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In this issue:

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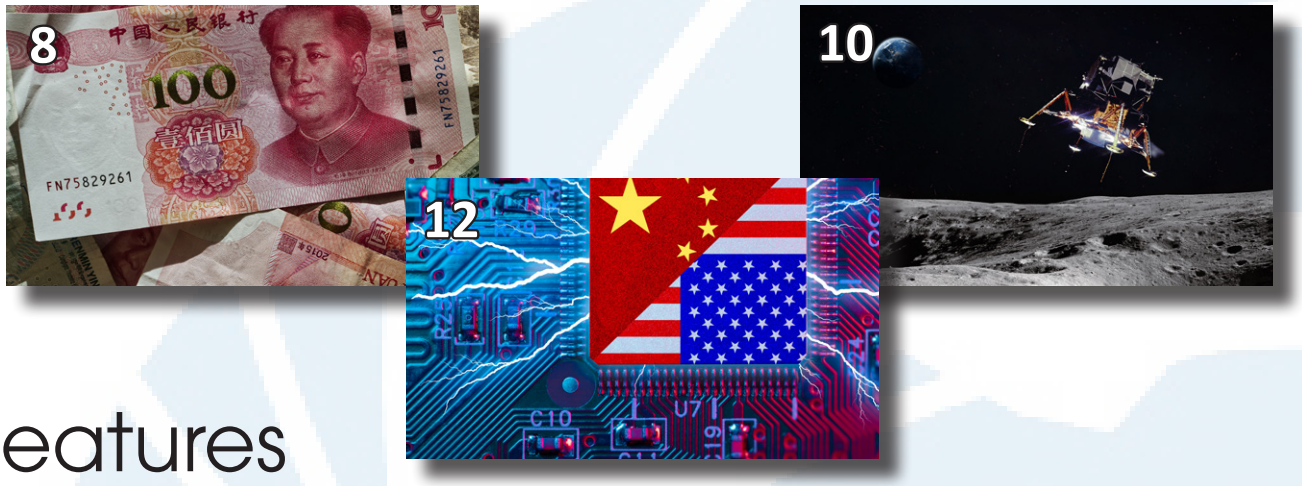

Features

**Please note* *that the admission of new BRICS members Argentina, Egypt, Ethiopia, Iran, Saudi Arabia, and United Arab Emirates, effective 1 January 2024, occurred during the fifteenth BRICS Summit in South Africa on 24 August 2023, after the submission of the feature articles enclosed.*

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Message From the Chair
Elevating Our International Leadership


RICHARD MONTES DE OCA

It's an exciting time to be involved in the ILS! I am blessed and honored to serve as the new chair of The Florida Bar International Law Section (ILS). Since 1981, the ILS has been recognized by The Florida Bar, throughout the state of Florida, in other states, and in various countries for our extraordinary international expertise, programs, and network. Indeed, I recently had a conversation with a board member of another bar association's international law section, who referred to the ILS as the "gold standard" in international law. This is a testament to the remarkable work and reputation of our section, including the leadership and legacy of our past chairs. My goal this year is to continue elevating our section's leadership in the international community through Commitment, Collaboration, and Celebration and to lead with the theme Elevating Our International Leadership.

Commitment. The commitment required to achieve our goal begins with me as chair and our Executive Board, but it extends to our Executive Council, committee chairs, sponsors, past chairs, program administrator, and even our new law student interns. As such, I am calling on each of you to please consider how you can contribute your time, skills, resources, and connections to help us achieve our goal.

Collaboration. The ILS has established international relationships around the world with more than twenty cooperation agreements with Foreign Bar Associations (FBAs). This year, we plan to strengthen those relationships, activate others, and establish new ones by (1) inviting FBAs to attend our iLaw conference, (2) encouraging the law schools in their region to compete in our Richard DeWitt Memorial Vis Pre-Moot, (3) asking FBA members to contribute to *International Law Quarterly (ILQ)*, and (4) participating in and hosting international delegations and trade missions. Our collaboration will also extend to other bar sections and associations, international organizations, foreign consulates, and trade offices.

Celebration. In addition to the important work of our section, I want to ensure we take the time to celebrate our achievements, enjoy our time together, and just have some fun! We will bring back our section retreat, organize traditional networking receptions, and plan new entertaining events, including with other organizations.

In this issue of the ILQ, we focus on BRICS (Brazil, Russia, India, China, and South Africa). As a group, BRICS represents a geopolitical and economic alliance with more than US$24.7 trillion (over 28%) of the world's GDP, and more than 3 billion (nearly 40%) of the world's population. Viewed as a mounting rival to the Group of Seven (G7), BRICS has established the New Development Bank with an authorized capital of US$100 billion as an alternative to the World Bank and the International Monetary Fund. Over the years, it has also organized a number of summits in various member counties, including its fifteenth summit in Johannesburg, South Africa in August of this year.

With the Russia-Ukraine war intensifying, the trilateral cooperation between the United States, Japan, and South Korea formalizing, the U.S.-China trade war continuing, and China's influence in Brazil and the rest of Latin America increasing, the geopolitical and economic climate surrounding BRICS could not be more intense or uniquely fragile. This *ILQ* features insightful articles that highlight the delicate intersection of law and policy with BRICS members and their counterparts in the West. Whether it's a focus on the competitive threat China poses to the West, the imposition of sanctions by the United States on BRICS members, or the effects of BRICS on international trade, these timely and thoughtful pieces inform the international legal community about the significant role BRICS is playing on a global scale.

I want to personally thank and celebrate our authors and editors for another fantastic issue of the *ILQ*. Your thought leadership, commitment, and collaboration are examples of how the ILS is *Elevating Our International Leadership.*

Richard Montes de Oca

Chair, International Law Section of The Florida Bar

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From the Editor . . .

JEFFREY S. HAGEN

Seemingly every time you turn on the news, there is another developing story about one of the countries within the bloc of nations known as "BRICS." Whether it's the Russia-Ukraine war, an Indian lunar landing, China's economic slowdown, Brazil's political changes, or even the recent fifteenth BRICS Summit in South Africa, the motives and actions of these specific countries are consistently opined on and dissected by U.S. media. BRICS doesn't only have the attention of the United States though, as six new countries will formally become members on 1 January 2024: oil heavyweights Saudi Arabia and United Arab Emirates; World Cup winner Argentina; Egypt and Iran, geopolitical allies of China and Russia; and Ethiopia, one of Africa's fastest growing economies. Approximately thirty other nations, including our neighbor to the south, Cuba, have applied for membership and seek inclusion.

BRICS's goals are large in scale: establishing currency to challenge the dollar; a BRICS bank for members; and multilateral agreements in trade, finance, and diplomacy. As BRICS grows stronger, it is our role as counselors to advise our international clientele based on an ever-changing legal landscape in different sectors. As Florida attorneys, we need to stay aware of laws being passed in our state that affect nationals of many of these countries, such as the recent law limiting the purchase of real estate by Chinese, Russian, and Venezuelan nationals. Finally, it's important that we advocate for our clients, even in the face of adversity.

In this Fall 2023 edition of the *International Law Quarterly*, our authors focus on both the BRICS group and the legal changes within its member countries. **Sam Houshmand**'s article "The Ditching of the Dollar: Will the Development of a BRICS Currency Undercut the Potency of OFAC's Sanctions Regime?" paints an important picture of a potential future world order where the United States may not maintain the financial upper hand. Next, **Neha Dagley**'s article "BRICS Space Alliance: An Emerging Power in the Global Space Race" champions the impressive multilateral advancements of BRICS nations in space collaboration, while also serving as an effective segue from the commercial space regulatory articles in the Spring 2023 edition of *ILQ*.

