst the countries of the region. One must also take into account the significant impact that economies of various sizes and characteristics, combined with varying and highly complex legal and regulatory structures, have on the legal profession in Latin America.

At the same time, there are areas where the cultural similarities among many Latin American countries also make it possible to speak about trends in the region. Although the following discussion is largely centered on Brazil, some of the developments highlighted below also apply to law practices in other Latin American countries.

Law firms in Latin America are still evolving as businesses and commercial institutions. This was clear this year when several major law firms changed their old long names for easier and more commercially practical names. In Brazil, as in other countries of Latin America, until recently, law firms were only permitted to carry the names of their practicing partners, and in case of a partner's retirement or death, his or her name had to be expunged from the name of the firm. This practice prevented many law firms in the past from building a strong trademark. With the restriction eased, law firms finally were able to invest in their own brand, and today the legal market has a much greater appreciation that a strong mark, built on the basis of the provision of high-quality, timely and responsive work, is one of the most effective ways to attract and keep clients.

The restructuring of names, trademarks and logos, changes in ways of presenting and marketing law firms, in addition to refinements in internal organization, structuring and distribution of fees, career and pension planning and similar matters, were a mark of 2014 in the Latin American legal profession. These changes will continue to play a major role in practice management for some years to come.

Similarly, discussions regarding partner compensation are also a work in progress in Latin America. Variations on "eat what you kill" systems and its improvements, versus "lockstep," continue to preoccupy law firm management. Few, if any, firms have compensation systems that are well-tested. A number of Brazilian firms have lately tried to shift to a strict lockstep model without success. Thus, the structure and the institutionalization of the law firms are still issues to be discussed and resolved in the majority of firms, be they Brazilian or located in other countries of Latin America.<sup>55</sup>

Another issue that has occupied Latin American law firms, lawyers and bar associations in 2014, was the presence and range of permissible activities for foreign international law firms in their countries. In a number of Latin American countries, the ability of foreign law firms to render legal services in the country is virtually unlimited and undisputed. In others, for example Brazil, this has been an issue. Briefly speaking, international firms can

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<sup>55</sup>. See Rosie Cresswell, *Tailor Made*, *LATIN LAWYER* (December 2, 2013), available at <http://latinlawyer.com/features/article/45911/tailor-made/>.

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and do operate in Brazil as consultants in foreign law.<sup>56</sup> It is sufficient to note here that this issue remains controversial throughout Latin America and especially in Brazil. Several Brazilian law firms' management are conducting surveys of practices in other countries, and there is an ongoing discussion with the Bar as to regulating this issue. Interestingly, nearly all corporate law firms in the region are joining or have joined alliances that provide them a global presence (e.g., Terralex, Lex Mundi, Tag Law and others), perhaps in preparation for future cross-border capability. Regional law firm alliances have also been inaugurated, especially those located in jurisdictions that have special relations and common characteristics, as well as in smaller countries of, for instance, Central America. Some alliances involving some degree of integration between Latin American firms and bigger global firms have also come into being, for instance in Brazil, Colombia, and Chile.<sup>57</sup>

Finally, 2014 was a year of heightened sensitivity to financial considerations for firms in countries whose economic results were worse than had been expected. Brazil, Argentina, and Venezuela, for different reasons, were good examples of such disappointed expectations.

As recently as two or three years ago Brazil was anticipating a period of brilliant growth, attractive new investments and, therefore, extraordinary volumes of work for lawyers and significant expansion for law firms. Brazilian firms thus engaged new partners, created new areas of practice and invested in recruitment, training and infrastructure. The results of recent elections and the situation of the fiscal balance however have not created great enthusiasm in the production chain or in local or foreign investment flow. Law firms will now have to adapt their newly grown structures and rationalize their budgets in accordance with these economic realities.<sup>58</sup>

Although 2014 was in general a good year for Latin American lawyers and law firms, expectations for 2015 are not as rosy. All of us hope that those expectations are not fulfilled but it is clear in the market that law firms are adopting rationalization measures where expenses and costs are concerned, that investments will be reconsidered, and that next year will certainly continue to be a challenge for law firm managements.<sup>59</sup>

### VIII. Africa

Leaders of law firms in Africa face many of the same challenges occupying the minds of law firm leadership elsewhere on the globe, but frequently these challenges have unique features linked to Africa's emerging market status.

Assessing opportunities in Africa is often based on a misguided view that Africa is an homogeneous entity. Africa's natural resources, particularly its oil and gas resources have

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56. See *Brazil: Overview*, ALLEN & OVERY, <http://www.allenoverly.com/locations/latin-america/brazil/en-gh/Pages/default.aspx> (last visited March 29, 2015).

57. See Charlotte Mullen, *Broseta Targets South American Law Firm Alliance*, GLOBAL LEGAL POST (July 18, 2013), <http://www.globallegalpost.com/big-stories/broseta-targets-south-american-law-firm-alliance-4387135/>.

58. See *Economic Performance of Brazil Not Meeting Expectations*, OLIVEIRA LAWYERS (Dec. 12, 2012), <http://www.oliveiralawyers.com/pt/news/business-law/economic-performance-of-brazil-not-meeting-expectations/>

59. See *generally Brazil Economic Outlook*, FOCUS ECONOMICS (Mar. 17, 2015), <http://www.focus-economics.com/countries/brazil>.

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captured the interest of law firms and their clients, with expectations of increased demand for infrastructure and PPP projects.<sup>60</sup> To this must be added the impact of the rise of the African middle class and increasing urbanisation on the demand for electricity, water, housing, transport, healthcare, education, banking, consumer goods and telecommunications.<sup>61</sup> Like their international counterparts, African law firms are crafting their strategies carefully—a carefully considered strategy needs to segment the African market into more distinct regions, trading blocs, economic clusters or groups of countries with similar legal frameworks to have a realistic prospect of success. Within these more distinct market clusters, different opportunities must be sized, the opportunities matched with existing skills and up-skilling where required skills are in short supply. Then law firms have to consider the allocation of scarce resources to key business development initiatives: the creation of networks and alliances, or on the ground offices throughout the African continent.

Several international law firms are expanding their footprint in Africa.<sup>62</sup> With some of the fastest-growing economies in the world located in Africa, it is no wonder that global law firms are looking to tap into revenue streams from the African legal market. Leading African firms are no different. They too are grappling with how to expand into Africa. One approach entails partnering with local experts in other African jurisdictions, like Webber Wentzel has chosen to do with its membership in the African Legal Network.<sup>63</sup> This approach offers flexibility in a market which often requires nimble responses to opportunities and irregular work flow. Another approach entails expansion through opening up regional offices in various African jurisdictions, like ENS and Bowman Gilfillan has done.<sup>64</sup> Unlike their international counterparts African firms also frequently find themselves being courted by international firms seeking an African partner; or alternatively competing with international firms who are increasingly opening offices on the continent. A key question for local firms is then also how to best position themselves vis-à-vis new global competitors. One way is to align themselves with an international firm. Some African firms have chosen alliances, as Webber Wentzel did with its alliance with Linklaters in 2013, and Cliffe Dekker Hofmeyr with DLA Piper in 2005, while others have opted for mergers, as Deneys Reitz did with its merger with Norton Rose in 2010.

Tremendous demand exists for talented African lawyers and retaining star performers in the face of the global opportunities offered by international firms is challenging. In addition to the mergers and alliances referred to earlier, several international firms have opened offices on the continent, but particularly in South Africa in recent years—more often than not by leveraging off a key team recruited from an existing firm. In the most recent development, Allan & Overly opened an office in Johannesburg, staffed with a team of banking lawyers from Bowman Gilfillan.<sup>65</sup>

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60. See, e.g., *Africa: Overview*, VINSON & ELKINS, <http://www.velaw.com/practices/Africa.aspx>.

61. Deloitte, *Deloitte on Africa: The Rise and Rise of the African Middle Class*, 1 available at <http://www2.deloitte.com/content/dam/Deloitte/au/Documents/international-specialist/deloitte-au-aas-rise-african-middle-class-12.pdf>.

62. See Vinson & Elkins, *supra* note 60.

63. *Africa Overview*, WEBBER WENTZEL, <http://www.webberwentzel.com/wwb/content/en/ww/ww-africa-overview>.

64. *Bowman Gilfillan Africa Group*, BOWMAN GILFILLAN, <http://www.bgaficagroup.com/>.

65. *South Africa: Overview*, ALLEN & OVERLY, <http://www.allenoverly.com/locations/africa/South-Africa/Pages/default.aspx>.

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African firms have not been immune to the increasing pricing pressure exerted by clients and an ever increasing extraction of cost-free value-add services. South Africa has seen an increase of legal process outsourcers (LPOs) entering the market. These LPOs are not only taking advantage of South Africa's reputation as a competitive outsource destination to deliver services to overseas clients,<sup>66</sup> but are increasingly finding a market for their services amongst cost conscious clients in Southern Africa. Exigent and Cognia Law are already operating in Cape Town. Integreon is likely to open offices soon and with some of South Africa's leading corporates looking to manage legal costs by the increasing use of LPOs, local firms who wish to stay ahead of the pack need to create strategies for working or competing with LPOs' offerings for commercial, corporate and litigation services as a matter of urgency.

The right entry points into the African continent by global corporates and law firms are constantly under discussion. Nigeria, Kenya and South Africa are generally considered the three obvious choices for entry. For years Johannesburg has been the obvious choice and it does not seem as if the economic growth in Nigeria and Kenya in recent years is changing this trend. Besides Allen & Overy, during 2014 Clyde & Co opened offices in Johannesburg and Cape Town, and Fasken Martineu (which merged with Bell Dewar) entered into an alliance with Simmons & Simmons. White & Case, which opened its Johannesburg office in 1995, bulked up its presence. Linklaters' alliance with Webber Wentzel, with offices in Johannesburg and Cape Town, lends further support for South Africa as the preferred entry point for international firms.

Despite the ease with which reference is often made to Africa as a single destination, each of its 54 sovereign states has its own risk profile. While labor unrest in South Africa has been making headlines, Al-Shabaab's attack on Nairobi's Westgate Mall in September, 2013 dominated Kenya's headlines and restrictive rules regulating Kenyan firms' ability to market their relationships with international partners appear to count against Kenya as an ideal entry point.<sup>67</sup> It remains to be seen whether legislative reviews kicked off in June, 2014 to address restrictive Kenyan rules will alleviate that challenge.<sup>68</sup> In Nigeria, persistent attacks from Boko Haram and increasing political tension leading up to the 2015 elections appear to be discouraging potential investors. When it comes to choosing the ideal center from which to service clients in Africa, Johannesburg still appears to be the clear leader, as it remains a key jurisdiction from where clients drive their African operations and South Africa falls in the top quartile worldwide for ease of doing business.<sup>69</sup>

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66. Awarded Best "Offshoring Destination 2012" by the UK's National Outsourcing Association and Offshoring Destination of the Year<sup>66</sup> for 2013 by the European Outsourcing Association, BPESA (Apr. 26, 2013), available at <http://www.bpesa.org.za/south-africa-wins-offshoring-destination-of-the-year-award-2013/>.

67. See generally Joanne Harris, *Africa's Legal Market: The Business Case*, IRISH RULE OF LAW INTERNATIONAL (Mar. 31 2014), <http://irishruleoflaw.ie/africas-legal-market-the-business-case/>.

68. Joanne Harris, *Liberalisation kicks off in Kenya*, THE LAWYER.COM, 24 June 2014, accessed 25 September 2014.

69. World Bank Ease of Doing Business Index (2013), available at <http://data.worldbank.org/indicator/IC.BUS.EASE.XQ>.

## Transnational Legal Practice

LAUREL TERRY AND CAROLE SILVER\*

### I. Introduction

At its core, transnational legal practice (TLP) is concerned with crossing borders. This may involve an individual lawyer or client moving into a space occupied by existing economic and regulatory activity, or it may involve actors from several jurisdictions coming together to create a new framework for their joint enterprise. We can think about border-crossing as involving the work of individual lawyers in providing advice, the structure of the organizations with and within which these lawyers practice, the clients they serve, and even the advice itself. Regulators and policy-makers also increasingly have the opportunity to cross borders by participating in networks that bring together actors with different jurisdictional, regulatory, or experiential frameworks. Meeting points and connective relationships are where the action is in TLP.

Growth in TLP is demonstrated by the annual statistics on international trade in legal services. In 2013, the United States exported more than nine trillion dollars in legal services, with an increase of almost \$800 billion over 2012.<sup>1</sup> The United States imported almost two trillion dollars in legal services in 2013.<sup>2</sup> The continued growth in international legal services provides an explanation for some recent market developments. For example, in a recent report, Georgetown Law's Center for the Study of the Legal Profession reported that 96 global cross-border law firm mergers were announced in 2012 and 56 U.S. law firms opened a new foreign office in 2012.<sup>3</sup> The American Lawyer's 2014

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1. See U.S. Bur. Econ. Affairs, Table 2.1. U.S. Trade in Services, by Type of Service [Millions of dollars], Oct. 24, 2014, <http://www.bea.gov/iTable/iTable.cfm?ReqID=62&step=1#reqid=62&step=6&isuri=1&6210=4&6200=160>. With the exception of declines in 2009 and 2010, U.S. legal services exports have gone up every year since 2006. *Id.* (showing exports, in millions, of \$5,256 (2006); \$6,400 (2007); \$7,317 (2008); \$7,256 (2009); \$7,247 (2010); \$7,704 (2011); \$8,379 (2012); and \$9,177 (2013)).

2. *Id.* (showing imports, in millions, of \$1,223 (2006); \$1,536 (2007); \$1,918 (2008); \$1,639 (2009); \$1,537 (2010); 1,943 (2011); \$2,050 (2012); and \$1,995 (2013)).

3. Georgetown Law, Center for the Study of the Legal Profession, *2013 Report of the State of the Legal Market* at 8, available at <http://www.law.georgetown.edu/continuing-legal-education/executive-education/upload/2013-report.pdf>. (The 2014 Report did not contain similar information about globalization. See generally Georgetown Law, Center for the Study of the Legal Profession, *2014 Report of the State of the Legal*

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Global 100 issue reported that more than 25,000 lawyers from the AmLaw 200 practiced in seventy countries.<sup>4</sup>

Despite the rise in exports of U.S. legal services and expansion of U.S. market participants, however, it is clear that U.S. law firms face increasing pressure from multiple sources. For example, the American Lawyer's 2014 Global 100 issue shows that when measured by head count, U.S. firms no longer dominate this list.<sup>5</sup>

Moreover, U.S. lawyers and firms face competition not only from law firms outside the United States, but from other types of competitors. Although the U.S. International Trade Commission's 2014 annual report, "Recent Trends in U.S. Services Trade," did not include a chapter specifically devoted to legal services, its discussion of electronic services noted the profound impact that technology has had on legal services and the increased competition that legal services face.<sup>6</sup> Georgetown's 2014 Report on the State of the Legal Market confirms this competition, noting, for example, as "clients continued to push back on rate increases, keeping pressure on the realization rates that firms were able to achieve."<sup>7</sup> In 2013, the U.S. International Trade Commission concluded that "[i]n the legal services industry, price competition and pressure from nontraditional providers will likely require consolidation in the U.S. industry, motivating firms to follow their clients into high-growth markets abroad."<sup>8</sup> The American Bar Association indicated its serious consideration of this movement by creating in August 2014 a new Commission on the Delivery of Legal Services, which will address, among other things, alternative models for delivery of legal services.<sup>9</sup> Moreover, according to the ABA, nearly a half billion dollars has been invested in legal startups as of 2013 with even more investment expected in 2014. Many of these start-ups seek to develop alternative models of delivering legal services.<sup>10</sup> Innovation in the legal services industry also was the focus of a conference organized by Harvard's Center on the Legal Profession in the spring of 2014. The Center since has announced an ongoing project to examine forces of disruption in the legal services market.<sup>11</sup>

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*Market*, available at [https://peermonitor.thomsonreuters.com/wp-content/uploads/2014/01/2014\\_PM\\_GT\\_Report.pdf](https://peermonitor.thomsonreuters.com/wp-content/uploads/2014/01/2014_PM_GT_Report.pdf).)

4. See *Outward Bound*, AMERICAN LAWYER 67 (Oct. 2014, the Global 100 issue).

5. See *id.*

6. See U.S. International Trade Commission, *Recent Trends in U.S. Services Trade: 2014 Annual Report*, Inv. No. 332-345, USITC Pub. 4463 (May 2014) (Final) at 11, 34, <http://www.usitc.gov/publications/332/pub4463.pdf> ("For example, consumers no longer need to visit law offices to obtain many generic legal services; they can now access legal software programs electronically and create personalized legal documents such as contracts and wills at much lower prices.")

7. See 2014 Georgetown Report, *supra* note 3.

8. See U.S. International Trade Commission, *Recent Trends in U.S. Services Trade: 2013 Annual Report*, Inv. No. 332-345, USITC Pub. 4412 (July 2013) (Final), at xv, available at <http://www.usitc.gov/publications/332/pub4412.pdf>. See also *id.* at 5-1 (Legal Services chapter).

9. See ABA Commission on the Future of Legal Services, [http://www.americanbar.org/groups/centers\\_commissions/commission-on-the-future-of-legal-services.html](http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html).

10. See, e.g., Susanna Ray, *They're After Legal Gold*, ABA J. 44 (May 2014); Martha Neil, *Investors Spent \$458M on Legal Startups in 2013; Will 2014 Be Another Big Year?* ABA e-Journal (Feb. 14, 2014), [http://www.abajournal.com/news/article/will\\_2014\\_investment\\_in\\_legal\\_startups\\_hit\\_500m](http://www.abajournal.com/news/article/will_2014_investment_in_legal_startups_hit_500m).

11. See Harvard Law School Center on the Legal Profession, *Disruptive Innovation*, <https://clp.law.harvard.edu/clp-research/legal-markets/> (includes a link to the March 2014 conference and materials).

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This brief description of certain aspects of competition in the market for legal services indicates that when analyzing recent TLP developments, one must increasingly look not only to the traditional providers, but also at other types of providers that seek to fill the legal services space—including those operating in a distant jurisdiction. Clients have driven part of this change, especially in-house corporate counsel, who seek to provide increasingly greater value for their legal spend.<sup>12</sup> Consequently, lawyers and law firms are interested in avenues for growth, including markets that have been inaccessible because of regulatory barriers, which increases attention to TLP issues.

In this YIR, we take a new approach by framing our discussion to highlight the meeting points and relationships that facilitate border-crossing for a variety of actors involved in TLP policy-making and practice. We call these “TLP-Nets,” using the term “Nets” to suggest the notion of a network. Networks are “boundary-spanning and boundary-creating structures that affect the roles of organizational actors, including business corporations, voluntary associations, advocacy groups, foundations, think tanks, and state entities.”<sup>13</sup> As we describe them here, TLP-Nets represent our preliminary assessment based on their activities in TLP-related matters.<sup>14</sup> We use the term “TLP-Nets” to focus attention on the actors and facilitators as well as the activities that comprise what is significant about TLP.

Section II offers two categories of TLP-Nets: one nationally-based, and the other inherently international. Within each category we suggest examples of TLP-Nets and describe their recent activities. Our description is only an overview, a mechanism for cataloguing the activities relevant to TLP during 2014 in a way that provides some insight into the structure and interaction of activities and actors. Section III offers concluding observations. As to both scope and depth, we hope that future work will build on what we begin here and explore the networks of relationships that comprise TLP-Nets.<sup>15</sup>

## II. TLP-Nets

TLP-Nets embody a diverse set of relationships and initiatives that further coordination, communication and policy-making on matters related to TLP, and they serve as meeting points for various governmental, regulatory, organizational and individual actors. Participants include formal and informal associations—including some that require jurisdictional authority as a condition for entry—and their activities may be ongoing or one-off meetings. What is common is that TLP-Nets offer paths for those involved to move

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12. Association of Corporate Counsel, “Controlling Law Firm Spending With Business-Oriented Solutions is Top Priority For Corporate Clients,” (Oct. 25, 2010), avail. at <http://www.acc.com/aboutacc/newsroom/pressreleases/2010-ACC-Serengeti-Survey-Key-Findings.cfm>.

13. John P. Heinz, Anthony Paik, and Ann Southworth, *Lawyers of the Right: Networks and Organization*, 32 *Law & Social Inquiry* 883, 885 (2007).

14. See Anthony Paik, John P. Heinz, and Ann Southworth, *Political Lawyers: The Structure of a National Network*, UC Irvine School of Law Legal Studies Research Paper Series No. 2010-26, available at file:///C:/Users/Administrator/Downloads/SSRN-id1694627.pdf (describing network analysis research methodology); Tom Ginsburg and Gregory Shaffer, *How Does International Law Work?: What Empirical Research Shows* in Peter Cane & Herbert Kritzer, eds., *OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES* (2010)(describing the production of international law).

15. For more on the study of the impact of individuals and professional capital, see Yves Dezalay and Bryant G. Garth, *DEALING IN VIRTUE* (1998).

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outside of their own experiences, responses, and perspectives and expose themselves to alternative and relevant interests and approaches. These TLP-Nets facilitate the conversation about TLP on a variety of matters, including the scope and approach to regulation.<sup>16</sup> In this section, we describe two general categories of TLP-Nets, each with several examples. This bifurcated classification serves our purposes of simplifying the discussion, but we do not mean to suggest that the activities or members of these Nets are constrained by a particular jurisdictional scope. Rather, each of the Nets operates across borders, including by interacting with one another.

A. NATIONALLY-BASED TLP-NETS

Nationally-based TLP-Nets take as their focus the TLP agenda of a particular jurisdiction, and necessarily are comprised principally—although not exclusively—of actors based in that jurisdiction. Here, we highlight two of these, one based in the United States and the other in Europe. Our discussion delves more deeply into the U.S.-based TLP-Net than in other directions, because it is the focus of this Year-in-Review and because this is the world we know well and, in certain instances, also occupy to some extent. Note, however, that this difference in detail does not indicate that there is more development in the U.S. than in Europe or elsewhere. We look forward to more complete examinations of other nationally-based TLP-Nets in the future.

1. *U.S.-based TLP-Net*

The U.S.-based TLP-Net is a complex web of relationships among various kinds of organizations and individuals. We might begin by focusing on the formal associations of state-based lawyer regulators in the US, which have been active for many years. These include the National Conference of Bar Examiners (NCBE), which brings together state governmental officials and others involved with lawyer admission issues;<sup>17</sup> the National Organization of Bar Counsel (NOBC), which is a means of collaboration for state governmental officials involved in lawyer discipline issues;<sup>18</sup> and the Conference of Chief Justices (CCJ), which includes the Chief Justice from each state's highest court.<sup>19</sup> These regulator associations have advanced the coordination and, in certain instances, regulatory changes with respect to domestic legal practice. What is noteworthy, however, is the degree to which they now interact with international regulatory actors,<sup>20</sup> resulting in cross-fertilization of TLP-related terminology, ideas, and initiatives.

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16. L. Terry has been advised of consultations engaged in by former Australian regulators Steve Mark and Tahlia Gordon with several U.S. regulators.

17. See NCBE, About Us, <http://www.ncbex.org/contacts/> ("About Us-Mission").

18. See NOBC, About Us, <http://nobc.org/index.php/about-us> ("The National Organization of Bar Counsel (NOBC) is a non-profit organization of legal professionals whose members enforce ethics rules that regulate the professional conduct of lawyers who practice law in the United States, Canada and Australia.").

19. See Conference of Chief Justices, <http://ccj.ncsc.org/> ("The Conference of Chief Justices (CCJ) was founded in 1949 to provide an opportunity for the highest judicial officers of the states to meet and discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters.").

20. See *infra* note 29 for a discussion of the International Conference of Legal Regulators.

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The CCJ, for example, included a session on “Regulating the Practice of Law in the Global Arena”<sup>21</sup> at its 2014 Midyear Meeting. Among the participants was Thomas Fine, Director of Services and Investment at the Office of the U.S. Trade Representative. Fine’s interaction with the CCJ was not limited to that single appearance; he has subsequently participated in several meetings of the CCJ Task Force on Foreign Lawyers.<sup>22</sup> The Task Force, under the leadership of New York Chief Judge Jonathan Lippman, reflected an open and inclusive mindset through inclusion of non-CCJ members in its meetings. Representatives from the Council of Bars and Law Societies of Europe, from the Law Council of Australia, from the Office of the U.S. Trade Representative, and from the ABA Task Force on International Trade in Legal Services (ITILS) participated in Task Force meetings during 2014.<sup>23</sup>

The NCBE, comprised of state bar examiners and others interested in admissions issues, also played a role in 2014 in fostering greater awareness of TLP issues. The NCBE’s annual conference is a significant forum that addresses broad and diverse issues that move well beyond the everyday work of its core bar examiner audience.<sup>24</sup> TLP matters fall within this expansive scope, and NCBE’s conference has included speakers from outside the United States and sessions on topics related to admission of inbound foreign lawyers. Its publications also reflect an interest in TLP and have included articles about transnational legal practice and regulatory methods used outside the United States.<sup>25</sup> NCBE’s inclusion of TLP issues was mirrored by the inclusion of the NCBE in the dialogue convened in recent years by the World Trade Organization: in 2011, NCBE president Erica Moeser spoke about US regulation of legal services at the WTO, and she co-authored a chapter about US legal services in a 2014 publication of the WTO and Cambridge Press.<sup>26</sup>

The NOBC was also involved in issues related to transnational practice in 2014. For example, several key NOBC members have been involved in the International Conference of Legal Regulators, which is one of the international TLP-Nets described later in this YIR.<sup>27</sup> When the International Conference of Legal Regulators held its 2013 meeting in

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21. See Conference of Chief Justices, *2014 Midyear Meeting Education Program: Regulation of the Practice of Law* (Jan. 25-29, 2014) at 5 (on file with authors).

22. L. Terry, has personal knowledge of his telephonic participation.

23. L. Terry has personal knowledge of these facts.

24. For information on the program and speakers at the 2013 Annual Bar Admission Conference, see Erica Moeser, President’s Page, *THE BAR EXAMINER* (2013) at 4, available at [http://www.ncbex.org/assets/media\\_files/Bar-Examiner/articles/2013/820213abridged.pdf](http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/820213abridged.pdf).

25. See, e.g., Alan Treleaven, *Moving Towards National Bar Admission Standards in Canada*, 83(3) *THE BAR EXAMINER* 17 (2014); Diane F. Bosse, *Testing Foreign-Trained Applicants in a New York State of Mind*, 83(4) *THE BAR EXAMINER* (December 2014); Laurel S. Terry, *Admitting Foreign-Trained Lawyers in States Other than New York: Why It Matters*, 83(4) *THE BAR EXAMINER* (December 2014).

26. See Erica Moeser and Laurel Terry, *Legal Services in the United States* in Aik Hoe Lim and Bart De Meester (editors), *DOMESTIC REGULATION AND SERVICES TRADE: PUTTING PRINCIPLES INTO PRACTICE* 129-141 (Cambridge University Press 2014).

27. Current or former NOBC members who spoke at the 2014 London meeting of the International Conference of Legal Regulators included John Berry, Director of Legal Services Division, Florida Bar, Robert Hawley, Deputy Executive Director, State Bar of California, Jerry Larkin, Attorneys Disciplinary Commission, Illinois, and Gene Shipp, Office of Bar Counsel, Washington DC. Greg Mize participated on behalf of the Conference of Chief Justices. See Agenda, *Rethinking Regulation, Third International Conference Of Legal Regulators*, 8-9 July 2014, London, <http://www.international-conference-of-legal-regulators.org/app/download/5795414089/agenda+for+international+conference+for+legal+regulators.pdf>.

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San Francisco, all NOBC members were invited to the last session of the international conference and all international conference attendees were invited to attend the NOBC's annual meeting reception (and were encouraged to register for the full NOBC meeting), leading the groups' members to engage.<sup>28</sup> Internationally-active NOBC members have continued to share with the general NOBC membership their thoughts on the importance of including an international mindset in their work. For example, during the 2014 NOBC Annual Meeting, Robert Hawley, Deputy Executive Director of the State Bar of California, called attention to the global implications of regulating lawyers outside of their home jurisdiction, stating: "The idea that you're going to have to deal with a foreign national on cross-border practice is very real." Noting the CCJ's shared concern with this issue, Hawley commented that limiting to U.S. jurisdictions how out-of-state lawyers may practice under transitory presence rules such as Model Rule 5.5 "is going to get us all in trouble." Responding to Hawley's remarks was Wallace E. (Gene) Shipp Jr., bar counsel for the District of Columbia Bar, who commented from the audience: "As long as we are exporting more legal services than we are bringing in, firms are going to want to exploit this internationally. It is game on."

In other contexts, Shipp has explained the evolution that has taken place within the NOBC and its interest in confronting international issues. For example, in August 2014, the ABA Center for Professional Responsibility's Policy Implementation Committee devoted part of its meeting to the issue of the ABA Guidelines for an International Lawyer Regulatory Information Exchange, which were adopted in 2013 and encourage, *inter alia*, U.S. regulators to identify their regulatory counterparts in other countries.<sup>29</sup> Shipp is a member of the ABA Policy Implementation Committee and was the committee member responsible for this agenda item.<sup>30</sup> Shipp reported on the globalization discussions at the 2014 NOBC Annual Meeting and offered his view that NOBC members had undergone a sea change and were ready to address TLP and globalization issues.<sup>31</sup>

The CCJ, NCBE and NOBC are umbrella organizations comprised of state-based regulators who themselves, of course, affect TLP-related matters either by action or inaction, whether or not based on studied consideration. And while state regulators traditionally have not been at the forefront of TLP developments, they have become more engaged

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28. See Program: Regulation in Practice 2nd International Legal Regulators Conference, 5-7 Aug. 2013, San Francisco (on file with authors). The last session was entitled "NOBC session: The changing purpose and goals of attorney regulation—experience from outside the USA." The conference program previously was available online at <http://www.international-conference-of-legal-regulators.org/past-conferences/san-francisco-2013/>. The overlap between the activities of the NOBC and the International Conference of Legal Regulators in San Francisco was facilitated by Bob Hawley, who is Deputy Executive Director of the State Bar of California and active in both organizations.

29. See ABA Res. 104 (Regarding Guidelines for an International Regulatory Information Exchange) (adopted Aug. 12-13, 2013), [http://www.americanbar.org/content/dam/aba/directories/policy/2013\\_hod\\_annual\\_meeting\\_104.authcheckdam.docx](http://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_104.authcheckdam.docx).

30. See ABA Center For Professional Responsibility Policy Implementation Committee, Agenda (Aug. 8, 2014)(on file with author). The Committee Chair was North Dakota Supreme Court Justice Dan Crothers, indicating further interaction among state regulators and others. See also Laurel S. Terry, *Agenda Item II(C)(1): Guidelines for International Regulatory Information Exchange Memo and Supporting Materials* (Aug. 2, 2014), available at <http://tinyurl.com/ABA-intl-guidelines-dropbox>.

31. L. Terry has personal knowledge of Mr. Shipp's remarks. See also Helen W. Gunnarsson, *Discipline Systems Still Playing Catchup In Policing Increasingly Mobile Attorneys*, 30 Law. Man. Prof. Conduct 539 (Aug. 13, 2014).

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and are thinking more seriously about what their roles are and should be. The TLP-Nets undoubtedly have contributed to the increased state attention to these issues. For example, in 2014, following the approval of the work of the ABA Commission on Ethics 20/20 by the ABA House of Delegates, a number of states adopted the changes recommended by the 20/20 Commission to the “choice of law” provision found in ABA Model Rule of Professional Conduct 8.5.<sup>32</sup> The new comment to Rule 8.5 makes it easier, for example, to determine which conflict of interest rule to follow in the case of lawyers with offices in the United States and in England.<sup>33</sup> The Ethics 20/20 recommendations are undoubtedly why in 2014 a number of states adopted rules that recognize or liberalize the conditions under which inbound foreign lawyers may practice in the United States.<sup>34</sup>

Certain states have taken a leadership role in pursuing an agenda of change. One example of this is the Georgia, which is one of only four states that has adopted rules addressing all five methods by which foreign lawyers might actively practice in the United States.<sup>35</sup> Georgia’s efforts to explain and discuss a liberalized regulatory agenda provided the basis for the January 2014 “Toolkit” developed by the ABA Task Force on International Trade in Legal Services (ITILS).<sup>36</sup> Moreover, Georgia not only provided the model for the Toolkit, but has taken a leading role in publicizing it. For example, in May 2014, the State Bar of Georgia, which is a regulatory entity, hosted a conference for regulators in Southeastern states in order to expose them to the Toolkit and to the issues raised by US-EU T-TIP trade negotiations.<sup>37</sup> The Toolkit was one focus of the previously-mentioned 2014

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32. See ABA Center for Professional Responsibility Policy Implementation Committee, State by State Adoption of Selected Ethics 20/20 Commission Policies and Guidelines for an International Regulatory Information Exchange (Nov. 14, 2014), *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/state\\_implementation\\_selected\\_e20\\_20\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e20_20_rules.authcheckdam.pdf) [hereinafter Ethics 20/20 Implementation].

33. Comment [5] explains that with respect to Rule 8.5(b)(2) and conflicts of interest, when the predominant effect is uncertain, a lawyer and client can agree that the lawyer’s work on a matter will be governed by the conflict of interest rules of a particular jurisdiction, provided certain conditions are met. See ABA COMM’N ON ETHICS 20/20, 107D 2-3 (2013), *available at* [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2013\\_hod\\_midyear\\_meeting\\_107d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2013_hod_midyear_meeting_107d.authcheckdam.pdf).

34. As noted *infra*, in February 2013, upon the recommendation of the ABA Commission on Ethics 20/20, the ABA House of Delegates adopted three “inbound foreign lawyer” proposals to supplement the foreign lawyer MJP proposals that it had adopted in 2002. The ABA maintains charts that show the current adoption status of these inbound foreign lawyer rules. See Am. Bar Ass’n, State Implementation of MJP Policies (Oct. 7, 2014), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/recommendations.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf); Ethics 20/20 Implementation, *supra* note 32. One of the authors maintains a map and chart that consolidates this information. See Laurel S. Terry, Summary of State Foreign Lawyer Practice Rules (11/14/14), *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_8\\_9\\_status\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf) and on my personal website at [http://www.personal.psu.edu/faculty/l/s/lst3/Laurel\\_Terry\\_map\\_foreign\\_Lawyer\\_policies.pdf](http://www.personal.psu.edu/faculty/l/s/lst3/Laurel_Terry_map_foreign_Lawyer_policies.pdf). *But see* Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken*, 43(2) Hofstra L. Rev. \_\_ (2014)(forthcoming)(arguing that the ABA Commission on Ethics 20/20 was less successful with its globalization mission than with its technology mission).

35. *Id.*

36. The full title of the “Toolkit” is American Bar Association Task Force on International Trade in Legal Services, *International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience* (Updated Jan. 8, 2014). It is available at this website: <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/ITILS%20Toolkit.pdf>. The impetus for the Toolkit came from Bill Smith, who is General Counsel Emeritus of the State Bar of Georgia and a member of the ABA ITILS.

37. See State Bar of Georgia, Southeastern Workshop on the EU/US Free Trade Agreement Agenda (Atlanta, May 16, 2014)(on file with law review). See also Laurel S. Terry, Presentation Slides: *Regulating Lawyers*

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CCJ globalization program; at the conclusion of this meeting, the CCJ adopted a resolution recommending that state courts consult the Toolkit, illustrating the interaction and cross-fertilization that occurs within the U.S.-based TLP-Net.<sup>38</sup>

Potential competition between state legislatures and state courts may also have an impact on TLP regulation. An example is illuminating: during the 2014 Southeastern States Workshop, someone referred to 2011 proposed legislation in North Carolina that would have allowed UK-like alternative business structures.<sup>39</sup> The regulators were advised that if they did not respond to the needs of the public and clients, other branches of government might step in.<sup>40</sup>

While lawyer regulation in the United States occurs at the state level, federal actors participate in TLP matters through national trade policy, among other things.<sup>41</sup> During 2014, officials in the Office of the U.S. Trade Representative<sup>42</sup> (USTR) handled four different sets of trade negotiations that included legal services within their ambit: (1) the ongoing World Trade Organization negotiations about the General Agreement on Trade in Services (GATS); (2) the Trade in Services Agreement (TISA) negotiations, which involve a subset of WTO Members who are interested in making faster progress with respect to services; (3) the Trans-Pacific Partnership (TPP) negotiations among twelve countries located on or near the Pacific Ocean; and (4) the Transatlantic Trade and Investment Partnership (T-TIP) negotiation between the United States and the European Union.<sup>43</sup>

Governmental trade negotiations influence TLP in several different ways. The negotiators themselves shape conversations by engaging with others involved in the TLP agenda, including the CCJ<sup>44</sup> and the ABA Task Force on International Trade in Legal Services (ITILS), which serves as an umbrella group that brings together the many ABA constituencies that have an interest in legal services trade negotiations.<sup>45</sup> Governmental

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*in a Global Arena* (Atlanta, May 16, 2014), available at [http://www.personal.psu.edu/faculty/l/s/lst3/Terry\\_GA\\_ITILS\\_May\\_2014.pdf](http://www.personal.psu.edu/faculty/l/s/lst3/Terry_GA_ITILS_May_2014.pdf).

38. Conference of Chief Justices, 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. 29, 2014), available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01292014-Support-Framework-Created-State-Bar-Georgia.ashx>. The NCBE has also helped publicize the Toolkit by including an article about it in the December 2014 issue of the Bar Examiner magazine. See Terry, *supra* note 25.

39. See generally Daniel Fisher, *North Carolina Bill Would Let Non-Lawyers Invest In Law Firms*, Forbes (March 11, 2011), <http://www.forbes.com/sites/danielfisher/2011/03/11/north-carolina-bill-would-let-non-lawyers-invest-in-law-firms/>.

40. Terry heard these developments mentioned at the Southeastern Workshop cited *supra* note 37.

41. See, e.g., Laurel S. Terry, *Transnational Legal Practice (United States) [2010-2012]*, 47 Int'l Law. 499, 510 (2013); Laurel S. Terry, Carole Silver, Elyn Rosen, *Transnational Legal Practice: 2009 Year-in-Review*, 44 Int'l Law. 563, 572-576 (2010).

42. For information on the Office of the US Trade Representative, see <http://www.ustr.gov/about-us/mission>.

43. See generally Office of the U.S. Trade Representative, Free Trade Agreements, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (linking to T-TIP and TPP); Office of the U.S. Trade Representative, WTO & Multilateral Affairs, <http://www.ustr.gov/trade-agreements/wto-multilateral-affairs>.

44. See *supra* note 21 (CCJ 2014 Midyear Meeting Education Program): *Regula*

45. See ABA Task Force on international Trade in Legal Services, About the Task Force, [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/promoting\\_international\\_rule\\_law/internationaltradetf/taskforceabout.htm](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/internationaltradetf/taskforceabout.htm). See also note 61 *infra* (discussing EU-US LEGAL SERVICES

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trade negotiations also affect the work of various other actors. The Summits convened by the American Bar Association and the 2014 IBA Report, both of which are described in greater detail below, respond to, and reflect, the trade agenda.

But other federal offices also influence the TLP dialogue. For example, employment data produced by the U.S. Department of Bureau of Labor Statistics regularly is the basis of discussions about U.S. legal education and legal practice.<sup>46</sup> Legal education, in turn, increasingly is part of the TLP conversation because of the inclusion of international students in US law schools, and the related outreach of the schools to international students, employers, and peer academic institutions.<sup>47</sup>

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ROUNDTABLE, AGENDA AND SUPPORTING MATERIALS (Boston, Aug. 9, 2014)(on file with author); TRANS-PACIFIC BAR LEADERS SUMMIT Agenda (San Francisco, Aug. 10, 2013)(on file with authors).

46. See, e.g., Ben Barros, Bureau of Labor Statistics Legal Jobs 2004-2014, Faculty Lounge Blog Post Sept. 8, 2014 <http://www.thefacultylounge.org/2014/09/bureau-of-labor-statistics-legal-jobs-2004-2014.html>. See generally, Carole Silver, "Getting real about globalization and legal education: potential and perspectives for the U.S.," 24 *Stanford Law & Policy Review* 457 (2013); Carole Silver, *Coping with the consequences of 'too many lawyers': securing the place of international graduate law students*, 19 *International Journal of the Legal Profession* 227 (2012).

47. Carole Silver, *Globalization and the Monopoly of ABA-Approved Law Schools: Missed Opportunities or Dodged Bullets?* 82 *Fordham L. Rev.* 101 (2014). One influence on the robustness of TLP is the production of lawyers who are trained to participate in TLP, which implicates law schools. Academics and law schools have continued to play a role in fostering discussion about TLP in general and also regulatory issues. For example, the numbers of U.S. LL.M. programs, many of which enroll large numbers of foreign students, continue to be large. See generally ABA Section of Legal Education and Admissions to the Bar, Programs by Category: Post J.D. Programs by Category, [http://www.americanbar.org/groups/legal\\_education/resources/llm-degrees\\_post\\_j\\_d\\_non\\_j\\_d/programs\\_by\\_category.html](http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html). The ABA does not regularly publicize figures on the number of foreign students or lawyers attending U.S. law schools. See Silver, *Coping*, *supra* n. 46; Carole Silver, *What We Don't Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 *Akron L. Rev.* 1009 (2010); Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 *Cardozo J. Int'l & Comp. L.* 143 (2006). There continue to be record numbers of foreign educated applicants who sit for U.S. bar exams. See Bosse, *supra* note 25, ("In 1997, the year before the new rules were enacted, New York tested 1,701 foreign-educated candidates, 15% of our candidate pool of 11,218. In 2013, the 4,602 foreign-educated candidates we tested comprised 29% of our candidate pool of 15,846. Between 1997 and 2013, the number of graduates of ABA-approved law schools we tested increased by 18%; the number of our foreign-educated candidates grew in that period by 270%."); see Terry, Summary, *supra* note 34 ((noting that the number of states in which a foreign-educated applicant sat for a bar exam has grown by approximately 50% since 1992, growing from 19 in 1992 to 28 in 2013 and that since 2002, the number of foreign-educated applicants has approximately tripled in states other than New York and California, going from 140 in 2002 to 415 in 2013). Several U.S. law schools now teach international law as part of required first year courses, or as an upper-level required course. See, e.g., U.C. Irvine School of Law, International and Comparative Law, <http://www.law.uci.edu/faculty/faculty-scholarship/international-law.html> ("UCI Law is one of the few law schools in the United States that have incorporated a dedicated international law course into the first-year curriculum. The course—International Legal Analysis—helps students learn to solve international and transnational legal problems that they are increasingly likely to face in today's globalized practice of law."); University of Nebraska College of Law ("The only law school in the Big Ten to require an international Law class in the first year"), <http://law.unl.edu/prospective/whynebraska/>; but see Penn State's Dickinson Law, Practicing Law in a Global World: Contexts & Competencies, (required IL course begins in 2015 and will introduce students to international law and TLP). See also The University of Michigan Law School ("As the first top law school to require Transnational Law, Michigan ensures that its students explore the foundations of public and private international law and the fluidity of the traditional boundaries between these areas."), <http://www.law.umich.edu/prospectivestudents/internationalism/Pages/default.aspx>.

