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# "Hot" Topics

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# In this issue:



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# Features

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# Message From the Chair
## *Commitment, Collaboration, and Celebration*


RICHARD MONTES DE OCA

In my last chair's message, I mentioned our Section's goal during my tenure of *Elevating Our International Leadership*. I also emphasized that we would only be successful if we did so through *Commitment, Collaboration, and Celebration*. I'm pleased to say that our Section has shined in each of these characteristics and has enjoyed a few fantastic months. Below are just a few highlights of the extraordinary activities and accomplishments we have achieved together.

- In August, our Section held our first ever ILS Leadership Forum at Puttshack. This was a great opportunity for our ILS leaders to engage in valuable team building, establish important goals, and plan for the coming year.
- In September, ILS past chair Thomas Raleigh and ILS member Joseph McFarland attended the Quebec City Bar 2023 *Rentrée Judiciaire* events in Quebec City to build on the relationship our Section has enjoyed with them for over twenty years under our cooperation agreement. We enjoyed an inspiring Lunch & Learn with prominent international lawyer Patricia Mendez Cambo. Our Section also collaborated with the Miami Finance Forum, eMerge Americas, and the Florida Venture Forum for a Venture Capital Event at the Four Seasons. We also cohosted a fun End of Summer Social at Bay 13 with our friends at the Association of Certified Fraud Examiners (ACFE).
- In October, ILS Arbitration and Mediation Committee chair Gary Birnberg was in London, England to attend the Opening of the Legal Year and meet with various leaders from the Bar Council of England & Wales to discuss the development of our cooperation agreement. The ILS also supported the Cuban-American Bar Association (CABA) Cuba Conference, which focused on International Human Rights and Legal Advocacy and featured, among others, ILS past chair Eduardo Palmer.
- In November, we had an ILS delegation attend the International Bar Association (IBA) conference in Paris. During the conference, our Section signed a Cooperation Agreement with the Bar Council of England and Wales. We also attended a breakfast meeting hosted by the Paris Bar (*Barreau de Paris*) to discuss important initiatives under our Cooperation Agreement. Later that month, we held a successful annual ILS Orlando Luncheon at the Citrus Club, thanks to our gracious host and ILS past chair J. Brock McClane.
- In December we had a wonderful Lunch & Learn with former Florida Supreme Court justice and White & Case partner, Raoul Cantero, at Fiduciary Trust International. We also had a remarkable Holiday Reception at Cantina La Veinte with a great turnout of Section members, friends, and colleagues. It was a perfect ambiance to celebrate all of our Section's accomplishments so far this year and to prepare for 2024!

Speaking of 2024, iLaw, our flagship international law conference, is here! We have a spectacular program lined up with amazing speakers in various tracks in International Arbitration, Litigation, and Transactions. We have panels on privacy, life sciences, intellectual property, construction, investments, Latin America, financial crimes, and transportation. We also have a fascinating keynote speaker on artificial intelligence, Ryan Abbott. Finally, we have a closing plenary session of all-star international general counsels. One of our main objectives for iLaw this year was to bring a variety of speakers from different countries so our attendees could benefit from their perspectives and experiences. We were successful in achieving this by securing speakers from Latin America, Europe, and Asia. I'm excited to see iLaw 2024 come to life and can't wait to see you all there!

This issue of the *ILQ* focuses on "Hot" Topics. Whether it's climate change, greening of trade, aircraft exports, or new immigration policies, this issue is full of insightful articles that touch on some of the hottest topics in international law today. I know you'll enjoy reading them, and I'm grateful to the authors who contributed them for publication.

It's a privilege to lead this great Section, and I want to take a moment to thank all of our members and leaders for their continued commitment and collaboration. I'm grateful to all of you for helping us achieve our goals so far and look forward to our continued success and celebration in 2024!

**Richard Montes de Oca**
**Chair, International Law Section of The Florida Bar**
**Buchanan Ingersoll & Rooney PC**

# From the Editor . . .

JEFFREY S. HAGEN

Average temperatures in several consecutive months in 2023 were the highest on record, according to scientists. It is undeniable that our climate is changing. The level to which climate change is directly attributed to human impact is debated, among both scientists and politicians. What's not debatable, though, is the unique position in which we find ourselves as international legal practitioners, in terms of how *we* can impact this planet. If positive global environmental changes are successfully implemented, the global cooperation agreements drafted and negotiated by international lawyers like us will surely be a key component. The effects of a warming planet stretch further than pacts like the Paris Agreement on Climate Change, though. As some of the articles written by our forward-thinking authors demonstrate, new legal markets and trends are beginning to emerge due to environmental change.

This Winter 2024 edition of *International Law Quarterly* is not only climate-focused, but it also sheds light on other "hot topics" in international law. It is worth noting, however, that we did *not* receive an article that touched on legal aspects related to the seemingly hottest topic of all—the war between Israel and Hamas. That this is a sensitive issue for many should not deter legal discourse. We welcome thoughtful and respectful articles about international human rights violations, the definitions of "genocide" or "war crimes," interruption of trade routes, United Nations proceedings, Israeli parliamentary changes, Qatar's unique role as intermediary, and the effects the war has had in the United States, such as surging anti-Semitism's impact on freedom of religious expression balanced against free speech limits. We would also welcome articles on the war's impact on the legal community, such as hiring practices for law firms. In challenging times such as these, rational evaluation, critique, and reasoning from the international legal community would be a healthy and constructive addition to some of the irrational exchanges that flood our social media feeds. Trolls and bots on X and Instagram cannot become the experts on these essential topics.

In this edition, our first three articles are focused on how environmental and legal change are becoming increasingly connected. **Michael Greenberg**'s article "Florida, Insurance, and Climate Change: How Chilling Its Litigation Climate and Globalizing Its Reinsurance Market Will Help Florida Weather Future Storms" assesses surging insurance costs in our state and the impact that our tropical location is having on the Florida legal system. In the following article, **Franka Puas** and **Katherine Bryne** didactically describe the concept of the crime of ecocide in "Viability of the Crime of Ecocide: Exacerbating Existing Evidentiary Challenges." In his article entitled "The Greening of Trade," **Robert Kossick** dissects how eco-friendly trade policies can disrupt traditional legal realities in certain transactions.

Our next four features focus on other "hot topics" of international law. In their piece entitled "Tailoring RICO Claims for Fast Fashion: Is It a Good Fit?," our very own editors **Jennifer Mosquera** and **Li Massie** delve into the world of fast fashion, intellectual property, and racketeering. Following this, **Lisa McKellar Poursine** and **Rodrigo Fernandez Valle** analyze the recent election of Javier Milei in their article "Making Argentina Great Again Requires Labor and Employment Law Revitalization Now: Will the 'Lion' Couple Determination With Opportunity?" In the next article, "Aircraft Exports: A Trap for the Unwary in Cross-Border Transactions," **Katie DeLuca** and **Adrian Mosqueda** steer us on course for an education in the complex, niche legal minefield of aviation export law. In our final feature, **Larry Rifkin** writes about "Implementation of New Immigration Policies in the Past Year," which should become even more of a "hot topic" as we progress toward the 2024 presidential election.

Finally, we would be remiss not to also mention that in this edition of *International Law Quarterly*'s "Quick Take" column, International Law Section Chair **Richard Montes de Oca** is published in his piece "Six Elements of an Effective Compliance and Ethics Program." A special thank you and shout out to Richard for his commitment to our Section over the years, and particularly this year most of all. Additionally, **Marc Hurwitz** from Crossroads Investigations has written an article for our "Best Practices" column, entitled "Navigating the Complexities of International Private Investigations: The Essential Role of Local Expertise."

As usual, we also present the ILS Section Scene, which in this edition features: (i) the IBA Conference Welcome Party in Paris, (ii) the ILS–Bar Council of England and Wales Cooperation Agreement, (iii) the ILS Annual Orlando Luncheon in Orlando, (iv) the ILS Holiday Party in Miami, and (v) an end-of-year summer social and two ILS Lunch & Learns. Last but certainly never least, we also feature a World Roundup in every edition of *ILQ*, providing current events and legal summaries of important updates in different countries and regions. This World Roundup features legal updates from Africa, the Caribbean, China, India, the Middle East, North America, South America, and Western Europe.

We hope you enjoy this "hot off the press" edition of *International Law Quarterly*, which is being released in tandem with the ILS Global Forum on International Law (iLaw). As we move forward in 2024, we hope you will continue to become more involved in our Section, and that you will be inspired to write for this honorable publication.

Best regards,

**Jeffrey S. Hagen**
**Editor-in-Chief**
**Harper Meyer LLP**

QUICK TAKE

# Six Elements of an Effective Compliance and Ethics Program

**By Richard Montes de Oca, Miami**

Companies, directors, and officers today are operating in an environment of ever-increasing laws and regulations, including anticorruption, antifraud, antitrust, anti-money laundering, sanctions and export controls , privacy, and Environmental, Social and Governance (ESG). Enforcement agencies are aggressively prosecuting companies and their employees, officers, and directors for violations of such laws, which can lead to substantial fines, penalties, and consequences, up to and including imprisonment, particularly given the heightened level of scrutiny by regulators such as the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). Fortunately, various U.S. and international laws provide companies with a defense or an opportunity to mitigate fines and penalties for violations of law if they have an effective corporate compliance and ethics program in place. The goal of such a program is to ensure compliance with applicable laws and to detect and prevent criminal conduct by a company's employees, consultants, and agents, thereby reducing the risk of violating the law. Further, if a violation of law does occur, an effective compliance and ethics program is designed to provide a basis for demonstrating to regulators that such violation was a result of unauthorized individual action and not corporate acquiescence.

The U.S. Federal Sentencing Guidelines and various frameworks and memoranda from the DOJ, SEC and the U.S. Office of Foreign Asset Control (OFAC) are useful for determining the key elements of an effective compliance and ethics program.[1] The fundamental compliance and ethics program questions that are outlined in the latest DOJ Compliance Program Guidance are as follows: (1) Is the compliance program well designed?; (2) Is the compliance program being applied earnestly and in good faith? (This is

## Quick Take, continued

viewed as whether the compliance program is adequately resourced and empowered to function effectively.); and (3) does the compliance program work in practice?

An effective compliance and ethics program consists of various elements, including: (1) ethical culture and governance; (2) risk assessment and due diligence; (3) policies and procedures; (4) training and communication; (5) reporting and investigations; and (6) monitoring and auditing. Regulators have determined that a one-size-fits-all compliance program or a mere "paper program" is properly tailored and implemented to each company's particular business and that such elements are regularly updated to address changes in an organization's governance, operations, and regulations. The following is a discussion of each of the elements of an effective compliance and ethics program.


### 1. Ethical Culture and Governance

***Promote an organizational culture that encourages ethical conduct and compliance with the law. Maintain a sound governance structure and practices to support the compliance and ethics program***.

- The tone of a company's ethical culture is set at the top of the organizational structure. Your board and executive management must demonstrate that ethics at your organization is paramount. But it's also critical to ensure that a company's middle management is taking ethics seriously. Your organization can foster an ethical culture by leading with a code of ethics and ensuring its compliance throughout the organization. It's also important to ensure the company consistently rewards good conduct and disciplines bad conduct, including violations of the code of ethics.
- The ethical culture of an organization is also demonstrated by the time, resources, and funding dedicated to fostering ethics and compliance.
- From a governance perspective, the creation of a compliance committee is key to ensuring a compliance and ethics program is effective. This group would oversee the program and the compliance officer; establish a compliance budget and recommend resources; and review results from compliance focus groups, audits, and surveys, which would help create custom compliance programming to help mitigate risks. This committee is also responsible for reviewing program reports and developing an annual compliance plan.

### 2. Risk Assessment and Due Diligence

***Periodically assess the risk of criminal and unethical conduct and modify the program to reduce risk. Conduct due diligence to mitigate risks.***

- Regulators, rating agencies, and other stakeholders expect companies to conduct assessments to ensure they are not exposing the company to unreasonable levels of risk. Specifically, an organization must: (1) evaluate, quantify, and prioritize compliance risks; (2) develop risk mitigation plans including training, policy development, and compliance controls; and (3) ensure there is ongoing assessment and measurement of the compliance and ethics program's effectiveness.
- A company is also expected to conduct due diligence of employees, customers, third parties, and mergers and acquisitions targets.
- Regulators don't expect companies to take a "scorch the earth" approach when it comes to risk assessments and due diligence. Instead, they advise companies to take a "risk-based" approach that balances the time, resources, and funds invested in those activities against the highest risks faced by the organization.

## Quick Take, continued

### 3. Policies and Procedures

***Adopt and distribute policies and procedures to prevent and detect criminal and unethical conduct.***

- The code of ethics is the cornerstone of any compliance program. It provides guiding principles and values that set the tone, spirit, and culture of the company. The code of ethics also emphasizes compliance with important applicable laws and outlines expectations for ethical conduct by employees, officers, and directors.
- A company's policies address compliance with laws and establish ethical standards relating to specific areas of risk within a company. They also provide specific guidelines by which employees, officers, and directors are to conduct themselves when engaging in activities on behalf of the company. It's important that the company policies be tailored to their operations and business practices, and that they are drafted in a reader-friendly manner.
- Some of the key company policies include the employee handbook, the anticorruption policy, the trade compliance manual, the privacy policy, and the supplier code of conduct.
- Companies should ensure that their polices are readily available and accessible to their employees and other relevant stakeholders.

### 4. Training and Communication

***Continuously train and communicate on policies and procedures to ensure comprehension, certification, and compliance.***

- Conduct training to all employees on the code of ethics and general policies, and provide specialized training for relevant employees in specific areas of risk.
- Create a compliance and ethics program website to include frequently asked questions and employee resources.
- Provide periodic communication to employees about the compliance and ethics program, including new policies and procedures.
- Compliance training can be delivered using a variety of methods, including live, recorded, and online. There's no one-size-fits-all approach to training, but it should also be conducted based on a "risk-based approach." The higher the risk area, the more likely a live, in-person training to the relevant audience is appropriate.

It's important to ensure that all training delivered is acknowledged by the recipient and that the company maintains accurate records of all such trainings.

### 5. Reporting and Investigations

***Maintain a mechanism for reporting allegations of criminal and unethical conduct on a confidential and anonymous basis without fear of retaliation. Investigate all reports of violations in a focused, objective, comprehensive, and responsive manner.***

- Employees should have a method for reporting violations of law and policy in a company. One effective reporting method is the creation of an ethics hotline. Tips are the leading means of detection of workplace fraud, and phone- and web-based hotlines are the main means of capturing those tips.
- The company should ensure that it is actively and publicly promoting its hotline.
- When a violation of law or policy is reported, it is important to ensure there is no retaliation against the reporting person, or it can create a "chilling effect" on future reports.
- Companies should promptly and thoroughly investigate the compliance reports it receives.
- Investigation procedures should be adopted and followed when conducting internal investigations to ensure consistency in the process regardless of which department or party is responsible for leading the investigation.

### 6. Monitoring and Auditing

***Conduct monitoring and auditing to detect criminal and unethical conduct and periodically evaluate the effectiveness of the compliance program.***

- Determine what revisions should be made to the compliance program to comply with new laws and regulations or to adjust to a company's changing culture or operating procedures.
- Create a plan to visit all business locations, perform reviews, and develop and improve employee- and vendor-screening processes.
- Track most frequently asked questions and expand the audit and monitor process to incorporate relevant parties in the supply chain (customers, business partners, etc.). Target auditing and monitoring metrics with annual benchmarks tied to performance evaluations.

## Quick Take, continued

- Evaluate lessons learned from past violations, investigations, mergers, transactions, and failed partnerships, and incorporate corrective measures into your program to avoid reoccurrence and to strengthen the ethical culture.

Although establishing an effective compliance and ethics program requires substantial time, commitment, and resources, doing so will: (1) reduce the risk of regulatory violations and unethical behavior at your organization; (2) provide a stronger defense against DOJ, SEC, and other regulatory enforcement actions; and (3) strengthen your organization's shareholder, customer, and public confidence, trust, and loyalty. But it will not happen overnight. Developing and implementing a compliance and ethics program takes time, resilience, and resources, but with the effective elements above as your guide, a dedicated compliance officer or counsel to lead the initiative, and an organization that is genuinely committed to an ethical culture, you can adopt a program that will add considerable value to your business or organization.

***Richard Montes de Oca*** *is a shareholder of Buchanan Ingersoll & Rooney PC and is the current chair of the International Law Section of The Florida Bar. He focuses his practice in the areas of corporate governance, corporate finance, mergers and acquisitions, and securities with an emphasis in international transactions. He is also a Certified Compliance and Ethics Professional (CCEP) and specializes in global compliance and business ethics. Mr. Montes de Oca serves as the leader for Buchanan's International Business Transactions and Compliance practice group.*

**Endnote**

1 In May 2019, OFAC published "A Framework for OFAC Compliance Commitments," https://www.treasury.gov/resource-center/sanctions/Documents/framework _ofac_cc.pdf. In July 2019, the DOJ released new guidance on its "Evaluation of Corporate Compliance Program," which contains factors prosecutors should evaluate to determine if corporate compliance programs and efforts comply with the law, https://www.justice.gov/atr/page/file/1182001/download. In March 2023, DOJ Updated Corporate Compliance Program Guidance, https://www.justice.gov/criminal-fraud/page/file/937501/download.

# Florida, Insurance, and Climate Change: How Chilling Its Litigation Climate and Globalizing Its Reinsurance Market Will Help Florida Weather Future Storms

**By Michael B. Greenberg, Deerfield Beach**

Anyone who owns a home in Florida is keenly aware of the high cost of homeowners insurance in the state. Given the inherent risk the state faces due to its geographical location—it has been hit by more hurricanes than any other U.S. state[1]—it makes sense that homeowners insurance costs more in Florida than in other parts of the country. After all, 40% of the 301 hurricanes that have hit the United States between 1851 and 2022 have hit Florida, and 37 of those 120 hurricanes that hit Florida were major hurricanes (rated Category 3 or higher in strength).[2] Florida's 8,436 miles of shoreline make it the most disaster-prone state in the country.[3]

But bad weather has not been the only contributing factor to the high cost of insurance.[4] As a report published by the National Association of Insurance Commissioners (NAIC) established, based on data from the Florida Office of Insurance Regulation (OIR), though Florida homeowners insurance claims totaled just over 8% of all homeowner claims made across the entire United States in 2019, homeowners insurance lawsuits filed against insurers in Florida comprised more than 76% of all lawsuits filed against insurance companies nationwide.[5] This was so despite the fact that Florida home insurers were in line with the national average for closing claims without payment relative to total claims closed.[6] Further, the data indicate that the disproportionately high number of lawsuits relative to claims made has been an ongoing pattern for many years.[7]

Due to the high cost of litigation, insurance companies were forced to either charge their customers higher premiums or else risk not having adequate funds in reserve to cover potential widespread natural disasters.[8] And even with higher premiums, many insurers operating in Florida either stopped offering insurance in the state or folded altogether. Since 2022, four major insurers have pulled out of Florida,[9] and as of May 2022—at which point a hurricane had not hit Florida since 2018 (Hurricane Ian hit Florida in September 2022)—seven Florida-based insurance companies that insured a combined total of nearly 5% of Florida's housing stock had become insolvent.[10] As a result of their decreased number of insurance options, Florida homeowners who were already contending with expensive premiums have seen these costs skyrocket even further.