Our next four features focus on legal considerations specific to four BRICS member countries. **Sue Ghosh Stricklett** and **Frederic Rocafort** penned a China-focused article "The Emergence of BRICS, the China Challenge in the Western Hemisphere, and Great Power Competition." **Anna Tumpovskiy** highlighted the struggle for legal representation of sanctioned individuals, notably Russians, in her piece "U.S. Sanctions and Access to Justice." **Thea Janeway** stressed the importance of social security totalization agreement developments in her article "From Trivialized to Totalized: India Pursues Equal Contributions to Social Security." Finally, in "A Decade of the Brazilian Anticorruption Law," **Mariana Vasques Matos** informed us about her home country's progress in this critical area.

In this edition, we also present articles from two past ILS chairs. In keeping with the theme of legal considerations pertaining to BRICS nations, **Larry Rifkin** wrote an article titled "Business Visas Available for U.S. Citizens Who Want to Invest or Work in the BRICS Countries." Directly following this piece, primarily based on his unique expertise in the field of international trade, **Peter Quinter** authored "BRICS Is Changing Our World."

Finally, **Almudena Del Castillo Santamaria**, an attorney from Valencia, Spain, wrote an exceptional feature on "The Rule of Law and the Crisis of the Judicial System: A Special Focus on Spain, Poland, and Russia." We should also mention that in this edition of *International Law Quarterly*'s "Best Practices" column, **Natalie Jacobs** describes "Cross-Border M&A Considerations for Inbound Investors."

As usual, we also present the ILS Section Scene, which in this edition features the Milan and Bergamo Bars Strategic Meeting in May in Milan, Italy, the annual Florida Bar Convention in June in Boca Raton, Florida, and the inaugural ILS Leadership Forum in August in Miami, Florida. Also, always featured is the World Roundup, providing summaries of important legal updates in different countries and regions. This World Roundup features legal updates from Africa, the Caribbean, China, India, Mexico, the Middle East, North America, and Western Europe.

We hope by reviewing this informative edition of ILQ that you will be better equipped to advise clients who hail from or do business with BRICS countries. As BRICS expands, staying aware of these political, economic, and legal developments should prove increasingly valuable.

Jeffrey S. Hagen

Editor-in-Chief

Harper Meyer LLP

The Ditching of the Dollar:
Will the Development of a BRICS Bloc Currency Undercut the Potency of OFAC's Sanctions Regime?

By Sam Houshmand, Miami

Introduction

For decades, the U.S. dollar enjoyed global supremacy as the unchallenged default currency of international trade. The dollar's dominance coupled with the primacy of the United States as the world's largest economy collectively permit the United States—via the Department of the Treasury's Office of Foreign Assets Control (OFAC)—to aggressively develop and deploy a wide range of economic sanctions with extraterritorial reach against the noncompliant, irrespective of the nationality of the actors and the nexus of the transaction. Each violation of these sanctions entails significantly dire consequences that include, but are not limited to, civil monetary penalties, prohibitions on participation in the U.S. financial system, investigations by U.S. federal law enforcement, and criminal prosecution by the U.S. Department of Justice. Accordingly, businesspeople and entities take meticulous steps, including regular consultations with legal counsel specializing in international trade and export compliance, to ensure that prospective transactions fully comply with OFAC's sanctions labyrinth.

Despite this historical backdrop, recent geopolitical changes associated with the economic ascension of prominent nation-states, as well as shifting global alliances in the form of regional blocs such as BRICS, prompt a slow yet certain evolution of the existing economic order in a multipolar world; economists and international attorneys alike observe daily reports of the increasing abandonment of the U.S. dollar in bilateral trade relations between nations across the globe. As an example, BRICS—an acronym for the five member nations of Brazil, Russia, India, China, and South Africa—represents a substantial portion of the world's population, global market, and economic output. While the current membership of BRICS officially consists of five nations, thirteen other nation-states formally submitted membership applications and six additional nations expressed interest in membership.[1] In this context, recent BRICS communiques to develop a currency within the bloc warrant a close examination by policymakers, economists, and legal counsel to determine whether the proposed currency will diminish the efficacy of OFAC's sanctions. To assess, it is important to briefly review the underlying financial ecosystem that sustains the potency and reach of U.S. sanctions, prior instances in which nations and blocs traded in non-dollar currencies and the results of such efforts, as well as the configuration and operation of BRICS.

International Financial Architecture Underlying the Dollar's Omnipresence

Prior to World War II, the then British sterling, German mark, and French franc enjoyed supremacy over the dollar, which was a comparatively negligible currency at the time.[2] After ascending to global superpower status in the post-war era, the United States fortified the dollar's status as the world's reserve currency through a variety of agreements

The Ditching of the Dollar, continued

and mechanisms. Specifically, the Bretton Woods agreement in 1944 established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank).3 The IMF and the World Bank, each headquartered in Washington, D.C., provide financing in U.S. dollars.4 Pursuant to the Bretton Woods agreement, "each member country declared its currency's par value *in terms of US dollars* and had to defend this exchange rate."5 Likewise, many of the world's central banks maintain their reserves in U.S. dollars.[6]

With this infrastructure in place, an indispensable tool in OFAC's surveillance and enforcement arsenal is the Society for Worldwide Interbank Financial Telecommunication (SWIFT). The SWIFT network operates as a messaging system that allows banks and financial institutions throughout the world to send and receive encrypted information in real time via cross-border money transfer instructions.[7] With a vast network encompassing 11,000 banks and financial institutions from more than 200 countries and territories, it is likely that inter-bank messages instructing monetary transfers will intersect the SWIFT platform at some point.[8] Accordingly, U.S. intelligence and defense agencies closely monitor SWIFT messaging and data to probe suspect transactions and to enforce sanctions; specifically, OFAC uses its broad subpoena powers to obtain information regarding international transactions by issuing subpoenas upon SWIFT's New York operating center.[9] While SWIFT is technically incorporated in Belgium and operates under the jurisdiction of Belgium and the European Union (EU), the United States wields substantial influence over SWIFT to compel compliance with U.S. sanctions. For instance, when a banking entity is sanctioned, the entity loses access to the SWIFT network and is no longer able to send or receive cross-border payments in U.S. dollars, which substantially harms the target nation's ability to participate in global commerce.[10]

As a result of the United States' robust abilities to project its sanctions, thanks largely to the dollar's omnipresence, consequential resentment among affected nations led to coordinated efforts to erode the dollar's hegemony. U.S. Secretary of the Treasury Janet Yellen acknowledged as much in a recent interview in which she stated, "[t]here is a risk when we use financial sanctions that are linked to the role of the dollar that over time it could undermine the hegemony of the dollar."[11] To that end, precedent as well as ongoing efforts exist in which nation-states attempt to insulate themselves from sanctions via bilateral and multilateral agreements. A review of such efforts is necessary to assess BRICS's efforts to develop a bloc currency.