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In 2014, as in other years, other federal actors also were involved in issues related to TLP. For example, the U.S. Department of Commerce focuses directly on expanding overseas opportunities for U.S. lawyers and their clients.<sup>48</sup> The Department of the Treasury is responsible for the U.S. government's interface with the Financial Action Task Force or FATF, which is an intergovernmental organization whose recommendations address, inter alia, lawyer conduct.<sup>49</sup> Treasury officials regularly consult with legal profession representatives regarding FATF developments,<sup>50</sup> which in turn have led to lawyer-education efforts by the ABA and others regarding money laundering and terrorism financing.<sup>51</sup> One of the practice areas that has been targeted for education is lawyers involved in transnational practice.<sup>52</sup>

Federal courts also have the potential to shape TLP-related matters by hearing challenges to existing regulatory barriers. For example, the Jacoby & Myers lawsuits challenged as unconstitutional state ethics rules that prohibited partnerships between lawyers and non-lawyers and that prohibited outside investment in law firms are one example of such a challenge.<sup>53</sup> These types of lawsuits, if successful, would change the U.S. TLP landscape.

In addition to the regulatory-and trade-based activities and associations described above, the U.S.-based TLP-Net also includes groups based within the American Bar Association. The Transnational Legal Practice Committee of the ABA Section of International Law (TLP Committee) is one of the ABA groups that has TLP as its focus. The

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48. See, e.g., ABA Task Force on International Trade in Legal Services, Agenda for the April 25, 2014 Committee Conference Call (one agenda item was the postponed Department of Commerce Legal Services Trade, Mission to China)(on file with law review).

49. See generally New York Law School, *Combating Threats to the International Financial System: The Financial Action Task Force: Program*, <http://www.nylslawreview.com/?p=6927>.

50. The ABA Task Force on Gatekeeper Regulation and the Profession tries to meet quarterly with representatives from the U.S. Department of the Treasury on FATF issues. In addition, U.S. governmental officials and legal profession representatives participate in some of the same education events. See, e.g., Terry, *infra* note 51.

51. See A Lawyer's Guide To Detecting And Preventing Money Laundering And Countering Terrorist Financing: A Collaborative Publication of the International Bar Association, the American Bar Association, and the Council of Bars and Law Societies of Europe (Oct. 2014)(hereinafter Lawyer's Guide), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct\\_abaguide\\_preventingmoneylaundering.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf); IBA, Money laundering prevention guide a global first for lawyers (Nov. 5, 2014), <http://www.ibanet.org/Article/Detail.aspx?ArticleUId=f272a49e-7941-42ee-aa02-eba0bde1f144>. See also Laurel S. Terry, *Legal Profession Efforts to Combat Money Laundering & Terrorist Financing*, 59 N. Y. L. Rev. \_\_\_ (2015)(forthcoming); John A. Terrill, III, FATF and the Role of Lawyers in Money Laundering and Terrorist Financing: Lessons from the English Approach, 59 N.Y.L.R. \_\_\_ (2015)(contrasting the U.S. and U.K. approaches to implementing the FATF Recommendations, the latter of which has a low threshold for requiring lawyers to disclose confidential client communications).

52. See, e.g., ABA Sec. Int'l L. International Anti-Money Laundering Committee, The New FATF Recommendations & the AML/CFT Methodology (May 6, 2014)( A non-CLE teleconference and in-person program).

53. See, e.g., Jacoby & Meyers, LLP v. Schneiderman, CIV 11-03387 (S.D.N.Y.); Jacoby & Meyers Law Offices, LLP v. Judges of the Connecticut Superior Court, CIV 11-00817 (D. Conn.); Jacoby & Meyers Law Offices, LLP v. Justices Of The Supreme Court Of New Jersey, CIV 11-02866 (D.N.J.)(case voluntarily dismissed July 29, 2014). See also Jacoby & Meyers, LLP v. Presiding Justices Of The First, Second, Third And Fourth Departments, Appellate Division Of The Supreme Court Of The State Of New York, No. 12-1377, (2nd Cir 2013) (amended summary order granted on Jan. 09, 2013 remanded the New York case to the district court with instructions to vacate the judgment and grant plaintiffs leave to amend their complaint; according to the Southern District of New York docket, this lawsuit is still active ).

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Committee Co-Chairs during the first part of 2014 were Stephen Denyer, Wayne Carroll, and Hermann Knott.<sup>54</sup> In August 2014, German lawyer Herman Knott assumed leadership of this committee. Whereas the ABA ITILS focuses primarily on developing the ABA's response to trade negotiations, the TLP Committee focuses on broader issues, including what is happening "on the ground." For example, the TLP Committee offered a four-part webinar series in 2014, called "South of the Border," which built upon the TLP Committee's award winning 2013 webinar series, "BRICS in the Wall."<sup>55</sup> These programs (which continue to be available through the Committee's website) explored the markets for transnational legal services in several key emerging markets. Panels represented a combination of vantage points, including local lawyers and regulators as well as expatriate lawyers with expertise related to the particular jurisdiction,<sup>56</sup> and addressed three questions:

- (1) What rules apply to the practice of law in each country, particularly for foreign lawyers?
- (2) What practical steps should a foreign lawyer take to avoid breaching any professional rules?
- (3) What has the experience been of foreign lawyers attempting to provide legal services in these countries?

The TLP Committee organized a number of other programs during the year, as well, including a dinner-debate on international practice strategies at the 2014 ABA Annual Meeting,<sup>57</sup> and co-sponsored programs at the Spring 2014 and Fall 2014 International Section meetings.<sup>58</sup> At the same time, despite the TLP Committee's substantial activity,

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54. The TLP Committee leadership reflects the importance of both national and international TLP-Nets. Wayne Carroll is a U.S. lawyer who practices for PwC in Germany. Hermann Knott is a German lawyer, who has a U.S. LL.M. degree and is licensed in New York, who practices with Luther Rechtsanwaltsgesellschaft mbH. Stephen Denyer was, until May of 2014, a partner in the Allen & Overy law firm. A&O, as it is known, is one of the Magic Circle law firms based in London, and a serious competitor to U.S.-based law firms for the representation of elite business clients around the world. Denyer had been the "Global Markets Partner" at A&O, meaning that he took charge of leading and coordinating A&O's approach to markets in which it did not yet have an established presence. In addition to serving as co-Chair of the ABA TLP Committee, he has been active in the CCBEL and the IBA. In May, Denyer became head of City and International at the Law Society of England and Wales, where his platform will be both internal and external.

55. See, e.g., ABA Section of Int'l L., Transnational Legal Practice Committee, (includes links to the 2014 webinars focused on transnational legal practice in Argentina, Chile, Colombia and Peru and the 2013 webinars focused on transnational practice in Brazil, Russia, India and China). The BRICS in the Wall series won the 2013 International Section award for Outstanding Non-CLE Committee Program Series. See ABA Sec. Int'l L., August 2013 E-Update, [http://www.americanbar.org/content/newsletter/groups/international\\_law/e\\_update\\_2013\\_aug.html](http://www.americanbar.org/content/newsletter/groups/international_law/e_update_2013_aug.html). The BRICS in the Wall series was developed by Committee Co-Chairs Wayne Carroll and Steven Denyer. The South of the Border series continued under the leadership of Committee Chair Hermann Knott.

56. *Id.*

57. See *id.*

58. See *Views from Mt. Olympus: Senior Lawyers Speak on 'The Future of the Changing Legal Profession—U.S. and Beyond,'* (Spring 2014)(organized and moderated by Bob Lutz, the panelists included the Hon. Judith Kaye, ret., Bernard Nussbaum, NYU Dean Trevor Morrison, and Fred Ury. This program received the award for "best program" of the conference); *The Changing Landscape of the Latin American Legal Profession*" (Oct. 2014)(program moderated by Bob Lutz). The Committee also sponsored programs at the October 2013 and Spring 2015 meetings related to different aspects of the "Changing Legal Profession." See *The Times They Are A-Changin': The New Lyrics of International Law and Practice*' (Spring 2015 TLP Committee program).

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it is not the only group within the Section of International Law to address these issues; other groups that include related matters within their scope are the U.S. Lawyers Abroad Committee and the Foreign Legal Consultant Committee.<sup>59</sup> These three groups frequently collaborate and share common members.

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, all of which were designed to bring together legal profession stakeholders from the countries involved in these trade negotiations in order to facilitate communication among these groups.<sup>60</sup> ITILS also worked with state bars and the National Organization of Bar Presidents to develop and then promote ABA policy related to TLP, including the 2013 resolutions on inbound foreign lawyers who practice pro hac vice or as in-house counsel, the resolution on International Legal Regulatory Information Exchange, and Formal Ethics Opinion 464 regarding the propriety of a U.S. lawyer dividing a legal fees with other lawyers who may lawfully share fees with non-lawyers.<sup>61</sup>

The ABA's Center for Professional Responsibility contributes to the U.S. TLP-Net in important ways, too. It plays a central role in generating TLP-related information, facilitating discussions and negotiations, and drafting model regulatory proposals. In addition to its involvement in many of the activities previously referenced, it sponsored a plenary session on regulatory innovation at the 2014 National Conference on Professional Responsibility. The idea for this session emerged from the recognition of Center leadership of the influence of developments occurring outside of the United States on TLP-related matters in the United States.<sup>62</sup> The session was designed to encourage states to experiment with regulatory changes that had not been endorsed by the ABA.

In addition to the formal organizational efforts within the ABA, there are numerous linkages between among these entities, including overlaps in membership or staff among the TLP Committee, the ABA Center for Professional Responsibility, ITILS, the ABA Commission on Ethics 20/20, and the new ABA Commission on the Future of the Deliv-

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59. See generally ABA Section of International Law, Committees, [http://www.americanbar.org/groups/international\\_law/committees.html](http://www.americanbar.org/groups/international_law/committees.html). On the Section's webpage, these three committees, along with four other committees, are listed under the heading "Legal Practice."

60. See, e.g., EU-US Legal Services Roundtable Agenda, *supra* note 45; Trans-Pacific Bar Leaders Summit Agenda, *supra* note 45.

61. See, e.g., ABA Task Force on International Trade in Legal Services, *ABA Policy on International Trade*, [http://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/promoting\\_international\\_rule\\_law/internationaltradetf/policy.html](http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/promoting_international_rule_law/internationaltradetf/policy.html) (includes links to these resolutions and ethics opinion). Additional education efforts include a National Conference of Bar Presidents webinar on these topics and education materials provided to the ABA Center for Professional Responsibility Policy Implementation Committee. See Nat'l Conf. Bar Pres. 21st Century Lawyer Webinar Series, *Another Copernican Revolution? Addressing the Challenges of Global Lawyering* (Nov. 12, 2014), <http://www.ncbp.21stcenturylawyer.org/#/watch-previous/ckva>; materials available at <https://www.dropbox.com/sh/8ndkdqnwyps0gdl/AADxAD99Te34cOZBcq0m75RVa>.

62. See ABA, *Lawyer Regulatory Innovation in England, Wales, Australia and Canada: What's In it for Us?*, 40th National Conference on Professional Responsibility (May 29, 2014-Long Beach, CA), <http://www.americanbar.org/calendar/2014/05/40th-aba-national-conference-on-professional-responsibility/conferencematerials/session1.html>.

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ery of Legal Services.<sup>63</sup> Although a detailed analysis of these connections is beyond the scope of this YIR, it would provide an important dimension to a more nuanced study of the U.S.-based TLP-Net.

2. *The European-based TLP-Net*

A second area of TLP-related activity that might be considered “national” relates to the European Union. An important actor in an EU-based TLP-Net is the Council of Bars and Law Societies of Europe (CCBE), which is an association of EU Member State bar associations that primarily comprise the regulators for each of the EU Members and certain European observer states, as well.<sup>64</sup> The CCBE’s influence extends within and beyond Europe, and its policies and activities also exert pressure on U.S. TLP policy. For example, in the context of the T-TIP negotiations cited earlier, the CCBE has submitted its negotiation “requests” to the ABA and CCJ.<sup>65</sup> These requests seek similar treatment from all U.S. states, thus putting pressure on U.S. regulators and others to develop a national approach to lawyer regulation, or, at a minimum, one that is more streamlined than the current patchwork structure. These requests ask that all U.S. states have in place a foreign legal consultant rule authorizing advice on home country law, international law, and third country law; it also has requested the implementation of rules authorizing (i) temporary transactional practice; (ii) service as a representative or neutral in international mediation and arbitration permitting; and (iii) “association” rights, in which a properly licensed U.S. lawyer could be employed by a foreign lawyer or firm, and a properly licensed U.S. lawyer could be a partner of a foreign lawyer who properly works in a foreign jurisdiction.<sup>66</sup> These “requests” by the CCBE already have prompted discussions within the CCJ, ABA, and elsewhere.

Although this section has highlighted TLP-Nets in the United States and Europe, there are other significant national TLP-Nets. The Law Council of Australia and the Federation of Law Societies of Canada, for example, might both be considered to be TLP-Nets since they provide a forum for national regulators to discuss TLP issues.<sup>67</sup> Members of both of these organizations have had significant interactions with participants in the

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63. See ABA Commission on Ethics 20/20, About Us, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/about\\_us.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/about_us.html); ABA Commission on the Future of the Delivery of Legal Services, Roster, [http://www.americanbar.org/groups/centers\\_commissions/commission-on-the-future-of-legal-services/commission-members.html](http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services/commission-members.html); and ABA Task Force on International Trade in Legal Services. Task Force Roster, [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/Roster%20-%20ABA%20ITILS%20Task%20Force%20\(2013-2014\)%20\(2\).authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/Roster%20-%20ABA%20ITILS%20Task%20Force%20(2013-2014)%20(2).authcheckdam.pdf).

64. The CCBE includes what might be viewed as “representational” entities, as well as regulatory bars among its members. See, e.g., The Law Society of England and Wales and the Deutscher Anwaltverein e.V.the DAV. See <http://www.ccbe.eu/index.php?id=19&L=0> (available as links by selecting Germany and the United Kingdom).

65. See Council of Bars and Law Societies of Europe, “CCBE request to the United States in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations,” available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/European\\_Legal\\_Profe1\\_1415787235.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/European_Legal_Profe1_1415787235.pdf).

66. *Id.*

67. See generally Law Council of Australia, Our Role, <http://www.lawcouncil.asn.au/lawcouncil/index.php/about-the-law-council-of-australia/our-role>; Federation of Law Societies of Canada, Our Mission, <http://www.flsc.ca/en/our-mission/>.

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United States. TLP-Net, including the CCJ, NCBE, ABA ITILS, and ABA Center for Professional Responsibility.

In this section, we have attempted to describe the notion of nationally-based TLP-Nets. The relationships embodied in these national-Nets do not stop at national borders, however. Rather, they are inherently border-crossing, internally and externally, in terms of geography as well as with regard to other organizations involved in related matters. This may stem from the TLP topic as much as from other factors, and may blur the categorization of these Nets according to a geographic or political set of interests.

**B. INTERNATIONAL TLP-NETS**

In contrast to nationally-based TLP-Nets, internationally-focused Nets are formed to bring together actors from various jurisdictions to generate dialogue and share information. We offer two examples of international TLP-Nets. Each has been active for at least several years, but their significance seems to us to be building.

*1. International Regulatory-Focused Net*

The first example is comprised of a TLP-Net focused on regulatory matters. It is the International Conference of Legal Regulators (ICLR), which began only recently with an inaugural meeting in September 2012, in London.<sup>68</sup> The ICLR has been convened each subsequent year, first in San Francisco and most recently again in London in July 2014.<sup>69</sup> The 2014 meeting included U.S.-based representatives from the CCJ, the NCBE, the NOBC, and individual U.S. state regulators. Although the conference did not include any U.S. federal governmental actors, it did include individuals from a number of the other groups identified in this article, including law firms, clients, and academics. The ICLR has been organized by Alison Hook on behalf of the U.K. Solicitors Regulation Authority for whom she serves as a consultant; previously, she served as “Director of International at the Law Society of England and Wales between 2002 and 2010.”<sup>70</sup>

Our sense is that the ICLR has had an important impact on certain conversations among U.S. lawyer regulators, and that it is encouraging them to bring TLP-related matters into their domestic agendas. It would not surprise us to find convergence reflected in discussions about approaches to regulatory matters if the ICLR continues to bring together and facilitate the interaction of national regulators.

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68. See Laurel S. Terry, *Transnational Legal Practice (International) [2010-2012]*, 47 *Int'l Law* 485, 493-94 (2013); Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, 82(2) *Bar Examiner* 18 (June 2013).

69. See International Conference of Legal Regulators, Conference Programme (London 2014), <http://www.international-conference-of-legal-regulators.org/london-2014-1/programme-details/>; (San Francisco 2013), <http://www.international-conference-of-legal-regulators.org/past-conferences/san-francisco-2013/>.

70. Hook currently is the principal of Hook International. Hook International, about us, <http://www.hookinternational.co.uk/about-us/>. In her former capacity, Hook's responsibilities included “developing business internationally for members of the Law Society, as well as for the Society's own international policies and relationships.” *Id.* On her relationship to the ICLR, see <http://www.international-conference-of-legal-regulators.org/contact-us/>. Although the conference organizers sent targeted invitations, the registration form for the 2014 ICLR Conference was available online. See ICLR, Register for London 2014, <http://www.international-conference-of-legal-regulators.org/london-2014-1/register-for-london-2014/>.

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Along the same lines as the organization of the ICLR are informal regional collaborations among lawyer regulators, which may be gaining traction. For example, during the course of 2014, governmental regulators in a number of Canadian provinces were involved in efforts to rethink the nature of lawyer regulation in ways that impacted TLP, and certain of these engaged in regular discussions with their US counterparts and others about these matters.<sup>71</sup> This sort of dialogue offers the opportunity for linkages between nationally-based authorities, and may lead to regulatory cooperation, if not more. For example, some U.S. state and Canadian regulators, along with lawyers and academics involved in TLP matters, are currently developing plans for a May 2015 workshop on about regulatory innovation that would build upon the plenary session held during the 2014 ABA annual ethics meeting.

2. *Additional International TLP-Nets*

The International Bar Association, which boasts a membership of more than 50,000 individual lawyers and over 200 bar organizations, provides a second example of an international TLP-Net.<sup>72</sup> The IBA provides an interesting example because it includes as members both individual lawyers and bar associations. One important factor that should be noted is the elite character of many IBA lawyers, including lawyers from the world's most elite law firms. While the IBA is by no means limited to elites, it certainly functions as a meeting place of those in powerful positions in various markets and organizations that are at the center of a transnational market in legal services.

The IBA International Trade in Legal Services Committee (IBA ITILS) is a significant actor in the world of transnational legal practice and, in our estimation, may be poised to become even more so.<sup>73</sup> For example, it was the IBA ITILS that asked the IBA to commission a new, significant international report on lawyer regulation. The Report, released in October 2014 during the Tokyo IBA Annual Meeting,<sup>74</sup> weighs in at more than 700 pages and promises to become a foundational effort for cataloguing lawyer regulation on a worldwide basis. It gathers information on "the rules governing local practice in each jurisdiction, the rules governing cross-border legal practice and the actual position in relation to cross-border legal practice,"<sup>75</sup> with regard to more than 90 countries.<sup>76</sup> The entry

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71. One of the authors has personal knowledge of the fact that representatives from the Law Society of Upper Canada and from the Nova Scotia Barristers Society have communicated with representatives from the Conference of Chief Justices and with U.S. academics, including Professor Susan Saab Fortney.

72. *About the IBA*, IBA, [http://www.ibanet.org/About\\_the\\_IBA/About\\_the\\_IBA.aspx](http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx).

73. IBA ITILS is the successor to the IBA GATS Committee, which was active in TLP-related matters for some time. IBA's GATS Committee had, for example, prepared a number of resolutions and documents that have been cited in World Trade Organization reports. See, e.g., Council for Trade in Services, Note by the Secretariat: Legal Services, S/C/W/318 (June 14, 2010). See also Laurel S. Terry, *Lawyers, GATS, and the WTO Accountancy Disciplines: The History of the WTO's Consultation, the IBA GATS Forum and the September 2003 IBA Resolutions*, 22 Penn State Int'l L. Rev. 695 (2004).

74. See IBA President Launches Major Report on Legal Services, <http://www.ibanet.org/Forum/Thread/Default.aspx?ForumUid=03e2f023-6378-42ae-b3d6-051b6ddb2aea&ThreadUid=e96cc6c6-8673-4b74-876a-bed710a4f9f3>.

75. IBA Global Regulation and Trade in Legal Services Report 2014, at p. 3, avail. at <file:///C:/Users/Administrator/Downloads/IBA%20Global%20Cross%20Border%20Legal%20Services%20Report%20November%202014%20-%20FINAL%20Amends.pdf>.

76. IBA Global Regulation and Trade in Legal Services Report 2014, at p. 3, avail. at <file:///C:/Users/Administrator/Downloads/IBA%20Global%20Cross%20Border%20Legal%20Services%20Report%20November>

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for each jurisdiction is structured around a set of more than 35 common questions.<sup>77</sup> The Report, which is available in both a pdf format and on the IBA ITILS Committee webpage with individual jurisdiction (including sub-jurisdictions) listings available for review,<sup>78</sup> was circulated before its release to governmental trade negotiators participating in the TISA negotiations.<sup>79</sup> Upon its completion, the IBA sent the Report to all WTO governments.

The IBA Report was prepared by Alison Hook, mentioned earlier. Her involvement illustrates the overlapping membership of these TLP-Nets, and the connections that span the borders between governmental actors, nongovernmental actors, and professional associations, and through national and international organizations and activities.

The importance of the 2014 IBA Global Regulation Report—and the IBA ITILS—stems from its jurisdictional comprehensiveness and its internal organization. Assuming reliable updates to keep information current and additions to the jurisdictions included, it is likely to become a go-to site for lawyer regulatory questions.

Structurally, the IBA ITILS operates as a Committee of the IBA Bar Issues Commission (BIC),<sup>80</sup> which is the portion of the IBA devoted to its member organizations, as opposed to individual lawyers. In many countries around the world, the bar associations serve as lawyer regulators, and the BIC includes as members both “regulatory” bar associations and “representational” bar associations; interestingly, the IBA Membership list does not distinguish between these two categories.<sup>81</sup> The IBA BIC facilitates discussions about issues that affect the legal profession worldwide and, where appropriate, forwards policy proposals to the IBA Council for its consideration.<sup>82</sup> In doing so, it relies on its

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ber%202014%20-%20FINAL%20Amends.pdf (indicating that the report addresses rules in “over 90 countries, or over 160 jurisdictions”).

77. *Id.* at Table of Contents.

78. This report is available on the IBA ITILS webpage. See International Bar Association, International Trade in Legal Services, [http://www.ibanet.org/PPID/Constituent/Bar\\_Issues\\_Commission/BIC\\_ITILS\\_Map.aspx](http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/BIC_ITILS_Map.aspx) (last visited Nov. 8, 2014). Results for U.S. jurisdictions can be accessed by selecting “Americas” under “Regions,” with the option of selecting a specific “Ease of Trade” category. Clicking on a specific jurisdiction will reveal the list of survey questions and the jurisdiction’s responses. Because this data is likely to be influential, I recommend that jurisdictions review their information on this web page for accuracy and contact the ABA Task Force on International Trade in Legal Services (or me) to report any inaccuracies so that this information can be conveyed to the IBA. It is not clear, however, whether or when the data will be updated. If jurisdictions would prefer to review the data in pdf format, they can access the entire 700+ page report at this url: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=1D3D3E81-472A-40E5-9D9D-68EB5F71A702>. The U.S. data begins at page 493.

79. See Laurel S. Terry, *Putting the Legal Profession’s Monopoly on the Practice of Law in a Global Context*, 82 *Fordham L. Rev.* 2903, 2920, n. 71 (2014) (“In February 2014, the IBA distributed an “extract.” Int’l Bar Ass’n, Report for the Special Friends of Services Group—Trade in Legal Services: An Extract from the IBA Regulation and Trade in Legal Services Report 2014 (2014) (on file with *Fordham Law Review*); Email from Elaine Owen, Head of Bar Issues Comm’n, Int’l Bar Ass’n, to members of the IBA ITILS Comm. (Feb. 4, 2014, 6:44 AM) (on file with *Fordham Law Review*) (noting distribution of the extract”). As explained *supra* note 43, TISA is the acronym for ongoing services-based trade negotiations among a subset of WTO Member States.

80. See IBA, Bar Associations-Bar Issues Commission, [http://www.ibanet.org/barassociations/bar\\_associations\\_home.aspx](http://www.ibanet.org/barassociations/bar_associations_home.aspx) [hereinafter IBA BIC]

81. See, e.g., Int’l B. Ass’n, IBA Member Organisations in the Americas, [http://www.ibanet.org/barassociations/BIC\\_Americas.aspx](http://www.ibanet.org/barassociations/BIC_Americas.aspx) (members include both the New York State Bar Association and regulatory bars in South America).

82. See IBA BIC, *supra* note 81.

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committees to support its work. For example, the IBA Anti-Money Laundering Committee joined with the ABA and the CCBE to coauthor and sponsor the Lawyer's Guide to Money Laundering, which was developed in response to a FATF "Typologies Report" that was perceived as inadequate.<sup>83</sup> The IBA ITILS Committee has been responsible not only for the 2014 Report discussed above, but also for developing the IBA's trade-related policies. It continues to be active in this area and held a retreat in 2014 devoted to the topic of "association rights" among domestic and foreign lawyers and law firms.<sup>84</sup>

A third example of an international TLP-Net is the International Association of Legal Ethics, which sponsored the sixth International Legal Ethics Conference (ILEC 6), which was held in London in July 2014.<sup>85</sup> Although not all of the presentations at ILEC 6 addressed TLP directly, TLP undoubtedly is one of the reasons why there is growing interest in understanding legal profession and legal ethics issues in other countries. It is also noteworthy that the 2014 London International Legal Regulators Conference immediately preceded the ILEC 6 conference so that individuals could attend both conferences, which a number of individuals did.<sup>86</sup>

In addition to these three examples of internationally-focused TLP-Nets, other organizations, such as the World Justice Project, also might serve as a meeting point of sorts.<sup>87</sup> Its 2014 Rule of Law Index surveyed ninety-nine countries on government accountability, crime, fundamental rights, and access to justice. In the minds of many, access to justice includes TLP-related issues.<sup>88</sup>

In sum, internationally-focused TLP-Nets do not operate in isolation; an analysis of the membership of one might include substantial overlap with the other. Nor are the agendas of these Nets we highlighted entirely distinct; rather, they are all aimed at enhancing the sharing of information and understanding within the international community.

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83. See A Lawyer's Guide To Detecting And Preventing Money Laundering And Countering Terrorist Financing: A Collaborative Publication of the International Bar Association, the American Bar Association, and the Council of Bars and Law Societies of Europe (Oct. 2014)(hereinafter Lawyer's Guide), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct\\_abaguide\\_preventingmoneylaundering.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014oct_abaguide_preventingmoneylaundering.authcheckdam.pdf); IBA, Money laundering prevention guide a global first for lawyers (Nov. 5, 2014), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f272a49e-7941-42ee-aa02-eba0bde1f144>. This guide is an example of a one-off collaboration among the ABA, IBA, and CCBE in order to respond to perceived deficiencies in the Legal Profession Typologies report issued by the FATF. See Terry, *supra* note 52.

84. See Minutes of the IBA ITILS Committee Meeting (May 19, 2014).

85. See International Legal Ethics Conference VI: Legal Ethics at a time of Regulatory Change (London, July 10-12, 2014), <http://www.city.ac.uk/international-legal-ethics-conference>.

86. The coordination of these two conferences stands in contrast to what happens with the ABA's annual legal ethics conference and the annual Law & Society conference, which has a coordinated "legal services" track. For a number of years, these two conferences have been scheduled at the same time but in different cities, even though there might be a number of individuals who would be interested in attending both of these conferences.

87. See World Justice Project, Who We Are, <http://worldjusticeproject.org/who-we-are>. The WJP is an independent, multidisciplinary organization working to advance the rule of law around the world.

88. Its 2014 *Rule of Law Index* surveyed ninety-nine countries on government accountability, crime, fundamental rights, and access to justice. World Justice Project, WJP Rule of Law Index 2014, [http://worldjusticeproject.org/sites/default/files/files/wjp\\_rule\\_of\\_law\\_index\\_2014\\_report.pdf](http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf). See also Rule of Law Index webpage, <http://worldjusticeproject.org/rule-of-law-index>.

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**III. Conclusion**

As in prior years, 2014 was another active year for transnational legal practice developments. The discussion above offers one way of thinking about TLP-related matters by focusing on the meeting points—or Nets—that bring interested actors together and provide them with opportunities to gain insight, participate in policy making and even attempt to shape the regulatory agenda. More can be learned by delving more deeply into the participants and relationships; in this YIR, space limitations prevent us from going further. Future research, however, might explore certain key actors whose overlapping relationships illustrate the interconnectedness of these international and national TLP-Nets. As more TLP-related activity is undertaken, additional meeting points and interactions will occur, providing a rich avenue for future work.<sup>89</sup>

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89. While this list is not exhaustive, some of the key actors whose relationships and connections have proven important include: Bill Smith, Gene Shipp, Bob Hawley, and John Berry, Erica Moeser, Chief Justices Jerry VandeWalle and Shirley Abrahamson, Chief Judge Jonathan Lippman, Hon. Greg Mize, Ellyn Rosen, Kristi Gaines, Bob Lutz, Steven Younger, Ben Greer, Rew Goodenow, Stephen Denyer, Wayne Carroll, Hermann Knott, Jonathan Goldsmith, Alison Hook, Russell Miller, Zeynep Onen, Margaret Drent, Darrell Pink, Victoria Rees, Alan Treleaven, Jonathan Herman, Alison Hook, David Wilkins, Susan Fortney, Margery Nicoll, Gordon Hughes, Michael Colbran and many others.

## U.S. Lawyers Practicing Abroad

BAYO CALLENDER<sup>1</sup>

### I. Introduction

The U.S. Lawyers Practicing Abroad Committee (“USLAC” or Committee) is comprised of attorneys admitted in the United States but who reside or work in jurisdictions outside of the United States. Several years ago, the committee identified obstacles that impeded efforts to obtain consular and embassy notarial services in a range of geographic regions. In response, USLAC polled Committee members in 2007, calling for the identification of practical and procedural barriers to consular and embassy notarial service. Obstacles identified by Committee members included proximity to service centers, costly and time-consuming local consular procedure, limited hours of operation, limitations on access to services, and long turnaround times—all representing access to justice challenges. These factors were also described by members as being unduly burdensome, particularly for less affluent clients and served to inhibit the attorney’s ability to provide effective assistance to their client.

### II. Attestation and Verification of Documents

The Hague Convention of October 5, 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (The Hague Apostille Convention)<sup>2</sup> is a widely-accepted alternative to U.S. embassy and consular services for recognizing extraterritorial signature attestation of public documents. However, in many countries that are parties to the Hague Apostille Convention, services were not available for documents in foreign languages. Additionally, when available, services were often limited or cost-prohibitive. In countries that do not participate in the Convention, the certification process requires sub-

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\* Bayo Callender is a human rights attorney who works as a Judicial Assistant at the United Nations International Criminal Tribunal for the former Yugoslavia.

2. Ninth Session of the Hague Conference on Private International Law, October 5, 1961, *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, available at <http://www.hcch.net/upload/conventions/txt12en.pdf>. (The Hague Apostille Convention recognizes public documents, including signature attestation by means of an *apostille* or certification of signature, capacity of the signer, and seal on the documents by a government authority. The treaty entered into force in 1965 and as of March 5, 2015, there are 108 parties to the Convention). See also *U.S. Declaration on Accession to the Convention Abolishing the Requirement for Foreign Public Documents*, available at [http://www.hcch.net/index\\_en.php?act=status.comment&csid=353&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=353&disp=resdn).

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sequent affirmation by a consular official from the country where the attestation will be used.

The Vienna Convention on Consular Relations of April 24, 1963 (“VCCR”)<sup>3</sup> represents another widely used treaty framework that addresses cross-border recognition of attestation and signature verification. This Convention is limited, however, to recognizing notarial acts as a consular function and does not address the practical concerns raised in USLAC’s 2007 assessment of the issues. Further, neither The Hague Apostille Convention nor the Vienna Convention reflects contemplation of more modern forms of signature verification including electronic signatures.

In 2009, USLAC submitted to the Joint Editorial Board of the American Bar Association Section of International Law and the National Conference of Commissioners on Uniform State Laws<sup>4</sup> a proposed amendment to the Uniform Law on Notarial Acts (ULONA).<sup>5</sup> This proposal came after the passage of the Uniform Unsworn Foreign Declarations Act (UUFDA).<sup>6</sup> The UUFDA allows for the use of unsworn declarations in state legal proceedings that have been made by declarants located physically outside of United States boundaries. The UUFDA eliminates the use of a notary by allowing an unsworn declaration made subject to penalties for perjury and follows a model legislated format to serve as an equivalent to a sworn declaration. Drawbacks of its application are that the UUFDA derogates from safeguards put in place by the notarial officer system and it had only been adopted in a few states, further diminishing broad utility.

USLAC’s proposed ULONA amendment<sup>7</sup> articulated an alternative notarial service practice where U.S.-admitted attorneys lawfully residing and engaging in legal work in a foreign jurisdiction would be allowed to facilitate the acknowledgement, attestation, and certification of documents. Although USLAC’s proposal was not adopted, the National Conference of Commissioners of Uniform State Laws did revise the ULONA<sup>8</sup> to include recognition of electronic notarial acts and provided an implementation structure.

In 2013, USLAC and the Europe Committee worked collaboratively to raise awareness through writing articles,<sup>9</sup> engaging in discussions, and seeking feedback from various leadership and committee representatives within the ABA Section of International Law and the U.S. Department of State. After crafting a report comprised of background information in support of the Committee’s position a proposed resolution was presented to the ABA’s House of Delegates. At the ABA Section of International Law Council Meeting in

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3. Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

4. The Joint Editorial board serves as a coordinating entity between the American Bar Association Section of International Law and the National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission). The Uniform Law Commission drafts and proposes model statutes where uniformity among states is desired.

5. See REVISED UNIF. LAW ON NOTARIAL ACTS (2010), available at <http://www.uniformlaws.org/Act.aspx?title=Law%20on%20Notarial%20Acts,%20Revised>.

6. See UNIF. UNSOWN FOREIGN DECLARATIONS ACT (2008), available at [http://www.uniformlaws.org/shared/docs/unsworn%20foreign%20declarations/uufda\\_final\\_08.pdf](http://www.uniformlaws.org/shared/docs/unsworn%20foreign%20declarations/uufda_final_08.pdf).

7. UNITED STATES LAWYERS PRACTICING ABROAD, PROPOSED REFORM LAW ON NOTARIAL ACTS, available at [http://apps.americanbar.org/dch/thedl.cfm?filename=/IC916000/sitesofinterest\\_files/Proposed\\_Reform\\_of\\_Uniform\\_Law\\_of\\_Notarial\\_Acts.pdf](http://apps.americanbar.org/dch/thedl.cfm?filename=/IC916000/sitesofinterest_files/Proposed_Reform_of_Uniform_Law_of_Notarial_Acts.pdf)

8. See ULNA, *supra* note 5.

9. Linda Strite Murnane, *A Call for a 21st Century Review Aimed at Legitimizing Documents in a Global Economy*, 4 A.B.A. SEC. OF INT’L L. 4, (2013) at 4.

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London on October 19, 2013, USLAC's Laurence Wiener presented the *Section Resolution and Report on Attestation and Verification of Signatures in Cross-Border Practice* co-authored with USLAC's Linda Strite Murnane and the Europe Committee's Patrick Del Duca, and Werner Kranenberg, among others.<sup>10</sup>

Following substantive discussions at the Section of International Law meetings in 2012 and 2013, the revised Report and Recommendation was vetted for further collaboration with the ABA's Science and Technology Committee. At the Mid-Year Meeting of the American Bar Association in February 2014 (Chicago), the ABA House of Delegates voted to approve Resolution 105, which culminated the seven-year effort to improve access to legal services by seeking to modernize the authentication of signatures process in a global context.

### III. USLAC's 2014 Community Outreach Report

During the 2014 Section of International Law Fall Meeting in Buenos Aires, Argentina, USLAC continued its community outreach tradition.<sup>11</sup> On October 21, 2014, a diverse group of ABA members representing various ABA committees visited the impoverished shantytown of Villa 21 and met with students from this immigrant community attending the *Colegio Buen Consejo*. Members spoke about the power of education and the advantages of multi-lingual and multi-cultural skills in the legal profession. The brainchild of a long-standing member, Bruce Horowitz, USLAC has spearheaded the organization of community outreach projects associated with ABA Section of International annual meetings for several years. Past projects include helping in soup kitchens, donating blood to the American Red Cross, and speaking with high-school students representing first and second generation immigrants with multilingual skills. This year, USLAC also facilitated a donation to assist students with maintaining enrollment in the *Colegio Buen Consejo*.

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10. Ann-Kristin Becker, et al., *Europe Update*, 4 A.B.A. SEC. OF INT'L L. (2013).

11. Marcelo E. Bombau, *November 2014 E-Update*, A.B.A. (Nov. 2014), [https://www.americanbar.org/publications/international\\_law\\_eupdate/2014/11/issue.html](https://www.americanbar.org/publications/international_law_eupdate/2014/11/issue.html).

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## Africa

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RICARDO SILVA, MATTHEW SNYDER, AISSATOU SYLLA, MATTHEW WELDON

### I. North Africa

#### A. ALGERIA

##### 1. *Assemblies Refused; Rape Compensation*

Algeria was elected to a three-year term on the UN Human Rights Council in January 2014.<sup>1</sup> In January, Algeria's Minister of the Interior instructed local authorities to refuse requests for gatherings of nineteen associations including the *Ligue Algérienne pour la Défense des Droits de l'Homme*.<sup>2</sup> In February, Algeria adopted Decree 14-26, providing for state compensation for victims of rape by armed groups during internal conflicts in the 1990s.<sup>3</sup>

##### 2. *Oil and Gas*

In September, Algeria held its first auction of oil and gas fields since 2011, including some of the world's largest.<sup>4</sup> Four of thirty-one blocks were awarded.<sup>5</sup> Hydrocarbon law amendments in 2013 may have facilitated the offering.<sup>6</sup>

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\* Committee Editor: Anne Bodley. An unabridged version of this article with the authors' biographies is available at <http://www.abanet.org/dch/committee.cfm?com=IC805000>.

1. *Algeria: Allow Rights Groups to Visit*, HUM. RTS. WATCH (Feb. 11, 2014), <http://www.hrw.org/news/2014/02/11/algeria-allow-rights-groups-visit>.

2. *Amnesty International's Human Rights Concerns Ahead of Elections*, EL WATAN 2014 (Apr. 14, 2014), <http://elwatan2014.com/english/item/1648-Amnesty-Internationals-human-rights-concerns-ahead-of-elections>.

3. *Id.*

4. Hamid Ould Ahmed, *Algerian Oil and Gas Field Auction Looks for Foreign Investors*, REUTERS (Sept. 30, 2014), <http://uk.reuters.com/article/2014/09/30/algeria-energy-idUKL6N0RV19S20140930>.

5. *Algeria Awards Four of 31 Oil, Gas Fields in Auction*, TRADE ARABIA (Sept. 30, 2014), [http://www.tradearabia.com/news/OGN\\_266764.html](http://www.tradearabia.com/news/OGN_266764.html).

6. *Id.*



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B. EGYPT

1. *Elections*

In March, interim President Adly Mansour signed a law to regulate elections.<sup>7</sup> The legislation required candidates to be at least forty years old and to collect more than 25,000 endorsements from at least fifteen of the country's twenty-seven provinces to run.<sup>8</sup> In May, former Field Marshal Abdulfattah el Sisi won with nearly 97 percent of the vote, as human rights groups voiced concern over the conduct of the elections.<sup>9</sup>

C. TUNISIA

1. *Constitution*

In January 2014, Tunisia's National Constituent Assembly adopted a new constitution.<sup>10</sup> While recognizing Islam as the country's religion, it upholds freedom of belief.<sup>11</sup> It also works toward equality between men and women, including in the right to work, adequate working conditions, fair wages, and political representation.<sup>12</sup>

2. *Transitional Justice Law*

In April, Tunisia passed a law establishing a Truth and Dignity Commission, creating a fund for the "Dignity and Rehabilitation of Victims of Despotism," and providing for specialized judges in human rights cases.<sup>13</sup>

D. MOROCCO

1. *"Rape Marriage Law" Amended*

On January 22, 2014, Morocco's parliament amended its penal code to prevent sexual abusers from avoiding prosecution by marrying their victims, removing this possibility from Article 475.<sup>14</sup>

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7. *Egypt issues Presidential Election Law*, AL JAZEERA (Mar. 8, 2014), <http://www.aljazeera.com/news/middleeast/2014/03/egypt-presidential-election-law-201438141520330512.html>.

8. *Id.*

9. Richard Spencer, *Egypt Election: Sisi Wins Election by Landslide*, TELEGRAPH (May 29, 2014), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/10861905/Egypt-election-Sisi-wins-election-by-landslide.html>.

10. Tarek Amara, *Tunisia Approves New Constitution, Appoints Government*, REUTERS (Jan. 26, 2014), <http://www.reuters.com/article/2014/01/27/us-tunisia-politics-idUSBREA0P0P220140127>.

11. *Id.*

12. *Tunisia's New Constitution: A Breakthrough for Women's Rights*, UN WOMEN (Feb. 11, 2014), <http://www.unwomen.org/en/news/stories/2014/2/tunisia-new-constitution>.

13. Organic Law on the Foundations & Organisation of Transitional Justice, Art. 8, Republic of Tunisia; *see ICTJ Welcomes Tunisia's Historic Transitional Justice Law*, INT'L CENTER FOR TRANSITIONAL JUST. (Dec. 17, 2013), <http://www.ictj.org/news/ictj-welcomes-tunisia%E2%80%99s-historic-transitional-justice-law>.