In response, starting in 2021 the Florida Legislature passed a series of reforms intended to stabilize the insurance marketplace by making it financially feasible for insurers to do business in the state. In light of the Florida OIR's reporting that,

## Florida, Insurance, and Climate Change, continued

as of May 2022, 71% of the US$51 billion paid out by insurance companies for claims in the state over the prior ten years went to attorney fees and public adjusters,[11] one major reform was repealing the one-way attorney fee statute that incentivized lawsuits by making it virtually risk-free for insureds to go to court against their insurance company.[12] Other reforms included reducing the timeframe within which insureds must file a claim with their insurance company relative to the initial date of loss,[13] banning assignment of benefit agreements that allowed insureds to assign to a mitigation or temporary repair company the right to sue their insurance company based on an underlying claim (which often led to multiple lawsuits and separate claims for attorney fees based on a single underlying insurance claim),[14] and requiring insureds (and insurance claim assignees) who plan to file suit to submit to the insurer a presuit notice containing specific information so as to afford the insurer the opportunity to attempt to resolve the dispute without litigation.[15]

The effects of these reforms will necessarily take some time to measure fully. Supporters of the reforms contend that a decrease in litigation, along with statutory changes aimed at encouraging a more competitive insurance marketplace, should generally lead to less expensive insurance—or, at the very least, less pronounced insurance premium increases—for Florida homeowners. We hope this turns out to be true, as climate change's effects over the coming decades could make obtaining affordable, quality insurance from financially sound companies even more essential to Florida homeowners.

Of course, the extent of human-induced climate change's effect on hurricane frequency and intensity is a subject of both political and scientific debate. Last revised 1 June 2023, the current website of the Atlantic Oceanographic & Meteorological Laboratory (AOML), which is part of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), still references the following consensus statements issued by participants of the 2006 Sixth International Workshop on Tropical Cyclones of the World Meteorological Organization (IWTC-6) regarding how long-term climate change might affect hurricane intensity and frequency:

1. Though there is evidence both for and against the existence of a detectable anthropogenic signal in the tropical cyclone climate record to date, no firm conclusion can be made on this point.
2. No individual tropical cyclone can be directly attributed to climate change.
3. The recent increase in societal impact from tropical cyclones has largely been caused by rising concentrations of population and infrastructure in coastal regions.
4. Tropical cyclone wind-speed monitoring has changed dramatically over the last few decades, leading to difficulties in determining accurate trends.
5. There is an observed multi-decadal variability of tropical cyclones in some regions whose causes, whether natural, anthropogenic or a combination, are currently being debated. This variability makes detecting any long-term trends in tropical cyclone activity difficult.
6. It is likely that some increase in tropical cyclone peak wind-speed and rainfall will occur if the climate continues to warm. Model studies and theory project a 3-5% increase in wind-speed per degree Celsius increase of tropical sea surface temperatures.
7. There is an inconsistency between the small changes in wind-speed projected by theory and modeling versus large changes reported by some observational studies.
8. Although recent climate model simulations project a decrease or no change in global tropical cyclone numbers in a warmer climate, there is low confidence in this projection. In addition, it is unknown how tropical cyclone tracks or areas of impact will change in the future.
9. Large regional variations exist in methods used to monitor tropical cyclones. Also, most regions have no measurements by instrumented aircraft. These significant limitations will continue to make detection of trends difficult.
10. If the projected rise in sea level due to global warming occurs, then the vulnerability to tropical cyclone storm surge flooding would increase.[16]

Compare those IWTC-6 consensus statements from 2006 with the conclusions of the 2022 report on tropical cyclones and climate change issued by the Tenth International Workshop on Tropical Cyclones (IWTC-10), the abstract of which stated that recent studies have "reinforced the robustness of increases in [hurricane] intensity and associated [hurricane] hazards and

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# Viability of the Crime of Ecocide: Exacerbating Existing Evidentiary Challenges

**By Franka Pues, London, UK, and Katherine Byrne, Paris, France**


The proposed crime of ecocide seeks to extend efforts to protect the environment to the international criminal liability regime. Its proposed incorporation into the Rome Statute would put the crime of ecocide on par with atrocity crimes such as genocide and crimes against humanity,[1] thus compounding the importance of protecting the environment and putting those who cause severe harm to the environment on trial on the world stage of the International Criminal Court (ICC). However, a new legal concept comes not without challenges. This article will focus on evidentiary challenges associated with the proposed crime of ecocide at the ICC.

The crime of ecocide and its possible implementation into the international criminal law (ICL) regime has been widely discussed for its implications. The definition, especially the most recent one provided by the Independent Expert Panel convened by the Stop Ecocide Foundation, has been investigated for definitional viability, the international environmental law regimes compared, and conclusions drawn about the suitability of ICL for environmental harm and damage.[2] However, what has been largely lacking from this debate are the subsequent evidentiary questions that arise concerning the availability of sufficient proof. These issues have significant implications on the viability of ecocide in ICL. This is because the implementation of ecocide will not change the liability landscape for environmental damage if the standards for proving such offenses are onerous.

This article considers the process of fact-finding and evidence gathering as well as concerns about causation and attribution of environmental damage. It addresses the rapid pace of change in environmental evidence and draws on current debates about digital evidence, specifically from social media platforms, and its potential usefulness in proving ecocide. Finally, this article reflects on the legal knowledge required to assess evidence for a new type of harm that falls outside current patterns of assessment of criminal responsibility.

This article centers on the definition of ecocide as developed by the International Expert Panel. Therefore, while the Independent Expert Panel's definition remains only a proposed crime of ecocide at the time of writing, for simplicity, this article will hereafter employ and refer interchangeably to the Independent Expert Panel's definition as the "crime of ecocide" or the "proposed crime of ecocide."

## Existing Environmental Protections in International Criminal Law

Historically, domestic and international laws have rarely been enacted with the protection of the natural environment at their core. This is a key issue that raises its head time and time again in cases concerning the environment, which stymies judicial tendencies toward creating precedent that obliges state and non-state actors to protect the environment.

Domestic and international legal frameworks have enshrined objectives that often result in personal proprietary or economic interests being prioritized over environmental protection.[3]

## Viability of the Crime of Ecocide, continued

Recent policies and laws around the globe have aimed to incentivize states and corporations alike to implement policies that protect the environment. But the carrot is clearly not enough.[4] We already know current efforts are insufficient and ineffective; the principal aim of the Paris Agreement of keeping global warming below 1.5 degrees Celsius compared to pre-industrial levels is rapidly slipping through our fingers. Recent conflicts have seen targeted attacks that have deliberately caused environmental destruction. In Ukraine, the Kakhovka dam was destroyed, releasing hundreds of thousands of tons of oil and toxic substances.[5] Penalizing actors for the proposed crime of ecocide may well be the stick that is needed in a holistic carrot and stick approach to ensure protection of the natural environment.[6]

ICL has historically been no different in lacking focus to protect the environment, given that its character is predominantly anthropocentric.[7] This lack of focus on the environment stems from the fact that, after the Second World War, international criminal law was used to prosecute the most serious atrocity crimes, and today's ICL was modelled on the liability regime of the Nuremberg trials.[8] As it stands, reference to the environment is made only once in the Rome Statute. Article 8(2)(b)(iv) sets out when certain acts against the environment are violative of laws and customs in the context of international armed conflict:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated [.]

This definition is undeniably narrow. First of all, in its current form, certain damage to the natural environment can only constitute a crime in situations of international armed conflict. Further, a high and subjective[9] standard is set for the mens rea requirement with the reference to "intentionally" included in the provision. The definition also provides for an extremely high threshold for the type of environmental harm that must occur in order to fall within its parameters, in that the harm must be "widespread, long-term and severe." The idea that a crime must be widespread has also been included in the definition of genocide in Article 7 of the Rome Statute. This in itself is often considered to be difficult to prove, but the combination of widespread with two further elements, in particular long-term, only adds to the complexity and demonstrates the high threshold set out in this section.

Finally, the caveat that the damage to the natural environment must be "clearly excessive in relation to the concrete and direct overall military advantage anticipated" undercuts the growing global consensus that efforts to preserve and protect the natural environment are a priority.[10] Not only has this proportionality standard set out in Article 8(2)(b)(iv) been criticized for being too heavily weighted against finding an attack disproportionate, but the objective elements have also been criticized for "rely[ing] heavily on value judgments" and "hing[ing] on an assessment of prospective events."[11] Indeed, commentators have argued that the overall high threshold for the operation of Article 8(2)(b)(iv) undermines its viability for potential enhancement of environmental protection through the ICL framework.[12]

Cusato has highlighted the factual and evidentiary challenges that arise with judicial treatment of environmental issues in ICL within the scope of the existing provision at Article 8(2)(b)(iv) of the Rome Statute. Questions of causation and attribution are inherent in the treatment of environmental issues. Delay or change of circumstances, including certain weather changes, may impact the fact-finding and evidence collection processes. Evidence of environmental damage caused by warfare would likely be gathered only at the end of the hostilities, which may be months, if not years, after the original act causing the damage is committed. Further, establishing a causal relationship between an act and the environmental harm that results is regarded as highly complex both in peace and wartime.[13] Cusato has also pointed to the all-important issue of the difficulty of attribution of environmental destruction in cases of armed conflict where causation is uncertain or contested by the parties.[14]

**Independent Expert Panel Definition and Implementation as Separate Offense in the Rome Statute**

The Independent Expert Panel's ambit was to create a proposed definition to serve as a basis of consideration for an amendment to the Rome Statute, thus adding a new crime to ICL against the backdrop that serious environmental harm should be deemed to be of international interest and relevance in line with the crimes already set out in the Rome Statute.[15] The Independent Expert Panel proposed, among others, the following amendment to the Rome Statute to provide for the crime of ecocide:

> Article 8 ter Ecocide
>
> 1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a

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# The Greening of Trade

**By Robert M. Kossick, Seattle**

The World Trade Organization (WTO) estimates that 20% to 30% of global carbon emissions derive from the sourcing, producing, and transporting of commodities and merchandise in international trade.[1] It is, in a related vein, estimated that environmental crimes generate up to US$265 billion per year in criminal revenue.[2] In spite of the significant efforts that have been made on a multilateral basis over the past decades to counteract such trends, sustainable, move-the-needle success has been elusive. The U.S. federal agency with primary regulatory authority to enforce trade/green trade, Customs and Border Protection (CBP), references this state of affairs when it notes that the linkages between climate change, environmental degradation, and international trade are "increasingly dramatic and devastating."[3]

Estimates of this nature highlight the contribution international trade makes to climate change and environmental degradation. That said, there is another side to the story. Though it may be less obvious, international trade can, through the diffusion of green tools, technologies, and practices, also play an important role in remediating the effects of climate change and environmental degradation. The key to enabling international trade to be a force for environmental good lies in the development and implementation of green trade policies and strategies. This article begins by defining the scope of environmental issues associated with international trade and identifying the consequences that can arise therefrom. It next addresses the mitigation strategies and challenges that inform the process of greening trade. The article concludes by setting forth best practices designed to help import and export companies avoid costly carbon assessments, foreclose the possibility of being charged with environmental crimes, manage reputational risk, and maximize the likelihood of successfully navigating the transition to green trade.

## Scope and Consequences

Green trade is a broad and imprecisely defined concept. In the interest of establishing a foundation for thinking about the content that follows, this section breaks down the considerations that come within the scope of this concept and identifies the anthropogenic consequences that can flow from a failure to reverse the effects of human-induced climate change and environmental degradation.

### *Scope*

There are, in simplest conception, two environmental stewardship considerations that provide the rationale for the movement toward green trade. The first involves carbon emission-driven climate change tied to the land clearing, mining, constructing, manufacturing, packaging, and shipping activities that underlie trade. The second centers, in effect, on the environmental degradation that all too often is a byproduct of international trade. Examples of the types of issues associated with this latter consideration include environmental pollution, waste management, and illegal harvesting/trafficking (endangered species, seafood, logging, hazardous materials, etc.).

## The Greening of Trade, continued

***Consequences***

News sources today routinely report on record-breaking air and water temperatures, deadly heatwaves, disappearing glaciers and inland bodies of water, crippling droughts, failing forests, devastating wildfires, intensifying wind and storm patterns, rising sea levels, polluted mining and industrial sites, illegal fishing and logging, and trafficking in endangered species and hazardous waste. Environmental events and developments of this kind can create dangerous work conditions, jeopardize the health and safety of living beings, render manufacturing and distribution facilities inoperable, damage or destroy critical infrastructure (ports, highways, bridges, energy grids, etc.), compromise vital trade routes, displace people, interfere with the planting and harvesting of crops, impede livestock rearing, and promote the spread of pests and disease. These outcomes, to the extent they disrupt production and global supply chains, increase the costs and risks of doing business, trigger shortages and food insecurity, create opportunities for smuggling and money laundering, encourage beggar-thy-neighbor protectionism, diminish human capital, lower GDP, redistribute comparative advantages, accelerate the loss of species and ecosystems, and provoke fragile ecological tipping points, can undermine the global trading system, economic development, and national security. Because modern physical infrastructures, production practices, economic frameworks, and security safeguards were not designed to withstand shocks and strains such as those described above, it is imperative that action be taken now to slow the effects of climate change and to prepare for the environmental impacts that are still to come. The best opportunity for accomplishing these goals lies in embracing and successfully completing the transition to green trade.

**Mitigation Strategies**

Different strategies, with a view to diminishing international trade's contribution to climate change environmental degradation, have been placed on the table. These strategies have been implemented to varying degrees. Some have been enacted or otherwise brought online. Others are still under discussion or pending. These strategies can be summarized as follows:

***Incentivize Green Tech Innovation***

This strategy involves the public sector incentivizing the private sector's innovation of technologies that are capable of facilitating the establishment and oversight of cleaner and greener global supply chains; the decarbonization of traditional agriculture, aquaculture, manufacturing, and transportation practices; and the development of new sources of renewable energy. These incentives can be provided through a number of mechanisms, including, for example, the use of green industrial policies (the United States' Inflation Reduction Act, the European Union's Green Deal and Net Zero Industry Act, Japan's Green Transformation Act, South Korea's Green New Deal, China's 14th Five Year Plan, etc.), sovereign wealth fund investments, fiscal policy, grants, prize-driven competitions, goal-oriented challenge awards, and the streamlined processing of intellectual property registrations and applications.

***Optimize the Dissemination of Green Tech***

The corollary to the preceding strategy calls for optimizing the diffusion of proven and/or newly innovated green technologies, especially to countries that might not otherwise have the capacity, resources, or expertise to develop their own green tech solutions. Measures that can be taken to facilitate the dissemination of green tech include:

- Liberalizing high-level tariffs on qualifying environmental goods, following the example set by APEC beginning in 2012.
- Reducing "nuisance" tariffs (1%–5% ad valorem) on qualifying environmental goods. This measure alone would have the effect of making approximately 75% of all existing environmental goods duty free.[4]
- Introducing new, zero-tariff Harmonized System codes for qualifying environmental goods.
- Eliminating non-tariff and technical barriers for qualifying goods.

The successful implementation of these measures could, it is estimated, contribute to a 600 million ton reduction in developing countries' carbon emissions by 2040.[5] This outcome would, given the increasingly prominent role played by developing countries in generating carbon emissions, go a long way to advancing the Paris Agreement's climate change resilience and carbon emission goals.

***Establish Green Standards and Practices***

The next strategy calls for the introduction, on a mission-/function-appropriate basis, of green standards and practices across the spectrum of trade-related operations. Examples of measures that can be taken in this regard include:

- Incorporating carbon reduction, sustainable sourcing, and

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# Tailoring RICO Claims for Fast Fashion: Is It a Good Fit?

**By Jennifer Mosquera, Miami, and Li Massie, Tallahassee**


The fast fashion industry is defined by its quick response to fashion trends at low price levels and often with inferior quality.[1] In the last few years, Shein, the Chinese fast fashion giant, has seen explosive growth, its sales rising from US$10 billion in 2020 to US$100 billion in 2022.[2] Shein now serves more than 150 countries with 11,000 employees, produces thousands of new designs a day, and is valued at US$60 billion, a valuation that is higher than other more established fast fashion brands like H&M.[3] In November 2022, Shein accounted for 50% of U.S. fast fashion sales.[4] Additionally, Shein confidentially filed to go public in the United States and might be publicly trading its shares in the U.S. market as early as 2024.[5]

## Racketeering Allegations in the World of Fast Fashion

Hand in hand with Shein's rise in sales has come a rise in scrutiny of Shein's supply chain as well as litigation on the basis of intellectual property (IP) infringement.[6] One such lawsuit, brought in the Central District of California in July 2023 (the Shein lawsuit), alleges that Shein's business model intentionally creates such severe IP right infringement that it amounts to racketeering among the collection of entities that form part of Shein.[7] The Shein lawsuit details many allegations of Shein's noncompliance regarding labor and health conditions, environmental implications, tax avoidance, and history of IP infringement.[8] The plaintiffs of the Shein lawsuit are eight independent designers who allege that Shein produced, distributed, and sold exact copies or close copies of their copyrightable graphic designs.[9] The Shein lawsuit includes claims of trademark infringement, copyright infringement, and violations of the Racketeering Influence and Corrupt Organizations (RICO) Act.

Specifically, the plaintiffs allege that Shein "built an algorithm purposefully designed to unearth and then misappropriate the most valuable asset an independent designer might have: commercially valuable designs."[10] The plaintiffs allege that through the use of various shell companies and its artificial intelligence "algorithm," Shein systematically and repeatedly infringes on the copyright and trademark rights of various creatives without any meaningful consequences, instead opting to wait and see if any complaints regarding IP infringement are reported and then settling any claims at a low cost.[11]

### Breaking the Pattern: The RICO Act as an Unlikely Vehicle for IP Infringement Claims

*The Wall Street Journal* reported in 2022 that more than fifty federal cases over three years were levied against Shein alleging trademark or copyright infringement.[12] This is almost

## Tailoring RICO Claims, continued

ten times the number of copyright or trademark-infringement cases brought against fast fashion rival H&M.[13]

Typical avenues for IP infringement claims include those brought under the Copyright Act of 1976 (Copyright Act) and the Lanham Trademark Act (Lanham Act). The Copyright Act protects original works of authorship from unauthorized copying, distribution, performance, display, and adaptation. Similarly, the Lanham Act regulates trademarks and provides several federal civil causes of action regarding trademark infringement, dilution, and unfair competition.

Rather than only pursue claims under the Copyright Act or the Lanham Act, plaintiffs in the Shein lawsuit made the creative choice to additionally bring RICO claims. Passed in 1970, the RICO Act was originally intended to prevent the infiltration of organized crime into interstate commerce.[14] The RICO Act provides both criminal and civil remedies, including giving private parties standing to bring civil RICO claims when they are injured by RICO violations.[15]

To successfully establish a civil RICO claim, plaintiffs must prove that racketeering activity occurred—namely, that the defendant committed at least two of the enumerated predicate acts and that these violations form a pattern of racketeering activity (i.e., long-time organized conduct).[16] Additionally, plaintiffs must show they were injured and that the defendant's violation is causally connected to their injury.

Under the definition of racketeering activity, the RICO Act includes a laundry list of state and federal crimes that can be alleged as predicate acts for a civil RICO claim.[17] The plaintiffs in the Shein lawsuit allege that Shein committed criminal copyright infringement and wire fraud. Both of these crimes qualify as predicate acts under the RICO Act. The amended complaint alleges that the common purpose of the Shein enterprise "was to misappropriate the designs of, infringe the copyrights of, and defraud Plaintiffs and other similarly situated designers."[18]

Although claims under the Copyright Act and the Lanham Act seem like more typical avenues to bring plaintiffs' IP infringement complaints, there are potential strategic benefits that might have been considered in bringing these claims under the RICO Act. First, the unwieldy corporate structure of Shein makes it harder to bring traditional IP infringement claims. As pointed out in the amended complaint, there is no clear indication of which company within the entities that make up Shein would be the appropriate defendant.[19] Through the use of RICO, because all of the defendants are alleged to be actors within the racketeering activity, the defendants can be found liable for the IP infringement executed by other actors within the Shein enterprise, so long as the plaintiffs can prove each individual defendant's involvement.