Past Precedent of Non-Dollar Trade

Dollar Diminution via Bilateral Trade – Internationalization of the Yuan

The conducting of trade relations in non-dollar currencies, while not unprecedented, is a relatively new phenomenon; the term "de-dollarization" was coined to describe such efforts. Recent case studies of de-dollarization on a bilateral scale involve the Russian Federation. After its invasion and annexation of the Crimean Peninsula in 2014, the United States and the EU imposed successive rounds of sanctions on Russia.[12] The sanctions targeted specific firms and individuals with close ties to the Russian government, sector-wide sanctions that targeted Russian banks, and materials related to Russia's defense and energy sectors.[13] With its growing economic clout, the People's Republic of China viewed Western sanctions against Russia as a strategic opportunity to internationalize its currency by applying the yuan in trade and investment contracts between Russian and Chinese state-owned enterprises.[14] Likewise, individuals and entities in Russia enthusiastically switched to the yuan to mitigate the effect of sanctions. For example, in June 2015, a subsidiary of Gazprom announced it was settling all of its crude sales to China in renminbi.[15] According to the head of Deutsche Bank in Russia, the interest of large Russian corporations in "using various products in renminbi" was "not just a blip," but "a trend."[16] In total, more than 100 Russian commercial banks opened corresponding accounts for settlements in yuan and the overall use of the yuan in settling trade between China and Russia increased nine-fold between January and September 2014.[17]

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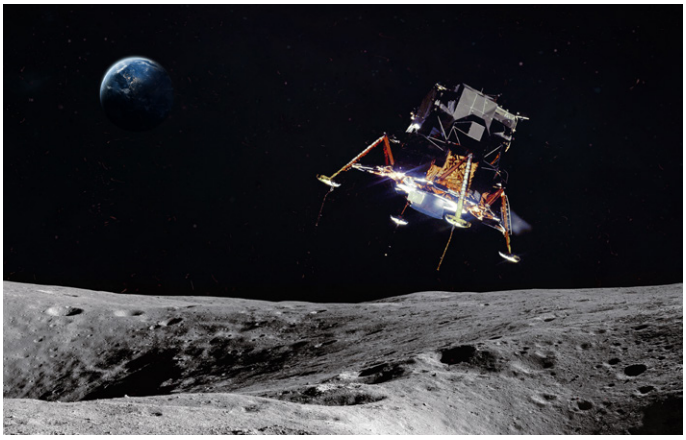
BRICS Space Alliance: An Emerging Power in the Global Space Race

By Neha S. Dagley, Leiden, Netherlands



The vastness of space is truly fascinating, and even more so is the human exploration of space. In recent decades, great strides have been made in the exploration and commercialization of space. The United States is, of course, a key player on the global stage, as are the nations that make up the BRICS alliance—Brazil, Russia, India, China, and South Africa. The BRICS countries are heavily invested in the global space race, and their cooperation is essential to the future of space exploration and development.

The Outer Space Quintet

To understand the dynamics of space cooperation between the BRICS countries, it is important to be familiar with the five key United Nations treaties on outer space:

- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies[1]
- Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space[2]
- Convention on International Liability for Damage Caused by Space Objects[3]
- Convention on Registration of Objects Launched into Outer Space[4]
- Agreement Governing the Activities of States on the Moon and Other Celestial Bodies[5]

According to the Status of International Agreements relating to activities in outer space as of 1 January 2023, Brazil, China, India, Russia, and South Africa have ratified the 1976 Outer Space Treaty, the 1968 Rescue Agreement, the 1972 Liability Convention, and the 1975 Registration Convention, with India being the only signatory of the five nations to the 1979 Moon Agreement.[6] These ratified international treaties serve as the guiding principles for the cooperation and collaboration between the BRICS countries.

The BRICS countries have made significant strides in recent years in their collaboration on key outer space issues. This progress has been made through joint discussions at BRICS summits, declarations, and written agreements. A common theme in these documents is the emphasis on the peaceful use of outer space.

2015: VII BRICS Summit: *BRICS Partnership—a Powerful Factor of Global Development*—the Ufa Declaration

The Seventh BRICS Summit was held in Ufa, Russia, 9-10 July 2015. On 9 July 2015, the Ufa Declaration was adopted by the BRICS countries reaffirming the importance of strengthening international cooperation in the field of peaceful uses of outer space among BRICS countries.[7]

The Ufa Declaration noted "that the exploration and use of outer space shall be for peaceful purposes."[8] It stressed that the conclusion of an international agreement "to prevent an arms race in outer space" was a priority task of the Conference on Disarmament.[9] The Ufa Declaration also recognized the mutual "benefit from opportunities for outer space cooperation," indicating an intention to intensify cooperation in the areas of "joint application of space technologies, satellite navigation, including GLONASS[10] and BeiDou,[11] and space sciences."[12] Finally, it reiterated that "outer space shall be free for peaceful exploration and use by all States on a basis of equality in accordance with international law, and the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development."[13]

BRICS Space Alliance, continued

2021 Agreement on Cooperation on BRICS Remote Sensing Satellite Constellation

Acting in accordance with the Ufa Declaration and guided by the principles set forth in the 1967 Outer Space Treaty, the BRICS countries ultimately entered into an agreement amongst their respective space agencies in 2021. On 18 August 2021, the Brazil Space Agency (AEB), the State Space Corporation "Roscosmos" (ROSCOSMOS), the Indian Space Research Organization (ISRO), China National Space Administration (CNSA), and the South African National Space Agency (SANSA) signed an Agreement on Cooperation on BRICS Remote Sensing Satellite Constellation.[14]

The Remote Sensing Agreement is a significant step forward in the cooperation of BRICS countries in the field of space. The intent of the agreement is to create a collaborative observation system composed of the parties' contributed remote sensing satellites and ground-based remote sensing infrastructure, forming a "constellation" of satellites. The purpose of the agreement is to address challenges related to global climate change, disaster management, environmental protection, prevention of food and water shortages, and sustainable socioeconomic development.[15] The implementation of the agreement contemplates an exchange of information and technical data that does not fall within access, usage, and distribution restrictions according to the legislations of the respective states.[16] Article XII requires completion of domestic procedures necessary to bring the agreement into force.[17] The term of the agreement is ten years with an automatic ten-year extension unless terminated sooner.[18]

2021: XIII BRICS Summit New Delhi, India—*BRICS @ 15: Intra-BRICS Cooperation for Continuity, Consolidation and Consensus*—the New Delhi Declaration

Marking the fifteenth anniversary of BRICS, the thirteenth BRICS Summit was held in New Delhi, India, on 9 September 2021. In the New Delhi Declaration, the BRICS countries once again confirmed their commitment "to ensure prevention of an arms race in outer space and its weaponization and the long-term stability of outer space activities, including through the adoption of a relevant multilateral legally binding instrument."[19] The Declaration also commended the signing of the agreement amongst BRICS Space Agencies on Cooperation on BRICS Remote Sensing Satellite Constellation, anticipated to enhance capabilities in the research on global climate change, disaster management, environmental protection, prevention of food and water scarcity, and sustainable socioeconomic development.[20]

2022: XIV BRICS Summit Beijing, China—*Foster High-Quality BRICS Partnership, Usher in a New Era for Global Development*—the Beijing Declaration

The 2022 BRICS Summit, held in Beijing, China, came on the heels of a tumultuous time with Russia's military invasion of Ukraine occurring only four months prior to the summit. The complexity of the situation, however, did not prevent yet another Declaration that included an affirmation of support for the "long-term sustainability of outer space activities and prevention of an arms race in outer space (PAROS) and of its weaponization."[21]

Recent Developments and the 2023 BRICS Summit

The 2023 BRICS Summit was held 22-24 August in Johannesburg, South Africa. The theme of the summit was *BRICS and Africa: Partnership for Mutually Accelerated Growth, Sustainable Development and Inclusive Multilateralism*.[22] Although outer space cooperation is not identified as one of the five priorities for 2023, it will undoubtedly be one that will remain important, considering recent key advancements made by China, India, and Russia with respect to space exploration:

China

China's new Tiangong space station, or Heavenly Palace, has been years in the making, with the third and final module launched in October 2022. The new station can support three astronauts, or up to six people during crew rotations. On 29 November 2022, three taikonauts arrived at the Tiangong space station. This is a significant event given that China's astronauts have been barred from the

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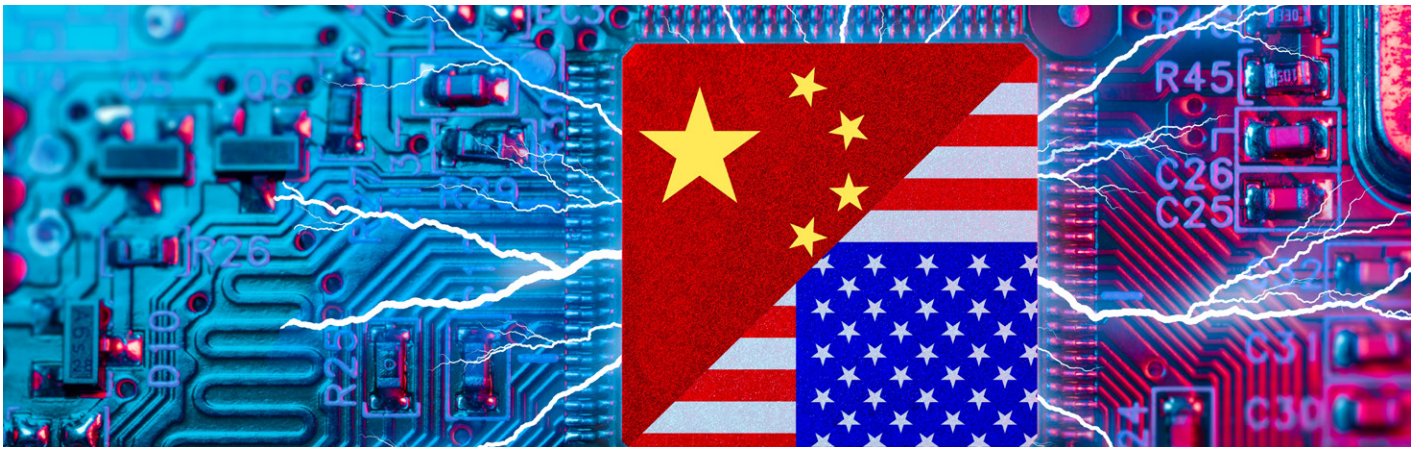
The Emergence of BRICS, the China Challenge in the Western Hemisphere, and Great Power Competition

By Sue Ghosh Stricklett, Washington, D.C.

With contributions by Frederic Rocafort, Seattle



Henry Kissinger once recounted that according to Chinese leader Deng Xiaoping, "the Soviet Union would never be bound by agreements; it understood only the language of countervailing force." Implicit in Deng's observation is that the Chinese Communist Party (CCP) also cannot be bound by agreements. As was true of the Soviet Union, Chinese power can only be checked by one countervailing force—the United States.

The Emergence of BRICS

China positions itself as an economic and military power rivaling that of the United States, offering an alternative model for developing nations. The annual summit of emerging economies known as BRICS[1] appears to be an ideal forum for China to display its geopolitical influence without a U.S. countervailing force to check its power. BRICS has neither a binding membership agreement nor an organization that provides transparency of process and accountability of its leadership.

Despite a consensus on developmental economics and cooperation for mutual benefit, BRICS summits have failed to resolve the divergent political, trade, and security interests of its participating countries. And although unified in their desire to offset U.S. supremacy in multilateral institutions, various initiatives launched at BRICS annual summits were either abandoned or have had limited subsequent action. These initiatives, over the years, have included a shared optical submarine cable to counter U.S. spying, an alternative to the SWIFT payment system used by banks for cross-border transactions, and a reserve currency backed by precious metals as an alternative to the dollar as a reserve currency. At the 2021 BRICS summit, Chinese veto power over BRICS proceedings scuttled India's call for an investigation into the origins of COVID-19, which had ravaged developing economies.

BRICS nonetheless cemented a China-Russia strategic alliance as a viable counterweight to the United States while diffusing the two countries' regional hegemonic competition, particularly in Central Asia and South Asia. The durability of this alliance remains uncertain, however, since China and Russia have little in common other than their shared political heritage and their common apprehension of a U.S. countervailing force. Further, an outbreak of a China-triggered conflict, particularly in Central Asia or in South Asia, could rupture the alliance. But for now, it is holding.

BRICS New Development Bank

A 2014 agreement establishing a BRICS New Development Bank (NDB) and a Contingent Reserve Arrangement (CRA)

to protect against the risk of a global liquidity crisis could have been a turning point in BRICS' solidarity if it had successfully resisted Chinese control.[2] The NDB, created as an alternative to the International Monetary Fund (IMF), offers a small fraction of the IMF's capital reserves and annual authorized lending but without the IMF's institutional safeguards. Future expansion of the NDB's planned projects may strain the bank's liquidity. Finally, since the majority of project funding is from Chinese government sources, they are not deleveraged from China's government debt[3] or the Chinese Belt and Road Initiative (BRI) loan commitments, many of which are in receivership. Adding Bangladesh, Egypt, Uruguay, and United Arab Emirates (UAE) as new NDB members or Saudi Arabia as a potential new member does little to diminish these risks, despite the accessibility of financial resources from affluent BRICS members.

China's Growing Influence in the Western Hemisphere

China's financial and military forays into underdeveloped and developing countries are a prelude to the unraveling of failed states and resultant economic dislocation. Moreover, the escalating security threats posed by U.S.-sanctioned countries that are also current or potential BRICS members (e.g., Russia, Venezuela, Cuba, Iran, Syria) should not be underestimated.

A significant threat to U.S. national security is the popularity of BRICS membership in the Western Hemisphere (i.e., Brazil, Argentina, Mexico, Honduras, Uruguay, Venezuela, and Cuba), given the region's proximity to mainland United States and its susceptibility to the CCP's economic and political model. Brazil and Argentina, two of South America's regional power players, lead the pack.

According to Chinese state media,[4] Huawei "has firm sights on deepening its brand development across Latin America." Demonstrating the independence of his country from U.S.-dominated global trade, Brazilian President Luiz Inácio Lula da Silva, during his 2023 trip to Shanghai, visited Huawei's Shanghai innovation center; both the facility and the company are on the U.S. sanctions blocked list. China has announced US$600 million investments in Brazilian auto factories to produce electronic vehicles and is a significant investor in Brazilian oil and gas refineries.

Commentators in Argentina warn[5] about China's increasing involvement in Argentina's economy. Sergio Massa, minister of economy and presidential candidate for the governing coalition, declared during a visit to Beijing that his country "should be called Argenchina." The governor of Tierra del Fuego Province, Gustavo Mellela, a member of President Alberto Fernández's coalition, in August 2022 signed[6] a memorandum of understanding with a Chinese state-owned enterprise, Shaanxi Chemical Industrial Group, to build a port and petrochemical hub in the locality of Río Grande raising concerns over Chinese-controlled critical infrastructure. China is also keen on seeing its companies become involved in the dredging and beaconing of key Argentinean waterways.[7]

Argentina's ambassador to China, Sabino Vaca Narvaja, proclaimed in a Facebook post[8] (Argentina Embassy, China, 23 April 2023) his personal involvement in his country's push to join the NDB, which he said would "liberate" "emerging countries" from traditional financial institutions. During his recent visit to Beijing and his meeting with Xi Jinping, President Fernández stated[9] that his government and the CCP "shared the same political philosophy, which places man at the center of politics;" during that same meeting, Ambassador Narvaja serenaded[10] in Mandarin "Without the Communist Party, There Would Be No New China," the title of a popular song from the communist revolution in the 1940's.