14. *Morocco Repeals 'Rape Marriage Law'*, AL JAZEERA (Jan. 23, 2014), <http://www.aljazeera.com/news/africa/2014/01/morocco-repeals-rape-marriage-law-2014123254643455.html>.

## II. West Africa

### A. BENIN

#### 1. *Compensation Ordered*

On May 13, the Organisation for the Harmonisation of Business Law in Africa (OHADA) Common Court of Justice and Arbitration ordered Benin to pay CFA Francs 129 billion (approximately US\$346.3 million) to Bénin Control, a company owned by businessman Patrice Talon, as compensation for wrongful termination of import services contracts between the company and the Benin government.<sup>15</sup> The terminations had followed an accusation from Benin President Thomas Yayi Boni that Talon had attempted to poison him and stage a coup.<sup>16</sup> Benin appealed.<sup>17</sup>

### B. BURKINA FASO

#### 1. *Zongo Case*

On March 28, the African Court on Human and Peoples' Rights in Arusha, Tanzania, ruled on the Norbert Zongo case, a Burkina Faso journalist murdered in 1998.<sup>18</sup> The court found that Burkina Faso had violated journalists' rights to free speech under the African Charter and Economic Community of West African States' (ECOWAS) treaty, and that the plaintiffs were denied justice as the state had failed to act with diligence investigating the murders.<sup>19</sup>

### C. CAPE VERDE

#### 1. *Banking and Finance*

Cape Verde adopted a new financial system framework on April 23, aiming to promote savings and foster economic development.<sup>20</sup> It also "defines the regulatory powers of financial authorities, particularly the Bank of Cape Verde."<sup>21</sup>

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15. Fiacre Vidjninginou, *Patrice Talon Fait Condamner le Bénin*, JEUNE AFRIQUE (May 22, 2014), <http://economie.jeuneafrique.com/regions/afrique-subsaharienne/22167-patrice-talon-fait-condamner-le-benin.html>.

16. *Id.*

17. *President Pardons Alleged Coup Plotters*, ECONOMIST INTELLIGENCE UNIT (May 16, 2014), <http://country.eiu.com/article.aspx?articleid=1441816128&Country=Benin&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability&u=1&pid=332628817&oid=332628817&uid=1>.

18. Press Release, African Court on Human & Peoples' Rights, Judgment in the Matter of Late Norbert Zongo & Others v. Burkina Faso (Apr. 1, 2014), <http://www.african-court.org/en/index.php/news/latest-news/524-judgment-in-the-matter-of-late-norbert-zongo-and-others-v-burkina-faso>.

19. *Id.*; *Assassinat de Norbert Zongo: La cour Africaine Reconnaît la Responsabilité de L'État Burkinabè Dans le Déni de Justice des Victims* [Assassination of Norbert Zongo: The African Court Recognizes the Responsibility of the Burkinabe State in the Denial of Justice for Victims], BAYIRI (Apr. 15, 2014), <http://bayiri.com/societe/justice/assassinat-de-norbert-zongo-la-cour-africaine-reconnait-la-responsabilite-de-l-etat-burkinabe-dans-le-deni-de-justice-des-victimes.html>.

20. Miranda Correia Amendoeira & Associados, *Guiding Principles of the Financial System*, LEGAL NEWS: CAPE VERDE (Feb. 2014) [http://www.mirandalawfirm.com/uploadedfiles/20140807\\_caa77b.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140807_caa77b.pdf).

21. *Id.*

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D. CÔTE D'IVOIRE

1. *Mining*

Côte d'Ivoire adopted a new mining code on March 24, replacing its 1995 predecessor, *inter alia*, requiring proof of mine operators' qualifications and for funds to be held with an Ivorian bank.<sup>22</sup> Ivorian authorities can subject the mining license award to part ownership by an Ivorian national.<sup>23</sup>

2. *Gbagbo trial*

On June 12, the International Criminal Court confirmed it would try former President Laurent Gbagbo on four counts of crimes against humanity allegedly committed between December 2010 and April 2011, during post-presidential election unrest.<sup>24</sup>

3. *Arbitration*

In September, Côte d'Ivoire announced it would file a dispute with Ghana over their maritime border, presumably with the International Court of Justice.<sup>25</sup> The country accuses Ghana of encroaching on its territory where oil and gas have been discovered.<sup>26</sup>

E. GAMBIA

1. *Aggravated Homosexuality Act*

On August 25, Gambia passed a bill to "introduce the crime of aggravated homosexuality into the criminal code and make it punishable by life imprisonment."<sup>27</sup> The bill defines "aggravated homosexuality," *inter alia*, as when a person has homosexual relations if they are HIV-positive or with someone under the age of eighteen.<sup>28</sup> "Homosexual acts" are a crime under Gambia's criminal code.<sup>29</sup>

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22. Loi No. 2014-138 du 24 Mars 2014 Portant Code Minier [Law No. 2014-138 of March 24, 2014 on the Mining Code], CENTRE DE PROMOTION DES INVESTISSEMENTS EN CÔTE D'IVOIRE [Investment Promotion Centre in Ivory Coast], Mar. 24, 2014, [http://www.cepici.gouv.ci/userfiles/file/CODE\\_MINIER.pdf](http://www.cepici.gouv.ci/userfiles/file/CODE_MINIER.pdf).

23. *Id.*

24. Press Release, Int'l Criminal Court, Pre-Trial Chamber I Commits Laurent Gbagbo to Trial (June 12, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1016.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1016.aspx).

25. *Ivory Coast Says to File Legal Complaint over Ghana Border Row*, REUTERS (Sept. 26, 2014), <http://af.reuters.com/article/ghanaNews/idAFL6N0RR4M520140926>.

26. *Ghana Says Oil Firms can Keep Working during Border Arbitration*, CNBC AFRICA (Sept. 24, 2014), <http://www.cnbc.com/news/resources/2014/09/24/ghana-oil-firms-border-arbitration/>.

27. *Gambia Passes Bill to Introduce Crime of 'Aggravated Homosexuality'*, REUTERS (Sept. 10, 2014), <http://af.reuters.com/article/topNews/idAFKBN0H50HS20140910>.

28. Hanibal Goitom, *Gambia: Parliament Adopts Stringent Anti-Homosexuality Law*, LIBR. CONGRESS (Sept. 16, 2014), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_1205404120\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205404120_text).

29. *Id.*

F. GHANA

1. *Côte d'Ivoire Boundary Dispute*

On September 23, Ghana Attorney General and Minister for Justice, Marietta Brew Appiah-Opong, confirmed that Ghana had commenced arbitration over its maritime boundary with Côte d'Ivoire.<sup>30</sup>

2. *Presidential Elections*

On October 3, an Accra court dismissed a suit against the National Patriotic Party (NPP) Presidential Primary Election brought by two of its members asserting that election notices fell short of the required six month duration.<sup>31</sup> The judge dismissed the application holding, *inter alia*, that the suit was premature and the applicants should have first exhausted NPP grievance procedures.<sup>32</sup>

G. GUINEA

1. *Mining Arbitration*

In April 2014, the Guinean government revoked a mining license granted to Israeli billionaire Benny Steinmetz and his company BSGR.<sup>33</sup> The license, which had been awarded to British-Australian company Rio Tinto and revoked in 2008 during the Lansana Conté regime when it was awarded to Steinmetz, was re-awarded to Rio Tinto on the belief that Steinmetz had bribed Conté's family to revoke Rio Tinto's license.<sup>34</sup> BSGR is seeking international arbitration against Guinea over the loss of mining permits.<sup>35</sup>

2. *September 28 Massacre: Dadis Camara as Witness*

Five years after the 2009 massacre by then-junta police and army in a Conakry stadium claiming over 150 lives, former junta president Moussa 'Dadis' Camara appeared before

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30. Kwasi Kpodo, *Ghana Files Arbitration Suit over Border Dispute with Ivory Coast*, REUTERS (Sept. 23, 2014), <http://www.reuters.com/article/2014/09/23/us-ghana-ivorycoast-border-idUSKCN0H1IAW20140923>.

31. *Court Dismisses Suit Against NPP Presidential Primary*, GHANA BROAD. CORP. (Oct. 3, 2014), <http://www.gbcghana.com/1.1859167>.

32. Isaac Yeboah, *Court Dismisses Suit Against NPP Presidential Primary*, GRAPHIC ONLINE (Oct. 3, 2014), <http://graphic.com.gh/news/politics/31619-court-dismisses-suit-against-npp-presidential-primary.html>.

33. *Guinea Panel Urges Stripping Steinmetz of Iron-Ore Licenses*, HAARETZ (Sept. 4, 2014), <http://www.haaretz.com/business/.premium-1.584834>.

34. Nigel Wilson, *Rio Tinto Sues Israeli Billionaire Beny Steinmetz over Guinea Mining Rights*, INT'L BUS. TIMES (May 1, 2014), <http://www.ibtimes.co.uk/rio-tinto-sues-israeli-billionaire-beny-steinmetz-over-guinea-mining-rights-1446950>.

35. James Wilson & Tom Burgis, *BSGR Seeks Arbitration Against Guinea over Loss of Mining Rights*, FIN. TIMES (May 7, 2014), <http://www.ft.com/cms/s/0/6d0822f2-d600-11e3-a239-00144feabdc0.html#axzz3DcCrn0JV>.

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judges in Burkina Faso in August.<sup>36</sup> Dadis appeared as a witness in a confidential proceeding.<sup>37</sup>

H. GUINEA-BISSAU

1. *Mining*

A new mining code was approved April 29.<sup>38</sup> The code applies to the exploitation of mineral resources in the soil, subsoil, and territorial waters, in line with West African Economic and Monetary Union (*l'Union Économique et Monétaire Ouest Africaine*, UEMOA) rules.<sup>39</sup>

2. *Oil and Gas*

In April, a new petroleum law was approved, regulating liquid and gaseous hydrocarbon exploitation.<sup>40</sup> The statute introduced new rules for exploration and production rights, the national oil company's participation, and limits to the number of licenses or blocks awarded.<sup>41</sup>

I. LIBERIA

1. *Truth and Reconciliation Plan*

In June, the Liberian government released a national peacebuilding plan and, in October, launched the National Palava Hut Program to foster reconciliation through community and grassroots dialogue.<sup>42</sup> The plan advocates reparations but does not advance the Truth and Reconciliation Commission's call for prosecutions of war crimes committed during the country's two armed conflicts.<sup>43</sup>

J. MAURITANIA

1. *Bank Capital*

Mauritania increased its bank capital requirements from six to nine billion CFA Francs (from about US\$11.39 million to about US\$17 million) in 2014.<sup>44</sup> The requirement is

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36. Haby Niakate, *Guinée—Massacre du 28 Septembre: Dadis Camara, Simple Témoin* [Guinea—Sept. 28 Massacre, Dadis Camara Mere Witness], JEUNE AFRIQUE (Aug. 5, 2014), <http://www.jeunefrique.com/Article/JA2795p015.xml0/>.

37. *Id.*

38. Miranda Correia Amendoeira & Associados, *New Mining Code*, LEGAL NEWS: GUINEA BISSAU (April 2014) [http://www.mirandalawfirm.com/uploadedfiles/20141113\\_343721.pdf](http://www.mirandalawfirm.com/uploadedfiles/20141113_343721.pdf).

39. *Id.*

40. *Id.*

41. *Id.*

42. *World Report 2014: Liberia*, HUM. RTS. WATCH, <http://www.hrw.org/world-report/2014/country-chapters/liberia?page=2> (last visited Nov. 08, 2014).

43. *Id.*

44. *Mauritanie: Augmentation du Capital Minimum des Banques* [Mauritania: Increase in the Minimum Capital of Banks], FIN. AFRIK (May 27, 2014), <http://www.financialafrik.com/2014/05/27/mauritanie-augmentation-du-capital-minimum-des-banques/>.

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strong compared to the CFA zone, which has a minimum capital requirement of \_7.6 million (about US\$9.47 million).<sup>45</sup>

K. MALI

On August 21, Mali adopted a draft law regulating statutory interest rates and prohibiting usury implementing a 2013 UEMOA act.<sup>46</sup> The regulation also provides for Central Bank or Banking Commission intervention where financial institutions are ordered to cease trading.<sup>47</sup>

L. NIGER

Following the 2006 adoption of a mining code increasing state royalties from about 5.5 percent to at least 12 percent, Niger sought to reset contracts including those with nuclear company Areva.<sup>48</sup> In 2014, after a two-year negotiation, the parties reached an agreement that has remained undisclosed despite the country's constitution, which requires publication.<sup>49</sup>

M. NIGERIA

1. *Same Sex Marriage Prohibition*

On January 7, President Goodluck Jonathan signed a bill prohibiting same-sex marriage or civil union in Nigeria, prescribing up to 14 years' imprisonment for violations.<sup>50</sup> The Act also prohibits the registration of homosexual clubs and makes meetings convened by gay people illegal.<sup>51</sup>

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45. *Id.*

46. B. Paitao, *Plénière à l'Assemblée Nationale: Le Projet de Loi Relative à la Définition et à la Répression de l'Usure Adopté* [Plenary of the National Assembly: Draft Law on the Definition & Suppression of Usury Adopted], MALIWEB (Aug. 25, 2014), <http://www.maliweb.net/politique/pleniere-lassemblee-nationale-projet-loi-relative-definition-repression-lusure-adopte-485992.html>.

47. *Id.*

48. Daniel Flynn & Geert de Clercq, *Special Report—Areva & Niger's Uranium Fight*, REUTERS (Feb. 05, 2014), <http://uk.reuters.com/article/2014/02/05/uk-niger-areva-specialreport-idUKBREA140A920140205>.

49. Jennifer Lazuta, *Niger Signs Long-Delayed Uranium Deal with Areva*, VOICE OF AM. (May 27, 2014), <http://www.voanews.com/content/niger-signs-long-delayed-uranium-deal-with-areva/1923567.html>.

50. *Nigeria Passes Law Banning Homosexuality*, TELEGRAPH, (Jan. 14, 2014), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10570304/Nigeria-passes-law-banning-homosexuality.html>.

51. *Id.*

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2. *Pension Reform*

On July 1, the President signed the Pension Reform Act 2014.<sup>52</sup> The Act re-enacts provisions administering the Uniform Contributory Pension Scheme, and, *inter alia*, increasing minimum contributions and establishing a pension protection fund.<sup>53</sup>

N. SÃO TOME AND PRÍNCIPE

1. *Opposition wins Parliament*

In October 2014, led by former Prime Minister Patrice Trovoada, opposition party Independent Democratic Action won a majority in parliamentary elections.<sup>54</sup> The AU congratulated the country on peaceful elections.<sup>55</sup>

O. SIERRA LEONE

1. *Companies Act Amendment*

In July 2014, Sierra Leone ratified the Companies (Amendment) Act 2014 to improve trade, protect investors, and encourage economic development.<sup>56</sup>

P. SENEGAL

1. *Sustainable Fisheries*

A renewed five-year partnership was initiated by Senegal and the European Union (EU) in April granting the EU fishing rights off the coast of Senegal.<sup>57</sup> The framework has a “double objective” of regulating resource access and providing sectoral support.<sup>58</sup>

2. *Arms Trade Treaty*

In September, Senegal was one of eight countries to ratify the Arms Trade Treaty, bringing ratifications to fifty pursuant to which the Treaty entered into force ninety days later, on December 24.<sup>59</sup> The Treaty regulates the cross-border arms trade.<sup>60</sup>

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52. *Nigeria: Changes in 2014 Pension Reform Act Increase Need for Preparation & Communication*, TOWERS WATSON (Aug. 27, 2014), <http://www.towerswatson.com/en/Insights/Newsletters/Global/global-news-briefs/2014/08/nigeria-changes-in-new-2014-pension-reform-act-increases-need-for-preparation-and-communication>.

53. Taiwo Oyedele, *Nigeria: How the New Pension Reform Bill May Affect You*, MONDAQ (Apr. 23, 2014), <http://www.mondaq.com/x/308768/Employee+Benefits+Compensation/How+The+New+Pension+Reform+Bill+May+Affect+You>.

54. *Opposition Wins Elections in Sao Tome & Principe*, EIN NEWS (Oct. 14, 2014), [http://world.einnews.com/article\\_\\_detail/229079060?lcode=2c15xO5KcdX-L4eIVR8-W16qfpeFaGu9SAfkpjeiHpg%3D](http://world.einnews.com/article__detail/229079060?lcode=2c15xO5KcdX-L4eIVR8-W16qfpeFaGu9SAfkpjeiHpg%3D)

55. *Africa: AUC Chairperson's Statements on Elections in Sao Tome & Principe, & Mozambique*, ALLAFRICA (Oct. 20, 2014), <http://allafrica.com/stories/201410202280.html>.

56. Augustine Samba, *Sierra Leone News: Parliament Ratifies Companies Act 2014*, AWARENESS TIMES (July 24, 2014), [http://news.sl/drwebsite/publish/article\\_200525843.shtml](http://news.sl/drwebsite/publish/article_200525843.shtml).

57. *EU & Senegal Extend Fisheries Partnership*, AGRITRADE (June 16, 2014), <http://agritrade.cta.int/en/Fisheries/Topics/ACP-EU-relations-FPAs/EU-and-Senegal-extend-fisheries-partnership>.

58. *Id.*

59. *Id.*

### III. Central Africa

#### A. CAMEROON

##### 1. *Economic Partnership Agreement*

On July 9, Cameroon authorized ratification of the 2009 EPA with the EU.<sup>61</sup> The Agreement, which aims to remove customs barriers between the two entities over fifteen years to create a free-trade zone, was ratified July 25, 2014.<sup>62</sup>

#### B. CENTRAL AFRICAN REPUBLIC

##### 1. *Coup d'État*

The March 2013 coup plunged the country into conflict severely impacting its legal system.<sup>63</sup> The transitional parliament elected a new interim president in January 2014 and started on a new constitution.<sup>64</sup>

##### 2. *Special Criminal Court*

In August, the Central African Republic signed a Memorandum of Understanding with the UN to establish a special criminal court to prosecute international crimes perpetrated in the country.<sup>65</sup> The court will be composed of Central African and international judges.<sup>66</sup> The transitional parliament is required to pass a law to effect the agreement.<sup>67</sup>

#### C. CHAD

##### 1. *Habré Regime on Trial*

The trials of twenty-six former state security agents of the Hissène Habré dictatorship, accused *inter alia* of murder, torture, kidnapping, and arbitrary detention, started in N'Djaména in November.<sup>68</sup> The trial of former Chadian leader Hissène Habré before the 'Extraordinary African Chambers within the Jurisdiction of Senegal for the Prosecu-

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60. Press Release, Secretary-General, Arms Trade Treaty Reaches 50 Ratifications during 2014 Treaty Event, Triggering Entry into Force, U.N. Press Release DC/3522-L/T/436 (Sept. 25, 2014), <http://www.un.org/News/Press/docs/2014/dc3522.doc.htm>.

61. *Cameroonian Parliament Authorizes President to Ratify EPA with EU*, BUS. IN CAMEROON (July 15, 2014), <http://www.businessincameroon.com/public-management/1507-4945-cameroonian-parliament-authorises-president-to-ratify-epa-with-eu>.

62. *Cameroon Ratifies Economic Partnership Agreement with EU*, RTT NEWS (July 28, 2014), <http://www.rttnews.com/2357592/cameroon-ratifies-economic-partnership-agreement-with-eu.aspx>.

63. Paul-Marin Ngoupana & Adrian Croft, *Central African Republic Names New Leader, EU to Send Troops*, REUTERS (Jan. 20, 2014, 3:49 PM), <http://www.reuters.com/article/2014/01/20/us-centralafrican-idUSBREA0J0VT20140120>.

64. *Id.*

65. *Centrafrique: MINUSCA, Opening of Procedures of Justice*, LA NOUVELLE CENTRAFRIQUE (Sept. 18, 2014), <http://www.lanouvelcentrafrique.org/centrafrique-minusca-opening-of-procedures-of-justice/>.

66. *Id.*

67. *Id.*

68. *Chad: Alleged Habré Accomplices to Stand Trial*, HUM. RTS. WATCH (Nov. 10, 2014), <http://www.hrw.org/news/2014/11/10/chad-alleged-habre-accomplices-stand-trial>.



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tion of International Crimes committed in Chad between 7th June 1982 and 1st December 1990 is scheduled to begin in Senegal in May 2015.<sup>69</sup>

D. CONGO (DEMOCRATIC REPUBLIC)

1. *War Amnesty*

On February 4, the Congolese parliament approved an amnesty covering acts dating back to mid-2000.<sup>70</sup> Welcomed by UN officials as fostering peace, the law grants amnesty for acts of insurgency, war, and political offenses.<sup>71</sup>

2. *Public-Private Partnerships*

On February 11, Law No. 14/005 (the ‘PPP Law’), a system of tax, customs, and exchange rate controls related to public-private partnership investment and development projects, went into effect.<sup>72</sup>

3. *Mining*

Two Joint Ministerial Orders of February 11 required mining companies to “hire small and medium-sized Congolese” firms for the “provision of services or goods.”<sup>73</sup> Joint Ministerial Orders from December 2013 extended the ban on copper and cobalt exports to December 31, 2014.<sup>74</sup>

4. *Tax*

To support the DRC’s “de-dollarization policy”, on February 1, the Minister of Finance issued a circular for recovery orders “imposed on mining companies” to be exclusively in Congolese Francs.<sup>75</sup>

E. CONGO (REPUBLIC)

1. *Investment Funds Created*

Law 1-2014 of January 6 created a state fund to invest in foreign assets.<sup>76</sup> Separately, Law 2-2014 of January 6 created a “state-owned financially-independent institutional in-

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69. *Id.*

70. *New DR Congo Amnesty Law Welcomed by UN Envoys*, UN NEWS CENTRE (Feb. 5, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47081&#.VDGeAGeYbIU> (last visited Jan. 16, 2015).

71. *Id.*

72. Upio Kakura Wapol, *A New Legal Framework to Promote the Public-Private Partnership in the Democratic Republic of the Congo*, LEXOLOGY (Apr. 30, 2014), <http://www.lexology.com/library/detail.aspx?g=6c132030-8d6b-4288-aaed-1f095202c772>.

73. Miranda Correia Amendoeira & Associados, *Mining Law*, LEGAL NEWS: DEMOCRATIC REPUBLIC OF THE CONGO (Feb. 2014), [http://www.mirandalawfirm.com/uploadedfiles/20140821\\_510e9a.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140821_510e9a.pdf).

74. *Id.*

75. *Id.*

76. Miranda Correia Amendoeira & Associados, *Fonds Congolais d’Investissement Created*, LEGAL NEWS: REPUBLIC OF THE CONGO (Feb. 2014), [http://www.mirandalawfirm.com/uploadedfiles/20140821\\_c62e6f.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140821_c62e6f.pdf).

vestor” with powers to “provide loans to local and regional authorities,” and to businesses.<sup>77</sup>

F. GABON

1. *Investment*

A February 25 decree established Gabon’s High Council for Investment to set and monitor its investment policies.<sup>78</sup>

2. *Social Security*

The Health Insurance and National Fund for Social Guaranty (CNAMGS) signed an agreement with local private insurance companies on May 28 to “improve coverage for employees and retirees from state and private sectors.”<sup>79</sup>

**IV. East Africa**

A. BURUNDI

1. *Media Restrictions Lifted*

On January 7, the Burundian Constitutional Court quashed provisions of its media law that had increased fines, required journalists to reveal sources, and restricted investigative abilities.<sup>80</sup> On April 25, Burundi adopted a new electoral code hailed as an improvement.<sup>81</sup>

2. *Arbitration*

On May 9, Burundi signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, making only the “commerciality reservation” under which the Convention only applies to “commercial” disputes.<sup>82</sup> The Convention entered into force for Burundi on September 21.<sup>83</sup>

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77. *Id.*

78. Miranda Correia Amendoeira & Associados, *Establishment of the High Council for Investment*, LEGAL NEWS: GABON (June 2014), [http://www.mirandalawfirm.com/uploadedfiles/20140820\\_8cb489.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140820_8cb489.pdf) (last visited Jan. 16, 2015).

79. *Id.*

80. *Constitutional Court Quashes Several Repressive Provisions of Burundian Medial Law*, IFEX (Jan. 8, 2014), [http://www.ifex.org/burundi/2014/01/08/articles\\_quashed/](http://www.ifex.org/burundi/2014/01/08/articles_quashed/).

81. Press Release, New Election Law a Step Forward for Burundi, United Nations, Apr. 28, 2014, *available at* <http://www.irinnews.org/report/100002/new-election-law-a-step-forward-for-burundi> (last visited Nov. 11, 2014).

82. *Burundi Accedes to New York Convention*, N.Y. ARB. CONVENTION (May 9, 2014), <http://www.newyork-convention.org/news/burundi-accedes-to-new-york-convention>.

83. Press Release, U.N. Info. Serv., Burundi Accedes to the Convention on the Recognition & Enforcement of Foreign Arbitral Awards (June 25, 2014), <http://www.unis.unvienna.org/unis/en/pressrels/2014/unisl200.html>.

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B. DJIBOUTI

1. *Infrastructural Development*

Djibouti commenced an infrastructural investment program to take advantage of its position in the Horn of Africa.<sup>84</sup> In March, the World Bank “announced a new strategy for Djibouti,” working to reduce its poverty and improve its economic diversification.<sup>85</sup>

C. ERITREA

1. *UN-banned Tax Persists*

Reports continued in 2014 of expatriate Eritreans paying two percent on earnings to Eritrean authorities, a tax banned in 2011 by UN Security Council Resolution 2023 as “being used to fund ‘arms and related material’ for rebel groups across the Horn of Africa.”<sup>86</sup>

D. ETHIOPIA

In April 2014, Ethiopian authorities arrested six bloggers and three journalists under its anti-terrorism law, which defines terrorist acts and support for terrorism.<sup>87</sup> The “court charged the nine with having links to banned opposition groups and trying to violently overthrow the government.”<sup>88</sup>

E. KENYA

1. *Marriage*

The Kenyan Marriage Act 2014 came into effect May 20, amending and consolidating laws.<sup>89</sup> The Act includes monogamous, polygamous, customary, Christian, Islamic, or Hindu marriages.

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84. *Djibouti Economy 2014: Recent Developments. & Prospects*, HIIRAN (Aug. 2, 2014), [http://hiiraan.com/news4/2014/Aug/55840/djibouti\\_economy\\_2014\\_recent\\_developments\\_and\\_prospects.aspx#sthash.adA4dBsS.dpbs](http://hiiraan.com/news4/2014/Aug/55840/djibouti_economy_2014_recent_developments_and_prospects.aspx#sthash.adA4dBsS.dpbs).

85. Press Release, World Bank, New Partnership with Djibouti to Focus on Human Development & Economic Diversification (March 13, 2014), <http://www.worldbank.org/en/news/press-release/2014/03/13/partnership-djibouti-human-development-economic-diversification>.

86. Martin Plaut, *Eritreans in Britain Forced by Embassy to Pay 2% Diaspora Tax*, GUARDIAN (Feb. 11, 2014), <http://www.theguardian.com/global-development/2014/feb/11/eritrea-britain-illegal-diaspora-tax-embassy>.

87. *Ethiopia: Drop Case Against Bloggers, Journalists*, HUM. RTS. WATCH (July 19, 2014), <http://www.hrw.org/news/2014/07/19/ethiopia-drop-case-against-bloggers-journalists>.

88. *Id.*

89. The Marriage Act, No. 4 (2014), KENYA GAZETTE SUPPLEMENT No. 62, available at <http://www.cick-kenya.org/index.php/legislation/acts/item/172-the-marriage-act-2014>.

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2. *Presidential Case Withdrawn*

On December 5, the International Criminal Court withdrew its charges in the *Kenyatta* case for lack of evidence.<sup>90</sup> The Kenyan president was charged, as an indirect co-perpetrator, with “crimes against humanity consisting of murder, deportation or forcible transfer, rape, persecution, and other inhumane acts allegedly committed during post-election violence in 2007-2008.”<sup>91</sup> The case against deputy president Ruto continues.

F. RWANDA

1. *New Genocide Ideology Law*

In 2014, Rwanda adopted a number of new laws advancing freedom of the media and, in October, a revision to the 2008 law proscribing genocide ideology. The revision contains a more precise definition of the offence and the requirement to demonstrate intent, reducing the scope for abusive prosecutions.<sup>92</sup>

2. *Mugesera Trial*

The High Court in Kigali continued to hear the trial of former government official Léon Mugesera in 2014. Mugesera, who was extradited from Canada to Rwanda in 2012, was charged with planning and incitement to genocide.<sup>93</sup>

G. SOMALIA

1. *Media Law Controls Journalists*

On September 1, Somalia’s Council of Ministers passed a new draft media law that would establish a National Media Council requiring Ministry of Information registration and the payment of an annual license. The draft law sets fines of \$5,000 to \$10,000 for “code of ethics” breaches, which is to be based on respect for Islam.<sup>94</sup>

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90. Press Release, Int’l Criminal Court, Statement of the Prosecutor of the Int’l Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta (Dec. 5, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx).

91. Press Release, Int’l Criminal Court, Kenyatta Case: Trial Chamber V(b) Vacates Trial Opening Date; Convenes Status Conferences to Discuss Pending Issues (Sept. 19, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1041.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1041.aspx).

92. *World Report 2014: Rwanda*, HUM. RTS. WATCH, available at <http://www.hrw.org/world-report/2014/country-chapters/rwanda?page=2> (last visited Nov. 22, 2014).

93. *Id.*

94. *Somalia: Media Law Imposes Heavy Fines on Journalists for Breaching ‘Code of Ethics,’* ALLAFRICA (Sept. 2, 2014), <http://allafrica.com/stories/201409031117.html>.

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2. *AU Rape Scandal*

In September, Human Rights Watch accused AU soldiers in Somalia of raping and sexually exploiting women on its bases.<sup>95</sup> The AU challenged the report and asserted a zero-tolerance policy on peacekeeper misconduct.<sup>96</sup>

H. SUDAN

1. *Apostasy Case*

In May 2014, a Sudanese court convicted Meriam Yahia Ibrahim Ishag to death for apostasy against Islam, which she denied, stating that she had been raised a Christian. She was released in June 2014 on appeal and, following negotiations and re-arrest, was able to depart Sudan to join her husband, an American national, in the United States with the daughter she delivered in prison.<sup>97</sup>

I. SOUTH SUDAN

1. *Conflict Continues*

Reports of Sudanese bombing raids continued in 2014.<sup>98</sup> Internally, it was reported that the government, as well as opposition forces and their allies had committed war crimes in South Sudan since fighting began in December 2013.<sup>99</sup> In April, then-UN High Commissioner for Human Rights Navanethem Pillay stated that more than 9,000 child soldiers had been fighting in the civil war.<sup>100</sup>

J. TANZANIA

On September 26, the East African Court of Justice held that Tanzania had violated the East African Community Treaty in the March 2012 elections to the East African Legislative Assembly.<sup>101</sup> The court found that Tanzania had failed to apply the Treaty's principal of proportional representation, allowing candidates from political parties that were not represented in the National Assembly.

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95. *Somalia: Sexual Abuse by African Union Soldiers*, HUM. RTS. WATCH (Sept. 8, 2014), <http://www.hrw.org/news/2014/09/08/somalia-sexual-abuse-african-union-soldiers>.

96. Jethro Mullen & Nana Karikari-apau, *Rights Group: African Union Soldiers Raped, Exploited Somali Women, Girls*, CNN (Sept. 10, 2014), <http://www.cnn.com/2014/09/09/world/africa/african-union-soldier-allegations>.

97. See David Millward, *Meriam Ibrahim Heads to New Life in New Hampshire*, TELEGRAPH (July 31, 2014), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11004015/Meriam-Ibrahim-heads-to-new-life-in-New-Hampshire.html>.

98. *Sudan Warplanes Bomb South Sudan Border Zones: Reports*, DAILY MAIL (Nov. 14, 2014), <http://www.dailymail.co.uk/wires/afp/article-2834399/Sudan-warplanes-bomb-South-Sudan-border-zones-reports.html>.

99. *South Sudan: Massacres, Unlawful Killings, Pillage*, HUM. RTS. WATCH (Aug. 8, 2014), <http://www.hrw.org/news/2014/08/08/south-sudan-massacres-unlawful-killings-pillage>.

100. *South Sudan Sides 'Recruit 9,000 Children to Fight'*, BBC (Apr. 30, 2014), <http://www.bbc.com/news/world-africa-27220244>.

101. Andante Okanya, *EA Court Faults Election of Tanzania EALA MPs*, NEW VISION (Sept. 30, 2014), <http://www.newvision.co.ug/news/660211-ea-court-faults-election-of-tanzania-eala-mps.html>.

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1. *New Constitution*

In October, a revised constitution passed mainland Tanzania's and Zanzibar's parliaments.<sup>102</sup> If adopted, the constitution would guarantee women the right to own land and provide for equal representation in decision-making bodies.<sup>103</sup>

K. UGANDA

1. *Anti-Homosexuality Act Repealed*

On August 1, the Constitutional Court of Uganda quashed the controversial Uganda Anti-Homosexuality Act, which punished homosexuality with life imprisonment.<sup>104</sup>

**V. Southern Africa**

A. ANGOLA

1. *Maputo Convention*

On January 20, the Angolan National Assembly ratified the Convention on the Conservation of Nature and Natural Resources in Africa, the "Maputo Convention."<sup>105</sup>

2. *FATF Compliance*

On February 10, Law 3/14 on money laundering and terrorism financing crimes was approved, criminalizing acts in accordance with the U.S. Financial Action Task Force against Money Laundering (FATF) 40 Recommendations. The Act amends prior legislation on this matter.<sup>106</sup>

3. *Model Agreement on Investments*

The Model Agreement on the Mutual Promotion and Protection of Investments between the Republic of Angola and other States, to bolster business opportunities between contracting parties, was approved by Presidential Decree 122/14 of June 4.<sup>107</sup>

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102. Deogratias Mushi, *Tanzania: Ecstasy as Katiba Vote Succeeds*, ALLAFRICA (Oct. 3, 2014), <http://allafrica.com/stories/201410030848.html>.

103. Deogratias Mushi, *Tanzania: New Constitution Moves Tanzania Closer to Gender Parity*, ALLAFRICA (Oct. 3, 2014), <http://allafrica.com/stories/201410010443.html>.

104. *Uganda Court Annuls Anti-Homosexuality Law*, BBC (Aug. 1, 2014), <http://www.bbc.co.uk/news/world-africa-28605400>.

105. Miranda Correia Amendoeira & Associados, *Maputo Convention Approved*, LEGAL NEWS: ANGOLA (Jan. 2014), [http://www.mirandalawfirm.com/uploadedfiles/20140401\\_efc3e3.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140401_efc3e3.pdf).

106. *Id.*

107. Miranda Correia Amendoeira & Associados, *Approval of Model Agreement on the Mutual Promotion & Prot. of Investment*, LEGAL NEWS: ANGOLA (Jan. 2014), [http://www.mirandalawfirm.com/uploadedfiles/20140401\\_efc3e3.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140401_efc3e3.pdf).

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B. COMOROS

1. *Mayotte Awarded EU Status*

Mayotte, claimed by Comoros, acquired EU “outermost region” status on January 1.<sup>108</sup> Comoros’ write-off of multilateral debt anticipated a 2014 public investment increase of 9.1 percent of GDP, with Comores Telecom to be privatized under the “Heavily Indebted Poor Countries” (HIPC) initiative.<sup>109</sup>

C. BOTSWANA

1. *LGBT Groups Permitted*

In November, the Botswana High Court overturned a government ban on a gay rights lobby, permitting registration of the group, a move hailed as progressive.<sup>110</sup>

D. LESOTHO

1. *Government Upheaval*

Lesotho was thrown into upheaval in September when Prime Minister Thomas Thobane was deposed.

2. *Succession Restrictions Upheld*

In *Masupha*, Lesotho’s highest court upheld the Chieftainship Act which denies succession rights to daughters of chieftains. The Constitutional Court had also ruled that, under customary law, only males or wives could succeed chieftains.<sup>111</sup>

E. MADAGASCAR

On January 17, Hery Rajaonarimampianina was confirmed winner of the December 2013 presidential poll.<sup>112</sup> The new president’s confirmation was followed by Madagascar’s reinstatement into the AU and other international organizations.<sup>113</sup>

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108. *Mayotte & the EU*, EUROPEAN EXTERNAL ACTION SERV., [http://eeas.europa.eu/delegations/mauritius/eu\\_mayotte/index\\_en.htm](http://eeas.europa.eu/delegations/mauritius/eu_mayotte/index_en.htm) (last visited Nov. 15, 2014).

109. *Country Profile 2014: Comoros*, AFRICA REPORT (Feb. 6, 2014), <http://www.theafricareport.com/Horn-East/country-profile-2014-comoros.html>.

110. *Ground-breaking Court Ruling Allows LGBT Rights Group to Register Org. in Botswana*, AFRICAN (Nov. 15, 2014), [http://www.theafrican.info/news.php?id\\_syndic\\_article=244201](http://www.theafrican.info/news.php?id_syndic_article=244201).

111. *Masupha v The Senior Resident Magistrate of the Subordinate Court of Berea & Others: A Case Summary*, S. AFRICA LITIG. CTR., <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Masupha-case-summary.pdf> (last visited Jan. 15, 2015).

112. Peter Cox, *Madagascar’s New President Brings Hope of Econ. Change*, ALLAFRICA (Jan. 3, 2014), <http://allafrica.com/stories/201401040012.html> (last visited Jan. 15, 2015).

113. *Madagascar Eyes Econ. Recovery as Donors Resume Support*, REUTERS (Mar. 27, 2014), <http://www.voanews.com/content/madagascar-eyes-economic-recovery-as-donors-resume-support/1880942.html>.

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F. MALAWI

1. *First “Cashgate” Conviction*

Following the 2013 “Cashgate” scandal,<sup>114</sup> which saw widespread looting of up to \$32 million from the Malawi government, in August, Ministry of Tourism official Treza Namathanga Senzani pleaded guilty to stealing around \$150,000 in the matter’s first conviction.<sup>115</sup>

G. MOZAMBIQUE

1. *Hydropower Partnerships; CSR*

In March, Mozambique authorized two hydropower projects. Both will be public-private partnerships between state-owned and private companies.<sup>116</sup> In May, the country adopted a Corporate Social Responsibility policy for the extractive industry.<sup>117</sup>

H. NAMIBIA

1. *Electoral Bill*

Ahead of national elections for November, Namibia replaced its 1992 Electoral Act. The new law reduces the time for conducting elections and addresses residency requirements, allowing voters to swear an oath before a registration officer.<sup>118</sup>

I. SOUTH AFRICA

1. *Arbitration*

The Supreme Court of Appeals in Bloemfontein dismissed an appeal by Ecclesia De Lange, a minister fired for marrying her same-sex partner. The court did not reach the merits but ruled that an arbitration agreement existed between De Lange and the Methodist Church of South Africa for dispute resolution.<sup>119</sup>

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114. *Malawi’s “Cashgate” Scandal: The \$32m Heist*, ECONOMIST (Feb. 27, 2014), <http://www.economist.com/blogs/baobab/2014/02/malawi-s-cashgate-scandal>.

115. Lameck Masina, *Malawi Court Sentences First Official in Cashgate Scandal*, VOA NEWS (Oct. 8, 2014), <http://www.voanews.com/content/malawi-court-sentences-official-in-cashgate-scandal/2476521.html>.

116. Miranda Correia Amendoira & Associados, *Negotiations of PPPs for Hydroelectric Projects Authorized*, LEGAL NEWS: MOZAMBIQUE (Feb. 2014), [http://www.mirandalawfirm.com/uploadedfiles/20140821\\_618411.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140821_618411.pdf).

117. Miranda Correia Amendoira & Associados, *Corporate Responsibility in the Extractive Indus.*, LEGAL NEWS: MOZAMBIQUE (May 2014), [http://www.mirandalawfirm.com/uploadedfiles/20140829\\_e5fef4.pdf](http://www.mirandalawfirm.com/uploadedfiles/20140829_e5fef4.pdf).

118. *Electoral Bill of 2014 Passes in NA*, NAMIBIAN (Aug. 29, 2014), [http://www.namibian.com.na/index.php?id=17063&page\\_type=story\\_detail](http://www.namibian.com.na/index.php?id=17063&page_type=story_detail).

119. Luiz DeBarros, *Court Rejects Fired Lesbian Minister’s Appeal*, MAMBA (Oct. 1, 2014), <http://www.mambaonline.com/2014/10/01/court-rejects-fired-lesbian-ministers-appeal/>.

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J. SWAZILAND

1. *AU Petition*

The African Commission on Human and People's Rights (ACHPR) in July decided to hear a Law Society of Swaziland complaint relating to a Practice Directive issued by Swaziland Chief Justice Michael Ramodibedi which prevents Swaziland courts from presiding over legal actions against the king or his office. The Law Society alleges the directive violates the country's constitution and international human rights obligations.<sup>120</sup>

K. ZAMBIA

1. *Business Legislation*

On March 21, Zambia passed the Business Regulatory Act No. 3 of 2014 creating, *inter alia*, a Business Regulatory Review Committee and Business Regulatory Review Agency.<sup>121</sup> It also passed the Legal Practitioners Act of 2014, regulating legal practice,<sup>122</sup> and the Service Commission Act of 2014, regulating the Public Service Commission, the Prisons Service Commission, and the Teaching Service Commission.<sup>123</sup>

2. *White Interim Presidency*

Zambian president Michael Sata's death in October 2014 saw the country's vice president, Guy Scott, assume the interim presidency. Scott is currently the only white African head of state.<sup>124</sup>

L. ZIMBABWE

1. *Defamation Act Unconstitutional*

In July, Zimbabwe's Constitutional Court struck part of its 2005 criminal law which punished those accused of defamation. The relevant part reads:

Any person who, whether inside or outside Zimbabwe—(a) publishes or communicates to any other person a statement which is wholly or materially false with the intention or realizing that there is a real risk or possibility of . . . (iii) undermining public confidence in a law enforcement agency, the Prison Service or the Defense Forces of Zimbabwe . . . [shall] be guilty of publishing or communicating a false

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120. Welcome Dlamini, *African Union Agrees to Try Ramodibedi*, SWAZI OBSERVER (Sept. 28, 2014), <http://www.observer.org.sz/news/66336-african-union-agrees-to-try-ramodibedi.html>.

121. POL. MONITORING & RES. CTR., BUSINESS REGULATORY ACT NO. 3 OF 2014: SUSTAINABLE PRIVATE GROWTH; IS THE PATH REGULATORY POLICY? 5 (2014), *available at* [https://pmrcblog.files.wordpress.com/2014/08/business-regulatory-act\\_policy-analysis.pdf](https://pmrcblog.files.wordpress.com/2014/08/business-regulatory-act_policy-analysis.pdf).