The second potential consideration in bringing these claims under the RICO Act is the potential remedies. In general, the Copyright Act authorizes recovery of actual damages based on the copyright owner's lost profits or the fair market value of the license that could have been negotiated between the parties that would have covered the infringing use.[20] The Lanham Act generally authorizes recovery of profits, actual damages, and costs.[21] In exceptional cases, reasonable attorney's fees may be awarded to the prevailing party.[22] Neither the Copyright Act nor the Lanham Act specifically authorizes the award of punitive damages.[23] Under the RICO Act's remedies, plaintiffs are allowed to recover treble compensatory damages in addition to mandatory reasonable attorney's fees if successful.[24]

The potential for treble compensatory damages under RICO and the ability to cast a wide net over Shein's entities make RICO a tempting prospect. However, most RICO claims come with the higher pleading standard established in Federal Rule of Civil Procedure 9(b), making it more difficult to plead these claims with sufficient particularity.[25] Additionally, in the Shein defendants' motion to dismiss, the defendants argued that based on the plaintiffs' pleadings Shein could not have committed criminal copyright infringement because it could not satisfy the intent element of that predicate act when the decisions were made by an algorithm without human input.[26] This, and the fact that garden variety copyright infringements are not a proper basis for RICO violations, makes it difficult for the Shein lawsuit plaintiffs to be successful on these grounds.[27]

The third consideration in choosing to bring these IP claims under RICO instead of the Copyright Act or the Lanham Act revolves around the extraterritorial application of such claims. The Copyright Act does not "reach acts of infringement that take place entirely abroad."[28] Similarly, this past summer, the U.S. Supreme Court rejected the extraterritoriality of the Lanham Act in *Abitron Austria GmbH v. Hetronic International, Inc.*, finding that the Lanham Act's provisions prohibiting trademark infringement only extended to claims where the infringing use in commerce was domestic.[29] In *Abitron*, the Supreme Court relied on the longstanding presumption against extraterritorial application of U.S. legislation and concluded that the ultimate question regarding the application

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# Making Argentina Great Again Requires Labor and Employment Law Revitalization Now *Will the "Lion" Couple Determination With Opportunity?*

**By Lisa McKellar Poursine, Miami, and Rodrigo Fernandez Valle, Westin**

A renewed sense of opportunity has recently flooded the spirit of many Argentine business owners, shedding light on their almost abandoned hope of running a business with predictable and reasonable labor costs. Both Argentine nationals and foreign investors doing business in Argentina know just how complex Argentine law is about terminating employees, with or without cause.

Over the past few years, big corporations such as Latam Airlines (a Chilean multinational airline), Air New Zealand, Qatar Airways, Norwegian, Walmart, Eli Lilly, Under Armour, Brightstar, Asics, and Nike, to name a few, decided to leave Argentina.[1] Even Argentina's Marcos Galperin, the billionaire cofounder, chairman, president, and former CEO of Mercado Libre, decided to take Latin America's version of Amazon from being headquartered in Buenos Aires, Argentina, to Montevideo, Uruguay.[2]

As they say, hope is the last thing ever lost. On 10 December 2023, Javier Gerardo Milei, who refers to himself as the "Lion,"[3] became Argentina's first Libertarian president and the first economist to take office in Argentine history. In a country that has largely voted Peronist since 1946, President Milei managed to win the presidency with an ultra right-winged agenda and win by more than ten percentage points in the ballotage.[4] Regardless of what his administration does, it must push for the implementation of policies likely to stimulate the Argentine economy.

One measure that would positively affect economic growth in the region would be the revitalization of Argentine labor and employment law. Article fourteen of the Argentine Constitution promulgated in 1853 establishes the right to work and run any lawful business, among many other individual rights. Following Argentina's "Golden Age" (a prosperous time from 1860 to 1930), the impoverished working class increased by nearly 6 million people who demanded more effective and expansive labor and employment laws. President Juan Domingo Peron (1946–1955, 1973–1974) set minimum wages, mandated Sunday rest, limited working shifts, and created new rights such as pensions, paid days off, accident laws, and bonuses, among many other workers' rights. To that end, the 1853 Constitution was drastically amended in 1949 with progressive labor rights, among other changes. The

## Making Argentina Great Again, continued

so-called "Peronist Constitution" did not last since a military coup overthrew President Peron in 1955 and reestablished the 1853 Constitution in 1957, scaling down a number of labor and employment rights.[5] This newly amended Constitution incorporated Article 14 bis, which elevated to a constitutional level several employment rights, such as paid days off, minimum wage, and compensation for wrongful termination. It also provided for labor law protection, such as the right to have unions, the right to go on strike, and related labor law rights. Finally, it provided for social security protection.

Since its inception, Article 14 bis of the Constitution has been considered the foundation of a profuse corpus of Argentine federal and local labor and employment laws, rules, and regulations, such as Ley de Contrato de Trabajo Nº 20.744, Ley de Empleo Nº24.013, Ley de Riesgos del Trabajo Nº 24.557, Ley de Jornada Laboral Nº 11.544, Ley de Edad Mínima de Admission al Empleo Nº 26.390, Ley de Acoso Laboral Nº 27.580, Ley de Contrato de Teletrabajo Nº27.555, Ley de Reglamentación de Sindicatos Nº 23.351, Ley de Negociación Colectiva Nº14.250, and Ley de Empleo Estable Nº 25.250.[6] Many consider Article 14 bis a legal obstacle to revitalizing labor and employment laws, suggesting the need for a constitutional amendment.[7]

The Argentine constitutional procedure to amend the Constitution is an arduous process that requires a special majority in Congress. President Milei would need the overwhelming support of the Argentine legislature for it to pass (two-thirds of Congress at an Assembly summoned to partially reform the Constitution). Further, Article 30 of the Constitution requires the Congress's special majority to pronounce the necessity of the constitutional amendment, among other daunting requirements. Having a new constitutional amendment while President Milei is in office seems to be a troublesome goal due to the time constraints, among other vital reasons.

The much-needed revitalization of labor and employment laws in Argentina does not necessarily demand a constitutional amendment. During the time of President Menem, a vast economic plan, including significant labor and employment reforms, was wholly implemented. Labor costs were significantly reduced and a much more flexible labor market was created. These changes were part of an extensive economic reform involving deregulation of the economy and a drastic reduction of public spending.[8] Similar to what other countries' leaders have done in the past, it is expected that President Milei will present a so-called omnibus bill (a proposed law including labor and employment revitalization among a multitude of diverse topics). It might limit the chance for extended debate and scrutiny. Still, the opportunity for its introduction is now.

*Argentina President Javier Gerardo Milei*

The United States is one of the few countries in the world where an employer in most of its jurisdictions can usually terminate its relationship with an employee without cause. While "at will" employment is a staunchly "pro-employer" concept, it is also the reason why businesses in most parts of the United States are more likely to take risks in hiring employees. Should a small business in Florida, for example, have economic problems, it can eliminate positions and close operations without being required to pay severance or give employees notice of the worksite closing.[9] Although that may seem overly harsh, it allows employers to scale quickly and for businesses to thrive. It also leads to low unemployment as employees are typically hired quickly.[10] Looking north for ideas, Argentina should learn from Menem's presidency and create a new labor and employment framework that facilitates employment opportunities and takes advantage of regional

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# Aircraft Exports: A Trap for the Unwary in Cross-Border Transactions

**By Katie DeLuca and Adrian Mosqueda, Miami**


Parties to cross-border business aircraft transactions must navigate a minefield of technical, transactional, tax, and regulatory considerations. While considerable focus is, justifiably, dedicated to aircraft technical issues, tax planning, and FAA and/or foreign registry requirements in these transactions, compliance with U.S. export control and clearance requirements is often inadvertently overlooked. One of the most common pitfalls of outbound cross-border transactions is the failure to properly export aircraft from the United States. This failure often stems from lack of awareness of and/or confusion over the applicable regulations. One common misconception is that deregistration from the United States "N" registry and/or issuance of an export certificate of airworthiness satisfies export clearance requirements. Another common misconception is that these requirements are not applicable to aircraft that remain on the United States "N" registry. Violations of applicable export regulations may result in civil and in the case of "knowing" violations, criminal penalties, which may include monetary fines, aircraft seizure and forfeiture and, in the case of criminal penalties, imprisonment. Therefore, it is crucial that parties to aircraft export transactions focus on compliance with these regulations.

**Exports and the Government Agencies That Regulate Them**

The term "export" is defined broadly under export control regulations to include the actual shipment of an item outside of the United States.[1] Accordingly, an export occurs any time an aircraft physically departs from the United States. Permanent exports of aircraft from the United States generally trigger the duty to make an Electronic Export Information (EEI) filing. All exports of aircraft must be in compliance with applicable export control regulations, regardless of whether an export is permanent or temporary. The U.S. government maintains export control requirements through several federal agencies, each of which presides over a complex and often overlapping web of regulations. The majority of aircraft exports are controlled by the following government agencies:

- Department of Commerce:
  - The Department of Commerce Bureau of Industry and Security (BIS). BIS administers and enforces the Export Administration Regulations (EAR) found at 15 C.F.R. Parts 730–780, which govern the export of commercial and dual-use items (items that have both commercial and military applications). The vast majority of business aircraft will be subject to the jurisdiction of BIS and controlled under the EAR.
  - The Department of Commerce, U.S. Census Bureau. The U.S. Census Bureau administers the Foreign Trade Regulations (FTR) found at 15 C.F.R Part 30, which govern the preparation and submission of EEI filings.
- Department of State, Directorate of Defense Controls (DDTC). DDTC administers and enforces the International Traffic in Arms Regulations (ITAR) found at 22 C.F.R Parts 120–130. These regulations govern defense articles,

## Aircraft Exports, continued

including aircraft listed on the U.S. Munitions List. As business aircraft are generally not subject to DDTC jurisdiction, ITAR requirements will not be discussed in this article.

- Department of Treasury, Office of Foreign Assets Control (OFAC). OFAC is responsible for administering and enforcing U.S economic trade sanctions against designated parties (individuals, entities, organizations, etc.), regions, and countries.

**Export Controls and U.S. Sanctions**

U.S. export controls and economic sanctions have a long jurisdictional reach. In addition to controlling exports of aircraft from the United States, the EAR also controls re-exports and transfers (in country) of aircraft subject to the EAR. Accordingly, the EAR may apply even in transactions between non-U.S. persons that take place outside of the United States. For example, the re-export of an aircraft subject to the EAR from one foreign country to another foreign country will remain subject to U.S. export control laws. Aside from prohibiting U.S. persons from engaging in transactions with sanctioned countries or designated entities, OFAC also asserts jurisdiction over foreign persons to the extent there is deemed to be a sufficient nexus with the United States. The question of what constitutes a sufficient nexus is ever evolving and expanding, but OFAC has found such nexus to be established even when contacts with the United States are tangential. For example, OFAC has long held that engaging in business transactions in U.S. dollars creates a sufficient nexus with the United States (even when the parties to the transaction are outside of the United States and the transaction itself occurs outside of the United States).

**License Requirements**

Certain aircraft export transactions may require a license or other authorization from the U.S. government. A license may be required based on the aircraft's classification under the EAR, the end user, the end use, and/or the destination.

***List-Based Licensing Requirements***

A license from EAR may be required depending on the aircraft's Export Control Classification Number (ECCN). Most business aircraft fall under a subpart of ECCN 9A991 and are typically categorized as ECCN 9A991.b.[2] Each ECCN lists a "reason for control" for the classified item. Currently, the reason for control of such ECCN 9A991.b is anti-terrorism. Currently, business aircraft with this ECCN are not controlled based on this reason for control (though this is always subject to change). A license would still be required, however, if the aircraft is exported to an embargoed or otherwise prohibited destination, to a prohibited end user or for a prohibited end use, or if the export is otherwise in violation of export control laws.

***End Use/End User Controls***

A license will be required if the exporter knows, or has reason to know, that the end use of an item will be for an unauthorized purpose. This includes end uses and activities directly associated with the proliferation of weapons of mass destruction, encompassing nuclear weapons, chemical and biological weapons, and the missile systems that deliver them. Additionally, a license will be required if the exporter knows or has reason to know that the aircraft is for certain persons on barred entity lists, including the Specially Designated Nationals (SDN) List, the Entity List, the Denied Persons List, or the Military End User List. Further, a license will be required if the exporter knows or has reason to know that the aircraft is intended for a military end use or military end user in certain countries, including Burma, China (which includes Hong Kong), Venezuela, Cambodia, Russia, or Belarus.[3] If the end user is a military end user, the export will require a license even if the item is destined for a non-military end use. For aircraft exports, it is essential to be aware of military end use/end user controls.

It is important to note that "knowledge" in the context of U.S. export controls and economic sanctions goes beyond positive knowledge that a circumstance exists or is substantially certain to occur; it also includes an awareness of a high probability of its existence or future occurrence.[4] This awareness can be inferred from evidence of the conscious disregard of facts known to a person and from a person's willful avoidance of facts.[5] Essentially, it means that one cannot simply ignore or be oblivious to these facts—metaphorically, one can't just put their head in the sand.

***Destination: Embargoed/Restricted Countries***

Aircraft exports are generally prohibited to embargoed countries such as Cuba, Iran, Syria, North Korea, and the Crimea, Luhansk, and Donetsk regions of Ukraine. Some country restrictions are more limited while others, such as sanctions on Russia and Belarus, are so extensive that they effectively constitute full embargoes. In response to Russia's invasion of Ukraine, BIS issued comprehensive sanctions against Russia. Effective 24 February 2022, BIS imposed

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# Implementation of New Immigration Policies in the Past Year

**By Larry S. Rifkin, Miami**

Immigration is a constantly evolving field of law. Though the regulations and statutes have remained the same for the most part in the last few years, the policy guidance of the presidential administration in power fluctuates and changes. U.S. Citizenship and Immigration Services (USCIS), as part of the Department of Homeland Security (DHS), is the government agency that oversees lawful immigration to the United States. The agency routinely issues policy guidance and/or updates its Policy Manual to clarify for the public the requirements for certain immigration-related benefits. In the past twelve months, USCIS has issued policy guidance and undertaken measures to clarify, revise, and modernize the current immigration system.

This article addresses policy changes USCIS has implemented or plans to implement with regard to the Child Status Protection Act, the I-140 immigrant petition, expansion of premium processing, temporary protected status, family reunification processes, and the H-1B program. DHS has neglected some areas and failed to meet some internal goals, as the processing times for certain applications have increased to unconscionable levels, causing an increase of federal mandamus suits against the government to address the delays.

**Child Status Protection Act**

The Child Status Protection Act (CSPA), in effect as of 6 August 2002, protects certain beneficiaries from losing eligibility for immigrant visas and adjustment of status in scenarios when beneficiaries may age-out and no longer qualify as an unmarried child under twenty-one years of age for immigration purposes.[1] For noncitizens seeking lawful permanent resident status in a preference category, the general formula for calculating the beneficiary's age under the CSPA is the age of the beneficiary on the date on which an immigrant visa number becomes available, but only if the beneficiary has sought to acquire the status of lawful permanent residence within one year of such availability, reduced by the number of days in the period during which the applicable petition was pending.[2]

In September 2015, the U.S. Department of State (DOS) and USCIS announced a revision to the Visa Bulletin, which created two charts of dates: Dates for Filing chart and Final Action Dates chart.[3] USCIS designates one of the two charts for use by applicants each month in determining when they may file their adjustment of status to lawful permanent residence applications with the agency.[4] Under previous CSPA guidance, USCIS only considered a visa available for CSPA age calculation based on the Final Action Dates chart listed in the Visa Bulletin.[5]

On 14 February 2023, USCIS updated its Policy Manual to reflect that an applicant's CSPA age is now calculated based on their age on the first day of the month when USCIS considers a visa available for accepting and processing an adjustment application.[6] Thus, if USCIS announces that prospective applicants may use the Dates for Filing chart on the Visa Bulletin when filing adjustment of status applications, then USCIS also uses the Dates for Filing chart when calculating the applicant's CSPA age.[7] This policy update resolves any contradiction between different dates in the Visa Bulletin and the statutory text regarding when a visa is "available."

On 24 August 2023, USCIS also updated its policy guidance to clarify that USCIS considers the 14 February 2023 policy change to be an extraordinary circumstance that may excuse

## New Immigration Policies, continued

an applicant's failure to satisfy the "sought to acquire" one-year requirement in cases where the applicant did not file their adjustment application because USCIS could not calculate their CSPA age or would have calculated their CSPA age to be over twenty-one years old under the prior policy, but they are now eligible for CSPA age-out protection under the new policy.[8]

**Employer's Financial Ability to Pay Proffered Wage**

Employers/petitioners seeking to classify prospective or current employees under the first, second, and third preference employment-based immigrant visa classifications that require a job offer must demonstrate their continuing ability to pay the proffered wage to the beneficiary as of the priority date of the immigrant petition.[9] Employers are required to submit annual reports, federal tax returns, or audited financial statements for each available year from the priority date.[10] If the employer has 100 or more workers, USCIS may instead accept a financial officer's statement attesting to the employer's ability to pay the proffered wage.[11]

On 15 March 2023, USCIS issued policy guidance to clarify how it will analyze an employer's ability to pay the proffered wage for immigrant petitions in certain first, second, and third preference employment-based immigrant visa classifications.[12] USCIS updated its guidance to discuss in more detail various types of evidence that USCIS will review relevant to the employer's financial strength and the significance of its business activities.[13] More specifically, USCIS updated its Policy Manual to consider the following as secondary evidence of a petitioner's financial ability to pay the proffered wage: the employer's bank account statements, personnel records, and credit lines, and, in the case of sole proprietors and individual employers of domestic workers, the employer's income and personal liquid assets.[14] USCIS will also now consider the following factors in the totality of circumstances analysis:

- The petitioner's gross sales and gross revenues;
- The total wages paid to the petitioner's current employees during the most recent fiscal years;
- Media accounts about the petitioner's business;
- The number of years the petitioner has been doing business;
- The historical growth of the petitioner's business;
- Any recent changes that may have disrupted or interrupted its business (for example, reorganization, merger, bankruptcy);
- The petitioner's number of employees;
- The occurrence of any uncharacteristic business expenditures or losses from which the petitioner has since recovered (for example, extensive fire or flood damage); and
- The petitioner's overall reputation within its industry.[15]

USCIS's new policy guidance provides more flexibility for sponsoring employers to provide more documentation to show the financial strength of their business to meet the regulation's requirements. Further, the additional acceptable evidence that employers/petitioners may submit should provide a more nuanced approach to USCIS's decision-making process based on the individual business structure of each sponsoring employer.

**Expansion of Premium Processing**

Premium processing provides expedited processing for an adjudication by USCIS for an additional fee. As part of its efforts to increase efficiency and reduce burdens to the overall legal immigration system, in June 2022, USCIS began an expansion of premium processing under the EB-1 and EB-2 classifications. As of 30 January 2023, USCIS accepts premium processing requests for all multinational executive and manager petitions and National Interest Waiver petitions.[16] Under premium processing for these petitions, USCIS will take adjudicative action within forty-five calendar days or refund the premium processing fee of US$2,500.[17]

On 6 March 2023, USCIS announced the expansion of premium processing for employment authorization applications for F-1 (academic students) seeking initial optional practical training (OPT) and F-1 students seeking science, technology, engineering, and mathematics (STEM) OPT extensions.[18] For these applications, USCIS will issue an adjudication within thirty calendar days or refund the US$1,500 premium processing fee.[19]

On 12 June 2023, USCIS announced the expansion of premium processing for applicants filing applications seeking a change of status to F-1 (academic student), F-2 (derivative family members of F-1), M-1 (vocational student), M-2 (derivative family members of M-1), J-1 (exchange program students), or J-2 nonimmigrant status (derivative family members of J-1).[20] For these applications, USCIS will issue an adjudication within thirty calendar days or refund the US$1,750 premium processing fee.[21]

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# ILS Lunch & Learn With Patricia Menéndez Cambó 14 September 2023 • Coral Gables

Fiduciary Trust International hosted the ILS Lunch & Learn on 14 September 2023 at their office in Coral Gables. Special guest Patricia Menéndez Cambó, former deputy general counsel with SoftBank Group, offered her insights on practicing law in Miami and changes to the international law scene in the last thirty years.