Great Power Competition: The United States' Response

The United States' China policy since President Nixon's 1972 visit has been supportive of China's economic growth and geopolitical rise, believing—as an article of faith—that China would mirror its East Asian neighbors (Japan and South Korea) in economic liberalization and that political reform would ensue. Even after the 1989 Tiananmen Square massacre exposed the modus operandi of Chinese autocrats, the United States ignored China's repetitive breach of United Nations and multilateral treaties (e.g.,

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U.S. Sanctions and Access to Justice

By Anna V. Tumpovskiy, Miami

In the past several decades, the United States has increased its economic leverage by implementing sanctions to disseminate its foreign and economic policy objectives, designating a large number of physical persons, aircrafts, vessels, and companies as sanctioned parties and blocking their assets. While this sounds rather insignificant in theory, for a sanctioned party it usually means economic death on an international scale. Counterparties may cease all transactions and cancel contracts with blocked parties, and financial institutions may close accounts, even if they are not subject to U.S. sanctions, making it virtually impossible to survive in the western part of the world.

This article describes potential hurdles for a sanctioned individual in finding qualified legal help to challenge the Specially Designated Nationals and Blocked Persons (SDN) designation with the Office of Foreign Asset Control (OFAC) of the U.S. Treasury Department and explores other avenues for seeking justice. Spoiler alert: these avenues are very limited.

With respect to selective sanctions, as part of its enforcement efforts, OFAC publishes an SDN list, a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries.[1] OFAC also lists individuals, groups, and entities designated under programs that are not country-specific. Collectively, such individuals and companies, including front companies or individuals determined to be owned or controlled by, or acting for or on behalf of, targeted countries or groups, are called Specially Designated Nationals or SDNs.

Throughout the years, it was generally believed that in order for a person or a company to be designated an SDN, they must have done something extremely iniquitous. Common examples were parties involved in terrorist activities or being part of criminal conglomerates involved in kidnapping or sale of drugs or weapons.[2] Lately, however, most common sanctions-related news involves Russian oligarchs being designated SDNs due to "their potential connection to the Kremlin" and being involved in ongoing legal battles with OFAC.[3]

Due to the ongoing vigorous sanctions programs the U.S. government has unleashed on Russia, the number of sanctioned companies, individuals, aircrafts, and vessels has grown to new, rather extreme numbers, and now includes universities, educational and scientific institutions, medical facilities, trading companies, banks, and small businesses.

OFAC's standard to determine whether or not to designate a party as a SDN is the very low "reasonable cause to believe" standard. OFAC has been known to designate persons based simply on open-source reporting, and

U.S. Sanction and Access to Justice, continued

the mere association with another sanctioned person could result in a designation. This means that a poorly investigated newspaper article or unofficial customs records from websites like Import Genius can become the reason OFAC decides to block a party.

On 24 February 2023, OFAC estimated that more than 2,500 Russia-related targets were on the SDN list, including approximately 2,400 individuals and entities, 115 vessels, and 19 aircrafts.[4] Since February, this number has likely increased twofold. Additionally, SDN designations include not only Russian parties, but parties from all over the world, including Latin America, China, UK, EU, and Ukraine. The SDN Program is not only designated for oligarchs; rather, it also includes individuals like small business owners, who may have no or very limited ability to hire qualified legal counsel in the United States, as further described in the next section.

Finding Adequate Legal Counsel

For an average individual or small business, receiving a SDN designation could make it challenging, if not simply impossible, to find adequate legal help to advise on OFAC SDN removal proceedings. Law firms practicing in this narrow field of law are quite scarce. Also, these law firms charge above average legal fees because their "usual" clients (such as Russian oligarchs) can afford it. It is also increasingly hard to find U.S. counsel willing to represent clients on the SDN list.

Furthermore, many U.S. counsel lack knowledge as to whether they can represent an SDN without first obtaining a license from OFAC. *American Airways Charters Inc. v. Regan* speaks to this. The court held that "although government permission, in the form of an Office of Foreign Assets Control license, is required prior to the execution of any transaction reaching the assets of a designated Cuban national, the Office of Foreign Assets Control lacks authority to condition the bare formation of an attorney-client relationship on advance government approval."[5] Another difficulty, however, lies in the question of how to get paid for the provision of legal and expert services.

In general, for legal counsel to collect legal fees from SDNs, they need to apply for a license from OFAC. Although every U.S. sanctions program is different, the scope of OFAC authorization for the provision of legal services to sanctioned parties is generally consistent across these sanctions programs, albeit with some variation and nuance. These legal provisions, which are predominantly found in the Code of Federal Regulations (CFR), not only authorize legal representation of SDNs by U.S. counsel, but also cover ancillary issues such as payment of attorney fees and reporting obligations.

A separate license may be required to accept legal fees if the client is blocked or otherwise subject to sanctions affecting its assets and debt obligations. Many sanctions programs offer general licenses for payment of legal fees for authorized representation from non-blocked funds located outside the United States, whereas other programs require a specific license to accept payment of legal fees. A specific license is generally required if the payment will originate from blocked funds and the payment involves a U.S. person or other U.S. nexus. If OFAC authorizes this use of blocked funds, it may nonetheless limit the amount of blocked funds that may be used for those fees. In practice, however, obtaining a license to collect legal fees might take some time, which might delay or hinder the legal representation process.

Some lawyers will not represent SDNs, considering it to be inherently risky from a reputational standpoint and for fear of being considered "un-American." For sanctioned individuals, the reputational and economic harm associated with being designated as a SDN is often catastrophic to their business and personal interests. Their counterparties, including their legal counsel, may choose to engage in derisking activity, meaning that even though they can legally transact business with the sanctioned party they nonetheless choose to end the relationship merely because of the perceived risk of running afoul of the sanctions.

OFAC makes it clear that those filing a petition for removal from the SDN list do not need to hire an attorney, as "OFAC accepts petitions directly from listed persons or from their representatives."[6] Filing a direct petition would require the blocked party to understand and comply with all SDN removal process regulations and preconditions.

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# From Trivialized to Totalized: India Pursues Equal Contributions to Social Security

By Thea L. Janeway, Wesley Chapel (Tampa)

India's Prime Minister Narendra Modi requested "social security totalization" during his U.S. visit in June 2023.[1] It would be worthwhile for the United States to consider Modi's request.

Social security totalization agreements are vehicles by which two or more countries coordinate social welfare benefits for individuals who live and work in more than one country during their working lives. Modi points to social security totalization as an opportunity to create equality among U.S. and Indian workers. Multinational corporate entities (MNCs) favor totalization agreements because they reduce double social security payments. While the rules vary under each agreement, all totalization agreements share the feature of assigning coverage so that workers pay social security to one country or the other, but not both. This article focuses on (1) key benefits and concerns in existing social security agreements; and (2) U.S.-specific tools and strategies that could advance India's totalization goals.

Why Social Security Totalization?

Workforce mobility is essential to the India-U.S. trading partnership. In 2022, the United States issued about 73% of all professional visas to workers of Indian origin.[2]

First, it's necessary to understand how social security impacts the workforce. Recall that "social security contributions" are compulsory payments to government that confer a future social benefit. They include unemployment insurance benefits and supplements; accident, injury, and sickness benefits; old-age, disability, and survivors' pensions; family allowances; reimbursements for medical and hospital expenses; and provision of hospital or medical services. The contributions may be levied on both employees and employers.[3]

Table One summarizes contributions under (1) the U.S. Social Security Act of 1935; and (2) India's Employee Provident Fund (EPF). This article uses EPF and social security interchangeably.