122. POL. MONITORING & RES. CTR., THE SERVICE COMMISSIONS (AMENDMENT) BILL OF 2013 1 (2014), *available at* <http://pmrcblog.files.wordpress.com/2014/07/pmrc-policy-analysis-the-service-commissions-amendment-bill-of-2013.pdf>.

123. Legal Practitioner's (Amendment) Act No. 1 (2014) GOVT. GAZETTE (Acts), § 52 (Zam.).

124. David Smith, *Guy Scott Takes Interim Role after Zambian President Sata's Death*, GUARDIAN (Oct. 29, 2014), <http://www.theguardian.com/world/2014/oct/29/scott-president-interim-zambia-sata-death>.

statement prejudicial to the State and liable to a fine . . . or imprisonment for a period not exceeding twenty years or both.<sup>125</sup>

The Court held that the wording contravened the Constitution.<sup>126</sup>

## VI. African Institutions

### A. AFRICAN UNION

#### 1. *AU Summits; Emergency Meeting*

The 22nd African Union Summit was held in Addis Ababa in January.<sup>127</sup> The assembly urged members to remain united in the AU's opposition to International Criminal Court proceedings against the Kenyan and Sudanese presidents, and with proposed amendments to the Rome Statute.<sup>128</sup> In June, the 23rd AU Summit convened in Malabo,<sup>129</sup> marked by reinstatement of Egypt's membership which had been suspended in July 2013 under an AU policy against unconstitutional regime change following the ouster of then-president Mohamed Morsi. In September, the AU held an emergency meeting to tackle the Ebola epidemic.<sup>130</sup>

### B. EAST AFRICAN COMMUNITY

#### 1. *EAPS Launched*

In May 2014, the East African Payment System (EAPS) was launched, moving toward monetary union in the EAC.<sup>131</sup> EAPS is currently operational between Uganda, Kenya, and Tanzania.

#### 2. *EU Allocates \$85 Million*

In 2014, the European Development Fund allocated the East African Community (EAC) \$85 million for 2016 to 2020, to be used for peace and security, regional economic

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125. Criminal Law (Codification and Reform) Act No. 23 (2004), GOVT. GAZETTE (Acts), 30-31, § 31(a)(iii) (Zim.), available at <http://www1.umn.edu/humanrts/research/Criminal%20Law%20Code%20Veritas.pdf>.

126. Ntungamili Nkomo, *Zimbabwe ConCourt Voids Criminal Defamation*, VOICE OF AM. (July 22, 2014), <http://www.voazimbabwe.com/content/zimbabwe-constitutional-court-criminal-law/1962758.html>.

127. Press Release, African Union, President Abdel Aziz of the Islamic Republic of Mauritania Elected African Union Chairperson (Jan. 30, 2014), <http://summits.au.int/en/22ndsummit/events/president-abdel-aziz-islamic-republic-mauritania-elected-african-union-chairperson>.

128. Press Release, African Union, 22nd Ordinary Session of the African Union Assembly Concludes: A Summary of Key Decisions (Jan. 31, 2014), <http://summits.au.int/en/22ndsummit/events/22nd-ordinary-session-african-union-assembly-concludes-summary-key-decisions-0>.

129. Press Release, African Union, 23rd Ordinary Summit of the African Union Ends in Malabo (June 30, 2014), <http://summits.au.int/en/23rdsummit/events/23rd-ordinary-session-african-union-ends-malabo>.

130. Jacey Fortin, *African Union Meets for Ebola Crisis Talk*, YAHOO! NEWS (Sept. 8, 2014), <http://news.yahoo.com/african-union-meets-ebola-crisis-talks-085717220.html>.

131. Press Release from Dr. Enos S. Bukuku, Deputy Sec'y Gen., East African Community, Launch of the East African Payment Sys., [http://www.eac.int/index.php?option=com\\_content&view=article&id=1590:press-statement-launch-of-the-east-african-payment-system-eaps-&catid=147:speeches-statements](http://www.eac.int/index.php?option=com_content&view=article&id=1590:press-statement-launch-of-the-east-african-payment-system-eaps-&catid=147:speeches-statements).

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integration, and natural resources.<sup>132</sup> Money allocated to regional economic integration helped implement the customs union, common market, and East African Monetary Union.<sup>133</sup>

C. AFRICAN DEVELOPMENT BANK

1. *Green Bonds; Sustainable Energy*

In February and March, the African Development Bank (AfDB) closed 1 billion Swedish Krona Green Bond funding rounds.<sup>134</sup> Proceeds from the Green Bond program are to fund projects combating climate change in Africa.<sup>135</sup> The AfDB also financed sustainable energy projects through its Sustainable Energy Fund for Africa (SEFA).<sup>136</sup>

2. *China Investment*

On May 22, the AfDB and China created the Africa Growing Together Fund, a \$2 billion fund to finance public and private development projects in Africa.<sup>137</sup> China's previous African investment policies have focused on bilateral deals and procurement from Chinese companies.<sup>138</sup>

3. *Ebola Response*

In August, the AfDB approved a \$60 million grant to the World Health Organization (WHO), part of a \$210 million package to strengthen public health systems in Western Africa and respond to the Ebola crisis.<sup>139</sup>

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132. Press Release, E. African Cmty., EU Allocates 85 Million Euros to EAC (Aug. 29, 2014), [http://www.eac.int/index.php?option=com\\_content&view=article&id=1640:eu-allocates-85-million-euros-to-eac&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1640:eu-allocates-85-million-euros-to-eac&catid=146:press-releases&Itemid=194).

133. *Id.*

134. Press Release, African Dev. Bank, AfDB Prices SEK 1 Billion Green Bond Due March 2019 (Mar. 10, 2014), <http://www.afdb.org/en/news-and-events/article/afdb-prices-sek-1-billion-green-bond-due-march-2019-12887/>.

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136. Press Release, African Dev. Bank, Sustainable Energy Fund for Africa Supports Mali in Promoting Renewable Energy (Aug. 13, 2014), <http://www.afdb.org/en/news-and-events/article/sustainable-energy-fund-for-africa-supports-mali-in-promoting-renewable-energy-13422/>.

137. Press Release, African Dev. Bank, AfDB Announces US \$2 Billion Fund with China (May 22, 2014), <http://www.afdb.org/en/news-and-events/article/afdb-announces-us-2-billion-fund-with-china-13165/>.

138. Richard Hudson, *Chinese Invs. in Africa: The Ethics of Transparency*, SEVEN PILLARS INST. (April 7, 2014), <http://sevenpillarsinstitute.org/news/chinese-investments-africa-ethics-transparency>.

139. Press Release, \$210 Million Response: AfDB Steps Up Efforts to Curb Ebola Outbreak in West Africa, African Development Bank, Aug. 19, 2014, <http://www.afdb.org/en/news-and-events/article/210-million-response-afdb-steps-up-efforts-to-curb-ebola-outbreak-in-west-africa-13437/>; Press Release, AfDB and WHO Sign US\$60 Million MOU to Strengthen Ebola Response in West Africa, African Development Bank, Aug. 27, 2014, <http://www.afdb.org/en/news-and-events/article/afdb-and-who-sign-us-60-million-mou-to-strengthen-ebola-response-in-west-africa-13448/>.

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4. *Return to Côte d'Ivoire*

On September 8, the AfDB marked its official return to headquarters in Abidjan.<sup>140</sup> The Bank had left Côte d'Ivoire in 2003 following a failed coup.<sup>141</sup> The AfDB celebrated its Golden Jubilee in Abidjan on November 4, fifty years since it held its first Board of Governors' meeting in 1964.<sup>142</sup>

D. AFRICAN IMPORT-EXPORT BANK

1. *Aftrades; Syndicated Loan*

In March, the African Export-Import Bank (Afreximbank) launched a \$100 million trade debt-backed securities (AFTRADES) facility.<sup>143</sup> In April, Afrximbank closed its largest syndicated loan to date, a dual-tranche \$467/\_224.4 million loan facility.<sup>144</sup>

E. SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

1. *EU Economic Partnership Agreement (EPA)*

On July 15, the SADC and the EU concluded EPA negotiations that had been ongoing since 2004.<sup>145</sup> The Agreement will likely enter into force in 2015.<sup>146</sup>

F. COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)

1. *EU Grant*

In 2014, COMESA received \_33 million from the EU for regional integration.<sup>147</sup> The funds are provided through the 10th European Development Fund (10th EDF) under the

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140. Press Release, African Dev. Bank, Flag-raising Ceremony Marks AfDB's Return to Official Headquarters in Côte d'Ivoire (Sept. 8, 2014), <http://www.afdb.org/en/news-and-events/article/flag-raising-ceremony-marks-afdb-return-to-its-official-headquarters-in-cote-divoire-13474/>.

141. Olivier Monnier, *Abidjan Rebounds as Bank's Return Fuels Optimism after Strife*, BLOOMBERG (June 30, 2014), <http://www.bloomberg.com/news/2014-06-30/abidjan-rebounds-as-bank-s-return-fuels-optimism-after-turmoil.html>.

142. Press Release, African Dev. Bank, The AfDB Marks Its Golden Jubilee in November 2014 (Sept. 9, 2014), <http://www.afdb.org/en/news-and-events/article/the-afdb-marks-its-golden-jubilee-in-november-2014-13441/>.

143. Press Release, African Import-Export Bank, Afrximbank Launches \$100 Million Facility to Improve Liquidity in Zimbabwe (Mar. 22, 2014), <http://afreximbank.com/afreximbank-launches-100-million-facility-improve-liquidity-zimbabwe/>.

144. Press Release, African Import-Export Bank, Afrximbank Closes Syndication Stage of US\$467 Million and Euro 222.4 Million Loan Facility (Apr. 30, 2014), <http://afreximbank.com/afreximbanks-closes-syndication-stage-us467-million-euro222-4-million-loan-facility/>.

145. *Conclusion of the Economic Partnership Agreement*, TRALAC (July 18, 2014), <http://www.tralac.org/news/article/5900-conclusion-of-the-economic-partnership-agreement.html>.

146. *Id.*

147. *COMESA Secures \_33 Million: Invites Member States to Submit Requests*, COMESA, [http://www.comesa.int/index.php?option=com\\_content&view=article&id=1311:comesa-invites-member-states-to-apply-for-funds&catid=5:latest-news&Itemid=41](http://www.comesa.int/index.php?option=com_content&view=article&id=1311:comesa-invites-member-states-to-apply-for-funds&catid=5:latest-news&Itemid=41) (last visited Sept. 10, 2014).

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COMESA Adjustment Facility (CAF) Regional Integration Support Mechanism (RISM).<sup>148</sup>

2. *EU Piracy Initiative*

In 2014, COMESA and the EU launched a \$5.4 million program to promote regional security fighting Indian Ocean piracy.<sup>149</sup>

G. ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN AFRICA (OHADA)

1. *Corporate Law Amendments*

On January 31, OHADA's Council of Ministers amended the corporate provisions of its Uniform Act on Commercial Companies and Economic Interest Groups including establishing a simplified joint stock company type.<sup>150</sup>

H. UN INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (UNICTR)

1. "*Military II*"<sup>151</sup>

In February, the UNICTR ruled in the appeals of Augustin Ndingilijimana, François-Xavier Nzuwonemeye, Innocent Sagahutu, and the Prosecution.<sup>152</sup> Although previously convicted of genocide, extermination, and murder, the Appeals Chamber reversed the convictions of Ndingilijimana and Nzuwonemeye, and reduced Sagahutu's sentence from twenty to fifteen years.<sup>153</sup> In June, the Appeals Chamber reversed rape and murder convictions in co-accused Bizimungu's case, affirming the remainder and leaving the thirty-year sentence intact.<sup>154</sup>

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148. *Id.*

149. Jeff Kapembwa, *COMESA, EU Team Up Against Piracy*, SOUTHERN TIMES (Sept. 22, 2014), <http://www.southerntimesafrica.com/articles/10337/Comesa—EU-team-up-against-piracy-/#.VCKTxjeiLYw>.

150. Press Release, OHADA, *Acte Uniforme Relatif au Droit des Sociétés Commerciales et du Groupement d'Intérêt Économique*, [Uniform Act Relating to the Law of Commercial Companies and Economic Interest Groupment, the Organization for the Harmonization of Business Law in Africa], at 207 (Feb. 4, 2014), [http://www.ohada.org/tuto-ohada/jo-numero\\_special\\_%2004-02-2014-optimise.pdf](http://www.ohada.org/tuto-ohada/jo-numero_special_%2004-02-2014-optimise.pdf).

151. *Ndingilijimana v. Prosecutor*, Case No. ICTR-00-56-A, Judgment on Appeal (Int'l Crim. Trib. for Rwanda Feb. 11, 2014), available at <http://www.unicttr.org/en/cases>.

152. Press Release, Appeals Chamber Delivers Judgement in Military II Case, UNICTR, Feb. 11, 2014, <http://www.ictr.org/tabid/155/Default.aspx?id=1379>.

153. *Id.*

154. Press Release, U.N. Int'l Crim. Tribunal for Rwanda, Appeals Chamber Delivers Judgment in the Bizimungu Case (June 30, 2014), <http://www.unicttr.org/en/news/news-archive/2014>.

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2. *Munyagishari Transferred*

In July, the UNICTR transferred genocide suspect Bernard Munyagishari to trial in Rwanda,<sup>155</sup> joining Jean Bosco Uwinkindi, whose case was the first to be sent by the UNICTR to Rwanda in 2012.<sup>156</sup>

3. *Three Appeals Delivered*

On September 29, the UNICTR delivered judgment in three appeals.<sup>157</sup> The tribunal dismissed convictions for genocide, extermination, and murder,<sup>158</sup> reaffirming others in the *Nizeyimana* appeal, reducing his sentence from life to thirty-five years.<sup>159</sup> The Chamber affirmed the *Nzabonimana* case except one instance of incitement to commit genocide and another of conspiracy to commit genocide, confirming his life sentence.<sup>160</sup> It reversed aspects of the Trial Chamber's findings against co-accused Karemera and Ngirumpatse, but overturned no aspect of the convictions nor altered the sentences.<sup>161</sup>

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155. *World Report 2014: Rwanda*, HUM. RTS. WATCH, <http://www.hrw.org/world-report/2014/country-chapters/rwanda?page=2> (last visited Nov. 22, 2014).

156. *Id.*

157. Press Release, U.N. Int'l Crim. Tribunal for Rwanda, ICTR Appeals Chamber Delivers Judgments in Three Cases (Sept. 29, 2014), <http://www.unicttr.org/en/news/ictr-appeals-chamber-delivers-judgements-three-cases>.

158. *Id.*

159. *Nizeyimana v. Prosecutor*, Case No. ICTR-00-55C-A, Judgment on Appeal, 169–170 (Int'l Crim. Trib. For Rwanda Sept. 29, 2014), available at <http://www.unicttr.org/en/cases>.

160. ICTR Appeals Chamber Delivers Judgments in Three Cases, *supra* note 157.

161. *Id.*

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## **Asia/Pacific**

JUSTIN G. PERSAUD AND STEVE SAUNDERS\*

### **I. Introduction**

The Asia/Pacific Committee covers the Asia/Pacific region, including Afghanistan, Australia, Bangladesh, Bhutan, Brunei, Cambodia, the Cook Islands, Indonesia, Japan, North Korea, South Korea, Laos, Malaysia, the Marshall Islands, Myanmar, Nepal, New Zealand, Pakistan, Palau, the Philippines, Singapore, Sri Lanka, Thailand, Tonga, Vietnam, and other countries in the region. This article highlights selected 2014 legal developments in the Asia/Pacific region and Japan.

### **II. Asian Region**

The Asian/Pacific securities regulatory framework witnessed numerous developments in 2014. This article will present a brief update on the Asia Region Funds Passport.

In Asia, there is currently no single agreement or streamlined process that would allow an investor to invest in several markets through one vehicle. In 2011, at the Honolulu Asia Pacific Economic Co-Operation (APEC) meeting, finance ministers endorsed the pilot Asia Region Funds Passport (ARFP) structure, a suggestion first proposed by Australia at the October 2010 APEC meeting in Kuala Lumpur. The ARFP would be akin to the European Union's Undertakings for Collective Investment in Transferable Securities (UCITS) model.

Australia had set a two-stage process to implement the proposal. First, the Australian Securities and Investments Commission (ASIC) would negotiate bilateral mutual recognition agreements with key jurisdictions in the region. Second, once the bilateral agreements were in place, governments and agencies in the region would work to develop these into a multilateral Passport system.<sup>1</sup> True to form, as of September 20, 2013, Australia,

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1. APEC Finance Ministers Consider UCITS-Style Asia Region Funds Passport, *GLOBAL CUSTODIAN* (November 16, 2011), <http://australia.globalcustodian.com/news/Fund-Administration/APEC-Finance-Ministers-Consider-UCITS-Style-Asia-Region-Funds-Passport/41233>.



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Korea, New Zealand, and Singapore signed the *Statement of Intent on the Establishment of the Asia Region Funds Passport*.<sup>2</sup>

On April 16, 2014, a consultation paper for the ARFP was released.<sup>3</sup> The purpose of the paper was to seek views from the public regarding the details of the proposed arrangement. The consultation paper set out the objectives and rules that would apply to fund managers and passport funds. The objectives include: delivering benefits of greater competition to investors;<sup>4</sup> ensuring adequate protections to investors;<sup>5</sup> strengthening the capacity and competitiveness of the Asia region fund management industry;<sup>6</sup> deepening the region's financial markets;<sup>7</sup> and maintaining a stable and efficient financial system.<sup>8</sup> Additionally, the ARFP consultation paper set out the rules for reporting, procedure for licensing, and any investment restrictions. The period for consultations closed on July 11, 2014. The system is expected to be launched in 2016.

### III. Japan

#### A. THE DEATH PENALTY IN JAPAN

The death penalty continues to be a controversial topic in Japan. Two individuals were executed in August 2014.<sup>9</sup> Additionally, a 78-year-old man was released from death row after being imprisoned since 1966. Japan's most recent justice minister indicated she would not review the system in Japan. The issue will probably become moot following the general election called for December 2014.<sup>10</sup>

#### B. ELECTORAL LAW REFORM

Japan's Supreme Court announced in November 2014 that the 2013 election for the Upper House of Parliament was "held in a state of unconstitutionality" but did not invalidate the election.<sup>11</sup> A lawsuit was filed complaining that rural voters held an almost 5-1 advantage over urban voters in voting power. The only response of the government to

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2. ASIA-PACIFIC ECONOMIC COOPERATION, STATEMENT OF INTENT ON THE ESTABLISHMENT OF THE ASIA REGION FUNDS PASSPORT 3 (2013), *available at* <http://fundspassport.apec.org/files/2013/12/131210-ARFP-Signed-SOI.pdf>.

3. ASIA-PACIFIC ECONOMIC COOPERATION, CONSULTATION PAPER: ARRANGEMENTS FOR AN ASIA REGION FUNDS PASSPORT AN APEC FINANCE MINISTERS' INITIATIVE (2014), *available at* <http://fundspassport.apec.org/files/2014/04/20140411-Consultation-Paper-on-the-Passport-Arrangements-FINAL.pdf>.

4. ASIA-PACIFIC ECONOMIC COOPERATION, *supra* note 3, at 5.

5. *Id.* at 6.

6. *Id.*

7. ASIA-PACIFIC ECONOMIC COOPERATION, CONSULTATION PAPER: ARRANGEMENTS FOR AN ASIA REGION FUNDS PASSPORT AN APEC FINANCE MINISTERS' INITIATIVE 7 (2014), *available at* <http://fundspassport.apec.org/files/2014/04/20140411-Consultation-Paper-on-the-Passport-Arrangements-FINAL.pdf>.

8. *Id.*

9. Japan Executes Two More Prisoners, THE GUARDIAN (Aug. 29, 2014, 5:52 PM) <http://www.theguardian.com/world/2014/aug/29/japan-executes-two-more-prisoners>.

10. D. McN., The Death Penalty in Japan: Hanging Tough, THE ECONOMIST (Sept. 30, 2014, 3:34) <http://www.economist.com/blogs/banyan/2014/09/death-penalty-japan>.

11. Isabel Reynolds & Maiko Takahasi, Voting disparity to help LDP stay in charge amid Supreme Court inaction, THE JAPAN TIMES (Nov. 28, 2014), <http://www.japantimes.co.jp/news/2014/11/28/national/politics-diplomacy/voting-disparity-to-help-ldp-stay-in-charge-amid-supreme-court-inaction/#.VHkhGskjzQc>.

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this perennial issue was to pass a bill in 2013 to reduce the number of seats in the Lower House from 480 to 475, which will mostly likely dilute the power of urban voters even more than previously.

C. CYBERLAW IN JAPAN

A cyber criminal who sent out death threats online admitted his guilt in May after being arrested in 2013.<sup>12</sup> The suspect had used other people's computers to send out the threats, which led police to arrest and charge all four of those other individuals. All four admitted their guilt but were later released.

D. MONEY LAUNDERER WHO FLED JAPAN

Following up on a previous story,<sup>13</sup> the Nigerian money launderer who escaped from Japan before he could be arrested in 2007 was finally sentenced to prison, but in the United States after his arrest in Atlanta in November 2012. He pled guilty to one felony and will spend almost five years in prison in addition to paying a large restitution of \$6.7 million.<sup>14</sup>

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12. Kyodo, Accused cyberriddler changes plea to guilty, *THE JAPAN TIMES* (May 22, 2014), <http://www.japantimes.co.jp/news/2014/05/22/national/crime-legal/accused-hacker-katayama-changes-plea-admits-online-death-threats/#.VHkje8kzQd>.

13. Four money laundering suspects held, *THE JAPAN TIMES* (Sept 14, 2007), [http://www.japantimes.co.jp/news/2007/09/14/national/four-money-laundering-suspects-held/#.VSU\\_V0KhuIA](http://www.japantimes.co.jp/news/2007/09/14/national/four-money-laundering-suspects-held/#.VSU_V0KhuIA).

14. USA: Nigerian Kingsley Osagie Sentenced, *ANTI-FRAUD INTERNATIONAL* (July 28, 2014), <http://antifraudintl.org/threads/usa-nigerian-kingsley-osagie-sentenced.88408/#post-244557>.

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## Canada

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### I. Overview

2014 saw a number of significant legislative, treaty, and policy developments for Canada in the areas of trade controls, trade and investment agreements, security and economic issues, measures to address the Canada-US price gap, securities law, corporate immigration, and scientific research and experimental development.

In case law, the Supreme Court of Canada issued two decisions heralded as “landmark” in their respective areas of the law. In the first presented here, the court recognizes aboriginal title in British Columbia, raising important questions for resource and other economic development activities. In the second, the court borrows from the civil law tradition, among other things, in recognizing a duty of good faith as an organizing principle of the common law, requiring honesty in the performance of contractual duties.

### II. Trade Controls\*

#### A. ECONOMIC SANCTIONS

Beginning in March and continuing throughout 2014, Canada implemented aggressive list-based sanctions in response to the Russian invasion of Ukraine and annexation of the Crimea. Under the Special Economic Measures (Russia) Regulations (Russia Regulations), persons in Canada and Canadians outside Canada are prohibited from engaging in a range of dealings with listed Russian individuals and entities,<sup>1</sup> broadly referred to as “Designated Persons” under Canadian sanctions law. The Special Economic Measures (Ukraine) Regulations applies similar restrictions in respect of listed Designated Persons in Ukraine.<sup>2</sup> The Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations prohibits dealings involving listed persons associated with the former Yanukovich re-

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\* Edited by Angela E. Weaver. Individual authors will be identified by section.

\*\* John W. Boscariol.

1. Special Economic Measures (Russia) Regulations, SOR/2014-58, s. 3 (Can.).

2. Special Economic Measures (Ukraine) Regulations, SOR/2014-60, s. 3 (Can.).

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gime.<sup>3</sup> Currently, Canada has listed more individuals and entities than either the United States (US) or the European Union (EU) under their respective Russia/Ukraine sanctions.

Under the Russia Regulations, Canada also prohibits dealing in new financing of longer than thirty or ninety days' maturity in relation to certain listed entities, their property, or any interests or rights in their property.<sup>4</sup> Dealing in new capital funding through the transaction of shares in exchange for an ownership interest in relation to certain listed entities, their property, or any interests or rights in their property is also prohibited.<sup>5</sup>

Unlike the US and the EU, Canada has yet to impose any restrictions on the supply of items to be used in Russia's oil exploration and extraction sector, despite an August 6, 2014, statement from the Prime Minister indicating that such measures would be implemented in parallel with those adopted by Canada's allies.<sup>6</sup>

Canada imposed new economic sanctions measures under its Special Economic Measures Act<sup>7</sup> against South Sudan,<sup>8</sup> and under its United Nations Act<sup>9</sup> against Yemen<sup>10</sup> and the Central African Republic.<sup>11</sup> These are all list-based measures targeting identified Designated Persons. Canada also intensified its sanctions measures against Syria by prohibiting various activities relating to chemicals that can be used as precursors to chemical weapons agents, and dual-use equipment that can be used in a chemical weapons program.<sup>12</sup>

At the present time, Canada imposes trade controls of varying degrees on activities involving the following countries, in addition to those mentioned above, and over 2,000 listed entities and individuals associated with them: Belarus, Burma (Myanmar), Côte d'Ivoire, the Democratic Republic of the Congo, Cuba, Egypt, Eritrea, Guinea, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Pakistan, Somalia, Sudan, Tunisia, and Zimbabwe.

**B. EXPORT AND TECHNOLOGY TRANSFER CONTROLS**

Canada made significant amendments to its controls governing the export and transfer of goods and technology twice during 2014—on April 10 and October 23.<sup>13</sup> In both instances, the changes were intended to bring Canada's Export Control List into conformity with its commitments under international export control regimes, including the Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime, and the Australia Group.

3. Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44, s. 2 (Can.).

4. See SOR/2014-58, s. 3.1 (Can.).

5. See *id.* s. 3.2.

6. Statement, Prime Minister Stephen Harper, Statement by the Prime Minister of Canada Announcing Additional Sanctions (Aug. 6, 2014), <http://www.pm.gc.ca/eng/news/2014/08/06/statement-prime-minister-canada-announcing-additional-sanctions>.

7. S.C. 1992, c. 17 (Can.).

8. See Special Economic Measures (South Sudan) Regulations, SOR/2014-235 (Can.).

9. R.S.C. 1985, c. U-2 (Can.).

10. See Regulations Implementing the United Nations Resolution on Yemen, SOR/2014-213 (Can.).

11. See Regulations Implementing the United Nations Resolutions on the Central African Republic, SOR/2014-163 (Can.).

12. See Regulations Amending the Special Economic Measures (Syria) Regulations, SOR/2014-11 (Can.).

13. See Order Amending the Export Control List, SOR/2014-90 (Can.); Order Amending the Export Control List, SOR/2014-239 (Can.).

C. DEFENSE TRADE CONTROLS

On May 15, 2014, significant changes were made to the scope of goods and technology subject to Canada's domestic security regime for listed defense, satellite and aerospace goods, and technology (Controlled Goods Program).<sup>14</sup> The Schedule to the Defence Production Act<sup>15</sup> was amended to create two streams of goods and technology subject to the rigorous security and screening controls of the Controlled Goods Program. These now apply to (i) all US-origin goods and technology that are subject to the US International Traffic in Arms Regulations<sup>16</sup> and (ii) certain specified goods and technology, regardless of origin, considered by Canada to have strategic significance or pose national security concerns.

**III. Trade and Investment Agreements\***

In 2014, Canada signed its first Free Trade Agreement (FTA) in the Asia-Pacific region with South Korea after nine years of negotiation.<sup>17</sup> The FTA is significant given the level of two-way trade between the countries<sup>18</sup> and the fact that South Korea is the fourth largest economy in the region.<sup>19</sup> The agreement is also important from a competitiveness perspective because Canada's trading partners in the EU and US already enjoy preferential access to the South Korean market.<sup>20</sup> Canadian sectors that are expected to benefit from the agreement include the agricultural, seafood, and forestry sectors.<sup>21</sup> Canadian auto producers, including Ford Canada, voiced opposition to the agreement, and in particular were critical of the lack of a "snap back" clause similar to that in the US-Korea FTA that would allow Canada to impose a retaliatory tariff on automobile imports in the event that access to the South Korean automobile market were to be blocked by non-tariff barriers.<sup>22</sup> Canada did, however, negotiate expedited dispute resolution for the automo-

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14. See Regulations Amending the Schedule to the Defence Production Act, SOR/2014-126 (Can.).

15. R.S.C. 1985, c. D-1 (Can.).

16. 22 C.F.R. §§ 120-130.

\* Wendy J. Wagner and Anca M. Sattler.

17. Canada-Korea Free Trade Agreement, Can.-S. Kor., Sept. 22, 2014, [http://sice.oas.org/TPD/CAN\\_KOR/CAN\\_KOR\\_Final\\_FTA/ENG/ckfta-tofa-eng.pdf](http://sice.oas.org/TPD/CAN_KOR/CAN_KOR_Final_FTA/ENG/ckfta-tofa-eng.pdf) (entered into force Jan. 1, 2015).

18. In 2013, Canadian exports to South Korea exceeded \$3.5 billion and Canadian imports from South Korea were over \$7 billion. *Factsheet: Republic of Korea*, GOV'T CAN. (Feb. 2015), [http://www.canadainternational.gc.ca/ci-ci/assets/pdfs/fact\\_sheet-fiche\\_documentaire/RepublicKorea-FS-en.pdf](http://www.canadainternational.gc.ca/ci-ci/assets/pdfs/fact_sheet-fiche_documentaire/RepublicKorea-FS-en.pdf).

19. *Canada-Korea Free Trade Agreement (CKFTA)*, FOREIGN AFF. TRADE & DEV. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/index.aspx?lang=eng> (last modified Feb. 2, 2015).

20. See Free Trade Agreement between the United States of America and the Republic of Korea, U.S.-S. Kor., June 30, 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>; Council Decision 2011/265/EU, 2011 O.J. (L 127).

21. See *Canada-Korea Free Trade Agreement (CKFTA) – Overview: Appendix – Technical Summary of Final Negotiated Outcomes*, FOREIGN AFF. TRADE & DEV. CAN., <http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/overview-apercu.aspx?lang=eng#appendix>.

22. See Scott Deveau, *Ford Canada, Ontario Blast South Korean Trade Deal, Saying Ottawa's Pact Will Flood Country with Foreign Cars*, FIN. POST (Mar. 11, 2014, 9:19 AM), <http://business.financialpost.com/2014/03/11/ford-canada-blasts-south-korean-trade-deal-saying-ottawas-pact-will-flood-country-with-foreign-cars/>.

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tive sector, and also will be entitled to apply safeguard measures in the event of a flood of imports in any sector.<sup>23</sup>

The bilateral agreement also contains an investor-state dispute settlement chapter that is similar to that found in Chapter 11 of the North American Free Trade Agreement (NAFTA). The chapter includes interpretative annexes that presumably are intended to confine the scope of certain obligations, for example, by adopting a narrow interpretation of “customary international law” in the context of minimum standard of treatment, and by preserving the ability of a party to pursue certain non-discriminatory regulatory actions to protect public health, safety, and the environment.<sup>24</sup> Curiously, while the investment chapter provides investors with protections that are equivalent to those offered within the Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) and the Canada-EU Comprehensive Economic and Trade Agreement (CETA), inclusion of the chapter did not garner the controversy generated by those agreements.

In 2014, the Canadian government also heralded the conclusion of the seven-year-long CETA negotiations between Canada and the EU, an agreement that it promotes as “broader in scope and deeper in ambition than the historic [NAFTA].”<sup>25</sup> Unprecedented in Canada—but likely to be a continued feature of FTA negotiations, given the reach of FTA into sub-national areas of jurisdiction such as procurement—the provinces and territories directly participated in the negotiations.

The agreement between Canada and the EU is not signed at this time and a number of steps must be undertaken prior to the agreement coming into force, including: finalization of the text through technical and legal review; translation into multiple European languages; and submission of the agreement for ratification. In Europe, this final step requires the support of a qualified majority of EU member states as well as an affirmative vote from the European Parliament.<sup>26</sup> In addition, certain laws and regulations of Canada, the provinces, and the member countries of the EU will need to be amended prior to the coming into force of the agreement. Assuming the agreement ultimately gains approval, it will not be in force for several years.

In other developments, Canada added an FTA with Honduras<sup>27</sup> to its existing FTAs with countries in the Central and Southern Americas, including Panama, Colombia, Peru, Costa Rica, and Chile. The Chile FTA was updated in 2014 to add a chapter on technical barriers to trade.<sup>28</sup> Canada continues trade agreement negotiations in the Americas, with

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23. See Canada-Korea Free Trade Agreement, *supra* note 17, ch. 7, 21.

24. *Id.* ch. 8.

25. *Canada-European Union: Comprehensive Economic and Trade Agreement (CETA)*, FOREIGN AFF. TRADE & DEV. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng> (last modified Nov. 28, 2014).

26. See *Trade Negotiations Step by Step*, EUR. COMMISSION (Sept. 2013), [http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149616.pdf](http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf). See generally Press Release, European Commissioner for Trade, Statement on CETA (Sept. 16, 2014), [http://europa.eu/rapid/press-release\\_SPEECH-14-603\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-14-603_en.pdf); *Countries and Regions: Canada*, EUR. COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada> (last updated Oct. 9, 2014).

27. Canada-Honduras Free Trade Agreement, Can.-Hond., Nov. 5, 2013, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/honduras/toc-tdm.aspx?lang=eng>.

28. See *Canada and Chile Conclude New Chapter in Free Trade Agreement*, FOREIGN AFF. TRADE & DEV. CAN., <http://www.international.gc.ca/media/comm/news-communiqués/2014/11/10a.aspx?lang=eng> (last modified Nov. 10, 2014).

the Dominican Republic, the Caribbean Community (CARICOM), and with Guatemala, Nicaragua, and El Salvador.<sup>29</sup>

The controversial FIPA with China was ratified in September and came into force on October 1, 2014, in spite of an ongoing court challenge from the Hupacasath First Nation on grounds that Canada had a duty to consult prior to ratification.<sup>30</sup> The Hupacasath claimed that the impending Canada-China FIPA would bring about changes to their asserted aboriginal rights and to the achievable scope of self-government. This argument was rejected by the Federal Court of Canada, which held that ratifying the Canada-China FIPA without first engaging in consultation with first nations peoples is not in contravention of Canada's duty to consult native bands, and that any adverse impacts claimed by the Hupacasath from Canada's failure to consult with the band were "non-appreciable and entirely speculative in nature."<sup>31</sup> The Federal Court of Appeal heard Hupacasath's appeal, and a decision is pending at the time of writing.

FIPAs with Benin and Kuwait came into force in 2014.<sup>32</sup> Canada also signed FIPAs with Cameroon, Nigeria, and Serbia; concluded FIPA negotiations with Burkina Faso; and began negotiations with Kenya, Kosovo, and the United Arab Emirates.<sup>33</sup>

#### **IV. Developments in Security and Economic Issues\***

2014 saw the "renewal" of the US-Canada Regulatory Cooperation Council (RCC), established in 2011 in connection with the Canada-US declaration on *A Shared Vision for Perimeter Security and Economic Competitiveness*.<sup>34</sup> In August of 2014 the two governments issued the *Joint Forward Plan*, eschewing detailing specific action items and instead targeting three broad areas:

- (A) Department-Level Regulatory Partnerships: Public documents that will outline RCC strategies and the framework for how the activities will be managed between regulatory partners.
- (B) Department-to-Department Commitments and Work Plans: A first set of commitments to cooperate in specific areas of regulatory activity, for which technical work plans will be developed annually [and]
- (C) Cross-Cutting Issues: Identifying current laws, policies and practices in both governments that can present challenges/opportunities to international regulatory co-

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29. See *Canada's Free Trade Agreements*, FOREIGN AFF. TRADE & DEV. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng> (last modified Dec. 18, 2013).

30. See *Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations*, FOREIGN AFF. TRADE & DEV. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng> (last modified Oct. 1, 2014).

31. *Hupacasath First Nation v. Can.*, 2013 F.C. 900, para. 147 (Fed. Ct. Can.).

32. See *Canada's Foreign Investment Promotion and Protection (FIPAs)*, FOREIGN AFF. TRADE & DEV. CAN., <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng> (last modified Dec. 18, 2013).

33. See *id.*

\* Daniel D. Ujcz.

34. Press Release, President Obama & Prime Minister Harper of Canada, *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness* (Feb. 4, 2011), <http://www.whitehouse.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord>.



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operation, regardless of sector, and considering new tools and approaches to support regulators in achieving their cooperation objectives where possible.<sup>35</sup>

The most significant evolution between the RCC's initial work and the *Joint Forward Plan* is the governments' focus on institutionalizing the cooperative mechanisms. The *Joint Forward Plan* appears open to examining ways for regulatory agencies to cost-share testing and inspection services across jurisdictions and agencies, and explore the mechanism for identifying a proposed regulation's impact on the bilateral relationship.<sup>36</sup> Each of these issues requires careful analysis under domestic law (particularly the notice and rulemaking regulations, e.g., Administrative Procedures Act in the US); but it is noteworthy that the governments appear willing to address these issues.

The *Joint Forward Plan* prescribes that regulatory partnership statements and the first group of work plans will be published by February 27, 2015. Public reporting will be managed through regular RCC newsletters, as well as department-led vehicles that can be tailored as required. Information regarding the RCC may be accessed at <http://www.trade.gov/rcc/> and <http://actionplan.gc.ca/en/content/regulatory-cooperation-council>.

#### **V. Measures to Address the Canada-US Price Gap\***

In the 2014 Federal Budget,<sup>37</sup> the Government of Canada took aim at "unjustified geographic price discrimination" suffered by Canadian consumers in comparison to their US counterparts. The Canadian government has proposed provisions that give the Competition Bureau new powers to regulate prices; this signals a major change in Canadian competition policy and also raises very real practical concerns.

While the specifics have yet to be announced, the 2014 Federal Budget announced that measures will be introduced to regulate price discrimination, and that the Competition Bureau will be charged with the enforcement of same. Currently, Canada's Competition Act empowers the Competition Bureau to review pricing practices only where there is evidence of anti-competitive conduct.<sup>38</sup> By amending the Competition Act to prevent retailers from charging unjustifiably higher prices in Canada than in the US, the government will add "price regulator" to the role of the Competition Bureau. Traditionally, the role of the Bureau has been to ensure businesses are engaging in fair practices; high prices that are not attributable to anti-competitive conduct are not the Bureau's purview.<sup>39</sup>

Regulating unjustifiably high prices is exceptionally difficult. How does one determine when a higher price for a good sold in Canada is unjustifiable? Enforcing the government's proposal may also be challenging. If retailers face a small fine for breaking the law, they may just chalk it up to the cost of doing business in Canada; if penalties are too severe, businesses may simply choose not to sell their products in Canada. From a policy

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35. UNITED STATES-CANADA REGULATORY COOPERATION COUNCIL, JOINT FORWARD PLAN 13 (2014).

36. See *RCC Regulator and Stakeholder Event*, CANADA'S ECON. ACTION PLAN, <http://actionplan.gc.ca/en/page/rcc-ccr/rcc-regulator-and-stakeholder-event> (last visited Mar. 3, 2015).

\* Martin Masse and Monica Podgorny. Special thanks to Timothy Cullen, Student-at-Law.

37. See *Minister of Finance Confirms Return to Balanced Budgets in 2015*, DEP'T FIN. CAN. (Feb. 11, 2014), <http://www.budget.gc.ca/2014/docs/nrc/pdf/EN.pdf>.

38. Competition Act, R.S.C. 1985, c. C-34, pt. VIII (Can.).

39. See STANDING SENATE COMMITTEE ON NATIONAL FINANCE, 41ST PARL., 1ST SESS., THE CANADA-USA PRICE GAP 56 (2013) (Chair: Hon Joseph A. Day).

perspective, Canada will be placed in the odd position of having a law regulating local prices while it commits itself to maintaining NAFTA and other trade agreements that are aimed at creating open markets.

While voters had been complaining about higher Canadian prices, the price discrimination measures still came somewhat as a surprise after a number of studies examined the issue and found that US-Canada pricing differences result from differing market conditions.<sup>40</sup>

The Senate Report did uncover evidence of country pricing strategies.<sup>41</sup> The Retail Council of Canada testified before the Senate Committee that manufacturers primarily engage in country pricing because of the expectations of Canadian consumers vis-à-vis prices, higher Canadian operating costs, and market demand for certain goods. That said, the Senate Report also concluded that Canadians pay more because of other factors, namely: the relatively small size of the Canadian market; import tariffs; the higher underlying cost of doing business in Canada; insufficient competition in the Canadian retail market; and differences in government regulations, such as product safety standards.<sup>42</sup>

Despite reports that a bill would be introduced in the autumn of 2014,<sup>43</sup> the federal government has yet to do so.<sup>44</sup> This coincides with a waning of the political imperative for the initial initiative. The value of the Canadian dollar has tumbled relative to the US dollar. As a result, Canadian voters are unlikely to be as sensitive to comparative pricing differences, which are more obvious when the two currencies are at par.

That said, given the 2014 Budget announcement, the proposal remains “on the books.” Competition law lawyers and their clients will continue to await the release of the legislation to determine the specifics of the contravention and the definition of the Competition Bureau’s role as price regulator.

## VI. The Supreme Court of Canada Recognizes Aboriginal Title in British Columbia\*

In June of 2014 the Supreme Court of Canada rendered judgment in *Tsilhqot’in Nation v. British Columbia*.<sup>45</sup> The court upheld the trial decision of the British Columbia Supreme Court, which had declared that the Tsilhqot’in Nation of Indian peoples held aboriginal title in a defined area of central British Columbia, and that the province had breached the duty of consultation that it owed to the Tsilhqot’in through its land use planning and forestry authorizations within the claimed area prior to the recognition of title. The decision marks the first, conclusive recognition of title by aboriginal peoples<sup>46</sup>

40. See, e.g., *id.*

41. *Id.* at 6–10.

42. See *id.*, ch. 3.

43. See Chris Hall, *Canada-U.S. Price Gap Measures Coming in the Fall*, CBC NEWS (Aug. 14, 2014, 5:00 AM), <http://www.cbc.ca/1.2735703>.

44. Bill C-43, Economic Action Plan 2014 Act, No. 2, S.C. 2014, c. 39, was introduced in the House of Commons on October 23, 2014. Provisions to amend the Competition Act on the price gap issue were not included.

\* Kirk N. Lambrecht, Q.C.

45. *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256 (Can.).