ILS Lunch & Learn participants gather on the terrace of Fiduciary Trust International's Coral Gables office for a group photo with the Miami skyline in the distance.

Patricia Menéndez Cambó addresses the group.

Patricia Menéndez Cambó and Jim Meyer

Richard Montes de Oca, Jackie Villalba, Patricia Menéndez Cambó, Cristina Vicens, and Laura Reich

The ILS Lunch & Learn offers valuable information and a chance to network with colleagues, all during the lunch hour.

# ILS and ACFE End of Summer Social 28 September 2023 • Coral Gables

Members of the International Law Section and the Association of Certified Fraud Examiners South Florida Chapter #11 gathered at Bay 13 Brewery & Kitchen in Coral Gables for an end of summer social on 28 September 2023. Thanks to Eisner Amper for sponsoring this enjoyable event!


Davide Macelloni, Laura Reich, Ana Barton, and Richard Montes de Oca

Nicholas Landera and Richard Montes de Oca

Jennifer Mosquera, Adam Rabinowitz, and Nicholas Landera

Richard Montes de Oca, Ana Barton, Chelsea Thomas-Nunez, Jennifer Mosquera, and Susanne Leone

Stephan Schlentrich, Barbara Schlentrich, and Chelsea Thomas-Nunez

Ana Barton and Orlando Flores

# IBA Conference Welcome Party 29 October 2023 • Paris, France

Florida Bar International Law Section members joined with colleagues from all over the world at the International Bar Association Conference 29 October–3 November 2023 at Palais des Congrés in Paris, France. The traditional Welcome Party offered convention goers an opportunity to see old friends and make new ones ahead of a busy week of CLE and association meetings.

Susanne Leone, Evelyn Barroso, Martin Hauser, Gary Birnberg, Richard Montes de Oca, and Tiany Montes de Oca enjoy the party.

Roselyn Sands and Richard Montes de Oca

Sahel Assar, Richard Montes de Oca, and Tiany Montes de Oca

ILS delegates enjoy meeting international lawyers at the IBA opening reception.

# ILS–Bar Council of England and Wales Cooperation Agreement 1 November 2023 • Paris, France

The Florida Bar International Law Section and the Bar Council of England and Wales signed a cooperation agreement during a ceremony held in Paris, France, on 1 November 2023. ILS Chair Richard Montes de Oca, ILS Chair-Elect Ana Barton, and several ILS members were in Paris for the signing, which was livestreamed at the offices of Buchanan in Miami, Florida.

The delegates in Paris are joined by attendees in Miami via livestream.

Bar Council Chair Nick Vineall and ILS Chair Richard Montes de Oca sign their copies of the cooperation agreement.

Nick Vineall and Richard Montes de Oca celebrate the signing as ILS Chair-Elect Ana Barton looks on.

Nick Vineall and Richard Montes de Oca display the signed copies of the cooperation agreement.

The delegates in Paris gather for a photo.

# ILS Annual Orlando Luncheon
# 30 November 2023 • Citrus Club, Orlando

The annual Orlando Luncheon is a much-anticipated ILS tradition! More than 35 ILS members from North, Central, and South Florida gathered at this event to network and socialize. Held one week after Thanksgiving, attendees traveled to the luncheon by "planes, trains, and automobiles." Many thanks to Vinali Staffing and Crossroads Investigations for their sponsorship and support of this event.

Former ILS Chair Brock McClane welcomes the group to the ILS annual Orlando Luncheon.

Israel Velez from event sponsor Vinali Staffing shares his thoughts with attendees.

Laura Reich and Margareth Rossini

Jeff Hagen shares the latest edition of the *International Law Quarterly.*

Laura Reich addresses the group while they enjoy dessert.

Getting there is half the fun! Pictured are Laura Reich, Ana Barton, Jeff Hagen, and Richard Montes de Oca (Matt Akiba was in the front seat).

Nouvelle Gonzalo, Matt Akiba, Ana Barton, Richard Montes de Oca, Laura Reich, and Jeff Hagen


The ILS annual Orlando Luncheon is a time for members to enjoy the beginning of the holiday season.

# ILS Lunch & Learn With Raoul Cantero
# 5 December 2023 • Coral Gables

On 5 December 2023, Fiduciary Trust International hosted the ILS Lunch & Learn at their office in Coral Gables, Florida. Raoul Cantero, a partner of White & Case LLP and a former justice of the Florida Supreme Court (2002–2008), shared his experiences while sitting on the highest court of Florida as well as his current role of office executive partner in his firm's Miami office. Justice Cantero was the first justice of Hispanic descent and one of the youngest ever to sit on the court. Thank you to Fiduciary Trust International for hosting this event and to Jim Meyer from Harper Meyer LLP for moderating the discussion.

Participants enjoy lunch as Raoul Cantero shares his insights into the practice of law.

Michael Cabanas from Fiduciary Trust International addresses the group.

Raoul Cantero and Jim Meyer

ILS Lunch & Learn participants

# ILS Holiday Party • 19 December 2023
# Cantina La Veinte • Brickell

On a beautiful, clear night, ILS members gathered at Cantina La Veinte in Brickell for a festive outdoor holiday party. Between sips of margaritas and bites of guacamole, conversation and networking flowed among new and seasoned ILS members, and a great time was had by all!

Cristina Vicens, Davide Macelloni, Richard Montes de Oca, Laura Reich, and Ana Barton

Matt Akiba, Jackie Villalba, Jeff Hagen, Susanne Leone, and Jim Meyer

The ILS holiday party is always well attended!

Laura Reich and Ana Barton display tickets and the resulting strawberry margarita.

Ed Davis, Kateri Davis, Arnie Lacayo, Cristina Vicens, and Javier Samaniego

Fabio Giallanza, Joe Raia, Heather Odell, Johnny ElHachem, and Davide Macelloni

Kateri Davis, Ed Davis, Ryan Reetz, and Laura Reich

Laura Reich and Jackie Villalba

Alix Apollon, Matt Akiba, Julien Apollon, Evelyn Barroso, and Susanne Leone

Omar Ibrahem, Eddy Palmer, and Judge Robert Watson

Robert Downing, Jonathan Haag, and Richard Montes de Oca

Matt Akiba and Alain Acanda

# WORLD ROUNDUP

## AFRICA

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*ngosong@harrisbricken.com*

### Failure of globalization in Africa makes a case for "smart protectionism."

Globalization, as was often touted by its framers during the development of the GATT rounds of negotiations and later the Uruguay round,[1] rested on the idea that the free flow of capital, goods, people, and ideas across national boundaries would create maximum utility for the people of participating countries. The reality, however, is that while globalization may have maximized utility on a macro level, there have remained winners and losers. The obvious winners have been the advanced industrialized countries described as developed countries (DCs), and the apparent losers have been what are described as least developed countries (LDCs), many of which are found on the African continent. According to the Economist Intelligence Unit, a British business research group, Africa accounted for more than 3% of global manufacturing output in the 1970's, but that percentage has since been halved.[2] Obviously, many African countries have been globalization losers; however, a few success stories have emanated recently from the continent. Among these success stories are countries that increasingly implement the so-called "smart protectionism" economic development theory as a driver of their economic growth.

Smart protectionism is a new economic school of thought that advocates for the imposition of temporary tariffs and other protective measures to shield budding industries from the negative effects of cheap imports as part of a larger industrialization strategy.[3] This practice is not new, per se, as it has historically been implemented by the so-called rich DCs in their quests for economic growth. For example, in chapter two of *Trade Crash: A Primer on Surviving and Thriving in Pandemics & Global Trade Disruption,*[4] the authors document in detail the protectionist policies taken by the U.S. government from its inception through the 1940's, which enabled it to become an industrial powerhouse by the end of that decade.

Further, despite having benefited from globalization, many DCs continue to practice smart protectionism. For example, the WTO reported in June 2016 a rapid increase in trade-restrictive or protectionist measures taken by the world's leading economies that make up the G20 grouping of nations.[5] The report noted further that between mid-October 2015 and mid-May 2016, G20 economies had implemented 145 new trade-restrictive measures at an average rate of 21 new measures per month, "a significant increase compared to the previous reporting period at 17 per month."[6] These trade-restrictive measures were increased further during the COVID-19 pandemic. According to another WTO report, during the outbreak of the pandemic, a significant percentage of the 443 COVID-19-related trade and trade-related measures in the area of goods were introduced by DCs.[7] Of the 443 COVID-19-related measures, 197 or 44% were trade-restrictive.[8] In a recent example, on 10 September 2019, Ursula von der Leyen, then president-elect of the European Commission, announced that she wanted to lead the European Union in such a way as to "protect our European way of life."[9] In keeping with her pledge to protect the European way of life, in September 2023, the European Commission launched an anti-subsidy investigation on imports of Chinese electric vehicles with the goal to impose additional tariffs above the standard 10% rate that the EU charges on the importation of vehicles into the EU market.[10]

Of the countries on the African continent that have embraced smart protectionism, the United Republic of Tanzania is the key standout, having implemented policies that target and favor domestic manufacturing industries. In addition to pursuing a "developmental state model" under which governments control, manage, and regulate certain aspects of the economy, it also adopted investor-friendly policies, which appear to have contributed to less corruption while also increasing foreign direct investments in the country.[11] The implementation of these smart protectionist policies led the Tanzania industrial sector to grow from US$1.3 billion output in 2000 to US$5.31 billion output in 2020.[12] That industrial growth led the World Bank to declare in 2020 that Tanzania had moved from a low- to a lower-middle-income country.[13]

With the success of Tanzania's economic growth, the Republic of Rwanda, having emerged from the nadir of genocide in the mid-90's, also began implementing the smart protectionism model in the mid-2000's by prioritizing investments in the manufacturing sector in its quest to reach middle-income-country status by 2035 and high-income-country status by 2050. It planned to achieve this through a series of seven-year National Strategies for Transformation (NST1).[14] The NST1 followed two five-year Economic Development and Poverty Reduction Strategies (EDPRS) from 2008 to 2012 and EDPRS-2 from 2013 to 2018, during which Rwanda experienced economic growth averaging 7.2% a year over the decade to 2019, and a per capita gross domestic product (GDP) growth of 5%.[15] With its effective adoption of the smart protectionism model, the Rwandan economy was

projected to be the fastest-growing economy in Africa by the end of 2023, growing at a rate of 6.2%, based on a report from the Africa Development Bank titled "From Millions to Billions: Financing the Development of African Cities."[16]

The economic success of Tanzania and Rwanda, although a small sample size, nonetheless suggests that effective implementation of a balanced national development strategy that protects domestic industries but also encourages foreign investment is key to making globalization an economic winner for countries on the continent of Africa.

***Ngosong Fonkem*** *is an attorney at Harris Bricken Sliwoski LLP, an international law firm based in Seattle, Washington, USA. Mr. Fonkem received a B.A. from University of Wisconsin-Green Bay (2008), J.D./M.B.A. from West Virginia University College of Law (2011), and LL.M. from Tulane Law School (2012). Information on his co-authored book, Trade Crash: A Primer on Surviving and Thriving in Pandemics & Global Trade Disruption, is available at https://www.tradecrash.com/.*

## Endnotes

1 General Agreement on Tariffs and Trade (GATT) was perhaps the first truly multilateral free trade agreement (FTA), a treaty whereby 23 member countries agreed to a set of rules to govern trade with one another and maintained reduced import tariffs among its contracting parties. During the 1950's onward, a number of FTAs, such as the so-called Dillon and Kennedy rounds, were principally toward lowering import duties globally. Then, in 1980, the Tokyo round was concluded, and it transformed international trade. The last multilateral FTA, the Uruguay round, concluded in 1994 and led to the creation of the World Trade Agreement (WTO). *See* Bruce Aitken & Fonkem Ngsong, TRADE CRASH: A PRIMER ON SURVIVING AND THRIVING IN PANDEMICS & GLOBAL TRADE DISRUPTION (2020).

2 *Globalisation and Africa's development: The Limits of an Inward-Looking Economic Policy*, London School of Economics https://blogs.lse.ac.uk/africaatlse/2014/09/09/globalisation-and-africas-development-the-limits-of-an-inward-looking-economic-policy/ (9 Sept. 2014).

3 Derek Thompson. *The Case for Smart Protectionism*. THE ATLANTIC. 12 July 2016. https://www.theatlantic.com/business/archive/2016/07/the-case-for-smart-protectionism/490955/; Seyed Yasser Jebraily. *Smart Protectionism and Economic Development: A Dynamic Model for State-Market Relationship*. http://econrahbord.csr.ir/article_110870.html?lang=en.

4 Aitken, Bruce & Fonkem, Ngosong. *Trade Crash: A Primer on Surviving and Thriving in Pandemics & Global Trade Disruption*. https://www.tradecrash.com/.

5 Report on G20 Trade Measures: (mid-October 2015 to mid-May 2016). World Trade Organization (2016), https://www.wto.org/english/news_e/news16_e/g20_wto_report_june16_e.pdf.

6 *Id.*

7 *Report shows increase in trade restrictions amidst economic uncertainty, multiple crises*, World Trade Organization https://www.wto.org/english/news_e/news22_e/tmwto_06dec22_e.htm (6 Dec. 2023).

8 *Id.*

9 *'Protecting Our European Way of Life'? Outrage Follows New E.U.* Role, NY Times https://www.nytimes.com/2019/09/12/world/europe/eu-ursula-von-der-leyen-migration.html (12 Sept. 2019).

10 Philip Blenkinsop, *EU to investigate 'flood' of Chinese electric cars, weigh tariffs*, Reuters https://www.reuters.com/world/europe/eu-launches-anti-subsidy-investigation-into-chinese-electric-vehicles-2023-09-13/ (13 Sept. 2023).

11 Lugina, E. J., Mwakalobo, A. B .S. & Lwesya, F. *Effects of industrialization on Tanzania's economic growth: a case of manufacturing sector*. FUTUR BUS J 8, 62 (2022). https://fbj.springeropen.com/articles/10.1186/s43093-022-00177-x#citeas.

12 *Tanzania Manufacturing Output 1990*-2023, Macrotrends, https://www.macrotrends.net/countries/TZA/tanzania/manufacturing-output#:~:text=Tanzania%20manufacturing%20output%20for%202021,a%205.94%25%20increase%20from%202020.

13 On 1 July 2020, the World Bank announced that the Tanzanian economy upgraded from low- to lower-middle-income status. Umar Serajuddin & Nada Hamadeh, *New World Bank country classifications by income level: 2020-2021*, World Bank Blogs https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2020-2021 (1 July 2020).

14 https://vision2050.minecofin.gov.rw/root/nst/nst1.

15 *The World Bank in Rwanda*, The World Bank https://www.worldbank.org/en/country/rwanda/overview#:~:text=Rwanda%20now%20aspires%20to%20Middle,Sustainable%20Development%20Goals%20(SDGs).

16 *From millions to billions: Financing the development of African cities*, African Development Bank Group https://www.afdb.org/en/documents/millions-billions-financing-development-african-cities#:~:text=Smart%20investments%20in%20infrastructure%2C%20quality,of%20it%20deployed%20in%20cities (8 Nov. 2023).

## CARIBBEAN

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### United Kingdom establishes requirements for property filings on the Register of Overseas Entities.

The United Kingdom (UK) Economic Crime (Transparency and Enforcement) Act (the Act) came into force on 15 March 2022. A new Register of Overseas Entities (ROE) was created and is held by Companies House. This Act forms part of the UK government's strategy to combat economic crime while making sure legitimate businesses continue to see the UK as a place to invest.

### What is an overseas entity update statement?

An update statement must be filed every year by all overseas entities on the ROE. It requires the entity to confirm that all the information about the overseas entity on the register is correct or to update anything that has changed.

### When to file the update statement?

All overseas entities must file an update statement every year. The entity can file an update statement more often.

The entity has fourteen days from the statement date to file. After this, the filing will be considered late.

The entity must file an update statement even if there have been no changes to the overseas entity and its beneficial owners during the update period. This confirms that the information on the register is correct.

### What happens if the entity files its update statement late?

- The entity will be committing a criminal offense and could be prosecuted or fined;
- The overseas entity ID will not be valid, and the entity will not be able to buy, sell, transfer, lease, or charge the entity's property or land in the UK;
- The UK will add a note to the entity's public record at the UK ROE at Companies House to indicate that the entity has not filed its update statement.

### What information must the entity review and update?

When submitting an update statement using the online service of the UK ROE at Companies House, the entity will be asked to review all information on the register about the overseas entity and its beneficial owners or managing officers. The entity must update any information that has changed. The entity may also be asked to reenter home addresses for individual beneficial owners and managing officers. All the information must be correct as of the date of the filing of the update statement.

### What to do when someone has become a registrable beneficial owner or managing officer after the entity's first filing?

If the entity is adding new beneficial owners or managing officers, the entity must provide the required information about them.

### What to do if someone is no longer a registrable beneficial owner or managing officer?

The entity must inform the date they on which the individual ceased being a beneficial owner or managing officer, and make sure their information is correct as of the date of the filing. The entity also needs to inform the UK ROE at Companies House about anyone that ceased to be a registrable beneficial owner during the update period. The information the entity provides about them must be correct as of the date they stopped being a beneficial owner. If there are no active beneficial owners, the entity must provide information about each managing officer.

### What to report when there are trusts involved in the structure of the overseas entity?

Overseas entities with trust information can now file their update statement online in the system of the UK ROE at Companies House. This includes trusts that the entity has already reported and trusts that the entity needs to report as part of its update statement.

***Fanny Evans*** *is a partner at Morgan & Morgan and is admitted to practice law in the Republic of Panama. She focuses her practice on corporate services, estate planning, and fiduciary services. Her portfolio of clients includes banks and trust companies, family businesses, corporate practitioners, and private clients. From 2011 until mid-2017, Mrs. Evans served as executive director and general manager of MMG Trust (BVI) Corp., the Morgan & Morgan Group's office in British Virgin Islands. Prior to becoming head of the BVI Office, she served as fiduciary attorney in a local firm focusing on corporations and trusts. Mrs. Evans is member of the Society of Trust and Estate Practitioners (STEP). She is fluent in Spanish, English, and Italian.*

## CHINA

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### Apostilles can now be used in China.

The Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents, commonly known as the Apostille Convention (Convention), entered into force in China on 7 November 2023. This international treaty facilitates the recognition of foreign documents through apostilles, official certificates issued by governments to authenticate documents. China's accession to the Convention marks a significant step forward in streamlining document authentication processes for a wide range of stakeholders.

Prior to the Convention's entry into force in China, authenticating foreign documents for use in the country was a complex and time-consuming process. Documents were first authenticated by the authorities in the issuing country, and then by a Chinese embassy or consulate in that country. In the case of documents issued by U.S. state governments, authentications by both a designated state official and the U.S. State Department were required. Jumping through all these hoops would invariably take months, and often required the use of intermediaries.

China's adoption of the Convention eliminates the need for multiple authentications, as apostilled documents are now considered fully authenticated in China without requiring the involvement of a Chinese diplomatic mission. Moreover, as each U.S. state has officials that

are designated as competent authorities under the Convention, there is no longer a need to have state-issued documents authenticated by the U.S. State Department.

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## INDIA

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### Comprehensive Legal Reform Aims to Replace Colonial Era Legal Frameworks in India.

In August 2023, Union Home Minister Amit Shah of India introduced three bills aimed at comprehensive legal reform. These bills include the Bharatiya Nyaya Sanhita Bill 2023, the Bhartiya Nagrik Suraksha Sanhita Bill 2023, and the Bhartiya Sakshya Bill 2023. Their purpose is to replace the antiquated legal frameworks, specifically replacing the Indian Penal Code (1860), the Code of Criminal Procedure (1973), and the Evidence Act (1872). These legislations, originally crafted under British rule with a focus on exploiting India's resources and suppressing dissent, will be replaced to better align with contemporary needs.