Two or more countries can coordinate social security benefits for cross-border workers through social security totalization agreements (SSAs). While the rules of each vary, all SSAs assign social security contributions to one country or the other.[4] [5]

SSAs delegate certain responsibilities to a "competent authority" agency and a "competent institution" agency.[6] The competent authority: (1) negotiates SSA terms; (2) administratively implements the SSA; (3) agrees with counter-competent authorities on allowing exceptions to SSA exemption benefits; and (4) otherwise communicates with counter-competent authorities for any purpose.

The competent institution: (1) issues certificates of coverage (Certificates) under the SSA exemption clause; (2) agrees with counter-competent institutions on allowing exceptions to SSA exemption benefits; (3) pays social security benefits in the other country by applying provisions relating to export of benefits; and (4) calculates social security benefits by applying provisions relating to totalization of periods.

India Pursues Equal Contributions to Social Security, continued

In India, the competent institution is the Employees' Provident Fund Organization, under the Ministry of Labour and Employment (EPFO). Indian workers obtain Certificates from EPFO and remit the Certificates to employers.[7] [8] In the United States, the competent institution is the Social Security Administration. The Social Security Administration requires employers—not employees—to request Certificates on behalf of workers and to retain Certificates for potential taxation inquiries.[9]

Table One: Social Security Contributions

	Social Security (United States)	Employees' Provident Funds (India)
Legal authority	Federal Insurance Contributions Act (FICA) and the Self-Employed Contributions Act (SECA)	The Social Security Code, 2020; Employees' Provident Fund and Miscellaneous Provisions Act (EPF Act)
Competent authority	Social Security Administration	Ministry of External Affairs
Competent institution	Social Security Administration Internal Revenue Service	Multiparty coordination among Ministry of Labour and Employment, the Employees' Provident Fund Office, other representatives of government (both central and state), multinational entities, and employees
Certificate holder	Employer	Employee
Income Tax Treaty Article 28 applies?	Yes	No
Contribution method	Payroll tax	Payroll deduction
Contribution rate[10]	12.4% of social security wages (6.2% employee share and 6.2% MNC share)	12% wages 12% mandatory MNC contribution up to basic wage cap

Benefits of Social Security Totalization Agreements: A Counterfactual

Broadly, SSAs provide three benefits: (1) avoiding double social security contributions by workers; (2) easy remittance of payments; and (3) preventing loss of payments.[11] We illustrate these below in Sarah's scenario, a hypothetical worker from India, and her hypothetical employer, Acme Infotech Limited.

Pyramid Effect of Double Social Security Contribution

Sarah, a data engineer in Acme's Hyderabad, India office, wants to work in Acme's U.S. office. Acme, like other multinational information technology software companies in India, attracts new graduates through overseas work opportunities. Fortunately, months of Sarah's chasing have paid off—Acme will send Sarah to its New York City sales establishment (unlike in the United States, workers in India compete for overseas assignments as they're seen to afford valuable development).

The Department of Labor occupational handbook indicates data engineers with Sarah's experience will earn median annual wages of US$80,000. As any good employer would, Acme takes steps to ensure Sarah's U.S. wages offer purchasing power parity. Indian law requires Acme to contribute Sarah's social security during her temporary assignment to the United States. Unfortunately, India does not have U.S. social security agreements (while having agreements with Canada and nineteen other countries). Therefore, Sarah and Acme must contribute to both U.S. and India benefits. Table Two has an example of how dual contributions might appear in Acme's books.

Article 20 of the India-U.S. Income Tax Treaty[12] requires India to pay and tax EPF contributions. So, Acme suggests "splitting" Sarah's pay—that is, Sarah gets a check in Indian rupees and a check in U.S. dollars, and then Acme pays Sarah's EPF contributions from her India wages and pays U.S. contributions from her U.S. wages. Sarah demurs on the "split," understandably concerned about surviving in NYC on US$30,000 annually. Instead, Sarah and Acme

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A Decade of the Brazilian Anticorruption Law

By Mariana Vasques Matos, São Paulo, Brazil

Rio de Janeiro, Brazil

Brazil celebrates the tenth anniversary of the Brazilian Anticorruption Law (Law No. 12,846/2013) in 2023. The past decade has significantly changed the environment in Brazil with respect to compliance and the fight against corruption. The Brazilian Anticorruption Law has played a fundamental role in these systemic changes. A question that remains is what lies ahead in the fight against corruption in Brazil, the largest Latin American country, following the election of President Luis Inácio Lula da Silva (Lula).

The enactment of the Brazilian Anticorruption Law has notably impacted corporations and the public sector with respect to anticorruption matters. The Clean Company Act (also known as the Brazilian Anticorruption Law) aims to incentivize corporations to share responsibility with the public administration for the promotion of integrity in the fight against corruption and other crimes. The cited law includes anticorruption provisions as well as makes illegal certain actions that affect or unduly interfere with the competitive nature of bidding on public contracts. The Anticorruption Law also makes it illegal to hinder investigations or inspections of entities, regulatory bodies, or government officials, as well as to intervene in such activities, including investigations conducted by regulatory agencies and inspections of entities of the national financial system.

The Clean Company Act is similar to the U.S. Foreign Corrupt Practices Act (FCPA) with respect to corruption or bribery activities involving government officials and/or related third parties of such government officials. Society's role was crucial to the launching of the Anticorruption Law. Waves of protests started in 2013, demonstrating the importance of such a law as the Brazilian population spoke out strongly against the widespread corruption that had become intrinsic to the country. The ten years following passage of the Anticorruption Law have been marked by a series of developments in Brazil with respect to compliance, and as a result there has been a heightened focus on anticorruption initiatives.

The enforcement of the Brazilian Anticorruption Law has contributed to the expansion of compliance culture within Brazilian society, has improved integrity programs within corporations, and has incentivized foreign investment into the country.

Another hot topic relating to the expansion of compliance in Brazil is the increasing amount of Environmental, Social, and Governance (also known as ESG) initiatives. The Brazilian government has become increasingly focused on environmental and social matters based on the latest decrees issued by the current government. One such decree is Decree No. 11,075/2022, which: (1) creates the National System for the Reduction of Greenhouse Gas Emissions (SINARE) and sets guidelines for sectoral emission reduction plans; (2) establishes the procedure for the preparation of Sectorial Plans for Mitigation of Climate Change; and (3) establishes the framework for the carbon credit market in Brazil. It is noteworthy that the creation of ESG practices has become more than a mere market trend. Rather, appropriate ESG practices have become a requirement for doing business, and effective ESG practices can provide a competitive advantage.

In addition to the passage of the Brazilian Anticorruption Law and the resulting compliance programs, a number of decrees, guidelines, and resolutions were issued by Brazilian authorities such as the General Comptroller's Office (CGU). The main purpose of such mechanisms is to enhance the prevention and detection of unlawful conduct related to corruption, as well as the enforcement of relevant rules and regulations.

An example of a significant development carried out in Brazil in the last decade is the federal investigation known

A Decade of the Brazilian Anticorruption Law, continued

as *Operação Lava Jato* (Operation Car Wash), which was the largest investigation against corruption and money laundering in the country. As a result of Operation Car Wash, hundreds of businesspeople and politicians were investigated and arrested, corporations were forced to pay fines, and billions of reais were returned to the public administration. In 2021, the anticorruption unit responsible for Operation Car Wash was officially shut down, signaling the end of an era for Brazil.