46. By section 35(2) of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), the “aboriginal peoples of Canada” includes the Indian, Inuit, and Métis peoples of Canada.

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in Canada.<sup>47</sup> Because rights associated with aboriginal title have constitutional protection,<sup>48</sup> the court's reasons describe both the correct legal test for proof of aboriginal title and also the legal implications arising from proof of title. The latter is the focus of this essay.

British Columbia is unique amongst the provinces of Canada, in that it has evolved to have many aboriginal land claims but few modern treaties addressing the issue of title. The challenges of protecting asserted aboriginal rights prior to proof of their existence in law was addressed by the Supreme Court in its 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*.<sup>49</sup> Here the court recognized the constitutional obligation of governments, before undertaking conduct which may adversely affect an asserted aboriginal right, to consult and, where necessary, accommodate aboriginal peoples in an effort to effect reconciliation.

The importance of consultation and accommodation prior to proof of title was re-emphasized by the court in *Tsilhqot'in Nation*, and is evident from an examination of the legal consequence of proof of aboriginal title. Once proven, the aboriginal title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land.<sup>50</sup> Important to note is that the interest is communal; because of this, present use of the interest cannot deprive future generations of the benefits of the land. Once title is proven to exist in law, use of such lands must either enjoy the consent of the aboriginal title holders or be justified by a public interest which has a compelling and substantial objective and that also furthers both the aboriginal interest and the broader public objective.<sup>51</sup> Consultation and accommodation are one of the justification criteria.

The immediate practical impact of *Tsilhqot'in Nation*, then, is continued emphasis upon reconciliation through consultation and accommodation, and renewed emphasis on the importance of consultation and accommodation prior to and after proof of aboriginal title. Land use prior to proof of aboriginal title requires consultation and accommodation but not, in every case, aboriginal consent. Continuing land uses that have not been reconciled with aboriginal interests may, after proof of aboriginal title, unjustifiably infringe these constitutionally protected interests and may require cancellation.

The word *may* is especially important. The court opines that uses which could justify infringement of aboriginal title include "development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations."<sup>52</sup> This is ultimately a question of fact that will be examined on a case-by-case basis.

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47. The potential for judicial recognition of Aboriginal title in British Columbia, and elsewhere in Canada, was recognized in the court's 1973 decision in *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

48. See Constitution Act, 1982, § 35, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

49. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, para. 25 (Can.).

50. *Tsilhqot'in Nation*, 2014 SCC 44, paras. 67, 73–74.

51. See *id.* paras. 77, 82.

52. *Id.* para. 83 (citing *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 165).

VII. *Bhasin v. Hrynew*: An Engine for Civil Law/Common Law Harmony\*

Canada's separate legal traditions (the common law regime in the country's nine provinces and three territories, and the civil law tradition in Quebec) can result in disparate outcomes regarding identical contractual issues considered in different jurisdictions.<sup>53</sup> With its judges representing both legal traditions,<sup>54</sup> Canada's Supreme Court adroitly seeks greater harmony between systems, reducing each tradition's internal inconsistencies without jeopardizing their individuality.

In *Bhasin v. Hrynew*,<sup>55</sup> the Supreme Court recognized a duty of good faith, as "a general organizing principle of the common law" requiring that parties perform their contractual duties honestly and reasonably and not capriciously or arbitrarily, bringing Canada's common law in line with commercial expectations elsewhere in North America,<sup>56</sup> while producing a subtle shift towards a "civilian" approach to legal analysis.<sup>57</sup>

The court left undisturbed the trial judge's finding that in the period preceding termination of Mr. Bhasin's "commercial dealership agreement," the respondents were neither candid nor forthright, indeed misleading him on critical details, all of which led, at the expiry of the contract term, to his losing "the value in his business in his assembled workforce."<sup>58</sup>

The case turned on whether Canadian common law required the respondents to perform their contractual obligations "honestly" and with due regard for Mr. Bhasin's legitimate interests. The court wrote that

Finding that there is a duty to perform contracts honestly will make the law more certain, *more just and more in tune with reasonable commercial expectations*. It will also bring a measure of justice to the appellant, Mr. Bhasin, *who was misled and lost the value of his business as a result*.<sup>59</sup>

\* Theodore Goloff.

53. Section 92(13) of the Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), assigns "property and civil rights" exclusively to provincial competence. Different legal precepts might therefore apply to the termination of employees of employers such as banks, whose labor relations are otherwise federally regulated because of industry-specific federal competence, depending on where within Canada the termination took place. See *Breeze v. Federal Business Development Bank*, 1984 CarswellQue 1061 (Can. Que.) (WL).

54. A third of the Supreme Court judges, pursuant to the Supreme Court Act, R.S.C. 1985, c. S-26, §§ 5-6, are drawn from advocates of more than ten years at the Bar of Quebec or from the superior or appellate courts in Quebec, recognizing "Quebec's civil-law system [as] an essential ingredient of its distinctive culture" and making them custodians of a legal system integral to its culture. *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, para. 49 (Can.)

55. 2014 SCC 71 (Can.) (decision rendered November 13, 2014).

56. *Id.* paras. 33, 41.

57. Adherents sometimes boast that the civil law methodology of identifying the appropriate "codal" principle and applying it contextually provides decisions made by "authority of reason" and not, as in "common law," "by reason of authority." While Quebec's Civil Code is enacted legislation, it constitutes its *jus commune*. Unlike legislation in common law consisting of a "particular rule[]" intended to control certain fact situations with considerable detail, codification, such as the Civil Code of Quebec, "purports to be comprehensive and encompass the entire subject matter, not in the details but in the principles [calling] for a liberal interpretation in order that it may serve as the basis of decision for new situations." Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 Am. J. Comp. L. 419, 424-5 (1967). See also LOUIS P. PIGEON, *RÉDACTION ET INTERPRÉTATION DES LOIS 6-7* (1978).

58. *Bhasin*, 2014 SCC 71, para. 13.

59. *Id.* para. 1 (emphasis added).

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Determining Canadian common law to be: (i) uncertain, (ii) incoherent, and (iii) “out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States,”<sup>60</sup> the court felt obliged to develop the common law in step with societal/commercial expectations, but in an incremental fashion.<sup>61</sup> Good faith as an “organising principle” would not reverse pre-existing rules, but created an over-arching standard of conduct that “states in general terms a requirement of justice from which more specific legal doctrines may be derived [that] may be given different weight in different situations.”<sup>62</sup> Applying it to particular situations would allow a coherent way forward “where the development may occur incrementally in a way that is consistent with the structure of the common law of contract [with] due weight [given] to the importance of private ordering and certainty in commercial affairs.”<sup>63</sup>

Whether a good faith obligation is imposed as a matter of law, a matter of implied terms, or a matter of interpretation of existing terms became irrelevant, as the court recognized that (i) a basic level of honest conduct is “necessary to the proper functioning of commerce,” particularly in longer term “relational contracts” and that (ii) even in transactional exchanges, misleading or deceitful conduct is anathema to the legitimate expectations of the parties.<sup>64</sup> In fact, while exercising rights and duties under the contract, one party must have “appropriate regard to the legitimate contractual interests” of the other.<sup>65</sup> The intensity of this obligation will vary depending on the context of the contractual relationship, and “does not require acting to serve those interests in all cases.”<sup>66</sup> The duty does, however, require that a party not undermine those interests. Stated succinctly it provides “a simple requirement not to lie or mislead the other party about one’s contractual performance.”<sup>67</sup> The new duty operates irrespective and independent of the parties’ intentions, analogous to equitable doctrines that the parties are not free to exclude completely.<sup>68</sup> While parties might modulate how in their particular contract the duty will resonate, they can do so only in express terms.<sup>69</sup>

Whether as the driving force for such change, or as a measure of reassurance that “this modest step would [not] create uncertainty [on] freedom of contract,”<sup>70</sup> the court’s reference, *inter alia*, to the civil law of Quebec represents more than an incremental reconciliation of differing legal traditions. Comparative law as an engine for change is not new. In the areas of employment law and labor relations law, there has been fertilization of civil law precepts with dollops of common law.<sup>71</sup>

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60. *Id.* para. 41.

61. *Id.* para. 40.

62. *Id.* para. 64.

63. *Id.* para. 66.

64. *Id.* para. 60.

65. *Id.* para. 65.

66. *Id.*

67. *Id.* para. 73.

68. *Id.* para. 74.

69. *Id.* para. 78.

70. *Id.* para. 82.

71. See, e.g., *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 (Can.) (defining “constructive dismissal” in Quebec); *Ivanhoe, Inc. v. UFCW, Local 500*, 2001 SCC 47, [2001] 2 S.C.R. 565 (Can.) (redefining “successor employer” rights and obligations in Quebec).

What is original in *Bhasin* is that the methodology used, i.e. recognizing an over-arching principle and modulating it *in situ*, represents the essence of the civil law tradition.<sup>72</sup> It also reflects a need that domestic law harmonize with the commercial imperatives of a global trading economy. Finally, it enhances the court's role as a unifying force between different legal systems that should influence each other, bringing to each certainty, coherence, dynamism, and basic justice while maintaining their distinctive character.

### VIII. Securities Law\*

Two particularly noteworthy developments in 2014 are the Cooperative Capital Markets Regulatory System, and the adoption of no contest settlements by the Ontario Securities Commission.

#### A. CANADIAN COOPERATIVE CAPITAL MARKETS

The Canadian securities regulatory landscape is fragmented, as the Canadian Constitution vests the powers to regulate securities law at the provincial level.<sup>73</sup> In *Reference re Securities Act*, the Supreme Court of Canada opined that the national regulation of the capital markets should be regulated through a coordinated effort between the provinces and federal government, rather than by a wholesale takeover by the federal government.<sup>74</sup> But the justices conceded that issues of systemic risks in the capital markets were a national concern that could be captured through federal regulation.

With the addition of New Brunswick, Saskatchewan, and Prince Edward Island to a September 2013 Memorandum of Understanding (MOU) between the federal government, Ontario, and British Columbia regarding the establishment of a capital markets regulator,<sup>75</sup> and the release of the proposed Capital Markets Act and Capital Markets Sustainability Act, this year witnessed important developments in the implementation of this cooperative structure.<sup>76</sup> The overall proposed structure of the regime is currently composed of: a Council of Ministers; a Capital Markets Regulatory Authority (CMRA); a Regulatory Division; a Tribunal; a CEO/Chief Regulator; a Deputy Chief Regulator for BC, ON, AB, and QC; and two Deputy Chief Regulators for all other provinces.<sup>77</sup>

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72. *Banque de Montréal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429 (Can.), and *Payette v. Guay, Inc.*, 2013 SCC 45, [2013] 3 S.C.R. 95 (Can.) offer further examples of civil law methodology both with respect to identifying the appropriate fundamental principle, and modulating it contextually in terms of its intensity and application. Judge Gonthier in *Banque de Montréal* found that Quebec law recognized twin obligations owed by an employee to an employer of (i) good faith and loyalty, and (ii) avoidance of conflict of interest. If *Payette* illustrates the Supreme Court's impacting Quebec's civil law by reference to the Anglo-Canadian common law, *Bhasin's* originality is, in part, that it does the reverse quite directly and demonstratively.

\* Justin G. Persaud.

73. For discussion purposes, this is an oversimplification of the Canadian securities landscape as there are Multilateral Instruments, National Instruments, and other various agreements.

74. Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837 (Can.).

75. See *Ministers of Finance of British Columbia, Ontario and Canada Agree to Establish a Cooperative Capital Markets Regulator*, DEP'T FIN. CAN. (Sept. 19, 2013), <http://www.fin.gc.ca/n13/13-119-eng.asp>.

76. See Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System (Sept. 30, 2014), <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-MOA-English.pdf>.

77. This is a very broad summary of noteworthy organs from top to bottom of the Cooperative Capital Markets Regulatory System.

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The Council of Ministers would be responsible for appointing the CMRA's Board of Directors,<sup>78</sup> proposing legislative amendments to the cooperative system, and approving regulations made by the CMRA. The CMRA would be responsible for administering the proposed provincial Capital Markets Act and the federal Capital Markets Stability Act.

The cooperative agreement released on October 16, 2014, providing amendments to the September 2013 agreement. The amended provisions include:

- Provincial Capital Markets Act (PCMA), which is intended to: update provincial securities law, retain key comments, and make the current provincial legislation flexible to thrive within a robust regulatory framework. The PCMA must be adopted by each participating province and territory; and
- Capital Markets Stability Act (CMSA), which is intended to address issues pertaining to criminal activity and systemic risks at a national level to capital markets.<sup>79</sup>

**B. NO CONTEST SETTLEMENTS**

On March 11, 2014, the Ontario Securities Commission (OSC) released *Staff Notice 15-702 Revised Credit for Cooperation Program*.<sup>80</sup> The program, among other things, directs Staff to enter in to a settlement agreement that does not provide for any admission, finding of fact, or liability. This is not designed to be an exculpatory card for wrongdoers, rather there are certain factors that the OSC will consider in determining whether to enter into a settlement hearing or not. Those factors include:

- the degree and timeliness of the respondent's self-reporting in light of the misconduct;
- the degree of investor harm;
- the remedial steps taken by the respondent;
- the deterrent effect of the settlement on the respondent and the market; and
- any agreement to pay money at the time the settlement agreement is approved.<sup>81</sup>

Note, however, that even should all the aforementioned factors be present, a no contest settlement agreement would not be available in certain listed circumstances.

**IX. Corporate Immigration\***

On June 9, 2014, the federal government published Operational Bulletin (OB) 575,<sup>82</sup> which expands guidelines for immigration officers assessing Work Permit applications for Intra-Company Transferees with Specialized Knowledge. The OB makes it more difficult to use this exemption from the Labour Market Opinion (LMO) process:<sup>83</sup>

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78. Memorandum of Agreement Regarding the Cooperative Capital Markets Regulatory System, *supra* note 76, § 4.2.

79. *Backgrounder: Cooperative Capital Markets Regulatory System – Memorandum of Agreement on the Cooperative Capital Markets Regulatory System and Consultation on the Cooperative Legislation*, DEP'T FIN. CAN., <http://ccmr-ocrmc.ca/wp-content/uploads/Oct-9-Bkgrdr-PEI-English.pdf> (last modified Sept. 8, 2014).

80. Revised Credit for Cooperation Program, 37 O.S.C. Bull. 2583 (Mar. 13, 2014).

81. *Id.*

\* Sergio R. Karas.

82. *Operational Bulletin 575*, GOV. CAN. (June 9, 2014) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2014/ob575.asp>.

83. See Immigration and Refugee Protection Regulations, SOR/2002-227, § 203, as amended (Can.).

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To have specialized knowledge and to meet the requirements of [the new policy], an [Intra-Company Transferee Specialized Knowledge]<sup>84</sup> applicant would be required to demonstrate, on a balance of probabilities, a high degree of both proprietary knowledge and advanced expertise. Proprietary knowledge alone, or advanced expertise alone, does not qualify the applicant under this exemption. The onus is on the applicant to provide evidence that [he or she] meet[s] this standard.<sup>85</sup>

The new criteria will require Specialized Knowledge to be “unique and uncommon,” held by only a small number or small percentage of employees of a given enterprise. Note that where a treaty such as NAFTA,<sup>86</sup> the Canada-Chile Free Trade Agreement (CCFTA),<sup>87</sup> or the Canada-Peru Free Trade Agreement<sup>88</sup> provides a different definition of Specialized Knowledge, that definition will still apply.

In addition, the employee claiming to possess Specialized Knowledge must be remunerated at a level commensurate with the position. The foreign worker should receive, as a minimum, the prevailing wage for the specific occupation and region of work as listed in the Employment and Skills Development Canada (ESDC) “Working in Canada” website tool to determine prevailing Canadian Wage.<sup>89</sup>

Subsequent to making changes in the area of Specialized Knowledge, on June 20 the federal government announced major changes to the Temporary Foreign Worker Program. The changes announced are profound and make it more difficult for employers to hire foreign workers in many categories. The most significant policy changes can be summarized as follows:

- LMOs were replaced by Labour Market Impact Assessments (LMIA),<sup>90</sup> which are based on enhanced labour market data rather than on occupation descriptions listed in the National Occupation Classification (NOC); and
- Temporary foreign workers are divided into “high-wage temporary foreign workers,” being those in positions at or above the provincial/territorial median wage, and “low-wage temporary foreign workers,” being those in positions earning below that median wage.<sup>91</sup>

For low-wage temporary foreign workers, Work Permit duration is now limited to a one-year maximum rather than the previous two-year maximum. For high-wage temporary foreign workers, employers are required to present Transition Plans in addition to other recruitment efforts to demonstrate how they intend to decrease their dependence on temporary foreign workers. Limited exceptions apply.

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84. *See id.*

85. *Operational Bulletin 575*, *supra* note 82.

86. North American Free Trade Agreement, annex 1603, § C, Dec. 17, 1992, 32 I.L.M. 289.

87. Canada-Chile Free Trade Agreement, Can.-Chile, annex K-03, § III, Dec. 5, 1996, [http://sice.oas.org/Trade/chican\\_e/chcatoc.asp](http://sice.oas.org/Trade/chican_e/chcatoc.asp).

88. Canada-Peru Free Trade Agreement, Can.-Peru, annex 1203, § C, May 29, 2008, [http://sice.oas.org/Trade/CAN\\_PER/CAN\\_PER\\_e/CAN\\_PER\\_index\\_e.asp](http://sice.oas.org/Trade/CAN_PER/CAN_PER_e/CAN_PER_index_e.asp).

89. *Explore Careers by Wages*, JOB BANK, [http://www.jobbank.gc.ca/wage-outlook\\_search-eng.do?reportOption=wage](http://www.jobbank.gc.ca/wage-outlook_search-eng.do?reportOption=wage) (last modified Nov. 10, 2013).

90. *See* CANADIAN CHAMBER OF COMMERCE, POLICY ALERT: CHANGES TO THE TEMPORARY FOREIGN WORKER PROGRAM ON JUNE 20, 2014 (2014).

91. *See* EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA, OVERHAULING THE TEMPORARY FOREIGN WORKER PROGRAM (2014), *available at* [http://www.esdc.gc.ca/eng/jobs/foreign\\_workers/reform/overhauling\\_TFW.pdf](http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/overhauling_TFW.pdf).

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The new LMIA requires employers to provide much more comprehensive information regarding their recruitment efforts and to demonstrate that Canadians cannot be found for a specific position. Employers also need to demonstrate that Canadians have not been laid-off or had their hours reduced at a worksite that employs temporary foreign workers. The authorities will rely on better sources of labor market information to determine if there are Canadians who could fill those positions, including a proposed new job matching service to allow Canadians to apply directly for positions, a quarterly job vacancy survey by Statistics Canada, an annual national wage survey, and better use of government data.

Another measure announced will result in the refusal of LMIA applications for employers in the accommodation, food services, and retail trade sectors for positions that require little or no education or training, in geographical areas where unemployment rates exceed 6 percent.

The government promised to increase the number and scope of inspections of employers hiring temporary foreign workers, including more site visits, interviews of temporary foreign workers and other employees, the production of documents, and the banning of employers who break the rules. The government will also expand its use of the Confidential Tip Line launched in April 2014.

The government proposed criminal prosecution of employers suspected of activities that are in breach of the Immigration and Refugee Protection Act (IRPA), such as employing foreign nationals that are not authorized to work in Canada, counselling misrepresentation, and actual misrepresentations, with fines of up to \$100,000.00 and imprisonment of up to five years, or both.<sup>92</sup>

**X. An Attractive Jurisdiction for Scientific Research and Experimental Development\***

Canada continues to be an attractive country to conduct research and development. The Federal Budget of 2014 announced the creation of a Canada First Research Excellence Fund.<sup>93</sup> The purpose of the Fund is to support advanced research and innovation in order to help Canadian business become more competitive in Canada and around the world by investing \$1.5 billion over the next decade to help Canadian post-secondary institutions excel globally in research areas that create long-term economic growth for Canada. The budget also promises to commit an additional \$500 million over two years to the Automotive Innovation Fund,<sup>94</sup> to support significant new strategic research and development projects and long-term investments in the Canadian automotive sector.

The above funding is in addition to the generous \$3.6 billion the federal government provides annually to claimants under the Scientific Research and Experimental Develop-

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92. *Id.* at 20.

\* Sunita D. Doobay.

93. Budget 2014, *Economic Action Plan 2014: Supporting Jobs and Growth*, GOV'T CAN., <http://www.budget.gc.ca/2014/docs/themes/pdf/jobs-emploi-eng.pdf> (last modified Feb. 11, 2014).

94. Industry Canada, *Automotive Innovation Fund—Program Summary*, GOV'T CAN., <https://www.ic.gc.ca/eic/site/auto-auto.nsf/eng/am02257.html> (last modified Feb. 20, 2013).

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ment (SR&ED) tax incentive program.<sup>95</sup> The generous funding of the SR&ED program makes it attractive for foreign corporations to establish operations in Canada to carry out research and development. A foreign subsidiary generally will not qualify for the 35 percent investment tax credit Canadian Controlled Private Companies (CCPC) enjoy, but will generally qualify for the 20 percent investment tax credit. But the recent case of *Price Waterhouse Coopers Inc. Acting in the Capacity of Trustee in Bankruptcy of Bioartificial Gel Technologies (Bagtech) Inc. v. Her Majesty the Queen*<sup>96</sup> illustrates that the usage of a unanimous shareholder agreement may enable a majority foreign-owned Canadian corporation to still qualify for the beneficial CCPC rate.<sup>97</sup>

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<sup>95.</sup> See *2014 Federal Budget Continues to Support Canadian Innovation and Research*, CALGARY HERALD (Feb. 12, 2014, 5:49 PM), <http://calgaryherald.com/technology/2014-federal-budget-continues-to-support-canadian-innovation-and-research>.

<sup>96.</sup> 2012 TCC 120, *aff'd*, 2013 FCA 164.

<sup>97.</sup> Note that the general anti-avoidance (GAAR) rule of the Income Tax Act was not argued by the Minister of National Revenue, and must be considered should a unanimous shareholder agreement be considered for the purposes of obtaining the CCPC preferential SR&ED rate.

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## Europe

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This article updates selected aspects of European Union law from 2014.

### I. European Union Law

#### A. GERMANY-ÜBER IN GERMANY

On August 25, 2014, a Frankfurt court issued a preliminary injunction against the ride-sharing company, Über, for violating Germany's Passenger Transportation Act because Über was providing transportation services without mandatory insurance and licensing.<sup>1</sup> A taxi association sought the injunction because taxi drivers were losing business to Über.

Shortly thereafter, on September 16, the court revoked the preliminary injunction holding that, though banning Über in Germany was probably correct for violating the Passenger Transportation Act, the underlying matter was not "urgent" as is required for preliminary injunctions.<sup>2</sup> The taxi association had waited several months before filing the action against Über. Not surprisingly, this decision did not sit well with the taxi association, nor with taxi drivers.

Therefore, rather than filing another action against Über, two separate Frankfurt-based taxi drivers took measures into their own hands and ordered rides on Über. They subsequently sought their own injunctions against the respective Über drivers. Frankfurt courts issued preliminary injunctions against the individual drivers rather than against the corporate entity of Über.<sup>3</sup> Taking action against the Über drivers was meant to scare other

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\* Marie Tedesco Scott (lead editor), Bryan Yasinsac (co-editor, student at Florida State University College of Law); and contributors Wojciech Baginski (Polish Geological and Mining Act Updates), Anna Engelhard-Barfield (Data Privacy in Europe: The Google Decision of the European Court of Justice), Nicolas Etcheparre (French Labor Law), Luca CM Melchionna (Financial Transactions Tax; Efficiency in Cross Border Transactions), Jörg Rehder (Germany-Uber in Germany), Alexander Ritchie (Germany-Munich Art Trove), Roselyn Sands (French Labor Law), Michal Zolubak (Polish Competition Regulation).

1. Resolution of the Frankfurt District Court; File Number 2-03 O 329/14 (Aug. 25, 2014)

2. Press Statement, Frankfurt District Court, Landgericht Frankfurt hebt einstweilige Verfügung gegen 'Uber' auf [District Court of Frankfurt Revokes Preliminary Injunction Against Uber] (Sept. 16, 2014) (Ger.).

3. Stefan Schultz, *Gericht verbängt erstes Verbot gegen Uber Fahrer* [Court Issues First Ban on Uber Driver], SPIEGEL ONLINE (Sept. 11, 2014, 04:24 PM), <http://www.spiegel.de/wirtschaft/unternehmen/uber-verbot->

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drivers from associating with Über as they face fines of up to EUR 20,000 for each offense<sup>4</sup> (and potentially up to EUR 250,000 if they should violate their respective preliminary injunctions).<sup>5</sup>

Confrontation is not new to Über. Über has already faced legal hurdles in various U.S. states and municipal jurisdictions as well as in specific cities in Europe and Australia. Though many of the arguments against Über relate to licensing, insurance, and safety, it is clear that taxi owners and drivers are concerned about their respective businesses and investments. For example, New York taxi medallions, which are necessary to drive a taxi in New York, fetch up to \$1.0 million and have increased in cost by 500 percent since 2004.<sup>6</sup> These prices have flattened out in 2014; some believe that the introduction of ridesharing services such as Über is responsible.<sup>7</sup>

Like many other industries facing competition from the digital world, it seems that decades-old taxi regulations are in need of updating. According to Germany's Economics Minister, "possible amendments to existing regulations, [as they apply to] the digital world and users' changed mobility demands, are warranted."<sup>8</sup> If nothing else, the competition is forcing taxis to improve their services. A taxi association in Berlin, for example, is offering courses to taxi drivers on how to be polite, how to hold the door open for customers, and how to keep taxis clean.<sup>9</sup>

**B. GERMANY—MUNICH ART TROVE**

The March 2012 arrest of Cornelius Gurlitt led authorities to a great cache of art, previously thought to be lost under the Nazi regime during World War II. Developments in 2014 have set off new legal issues concerning the handling of looted artwork. The decision to publicize collection items, and the agreement between the authorities and Gurlitt both highlight effective means of international cooperation as well as the potential to hinder future claimants. The Augsburg Administrative Court decided to permit the

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fuer-fahrer-der-taxi-app-a-991000.html; see also *Klage eines Taxi-Unternehmers: Gericht stoppt weiteren Über Fabre in Frankfurt* [Action by a Taxi Company: Court Bans Another Uber Driver in Frankfurt], SPIEGEL ONLINE (Sept. 24, 2014, 07:19 AM), <http://www.spiegel.de/wirtschaft/unternehmen/uber-gegen-taxifahrer-gericht-stoppt-fahrer-a-993399.html>.

4. Personenbeförderungsgesetz [PBefG] [Passenger Transportation Act], March 21, 1961, BGBL. I at 241, § 61(2) (most recently amended on Aug. 7, 2013, BGBL. I at 3154) (Ger.).

5. Zivilprozessordnung [Civil Procedure Regulation], Dec. 5, 2005 BGBL. I at 3202; 2006, I at 431; 2007, I at 1781, § 890(1) (most recently amended on July 8, 2014, BGBL. I at 890) (Ger.).

6. Mark J. Perry, *NYC taxi medallion prices have flatlined for the last year following a decade of steady increases – the 'Uber effect'?*, AMERICAN ENTERPRISE INSTITUTE (Aug. 14, 2014, 11:02 AM), <http://www.aei-ideas.org/2014/08/nyc-taxi-medallion-prices-have-flatlined-for-the-last-year-following-a-decade-of-steady-increases-the-uber-effect/>.

7. *Id.*

8. Christian Schlesiger, et al., *Wirtschaftsministerium fordert mehr Wettbewerb auf dem Taxi-Markt* [Economics Ministry Demands More Competition on the Taxi Market], WIRTSCHAFTS WOCHE (Sept. 13, 2014), <http://www.wiwo.de/unternehmen/dienstleister/politik-diskutiert-uber-verbot-wirtschaftsministerium-fordert-mehr-wettbewerb-auf-dem-taxi-markt/10693642.html>.

9. Michael Franke, *Taxifahrer werden netter* (Taxi Drivers are Becoming Politer), FOCUS MAGAZINE (Sept. 22, 2014), [http://www.focus.de/finanzen/news/qualitaetsoffensive-taxifahrer-werden-netter\\_id\\_4147844.html](http://www.focus.de/finanzen/news/qualitaetsoffensive-taxifahrer-werden-netter_id_4147844.html).

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publication of images from the Gurlitt collection<sup>10</sup> providing potential claimants and the international community the chance to review discovered pieces of questionable provenance.<sup>11</sup> This decision, due in part to the cultural importance of the works,<sup>12</sup> helped address the issues of transparency of the investigation and disclosure to the international community. The lack of transparency demonstrated initially by the German government<sup>13</sup> was remedied in part by this decision. The efforts of the official government website<sup>14</sup> to promote greater awareness and information support to potential claimants through continuous publication of newly contested works also aided in transparency efforts. The publication of this information has brought greater transparency to the provenance assessment process and greater accessibility for potential claimants.

In April 2014, Gurlitt reached an agreement with the German government in which objects of questionable origin would be turned over to the Schwabing Art Trove Task Force for review.<sup>15</sup> Gurlitt agreed to follow the Washington Principles<sup>16</sup> in regard to the collection, but the agreement gives the Task Force just one year to conduct their provenance research.<sup>17</sup>

When Gurlitt died in May 2014, the *Kunstmuseum* Bern became sole heir to the collection.<sup>18</sup> While the Swiss museum is deciding whether or not to accept the collection,<sup>19</sup> the agreement, which provided continued access beyond one year to works that remain in question, assumed they would remain in Germany. While it could be assumed the Swiss museum would cooperate with continued investigations, the terms of the agreement, applying only German law, do not make it a requirement and raise issues not only for future claimants but also the rights of alienation should the museum decide to accept the estate.

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10. Gurlitt Case: 29 January 2014 Summary of Decision of Augsburg Administrative Court that the Contents of the Gurlitt Collection be Published, *LOOTED ART* (2014), <http://www.lootedart.com/QJ2EC3715461> [hereinafter *Gurlitt Collection be Published*].

11. *Koordinierungsstelle Magdeburg [Munich Art Trove]*, *LOST ART* (2014), <http://www.lostart.de/Webs/EN/Datenbank/KunstfundMuenchen.html>.

12. See *Gurlitt Collection be Published*, *supra* note 10.

13. Simon Schuster, *U.S. Pushes Germany to Reveal Hoard of Nazi-Looted Art*, *TIME* (Nov. 22, 2013), <http://world.time.com/2013/11/22/u-s-pushes-germany-to-reveal-hoard-of-nazi-looted-art/>.

14. See *Munich Art Trove*, *supra* note 11.

15. Gurlitt Case: 7 April 2014: Joint Press Release BKM, Bavarian Ministry of Justice and Christoph Edel, Lawyer for Cornelius Gurlitt, *LOOTED ART* (2014), <http://www.lootedart.com/QMWQYX761931> [hereinafter *Gurlitt Joint Press Release*].

16. BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, U.S. DEP'T OF STATE, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (Oct. 10, 2014), available at <http://www.state.gov/p/eur/rt/hlcat/122038.htm>.

17. See *Gurlitt Joint Press Release*, *supra* note 15.

18. Media Release, *Kunstmuseum Bern*, The Gurlitt Collection (May 07, 2014), <http://www.kunstmuseumbern.ch/en/service/media/media-release-2014/07-05-14-the-gurlitt-collection-1139.html>.

19. Media Release, *Kunstmuseum Bern*, The Gurlitt Collection: The *Kunstmuseum Bern* Retains Legal Representation (July 04, 2014), <http://www.kunstmuseumbern.ch/en/service/media/media-release-2014/04-07-14-the-gurlitt-collection-1187.html>.

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C. FRENCH LABOR LAW

A law for the safeguard of employment (LSE) has significantly modified the French redundancy process.<sup>20</sup>

This law was aimed at eliminating the uncertainty factor in the timing and costs of the mass redundancy process. Indeed, one of the key difficulties for employers in France has been managing the timeline of the Works Council process and its completion. This new law clearly defines the timeline for the Works Council process, which notably includes a legally fixed end-date—a pre-condition to implementation of a redundancy project.

Under the LSE, the role of the Labor Administration is now key; no redundancies can take place without its approval. Under the new law, both Works Councils and the Labor Administration must be presented with documentation explaining the project and make observations and proposals concerning the procedure or the social measures provided for by the redundancy plan (*Plan de Sauvegarde de l'Emploi*).

Moreover, the new process now gives the employer the option to either prepare these documents unilaterally or prepare them in negotiation with the unions. Negotiations are generally favored, given that the Labor Administration will be less strict regarding the contents of the redundancy plan.

The LSE also changes the jurisdiction of the French courts: an administrative judge—not a civil court—has jurisdiction, but only to challenge the Labor Administration's decision to approve or reject the project. Once the Labor Administration has given approval, the administrative judge should only verify that the process through which the redundancy plan was designed respects the law.

Recent case law has highlighted two interesting trends in the manner in which the French courts interpret this new law.

First, certain commentators feared that the French civil courts would be reluctant to hand over their jurisdictional powers to the administrative courts. However, decisions rendered over the past year prove that the French civil courts intend to apply the law to the letter.<sup>21</sup>

Second, most commentators feared that the courts would overstep the boundaries of their prerogatives. However, the decisions rendered by the courts over the past year show that the administrative judges merely verify that the legal process has been respected by the employer and do not question the contents of the plan.<sup>22</sup>

The French Labor Administration recently published figures that highlight the success of the new law.<sup>23</sup> Approximately ninety-two percent of the redundancy plans submitted to the Labor Administration are approved. In addition, only seven percent of the non-ap-

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20. Loi 2013-504 du 14 juin 2013 relative à la sécurisation de l'emploi [Law 2013-504 of June 14, 2013 on Security of Employment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], applicable July 1, 2013; See also Roselyn S. Sands, *France - New French Labor & Employment Law Legislation Brings Significant Changes - Effective Date June 17, 2013*, THE INT'L EMPLOYMENT LAWYER (Aug. 7, 2013), <http://intemploy.blogspot.com/2013/08/france-new-french-labor-employment-law.html>.

21. See, e.g., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nanterre, Sept. 10, 2014, Cour d'appel [CA] [regional court of appeal] Versailles, Jan. 22, 2014 (Fr.).

22. Tribunaux administratifs [TA] [regional administrative court of first instance] Chalon, Feb. 11, 2014; Conseil d'État [CE] [highest administrative court] Marseille, Apr. 15, 2014; Tribunaux administratifs [TA] [regional administrative court of first instance] Strasbourg, July 8, 2014.

23. Ordinary parliamentary session (Jan. 29, 2014).

proved plans are challenged before the courts, whereas approximately thirty percent of previous plans were challenged. Only five to ten percent of these challenges are successful, reducing risks bearing on companies implementing redundancy plans.

In conclusion, the mindset regarding redundancies has changed. The new legislation aims at favoring negotiations between employees and their employer, and allows for faster and less risky implementation of redundancy plans in France.

#### D. POLISH GEOLOGICAL AND MINING ACT UPDATES

Polish regulations related to prospecting, exploration, and extraction of hydrocarbons were significantly revised and developed in 2014.

On August 1, 2014, Polish President Bronislaw Komorowski signed into law the Amendment to the Geological and Mining Act (the Mining Act Amendment).<sup>24</sup> Generally, the Mining Act Amendment will come into force on January 1, 2015. Among the many significant changes aimed toward accelerating and facilitating exploration of shale gas contained within the Amendment, the following should be noted:

- (1) Institution of a single concession covering prospecting, exploration, and extraction was introduced;
- (2) Concession will be granted for a period of ten to thirty years;
- (3) Simplification of the granting process for obtaining an environmental decision;
- (4) The National Mineral Energy Operator (NOKE) will not be created. However, control powers of the environmental inspection will be increased and the Ministry of Environment will retain control over the performance of the obligations of the entrepreneur under the concession.

In September 2014, in order to attract foreign investors, the Polish government issued for public consultation a project of a special bill regarding preparation and implementation of investments in prospecting, exploration, extraction, and transportation of hydrocarbons. The main aim of this special bill is to accelerate exploration of shale gas in Poland by making the administrative procedure easier and significantly faster, reducing the time from twelve months to approximately three months.

On August 25, 2014, the President of Poland signed the Act on the Special Hydrocarbon Tax;<sup>25</sup> it will come into force on January 1, 2016.

#### E. POLISH COMPETITION REGULATION

The latest developments in the Polish competition regulations were introduced by the amendment<sup>26</sup> to the Competition Act (Competition Act Amendment).<sup>27</sup> The new legislation was aimed at simplifying the merger control procedures and increasing the efficiency of the existing competition rules. The Competition Act Amendment was announced in

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24. Ustawa z dnia 11 lipca 2014 r. o zmianie ustawy – Prawo geologiczne i górnicze oraz niektórych innych ustaw [Act of 11 July 2014, Amendment to the Geological and Mining Law] Dz.U. 2014 poz. 1133.

25. Ustawa z dnia 25 lipca 2014 r. o specjalnym podatku węglowodorowym, [Act of 25 July 2014, Act on the Special Hydrocarbon Tax], Dz.U. 2014 item 1215.

26. Ustawa z dnia 10 czerwca 2014 o zmianie ustawy o ochronie konkurencji i konsumentów oraz ustawy–Kodeks postępowania cywilnego [Act of 10 June 2014 on amendment of the Act on protection of competition and consumers] Dziennik Ustaw [Journal of Laws] [Dz.U.] 2014 No. 954 [hereinafter the Competition Act Amendment].



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the Polish Journal of Laws on July 17, 2014 and will come into force on January 18, 2015. The Competition Act Amendment generally provides for the following changes:

- (1) Distinction between “simplified” and “extended” merger control procedures. The simplified procedure is a one-stage procedure designed for simple mergers. In such cases, the clearance decision should be granted in one month from the submission of the application. The extended procedure is intended for complicated concentrations. In these cases, the President of the Office of the Competition and Consumer Protection issues a decision pursuant to which the proceedings proceed to the extended stage. The time limit for the completion of the second stage is four months.
- (2) Additional incentives for undertakings that have already applied for the leniency procedure. These incentives are designed to notify the President of the Office of the Competition and Consumer Protection of the existence of other prohibited agreements. In such cases, the notifying undertaking may be granted a 30 percent reduction of the fine to be imposed for the first prohibited agreement and even a total exemption from fine in regards to the other prohibited agreements. In general, this leniency procedure will apply if the Office of the Competition and Consumer Protection does not have any information about the additionally notified prohibited agreement and the notifying undertaking is one of the parties.<sup>28</sup>
- (3) Extension of the statute of limitation periods from one to five years for anti-competitive practices.

F. DATA PRIVACY IN EUROPE: THE GOOGLE DECISION OF THE EUROPEAN COURT OF JUSTICE

On May 15, 2014 the European Court of Justice (ECJ) issued a decision in *Google Spain SL v. Agencia Española de Protección de Datos*.<sup>29</sup>

Therein, the ECJ held that “an internet search provider is responsible for the processing that it carries out of personal data that appear on web pages published by third parties.”<sup>30</sup>

Thus, if following a search made on the basis of a person’s name, the list of results displays a link to a web page which contains information on the person in question, that data subject may approach the operator directly and, where the operator does not grant his request, [may] bring the matter before the competent authorities in order to obtain, under certain conditions, the removal of that link from the list of results.<sup>31</sup>

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27. Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów [Act of 16 February 2007 on protection of competition and consumers] Dziennik Ustaw [Journal of Laws] [Dz.U.] 2007 No. 50, item 331 as amended [hereinafter the Competition Act].

28. Krzysztof Kanton and Katarzyna Karasiewicz, Immunity, Sanctions & Settlements, GLOBAL COMPETITION REVIEW (Oct. 29, 2014), <http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/39/poland/>.

29. *Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (May 13, 2014)*, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN> [hereinafter Google C-131/12].

30. Press Release, *Court of Justice of the European Union, No. 70/14, (May 13, 2014)*.

31. *Id.* ¶ 1.

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This decision relates to and interprets the EU Directive 95/46/EC.<sup>32</sup> The objective of the Directive is to protect the fundamental rights and freedoms of natural persons, particularly the right of privacy, but also the right to remove obstacles to the free flow of such data. The Court emphasized that an internet search provider automatically, constantly, and systematically collects data within the meaning of the Directive and processes data when it retrieves, records, organizes, stores, and discloses data.<sup>33</sup>

During the first few weeks after the decision, Google received 70,000 deletion requests, including more than 12,000 such requests from Germany. The “right to be forgotten” has become a new buzzword and supporters of the decision have claimed a victory in the fight for self-determination and democracy. Meanwhile, opponents of the decision claim media censorship and the end of a free internet.

On May 16, 2014, German Minister for Economy and Energy, Sigmar Gabriel, published a full-page article in the *Frankfurter Allgemeine Zeitung* (FAZ) titled “Our political consequences of the Google Debate.”<sup>34</sup> Minister Gabriel announced that Europe would now, after the Google decision, find a solution to address the “information capitalism which calls into question the whole market economy system.”<sup>35</sup> He emphasized that “the Court restored the rule of law by stating that Google is not allowed to ignore European standards by storing and processing data outside of the EU” and that “Europe is standing for the opposite of the totalitarian idea to make every detail of human behavior, human emotions and human thoughts the object of capitalistic marketing strategies.”<sup>36</sup> Minister Gabriel has called for “serious consideration to decartelize Google.”<sup>37</sup>

Heiko Maas, the German Minister of Justice, was quoted in a FAZ article of June 27, 2014 that he thought a forced break-up of Google should be explored, if Google continues to abuse its market domination.<sup>38</sup> Google searches are generally estimated to amount

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32. Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281).

33. Google C-131/12, *supra* note 29, ¶ 28: “Therefore, it must be found that, in exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine ‘collects’ such data which it subsequently ‘retrieves’, ‘records’ and ‘organises’ within the framework of its indexing programmes, ‘stores’ on its servers and, as the case may be, ‘discloses’ and ‘makes available’ to its users in the form of lists of search results. As those operations are referred to expressly and unconditionally in Article 2(b) of Directive 95/46, they must be classified as ‘processing’ within the meaning of that provision, regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data.”

34. Sigmar Gabriel, *Unsere politischen Konsequenzen aus der Google-Debatte* [Our political consequences of the Google Debate], FRANKFURTER ALLGEMEINE ZEITUNG (May 16, 2014), <http://www.faz.net/aktuell/feuilleton/debatten/die-digital-debatte/sigmar-gabriel-konsequenzen-der-google-debatte-12941865.html>.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Maas erwägt Entflechtung von Google* [Maas is considering unbundling of Google], FRANKFURTER ALLGEMEINE ZEITUNG (Jun. 27, 2014), <http://www.faz.net/aktuell/politik/inland/justizminister-im-f-a-z-gespraech-maas-erwaegt-entflechtung-von-google-13014260.html>.