The current laws have been subject to criticism due to their colonial roots and technical shortcomings, notably lacking gender neutrality and featuring complex structures. The proposed reforms are targeted at remedying these deficiencies. The new laws are crafted with a focus on gender neutrality from the perspective of the accused and place a key emphasis on streamlining the legal process. The envisioned goal is to ensure prompt and equitable justice, with a commitment to delivering resolution within three years of a case is filed.

Acknowledging the need to adapt to contemporary challenges, the bills will codify and recognize modern crimes, such as Ponzi schemes. This counteracts legal stagnation and ensures that the legal system remains relevant and effective.

Despite the progressive nature of the proposed reforms, there has been criticism. One is the renaming of the bills. This criticism is, in part, due to the Hindi titling of the bills in a country that has several non-Hindi-speaking states. Additionally, it is seen as unnecessary meddling in a legal system that mandates the proceedings of the Supreme Court and the High Courts to be in English. Nevertheless, the shift is symbolic, representing a pivot toward a justice-oriented focus rather than a punitive one. In alignment with this, the proposed bills include provisions for community service as an alternative to punishment for petty crimes.

This legislative move is poised to shape the future of India's legal landscape, and it is hoped it will foster a more equitable and efficient system of justice.

***Neha S. Dagley** is a Florida commercial litigation attorney who has, for the last nineteen years, represented foreign and domestic clients across multiple industries and national boundaries in commercial litigation and arbitration matters. A native of Mumbai, Ms. Dagley is fluent in Hindi and Gujarati. She is co-chair of the Asia Committee of The Florida Bar's International Law Section. She is pursuing an advanced LL.M. in air and space law at Universiteit Leiden in the Netherlands.*

***Yavana Chitrarasu**, from Singapore, is an aspiring undergraduate student with a passion for sustainable food solutions. A proactive intern at a cultured meat startup, she has demonstrated a keen interest in innovative approaches to addressing environmental challenges. She eagerly awaits the start of her journey to further explore her interests in sustainability and the law.*

## MIDDLE EAST

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### Libyan sovereign wealth fund launches treaty claim against Belgium.

The Libyan Investment Authority (LIA) initiated investor-state arbitration against Belgium to challenge seizures imposed on its assets. The LIA succeeded in lifting the last remaining attachments obtained by a pair of award creditors in France. It has now commenced a treaty claim against Belgium over the freezing of its assets.

**U.S. court refuses to enforce DIFC-LCIA arbitration clause.**

A U.S. court has refused to enforce a Dubai International Financial Centre (DIFC)-London Court International Arbitration (LCIA) arbitration agreement (with a DIFC seat), ruling that the DIFC-LCIA is "not the same forum" as Dubai International Arbitration Centre. In 2021, the Dubai government issued a decree abolishing the DIFC-LCIA also "transferred the assets, rights and obligations" of the DIFC-LCIA to DIAC and expressly stated that existing DIFC-LCIA clauses would be deemed valid. However, a U.S. federal court held that neither the U.S. court nor the Dubai government had the power to "rewrite" the

arbitration agreement and order the proceeding to take place in another forum. The court stated that "Whatever similarity the DIAC may have with the DIFC-LCIA, it is not the same forum in which the parties agreed to arbitrate." This is the first reported case of a DIFC-LCIA arbitral clause being struck down.

### Tunisian state oil company faces ICC claim.

Zenith Energy has launched international arbitration in Paris against Tunisian state-owned Entreprise Tunisienne d'Activités Pétrolières (ETAP). This was the second arbitration case launched by Zenith. The company carried out what it said was "conservative seizures against ETAP following failures to satisfy contractually binding payments for oil production." (In July 2023, the company announced the seizure of US$6.5 million in a Swiss bank account owned by ETAP.) The arbitration will be pursued at the International Chamber of Commerce (ICC). Zenith launched its first arbitration case against Tunisia in June 2023, at the International Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C. Zenith is claiming at least US$48 million under the ISCID case. It did not specify a value for the separate ICC proceedings. The company said ETAP had failed to comply with its contractual obligations. ETAP did not pay for oil produced and sold by a Zenith subsidiary.

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## NORTH AMERICA

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### Biden administration asks Congress to approve sale of tank shells to Israel.

In the wake of the war between Israel and Hamas, the Biden administration has asked Congress to approve the sale of 45,000 tank shells to Israel for use in its fight against Hamas in Gaza, Reuters reported on 8 December 2023. The request, which is under review by the Senate Foreign Relations Committee and House of Representatives Foreign Affairs Committee, faces opposition from those who support a ceasefire between Israel and Hamas as well as criticism of what former State Department official Josh Paul objected to as the Biden administration's "blind support" for Israel.

Images from the Israel-Hamas war show that Israel is routinely using Merkava tanks to engage Hamas fighters in Gaza. Israel launched its avowed campaign to destroy Hamas after the Islamist militant group attacked Israeli towns on 7 October 2023, killing an estimated 1,200 people and taking more than 240 hostages.

The potential US$500 million sale of tank shells to Israel is in addition to President Biden's recent US$110.5 billion supplemental funding request to provide military aid to both Ukraine and Israel. That funding request is in limbo, however, as it also included a request for more funding for security at the U.S.-Mexican border. The request for additional border security funding, intended as an enticement for Congressional Republicans to vote for the funding request, in fact ignited debate over the border security issue, resulting in delays and division, including among Biden's own party. These on-going debates have left Biden's funding plans for the conflicts in Ukraine and Israel in jeopardy.

### Canadian law firms urge law school deans to take hard line against anti-Semitism and Islamophobia.

On 7 December 2023, eighty Canadian law firms sent a letter sent to all Canadian law schools expressing serious concerns over reports of growing anti-Semitic and Islamophobic conduct on college campuses. The letter follows a similar letter sent by twenty-four U.S. law firms to U.S.-based law schools.

The letter states, in relevant part:

> Over the last several weeks, we have been alarmed by the surging reports of anti-Semitic harassment, vandalism and assaults on university campuses. These include protesters calling for the death of Jews. Such anti-Semitic acts would never be tolerated at any of our law firms, nor should they be tolerated at our Canadian universities.
>
> We also believe that universities should not accept student societies and outside groups engaging in acts of harassment and threats of violence, as has been occurring and tolerated on many campuses. In fact, some of these student groups associated with many of your universities have shown outspoken support for the terrorist group Hamas.
>
> As employers who recruit from each of your law schools, we look to you to ensure your students are prepared to join workplace communities such as ours that have zero tolerance for any form of discrimination or harassment.
>
> We continue to carefully monitor the situation and trust that you will take the same unequivocal stance on your campuses. We also invite you to meet in order to arrange a respectful dialogue so that we can understand how you are addressing with urgency this serious situation.

### Mexico considers a forty-hour work week.

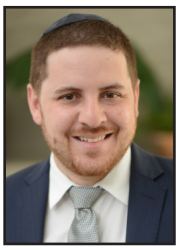
The Mexican Chamber of Deputies, which is the lower house of the Congress of the Union, is considering a

proposed bill to lower the Mexican work week to forty hours from the current forty-eight hours and to guarantee workers two days off a week. Promoters of the forty-hour work week say it would permit workers greater rest and promote healthy living. Compliance with the bill would be accomplished via inspections by the Mexican Labor Ministry, and employers not in compliance could face hefty fines. A number of industry groups have opposed the proposed bill, saying it will unjustly raise their labor costs and cost them their competitiveness in the global market.

***Laura M. Reich*** *is a commercial litigator and an arbitrator practicing at Harper Meyer LLP. In addition to representing U.S. and foreign clients in U.S. courts and in arbitration, she is also an arbitrator with the American Arbitration Association and the Court of Arbitration for Art in The Hague. A frequent author and speaker on art, arbitration, and legal practice, Ms. Reich is an adjunct professor at Florida International University Law School and Florida Atlantic University and treasurer of the International Law Section of The Florida Bar.*

***Clarissa A. Rodriguez*** *is a board certified expert in international law. She is a member of the Harper Meyer LLP dispute resolution practice and specializes in art, fashion, and entertainment law, as well as international law. With nearly two decades of experience, Ms. Rodriguez leads and serves on cross-disciplinary teams concerning disputes resolution and the arts industry. She has found a way to dovetail her passion for the arts into her legal career by representing the players in the art, fashion, and entertainment industries in their commercial endeavors and disputes.*

## SOUTH AMERICA



**Rafael Szmid, New York, and Hillary Sharp, Miami**
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### Working group identifies top focus sectors for anticorruption investigations in Brazil.

Last August, Brazil's anticorruption law celebrated its tenth anniversary. A couple of months later in October, the Organization for Economic Cooperation and Development's (OECD) working group on bribery issued a report stating that Brazil must correct outstanding issues pertaining to the independence of the judiciary and law enforcement bodies to properly comply with the OECD's recommendations.

According to the report, the lack of independence and autonomy of prosecutors and the resulting "chilling effect" from recent enforcement actions against prosecutors may impact Brazil's ability to effectively tackle corruption.

According to some specialists, the recommendations from the report come in response to a Brazilian Supreme Court decision that annulled the use of evidence obtained as a result of the leniency agreement entered with the Brazilian construction company Odebrecht during the infamous *Operação Lava Jato* (in English, the Car Wash Operation) dedicated to uncovering corruption schemes involving the Brazilian state oil company Petrobras. The use of this evidence resulted in several convictions of top executives of various companies involved in Brazil and abroad, and the incarceration of then (and current) Brazilian President Luiz Inacio Lula da Silva.

Nevertheless, the Brazilian Supreme Court decided that the leniency agreement with Odebrecht, which also required Odebrecht to plead guilty and pay a hefty fine to Brazil, the United States, and Switzerland, was invalid due to the prosecutors' failure to comply with due process requirements and international legal cooperation procedures that would have formalized the agreement. Moreover, the agreement was tainted by evidence showing that prosecutors inappropriately collaborated with the judge overseeing the investigation.

Despite a plethora of efforts on behalf of the Brazilian government to enforce its anticorruption laws, according to a 2022 study,[1] Brazil remains the country most frequently cited in connection with ongoing FCPA-related investigations, as well as the country most frequently implicated in FCPA-related bribery schemes that result in enforcement actions. The high number of ongoing FCPA investigations involving Brazil tends to lead to a concomitant rise in local investigations and vice versa.

Nevertheless, Brazilian authorities have expressed their intention to focus on large public infrastructure projects across a variety of sectors (e.g., construction of roadways/railways, power plants, airports, etc.) as part of the newly launched *Novo PAC* (*Programa de Aceleração do Crescimento*) (in English, the New Growth Acceleration Program or New PAC).

The New PAC is a federal program with a budget of BRL 1.7 trillion Brazilian Reais (approximately US$340 billion) meant to create partnerships between the private sector and Brazil's federal government, states, and municipalities to boost infrastructure projects, accelerate growth, and create jobs. The New PAC is a new iteration of 2007 PAC, which faced numerous challenges, including allegations of corruption involving the selection of companies awarded contracts to carry out the PAC projects, the lack of transparency regarding public tenders and the allocation of resources, as well as the inconsistent application of anticorruption laws by Brazilian authorities.

The New PAC is currently prioritizing projects[2] that include:

1. Infrastructure of Cities: urbanization of slums, optimization of water supplies, sewage, and solid waste systems, improvement of urban mobility, and prevention of natural disasters;
2. Health: construction and improvement of Basic Health Centers (in Portuguese, *Unidades Básicas de Saúde or UBS*), polyclinics, and maternity hospitals;
3. Education: construction and improvement of kindergartens, primary and secondary schools, and purchase of school buses;
4. Culture: construction and improvement of Unified Arts and Sports Centers (in Portuguese, *Centro de Artes e Esportes Unificados or CEUs*) and historical heritage projects; and
5. Sports: construction and improvement of community sports venues.

Apart from the US$75 billion allocated in the Brazilian Federal Budget, the New PAC intends to rely on funding from state-owned companies and public banks, contributions stemming from concessions to the private sector, and public-private partnerships. In seeking funding from the private sector, the Brazilian government has stated that the New PAC presents "promising opportunities for international investors."[3]

Moreover, as part of Brazil's efforts to prioritize enforcement of the anticorruption laws with respect to government-funded projects, the Office of the Comptroller General (CGU) is pushing for compliance-related cooperation agreements with Brazil's state banks, given their crucial role in funding these projects. In particular, the CGU will assist Brazil's state development bank, the *Banco Nacional de Desenvolvimento Econômico e Social,* to develop a set of mandatory compliance requirements that companies with yearly revenues of over BRL 300 million Brazilian Reais (approximately US$60 million) will have to satisfy to be eligible to receive loans.

However, the challenges associated with Brazil's evolving compliance landscape, including the inconsistent implementation and enforcement of anticorruption laws, pose significant hurdles for foreign companies seeking to satisfy the requirements set forth by Brazil's ambitious laws.

## Brazil's new public procurement law requires winners of large-scale project bids to implement compliance programs.

As the country with the largest economy in South America, Brazil is indisputably a global giant. With its booming economy and extensive government involvement and participation in key sectors (e.g., health, education, infrastructure, and transportation), myriad global companies are constantly incentivized to participate in public procurement bids to sell their products and provide their services to the Brazilian government.

Nevertheless, the process of procurement and bidding in public tenders has been historically fraught with complications. Apart from complicated rules and requirements favoring Brazilian entities over foreign companies, typical issues involving public procurement in Brazil include bid rigging, payment of bribes, and/or fraud.

As a result, the new public procurement law enacted in 2021 (Law No. 14,133/2021) imposes new compliance requirements, including compliance programs, which will be mandatory as of April 2024.

The main developments of this law that affect compliance frameworks are:

- Mandatory Compliance Programs: bids related to large-scale projects (contracts worth more than BRL 200 million Brazilian Reais [approximately US$40 million] related to constructions, services, and/or supplies) are required to implement and provide proof of compliance programs;
- Compliance Programs as Tiebreaking Criteria: companies with robust compliance programs as required by Brazilian authorities will have a competitive advantage in bidding processes over companies that do not;
- Violation of Labor Laws to Preclude Participation: companies convicted of violating labor laws (including exploitation of child and teenage labor and subjecting employees to conditions analogous to slavery) cannot be awarded public contracts; therefore, companies are encouraged to invest in full-scale compliance programs to prevent the same;
- Mitigation of Sanctions: existence and improvement of compliance programs will be considered a mitigating factor when determining the imposition of sanctions; and
- Rehabilitation of Sanctioned Companies: the implementation and improvement of compliance programs is now a mandatory requirement for the rehabilitation of sanctioned companies.

Brazil's enactment of this new public procurement law signifies a commitment to fostering transparency, competition, and accountability in the procurement process and to encouraging foreign participation in public tenders. Although its effectiveness remains to be seen and the delayed implementation of this new law may suggest Brazilian authorities are unprepared to integrate and enforce it, the new public procurement law has the potential to reshape the landscape of compliance law for the best.

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## WESTERN EUROPE

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### EU court rules against Austrian content moderation law.

On 9 November 2023, the European Court of Justice (ECJ) decided in favor of tech giants TikTok, Meta (formerly Facebook), and Google against an Austrian online content law. The Austrian law required platforms to have reporting systems for illegal content and imposed reporting obligations beyond their own jurisdiction. The court ruled that big tech companies are not subject to such reporting systems or obligations imposed by EU member states that go beyond their jurisdiction.

The Digital Services Act (DSA), adopted in October 2022, aims to establish harmonized rules for a safe and trusted online environment. This decision comes amid increasing efforts in the EU to regulate online content. The DSA builds upon the E-Commerce Directive and reinforces the country-of-origin principle, with online platforms subject to the law of the EU country where they have their headquarters. In this case, the court affirmed that a national law imposing obligations on a broadly defined category of services, such as communication platforms, is not an exception to this principle.

While the court's decision may be seen as a win for tech giants, it also raises concerns, as some argue that strict obligations for communication platforms, as envisaged by Austria, could address issues like hate speech and false reports. However, the court emphasized the importance of maintaining the integrity of the common internal market and avoiding division through national regulations.

### German court rules government climate policy unlawful.

The Berlin-Brandenburg Higher Administrative Court declared the German government's climate change mitigation policy to be unlawful on several points. The court specifically pointed out shortcomings in the government's actions related to transport and housing concerning the established upper limits for carbon emissions in individual sectors, as outlined in the Climate Protection Act.

As a result of the ruling, the court has ordered Berlin to take an emergency action. The government is now required to present emergency programs aimed at aligning its policies on transport and housing with the Climate Protection Act from 2024 to 2030.

The ministry for climate, led by Vice Chancellor Robert Habeck, will assess the details to determine the appropriate course of action. The ministry for transport did not immediately provide a comment on the ruling, and the ministry for housing and construction stated that it will examine how to proceed once the reasons for the judgment are available. The ruling emphasizes the importance of aligning government policies with climate protection goals and may have implications for Germany's approach to addressing climate change in the specified sectors.

The regional court's ruling, which found the German government's climate change mitigation policy to be unlawful, was based on complaints filed by environmental associations BUND and Deutsche Umwelthilfe (DUH). These organizations had raised concerns about the government's actions on transport and housing, citing violations of established carbon emission limits for individual sectors outlined in the Climate Protection Act.

While the court upheld the complaints from BUND and DUH, it also left open the possibility for the government to appeal the decision. This means there is an option for the government to challenge or contest the ruling in a higher court. Therefore, the legal process may continue, and the final resolution of the case could be subject to further legal proceedings.

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# Best Practices: Navigating the Complexities of International Private Investigations: The Essential Role of Local Expertise

**By Marc Hurwitz, Tampa**

In the realm of private investigations, the challenges compound when they extend beyond domestic borders. International private investigations is a nuanced and intricate field, demanding a deep understanding of varied legal systems, cultures, and languages. A key factor in the success of these investigations is the utilization of "boots on the ground"—local investigators who possess in-depth knowledge of the region in which they operate.

The importance of local expertise in international investigations cannot be overstated. Investigators native to or stationed in a specific country bring with them an invaluable familiarity with the local landscape. This includes an understanding of the available resources, how to access vital information, and the particulars of local regulations and practices. In contrast, someone outside of a particular region might not fully grasp these intricacies. For instance, a foreign investigator may not be aware that each state in the United States has its own division of corporations, a critical piece of information for business-related investigations.

Consider the scenario where an investigation involves tracking financial transactions or corporate affiliations across different countries. An investigator based in the United States might be well-versed in navigating American corporate databases but may falter when trying to access similar information in a foreign country, where the process could be vastly different. This is where local investigators become indispensable. They not only understand the legal framework and bureaucratic processes of their country but are also attuned to cultural nuances that might influence the investigation.

Another crucial aspect of international private investigations is the network of overseas agents. Engaging an investigator who has established a wide-ranging network of trusted and reliable agents across various countries is vital. These networks are built over years and are based on mutual trust and professional respect. They ensure that the investigator leading the case can reliably delegate tasks to agents in other countries, confident in their ability to deliver accurate and timely results.

## Best Practices, continued

The importance of an agent's network and approach is paramount. Having agents who are not just skilled but also intimately familiar with their operational environment can make a significant difference. These agents can navigate local bureaucracies, understand the legal implications of their actions, and are often able to uncover information that might be inaccessible or overlooked by someone without their local insight.

Furthermore, international private investigations often involve sensitive matters that require discretion and adherence to legal standards. Local investigators are more likely to be aware of and compliant with the laws and ethical standards in their jurisdiction. They can also advise on the legality and feasibility of various investigative methods in their region, ensuring the investigation does not inadvertently break local laws or cultural norms.

The success of international private investigations hinges significantly on the expertise of local investigators. Their knowledge of regional laws, customs, and available resources is invaluable. Additionally, engaging an investigator with a robust network of trusted overseas agents ensures that the investigation is conducted efficiently, ethically, and effectively, regardless of geographical boundaries. As the world becomes increasingly interconnected, the demand for skilled international investigators with strong local networks will continue to rise, highlighting their indispensable role in the complex landscape of international private investigations.