As a result of many federal investigations like Operation Car Wash, Brazil has enjoyed a shift toward a level of cooperation between national and foreign authorities that the country has never experienced. The information and cooperation exchanged between national and foreign authorities have expedited resolutions in many investigations, and such collaboration is expected to remain a positive effect of Operation Car Wash.

The cultural change in Brazil is another positive effect of the events of the past decade. Although corruption is still a serious problem in Brazil, people and companies have changed the way they conduct business. Transparency is necessary in interactions with public officials, as well as for enforcing internal policies and procedures in the daily activities of conducting business.

Challenges to conducting business in Brazil remain. There is a significant level of uncertainty with respect to how Brazilian Superior Courts decide anticorruption cases, as well as what actions get prosecuted. This is because the Brazilian federal government has a large caseload of lawsuits involving corruption and other crimes. In addition, the reelection of President Lula, despite his prior arrest and conviction for corruption, could have an effect on how corruption cases are prosecuted and decided.

Although Lula and other members of his administration have a complicated background in terms of prior corruption accusations and convictions, measures taken by the new administration seem to demonstrate that compliance and investigations will continue to be a focus of the Brazilian government. The investments made by CGU and the Brazilian Federal Prosecutor's Office (MPF) in technology tools that can facilitate the fight against corruption (i.e., AI tools named Alice and Radar, respectively) and the CGU's willingness to issue a plan to fight corruption that it is likely to be launched by the end of 2023 seem to be good indicators of the federal government's willingness to fight corruption.

Additionally, in December 2023, the new Brazilian Public Procurement law (Law No. 14,133/2021) will enter into force. Among other provisions, the new law will require the winner of a public bid to implement an integrity program if the contract value is above a relevant threshold amount, which was not specified by the cited law.

In light of new anticorruption laws and the cultural change in Brazil, there is hope for a future marked by the continued willingness of public authorities to combat corruption and other crimes. In addition, it is expected that cooperation between national and foreign authorities will continue to increase and that companies will continue to focus on implementing procedures to improve their governance as part of the ESG initiatives, and will also continue to implement robust and effective compliance programs to prevent and remediate unlawful conduct to navigate the Brazilian market.

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Business Visas Available for U.S. Citizens Who Want to Invest or Work in the BRICS Countries

By Larry S. Rifkin, Miami

The BRICS group of nations are currently the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China, and the Republic of South Africa. The growing economic might of the BRICS countries, their significance as one of the main driving forces of global economic development, their substantial population, and their abundant natural resources form the foundation of their influence on the international scene.[1] The informal group accounts for more than 40% of the world's population and about 26% of the global economy.[2] As of July 2023, more than forty countries have expressed interest in joining the BRICS group of nations.[3] Given their emerging market economies and growing opportunities, this article will examine the opportunities for U.S. citizens to work and invest in each of the five nations.

Federative Republic of Brazil

Brazil is the twelfth largest economy in the world and the largest in South America.[4] The country is a top-five producer of thirty-four commodities and is the largest net exporter in the world.[5] There are various options for U.S. citizens seeking to work and reside in Brazil. For Americans seeking to retire and reside in Brazil, there is a temporary visa available if the applicant's foreign source of income is in the amount of US$2,000 net per month or greater.[6] This temporary visa is valid for one year and is renewable.[7]

For foreigners (including U.S. citizens) seeking to work in Brazil, the sponsoring company or institution in Brazil has to apply for work permits on their behalf directly with the Ministry of Justice and Public Security.[8] This type of visa can be issued to professionals traveling to Brazil to work and/or render any service under contract, including scientists, researchers, managers, directors, or technicians. Upon approval of the work permit, the Brazilian Consulate will issue the applicant a VITEM V visa, which is a multiple entry visa valid for a maximum of two years and allows the visa holder to work and reside in Brazil.[9] Prior to the expiration of the visa, it may be extended for an additional two-year period.[10]

For foreign investors (including U.S. citizens) seeking permanent residence in Brazil, the government enacted the permanent residence investor visa (VIPER) in 2009. There are several accessible investment options to obtain temporary residency in Brazil:

- A foreign direct investment of BRL 500,000 (approximately US$100,000) in a Brazilian legal entity (newly constituted or existing business)[11]
- A real estate investment of BRL 1 million (US$200,000) [BRL 700,000 (approximately US$140,000) in the north/northeast regions][12]

Business Visas Available for U.S. Citizens to Invest/Work in the BRICS Countries, continued

An investment in a Brazilian legal entity requires initial approval by Brazil's Board of Labor (Ministry of Justice and Public Safety) prior to submitting the temporary residence application to the Consulate.[13] The application with the Consulate requires biographic documents, fees, and a background check.[14] The grant of permanent residence, however, is not unconditional. The investment will be reviewed by the government after three years to ensure the investment is in good standing, employs local residents, and is being maintained.

A real estate investor visa in Brazil requires a purchase of commercial or residential property, whether built or under construction, in an urban area with the minimum values indicated before, depending on the location of the property. The real estate investment may involve the acquisition of more than one property, provided the sum of all properties corresponds to the requisite amounts.[15] The temporary residency permit is valid for up to four years.[16]

Russian Federation

The Russian Federation is the world's eighth-largest economy.[17] Russia's invasion of Ukraine in February 2022 has greatly affected its economic situation. In reaction to the invasion, a number of nations, including the United States, the European Union, and the G7 nations, imposed sanctions on the Russian economy. On 6 April 2022, President Biden issued an Executive Order prohibiting U.S. citizens from making new investments in the Russian Federation.[18]

In response to the numerous sanctions, the Russian Federation introduced in January 2023 the Russian Golden Visa program, designed to attract foreigners interested in investing in Russian businesses or real estate and wanting to secure residency in the country.[19] The investment amount for foreigners depends on the type of investment:

- 15 million rubles (US$200,000) for investments in "socially significant projects" in Russia
- 30 million rubles (US$400,000) invested in a Russian legal entity carrying out entrepreneurial activity
- 20-50 million rubles (US$270-680,000) invested in real estate, depending on the location of the property[20]

Mortgaged properties do not qualify under the real estate investment. The program applies no physical presence requirements, so the foreign investors are not required to reside in the country for any minimum period of time.[21] Residency permits can also be granted for up to five generations of the investor's family members (spouse, children, parents, grandparents, grandchildren, and spouse's parents).[22] Finally, investors who maintain their investments for at least five years, are proficient in Russian, and can demonstrate a legal source of income qualify to apply for Russian citizenship.[23]

Republic of India

India is the fifth-largest economy in the world.[24] Experts expect investments to see a turnaround and thrust the country's economy into sustainable growth. India will likely grow at a moderate pace of 6% to 6.5% in FY 2023-24, as the global economy continues to struggle.[25] Growth in investments will be critical to meet India's rising demand and to ensure noninflationary growth in the long run.[26]

An employment visa is available for intra-company transferees, foreign nationals coming for employment with non-government organizations (NGOs), execution of a project or contract, repair jobs involving any plant or machinery, training of personnel, consulting positions, foreign artists, and foreign athletes.[27] The applicant must be a highly skilled and/or qualified professional who is being engaged by a company/organization/industry in India on contractual or employment basis.[28] The foreign national must submit proof of employment or contract by a company/firm/organization in India, documentary proof of educational qualifications and professional expertise, and evidence of salary in excess of US$25,000.[29] The duration of the employment visa would be for the period of employment/volunteer work, which will usually not exceed one year at a time.[30]

The Indian government's Foreign Direct Investment (FDI) visa program rewards foreigners with a ten-year residency permit if they invest INR 10 crore (approximately US$1.22 million) in the country over an eighteen-month period or INR 25 crore (approximately US$3 million) within thirty-six