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to eighty-five to ninety percent of all internet searches in Germany.<sup>39</sup> Minister Maas proposed to never store any data unless it was warranted for a specific reason, or *Anlass*.<sup>40</sup>

On July 9, 2014, the German Monopolies Commission published its bi-annual expert report and proposed a “strengthened cooperation between data protection and competition government entities.”<sup>41</sup> The Commission concluded that it was obvious that monopolies agencies had in the past primarily addressed competition problems which disadvantaged commercial internet providers and advertisers (primary market level), but that problems with access to users’ data (secondary market level) had only been addressed very indirectly.<sup>42</sup>

The Commission further stated that the problem of excessive access to data required investigation in terms of competition policy and that the ability of users to deal with their data, or data sovereignty, in an autonomous manner needed to be strengthened.<sup>43</sup> The Commission expressly supported prompt passage of the European Data Protection Regulations from a competition policy perspective.<sup>44</sup> The new European Data Protection Law is slated to be adopted in 2015.

## II. European Union Corporate and Financial Law

### A. FINANCIAL TRANSACTIONS TAX

In April 2014, the ECJ dismissed an appeal brought by the United Kingdom against a decision of the EU Council of Ministers authorizing eleven Member States to use enhanced cooperation procedures in the area of Financial Transaction Tax (FTT).<sup>45</sup> After that Council decision, the European Commission adopted a proposal to issue a directive. According to the ECJ:

[T]he Court considers that the two arguments put forward by the United Kingdom are directed at elements of a potential FTT and not at the authorization to establish enhanced cooperation, and consequently those arguments must be rejected and the action must be dismissed.<sup>46</sup>

A few weeks later, at the May 2014 Economic and Financial Affairs Council (ECOFIN) meeting, the European Finance ministers issued joint statements referencing the FTT. In particular, according to its press release:

The presidency took note of a joint statement by ministers of 10 participating countries and confirmed that all relevant issues would continue to be examined by national

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39. German Monopolies Commission, Expert Report XX, Chapter 1, Current Problems of Competition Policy. Google, Facebook + Co - A Challenge for Competition Politics, (July 9, 2014), Subchapter 3, Data Access and Market Power, p. 63, ¶ 26.

40. *Maas is considering unbundling of Google*, *supra* note 38.

41. German Monopolies Commission, *supra* note 39, ¶ 58.

42. *Id.* ¶ 5.

43. *Id.* ¶ 6.

44. *Id.*

45. Press Release, *Court of Justice of the European Union*, No. 65/14 (Apr. 30, 2014), available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140065en.pdf>.

46. *Id.*

experts. It noted the intention of participating countries to work on a progressive implementation of the FTT, focusing initially on the taxation of shares and certain derivatives.<sup>47</sup>

Implementation of the FTT is slated to occur progressively beginning January 2016. The base of member states' cooperation remains the same as in the Commission's February 2013 proposal. According to that, the FTT will be harmonized across member states with a minimum tax assessed at 0.1 percent, calculated on transactions of financial instruments of all types (with the exception of derivatives which shall be taxed at 0.01 percent). The adoption of a harmonized FTT must be unanimous by all participating countries.<sup>48</sup>

#### B. EFFICIENCY IN CROSS BORDER TRANSACTIONS

This past year's implementation of the Commission's Communication *Europe 2020: A Strategy for Smart, Sustainable, and Inclusive Growth*<sup>49</sup> plan saw the Council stressing the importance of a strong industrial base.<sup>50</sup> Inside this area, the business environment has been closely monitored in order to create a better regulatory framework. "[A]lthough there have been improvements in the EU overall, progress remains uneven. Inflexible administrative and regulatory environments, rigidities in some labour markets and weak integration in the internal market continue to hold back the growth potential of firms, especially SMEs."<sup>51</sup>

Within the corporate governance area, in April 2014, the Commission presented a first proposal to revise the Shareholder Rights Directive for listed companies (2007/36/EC).<sup>52</sup> This proposal, based on Article 50(2)(g) and 114 of the Treaty on the Functioning of the EU, follows two Green Papers as a result of shareholder consultations for the enhancement of participation and transparency.<sup>53</sup> The focus of the proposal is on the behavior of corporate boards, assets managers, and cross-border proxy/voting advisers.

The proposal:

[R]equires the realisation of the following more specific objectives: 1) Increase the level and quality of engagement of asset owners and asset managers with their investee companies; 2) Create a better link between pay and performance of company directors; 3) Enhance transparency and shareholder oversight on related party transactions; 4) Ensure reliability and quality of advice of proxy advisors; 5) Facilitate

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47. Press Release, Council of the European Union, No. 9273/14 (May 6, 2014), available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/142513.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/142513.pdf).

48. *Id.*

49. Communication COM (2010) 2020 Final, [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm).

50. Key areas: comparing Member States' performances, European Commission, [http://ec.europa.eu/europe2020/making-it-happen/key-areas/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/key-areas/index_en.htm).

51. *Industrial Policy, European Commission*, [http://ec.europa.eu/europe2020/pdf/themes/11\\_industrial\\_policy\\_02.pdf](http://ec.europa.eu/europe2020/pdf/themes/11_industrial_policy_02.pdf).

52. Directive 2007/36/EC of the European Parliament and of the Council of 11th July 2007 on the exercise of certain rights of shareholders in listed companies, 2007 O.J. (L 184), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:184:0017:0024:EN:PDF>.

53. See Corporate governance in financial institutions and remuneration policies, COM(2010) 284 final (Jun. 2, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0284:FIN:EN:PDF>; see also The EU corporate governance framework, COM(2011) 164 final (Apr. 5, 2011), available at [http://ec.europa.eu/internal\\_market/company/docs/modern/com2011-164\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf).

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transmission of cross-border information (including voting) across the investment chain in particular through shareholder identification.<sup>54</sup>

The Commission presented a second proposal directed to facilitate the creation of companies with a single shareholder across the EU. Its goal is to enhance the process of establishing subsidiaries in other Member States because subsidiaries tend to have foreign parent companies as shareholders. “European small and medium-sized enterprises (SMEs) are the backbone of the EU economy: the 20.7 million SMEs produce 58% of EU GDP and account for 67% of all jobs in the private sector.”<sup>55</sup>

Due to legal, administrative, and language barriers, SMEs encountered several obstacles expanding their operations in other member states, and as a result only around 2 percent of SMEs succeeded in setting up branches in other member states (in the form of a subsidiary, branch, or joint venture).

This proposal also aims to bypass the failed 2008 European Company Statute (SPE) proposal due to lack of unanimous member states’ agreement.<sup>56</sup> The Commission withdrew the SPE project and introduced some of its features in this single shareholder European company proposal.

In most cases, these subsidiaries are single-member companies, since the single member is a parent company that “wholly owns them.” More than 40 percent of all limited liability companies in the EU are single member companies. Facilitating the creation of single-member companies across the EU should make it easier for businesses to establish subsidiaries in other countries.<sup>57</sup>

Finally, in October 2014, the Commission promoted a study to implement share ownership by company employees. The study analyzes various policy options to eliminate obstacles to employee’s financial participation in transnational company ownership.<sup>58</sup>

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54. *Id.*

55. Memorandum, Proposal for a Directive on single-member private limited liability companies – frequently asked questions, European Commission (Apr. 9, 2014), *available at* [http://europa.eu/rapid/press-release\\_MEMO-14-274\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-14-274_en.htm?locale=en).

56. Press Release, “Think Small First”: A Small Business Act for Europe, European Commission (Jun. 25, 2008), *available at* [http://europa.eu/rapid/press-release\\_IP-08-1003\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-08-1003_en.htm?locale=en).

57. Proposal for a Directive on single-member private limited liability companies, *supra* note 55.

58. Inter-University Centre for European Commission’s DG MARKT, The Promotion of Employee Ownership and Participation (October 2014), *available at* [http://ec.europa.eu/internal\\_market/company/docs/modern/141028-study-for-dg-market\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/141028-study-for-dg-market_en.pdf).

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## India

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This article surveys significant legal developments in India during the year 2014.<sup>1</sup>

### I. India Securities Law Update

Sustained economic growth is contingent on a well-functioning securities market, which satisfies the entities' need for capital and the investors' need for liquidity. The Securities and Exchange Board of India (SEBI), the Indian securities regulator, introduced a series of changes in 2014 designed to strengthen the corporate governance framework. To increase market depth, for example, SEBI has introduced new regulations for investment vehicles for the real estate and infrastructure sectors. SEBI has also combined portfolio investment classes—Foreign Institutional Investors (FIIs), including sub-accounts, and Qualified Foreign Investors (QFIs)—to a single investment class, Foreign Portfolio Investors. A snapshot of these changes is set out below.

#### A. STRENGTHENING CORPORATE GOVERNANCE NORMS TO BOOST INVESTOR CONFIDENCE

SEBI amended Clauses 35B and 49 of the Equity Listing Agreement to bring corporate governance norms into alignment with provisions in the Companies Act, 2013 (2013

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1. This article provides legal developments occurring primarily from January 2014 through November 2014.

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Act).<sup>2</sup> One of the key changes includes the establishment of a Risk Management Committee. SEBI also imposed additional requirements, for example: approval from the audit committee for all related party transactions, and shareholder approval through a special resolution for reducing shareholding below fifty percent in material subsidiaries.<sup>3</sup> SEBI has also advised the stock exchanges to equip their monitoring framework to identify and monitor practices that are not in compliance with the corporate governance norms laid down in Clause 49.

**B. INTRODUCTION OF REITs AND INVITs**

Recognizing the funding deficit in the real estate and infrastructure sectors, SEBI introduced a new framework for the registration and regulation of Real Estate Investment Trusts (REITs) and Infrastructure Investment Funds (InvITs).<sup>4</sup> The new regulations require REITs and InvITs to be set up as trusts with registered debenture trustees. REITs and InvITs must also invest in real estate and infrastructure projects, respectively, either by themselves or through Special Purpose Vehicles (wherein REIT or InvIT hold controlling interests and at least a fifty percent share of capital or interest). The regulations further provide that the units of REITs and InvITs shall be mandatorily listed on recognized stock exchanges.

In order to operationalize and facilitate the framework on REITs and InvITs, the government has taken it upon itself to promote REITs and InvITs and has proposed a specific tax regime that would provide tax incentives to attract investors.<sup>5</sup>

**C. INTRODUCTION OF THE FOREIGN PORTFOLIO INVESTMENT SCHEME**

Through the Foreign Portfolio Investors Regulations, 2014 (2014 Regulations), SEBI introduced a single investment scheme with uniform entry norms for portfolio investors, including Foreign Institutional Investors (FIIs) and Qualified Foreign Investors (QFIs).<sup>6</sup> The 2014 Regulations repealed both the 1995 FII Regulations as well as the prior QFI regulatory framework.

Under the new framework, registration powers for Foreign Portfolio Investors (FPIs) are delegated to Designated Depository Participants in order to reduce processing time and administrative backlog.<sup>7</sup> All FPIs, including foreign corporations or individuals registered as sub-accounts and QFIs, are now allowed to invest up to ten percent in equity share capital of a company. These investments were earlier limited to five percent of

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2. The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India) (entered into force Apr. 2014).

3. Clause 49 (VI)(C), Clause 49 (VII)(D) and Clause 49 (V)(F) of the Equity Listing Agreement (as amended by SEBI Circular No: CIR/CFD/POLICY CELL/2/2014 dated April 17, 2014 and SEBI Circular No: CIR/CFD/POLICY CELL/7/2014 dated September 15, 2014).

4. Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014, Gazette of India, section III(4) (Sept. 26, 2014); Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014, Gazette of India, section III(4) (Sept. 26, 2014).

5. ArunJaitley, Minister of Finance, India, Union Budget Speech 2014–2015 (July 10, 2014), ¶ 26, *available at* <http://indiabudget.nic.in/ub2014-15/bs/bs.pdf>.

6. Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014, Gazette of India, ¶¶ 2(1)(h), 4, section III(4) (Jan. 7, 2014).

7. Under the old framework, FIIs and sub-accounts were required to be registered with SEBI itself.

equity share capital. Unlike the FII Regulations where FIIs and sub-accounts were permitted to invest in unlisted equity shares, FPIs are not allowed to invest in unlisted equity shares.

The 2014 Regulations leave the tax treatment of FPIs unclear, and steps should be taken in the near future to clarify this issue.

#### D. INTRODUCTION OF NEW PROHIBITION OF INSIDER TRADING REGULATIONS

A high-level committee constituted to review the Prohibition of Insider Trading Regulations, 1992 (1992 PIT Regulations) highlighted the need to tighten insider-trading norms, and proposed new prohibition of insider-trading regulations to replace the 1992 PIT Regulations.<sup>8</sup> On November 19, 2014, SEBI considered this report and approved the introduction of new prohibition of insider trading regulations. Accordingly, SEBI (Prohibition of Insider Trading) Regulations, 2015 (2015 PIT Regulations) were notified on January 15, 2015 and shall come into force on May 15, 2015.<sup>9</sup>

The 2015 PIT Regulations shall apply to an entity whose securities are either listed or proposed to be listed on the stock exchanges. Unlike the 1992 PIT Regulations, under which mere communication of unpublished price-sensitive information (UPSI) was not an offense, the 2015 PIT Regulations prohibit insiders from communicating, providing, or allowing access to UPSI.<sup>10</sup>

#### E. REGULATION OF RESEARCH ANALYSTS

In a proactive step, SEBI has also recently introduced regulations such as the Research Analysts Regulations, 2014, which seek to register and regulate research analysts and that prescribe limitations on certain activities, including trading by research analysts, the publication of research reports, public appearances, and conducting business.<sup>11</sup>

SEBI undertook the reforms described above with the objective of protecting the interests of investors while ensuring fairness and efficiency in the market. Through these efforts, SEBI is keeping up with the swiftly changing paradigms of the securities market.

## II. Key Regulatory Developments Regarding Inbound and Outbound Investments

### A. FOREIGN DIRECT INVESTMENTS

Under Prime Minister Narendra Modi's government, various new initiatives are being undertaken to encourage Foreign Direct Investment (FDI). Significant developments have taken place regarding the liberalization of FDI in various sectors, including defense, the railways, and real estate construction development projects.

8. Report of The High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992, Part III.

9. Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Gazette of India, section III(4) (Jan. 15, 2015).

10. *Id.* ¶3.

11. Securities and Exchange Board of India (Research Analysts) Regulations, 2014, Gazette of India, ¶¶ 16, 18, section III(4) (Sept. 1, 2014).



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India has also recently embarked on an ambitious “Make in India” program to make the country an investor-friendly destination by streamlining existing bureaucratic processes by setting up single window clearances, e-Business portals, and investor facilitation cells.<sup>12</sup>

Some prominent changes in the realm of FDIs in India are highlighted below.

**B. KEY SECTORAL DEVELOPMENTS**

1. *Defense Sector*

The cap for FDI in the defense sector has been increased from twenty-six to forty-nine percent, subject to specific conditions. The Cabinet Committee on Security (CCS) will consider FDI proposals over the forty-nine percent cap on a case-by-case basis, especially when the investment is likely to result in access to modern and state-of-the-art technology.<sup>13</sup>

2. *Railway Infrastructure*

FDI in the construction, operation, and maintenance of specified projects (including suburban corridor projects through a public-private partnership model, high speed train projects, and infrastructure in industrial Mass Rapid Transport System) has been opened to private participation, and FDI has been allowed up to one-hundred percent under the automatic route in such activities. Proposals involving FDI beyond forty-nine percent in security-sensitive areas still need to be brought before the CCS for consideration on a case-by-case basis.<sup>14</sup>

3. *Construction Development Sector*

During the budget announcements for the year 2014, key reforms were suggested for FDI in the construction development sector. These included relaxation in minimum area and minimum capitalization requirements and the introduction of schemes for promotion of affordable housing projects. The Union Cabinet subsequently approved a proposal along these lines.<sup>15</sup> With effect from December 3, 2014 100 percent FDI under the automatic route in the construction development sector has been permitted, which shall be subject to certain conditions.

4. *Pharmaceuticals Sector*

FDI in the pharmaceutical sector up to the extent of 100 percent in green field project under automatic route and up to the extent of 100 percent in brown field under the approval route is permitted. Also FDI up to 100 percent under the automatic route is permitted for manufacturing of medical devices.<sup>16</sup>

12. MAKE IN INDIA, <http://www.makeinindia.com> (last visited Mar. 24, 2015).

13. Ministry of Commerce & Industry, Press Note No. 7 (2014 series) (Aug. 26, 2014) (India).

14. Ministry of Commerce & Industry, Press Note No. 8 (2014 series) (Aug. 27, 2014) (India).

15. See *Government relaxes FDI norms for construction, real estate sector*, THE INDIAN EXPRESS (Oct. 29, 2014, 10:00PM), <http://indianexpress.com/article/business/economy/government-relaxes-fdi-norms-for-construction-real-estate-sector/>; Reserve Bank of India, A.P. (DIR Series) Circular No. 60 (January 22, 2015).

16. See Reserve Bank of India, Notification 334/2015-RB (January 9, 2015).

C. OTHER REGULATORY DEVELOPMENTS

1. *FDI in Limited Liability Partnerships*

The Reserve Bank of India (RBI) has operationalized guidelines in relation to FDI in Limited Liability Partnerships permitted under the government approval route with retroactive effect from May 20, 2011. Direct or indirect foreign investment, regardless of the nature of “ownership” or “control” of an Indian company, shall require government approval. Also, specific pricing guidelines have been prescribed with respect to capital contribution and acquisition or transfer of profit shares.<sup>17</sup>

2. *FDI in Equity Instruments with Optionality Clauses*

The RBI has legitimized option arrangements. Equity instruments under the FDI scheme with option clauses can now be issued to foreign investors provided that the option, when exercised, should not entitle the non-resident investor to exit at an assured return. Further, the exit is required to comply with the prescribed requirements, including compliance with the minimum lock-in period and specified pricing guidelines.<sup>18</sup>

3. *Revision in Pricing Guidelines for Unlisted Equity Shares or Equity Instruments*

In the case of issue or transfer of unlisted equity instruments under the FDI route, price or consideration must now be determined according to an internationally accepted pricing methodology (instead of the discounted cash flow method methodology previously allowed) for valuation of shares on arm’s-length basis, duly certified by a chartered accountant or a SEBI-registered merchant banker.<sup>19</sup>

4. *Issue of Partly-Paid Equity Shares or Warrants*

The RBI has permitted issuance of partly-paid equity shares or warrants by Indian companies, under the respective automatic or approval routes, subject to compliance with the prescribed conditions. The pricing of partly-paid equity shares or warrants would need to be determined upfront. Also, twenty-five percent of the total consideration would need to be received upfront, with the balance receivable within twelve (for equity shares) or eighteen months (for equity warrants), subject to certain exceptions.<sup>20</sup>

5. *Issuance of Equity Shares Against Legitimate Dues*

The RBI has allowed Indian companies to issue shares to non-resident investors against any other funds payable by the investee company, remittance of which does not require prior government/RBI permission. This, however, is subject to compliance with the terms and conditions of the FDI policy, including sectoral caps, pricing guidelines, and applicable income tax laws.<sup>21</sup>

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17. Reserve Bank of India, A.P. (DIR Series) Circular No. 123 (Apr. 16, 2014).

18. Reserve Bank of India, A.P. (DIR Series) Circular No. 86 (Jan. 9, 2014).

19. Reserve Bank of India, A.P. (DIR Series) Circular No. 04 (July 15, 2014).

20. Reserve Bank of India, A.P. (DIR Series) Circular No. 03 (July 14, 2014).

21. Reserve Bank of India, A.P. (DIR Series) Circular No. 31 (Sept. 17, 2014).

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D. OVERSEAS DIRECT INVESTMENTS

Over the past few months, increased foreign investment due to a stable government in the Indian parliament and an increase in the foreign exchange reserves position has resulted in an improvement in India's macroeconomic scenario. In view of the same, the RBI has introduced certain changes that are expected to have a significantly favorable impact on outbound investments by Indian corporations.

The RBI has increased the limit of financial commitment by an Indian party under the Overseas Direct Investment (ODI) route from one-hundred percent of the net worth of an Indian Party (as per the last audited balance sheet of the Indian entity) to four-hundred percent of its net worth.<sup>22</sup> Any financial commitment exceeding USD one billion in a particular financial year, however, shall require prior RBI approval, even if such financial commitment is within the eligible ODI limit of four-hundred percent of net worth under the automatic route.

The limit for overseas remittance under the Liberalized Remittance Scheme (LRS) Facility has been increased from USD 75,000 to USD 125,000.<sup>23</sup> Also, RBI clarified that remittances under the LRS Facility can be used for acquisition of immovable property outside India and also for the acquisition/setting up of joint ventures and wholly-owned subsidiaries abroad.<sup>24</sup> Further, now an Indian Alternative Investment Fund (AIF), registered with SEBI can make overseas direct investment subject to some terms and conditions.

Going forward, it is widely expected that foreign investment in and out of the country will gain further momentum as both foreign investors and domestic investors are gaining confidence in India's new government. India is likely to witness a substantial increase in foreign investment inflows, benefiting a wide range of sectors (including infrastructure, construction development, power, services, and telecommunications), thereby enhancing India's global competitiveness and trade across sectors.

**III. Another Triumph For Vodafone, or Recipe for Retrospective Amendment—An Analysis of the Bombay High Court's Judgment**

The great jurist Nani A. Palkhivala once quoted Francis Bacon:

*"When Bacon said that: 'Knowledge is Power,' he meant it from the individual's standpoint and not from the national standpoint.*

*A nation progresses gloriously when knowledge and power are combined in the same individual. It faces a grave crisis when some have knowledge and others have power."*<sup>25</sup>

What follows is an intriguing case of the use of fiction and imagination in the zeal of tax collection.

During the assessment year 2009–10, Vodafone India Services Limited (Vodafone), a wholly-owned subsidiary of Vodafone Tele-Services (India) Holdings Limited (Holding

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22. Reserve Bank of India, A.P. (DIR Series) Circular No. 1 (July 3, 2014).

23. Reserve Bank of India, A.P. (DIR Series) Circular No. 131 (May 19, 2014). The proposed limit is to increase from USD 1,25,000/- to USD 2,50,000 as per the Sixth Bi-Monthly Monetary Policy Statement, 2014-15, dated February 3, 2015.

24. Reserve Bank of India, A.P. (DIR Series) Circular No.48 (December 09, 2014).

25. S. RAJARATNAM, LANDMARK CASES IN DIRECT TAX LAWS 93 (Institute of India, 2011).

Company), issued 289,224 equity shares of a face value of ten Indian Rupees (Rs.) at a premium of 8,509 Rs. per share to its Holding Company. The Income Tax Department (ITD) questioned the transaction on the ground that Vodafone should have valued each share at Rs. 53,775 (a shortfall of Rs. 45,256 per share). The ITD concluded that the valuation error resulted in an aggregate shortfall of Rs. 1,308.91 crores. The ITD sought to treat the aggregate shortfall as “income” and, as a consequence, the deficit amount was to be treated as a loan given by Vodafone to the Holding Company.<sup>26</sup>

Vodafone challenged the ITD’s finding. Vodafone’s primary argument was that the shortfall did not constitute income and, secondarily, that Chapter X of the Income Tax Act, 1961, relating to transfer pricing, was not applicable to this case. The High Court referred the jurisdictional issue to the Dispute Resolution Panel (DRP) under Section 144C(2) of the Income Tax Act. After consideration of the issues, the DRP held that the ITD had jurisdiction over Vodafone’s issuance of shares to its Holding Company, and authority to tax the shortfall as income.

Thereafter, Vodafone presented a writ petition before the Honorable Bombay High Court (the Court) against the DRP Order.<sup>27</sup>

#### A. REVENUE’S CONTENTIONS

Before the Court, Revenue argued that the legislative history of the 1961 Income Tax Act supports its position that, even in the absence of actual income, notional income can be taxed. Revenue further argued that, under Chapter X, if Parliament had intended taxing powers to be limited to “real income” (as argued by Vodafone), it would have used the words “actual income.”<sup>28</sup> Therefore, the difference between the arm’s-length price (ALP) and the contracted price should be added to the total income

Chapter X is a complete code by itself and not merely a machinery provision to compute the ALP. It applies wherever the ALP is to be determined by the Assessing Officer. Therefore, the charging section is inherent in Chapter X.

#### B. VODAFONE’S CONTENTIONS

In contrast, Vodafone argued that Section 92(1) of the 1961 Income Tax Act deals with income arising from international transactions, and the same formula should be used for the ALP.<sup>29</sup> However, in the present case, no income arose from issue of equity shares by Vodafone to its holding company.

Vodafone further argued that “income” is not defined separately under Chapter X, and that the DRP inappropriately interpreted that word. Vodafone argued that the word “income” should instead be understood as it is defined under Section 2(24) of the 1961 Income Tax Act. Moreover, Vodafone argued, the Act should be given a strict interpretation as a fiscal statute.

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26. Vodafone India Services Pvt. Ltd. v. DRP II & Others, (2014) 368ITR1, ¶2 (India) [hereinafter Vodafone v. DRP II].

27. DRP II Order (Feb. 11, 2014).

28. Vodafone v. DRP II, *supra* note 24, Paragraph ¶18(d).

29. *Id.* ¶ 2.

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Vodafone further contended that an issuance of shares is the creation of, not a transfer of shares. Therefore, Section 45 of the Act is inapplicable.

Further, Vodafone contended that the issuance of shares to its Holding Company and receipt of consideration for the same was a capital receipt under the Act and, therefore, could not come within the ambit of the word “income” under the 1961 Income Tax Act, save as expressly provided for in Section 2(24)(vi).

Subsequently, Vodafone drew attention to the definition of “income” under section 2(24)(xvi), which includes amounts received arising or accruing within the provisions of Section 56(2)(viib). However, the same applied only to issue of shares to a “resident” and, here, sought to tax consideration received in excess of the fair market value and not the alleged short-fall in the price of equity shares.

C. CONCLUSIONS OF THE COURT

After hearing the contentions of both parties and after examining the conclusions and reasoning by the tax authorities, the Court arrived at the following conclusions:

*Chargeability to tax:* The Court observed that the share premium has been made taxable by a legal fiction under Section 56(2)(viib) and is enumerated as income in Section 2(24)(xvi). However, what is brought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case, by contrast, what Revenue sought to tax was capital not received from a nonresident (i.e., the premium allegedly not received on application of ALP). Therefore, the Court concluded, absent express legislation, no amount received, accrued, or arising on capital account transactions can be subjected to tax as income.<sup>30</sup>

*Interpretation of the word “income”:* The Court observed that while interpreting a fiscal or taxation statute, the intent or purpose is irrelevant and the words of the taxation statute must be strictly interpreted.<sup>31</sup> With regards to this, it is apt to highlight the judgment of the Honorable Supreme Court in *Mathuram Agarwal v. State of M.P.*,<sup>32</sup> wherein the court held that it is impermissible to forgo the strict rules of interpretation.

*Application of Measure of ALP:* In tax jurisprudence, it is well-settled that there is difference between a “charge to tax” and the “measure of tax.” This distinction was highlighted by the Supreme Court in *Bombay Tyres India Ltd. v. Union of India*,<sup>33</sup> wherein it held that the charge of excise duty is on manufacture, while the measure of the tax is the selling price of the manufactured goods.

Further, the Court observed that it is a well-settled position in law that a charge to tax must be specifically mentioned in the Act. In the absence of a charging section in Chapter X of the 1961 Income Tax Act, it is not possible to read a charging provision into it.<sup>34</sup>

Therefore, the Court held that issue of shares at a premium by Vodafone to its non-resident Holding Company does not give rise to any income from an admitted International Transaction.<sup>35</sup>

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30. *Id.* ¶ 25.

31. *Id.* ¶ 28.

32. (1999) 8 S.C.C. 667 (India).

33. (1984) 1 S.C.C. 467 (India).

34. Vodafone v. DRP II, *supra* note 24, Paragraph ¶44.

35. *Id.* ¶ 49.

D. ANALYSIS

The judgment by the Court in the *Vodafone* case clarifies certain fundamental aspects of taxability arising out of transfer pricing adjustments. The ITD made an unsuccessful attempt to revalue the net worth of Vodafone by taking into consideration intangible additions made in the past, thereby creating a fictional net worth. Although the Court did not engage in direct discussion on this aspect of the case, it appears that such intangible additions cannot form the basis of computing net worth and, in a way, such exercise is similar to the principle of telescoping,<sup>36</sup> which in any case may no longer be a good principle.

The *Vodafone* judgment also underlines the principle of *casus omissus*. While it is undisputed that legislation has the power to make notional income into real income for taxation purposes, this interpretation cannot be read into the legislation in absence of a specific provision in the law. In *Navneet Lal C. Javeri v. ITAA Commissioner*,<sup>37</sup> the Honorable Supreme Court had held that resort to a legal fiction is permissible wherever it is necessary to deal with a device to avoid legitimate taxation. Long before that, Lord MacNaghtan in *London County Council v. Attorney General*<sup>38</sup> had said: "Income tax, if I may be pardoned for saying so, is a tax on income." Therefore, the Parliament has power to create a legal fiction; however, in the absence of specific provision, ITD cannot assume its existence of that legal fiction and, by doing so, violate the doctrine of *casus omissus*. The *Vodafone* judgment reaffirms this proposition without expressly stating so.

E. RECENT DEVELOPMENT

A similar issue came up before the Court in the case of *Shell India Markets Pvt. Ltd. v. ACIT*<sup>39</sup> and in the case of *Vodafone India Services Pvt. Ltd. v. UOI*<sup>40</sup> wherein the Court followed its earlier decision which is the subject matter of this section.

Subsequently, the Indian Ministry of Finance accepted the present decision by the Honorable Bombay High Court through an instruction issued by Central Board of Direct Taxes,<sup>41</sup> and further directed that the field officers in all cases where this issue is involved must adhere to the *ratio decidendi* of the present judgment.

#### IV. Anti-trust Laws in India: The Way Forward

After India set out on the path to economic liberalisation in 1991, it enacted the Competition Act, 2002<sup>42</sup> in January 2003. The 2002 Act marked a shift in focus, from curbing monopolies (under the erstwhile Monopolies and Restrictive Trade Practices Act, 1969)<sup>43</sup> to promoting competition. The 2002 Competition Act established India's anti-trust regulator, the Competition Commission of India (CCI). CCI became operational in May

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36. Telescoping is a concept whereby the taxpayer justifies the source of a disputed transaction to an intangible adjustment made by the Tax Authorities in one of the preceding tax assessments.

37. A.I.R. 1965 S.C. 1375 (India).

38. 4 T.C. 265 (H.L.).

39. 369 ITR 516 (Bom.).

40. *Id.*

41. Instruction No. 2/2015 dated 2nd January, 2015.

42. No.12, Acts of Parliament (2003) (India).

43. No. 54, Acts of Parliament (1969) (India).

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2009,<sup>44</sup> and is responsible for preventing practices that have an adverse effect on competition and for ensuring freedom of trade.<sup>45</sup>

In the last five years, CCI has regulated merger combinations and anti-competitive practices across various sectors, including automobiles, aviation, financial services, pharmaceuticals, and real estate.<sup>46</sup>

A. ABUSE OF DOMINANT POSITION

In August 2011, CCI penalized DLF Limited, one of the largest commercial real estate development companies in India, for abusing its dominant position in the relevant market and for imposing “unfair” terms in its agreements with apartment buyers.<sup>47</sup>

The Competition Appellate Tribunal (COMPAT) upheld CCI’s May 2014 order holding DLF guilty of abusing its dominant position.<sup>48</sup> In August 2014, while DLF’s appeal against the COMPAT order was pending, the Supreme Court of India directed DLF to deposit the penalty fee of USD 140 million. The DLF case is one of the first that dealt with the “exploitative” nature of abuse of customers as against the “exclusionary” nature of abuse. COMPAT’s confirmation of the CCI order and the Supreme Court’s directions to DLF to deposit the penalty appear, to some extent, to have validated CCI’s stance.

B. COMBINATIONS

While CCI approved the combination of Tesco Overseas Investments Limited and Trent Hypermarket Limited,<sup>49</sup> it levied a penalty on the parties for failure to provide notification about the combination within thirty days of the trigger event.<sup>50</sup> In doing so, CCI held that the trigger event for an acquisition is the date on which the enterprise communicates its intention to acquire to any statutory body.<sup>51</sup> A potential acquirer is now required to make combination notification even when it is in pre-merger negotiations, but has communicated its intention to make an acquisition to a regulatory body for pre-transaction regulatory clearance. Besides sending mixed signals regarding the timing for filing the combination notification, this strict interpretation may increase the cost of evaluating and making acquisitions.

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44. Annual Report of the Competition Commission of India (2009–10), *available at* <http://www.cci.gov.in/May2011/Advocacy/PubAnnRep0910-060911.pdf>.

45. The Competition Act, *supra* note 37, Statement of Purpose.

46. Any acquisition, merger, or amalgamation exceeding the monetary thresholds as per Section 5 of the Act requires CCI’s prior approval.

47. CCI Order, *Belair Owners Association v. DLF Limited*, Case No.19 of 2010(Aug. 12, 2011), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/DLFMainOrder110811.pdf>.

48. COMPAT Order, *DLF Limited v. Competition Commission of India & Ors*, Appeal No.20 of 2011 (May 19, 2014), *available at* [http://compat.nic.in/upload/PDFs/mayordersApp2014/19\\_05\\_14.pdf](http://compat.nic.in/upload/PDFs/mayordersApp2014/19_05_14.pdf).

49. CCI Order, Notice under Section 6 (2) of the Competition Act, 2002 given by Tesco Overseas Investments Limited, Combination Registration No. C- 014/03/162 (May 22, 2014), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2014-03-162.pdf>.

50. *Id.* § 43A (power to impose penalty for non-furnishing of information).

51. Regulation 5(8), the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, *available at* [http://www.cci.gov.in/images/media/Regulations/CCI\\_Combination\\_Regulations\\_as\\_amended\\_upto\\_23\\_02\\_2012.pdf](http://www.cci.gov.in/images/media/Regulations/CCI_Combination_Regulations_as_amended_upto_23_02_2012.pdf).

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C. NOTABLE ORDERS PASSED BY CCI IN 2014

An association was penalized for anti-competitive conduct in taking decisions relating to distribution and supply of products on behalf of its members. Its senior officers were held to be personally liable for endorsing such anti-competitive conduct.<sup>52</sup>

A penalty was imposed on Google USA and Google India<sup>53</sup> for failure to provide information sought by CCI within the stipulated timeline.

In a significant ruling on vertical restraints and excessive pricing,<sup>54</sup> a fine of USD 420 million was imposed on fourteen car manufacturers<sup>55</sup> for restricting the sale and supply of spare parts in the open market and directing them to stop anti-competitive prices. It has been reported that certain car manufacturers have obtained stays on the CCI Order from the Delhi High Court and the Madras High Court.<sup>56</sup>

D. IMPOSITION OF PENALTY

The 2002 Competition Act empowers CCI to penalize enterprises for all violations and pass such orders as it deems fit.<sup>57</sup> Penalties levied by the CCI on each enterprise can extend up to 10% of its average turnover for the three preceding financial years.

E. WAY FORWARD

Exclusive jurisdiction on all competition matters is vested with CCI and the COMPAT, with the overriding jurisdiction of the Supreme Court. Typically, most parties appeal to COMPAT to challenge CCI orders. COMPAT has, in turn, upheld the CCI orders in majority of cases. Some companies have also approached various High Courts as a delay tactic.

The CCI has also reviewed over 180 mergers in the last three years, taking an average of seventeen days to review mergers and acquisitions.<sup>58</sup> This is a welcome change considering India's track record of long delays in its legal and regulatory fora.

While competition law jurisprudence is at a nascent stage in India, the CCI is emerging as a pragmatic economic regulator committed to ensuring a level playing field for all enterprises. Companies are now waking up to the importance of operating their businesses within the contours of competition law.

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52. CCI Order, Re: Bengal Chemist and Druggist Association, *Suo moto* Case No. 02 of 2012 and Reference Case No. 01 of 2013 (Mar. 11, 2014), available at <http://www.cci.gov.in/May2011/OrderOfCommission/27/022012.pdf>.

53. CCI Order, Consim Info Private Limited v. Google Inc. & Anr, Case No. 07 of 2012 (Mar. 26, 2014), available at <http://www.cci.gov.in/May2011/OrderOfCommission/other/07302012.pdf>.

54. *Id.* § 4 (abuse of dominant position).

55. CCI Order, Shri Shamsher Kataria v. Honda Siel Cars India Ltd & Ors, Case No. 03 of 2011 (Aug. 25, 2014), available at <http://www.cci.gov.in/May2011/OrderOfCommission/27/032011.pdf> (Original Equipment Manufacturers).

56. *Delhi High Court grants 3-weeks protection to Mercedes Benz from CCI's order*, THE ECONOMIC TIMES (Sept. 24, 2014, 10:05PM), [http://articles.economictimes.indiatimes.com/2014-09-24/news/54279448\\_1\\_trade-norms-bmw-india-spare-parts](http://articles.economictimes.indiatimes.com/2014-09-24/news/54279448_1_trade-norms-bmw-india-spare-parts).

57. *Id.* § 27 (orders by CCI after inquiry into agreements or a dominant position abuse).

58. Transcript of Chairman of CCI's speech (Aug. 8, 2014), available at <http://www.cci.gov.in/images/media/speeches/ILS%20Pune%208.8.2014.pdf>.

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**V. The Lokpal And Lokayuktas Act, 2013**

On January 16, 2014, The Lokpal and Lokayuktas Act, 2013 (Lokpal Act), a historic Indian anti-corruption law, came into effect.<sup>59</sup> Versions of the bill have been proposed, debated, and deferred for years. In the last few years, amidst well-publicized corruption scandals such as “Coalgate”<sup>60</sup> and the 2-G Telecom licensing kerfuffle,<sup>61</sup> India has seen incredible grassroots movements and public engagement against corruption. The Lokpal Act will establish independent bodies that have the power to investigate and prosecute public corruption, even against high-level government officials.

A. BACKGROUND

In the first half of 2011, Indian civic engagement to urge governmental action against corruption was at an all-time high. In April 2011, anti-graft activist and grassroots leader Anna Hazare inspired massive public protests to seek action from the Indian government against public corruption. Hazare even initiated a hunger strike to increase pressure on the government to create an entity with the power to prosecute allegations of corruption.<sup>62</sup> A version of the Lokpal Act was drafted, proposed, and vigorously debated in Parliament, but ultimately did not pass. In May 2012, a slightly revised version of the bill was proposed again. On December 17 and 18, 2013, respectively, the Rajya Sabha and Lok Sabha passed the Lokpal Act. President Pranab Mukherjee approved the Act on January 1, 2014, and on January 16, 2014, the Lokpal Act came into effect.

In general, the law provides a framework to create independent entities that will field public complaints and allegations, and have the power to investigate and prosecute public corruption. The Lokpal Act was intended to encompass certain United Nations anti-corruption conventions, which India has ratified.

B. HIGHLIGHTS OF THE ACT

Key features of the Lokpal Act include:

- *National and State-level Bodies*: The Act will establish a national-level Lokpal, which will include a chairperson and a maximum of eight members, and Lokayukta at the state level.
- *Broad Jurisdiction*: The jurisdiction of the Lokpal will include all levels of public servants, including the Prime Minister.
- *High-level Authority*: The Lokpal will have power to oversee and direct the investigative agencies, including the Central Bureau of Investigation, that are inquiring into allegations received by the Lokpal.

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59. See The Lokpal and Lokayuktas Act, 2013, at 5, available at [http://www.prsindia.org/uploads/media/Lokpal/Lokpal%20and%20Lokayuktas%20\(A\)%202014.pdf](http://www.prsindia.org/uploads/media/Lokpal/Lokpal%20and%20Lokayuktas%20(A)%202014.pdf).

60. See Karl Mathiesen, *Coalgate: India urges supreme court not to close coal mines*, GUARDIAN UK (Sept. 1, 2014, 10:45AM), <http://www.theguardian.com/environment/2014/sep/01/coalgate-india-supreme-court-narendra-modi>.

61. See *Indian media: '2G scam' probe*, BBC NEWS (Nov. 21, 2014, 02:12AM), <http://www.bbc.com/news/world-asia-india-30140856>.

62. See Jason Burke, *Anna Hazare's anti-corruption protest sees Delhi signal compromise*, GUARDIAN UK (Aug. 23, 2011, 12:42PM), <http://www.theguardian.com/world/2011/aug/23/anna-hazare-anti-corruption-protest>.

- *Clear Timelines:* The Act establishes clear timeframes in which allegations should be investigated and tried. A preliminary inquiry into allegations must be completed in three months (although this period may be extended by three months); the investigation should be completed in six months (may be extended by six months at a time); and a trial must commence within one year after an investigation is complete (may be extended by one year).
- *Harsber Penalties:* The maximum jail time under the Prevention of Corruption Act was increased from seven to ten years. Minimum punishments for certain sections of the Prevention of Corruption Act were also increased.

## VI. Companies Act, 2013

The newly enacted Indian Companies Act, 2013<sup>63</sup> (2013 Companies Act) places great focus on promoting ethical business practices, accountability, and improving internal processes. Among the various provisions, the 2013 Companies Act requires the appointment of a fixed number of independent directors<sup>64</sup> and places great emphasis on their integrity, impartiality, and autonomy.<sup>65</sup>

A remarkable provision in the 2013 Companies Act is the one that defines “fraud”<sup>66</sup> and makes it a grounds for winding up a company.<sup>67</sup> In relation to affairs of a company, “fraud” includes any act, omission, concealment of any fact, or abuse of position committed by any person or any other person with the connivance, in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholder or its creditors or any other person, whether or not there is any wrongful gain or loss.<sup>68</sup>

The broad definition of “fraud” contained in the 2013 Companies Act is still to be tested in a court of law. Indeed, an act or omission by which one abuses his or her position for gaining an undue advantage may fall foul of the prohibitions set forth under the Prevention of Corruption Act, 1988—the special statute that deals with bribery in India.

Auditors found to have acted in a fraudulent manner or abetting or colluding in a fraud can be removed.<sup>69</sup> Further, an auditor who has contravened the provisions of the Act to deceive the company is punishable with imprisonment and/or a fine.<sup>70</sup>

Making of a false statement in any return, financial statement, or other document under the 2013 Companies Act is an offence punishable by imprisonment and fine.<sup>71</sup> Every listed company (and other companies, as prescribed) must constitute an Audit Committee which is required to evaluate internal financial controls and risk management systems.<sup>72</sup> Such companies are also required to establish a vigil mechanism for directors and employ-

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63. No. 18, Acts of Parliament, 2013 (India). Enacted on August 30, 2013, this Act replaces the Companies Act of 1956. Several provisions are yet to come into force.