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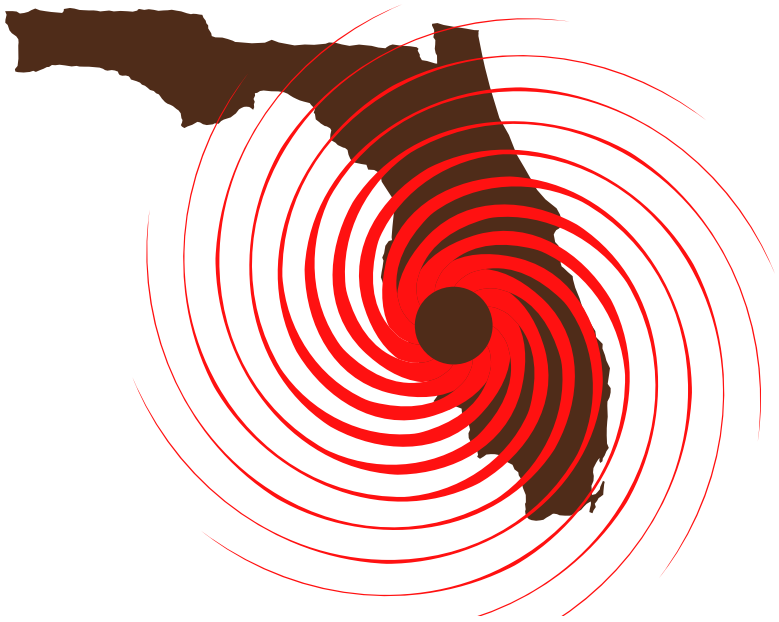
risks due to anthropogenic climate change. . . . However, there is still substantial uncertainty owing to model uncertainty in simulating historical [hurricane] decadal variability in the Atlantic and owing to limitations of observed [hurricane] records."[17] That sixteen years have passed between these reports and the same scientific authority is still debating the extent of climate change's effects on future hurricane activity demonstrates the difficulty of assessing such risks with certainty. Indeed, seven of the ten most intense hurricanes to hit the United States mainland between 1851 and 2022 occurred in 1961 or earlier.[18]

Thus, while most insurance companies agree that climate change is certainly a factor that will eventually affect risk, most view it as a long-term issue that does not affect their year-to-year premium changes and risk assessments.[19] Still, regardless of how immediately the global effects of climate change are felt, ideally the costs associated with risks that climate change may pose to infrastructure worldwide can be defrayed by an increasingly globalized reinsurance market.

One of Florida's recent legal reforms, which came into effect in July 2021, concerns international jurisdictions from which insurance companies selling homeowners insurance policies in Florida may purchase reinsurance. Reinsurance is insurance that insurance companies themselves must obtain in certain amounts as required by law and the Florida OIR in order to ensure that insurers will be able to pay out claims in the event of significant weather catastrophes.[20] The last few years have seen a dramatic increase in reinsurance costs, including a 27% increase on average in 2023 according to the OIR.[21] The reform revised Florida's reinsurance law—section 624.610, Florida Statutes—to allow insurance companies operating in Florida (the "primary" or "ceding" insurers) to receive regulatory credit for reinsurance obtained from reinsurers (the "assuming" insurers) domiciled in "reciprocal jurisdictions," thereby broadening the base of potential reinsurance sources from which primary insurers can obtain coverage so as to foster a more competitive reinsurance market with lower reinsurance costs.[22] The expected savings due to lower reinsurance costs would then be passed down from the primary insurers to Florida homeowners.

Incorporating changes made by the NAIC to its model reinsurance law, the Florida law defines "reciprocal jurisdiction" to mean: (1) a non-U.S. jurisdiction that is subject to an in-force covered agreement[23] with the United States or, if the subject covered agreement is between the United States and the European Union, a member state of the EU; (2) a U.S. jurisdiction that meets the NAIC's accreditation requirements; or (3) any other jurisdiction that is deemed qualified by the Florida OIR based on certain statutory criteria.[24] [25]



The criteria to qualify under the third category of reciprocal jurisdiction are: (1) the non-Florida jurisdiction allows its own domestic primary insurers to obtain and take credit for reinsurance obtained from a reinsurer domiciled in the United States in the same manner they could for reinsurance obtained from a reinsurer domiciled in that jurisdiction; (2) the non-Florida jurisdiction does not require the reinsurer domiciled in the United States that assumes the risk of its own domestic primary insurers to establish or maintain an official local presence in that jurisdiction; (3) the non-Florida jurisdiction provides written confirmation that it recognizes insurers and insurance groups domiciled or headquartered in a jurisdiction accredited by the NAIC are only subject to supervision by the domiciliary state (and are not subject to supervision of the non-Florida jurisdiction); and (4) the non-Florida jurisdiction provides written confirmation that information regarding insurers and their parent, subsidiary, or affiliated entities shall be provided to the OIR in accordance with a memorandum of understanding or similar document between the OIR and the non-Florida jurisdiction.[26]

Since the reform was enacted, thirty-six companies have been approved by the OIR as reciprocal jurisdiction reinsurers, twenty-one of which entered the Florida insurance market in 2023 alone).[27] The vast majority of these companies are

## Florida, Insurance, and Climate Change, continued

based in Bermuda (twenty-three), followed by the United Kingdom (four), Switzerland (four), Ireland (two), Germany (two), and Luxembourg (one).[28] Of note, Ireland, Germany, and Luxembourg are EU countries that were qualified as reinsurers under the in-force covered agreement between the United States and the EU. It is also worth noting that while the NAIC currently lists Japan as a qualified reciprocal jurisdiction under its standards, it does not appear that any reinsurers from Japan have entered the Florida reinsurance market.[29]

As litigation reform takes hold, it is hoped that more reinsurers from even more international jurisdictions will seek to enter the Florida marketplace in order to satisfy demand from the state's primary insurers, which would in turn benefit Florida homeowners by way of lower premiums. But lower premiums aside, fostering an open international market for property insurance and reinsurance now could pay dividends in dealing with the consequences of global climate change in the future.

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substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.

2. For the purpose of paragraph 1:

a. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;

b. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;

c. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;

d. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

e. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.

Since the Independent Expert Panel's proposed definition, much debate has followed that engages in the substantive text of the definition and the suitability of its proposed place in ICL.[16] This article, however, instead recognizes that, notwithstanding the elements of the definition, in order to give effect to the proposed definition, the crime of ecocide must be able to sustain the challenges it will come up against, including those relating to evidence. This is particularly important considering the constant evolution and expansion of environmental science.

**Historical Evidentiary Challenges in International Criminal Law and Their Potential Impacts in the Case of Ecocide**

As engagement with Article 8(2)(b)(iv) of the Rome Statute has shown, there exist significant challenges in providing appropriate evidence to establish accountability for environmental damage. It is perceivable that not only would these challenges also extend to the crime of ecocide, but that they would be further exacerbated, given the wider range of situations in which ecocide could occur in circumstances beyond those of international armed conflict.

Generally, at the international crimes level, identifying sufficiently relevant evidence comes with a plethora of challenges. These relate to the delay in investigations due to the complementary nature of ICC proceedings to domestic proceedings (issue of temporality), difficulties with gaining access to areas of ongoing conflict (geopolitical issues), and

the challenges that arise with the investigations of crimes that are far removed from the ICC itself (logistical issues).

***Issue of Temporality***

The issue of delay in investigation is particularly serious in the case of environmental harm. The ephemeral nature of environmental evidence means that gathering and preserving evidence of environmental pollution and degradation oftentimes needs to happen quickly. The ICC is usually only implicated once it has been shown that the local authorities are unable or unwilling to prosecute in the state in which the crime was perpetrated.[17] Given the rapid rate at which pollution or degradation can occur and spread—as well as the potential rapid rate at which evidence of the same can evolve or indeed, disappear—uncovering, collecting, and preserving evidence of environmental damage are processes that must take place as soon as possible after the occurrence of the act that caused ecocide. Investigations and attempts to collect evidence of environmental harm years after the act that caused it simply will not do.

Not only is certain evidence of environmental harm difficult to gather on account of its ephemeral nature, but intervention in the interim period before trial by either well-intentioned actors and/or attempts to erase evidence of environmental harm by perpetrators constitutes a risk to the fact-finding and evidence-gathering processes. Here, we are confronted with the paradox that different methods and legal frameworks aiming to protect the environment may run counter to each other where cleanup efforts may in fact impinge investigations into crimes of ecocide.

This tension is interesting to consider for impacts on evaluating the extent of the perpetrator's liability and appropriate sentencing. However, in the same way, an expeditious investigation and finding of liability may also mean that the

## Viability of the Crime of Ecocide, continued

full extent of the perpetrator's acts is not tangible or known at the time of investigation or conviction. Indeed, "long-term" is included in the proposed definition of ecocide. Therefore, an issue of not only delay, but rather of timing generally, can greatly impact the evaluation of evidence in cases of ecocide, which in turn, may have repercussions on findings of liability.

***Geopolitical Issues***

It is sadly more common for the worst impacts of environmental harm and pollution to be felt in the Global South.[18] In cases of environmental harm such as oil spills and mining disasters, foreign players are oftentimes implicated in the exploitation of the related natural resources. Governments of other nations and private actors key to local economies also have an economic interest in these activities. Such economic interests may eclipse any appetite for prosecuting actors implicated in the environmental harm at issue. Local authorities may experience pressure from trade partners to prevent any investigation that may inhibit the progression of such activities that create revenue. Challenges surrounding cooperation with states and the ICC's lack of enforcement powers become ever more apparent when considering environmental harm. As Whiting put it, national investigators have the support of the state; international investigators have no coercive powers and are therefore, entirely dependent on "voluntary" cooperation from states.[19]

***Logistical Issues***

Obtaining local on-the-ground knowledge is essential for effective investigation in ICL. For example, in the case of certain areas of the Amazon rainforest, despite new efforts by the authorities, control and exploitation of the land in these areas by armed gangs constitute a major obstacle to intervention by local authorities.[20] This obstacle could be even further exacerbated in the case of investigation by foreign investigators who do not hold "lay of the land" issue resolution practices and cultural norms that would enable them to evade conflict during local investigations.[21] In addition to the challenges of remoteness of location for ICC investigators and unfamiliarity with the site in question, there is also the likelihood that an area will still be affected by conflict at the time of the investigation.[22] This, coupled with a lack of cultural knowledge and limited funding capacity of the ICC, creates a less than ideal starting point for environmental investigations.

**Causation and Attribution in the Context of Ecocide**

The evidentiary issues discussed above are intrinsically connected with each other and feed into the challenges of demonstrating causation and attribution, which necessitate some unique considerations in the case of environmental harm.

Causation in environmental cases can be considered the process of connecting a particular episode of environmental damage to the responsible subject.[23] However, connecting those dots to prove causation is particularly challenging in cases of environmental harm.[24]

The geographical distance between the source of pollution and where the damage materializes may constitute a considerable obstacle in tracing the source of pollution, and in turn, identifying the perpetrator. In attempting to locate the source of the harm, assessment of the various possible contributing factors in the source's path may be necessary. This challenge folds into yet another difficulty of temporality: the more time it takes to find the source of the environmental damage, the greater risk there will be of the evidence disappearing. In essence, the time lapse between the occurrence of the polluting act and the materialization of the effects of the act dilutes the ease or speed with which the causation can be established.

Establishing the true origin of the act that caused the eventual harm to the environment is yet another major challenge. Where in a particular sequence of events should the causation cutoff point lie? Applying a "but for" causation approach to causation in cases of environmental damage creates monumental challenges, especially considering that various natural events or human activities may exacerbate the impact of the original damage done. The myriad factors that could possibly amplify the resulting environmental damage make determining whether the original source of pollution is the cause of the eventual damage extremely difficult. For example, to what extent should certain weather factors be considered in cases where fires or air pollution carried the original source of damage farther and over a longer period of time? If the origin of the environmental damage is a natural resource such as oil that spills and creates widespread environmental damage, should trade partners' interests and market pressure on the implicated oil company to produce at a faster rate factor in to assessing the cause of why the oil spill occurred?

The same goes for the attribution of the resulting environmental harm to a particular party. Attribution science is a field of climate science that helps to quantify the extent to which human influence on the climate is responsible for specific impacts and can support the adjudication of certain types of legal disputes concerning the environment.[25] However, environmental damage oftentimes cannot be

## Viability of the Crime of Ecocide, continued

unambiguously attributed to a single party; taking into account damage or certain conditions which predate the act in question or certain sequential events involving several parties culminating in the eventual harm makes attributing the harm for a finding of liability for ecocide extremely challenging. The International Criminal Tribunal for the former Yugoslavia (ICTY) Committee found that "much of the environmental contamination which is discernible cannot unambiguously be attributed to the NATO bombing."[26] Indeed, commentators have noted that while ecological destruction sometimes occurs as result of a dramatic event (like a nuclear explosion or oil spill), it instead often occurs as a result of many incremental, undramatic actions, by many individuals over a long period of time.[27] In this sense, the ICC's investigations and prosecutions of individuals for the crime of ecocide would even further exacerbate existing evidentiary challenges experienced during the prosecution of atrocity crimes.

**Digital Open-Source Evidence and Ecocide**

Despite the evidentiary challenges associated with fact-finding and the ephemeral nature of environmental evidence of certain damage, solutions may lie with recent technological developments for uncovering, gathering, and preserving evidence. The increasing prevalence of digital open-source evidence is enabling investigators to access contemporaneous information before its physical traces disappear. Digital open-source evidence consists of material that is publicly available online and that can be used as evidence before the ICC. While digital open-source evidence will not solve all the challenges associated with collecting environmental evidence, it can play an important role in providing some form of proof.

Historically in ICL proceedings, investigators and prosecutors at the ICC have relied on more traditional forms of evidence, at the core of which lie essential testimony of victims and other witnesses. While persons impacted by the environmental damage may be able to offer some type of testimony, such testimony may not always be available in the case of damage done to the environment, especially where the harm materializes over long periods of time. If we are to accept that the crime of ecocide would symbolize a move away from an anthropocentric approach to ICL, then we must grapple with the idea that the principal "victim" of ecocide—the

environment—cannot "speak for itself"[28] on account of the damage caused to it.

The use of digital evidence can facilitate the discovery of relevant evidence of environmental damage in relation to the crime of ecocide. Of particular interest is content produced on social media platforms such as Meta (formerly Facebook), TikTok, or X (formerly Twitter). Social media contemporaneously generates documents or comments on ongoing environmental harms and leaves a digital footprint of proof. Not only is it potentially helpful in identifying further witnesses who can provide crucial testimony, but it is particularly valuable when it comes to the type of material shared: photos, videos, location tags, and real-time commentary. Of course, developments in the technological realm that can be used as evidence go beyond open-source materials. New technologies that monitor the degradation of certain areas may be able to show damage and its evolution in real time. Combining this with satellite imagery will help to locate and time the crime in question. This underlines the importance of combining new methods of creating evidence with more established forms of evidence to create a strong network of proof.

The emergence of digital open-source evidence, particularly from social media sites, is still in its infancy in international criminal law. There has yet to be a case in which the ICC judiciary rules on the probative value and weight of such digital open-source evidence. However, its value is undeniable: by circumventing the challenges of cooperation, location, and temporality, it is a question of how, rather than if, digital open-source evidence will be integrated into the current network of evidence. The crime of ecocide then seems to be an ideal candidate to put its use to the test considering its challenging evidentiary landscape.

**Practical Implications: Judicial Evaluation of Environmental Evidence Outside Current Patterns of Assessment of Criminal Responsibility**

And what about the ultimate decision-makers in an ecocide case? All challenging roads lead to them, whether we consider the proposed definition of ecocide or the new types of evidence and evidentiary requirements that will come into play.

Greene has noted that, as matters stand, the ICC may not have the necessary specialized knowledge to prosecute environmental crimes. The current composition of the ICC is a reflection of its main focuses; the judges are experts in criminal law and procedure or humanitarian law.[29] To examine and prosecute defendants for environmental crimes, the ICC judges would arguably require considerable training or other external help, potentially in the form of a specialized panel comprising both environmental law experts and environmental scientists.

Efforts to increase the capacity of judges to handle cases concerning the environment are already ongoing. The Global Judicial Institute on the Environment Task Force (GJIE) "seeks to develop and enhance the capacity of judges, courts, and tribunals across the world to exercise their role in environmental matters through the effective implementation, compliance, and enforcement of the law." The GJIE seeks to achieve these objectives via activities such as judicial capacity-building and education programs, technical assistance, and information exchange.[30] Further, where there is a reliance on digital open-source evidence, training in the assessment and handling of such material would also be fundamental to the appropriate handling of these cases.

Stuart-Smith, EL Otto, and Wetzer note that while environmental attribution science has a major role to play in evaluating the factual basis for legal claims, the contribution of scientific evidence is contingent on how the law is applied, in particular with regard to determining causation.[31] We see clearly here that interdisciplinary collaboration and knowledge exchange is hugely important in developing legal understanding and capacity building to ultimately craft the legal tests for determining liability for environmental harm.

**Conclusion**

In recognizing the existing cavity in current legal frameworks and working to identify how best to ensure the environment is protected, the work of the Independent Expert Panel is key in identifying which legal framework may be best suited for the incorporation of the crime of ecocide. A multifaceted approach is likely necessary to protect the environment to the greatest extent possible by both incentivizing people to take action to protect the environment and deterring people from causing environmental harm. Giving effect to the proposed crime of ecocide in ICL acts as the deterrence element of this double-sided coin. However, it is clear that a plug-in approach into the Rome Statute without regard to necessary changes to the current evidentiary standards and causation and attribution analyses is not viable. Assessing environmental evidence is not only complex, but also distinctive in nature. Trying to squeeze the crime of ecocide into a box of current ICL evidentiary practices will likely not work. The evidentiary challenges relating to temporality, geopolitical and logistical issues, and the difficulties in determining causation and

## Viability of the Crime of Ecocide, continued

attribution on account of the rapid evolution or disappearance of environmental evidence exist as not entirely unique but exacerbating challenges to evidentiary assessment and determination of liability. In recognition of these exacerbated elements, adaptation is necessary, and digital open-source evidence as well as judicial training and capacity building exist as possible forward-looking solutions. The Independent Expert Panel strove to think outside the box in order to create a definition of ecocide that would help to protect the environment. It seems that the proposed crime of ecocide will also force us to think outside the box in order to effectively deal with related environmental evidence.

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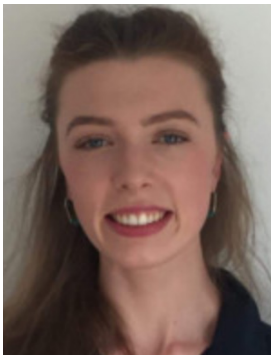

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competitive median labor costs and the Argentine workforce's ability to adapt to new challenges. Should Argentina do so, it would achieve a win-win scenario for both business owners and employees. It will, however, require a Lion's determination.

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environmentally responsible waste management plans into environmental, social, and corporate governance (ESG) frameworks.

- Diversifying supply chains so as to avoid the necessity of having to make environmentally unsustainable decisions on account of a lack of supplier options.
- Reshoring or nearshoring supply chains, where possible, thereby reducing the transportation component of a commodity's or product's carbon footprint.
- Building supply chain and production processes with parties that are committed, per the terms of sustainability-minded contractual agreements and purchase orders, to using verifiably green material inputs, clean energy and manufacturing practices, and zero emission shipping services.[6]
- Providing vendors/suppliers with sustainability toolkits or similar guidance.
- Using AI, blockchain, distributed ledgers, and other data-driven tools to ensure supply chain traceability and to monitor carbon emissions.
- Converting to green facilities (LEED certified, for example), fleets (EVs, for example), and, where possible, work arrangements (telecommuting, for example).
- Embracing the circular economy by repairing, recycling, and/or repurposing items that otherwise would have become waste.