64. *Id.* ¶ 149(4).

65. *Id.* ¶ 149(6).

66. *Id.* ¶ 447.

67. *Id.* ¶ 271.

68. *Id.* ¶ 447.

69. *Id.* ¶140(5) (yet to be enforced).

70. *Id.* ¶ 147.

71. *Id.* ¶ 448.

72. *Id.* ¶¶ 177(1), 177(4)(vii).

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ees to report genuine concerns.<sup>73</sup> If it is found that the accounts of a company were prepared in a fraudulent manner or that the affairs of a company were mismanaged during a particular period, the accounts may be reopened.<sup>74</sup>

**VII. Changes to the Indian Immigration System with a View to Woo U.S. Nationals and Indian Americans**

With a view to boosting tourism and business activities in India, Prime Minister Modi made several key announcements in 2014 pertaining to the entry, stay, and exit of foreign nationals in India. In the presence of several U.S. business and political leaders—many of the Indian diaspora—Modi announced that the time limits that applied to the validity of Person of Indian Origin (PIO) Cards and registration requirements would be eliminated and that U.S. nationals could look forward to receiving electronic visas or visas on arrival for travel tourism to India.<sup>75</sup>

**A. PIO CARDS**

PIO Cards are generally issued to (1) a foreign national who at any time has held an Indian Passport; or whose parents or grandparents were born in or were permanently resident in India as defined in the Government of India Act, 1935 and other territories that became part of India thereafter, provided neither was at any time a citizen of Afghanistan, Bhutan, China, Nepal, Pakistan, or Sri Lanka; or (2) one who is a spouse of a citizen of India or a person of Indian origin, as described above.<sup>76</sup>

Until recently, these PIO Cards were valid for a period of fifteen years after which they could be renewed for additional periods. PIO Card holders were also required to register with the Foreigners Registration Office or Foreigners Regional Registration Office (collectively, the FRRO) if they desired to stay in India for extended durations. In keeping with Prime Minister Modi's announcements, in September 2014, the Ministry of Home Affairs published modifications to the PIO Card system.<sup>77</sup> PIO Cards are now valid for the lifetime of the qualifying individual, and registration with the local FRROs is no longer required. PIO Card holders can live and work in India with very few restrictions (e.g., the holding of public office, voting in government elections, visiting restricted or protected areas, and undertaking mountaineering, research, or missionary work). Some of these activities—barring government positions and the right to vote—may be permitted upon obtaining additional permissions.

The PIO Card is now almost on par with the status that was earlier granted only under the Overseas Citizenship of India (OCI) scheme launched at the beginning of 2006.<sup>78</sup> Eligible foreign nationals, including certain persons of Indian origin and individuals

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73. *Id.* ¶ 177(9).

74. *Id.* ¶ 130 (yet to be enforced).

75. See, e.g., Vibhuti Agarwal, *Modi's Visa Announcement in the U.S. Not All It Seems*, WALL ST. J. (Sept. 30, 2014, 2:56PM), <http://blogs.wsj.com/indiarealtime/2014/09/30/modis-visa-announcement-in-the-u-s-not-all-it-seems/>.

76. BUREAU OF IMMIGRATION INDIA, <http://boi.gov.in/content/person-indian-origin-pio> (last visited Mar. 24, 2015).

77. MHA Gazette notification number 25024/9/2014/F.1.

78. OCI REGISTRATION, [http://www.ociregistration.com/oci\\_eligibility.htm](http://www.ociregistration.com/oci_eligibility.htm) (last visited Mar. 24, 2015).

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whose parents or grandparents migrated from India after January 26, 1950 as well as their minor children are allowed to register as OCIs. This is subject to the applicant being a citizen of a country that allows dual citizenship in some form or the other, though an OCI does not grant full “citizenship” rights in any way. Citizens of all countries except those who ever held citizenship of Pakistan and Bangladesh may qualify under this scheme. Registration as an OCI is a one-time process that grants all the benefits that are available to PIO Card holders with some additional benefits. Further, OCI Card holders have never been required to register with an FRRO for any length of stay in India.

It is important to note that one of the main advantages that the OCI scheme has over the PIO, is that a person who has been registered as an OCI for five years and who has lived in India continuously for one year is eligible naturalize as an Indian Citizen, whereas as per the amendment introduced to section 5(1)(a) & 5(1)(c) of the Citizenship Act in 2003, other persons of Indian origin have to reside in India for a minimum of seven years (with the last year on continuous stay) before being eligible for Indian citizenship. In both instances, a foreign national must relinquish his or her foreign nationality before naturalization as India does not recognize dual citizenship. However, from the recent announcements and changes it is unclear whether existing PIO Card holders will be allowed to naturalize in the way OCI Card holders can do currently.

**B. VISA ON ARRIVAL**

The Indian government also introduced visa on arrival, which is a quick and easy way to visit India for casual business visit or short business meetings. On making the online application, the traveler can arrive in India five days after the application and within thirty days, giving flexibility of twenty-four days in which to plan the travel.<sup>79</sup>

It can be used for business activities incident to a trip for another purpose. For example, one could visit a factory while on a family trip. There is no definition if what constitutes “casual business.” On making inquiries with the government we were verbally informed that a trip for 4 to 5 days just for a few meetings would be fine.<sup>80</sup>

The applicant is required to carry a copy of the ETA at the time of travel, validity of which will be 30 days from the date of arrival in India. Biometric details of the applicant will be mandatorily captured at the port of Immigration on arrival in India.<sup>81</sup>

Electronic Travel Authorization (ETA) is currently valid for entry through following nine designated Airports-Bengaluru, Chennai, Cochin, Delhi, Goa, Hyderabad, Kolkata, Mumbai & Trivandrum. This facility is made available in addition to the existing visa services.

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<sup>79</sup> Ismat Sarah Mangla, *India Launches ‘Tourist Visa On Arrival’ Program*, *Int’l Business Times* (Dec. 3, 2014), <http://www.ibtimes.com/india-launches-tourist-visa-arrival-program-1732663>.

<sup>80</sup> *Id.*

<sup>81</sup> *Australians unhappy with Indian biometric visa plan*, PLANET BIOMETRICS (Nov. 7, 2014), <http://www.planetbiometrics.com/article-details/i/2373/>.

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## Latin America and the Caribbean

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### I. Argentina: A New Civil and Commercial Code

Argentina adopted a new Civil and Commercial Code in September 2014.<sup>1</sup> Law Number 26,994 will enter into effect on January 1, 2016. Among numerous amendments that will affect everyday life of the Argentine society, the new Civil and Commercial Code introduces and specifically regulates certain sale intermediaries' contracts such as those dealing with franchise, agency, and concessions.

Under the law of Argentina (as in many other civil law countries), an agent includes a distributor who buys and resells good on behalf of a third party. There has been a consensus among academics and many practitioners on the idea that these types of long term relationships—particularly those which involve a high volume of sales, investments and operations carried over long periods of time—require more thorough protection of the agent and more specific regulation than had previously existed, especially because those relationships often result in a “vertical relationship that implies the prevalence of one of the parties—the producer—who imposes on the other the commercialization conditions through a boilerplate contract.”<sup>2</sup>

Under the law of Argentina, an agent is a person or entity who independently promotes businesses on behalf of a third party. Among the most significant regulations regarding agency contracts, the Code establishes that an agent is entitled to exclusivity: (a) in the businesses; (b) for the geographical zones; or (c) regarding persons specified in the contract. Moreover, the idea that the agent is neither a representative of the producer nor someone who assumes the risk of the operations he performs under the latter's name is reinforced and specifically regulated.

Another important aspect is the specific treatment of sudden termination, establishing that prior notice is mandatory and must be of one month per year of existence of the agency contract. Absence of prior notice of termination generates the obligation to pay compensation to the agent comprising the profit that the agent could have made during the prior notice period. Moreover, upon termination of the contract the agent is entitled

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\* Adrián Lucio Furman authored the section on Argentina. Lidia Ferranti and Alexandre L. Ribeiro do Valle authored the section on Brazil.

1. Law No. 26994, Oct. 8, 2014, [32985] B.O. 10 (Arg.).

2. Mauricio Boretto, *Los llamados “contratos de distribución” en el Código Civil y Comercial*, L. L. (Nov. 6, 2014), ADLA No. 32 (Dec. 2014).

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to receive compensation based on the new customers he obtained or the increased volume of sales attributable to his efforts. However, the law does not prescribe specific guidelines for determining these amounts. Still, however, the possibility of including reasonable “non-compete” clauses applicable to the agent after the contract’s termination is allowed and specifically regulated.

Regarding concession contracts (defined by the Code as those contracts where a party puts its business structure and organization in order to market goods provided by a producer, providing services, spare parts and accessories if also agreed), the Code establishes that the minimum agreeable term must be of four years, unless the producer provides the concessionary with sufficient facilities to perform the business. On those cases, the minimum term can be reduced to two years. Regarding sudden termination, the rules described above applicable to agents also apply.

Franchise agreements also receive a special chapter in the Code. Franchise agreements generally include any agreement that grants a person the right to use (directly or indirectly) trademarks, know how, brands, and names belonging to the franchisor, as long as there is a separate payment from the franchisee for the trademark license. Among the most important regulatory aspects is a four-year minimum term requirement (with exceptions for certain situations such as fairs or other short-term events). The Code also establishes that the franchise is exclusive for both parties, but it allows the parties to limit or exclude the exclusivity in their respective contract. A prohibition for the franchisee to assign the contract to third parties is also permitted (excepting monetary obligations, which can be assigned), with the exception of those contracts where sub franchising is permitted. A prior notice of one month per year of existence of the contract must be also given to terminate the contract, with a maximum of six months.

The specific regulation of these types of contracts under the new Civil and Commercial Code now clarifies the respective rights and obligations of the parties. Moreover, upon preliminary review, it can be noted that most of the regulations are in line with Argentine case law and experts’ opinions. However, the real and long lasting effects of these novel dispositions are yet to be experienced, considering that the Code will be valid and in full effect as from January 1, 2016, and case law regarding related conflicts will be produced years from now.

## **II. Brazil: A New Law to Regulate the Internet and Electronic Commerce**

In April 2014, the Brazilian government approved a new law providing for a civil rights-based framework for the Internet.<sup>3</sup> This Act establishes principles, guarantees, rights and duties relating to the use of the Internet in Brazil and determines performance guidelines for the nation, states, Federal District, and municipalities. The Law will regulate actions taken on the Internet, stating rights and duties for Internet users and for those that distribute content.

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3. Lei No. 12.965, de 23 de Abril de 2014, Diário Oficial da União [D.O.U.] de 24.04.2014 (Braz.).

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A. NEUTRALITY

Brazil is one of the few countries to address neutrality as a rule. This provision prohibits discrimination by Internet providers in certain services, protecting users by not allowing service providers to decrease the speed of the user's connection based on economic interests.<sup>4</sup> Furthermore, the information passed to the users must be precise and clear.

B. SECURITY

The new law requires that records of users' connections can be kept for a period of one year, and only under total secrecy. The information retained may contain only the IP address, date, and hour of the initial and final connections. The law also requires anonymity, so that one cannot store information about individual users except as stated in the previous sentence. There is the possibility that an interested party may request a court order to use the information as evidence in a lawsuit.<sup>5</sup>

C. MARKETING

For those who buy Internet services, the trend is toward improving the quality of the connection following the principle of neutrality. The new law will cause companies to create new digital marketing strategies to promote their products and services. Those who sell services must pay more attention to protecting all information about users in a way that respects their privacy and personal data.

D. REMOVAL OF CONTENTS AND RESPONSIBILITY

Where objectionable material is posted on the internet, the law provides that content can only be removed by court order and that the provider will not be held liable for reprehensible content posted by users. However, there are exceptions. Content must be removed without requiring a court order when there is a violation of any criminal law, for example, pedophilia, racism (hate speech), or violence. The rule is that the contents cannot be removed without a court order except where the content directly violates any criminal law.

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4. *Id.* art. 9.  
5. *Id.* art. 10.

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## Mexico

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### I. Introduction

2014 has been an auspicious year in Mexican law. Reforms to the energy and agricultural sectors, new money laundering statutes, developments in telecommunications, the implementation of oral trials, the integration of human rights regimes, and new open government policies, among other developments, have made Mexico's legal landscape as diverse as any in the world. These reforms are aimed at integrating Mexico more fully into the global marketplace, and making substantial efforts at integrating human rights, government access, and anti-corruption efforts part of the established legal regime.

With respect to the energy sector, President Enrique Peña Nieto signed into law the twenty-one component parts of a comprehensive energy reform years in the making. Eight months after introducing constitutional amendments to radically transform Mexico's hydrocarbon and electricity sectors, private investors may now begin new developments. Further agricultural reform is both an exciting and potentially divisive area of law

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as modern agriculture competes with Mexico's traditional communal land practices. The energy and agricultural sectors have been heavily regulated in the past, and any attempts to reform these sectors will have a tremendous impact on Mexican society. Complementing these reform efforts in the energy and agricultural sectors are attempts to open competition among Mexican and foreign companies, and eliminate money laundering from the marketplace. Exciting changes in telecommunications laws, for example, have allowed for greater competition.

Additionally, changes in Mexican jurisprudence have allowed for the implementation of oral trials in Mexico's judge-based system. This change, along with regulations allowing for open government, political and electoral reform, and the integration of human rights regimes into Mexican law, will grant Mexican citizens a greater voice in how the court system is run and justice is distributed. New constitutional protections to children and the environment demonstrate Mexico's ongoing concern for its most valuable natural resources.

## II. The Great Agricultural Reform

On January 6, 2014, President Peña Nieto announced the great agricultural reform.<sup>1</sup> President Peña Nieto said that a significant transformation in the agricultural sector legal framework would take place in 2014 by means of farmers' organizations and dialogue with legislators. He said that a modern and successful countryside is "essential" to achieving a prosperous nation, and that he will be a permanent ally of the agricultural sector so that farmers may reach dignified living conditions.

Agricultural reforms have yet to become a reality, but President Peña Nieto's announcement has sparked intense debate regarding the future of communal lands. Full private property ownership is regulated at the local level, while the administration of the communal lands is regulated at the federal level. There have always been differing opinions regarding communal property. Some question why these agricultural communities continue to exist. There are three clear reasons. The first reason is historical and intrinsic to Mexico. Social ownership existed in Mexico long before the Spanish arrival, and prior to the conquest of Mesoamerica. This regime was formally respected by the Spanish Crown, and lasted throughout the colonial period, during independence, the Porfiriato era, and was consolidated in the agricultural reform of 1915.

The second reason is derived from the social function of property established in the Constitution of 1917, a constitutional principle brought to fruition through the enactment of the equitable distribution of public wealth rule.<sup>2</sup> This redistribution granted rural farmers certain property rights in order to provide them with a livelihood, and allowed communal lands to be re-established.

The third reason is the economic function of property. Under Article 27 of the original Constitution, every owner was forced to work towards a social benefit, and land could not

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1. See Oscar Lopez, *Mexican President Announces Agrarian Reforms: 2014 Will Be 'Year of the Field'*, *LATIN TIMES* (Jan. 6, 2014, 9:04 PM), <http://www.latintimes.com/mexican-president-announces-agrarian-reforms-2014-will-be-year-field-142812>.

2. See Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 27, *Diario Oficial de la Federación* [DO], 5 de Febrero de 1917 (Mex.).

be left idle.<sup>3</sup> Today, more than 50 percent of the national land ownership is communal.<sup>4</sup> This fact obliges the State to respect that history and the constitutional principles that consolidated and formed these communities prior to making any changes.

### III. Oral Trials in Mexico

After centuries of conducting trials under a mixed-inquisitorial system, Mexico has shifted to an accusatorial system. The incorporation of this new paradigm aims to achieve a more fair administration of criminal justice.

In 2008, statistics showed that 85 percent of crime victims refused to testify because 98 percent of felonies went unpunished and the proceedings were frequently slowed, postponed, and delayed.<sup>5</sup> Moreover, most judges were not present during hearings, and the general assumption was that anyone could be corrupted.<sup>6</sup> The most important part of the reconstruction of the criminal system will be the introduction of oral trials.

In oral trials, judges will see and hear the evidence during public hearings, and defendants will be able to challenge abusers in a meaningful manner. Confession will no longer be the key component of a prosecution, as more weight will be given to scientific evidence and truthful testimony.

To date, only four out of the thirty-three jurisdictions are fully operational under the new model.<sup>7</sup> The deadline for all of the jurisdictions to implement the new law is June 2016. To assist in this process, Congress adopted a unified, single code for the entire country in March 2014.<sup>8</sup> This new criminal code is a major step towards the full implementation of the new system.

In order for the adversarial process to succeed, there must be a serious commitment towards the professionalization of all law enforcement bodies and meaningful training for legal professionals. All thirty-three jurisdictions have created public offices specifically entrusted with the task of coordinating with public and private institutions in their efforts to implement the accusatorial system, all under the control of a national secretariat (SETEC). Such entities advise and oversee the construction of proper facilities and the incorporation of state-of-the-art information technology for oral proceedings, as well as training in the new national code.<sup>9</sup>

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3. *See id.*

4. Jaime Andrés de la Llata Flores, *The Social Property in Mexico* (2004), <http://www.nass.usda.gov/mexsai/Papers/socialproperty.pdf>.

5. PRISMA CONSULTING LATINOAMÉRICA, JUICIOS ORALES EN MÉXICO (2011), *available at* <http://prismamx.net/pdfs/juiciosorales.pdf>

6. *See generally* TRANSPARENCY INT'L, <http://www.transparency.org> (last visited Apr. 4, 2015).

7. *See* CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R43001, SUPPORTING CRIMINAL JUSTICE SYSTEM REFORM IN MEXICO: THE U.S. ROLE 9 fig.2 (2013).

8. *See Mexico Enacts Uniform Criminal Procedure Code for the First Time in its History*, MEX. GULF REP. (Mar. 5, 2014), <http://www.mexicogulfreporter.com/2014/03/mexico-enacts-uniform-criminal.html>.

9. *See generally* SECRETARÍA TÉCNICA DEL CONSEJO DE COORDINACIÓN PARA IMPLEMENTACIÓN DEL SISTEMA DE JUSTICIA PENAL [SETEC], <http://www.setec.gob.mx> (last visited Apr. 4, 2015).

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**IV. Energy Reform**

On August 7, 2014, the Mexican Congress approved a set of bills that contain legislation to enact reforms to the energy sector.<sup>10</sup> The most important new legislation includes:

A. PEMEX Entitlements. The Ministry of Energy (SENER), with technical assistance from the National Hydrocarbons Commission (CNH), will grant *Petróleos Mexicanos* (PEMEX) “entitlements” to perform upstream activities in specific areas, provided it has the sufficient technical, financial, and performance capacity to undertake the activities required for each entitlement.

When performing works under any entitlements, PEMEX may work with the private sector through service and supply schemes. PEMEX may lose its entitlements through relinquishment or revocation by SENER for cause, however. The relinquished or revoked entitlements may be awarded to private companies by public bids, as determined by SENER.<sup>11</sup>

B. Private Sector Participation. As a result of the reforms, the private sector will be allowed to participate in competitive bids for upstream activities (i.e., the exploration and exploitation of oil and gas), either directly, through production-sharing agreements, profit-sharing agreements, or licenses, or indirectly, by means of a joint venture with PEMEX or service and supply agreements. The CNH may enter directly into any of the abovementioned contractual schemes with private sector companies.<sup>12</sup>

C. Booking of Reserves. PEMEX and private sector companies performing upstream activities under entitlements, as well as under contractual and licensing schemes, may book or report reserves, for accounting and financial purposes, provided the underlying documents clearly specify that underground hydrocarbons remain the property of Mexico.<sup>13</sup>

D. National Content. Beginning in 2015, companies involved in upstream activities will be required to comply with a minimum requirement for national content of 25 percent when performing such activities, except in deep and ultra-deep water operations where national content percentage will be determined by Mexico’s Ministry of Economy. The national content percentage will be gradually increased until it reaches a minimum of 35 percent in 2025.<sup>14</sup>

E. Tax Framework. Companies performing upstream activities will be subject to Mexico’s general tax framework.

F. Authorities. The most relevant governmental authorities in upstream activities are: (1) SENER, which is charged with selecting areas or fields for private sector participation, among other things; (2) the Ministry of Finance, which is charged with laying out economic and consideration aspects that will apply to public bidding processes, contracts, and licenses; and (3) CNH, which is charged with providing technical assistance to SENER,

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10. See Decreto por el que se expide la Ley de Hidrocarburos y se reforman diversas disposiciones de la Ley de Inversión Extranjera; Ley Minera, y Ley de Asociaciones Público Privadas [Decree on the Hydrocarbons Law], *Diario Oficial de la Federación* [DO], 11 de Agosto de 2014 (Mex.).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* transitorios 24.

organizing and calling public bids, awarding and executing public contracts, and determining general rules and guidelines for upstream operations.

G. Mexican Oil Fund. The “Mexican Oil Fund for Stabilization and Development” will be a sovereign fund of Mexico created by the Ministry of Finance as settlor and the Mexican Central Bank as trustee. Its main purpose is to receive, manage, and distribute income that results from PEMEX entitlements, and licenses and contractual schemes in upstream activities. The proceeds received by the Mexican Oil Fund will be used to pay private contractors of upstream activities, fund specific projects and funds, cover a portion of Mexico’s public expenditure, and invest in long term savings.

H. Private Sector Participation. Midstream activities (e.g., storage, pipelines, and bulk transport) and downstream activities (e.g., refining, processing of raw natural gas, and marketing and distributing products derived from crude oil and natural gas) may be performed by private sector companies through the issuance of permits authorized by SENER or the Energy Regulatory Commission (CRE), depending on the activity. Registration with the CRE is only necessary for the marketing of crude or refined oil products and gas.

I. Gasoline & Diesel Markets. Permits for the sale of gasoline and diesel by private sector companies will be authorized after January 1, 2016.<sup>15</sup> Prior to December 31, 2016, PEMEX will be the only company authorized to import gasoline and diesel; thereafter, the CRE will grant permits to private sector companies.<sup>16</sup>

J. Asymmetric Regulation for PEMEX. In order to procure a balanced oil and gas market, CRE will subject the first-hand sale of oil and gas and its derivatives to asymmetric regulation principles in order to limit PEMEX’s dominant position.<sup>17</sup> Asymmetric regulation principles are also meant to foster efficiency and competitiveness by allowing new players to participate in the oil and gas and derivatives markets.

K. New Regime for PEMEX. PEMEX and CFE will be transformed into productive companies that are owned by the Mexican State and will be participants in the oil and gas and electricity markets with non-regulatory roles, specific mandates, and preferential treatment in some activities. There will be a transitional period to allow a seamless transition of PEMEX and CFE into their new roles as productive state-owned companies. Regulatory and market coordination roles will be transferred to SENER, CNH, CRE, and the National Energy Control Center, among others.<sup>18</sup>

L. Labor Unions. Based on the number of employees and other factors specified by law, private participants in the oil and gas sector may be required to enter into collective bargaining agreements with labor unions. PEMEX’s union will have no exclusivity over other unions to enter into collective bargaining agreements with private companies.<sup>19</sup>

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15. *Id.* transitorios 14.

16. *Id.*

17. Francisco Barnés de Castro, *The Paradigm Change in the Mexican Hydrocarbons Sector*, BECOME KINETIC (Jan. 25, 2015), available at <http://www.becomekineti.com/img/Barnes%20The%20Paradigm%20Change%20in%20the%20Mexican%20Hydrocarbons%20Sector.pdf>.

18. *Id.*

19. *Mexico Enacts Uniform Criminal Procedure Code for the First Time in its History*, *supra* note 8.

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**V. The Competition Law**

On July 7, 2014, the “Competition Law” entered into force.<sup>20</sup> The Competition Law maintains most of the concepts and provisions of the Competition Law that has been in force since 1993, while strengthening the Federal Economic Competition Commission (COFECE). The new law introduces novel concepts aimed at increasing competition in all product and service markets. It represents a radical change in Mexican antitrust policy and is intended to generate competition in an open market economy.

The first accomplishment of the Competition Law is the creation, within COFECE, of an “Investigating Authority” to strengthen its investigatory authority and practices. The Investigating Authority is responsible for conducting investigations into monopolistic practices and illegal concentrations. The limitations period to file a claim for damages will be tolled by the commencement of an investigation. The goal of this reform is to increase the likelihood of success in private actions for damages. These private actions may be styled either as individual actions or as class (collective) actions.<sup>21</sup>

COFECE’s investigation will serve as the basis for processing complaints before federal courts specializing in economic competition issues, and will be used to prove the illegality of the conduct (e.g., engaging in the monopolistic practice or the prohibited concentration). Under the Competition Law, COFECE will now be obligated to respond to requests for rulings and to issue general guidelines on free competition matters upon request by private parties.

On the cartel side, exchange of information between competitors has been defined as an independent monopolistic practice when such exchange results from, or if the purpose of which is, any of the other conducts classified as absolute monopolistic practices (i.e., price-fixing, supply restriction, market division, or bid-rigging). Exchange of information was also incorporated as a criminal offense in the Federal Criminal Code; this crime does not require proof of intent. Individuals involved in these exchanges of information now face severe consequences; for example, up to ten years of imprisonment.<sup>22</sup>

COFECE now has the authority to conduct studies in market power and to then order measures to eliminate “barriers to free competition,” including ordering the divestiture of assets. As in the case of essential inputs, there is no precise definition of “barriers to free competition,” and the Competition Law indicates only that they may be: any structural characteristics of the market, facts or acts of economic agents with the purpose or effect of impeding competitors’ access or limiting their ability to compete in the markets; those that impede or distort the free competition process; and any legal provisions issued by any level of the Government that unduly impede or distort the free competition process.<sup>23</sup>

The most relevant change to merger control regulations in Mexico is the migration to a suspensory merger control regime. This change eliminates COFECE’s limit on issuing stop orders only for those transactions representing potential risks to the competition process. Under the Competition Law, all transactions must now wait to obtain clearance

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20. Decreto por el que se expide la Ley Federal de Competencia Económica y se reforman y adicionan diversos artículos del Código Penal Federal [Decree on the Competition Law], Diario Oficial de la Federación [DO], 23 de Mayo de 2014 (Mex.).

21. *Id.*

22. *Id.* art. 254a.

23. *Id.* art. 3.

before closing—even those transactions where it is evident that there will be no harm to the affected markets. Closely related to the foregoing reforms is the extension of the resolution period from thirty-five business days to sixty business days.<sup>24</sup>

The merger control thresholds have also been modified to consider only annual sales originated in Mexico and/or assets in the Mexican territory of the parties, instead of such amounts at a global level. Additionally, the regulatory burdens for the parties have been increased. For example, additional elements have been incorporated into the list of “basic” information required. Moreover, COFECE has been authorized to require information at any stage during the merger process, terms to require information have been extended, and additional formal requirements have been set for documents and translations.

## **VI. The Mexican Anti-Money Laundering Statute**

On October 17, 2012, the Federal Statute for the Prevention and Identification of Transactions with Illicit Resources (the Statute) was published and enacted.<sup>25</sup> On July 17, 2013, the Statute came into effect. It is designed to protect the Mexican economy through the establishment of measures and procedures that will prevent and detect transactions involving unlawful resources. The main governmental authorities on the subject are the Ministry of Treasury and Public Credit (Hacienda) for the general application and enforcement of the Statute; the Attorney General’s Office through the Special Unit of Financial Analysis, which focuses on money laundering transactions; and the Financial Intelligence Unit, which acts as a general prosecutor.

Operations that engage in criminal offenses punishable by the Federal Penal Code (e.g., terrorism, and financing terrorism)<sup>26</sup> often engage in money laundering through the financial system. Pursuant to the Statute, such non-financial activities<sup>27</sup> are identified as “Vulnerable Activities.” When a person or entity performs a Vulnerable Activity, it is then obligated to maintain certain information for its files (primarily “Know Your Customer” information, or KYC)<sup>28</sup> that shall be made available to the authorities for at least five years. Entities engaging in Vulnerable Activities must also appoint a responsible representative to Hacienda.<sup>29</sup>

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24. *Id.* art. 90.

25. Decreto por el que se expide la Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita [Decree on the Federal Statute for the Prevention and Identification of Transactions with Illicit Resources], Diario Oficial de la Federación [DO], 17 de Octubre de 2012 (Mex.).

26. See Código Penal Federal [CPF] [Federal Criminal Code], *as amended*, arts. 400 bis–400 bis 1, 139–139 quinquies, 148 bis–148 quarter, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

27. Although Financial Entities and their activities are also regulated by the Statute, those entities are regulated by a specific chapter.

28. See Decree on the Federal Statute for the Prevention and Identification of Transactions with Illicit Resources, art. 18; Reglamento de la Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita [Regulations for the Federal Statute for the Prevention and Identification of Transactions with Illicit Resources], arts. 12–20, Diario Oficial de la Federación [DO], 16 de Agosto de 2013 (Mex.).

29. In the event that a responsible person is not appointed by the entity, such function shall fall upon the manager(s) of the entity.



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Moreover, if the Vulnerable Activities transaction involves an amount over certain thresholds<sup>30</sup> (or if a group of transactions of the same nature accrue an amount that exceeds or equals such thresholds),<sup>31</sup> it will be identified and reported<sup>32</sup> through a special website established by Hacienda.<sup>33</sup> The Financial Intelligence Unit has authority to gather information that it considers useful in identifying and preventing money laundering operations.

Perhaps the most remarkable consequence of the Statute's enactment in business circles has been the limitations that it represents for several industries. For instance, brokers, property managers, real estate developers, notaries public, and any other persons involved in the real estate sector must now satisfy several formalities and gather certain information before entering into a transaction. These requirements have inaugurated a general "slow down" in the operation of real estate properties.

Another sector that has been significantly impacted by the Statute is the jewelry business. Prior to the enactment of the Statute, transactions involving jewels were a common and accepted practice. Because the Statute bans the use of jewelry to satisfy obligations, this market has now been dramatically restricted (if not completely extinguished).

All notices of Vulnerable Activities shall be submitted not later than the seventeenth calendar day of the month following the occurrence of the Vulnerable Activity.<sup>34</sup> Coincidentally, this is the same due date for the filing of monthly tax returns.

Cash transactions are also limited by the Statute; they are no longer allowed above certain thresholds for operations in certain areas, such as real estate, *in rem* rights, and vehicles.

Violations of the Statute may give rise to administrative and criminal sanctions including fines, minimum wages, revocation of licenses to notaries public and commercial public brokers, and up to twenty years of imprisonment. Punishments will vary according to the circumstances, the type of infringement, and other contextual elements. The economic sanctions and criminal liabilities are significant deterrents, as is the fact that violations of the Statute create an undesirable background for entities and individuals before Hacienda.

Criticism of the Statute arose in economic circles because of the heightened administrative burdens that it creates for the normal day-to-day operation of businesses. Although the Statute came into force on July 17, 2013, as of September 2014 several entities and individuals are still in the early stages of adopting its requirements and are currently seeking to abide by it and its secondary regulations.

The obligations contained in the Statute have also had an effect on commercial transactions. While Mexico's international reputation in terms of regulation against money laun-

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30. Decree on the Federal Statute for the Prevention and Identification of Transactions with Illicit Resources, art. 17.

31. Regulations for the Federal Statute for the Prevention and Identification of Transactions with Illicit Resources, art. 7.

32. Decree on the Federal Statute for the Prevention and Identification of Transactions with Illicit Resources, arts. 17–18.

33. *Portal de Prevención de Lavado de Dinero [Portal for the Prevention of Money Laundering]*, SECRETARÍA HACIENDA & CRÉDITO PÚBLICO, <https://sppld.sat.gob.mx/pld/interiores/sppld.html> (last visited Apr. 5, 2015).

34. Decree on the Federal Statute for the Prevention and Identification of Transactions with Illicit Resources, art. 23.

dering activities has improved, the regulatory limitations have caused difficulties for those who perform Vulnerable Activities as a core business. As a point of comparison, the Statute contains at least 120 more provisions than the laws of the United States. Sales and operations have been significantly reduced in the face of the aforementioned limitations.<sup>35</sup>

## VII. Mexican Telecommunications Developments

A 2013 constitutional amendment<sup>36</sup> initiated a transformation of the telecommunications and broadcasting industries. The reforms have been further accomplished through the adoption of the new Federal Telecommunications and Broadcasting Law (TBL), published on July 14, 2014.<sup>37</sup> Effective as of August 13, 2014, the TBL repealed both the Federal Telecommunications Law (FTL) and the Federal Radio and Television Law. The TBL implemented and expanded the constitutional amendment concerning the telecommunications and antitrust legal framework adopted in June 2013. Among other things, the TBL (1) states the Federal Institute of Telecommunications' (IFT's) powers, (2) establishes access and interconnection procedures, and (3) defines a preponderant economic agent's obligations along with its asymmetric regulation.

Article 7 of the TBL reaffirmed provisions set out in the 2013 constitutional amendment, such as IFT's autonomy through its juridical personality and own patrimony. Article 7 also reaffirms IFT's role in the promotion and regulation of all broadcasting and telecommunications matters, including IFT's exclusive exercise of authority in antitrust matters affecting both markets. In particular, IFT will exercise its exclusive authority affecting antitrust matters under its jurisdiction with respect to the provisions of Article 28 of the Constitution, the TBL, the Federal Competition Law, and other applicable regulations.<sup>38</sup>

Article 129 of the TBL provides the rules necessary to achieve network access and set interconnection rates between telecom operators following a two-step procedure: (1) holders of licenses to public telecommunication networks shall interconnect their networks, and to this end shall reach an agreement within sixty calendar days from the date of a request; and (2) if said term has elapsed and the parties have not executed an agreement, the interested party shall request IFT to rule on the interconnection rates, conditions, and terms not agreed with the other party.<sup>39</sup>

Proceedings related to interconnection matters before the IFT can be terminated by either (1) the IFT's decision on interconnection matters which shall be issued no later than thirty working days from the parties' deadline to make allegations<sup>40</sup> or (2) before IFT issues a decision on the dispute, by the parties' IFT-ratified agreement. According to

35. See Jesús Vázquez, *Ley Antilavado en México, Más Rigurosa que la de EU [Money Laundering Law in Mexico, More Stringent than US]*, *ECONOMISTA* (Aug. 6, 2014), <http://economista.com.mx/sistema-financiero/2014/08/06/ley-antilavado-mexico-mas-rigurosa-que-eu>.

36. *Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 60., 70., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones* ("Decreto"), *DIARIO OFICIAL DE LA FEDERACIÓN* [DO], 11 de Junio de 2013 (Mex.).

37. *Ley Federal de Telecomunicaciones y Radiodifusión [LFTR]* [Telecommunications and Broadcasting Law], *as amended*, *Diario Oficial de la Federación* [DO], 14 de Julio de 2014 (Mex.).

38. *Id.* at Art. 128.

39. *Id.* at Art. 129, sec. VI.

40. *Id.*

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Article 129, paragraph 2, section IX, the IFT's decision on interconnection rates will be effective no later than thirty days from the day after either notification of the IFT's decision or the parties' ratification of an agreement before the IFT.<sup>41</sup> Telecom operators that fail to comply are subject to the IFT's power to apply sanctions. The IFT's interconnection decisions can be appealed only through a claim of "indirect *amparo*," which does not suspend the regulatory decision during the pendency of the *amparo* proceeding before the court.

The TBL confirms the IFT's ability to impose asymmetric obligations on any operator found to be "preponderant" in each of the telecommunications or broadcasting sectors. "Preponderant" economic operators are defined in Article 262 of the TBL as operators in the telecommunications or broadcasting sectors which hold a national participation rate that exceeds 50% of users, subscribers, audience, traffic on its networks or used capacity thereof.<sup>42</sup>

Among the most important obligations the IFT can impose on preponderant telecom operators are the following:<sup>43</sup> (1) obligations to provide interconnection on a non-discriminatory basis, (2) unbundling local loop services, (3) infrastructure sharing, and (4) the obligation to obtain IFT's prior approval for all service pricing to consumers.

As already shown in its March 2014 decisions, the IFT has the power to determine preponderant economic operators in the telecom and broadcasting sectors and to impose asymmetric interconnection rates on them. First, in the decision of March 6, 2014, the IFT determined that Telmex, Telnor, and Telcel were preponderant economic operators in the telecom sector.<sup>44</sup> Second, in the decision of March 26, 2014, a plenary gathering of the IFT set the asymmetric interconnection rates applying to telecom preponderant economic operators,<sup>45</sup> which will remain in effect from April 6 until December 31, 2014.<sup>46</sup> However, the new TBL goes further by stating that a preponderant economic operator does not have the right to charge for termination of traffic in its own network.<sup>47</sup> Therefore, calls originating from non-preponderant operators calls completed in the preponderant operators' networks are not subject to interconnection charges at all.

Although the purpose of Article 131 of the TBL is to unravel the highly concentrated Mexican telecom market and to foster competition by imposing a zero interconnection rate for calls completed in the preponderant operators' networks, Article 131 may be subject to constitutional challenge. Indeed, Article 131 subtracts from IFT the constitutional power of imposing measures on preponderant economic operators to avoid results affecting competition—including asymmetric interconnection rates—assigned to the new regu-

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41. *Id.*

42. *See, supra*, note 16.

43. *See, supra*, note 16.

44. Instituto Federal de Telecomunicaciones, *De la Sesión del Pleno del Instituto Federal de telecomunicaciones en su V Sesión Extraordinaria del 2014, Celebrada el 6 de Marzo de 2014* [Plenary session of IFT Committee at its V Extraordinary Session] (Mar. 6, 2014), available at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_EXT\\_060314\\_76\\_Version\\_Publica\\_Hoja.pdf](http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_76_Version_Publica_Hoja.pdf).

45. Instituto Federal de Telecomunicaciones, *Acuerdo Mediante el cual el Pleno del Instituto Federal de telecomunicaciones determina las tarifas Asimétricas por los servicios de Interconexión que cobrará el agente económico preponderante*, (Mar. 26, 2014), available at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_260314\\_17.pdf](http://apps.ift.org.mx/publicdata/P_IFT_260314_17.pdf)

46. Press Release, América Móvil, América Móvil Informa (March 31, 2014), available at [http://www.americamovil.com/mailling/AMX\\_about\\_IFETEL.pdf](http://www.americamovil.com/mailling/AMX_about_IFETEL.pdf).

47. TBL, *supra* note 38 at Art. 131, sec. a.

latory authority by Mexico's Constitution. Therefore, Article 131 may violate IFT's autonomous constitutional power to set asymmetric interconnection rates on preponderant economic operators.<sup>48</sup> IFT's constitutional power has already been exercised by the new regulatory authority through setting the asymmetric interconnection rates applying to preponderant economic operators in the decisions of March 6 and March 26, 2014.<sup>49</sup>

While the procedure of leaving IFT free to decide whether imposing a zero interconnection rate or fixing asymmetric interconnection rates on an agent with substantial power respects IFT's constitutional powers to encourage competition by imposing either fair or cost-based asymmetric interconnection rates, the same may not be asserted for the mandatory statutory zero interconnection rate applied on a preponderant economic agent through Article 131, section (a) of the TBL.

As a result of the new, strong regulatory powers enjoyed by the IFT, the América Móvil Group has declared its intention to divest subscribers and assets to reduce its market share below 50% in order to avoid the stringent dominant operators asymmetric regulation set by the FTL.<sup>50</sup>

The new TBL seems to be the cure for the highly concentrated Mexican telecom market because, along with the Telecom Constitutional reform, it promotes conditions enabling the entry of new telecom operators and fostering competition, to the benefit of Mexican consumers.

### VIII. Recent Developments in Human Rights Law

The Supreme Court of Justice published two important human rights rulings on April 2, 2014.<sup>51</sup> The first ruling declares that the human rights regime contained in the Constitution and in international treaties constitutes the controlling parameters of constitutional law. In accordance with these new criteria, the validity of norms and the acts of authority that form part of the Mexican legal system must be analyzed. This ruling also establishes that when the constitutional standard sets an express restriction on the exercise of human rights, the constitutional standard prevails. In other words, the constitutional restriction will prevail even if it is more harmful to the person.

The second important ruling found that decisions issued by the Inter-American Court of Human Rights is binding on Mexican judges, whenever such a ruling is more favorable to the person. Additionally, whenever possible, Mexican jurisprudence should be harmonized with the Inter-American Court's case law. When this is not possible, the applicable standard should be that which offers a greater protection to human rights.

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48. Decreto, *supra* note 6, at transitory art. 8.

49. Instituto Federal de Telecomunicaciones, *De la Sesión del Pleno del Instituto Federal de telecomunicaciones en su V Sesión Extraordinaria del 2014, Celebrada el 6 de Marzo de 2014* [Plenary session of IFT Committee at its V Extraordinary Session] (Mar. 6, 2014), available at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_EXT\\_060314\\_76\\_Version\\_Publica\\_Hoja.pdf](http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_76_Version_Publica_Hoja.pdf).

50. Press Release, América Móvil, América Móvil Informs (July 8, 2014), available at [http://www.americamovil.com/mailling/AMX\\_Strategic\\_Committee.pdf](http://www.americamovil.com/mailling/AMX_Strategic_Committee.pdf).

51. 10th Registration: 2006224. Instance: plenary session. Type of thesis: jurisprudence. Source: Gazette of the Federation Judicial Weekly. Book 5, April 2014, Topic I. subject (s): constitutional. Thesis: P. / j. 20/2014 (10a). Page: 202. (Thesis 293/2011 (ruling of September 3, 2013)).

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The rulings are contradictory. The Supreme Court has implicitly held that the Mexican Constitution may restrict human rights—even when these rights are recognized internationally. At the same time, the Supreme Court explicitly supports the obligatory nature of human rights law as laid out by the Inter-American Court of Human Rights (IACHR). This approach is inconsistent with the Inter-American system of human rights protections, of which Mexico is a member. While the Supreme Court rulings place internationally recognized human rights law on par within the Mexican Constitution, they also declare that these rights can be restricted by the Constitution itself. In addition, while the Supreme Court established that IACHR rulings are always binding, it remains unknown how the legal precedents established by the IACHR will relate to state constitutions.

**IX. Constitutional Guarantees on the Rights of Girls, Children, and Adolescents**

In November 2014, the Mexican Senate overwhelmingly approved eighteen amendments to the General Law on the Rights of Girls, Children, and Adolescents (the General Law). These amendments reform various provisions of the General Law and provide for services for the care of minors.<sup>52</sup>

The General Law is intended: (1) to recognize girls, children, and adolescents as rights holders; in accordance with the principles of universality, indivisibility, and interdependence referenced in Article 1 of the Mexican Constitution; (2) to guarantee the full exercise, respect, protection, and promotion of the human rights of children and adolescents in accordance with the Constitution and international treaties; (3) to create and regulate integration, organization, and functioning of the national system for a comprehensive approach to the protection of the rights of girls, children, and adolescents, so that the State meets its responsibility to guarantee protection, prevention, and restitution; (4) to establish the managing principles and criteria that guide the national policy in the field of the rights of children and adolescents; and (5) to establish the general basis for the participation of private and social sectors in actions aimed at the protection and exercise of the rights of children and adolescents.<sup>53</sup>

The General Act requires government authorities to take all necessary actions and appropriate measures in decision-making where the interests of children and adolescents are involved. This means that when different options arise, the authorities must choose the option that more effectively applies the guiding principle of human rights granted to children, girls, and adolescents in the General Act.

The respective authorities shall also incorporate into their budgets a sufficient allocation of resources that would allow them to comply with the actions laid down in the new law. In the same way, the chamber of deputies of the Congress of the Union, the local Congress, and the Legislative Assembly of the Federal District will also budget resources from their respective budgets to comply with the actions laid down in the law.

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52. Coordination of Social Communication. Senate of the Republica Comunicado-512. 6 de Noviembre de 2014, *available at* <http://comunicacion.senado.gob.mx/index.php/informacion/boletines/16714-senadoras-especialistas-representantes-sindicales-y-academicos-abordan-el-tema-de-transparencia-sindical.html>.

53. Article 1 of the General Act. Pages 198 and 199. Parliamentary Gazette, Legislative Palace of San Lazaro, Thursday, October 23, 2014, year XVII, number 4140-A. LXII Legislature, House of Representatives.

## X. Electoral Reform

The electoral reform approved by the Mexican Congress in December 2013 and by a majority of the legislatures of the States in January 2014 was published in the official journal of the Federation (DOF) on February 10, 2014.<sup>54</sup> On February 10, the following thirty-one articles of the Mexican Constitution were reformed, added, or repealed: articles 26, 28, 29, 35, 41, 54, 55, 59, 65, 69, 73, 74, 76, 78, 82, 83, 84, 89, 90, 93, 95, 99, 102, 105, 107, 110, 111, 115, 116, 119, and 122, as well as twenty-one transitory articles. The electoral reform law includes an important combination of institutions and topics of great importance for the State as a whole, and for the Federation, States (federal entities), the Federal District, and municipalities. Its main objective is to standardize the principles under which federal and local elections are organized, and thus to ensure greater certainty, security, and quality in Mexico's electoral democracy.

Institutions and subjects addressed in the constitutional reforms include: institutions and electoral procedures (e.g., the national electoral system, the national electoral institute, elections and the local government agencies in electoral matters, electoral justice, political parties, independent candidates, the re-election of legislators and city councils, integration of the local Congress and the legislature of the Federal District electoral crimes, government propaganda and other laws); the creation of the Office of the Attorney-General and the State Prosecutor's offices; matters related to the Executive Branch as to the taking of possession of presidential reports, the possibility of forming coalition governments and to restrict or suspend guarantees, as well as the new powers of the legal adviser of the Government; concerning the new powers and sessions of the Congress, the Chambers of the Senate and its deputies, and the repeal of a Standing Committee. It also includes reforms to the national system of planning and evaluation of social policy.<sup>55</sup> The constitutional reform also created a new governmental body called the National Electoral Institute (INE), which substitutes of the Federal Electoral Institute (IFE).

"The INE will be run by an advisory board with a Chairman and ten advisers, modeled after the college of justices in the Supreme Court of the nation." However, the treatment of the candidates who enroll in the convention will be assisted by an advisory body that consists of seven people, three appointed by the political leadership organ of the Chamber of Deputies, two by the national human rights commissions (CNDH) and two from the Federal Institute for Access to Public Information and Data Protection (IFAI).<sup>56</sup>

Additionally, the Electoral Reforms amended campaign-spending rules. "Something very important in these reforms is the control of expenses where the General Council of the INE determined the rules under which the control of expenditure relating to electoral 'pre-campaigns' and the process of obtaining citizen support will begin in 2014 . . . The 'pre-campaigns' and the process of obtaining support citizen beginning in 2015, will be

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54. DECRETO por el que se reforman, adicionan y derogan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia política-electoral [DECREE by amending, supplementing or repealing certain provisions of the Constitution of the United States of Mexico, in political-electoral matters], *as amended*, DIARIO OFICIAL DE LA FEDERACION [DO], 10 de Febrero de 2014 (Mex.).

55. *Id.*

56. See Decree amending political-electoral matters, *supra* note 52.

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governed by the rules of control which were adopted by the General Council of the INE on November 19, 2014.<sup>57</sup>

The new electoral regulations related to campaign spending regulates the national system of accounting, the national registry of suppliers, approves the accounting and fiscal criteria for the whole country, and puts padlocks on the use of electronic purses through cash, travel expenses, and Repaps (receipts for political activities), among other things. It will have national scope and apply to parties, candidates, and independent candidates.<sup>58</sup>

To strengthen control procedures, the Commission's oversight, through the technical unit, will carry out the monitoring of newspapers, magazines, and other printed media, as well as general entertainment and the like, and will include enforcement tools and metrics.

On May 23, 2014, a General Law related to political institutions and electoral procedures was also published in the DOF, reforming the laws related to political parties, electoral offenses, and appeals in electoral matters.<sup>59</sup>

### **XI. Marine Waste Dumping Act**

On January 17, 2014, a new law related to dumping of waste in marine areas (the Act) was published in the DOF.<sup>60</sup> The purpose of the Act is to control and prevent pollution or alteration of marine resources. Under it, the Secretary of the Navy is empowered to grant and cancel dumping permits, inspections, investigations, and issue reports and resolutions. The Secretary of the Navy is also empowered to make determinations and impose sanctions, set preventive measures, shooting ranges, and may also participate in national and international forums on dumping, among other activities. The Secretary of the Navy is empowered to implement preventive measures that will prevent pollution of the marine environment and has the authority to take immediate action in case of emergencies. The destruction and sinking of ships or aircraft, including their ammunition, are considered preventive measures.<sup>61</sup>

At the same time, the Secretary of the Navy is empowered to evaluate the source, conditions, and effect of shedding. The Secretary of the Navy has the authority to grant appropriate permissions to individuals or corporations of either Mexican nationality or foreigners who meet all requirements of law and who act in accordance with official Mexican standards, technical studies, and applicable scientific information.

The Act establishes the offenses, penalties, and procedures for violations. Article 37 provides that anybody who "dumps" in violation of the Act shall have the responsibility to remediate and repair any environmental damage to the marine environment, in addition

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57. Instituto Nacional Electoral [National Electoral Institute], Agreement INE/CG203/2014 (General Council Agreement by INE in which accounting rules and oversight of primaries are determined in the electoral process 2014-2015) Sept. 25, 2014, *available at* <http://portales.te.gob.mx/consultareforma2014/node/5683>.

58. *See generally, id.*

59. Instituto Nacional Electoral [National Electoral Institute], Agreement INE/CG93/2014 (General Council Agreement by INE in which Transition Rules in the field of Auditing are determined.), July 9, 2014, *available at* <http://norma.ife.org.mx/documents/27912/310245>.

60. DECRETO por el que se expide la Ley de Vertimientos en las Zonas Marinas Mexicanas [DECREE on the Law of Dumping in Mexican Marine Zones is issued], *as amended*, DIARIO OFICIAL DE LA FEDERACION [DO], 17 de Enero 2014 (Mex.).

61. *Id.*

to any administrative, criminal, or civil sanctions that also require remediation and restoration of the site to its pre-dumping condition. Additionally, when remediation or restoration is not possible, violators will be responsible to pay the State sufficient compensation that will be quantified by the Secretariat on the basis of the allocation or damage to the marine environment.

## **XII. Constitutional Reform, Legal Transparency, and Access to Information**

On February 7, 2014, the Mexican government enacted legislation that ensures transparent government to its citizens, and provides administrative procedures to enforce this right (the Transparency Act).<sup>62</sup> The Transparency Act reforms are enumerated as follows:

(a) All information in the possession of any authority, entity, or organ of the executive, legislative, and judicial branches, autonomous bodies, or politicians, or any person or entity that receives public resources to exercise or perform acts of public authority at the federal, state, and municipal level, is public and may only be utilized for reasons of public interest and national security, under the terms specified in the law. The principle of maximum disclosure will prevail at all times.

(b) All authorities should document any activity resulting from the exercise of its powers or functions.

(c) Establish mechanisms for access to information and expeditious review procedures before impartial and autonomous specialized agencies.

(d) The authorities shall preserve all documents in administrative files and shall update and publish them through electronic means.

(e) Greater power to the Federal Institute for Access to Information and Data Protection (IFAI), which is an autonomous, specialized, impartial, and collegiate body with operational, budgeting, and decision-making autonomy. IFAI is charged with guaranteeing the right to access public information, issuing decisions on denials of requests for access to information, and protecting personal data.<sup>63</sup>

(f) Establishes what information can be classified as confidential or reserved.

(g) The resolutions issued by IFAI shall be binding.

(h) All authorities and public servants are obliged to assist IFAI.

The most far-reaching reform is the requirement that all government authorities ensure transparency and access to information: to (1) the Federal Executive power, Federal public administration and the Attorney General of the Republic; (2) the legislative Federal power, composed of the Chamber of Deputies, the Chamber of senators, the Permanent Commission and any of its bodies; (3) the Judicial power of the Federation and the Council of the Federal judiciary; (4) the autonomous constitutional bodies; (5) federal administrative tribunals; and (6) any other federal body.<sup>64</sup>

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62. DECRETO por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de transparencia [DECREE by amending and supplementing various provisions of the Constitution of the United Mexico, on transparency], *as amended*, DIARIO OFICIAL DE LA FEDERACIÓN [DO], 7 de Febrero 2014 (Mex.).

63. See Instituto Federal de Acceso a la Información y Protección de Datos at <http://inicio.ifai.org.mx/SitePages/ifai.aspx> (last visited November 26, 2014).

64. Transparency Law, *supra* note 60, Art. 3



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## Middle East

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### I. Kuwait

#### A. PUBLIC PRIVATE PARTNERSHIPS

Law No. 116 of 2014 (PPP Law)<sup>1</sup> was issued on 17 August 2014 to replace an earlier law addressing public private partnerships, Law No. 7 of 2008.<sup>2</sup> The Higher Committee of the Partnership Projects between the Public and Private Sectors was established in November 2014 in accordance with the PPP Law.<sup>3</sup> The Partnerships Technical Bureau was replaced by the Public Entity for Partnerships between the Public and Private Sectors.<sup>4</sup> The PPP Law is rendered in effect as of the date of issuance of the Implementing Regulations.<sup>5</sup> Among other things, the PPP Law increases the allowed project investment period to 50 years commencing from the date of finalization of the construction and preparation works or development works.<sup>6</sup> One important change in the PPP Law is the inclusion of provisions that would allow investors to pledge or offer as collateral its receivables from the project and/or shares in the project company.<sup>7</sup>

#### B. ELECTRONIC TRADING

Law No. 20 of 2014 (Electronic Trading Law)<sup>8</sup> was issued on 23 February 2014. Effective upon the issuance of the Implementing Regulations,<sup>9</sup> the law consists of eight chapters dealing with: (1) Definitions of e-trade means and related matters;<sup>10</sup> (2) the scope of

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1. Law No. 116 of 2014 Regarding Public Private Partnerships, Official Gazette No. 1197 (17 August 2014) (Kuwait).

2. Law No. 7 of 2008 Regulating Public Private Partnerships (10 February 2008) (Kuwait).

3. Law No. 116 of 2014, *supra* note 1 at arts. 2, 47.

4. *Id.* arts. 4, 47.

5. *Id.* art. 47.

6. Law No. 116 of 2014 Regarding Public Private Partnerships, art. 18, Official Gazette No. 1197 (17 August, 2014) (Kuwait).

7. *Id.* art. 23.

8. Law No. 20 of 2014 Concerning Electronic Transactions (23 February 2014) (Kuwait).

9. *Id.* arts. 44, 46.

10. *Id.* art. 1.

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application of the E-Trade Law;<sup>11</sup> (3) characteristics of an electronic document and register;<sup>12</sup> (4) electronic signature conditions and legal effect;<sup>13</sup> (5) government electronic documents and signatures;<sup>14</sup> (6) electronic payment conditions and legal effect;<sup>15</sup> (7) data protection and confidentiality;<sup>16</sup> and (8) E-trade crimes and penalties.<sup>17</sup>

C. CONSUMER PROTECTION

Law No. 39 of 2014 (Consumer Protection Law)<sup>18</sup> was issued on 8 June 2014. Under this law, suppliers must place on each product, in the Arabic language, among other things: the expiry date, the risks associated with use or consumption, the contents, and the price of the product.<sup>19</sup> Further, suppliers are not allowed to market products until a license from the relevant administrative authorities is obtained.<sup>20</sup> Penalties for the violation of the Consumer Protection Law may reach KD 20,000 and imprisonment of up to four years in certain cases.<sup>21</sup> Only the Public Prosecutor can initiate investigations in regard to crimes under the Consumer Protection Law.<sup>22</sup>

D. ENVIRONMENTAL PROTECTION

Law No. 42 of 2014 (Environmental Protection Law)<sup>23</sup> was issued on 13 July 2014 to replace an earlier law addressing environmental matters, Law No. 21 of 1995, as amended.<sup>24</sup> The Implementing Regulations for the Environmental Protection Law are expected to be issued in early 2015.<sup>25</sup> The highlight of the Environmental Protection Law is the long and detailed penalty provisions that can be applied to those who violate the Environmental Protection Law and Implementing Regulations when issued. Of particular note is the penalty of up to KD1 million as well as the death penalty or life imprisonment for violations of provisions relating to disposal of nuclear waste.<sup>26</sup>

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11. *Id.* arts. 2-7.

12. *Id.* arts. 8-17.

13. *Id.* arts. 18-25.

14. Law No. 20 of 2014 Concerning Electronic Transactions, arts. 26, 27. (23 February 2014) (Kuwait).

15. *Id.* arts. 28-31.

16. *Id.* arts. 32-36.

17. *Id.* arts. 37-46.

18. Law No. 39 of 2014 Relating to Consumer Protection (8 June 2014) (Kuwait).

19. *Id.* arts. 12, 13

20. *Id.* art. 25.

21. *Id.* art. 27.

22. *Id.* art. 39.

23. Law No. 42 of 2014 Regarding Protection of the Environment (13 July 2014) (Kuwait).

24. Law No. 21 of 1995 Establishing the Public Authority for the Environment (2 July 1995) (Kuwait).

25. *Id.* art. 179

26. *Id.* art. 130.

## Russia and Ukraine

GEORGY BORISOV, SERGEI KOROVKIN, AND OLEKSANDER PLOTNIKOV\*

### I. Russia

In 2014, the Russian State Duma introduced amendments to Russian law concerning mass media and personal data protection that may significantly impact foreign companies doing business in the Russian Federation. While the amendments discussed in this article were under consideration for some time, their implementation reportedly was accelerated in light of European Union and the United States sanctions against Russia due to the controversial Russia-Ukraine situation. However, these amendments will not take effect until 2016, allowing foreign companies to adjust to the new requirements and await further clarifications from the relevant Russian authorities.

#### A. FOREIGN OWNERSHIP IN RUSSIAN MASS MEDIA WILL BE LIMITED TO 20%

Amendments<sup>1</sup> to the Russian Law on Mass Media<sup>2</sup> (the “Media Amendments”) significantly limit the ownership share that a foreign company or individual may have in a mass-media organization. Before the Media Amendments, the restriction applied to foreigners<sup>3</sup> owning more than 50% of a television or radio station. The Media Amendments, however, will apply to all types of “mass media,” including cable TV, printed and online mass media, and will restrict such companies to no more than 20% foreign ownership.<sup>4</sup>

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1. Federal’nyi Zakon o Vnesenii Izmenenii v. Zakon Rossiiskoi Federacii “O sredstvah massovoi informacii” [Federal Law on Amendments to the Federal Legislative Act of the Russian Federation on Mass Media], ROSSIISKAIA GAZETA [ROS. GAZ.] Oct. 14, 2014, art. 2.

2. Federal’nyi Zakon o Sredstavh Massovoi Informacii [Federal Law on Mass Media], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 27, 1991, art. 32.

3. Under the Federal Law on Mass Media, a “foreigner” is any foreign state, company, legal entity, organization, country, or citizen (including Russians with dual citizenship), or any Russian legal entity with foreign participation, any organization controlled by an international organization, or a stateless individual.

4. A company cannot avoid the law by simply inserting Russian parent or intermediary companies between the foreigner and the mass media company, as “foreign ownership” refers to direct or indirect ownership of the company. It is also interesting to note that a mass media company that is 100% owned by Russians but through an offshore company (in Cyprus, for example) will be considered foreign and will have to re-domicile at least 80% of the company to Russia.

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The definition of “mass media” provided by the current Russian law is rather broad and encompasses various types of media, including newspapers, magazines and periodicals, radio and television channels or programs, video programs, newsreels, the internet, and “other forms of periodical transfer of information under a permanent company name,” which is not further defined or clarified. To comply with the current Russian law on Mass Media, broadcasting organizations are required to obtain special licenses from the Federal Service for Communication, Information Technologies and Mass Communications (Roskomnadzor).<sup>5</sup>

When engaging in any form of media business in Russia, including the Internet, foreigners must consider whether their activities in Russia constitute “mass media or broadcasting” activities. As with many current Russian laws, however, the overbreadth of the term “mass media” often makes this difficult to determine. For example, it is not clear whether websites may be considered “mass media” and if so, whether the company must be registered in the same manner as newspapers and magazines (which takes at least one month) or licensed for broadcasting activities (a more complicated and lengthy procedure, which sometimes is done on the basis of tenders). At the same time, if a foreign company’s main business activities do not fall within an identified “mass medium” under the relevant regulations (notwithstanding the company having an informational website), the Media Amendments’ foreign ownership limitations and registration and licensing requirements will not apply.<sup>6</sup>

Foreigners will not be able to directly own TV or radio channels, online media, printed media, and other Russian mass media (as defined above), as well as broadcasting organizations and editorial offices. Moreover, the Media Amendments limit to 20% the allowable indirect ownership by foreigners (i.e., ownership in any entity that owns or controls registered Russian mass media, broadcasting organizations, and editorial offices).<sup>7</sup>

If a relevant entity or individual fails to notify Roskomnadzor of its compliance with the new requirements by February 15, 2016 (or February 15, 2017 for foreign entities and Russian legal entities with foreign ownership in which Russian individuals or legal entities own 80% or more), its activities may be suspended by a court if so requested by Roskomnadzor. In addition, transactions made while in violation of the new requirements may be considered null and void.<sup>8</sup>

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5. According to the Federal’nyi Zakon o Vnesenii Izmenenii v Zakon Rossiiskoi Federacii “O sredstvakh massovoi informacii” [Federal Law on Amendments to the Federal Legislative Act of the Russian Federation on Mass Media], advertising billboards are not included. Online blogs with over 3000 readers per day are regulated by other Russian laws outside the scope of this article. Websites of companies not engaged in the mass media business generally are not covered by the Media Amendments.

6. See Federal’nyi Zakon o Vnesenii Izmenenii v Zakon Rossiiskoi Federacii “O sredstvakh massovoi informacii” [Federal Law on Amendments to the Federal Legislative Act of the Russian Federation on Mass Media], *supra* note 1. In case of a denial, courts or state authorities will decide on a case-by-case basis if these requirements apply, taking into account the specific circumstances of each particular case and the parties involved.

7. See Federal’nyi Zakon o Vnesenii Izmenenii v Zakon Rossiiskoi Federacii “O sredstvakh massovoi informacii” [Federal Law on Amendments to the Federal Legislative Act of the Russian Federation on Mass Media], *supra* note 1.

8. See *id.*

Ownership structures of affected companies must be changed in order to comply with the new requirements by February 1, 2016, or in certain cases, by January 1, 2017. The latter deadline applies only to:

- a) a foreign legal entity, or
- b) a Russian legal entity that is more than 20% owned by a foreigner, if the following criteria are met simultaneously:
  - 1) Such entities a) and b), jointly or separately, own or control more than 20% in an entity that owns a Russian mass media entity; and
  - 2) One or more Russian legal entities own or control, directly or indirectly, 80% or more in a) and b).<sup>9</sup>

When the Media Amendments were discussed in the Russian State Duma, some of its representatives explained the necessity of the Media Amendments by referring to the “information war” that Western countries could wage via the Russian mass media that they control.<sup>10</sup> However, in fact, the Media Amendments will take a toll not only on political media, but on all types of mass media, including purely entertainment media. The Media Amendments may trigger ownership changes of a significant number of currently active Russian mass media, including owners of major print and television media. The Media Amendments were also explained by representatives of the State Duma as mirroring similar regulations applied in foreign countries where foreigners cannot acquire shares in TV channels. Some commentators also expressed the opinion that the Media Amendments may be linked to prohibition of advertising on paid TV channels that will come into force in January 2015.<sup>11</sup>

**B. NEW REQUIREMENTS FOR THE STORAGE OF PERSONAL DATA OF RUSSIAN CITIZENS**

Recently enacted amendments<sup>12</sup> to the Russian Law on Personal Data<sup>13</sup> (the “Data Amendments”) will introduce limitations regarding processing and storage of personal data of Russian citizens in the databases located outside of Russia. The Data Amendments will become effective on September 1, 2016.

According to the Data Amendments, data “operators” must ensure that personal data of Russian citizens is recorded, organized, and stored through the use of databases located on

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9. *See id.*

10. *See* Elizaveta Surnacheva, *Limited by Duma*, KOMMERSANT VLAST (Sept. 29, 2014), <http://www.kommersant.ru/doc/2573623>.

11. *See* Svetlana Bocharova, Mikhail Rubin, Julia Yarosh & Sergei Sobolev, *Law on Limiting Foreigners' Ownership in Mass Media will be Passed Soon*, RBC (Sept. 18, 2014), <http://top.rbc.ru/politics/18/09/2014/949975.shtml>.

12. Federal'nyi Zakon o Vnesenii Izmenenii v Otdel'nie Zakonodatel'nie Acti Rossiiskoi Federatsii v Chasti Utochneniia Poryadka Obrabotki Personal'nykh Dannykh v. Informatsionno-Telekommunikatsionnykh Set'akh [Federal Law on Amendments to Certain Legislative Acts of the Russian Federation for Clarification of the Procedure of Personal Data Processing in Information and Telecommunication Networks] ROSSIISKAIA GAZETA [ROS. GAZ.] July 23, 2014, art. 2.

13. Federal'nyi Zakon o Personal'nykh Dannykh [Federal Law on Personal Data], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2006, No. 31, Item 3451; 2011, No. 31, Item 4701.

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the territory of the Russian Federation.<sup>14</sup> The Data Amendments will apply to all operators of personal data regarding Russian citizens, notwithstanding the location of such operators.

It appears that most local and foreign companies that process personal data of Russian citizens will be directly affected by the Data Amendments, including social networks, electronic mail providers, messengers, online booking systems, and payment systems.<sup>15</sup> Russian Minister of Communications Nikolay Nikiforov recently noted, however, that a number of additional regulations would still need to be enacted to determine specific information, circumstances, and databases covered by the Data Amendments.<sup>16</sup> According to Mr. Nikiforov, certain personal data of Russian citizens, including data placed on Facebook or Twitter, may be stored abroad in foreign databases, a matter that would presumably be addressed in future regulations.<sup>17</sup>

To comply with the Data Amendments, operators (including foreign operators) will have to establish their own data centers in Russia, enter into agreements with local Russian data centers, or rent servers from local Russian providers. Using local Russian servers should allow operators to process personal data of Russian citizens inside Russia. However, the Data Amendments do not specifically address how these contractual relationships between foreign operators and local data processors should be structured. In any event, when an operator engages a third party for processing of personal data, the operator is responsible for the actions of that third party with regard to the personal data.<sup>18</sup>

The Data Amendments do not require foreign operators to establish a subsidiary in Russia, so a foreign operator should be able to operate personal data without establishing a physical presence in the Russian territory, as long as it owns a data center in Russia or has entered into a contract with a local data center or local service provider in Russia.

The Data Amendments also do not specifically restrict duplicating information outside of Russia. As the question of whether such duplication is permitted remains open, one may reasonably assume that it is allowed as long as it is not expressly prohibited. At the same time, the Russian authorities may take a more restrictive approach on this matter, as they often do when statutory issues are unclear. Hopefully, this important issue will be clarified before the Data Amendments become effective.

An important exception to the Data Amendments requirement for locating databases on the Russian territory is for journalists carrying out their professional activities, “lawful” activities of mass media, and scientific, literary, and other creative activities, provided that

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14. The Federal Law on Personal Data defines an “operator” as a person or entity that organizes and performs the “processing of personal data,” as well as determines the purposes of such processing, the content of personal data to be processed, and the actions to be performed with regard to such personal data. *See id.* art. 3(2). “Processing of personal data” is further defined as any action or operation with regard to personal data, including collection, recording, systemization, accumulation, storage, refinement (updating [or] alteration), retrieval, use, transference (distribution, provision, [or] granting of access), depersonalization, blocking, deletion, [or] destruction of personal data.” *Id.* art. 3(3).

15. With respect to payment systems, it is notable that beginning on July 1, 2016, payment systems operating in Russia will not be permitted to transfer any information about monetary transfers made in Russia to a foreign country or to permit access to such information from the foreign country.

16. *See* Pavel Kantyshev, *Transfer of Personal Data into Russia Delayed*, VEDOMOSTI (Oct. 10, 2014), [www.vedomosti.ru/tech/news/34346721/perenos-dannyh-v-rossiyu-zaderzhitsya](http://www.vedomosti.ru/tech/news/34346721/perenos-dannyh-v-rossiyu-zaderzhitsya).

17. *Id.*

18. *Id.*

subject's personal data rights are not breached by these activities.<sup>19</sup> This leaves room for some foreign organizations—for example, U.S. universities managing personal data of Russian exchange students—to argue that they fall within one of these categories and therefore are permitted to store personal data of Russian citizens abroad. The activities of foreign operators and purposes for storing Russian citizens' personal data should be carefully considered in determining if this exception may apply.

As mentioned above, the Data Amendments are rather vague and leave significant unresolved issues pertaining to their implementation. Thus, it is important to monitor any clarifications or further amendments by the Russian authorities to advise companies on compliance with the new requirements before they take effect on September 1, 2016.

It should be noted, however, that the effective date of the Data Amendments might be accelerated to January 1, 2015, presumably as a retaliatory measure against the Ukraine-related sanctions against Russia by the United States and the European Union. As of the date of this writing, a draft law<sup>20</sup> is under consideration in the State Duma and is ready for the final third reading at a future (yet undetermined) time. However, it is possible that legislature's consideration of the accelerated effective date will be suspended or even cancelled altogether in order to allow for additional research and discussions with market participants regarding technical aspects of database transfers into Russia. If the effective date of the Data Amendments is moved up to January 1, 2015, foreign operators will face significant difficulties in complying with the new requirements in time.

### C. CONCLUSION

Although the new regulations related to Russian mass media and personal data of Russian citizens may appear to be a reaction to western sanctions against Russia, their impact will not be immediate, as they will most likely not take effect until 2016. Thus, there is still time for foreign investors to adjust to the new compliance requirements. The new regulations introduce significant limitations on the business activities of foreign companies in Russia and may result in negative consequences for Russian users of services provided by foreign companies in the areas of telecommunications, mass media, credit card purchases, and other spheres where personal data of Russian citizens is processed.

## II. Ukraine

### A. INTRODUCTION

Political instability in Ukraine was greatly exacerbated in 2014 when widespread protests led to former president Viktor Yanukovich's fleeing the country and Russia subsequently occupying the Crimea. Continuing Russian aggression and ongoing aid to rebels in eastern Ukraine has rendered the Ukrainian economy even more precarious. By the end of

19. See Data Amendments, *supra* note 7; Federal Law on Personal Data, *supra* note 8, art. 6(8).

20. Project N. 596277-6 Federal'nogo Zakona o Vnesenii Izmenenii v. Stat'u 4 Federal'nogo Zakona o Vnesenii Izmenenii v. Otdel'nie Zakonodatel'nie Acti Rossiiskoi Federatsii v. Chasti Utochneniia Poryadka Obrabotki Personal'nykh Danykh v. Informatsionno-Telekommunikatsionnykh Set'akh [Draft Amendment No. 596277-6 to Article 4 of Federal Law on Amendments to Certain Legislative Acts of the Russian Federation for Clarification of the Procedure of Personal Data Processing in Information and Telecommunication Networks], available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=123044>.



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2014, inflation was estimated to increase by 19% and Gross Domestic Product to decrease by 7%. Moreover, continued fighting in the Lugansk and Donetsk regions has significantly damaged public and commercial infrastructure and dramatically hindered business activity in eastern Ukraine.

Under these circumstances, a primary goal for the National Bank of Ukraine (NBU) and the new government has been to support the local currency and prevent foreign currency outflow from the country. The NBU's new management, which took over in 2014, faced significant problems connected with Ukraine's huge shadow economy and leaking of currency over the borders via various artificial arrangements. Limited by the urgency for action and low financial reserves, the NBU has chosen administrative mechanisms as its main instrument of stabilization.

In 2014, the NBU issued a number of regulations limiting or preventing foreign currency operations in order to decrease pressure on the local currency and prevent speculation in the capital market. Some restrictions implemented by the NBU were questionable and sparked significant public outcry. However, in general, the NBU's activity in this turbulent period has been prudent and justified by the enormous challenges Ukraine is facing.

**B. NBU REGULATIONS ADOPTED IN 2014**

*1. Resolution No. 172 on Carrying Out Currency Operations*

On March 28, 2014, the NBU adopted Resolution No. 172 "On Regulation of Activity of Financial Institutions and Performance of Currency Operations,"<sup>21</sup> which replaced previous temporary limitations on the currency market and updated measures aimed at stabilizing the national banking system and the Ukrainian currency, the hryvna ("UAH"). Resolution No. 172 temporarily prohibited Ukrainian residents from making early repayments of loans in foreign currency under agreements with non-Ukrainian residents (previously it was only prohibited to purchase foreign currency for this purpose). Later this Resolution was replaced by another NBU Resolution,<sup>22</sup> which contained the same restrictions.

*2. Resolution No. 515 on Compulsory Exchange of Receivables in Foreign Currency*

The NBU's Resolution No. 515 "On Settling the Situation on Ukrainian Currency Market" (August 20, 2014)<sup>23</sup> mandated compulsory exchange into local currency of 100%

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21. Postanova N° 172 Nacionalnii Bank "Pro vregulyuvannya diyalnosti finansovih ustanov ta provedeniya valyutnih operacii" [Resolution of the National Bank of Ukraine No. 172 on Financial Regulation of Operations with Currency], May 1, 2014, <http://zakon2.rada.gov.ua/laws/show/v0172500-14>.

22. Postanova N° 245 Nacionalnii Bank "Pro vregulyuvannya diyalnosti finansovih ustanov ta provedeniya valyutnih operacii" [Resolution of the National Bank of Ukraine No. 245 on Financial Regulation of Operations with Currency], v0245500-14, Aug. 20, 2014, <http://zakon2.rada.gov.ua/laws/show/v0245500-14/paran29#n29>.

23. Postanova N° 515 Nacionalnii Bank "Pro vregulyuvannya situacii na valyutnomu rinku Ukrainii" [Resolution of the National Bank of Ukraine NO. 515 on Resolution of the National Bank of Ukraine on Regulation of Situation on the Ukrainian Currency Market], v0515500-14, Nov. 22, 2014, <http://zakon2.rada.gov.ua/laws/show/v0515500-14>.

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(later decreased to 75%<sup>24</sup>) of receivables in foreign currency<sup>25</sup> from abroad (i) in favor of legal entities (other than banks), individual-entrepreneurs, foreign representative offices (except for official government representative offices); (ii) drawn on bank accounts opened for conducting joint activity without establishing a legal entity; and (iii) drawn on the accounts of Ukrainian residents which were opened outside of Ukraine on the basis of an individual license from the NBU. The servicing bank must execute the compulsory exchange (without need for the client's instruction) no later than the business day following the day such proceeds are credited to the clearing account.

Resolution No. 515 also extended the applicability of a previously-reduced term for settlements under export/import contracts (90 calendar days, decreased from the 180 calendar days prescribed by the Law of Ukraine "On Order of Settlements in Foreign Currency").<sup>26</sup>

In order to prevent leakage of hard currency over Ukraine's borders via artificial schemes, Resolution No. 515 also prohibited banks from ceasing currency control over clients' export operations based on documents concerning set-off of obligations. In practice, this means that residents of Ukraine are prevented from setting off obligations with their subcontractors under export agreements.

In addition, Resolution No. 515 prohibited banks from providing loans in foreign currency to legal entities, private entrepreneurs, or permanent representative offices of non-residents of Ukraine for the purpose of using those funds in Ukraine. Loans in foreign currency may be provided exclusively for performance of a borrower's cross-border obligations.

The restrictions of Resolution No. 515 were scheduled to expire in November 2014 but were extended until December 2, 2014<sup>27</sup> and may be extended beyond that date as well.

3. *Resolution No. 540 "On Additional Mechanisms to Steady the Ukrainian Currency Market"*

Building on previous measures aimed at stabilizing the Ukrainian currency market, the NBU's Resolution No. 540 "On additional mechanisms to steady the Ukrainian currency market" (dated August 29, 2014)<sup>28</sup> introduced new restrictions to decrease the demand for

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24. Postanova N° 591 Nacionalnii Bank "Pro vnesenya zmin do deakih normativno-pravovykh aktiv Nacionalnogo banku Ukraini" [Resolution of the National Bank of Ukraine No. 591 on Implementation of Changes to Legislative Acts of the National Bank of Ukraine], Sept. 22, 2014, <http://zakon2.rada.gov.ua/laws/show/v0591500-14/paran2#n2>.

25. Postanova N° 515 Nacionalnii Bank "Pro vregulyuvannya situacii na valyutnomu rinku Ukrainii" [Resolution of the National Bank of Ukraine No. 515 on Resolution of the National Bank of Ukraine on Regulation of Situation on the Ukrainian Currency Market], v0515500-14, Nov. 22, 2014, Art. 2, <http://zakon2.rada.gov.ua/laws/show/v0515500-14>. This rule applies to proceeds in hard currencies and Russian rubles.

26. Zakon Ukraini "Pro porjadok zdiisnennya rozrahunkiv v. inozemnii valyuti" [Federal Law on Settlements in Foreign Currency], Vidomosti Verhovnoi Radi Ukraini [Vidomosti] Sept. 23, 1994, arts. 1-2, <http://zakon2.rada.gov.ua/laws/show/185/94-%D0%B2%D1%80>.

27. Postanova N° 734 Nacionalnii Bank "Pro vregulyuvannya situacii na valyutnomu rinku Ukrainii" [Resolution of the National Bank of Ukraine No. 734 on Regulation of Situation on the Ukrainian Currency Market], v0734500-14, Nov. 22, 2014, <http://zakon2.rada.gov.ua/laws/show/v0734500-14>.

28. Postanova N° 540 Nacionalnii Bank "Pro vvedennya dodatkovih mehanizmv dlya stabilizacii groshovokreditnogo ta valyutnogo rinkiv Ukraini" [Resolution of the National Bank of Ukraine NO. 540 on Additional

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foreign currency in Ukraine and to strengthen the UAH. Resolution No. 540 set the following limitations on foreign currency transactions:

- (a) a ban on early repayment under loan agreements between Ukrainian borrowers and foreign creditors;
- (b) foreign cash sold to one person in a single business day may not exceed the equivalent of UAH 15,000 at any one bank (later reduced to UAH 3,000 by NBU Resolution No. 591<sup>29</sup>); and
- (c) an individual may transfer foreign currency abroad under existing currency non-trading operations:
  - (i) if the amount transferred does not exceed the equivalent of UAH 15,000 per business day, no confirming documents are needed from an existing foreign currency account (or no such account need be opened), but non-residents of Ukraine still must provide documents confirming the source of the funds;
  - (ii) if the amount transferred exceeds the equivalent of UAH 15,000 per business day but is not more than UAH 150,000 per month from an existing current foreign currency account, then Ukrainian residents may perform such transactions only by providing confirming documents (this requirement does not apply to non-residents).

However, Resolution No. 540 contains a long list of exceptions, including:

- (a) withdrawing cash in UAH at cash desks or ATMs is permitted up to UAH 150,000 per day per client;
- (b) withdrawing cash in Ukraine using electronic payment means (debit cards), whether issued by residents or non-residents, may be performed only in UAH;
- (c) withdrawing cash in foreign currency from current or deposit accounts at cash desks or ATMs is permitted up to the equivalent of UAH 15,000 per day per client at the official exchange rate of the NBU;
- (d) early return of foreign currency deposits is permitted only in national currency at the exchange rate of the authorized bank on the transaction day<sup>30</sup>

These exceptions apply to cash withdrawals in Ukraine or abroad, irrespective of the number of accounts the client has opened with that bank.

4. *Resolution No. 591 On Amending Certain Resolutions of the NBU*

On September 22, 2014, the NBU issued Resolution No. 591<sup>31</sup> banning the following transactions:

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Mechanisms to stabilize the Currency Market of Ukraine], v0540500-14, Aug. 29, 2014, <http://zakon2.rada.gov.ua/laws/show/v0540500-14>.

29. Postanova N° 591 Nacionalnii Bank "Pro vnesenya zmin do deakih normativno-pravovyh aktiv Nacionalnogo banku Ukraini" [Resolution of the National Bank of Ukraine No. 591 on Implementation of Changes to Legislative Acts of the National Bank of Ukraine], Sept. 22, 2014, <http://zakon2.rada.gov.ua/laws/show/v0591500-14/paran2#n2>.

30. Postanova N° 540 Nacionalnii Bank "Pro vvedennya dodatkovih mehanizmiv dlya stabilizacii groshovo-kreditnogo ta valyutnogo rinkiv Ukraini" [Resolution of the National Bank of Ukraine No. 540 on Additional Mechanisms to stabilize the Currency Market of Ukraine], v0540500-14, Aug. 29, 2014, art. 1, cl. 4, ¶ 2, <http://zakon2.rada.gov.ua/laws/show/v0540500-14>.

31. Postanova N° 591 Nacionalnii Bank "Pro vnesenya zmin do deakih normativno-pravovyh aktiv Nacionalnogo banku Ukraini" [Resolution of the National Bank of Ukraine No. 591 on Implementation of Changes

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- (a) repatriation of funds obtained by foreign investors as a result of the sale of securities of Ukrainian issuers, other than government bonds of Ukraine, outside stock exchanges;
- (b) repatriation of funds obtained by foreign investors as a result of the sale of corporate rights in legal entities in a form other than shares;
- (c) repatriation of foreign investors' dividends (other than those on securities traded on stock exchanges); and
- (d) payments on the basis of individual licenses from the NBU (except for transactions on the basis of individual licenses issued by the NBU to legal entities for placing currency valuables on accounts outside Ukraine).

These additional measures affected a great number of foreign companies and investors and were heavily discussed by different commercial and public organization both locally and abroad. Nevertheless, the NBU maintained that these measures were justified and reasonable and passed them despite significant social pressure.

On November 3, 2014 the NBU decreased the amount of works and services payments that require obtaining an act of pricing expertise<sup>32</sup> from the National Research and Information Center for Monitoring International Commodity Markets. That amount was decreased from EURO 100,000 to 50,000.<sup>33</sup>

5. *Temporary Suspension of Further Activity by Ukrainian Banks in Crimea*

On May 6, 2014, the NBU adopted a temporary suspension on the activity of Ukrainian banks in Crimea. In particular, banks were:

- (a) prohibited from providing financial services to their clients in Crimea;
- (b) instructed to terminate their branches' activity in Crimea and close such branches;
- (c) prohibited from establishing correspondent relations with Ukrainian banks and/or foreign banks, and other credit or financial institutions, which are located and/or carry out their activity in Crimea; and
- (d) instructed to terminate existing correspondent relations with Ukrainian banks and/or foreign banks, and other credit or financial institutions, which are located and/or carry out their activity in Crimea.<sup>34</sup>

These restrictions led to total termination of banking activity in Crimea and caused considerable problems for Ukrainian and international businesses in getting payments from Crimea.

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to Legislative Acts of the National Bank of Ukraine], Sept. 22, 2014, <http://zakon2.rada.gov.ua/laws/show/v0591500-14/paran2#n2>.

32. "Pricing expertise" is a confirmation that the contractual price of services must correspond with the market price.

33. Postanova N° 685 Nacionalnii Bank "Pro vnesenya zmin do deakih normativno-pravovyh aktiv Nacionalnogo banku Ukraini" [Resolution of the National Bank of Ukraine No. 685 on Implementation of Changes to Legislative Acts of the National Bank of Ukraine], Oct. 30, 2014, <http://zakon2.rada.gov.ua/laws/show/v0685500-14>.

34. Slideshow, Alexander Bychkov, Edmundo Elias, & Thomas Firestone, *Challenges of Doing Business in Emerging Markets: Latin American & Russia/CIS*, BAKER & MCKENZIE (Nov. 6, 2014), [http://www.bakermckenzie.com/files/Uploads/Documents/Amterdam/TradeCompliance%20Conference/pn\\_amsterdam\\_3dbiemergingmarkets.pdf](http://www.bakermckenzie.com/files/Uploads/Documents/Amterdam/TradeCompliance%20Conference/pn_amsterdam_3dbiemergingmarkets.pdf).

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On November 3, 2014, in order to effectively harmonize currency legislation with the situation in Crimea, the NBU established new rules applicable to companies and individuals who registered or reside in Crimea:

- (a) persons registered (permanently living) in Crimea are to be treated as non-residents of Ukraine for purposes of currency control rules;
- (b) transactions/payments from or to Crimea shall be treated as cross-border transactions and may be performed in UAH or foreign currency; and
- (c) residents of Ukraine are restricted from making any investments to Crimea.<sup>35</sup>

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35. Postanova N° 699 Nacionalnii Bank "Pro zastosuvannya okremih norm valyutnogo zakonodavstva pid chas rezhimu tymchasovoi okupacii na teritorivil'noi ekonomichnoi zoni 'Krim'" [Resolution of the National Bank of Ukraine No. 699 on Effective Harmonization of the Currency Legislation with the Situation on the Territory of Crimea], v0699500-14, Nov. 3, 2014, <http://zakon2.rada.gov.ua/laws/show/v0699500-14>.

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