This strategy offers significant leadership and initiative-taking opportunities for government agencies and private sector companies alike. Examples of agencies and companies that are proactively acting to tackle the challenge of transitioning to green trade include, amongst others, the Departments of Homeland Security, Commerce, and State, REI Co-Op, Nike, Apple, Amazon, Walmart, and Meta.

***Decarbonize Shipping***

As noted above, significant carbon emissions are embedded in the transportation of the cargo that is daily traded across international borders. Various strategies have been introduced to decarbonize the shipping industry, including:

- Switching to more climate-friendly fuels (advanced biofuels, hydrogen fuels, renewable synthetic fuels, ammonia-based fuels, methanol, etc.).
- Using more carbon-efficient modes of cargo transport (trains, vessels, etc.).
- Defining more direct shipping routes (for example, by


taking advantage of sea lanes opened up as the result of polar melting or exploiting shifts in prevailing atmospheric currents).

- Operating vessels and craft at more energy-efficient velocities and cruising altitudes.
- Developing more carbon-efficient last mile delivery practices (through, for example, the use of micro-hubs, EV fleets, drones, bikes, etc.).

***Develop and Implement Green Policies and Programs***

Another important strategy for combating trade-driven carbon emissions and environmental degradation revolves around the development and implementation of policies and programs that support green trade objectives and values. Examples of green trade-oriented policies and programs being pursued in the United States and around the world today include:

- Identifying and taking advantage of opportunities created by climatologically driven changes in the global distribution of comparative advantages. Newly gained comparative advantages, where leveraged in a responsible and sustainable fashion, can make an important contribution to the development and economic well-being of developing countries.
- Incorporating enforceable environmental provisions and mechanisms into traditional Free Trade Agreements (FTAs) such as the USMCA. Twenty-five years ago, this concept was controversial. Today it is a core element of FTAs.
- Eliminating the tariff bias that persists, to the benefit of "dirty" sectors and products (for example, steel and mining), in harmonized tariff schedules. The WTO is, to this end, spearheading an initiative to rebalance tariffs in furtherance of international climate goals.
- Negotiating or concluding agreements geared to achieving decarbonization (the *Indo-Pacific Economic Framework* for Prosperity (IPEF) Clean Economy Agreement, for example), upholding issue-specific environmental objectives (U.S.-Vietnam Timber Agreement, U.S.-EU Global

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Arrangement on Sustainable Steel and Aluminum, the Port State Measures Agreement in connection with illegal, unreported, and unregulated fishing, etc.), and assuring the continued availability of the critical materials required by the green economy (Security of Supply Agreements, or SOSAs, MOUs on geological surveys, U.S. critical mineral agreements with the UK, the EU, Japan, etc.).

- Promoting the development of more carbon-efficient shipping routes (port to port green shipping corridors, for example)[7] and distance-cutting, time-saving overland corridors (for example, the multimodal corridor Mexico is building across the Isthmus of Tehuantepec as an alternative to the drought-challenged Panama Canal).
- Developing and deploying, as appropriate, carbon accounting, reporting, and pricing mechanisms (the EU's Carbon Border Adjustment Mechanism,[8] the UK's pending Emissions Tracking Scheme, the proposed U.S. Carbon Border Tariff mechanisms,[9] the SEC's proposed climate-related disclosure rule, etc.). Such mechanisms can, when properly implemented, provide an important source of funds for fighting back against climate change and environmental degradation.
- Streamlining customs entry and clearance processes through the widest possible use of electronic manifests (i.e., all modes of transportation, both for imports and exports), the elimination of procedural redundancies, the enhancement of cargo security (achieved, for example, through the use of blockchain or distributed ledger technology),[10] the increased utilization of dedicated commercial lanes for shipments previously determined to be low-risk, and the revision of trusted trader programs to recognize and reward green practices (pursuant, for example, to the addition of environmental criteria to Authorized Economic Operator programs such as the United States' Customs-Trade Partnership Against Terrorism). It has been estimated that the implementation of such measures would cut down on carbon emissions that have been linked to processing and clearance delays at ports of entry around the world.[11]
- Strengthening enforcement postures and capabilities via the integration of tougher environmental laws and mechanisms, the deployment of more effective traceability/detection and allegation presentation tools, and the enhancement of inter- and intra-governmental operations.

***Enhance International Cooperation and Collaboration***

The final strategy for mitigating international trade's contribution to climate change and environmental degradation consists of strengthening cooperation and collaboration between countries and intergovernmental organizations (IGOs)/nongovernmental organizations (NGOs). Noteworthy measures in this regard include:

- Harmonizing carbon accounting, reporting, and pricing methods to ensure a just, coordinated, and universally accepted approach. The WTO's task force on carbon pricing is playing an important role in fleshing out a methodology that promotes a level playing field and avoids implementation imbalances.[12]
- Enhancing the capacity of countries that lack the resources and/or expertise needed to accurately track, report, and price carbon emissions. The G7 climate club, an open, cooperative, and inclusive initiative for advancing the objectives of the Paris Agreement, provides a good example of how a bloc of nations can boost climate cooperation, enhance synergies, and address capacity gaps between countries.
- Improving information sharing among green trade stakeholders so as to create a better foundation for making optimally informed climate-related policy decisions. A good example of what this looks like in practice is the International Renewable Energy Agency's Collaborative Frameworks program.
- Discouraging protectionist policies that arbitrarily restrict the flow of the critical materials needed to support green trade. Having a race to the bottom with respect to inputs that can help mitigate the devastating effects of climate change is in no nation's best interest.
- Using high-profile multilateral fora such as the United Nations Framework Convention on Climate Change's Conference of Parties to raise awareness about and build support for the measures that are needed to combat climate change and environmental degradation.

**Mitigation Challenges**

Notwithstanding the progress that has been made in terms of identifying and beginning to counteract trade's contribution to climate change and environmental degradation since the issue first came to the forefront in the 1990's, more work remains to be done. If the full promise and potential of using green trade as a strategy for creating a sustainable environment are to be realized, the following challenges need to be worked out as expeditiously as possible:

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### *Green Trade Rules of the Road*

While the rules of the road embodied in the General Agreement on Tariffs and Trade 1994 (GATT 1994) have provided a reasonably sound framework for addressing trade issues with an environmental nexus, they are, at the thirty-year mark, not optimally aligned with world's current climate crisis. The WTO's plurilateral negotiation of an Environmental Goods Agreement (EGA) remains, in a related vein, a work in process (eighteen members corresponding to forty-six countries are, at this time, participating in the negotiation).[13] The updating of the WTO's core rules of the road coupled with the reaching of consensus on the meaning of "environmental goods" for the purpose of finalizing the EGA would strengthen green trade's capacity to combat climate change and environmental degradation.

### *Balancing Sticks and Carrots*

In a global trade environment characterized by divergent national goals and interests, shifting comparative advantages, and intensifying geopolitical competition, it is crucial that policies and programs implemented at the national level enhance, not complicate, the manner in which trade can contribute to the remediation of the climate crisis and serve as a force for environmental good. Lawmakers must, to this end, exercise care to ensure that green trade-related policies and programs neither create incentives for carbon leakage nor open the door to discrimination-based trade disputes at the WTO.

### *Global Methodology for Measuring, Reporting, and Pricing Carbon Emissions*

There is, despite the development of the Greenhouse Gas Protocol (GHG Protocol), no universally agreed upon and consistent method for measuring, reporting, and pricing carbon emissions. This could, as more countries develop and implement carbon pricing regimes, create cross-jurisdictional compliance challenges, practice disparities, and developmentally delineated inequities. Getting a rigorous, standardized, equitable, and comparison-enabling methodology in place will ensure that carbon measurement, reporting, and pricing mechanisms facilitate the collection of revenue due on commodities and merchandise with excessive embedded carbon emissions. This will, in turn, help close a climate change funding gap that is, in spite of the US$100 billion/year pledge made by developed countries (and monitored by the OECD), now thought to be in the trillions of dollars.[14]

### *Binding and Enforceable Environmental Provisions in Agreements*

The last issue that can impede green trade's ability to counter climate change and environmental degradation centers on the generally low level of enforceability that attaches to Multilateral Environmental Agreements (MEAs) and, in the case of the United States, newly negotiated framework agreements such as the Indo-Pacific Economic Framework for Prosperity (IPEF) and the Americas Partnership for Economic Prosperity (APEP). Absent stronger provisions on this point, interested parties must rely, when it comes to enforcement, on a combination of the good will of the countries involved in a dispute and/or the pressure that can be brought to bear on wayward companies by an organized, media-savvy, and, frequently, invested public. Making MEAs and framework agreements enforceable in the same way that traditional next-generation FTAs are would go a long way to advancing the transition to a green economy.

### Best Practice Recommendations for Importers and Exporters

The green trade story is one whose telling is far from finished. Indeed, with human-induced climate change and environmental degradation being characterized by NATO as "the defining challenge of our time," the story has really only just begun. Countries, IGOs, NGOs, and industry have stepped up efforts to develop and implement strategies that enable trade to operate as a positive force on the environment. Going forward, this will increase trade compliance risk encountered by importers and exporters the world over. Companies can prepare for this new operating dynamic by implementing the following best practice recommendations:

- Evaluate existing production processes and supply chains with an eye to making them greener.
- Identify how newly launched industrial policies can help green trade operations.
- Incorporate verifiable green trade provisions into contract manufacturing agreements and/or purchase orders.
- Understand the mechanics of the carbon measurement, reporting, and pricing regimes that may be operative (or pending) in target import and export markets.
- Update internal controls and procedures in a way that takes into account the compliance risk associated with the ongoing rollout of green trade strategies.
- For companies with U.S. import-export operations, keep a watchful eye on CBP's enforcement posture. As its new Green Trade Strategy[15] ramps up, the agency has

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indicated it will increase the targeting and prosecution of environmental crimes. Such action will likely focus on illegal logging; illegal, unreported, and unregulated fishing; commercial activities (for example, mining) that degrades the environment; and trafficking in either endangered species or hazardous waste.

- Develop and implement a robust ESG plan. The consuming and investing public expects such plans and will punish companies that fall short on this point.

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## Tailoring RICO Claims, continued from page 19

of the Lanham Act turned on the location of the infringing use in commerce.

In contrast to the Copyright Act and the Lanham Act, the RICO Act focuses on a contextual approach that allows for the consideration of actions taken abroad. This same term, the U.S. Supreme Court revisited the question of extraterritoriality in the RICO context in *Yegiazaryan v. Smagin*.[30] Since 2016, when the Supreme Court decided *RJR Nabisco, Inc. v. European Community*,[31] private RICO claims require an element of domestic injury and civil RICO "does not allow recovery for foreign injuries." In *RJR Nabisco*, the parties stipulated there was no domestic injury, so the Supreme Court did not have to apply this new standard.[32] *Yegiazaryan* is the first time the Supreme Court answered the question of what constitutes a domestic injury for RICO purposes in application.

The Court endorsed a contextual analysis to determine if there was a domestic injury and then turned to the facts on appeal.[33] Smagin and Yegiazaryan were parties to an arbitration in London, in which Smagin was awarded a multimillion-dollar arbitral award. The underlying dispute dealt with the misappropriation of real estate investments in Russia, and both parties were Russian nationals. Because Yegiazaryan fled to California to avoid criminal indictment for fraud in Russia, Smagin chose to confirm his arbitral award in the Central District of California and commenced enforcement proceedings there.[34] Smagin ultimately brought RICO claims against Yegiazaryan, alleging he used a web of shell companies to conceal his assets and make it impossible for Smagin to collect on his judgment.

The Supreme Court found that Smagin met the domestic injury requirement even though the parties, the underlying dispute, and the arbitral award were foreign because the racketeering activity caused a domestic injury by interfering with Smagin's intangible right to collect on his California judgment.[35] The Court noted that although much of the conduct happened abroad, Yagiazaryan took a number of domestic actions in furtherance of his scheme to avoid paying the monies owed to Smagin.

In comparison to the Copyright Act or the Lanham Act, the contextual approach outlined in *Yegiazaryan* focuses on the touchstone of a domestic injury and seems to allow for claims to stand even when there is substantial foreign conduct and foreign actors.

**Future Implications**

In the world of fast fashion in particular and international trade in general, questions of IP infringement will continue between creators and brands. Claims of copyright and trademark infringement will even continue between major brands as fast fashion rivals like Shein and its competitor Temu, who has replicated Shein's model of quick manufacturing and shipping of fast fashion items, battle each other over intellectual property rights infringement.[36] For example, in December 2022, Shein sued Temu in the Northern District of Illinois, alleging in part trademark counterfeiting, and infringement of trademark and copyright.[37] In July 2023, Temu accused Shein of sending numerous false notices of copyright infringement under the Digital Millennium Copyright Act to Temu and forcing manufacturers into exclusive supply arrangements that prohibited manufacturers from working with Temu.[38] A few months later, in September 2023, Shein sued a UK branch of Temu in the United Kingdom for allegedly infringing its copyright by using thousands of Shein's promotional photos on Temu's website.[39]


Both the string of lawsuits between Shein and Temu and the numerous lawsuits brought by smaller creators and brand owners against Shein illustrate how brands can use intellectual property claims to protect their own rights and competitiveness in the industry while also raising important questions of public opinion. If the plaintiffs in the Shein lawsuit prevail on their RICO Act claims, instead of the rise of the next fast fashion company, we may be looking at the rise of the next fast fashion disruptor—RICO claims against international competitors.

**Conclusion**

In summary, intellectual property rights litigation can be an effective tool to protect intellectual property, to increase competitiveness, and to highlight regulatory noncompliance to the public. Although litigation may be brought under the

## Tailoring RICO Claims, continued

Copyright Act and the Lanham Act, such claims are limited when the infringing act occurs outside the United States. Counsel's RICO approach to addressing overseas infringement of intellectual property rights provides an opportunity for a high reward but is not a good fit for all IP claims as RICO claims are difficult to prove. If the plaintiffs in the Shein lawsuit prevail on their RICO claims, it may pave the way for a new wave of litigation and significantly change the landscape of IP infringement claims.

As for Shein, even if the claims are ultimately dismissed, the publicity around this RICO claim against Shein will still affect public opinion as the lawsuit continues to draw negative attention to Shein's supply chain and IP practices. Additionally, these litigation struggles could impact Shein's valuation or ability to become a publicly traded company in the United States.

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## Tailoring RICO Claims, continued

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## Aircraft Exports, from page 23

expansive controls on aircraft and aviation related items to Russia, including a license requirement for the export, re-export, or transfer (in-country) to Russia of any aircraft or aircraft parts specified in ECCN 9A991.[6] Belarus was made subject to these restrictions on 2 March 2022. Additionally, on 2 March 2022, BIS excluded any aircraft registered in, owned or controlled by, or under charter or lease by Russia or a national of Russia from being eligible for license exemption aircraft, vessels, and spacecraft (AVS).[7] On 8 April 2022, BIS removed AVS eligibility in connection with Belarus and/or Belarus nationals. Accordingly, any U.S. origin aircraft or aircraft manufactured in a foreign country that contains more than 25% of controlled U.S. origin content is subject to a license requirement before it can travel to Russia or Belarus.

**Due Diligence/Screening**

Cross-border aircraft transactions involve increased sanctions compliance risk. As such risk is further increased by expansive Russia sanctions, enhanced due diligence should be performed. The core of due diligence involves confirming the beneficial ownership of all transaction parties and screening them against government sanctions and export control lists. Sanctioned individuals and parties from sanctioned countries are generally aware that U.S. persons and most non-U.S. persons may not engage in transactions with them or provide goods or services to them. Similarly, individuals and entities seeking exports of items to destinations where a license would be difficult to obtain are generally aware of those licensing issues. Accordingly, these individuals and entities may use front companies or other pass-through entities in third countries to disguise the true ownership and/or true destination of the export. Accordingly, it is crucial to thoroughly verify identities, intended ultimate destinations, and intended end uses. Parties to transactions should also be alert for "red flags." Potential red flags include, but are not limited to, lack of transparency or a refusal to provide information regarding ownership, end use, or end user; ties to entities on government lists; funds coming from persons other than parties to the transaction; ultimate destinations to a country prone to being used as a trans-shipment point; and purchasing or selling the aircraft without benefit of a test flight. Potential buyers should also inspect the aircraft log books to confirm the aircraft was not operated in Russia or any other sanctioned territory in violation of U.S. export control and economic sanctions laws. Buyers should also review U.S. government lists of aircraft that may potentially be in violation of Russia/Belarus sanctions.[8] Sellers should also obtain end user/end use certificates detailing an aircraft's intended base,


use, end user, and a certification that the aircraft will not be used in violation of U.S. export controls and sanctions. Purchase agreements should make provision of beneficial ownership information, end user/end use certificates, and other necessary due diligence information a condition precedent to closing. Ensuring compliance with regulations involves obtaining end user/end use certifications detailing the aircraft's intended base, use, and purpose. A Destination Control Statement[9] and other export control language should be included in purchase agreements and on the commercial pro-forma invoice prepared for aircraft export clearance purposes. Documenting due diligence processes and keeping records for at least five years is vital for compliance and audit purposes. Representations and warranties regarding beneficial ownership and compliance with export control laws are vital, but they cannot replace thorough due diligence.

**Export Clearance Requirements**

***What is an EEI and when is it required?***

An EEI is an electronic submission of export data filed through the Automated Export System (AES), pursuant to the FTR. The EEI is also an Export Control Document under the EAR. An EEI filing contains details about the export transaction, such as the name, address, and EIN of the United States Principal Party in Interest (USPPI), the date of the export, the name and address of the ultimate consignee/end user, the item's value, the item's ECCN, and other mandatory and applicable conditional data elements.[10] The information in the EEI filing is used by the Census Bureau for statistical purposes and by BIS

## Aircraft Exports, continued

for export control purposes. Generally, an EEI filing is required for all exports from the United States to a foreign country[11] if the value of the exported item exceeds US$2,500 and for all items that require an export license, regardless of value.[12] Some notable exemptions from the EEI filing requirement include exports to Canada, when Canada is the ultimate destination,[13] and temporary exports that are exported and returned to the United States less than one year from the date of export.[14] When an EEI is filed correctly, it generates an Internal Transaction Number (ITN), which constitutes proof that the EEI was filed.

As the FTR is generally geared toward goods that will be packed up and shipped as freight, applying these regulations to aircraft, which generally depart the United States under their own power, can be difficult. Further, Section 30.26 of the FTR, which specifically addresses aircraft, is often misinterpreted, creating further ambiguity.[15] Generally, an aircraft is considered to be permanently exported if it is exported from the United States as part of a sale, lease, or other transfer of possession to a foreign person, or is otherwise intended to be based outside of the United States for more than one year. Accordingly, the key question in determining whether or not an EEI filing is required is whether the intent is to principally hangar and maintain the aircraft within the United States or outside of the United States for more than one year. If the intent is to principally hangar and maintain the aircraft outside of the United States for more than one year, an EEI filing will generally be required. If the intent is to principally hangar and maintain the aircraft outside of the United States for less than one year, it will generally be exempt from the EEI filing requirement as a temporary export.[16]

***Who are the parties to an export transaction?***

The key parties in an export transaction under the FTR are the Foreign Principal Party in Interest (FPPI), the USPPI, and the authorized agent. The FPPI is the party abroad that either purchases or leases the aircraft for export purposes or to whom final delivery or end use of the aircraft is made. The USPPI is the party in the United States that receives the primary benefit, monetary or otherwise, from the export transaction. An authorized agent is an individual or entity located in the United States, or under its jurisdiction, who has obtained a power of attorney or written authorization from the USPPI or the FPPI to act on their behalf and complete and file the EEI (in the context of business aircraft transactions, this is generally a customs broker). Other parties that may be relevant in aircraft export transactions are the foreign entity and the order party. The foreign entity is an individual or entity that temporarily enters the United States and acquires the goods for export. The foreign entity may not maintain a physical office or residence in the United States. The order party is the individual or entity in the United States that conducts the direct negotiations or correspondence with the foreign purchaser and, as a result, receives the order from the FPPI.

***Who is the USPPI?***

Identifying the USPPI is a mandatory aspect of all EEI filings. Typically, the U.S. seller or lessor would be the USPPI in an aircraft export transaction; however, in aircraft export transactions, other parties may be potential USSPIs depending on the circumstances of the transaction. Common potential USPPIs in aircraft export transactions include the following:

**Foreign Entity as USPPI:** If the foreign entity is temporarily in the United States to accept delivery of the aircraft, the foreign buyer may be the USPPI. A foreign buyer is temporarily in the United States if it has a representative temporarily in the United States to obtain the aircraft and such representative has authority to make decisions and act on behalf of the foreign buyer. In situations where the foreign entity will be the USPPI, the U.S. seller should obtain a power of attorney indicating the individual representative's authority to accept delivery of the aircraft and to act on behalf of the foreign buyer. One of the mandatory data elements in the EEI filing is the USPPI's EIN. If the foreign buyer does not have an EIN, the individual representative's passport number will be reported on the EEI. Based on verbal guidance from the Census Bureau and BIS, it seems that individual, rather than the foreign buyer, would be considered to be the USPPI. Accordingly, any such individual needs to understand his/her responsibilities relating to the export.

**Order Party as USPPI:** If the order party directly arranges for the sale and export of goods to the FPPI, the order party is the USPPI. The order party would typically be a broker. Such broker may be the USPPI in a context where neither the seller nor the buyer qualifies as a USPPI. For example, if the seller is a non-U.S. person who utilizes a noncitizen trust structure to hold legal title to the aircraft and the foreign buyer does not have a qualified representative present in the United States to accept delivery of the aircraft.

**Owner Trustee as USPPI:** There are certain scenarios where the owner trustee may be the USPPI. This would typically be the case when the seller, buyer, or any other party do not

## Aircraft Exports, continued

qualify as a USPPI.

**Maintenance Facility as USPPI:** If a maintenance facility is performing upgrades or other work to the aircraft post-closing, the maintenance facility may be the USPPI.

Determining the USPPI in aircraft transactions can be complicated. In particularly complex transactions or in situations where a party refuses to be designated as a USPPI, guidance from the Census Bureau may be necessary. It is important to note that just because a party does not consider themselves to be the USPPI, it does not mean the government will agree with that assessment. The designation of the USPPI is determined by the specifics of the transaction and the roles of the parties involved, not merely by their own perception or preference. Ultimately, if the U.S. government designates a party as the proper USPPI, such party cannot disclaim that obligation.

***Who is responsible for filing the EEI?***

Generally, the USPPI or the USPPI's authorized agent prepares and files the EEI.[17] In most business aircraft transactions, the USPPI will engage a customs broker as its authorized agent for this purpose. However, in routed export transaction (where the FPPI directs the movement of the aircraft out of the United States), the FPPI's authorized agent is responsible for the EEI filing. As the U.S. seller rarely is responsible for the movement of the aircraft out of the United States, most export transactions will either be routed transactions or foreign entity USPPI transactions.

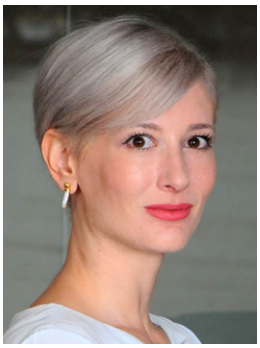
***Who is the exporter?***

The EAR defines the "exporter" as the person in the United States who has the authority of the principal party in interest to determine and control the sending of items out of the country.[18] The exporter is responsible for determining licensing authority (i.e., whether or not a license is required or whether a license exemption is available) and obtaining the appropriate license or other authorization when applicable.[19] The USPPI is deemed to be the exporter except in certain routed export transactions where the FPPI expressly assumes responsibility for determining licensing requirements and obtaining licensing authority. In such case, the authorized agent of the FPPI will be the exporter for the purposes of the EAR.[20]

**Transactional Considerations Regarding Export Clearance Requirements**

When dealing with aircraft export transactions, numerous factors should be considered by all parties involved to ensure compliance with the relevant export regulations. The purchase agreement governing the transaction should clearly define which party will be responsible for engaging and paying for the customs broker. The parties may wish to require the party tasked with the responsibility to engage a specific customs broker or, more generally, a customs broker with experience in aircraft exports. The parties should also undergo an analysis to determine who fits the role of USPPI, and then identify this party in the purchase agreement. In the event of a foreign entity USSPI, the parties should require that an individual with authority to act on behalf of the foreign buyer be present in the United States to accept delivery of the aircraft. Further, if the export is a routed transaction, the agreement should include the licensing authority assumption language required by 758.3(b) of the EAR, and if the authorized agent is known at such time, that party should be named as the exporter. The purchase agreement should also require the party responsible for the EEI filing to provide, or cause its authorized agent to provide, the ITN following the export. All parties should maintain the ITN, along with other records relating to the export, for at least five years. By incorporating these considerations into the purchase agreement and the overall transaction plan, potential risks can be mitigated.

Cross-border aircraft transactions demand comprehensive due diligence and regulatory compliance, with a focus on understanding the complexities of each transaction and the associated risks. The mobility of aircraft heightens the complexity of the already challenging U.S. export control regulations. Additionally, the evolving U.S. sanctions add serious risks to buyers who overlook the need for robust due diligence. Despite these added challenges, cross-border transactions can prove rewarding to those buyers and sellers who have the right team of professionals to guide them.



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## Aircraft Exports, continued

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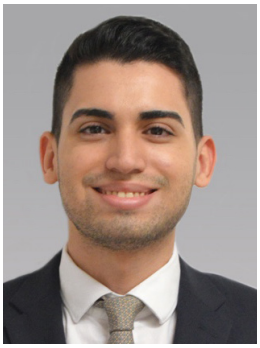

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**Endnotes**

1 15 CFR 734.13.

2 However, if an aircraft subject to EAR has been modified with ITAR controlled parts, the export classification would change from an EAR 9A991 aircraft to a subpart of either EAR 9A610 or USML VII classification. Licenses would be required based on those classifications.

3 *See* 15 CFR 744.21 and 15 CFR 744.22.

4 15 CFR 772.1.

5 *Id*.

6 87 FR 12,226 (3 Mar. 2022).

7 87 FR 13,048 (8 Mar. 2022).

8 The updated list can be found on BIS's Russia-Belarus Resources page at https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/russia-belarus.

9 15 CFR 758.6.

10 15 CFR 30.6.

11 EEI filings are also generally required for shipments to Puerto Rico from the United States, to the United States from Puerto Rico, and to the U.S. Virgin Islands from the United States or Puerto Rico. Although shipments to Puerto Rico and the U.S. Virgin Islands are not considered exports, an EEI filing is still generally required for shipments to these destinations as the Census Bureau uses this data for statistical purposes. That being the case, an EEI filing may be required if an aircraft will be principally hangered and maintained in Puerto Rico or the U.S. Virgin Islands for more than one year.

12 15 CFR 30.2(a)(iv).

13 15 CFR 30.36(a).

14 15 C.F.R 30.37(q).

15 Per 30.26 of the FTR, EEI filings are required for aircraft when "moving as goods pursuant to sale or other transfer from ownership in the United States to ownership abroad."

16 *See generally* 15 C.F.R 30.37(q).

17 15 C.F.R 30.3(a).

18 15 C.F.R 722.

19 758.3(a).

20 15 C.F.R 758.3(b).

## New Immigration Policies, continued from page 25

**Temporary Protected Status**

Temporary Protected Status (TPS) is a temporary immigration status granted to eligible nationals of a foreign state designated for TPS under the Immigration and Nationality Act (INA), or to eligible individuals without nationality who last habitually resided in the designated foreign state, regardless of their country of birth.[22] Congress created TPS in the Immigration Act of 1990.[23] During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain employment authorization documents.[24] As of 31 March 2023, there were approximately 610,630 people with TPS living in the United States.[25]

On 6 January 2023, DHS announced that the secretary of Homeland Security was extending the designation for TPS for Haiti for eighteen months, from 4 February 2023 through 3 August 2024.[26] The secretary also redesignated Haiti for TPS, allowing additional Haitian nationals (and individuals having no nationality who last habitually resided in Haiti) who have been continuously residing in the United States since 6 November 2022 to apply for TPS for the first time.[27] The initial registration period for new applicants under the Haiti TPS redesignation began on 26 January 2023 and will remain in effect through 3 August 2024.[28] DHS estimated that approximately "105,000 additional individuals may be eligible for TPS under the redesignation of Haiti."[29]

On 9 June 2023, DHS published Federal Register notices extending the TPS designations of El Salvador (10 September 2023–9 March 2025), Honduras (6 January 2024–5 July 2025), Nepal (5 December 2023–24 June 2025), and Nicaragua (6 January 2024–5 July 2025).[30]

On 3 October 2023, DHS announced that the secretary of Homeland Security was extending the designation for TPS for Venezuela for eighteen months, from 11 March 2024 through 10 September 2025.[31] The secretary also redesignated Venezuela for TPS, allowing "additional Venezuelan nationals (and individuals having no nationality who last habitually resided in Venezuela) who have been continuously residing in the United States since 31 July 2023 to apply for TPS for the first time."[32] The initial registration period for new applicants under the Venezuela TPS redesignation began on 3 October 2023 and will remain in effect through 2 April 2025.[33] DHS estimates that approximately "472,000 additional individuals may be eligible for TPS under the redesignation of Venezuela."[34]

**Family Reunification Parole Processes**

In May 2023, DHS announced new family reunification parole processes for certain nationals from Colombia, El Salvador, Guatemala, and Honduras, and their immediate family members, who have approved family-based petitions filed on their behalf by a U.S. citizen or lawful permanent resident.[35] These processes allow an eligible beneficiary to be considered for parole into the United States on a case-by-case basis while they wait for their family-based immigrant visa to become available.[36] Beneficiaries cannot apply directly for these processes. Petitioners are invited via mail or email to file Form I-134A, Online Request to be a Supporter and Declaration of Financial Support, for principal and derivative beneficiaries of Form I-130.[37] A separate Form I-134A must be submitted for each beneficiary.[38] If USCIS confirms that a petitioner's Form I-134A is sufficient, DHS will complete security vetting on each beneficiary and will consider each beneficiary for advance travel authorization on a case-by-case basis.[39] Beneficiaries and their family members granted parole under these processes will generally be paroled into the United States for a period of up to three years.[40]

On 10 August 2023, DHS published Federal Register notices that updated and modernized the Cuban and Haitian family reunification parole (FRP) processes, allowing petitioners to complete most of the FRP process on a secure online platform, eliminating the burden of travel, time, and paperwork and increasing access to participation.[41] The process is still available on an invitation-only basis.[42]

On 18 October 2023, DHS announced a new family reunification parole process for certain nationals of Ecuador who also have approved I-130 petitions filed on their behalf, "advancing the Biden-Harris Administration's effective strategy

## New Immigration Policies, continued

to combine expanded lawful pathways and strengthened enforcement to reduce irregular migration."[43] The Federal Register notice for this process is pending publication with detailed information on the application process and eligibility criteria.[44]

**H-1B Specialty Occupation Program**

On 23 October 2023, DHS published a notice of proposed rulemaking that would "modernize the H-1B specialty occupation worker program by streamlining eligibility requirements, improving program efficiency, providing greater benefits and flexibilities for employers and workers, and strengthening integrity measures."[45] Part of the changes or revisions to the existing process would be revising the regulatory definition and criteria for a "specialty occupation," codifying DHS's deference policy regarding a prior adjudication, mandating that evidence of the beneficiary's maintenance of status be included with each petition, modernizing the definitions of "nonprofit research organization" and "governmental research organization," and providing flexibilities to students, such as automatically extending the duration of their student status to 1 April of the relevant fiscal year.[46]

DHS also proposes to make changes to the H-1B cap registration process. This aims to ensure that each beneficiary will have the same chance of being selected, regardless of how many registrations are submitted on the beneficiary's behalf. This also helps to mitigate the ability for related entities to submit multiple registrations on behalf of the same beneficiary.[47] The notice proposes several measures to improve H-1B program integrity such as ensuring there is a bona fide job offer, compliance with site visits, and third-party placement.[48] The notice of proposed rulemaking had a comment period ending on 22 December 2023.[49]

**Processing Delays in Adjudication**

On 29 March 2022, USCIS announced a measure establishing new internal cycle time goals to reduce the agency's pending caseload.[50] The purpose of the cycle time goals was to reduce processing of I-131 (advance parole) applications to three months and I-130 family petitions (immediate relative) to six months.[51] To date, however, USCIS has fallen far short of these goals.

For immediate relative I-130 petitions (petitions filed by a U.S. citizen on behalf of a spouse, parent, or child under twenty-one), as of 30 October 2023, cases are completed between 14.5–19 months at the California Service Center; 13.5–18 months at the Nebraska Service Center; 14–21 months at the Potomac Service Center; 14–17 months at the Texas Service Center; and 15–19.5 months at the Vermont Service Center.[52] The only outlier to these timeframes is the National Benefits Center, where the estimated processing time is 54.5–66.5 months.[53] Four to five years to process a petition for the spouse, child under twenty-one, or parent of a U.S. citizen is unconscionable.

For advance parole (I-131) documents, which are documents that allow noncitizens to travel abroad while their benefits applications are pending, the processing times vary extremely, depending on the service center with geographical jurisdiction over the case: from 10.5 months at the Nebraska Service Center to 24.5 months at the Texas Service Center.[54]

The most evident delay in adjudications by USCIS has occurred with Form I-601A waiver applications, which are filed by noncitizens in the United States seeking approval of a waiver of their unlawful presence, which usually must be adjudicated before they can seek immigrant visa processing abroad. In Fiscal Year 2017, USCIS took an average of 4.6 months to adjudicate these waiver applications.[55] The processing times increased to 8.7 months in FY 2019, to 17.1 months in FY 2021, and to 31.7 months in FY 2022. A visit to USCIS's website today reveals that 80% of cases will be completed within forty-four months.[56] As a result of these massive delays in the adjudication of I-601A waiver applications, thousands of people are in limbo and a federal mandamus lawsuit is pending against USCIS.[57]

According to TRAC, a nonpartisan, nonprofit data research center affiliated with the Newhouse School of Public Communications and the Whitman School of Management, in February 2023 alone, the federal civil courts recorded 943 immigration-related lawsuits, the highest number of immigration-related lawsuits for any single month on record.[58] This growth in immigration lawsuits has been driven primarily by what are known as mandamus lawsuits, or lawsuits that are typically filed to protest the delays when the government fails to take action on a variety of immigration-related applications.[59]

**Conclusion**

USCIS and DHS have made strides in expanding premium processing of new applications, redesignating TPS for Haiti and Venezuela, thereby giving thousands of persons the opportunity to apply for these benefits and increasing the

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number of countries eligible for family reunification programs. They have also published policy guidance on employers' ability to pay the proffered wage that provides employers with flexibility in the evidence they can present, as well as issued a notice of proposed rulemaking to modernize the H-1B program. While DHS should be commended on these initiatives, unconscionable delays continue to exist in the adjudication of immigrant petitions of immediate relatives, advance parole documents, and I-601A unlawful presence waivers. USCIS must take policy measures to address these delays to avoid a plethora of additional mandamus lawsuits.

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**Endnotes**

1 INA 101(b)(1) (defines "child" as "an unmarried person under twenty-one years of age").

2 *See* INA 203(h)(1)(A) and INA 203(h)(1)(B).

3 7 USCIS-PM 7.F(4).

4 *Id.*

5 *See* Child Status Protection Act, https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20180523-CSPA.pdf, PA-2018-05, issued on 23 May 2018.

6 *See* Age Calculation under the Child Status Protection Act, https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230214-CSPA.pdf, PA-2023-02, issued on 14 Feb. 2023.

7 *Id*.

8 *See* Sought to Acquire Requirement Under the Child Status Protection Act, https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230824-CSPA.pdf, PA-2023-24, issued on 24 Aug. 2023.

9 *See* 8 CFR § 204.5(g)(2).

10 *Id*.

11 *Id*.

12 *See* Certain Petitioning Employers' Ability to Pay the Proffered Wage to Prospective Employee Beneficiaries, https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230315-AbilityToPay.pdf, PA-2023-08, issued on 15 Mar. 2023.

13 *Id*.

14 6 USCIS-PM 4.A(5).

15 *Id*. at B(3).

16 https://www.uscis.gov/forms/all-forms/how-do-i-request-premium-processing.

17 *Id*.

18 https://www.uscis.gov/newsroom/news-releases/uscis-announces-premium-processing-new-online-filing-procedures-for-certain-f-1-students-seeking-opt.

19 https://www.uscis.gov/forms/all-forms/how-do-i-request-premium-processing.

20 https://www.uscis.gov/newsroom/alerts/uscis-expands-premium-processing-for-applicants-seeking-to-change-into-f-m-or-j-nonimmigrant-status.

21 https://www.uscis.gov/i-907.

22 8 U.S.C. § 1254a.

23 Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990).

24 8 U.S.C. § 1254a(a).

25 Jill H. Wilson, Temporary Protected Status and Deferred Enforced Departure (Washington, DC: Congressional Research Service, updated 28 July 28, 2023), p. 6, https://sgp.fas.org/crs/homesec/RS20844.pdf.

26 88 FR 5022: Extension and Redesignation of Haiti for Temporary Protected Status, published on 26 Jan. 2023.

27 *Id*.

28 *Id*.

29 *Id*.

30 https://www.uscis.gov/humanitarian/temporary-protected-status#:~:text=On%20Sept.%205%2C%20 2023%2C,and%20the%20Federal%20Register%20notice.

31 88 FR 68130: Extension and Redesignation of Venezuela for Temporary Protected Status, published on 3 Oct. 2023.

32 *Id*.

33 *Id*.

34 *Id*.

35 https://www.uscis.gov/newsroom/news-releases/dhs-announces-family-reunification-parole-process-for-ecuador; https://www.uscis.gov/FRP#:~:text=The%20family%20 reunification%20parole%20(FRP,and%20their%20 immediate%20family%20members.

36 *Id*.

37 *Id*.

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38 *Id*.

39 *Id*.

40 https://www.uscis.gov/faq-family-reunification-parole-processes.

41 https://www.dhs.gov/news/2023/08/10/dhs-modernizes-cuban-and-haitian-family-reunification-parole-processes.

42 *Id*.

43 https://www.uscis.gov/newsroom/news-releases/dhs-announces-family-reunification-parole-process-for-ecuador.

44 *Id*.

45 88 FR 72870: Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers, published on 23 Oct. 2023.

46 *Id*.

47 *Id*.

48 *Id*.

49 *Id*.

50 https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work.

51 *Id*.

52 https://visagrader.com/uscis-processing-times/i-130 (accessed on 30 Oct. 2023).

53 *Id*.

54 https://visagrader.com/uscis-processing-times/i-131 (accessed on 30 Oct. 2023).

55 https://thinkimmigration.org/blog/2023/01/12/the-toll-of-delays-uscis-allows-nearly-600-increase-in-i-601a-waiver-processing-times/.

56 https://egov.uscis.gov/processing-times/ (accessed on 30 Oct. 2023).

57 https://www.americanimmigrationcouncil.org/litigation/class-action-lawsuit-challenging-uscis-delay-deciding-applications-provisional-unlawful (accessed on 30 Oct. 2023).

58 "Immigration Processing Delays Prompt Record Number of Mandamus Lawsuits in Federal Court," published on 15 May 2023 and available at https://trac.syr.edu/reports/717/ (accessed on 30 Oct. 2023).

59 *Id*.


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