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BRICS Is Changing Our World

By Peter Quinter, Miami

The post World War II global economy and institutions regulating international trade have been dominated by the United States and its allies. But now the United Nations (UN), World Trade Organization (WTO), World Bank, International Monetary Fund (IMF), and Society for Worldwide Interbank Financial Telecommunications (SWIFT) have a direct competitor to send and receive money transfer instructions internationally. Headlines in periodicals over the last twelve months tell the story. Examples include "A BRICS Currency Could Shake the Dollar's Dominance"[1] and "Lula Backs BRICS Currency to Replace Dollar in Foreign Trade."[2]

So, what is BRICS? BRICS is a group of emerging economies including Brazil, Russia, India, China, and South Africa. It is an international organization with headquarters located at the BRICS Tower, Shanghai, China. It is an independent, international organization to coordinate commercial, political, and cultural activities among its members. It is an absolute direct competitor to the G7, which is a group of seven advanced economies including the United States, United Kingdom, Canada, France, Germany, Italy, and Japan. The G7 was formed in 1973 as a group of the most advanced economies in the capitalist world. When Russia joined, it was known as the G8. The European Union remains a non-enumerated member of the G7. Russia's membership was suspended in 2014 in response to its annexation of Crimea. In June 2018, Russia permanently left the G8. A comparison chart of BRICS and the G7[3] is below.

Particulars	BRICS	G7
Formation year	September 2006	25 March 1973
Total members	05	07
Member countries	Brazil, Russia, India, China, South Africa	Canada, France, Germany, Italy, Japan, the United Kingdom and the United States
Headquarters	BRICS Tower, Shanghai, China	–
GDP		
Population	770 million people (10% of world population)	3.21 billion (45% of world population)

Whereas the member countries of the G7 is shrinking, BRICS membership is growing. Algeria, Argentina, Bahrain, Bangladesh, Belarus, Egypt, Ethiopia, Indonesia, Iran, Saudi Arabia, and the United Arab Emirates have all formally applied for membership in BRICS.[4]

BRICS members have met annually since its founding in 2009, and the next meeting will take place in August 2023 in South Africa. The New Development Bank is an example of a direct competitor to the IMF and is supported by a few hundred billion dollars from its members.[5] That money is

BRICS Is Changing Our World, continued

used to build roads, bridges, ports, and other infrastructure in various countries, none of it with any consideration of the foreign policy objectives of the United States. That's the point. While the IMF and New Development Bank are both focused on the expansion of trade and economic growth, each organization has its own priorities, and they do not match. The world of "globalization" that we all grew up with is now dividing into one led by the United States and the European Union, and another by China and Russia.

Not only foreign investment decisions by BRICS would exclude the United States, but payments between member countries that are processed via SWIFT in U.S. dollars may be done through a BRICS alternative international payment system,[6] and using a common currency among BRICS members, not in U.S. dollars. A recent headline stated: "Argentina moves away from US dollar for trade in Chinese currency."[7] To put it bluntly, *Fortune* magazine on 25 June 2023 ran the headline "How long will the dollar last as the world's default currency? The BRICS nations are gathering in South Africa this August with it on the agenda."[8] For the world to turn away from the U.S. dollar will inevitably result in the lower value of the U.S. dollar compared to other currencies. That makes everything more expensive for U.S. citizens and U.S. companies (and anyone else that conducts international trade with U.S. dollars).

As the BRICS countries get stronger economically, the United States is finding new ways to attempt to disrupt it. For example, in the April 2020 "Special 301 Report" prepared by the Office of the United States Trade Representative, it stated:

> Modern supply chains offer many new opportunities for counterfeit goods to enter into the supply chain, including in the production process. This practice can taint the supply chain for goods in all countries, and countries must work together to detect and deter commerce in counterfeit goods. The [OECD) report provided an overview of key enforcement challenges in BRICS economies (Brazil, China, India, Russia, and South Africa), identified gaps in enforcement systems, and highlighted ways in which governments can better combat the trade in counterfeit goods that threatens to permeate modern supply chains, . . .[9]

In other words, in effect, the U.S. government specially targets shipments of cargo arriving in the United States from BRICS countries to examine them for alleged counterfeiting. This is extraordinary as both India and Brazil are considered strong trading partners with the United States.

BRICS is not a trading bloc (such as the one involving Canada, the United States, and Mexico in the United States-Mexico-Canada Agreement or USMCA), and it is not a military defense organization such as NATO. In time, considering the success of BRICS and the eagerness of many significant countries to join BRICS, global investment decisions and the rules of international trade itself could be determined by Russia and China, and not the United States and the European Union. Moreover, BRICS may develop into a trading bloc where member countries may ship cargo to one another that enters member countries duty free. That would be a huge economic advantage for such members, and similarly a huge disadvantage for

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The Rule of Law and the Judicial System: A Special Focus on Spain, Poland, and Russia

By Almudena Del Castillo Santamaria, Valencia, Spain

European Court of Human Rights (Strasbourg)
Credit: By CherryX - Own work, CC BY-SA 3.0, https://en.wikipedia.org/w/index.php?curid=38007603

This article offers a general legal analysis of: (1) challenges to the rule of law in Europe; (2) a crisis unfolding in Eastern European countries, particularly Poland; and (3) the rapid spread of such crisis to southern countries, particularly Spain. Specifically, this analysis focuses on violations in one of the four major areas of the rule of law: the judicial system. A review of the European Court of Human Rights (ECtHR) case law reveals breaches of judicial independence, including cases where judges were irregularly appointed and how judicial decisions were motivated by intrusive powers and factors of influence. This review focuses on Poland, a country that is in serious breach of European democratic values, and Spain, a country that is beginning to show worrying signs that point to the weakening of its judicial system. Finally, this article analyzes the judicial system of Russia, a BRICS country that lacks a transparent and objective judiciary.

The Rule of Law Crisis in the EU: Approaching the Issue

The European Union (EU) has been successful in integrating and harmonizing twenty-seven different countries under a set of common values and objectives that have made the EU and all its member states a true and (up to now) strong community of such values. Among the values on which the EU relies—respect for human dignity, liberty, democracy, equality, and human rights, including the rights of persons belonging to minorities—respect for the rule of law is of vital importance.[1] In fact, the rule of law sets out a number of principles to help ensure a diverse society characterized by nondiscrimination, justice (with special emphasis on constitutional guarantees of equality in the eyes of the law), and gender-equality policies that aim to achieve equal treatment of men and women.

The priority the EU places on the rule of law is conditioned in Article 49 TEU, as the membership of potential applicant states to the EU depends on the democratic quality of their institutions and, ultimately, on the existence of a social and democratic state governed by the rule of law. For this reason, respect for the rule of law becomes a condition sine qua non for any potential candidate state, as well as an entry barrier for those countries whose democratic values fail to be fully respectful of the set of values the EU requires.

Times are changing. We live in an era of constitutional change where autocratic regimes and openly declared illiberal democracies seem to be gaining ground over modern systems of liberal constitutionalism. This reality is not only affecting Europe, but also democracies throughout the world. The rise of right-wing populism in the United

The Rule of Law and the Judicial System: Spain, Poland, & Russia, continued

States that ushered in the Trump administration, the left-wing populism exemplified by the Latin American regimes of Hugo Chávez and later succeeded by Nicolás Maduro in Venezuela, Putin's imperialism that has led to Russia's invasion of Ukraine, and China's growing hegemony and the left-wing populism of the Chinese Communist Party are just a few examples, and the list could go on.[2]

Hungary, under the administration of Viktor Orbán and his party *Fidesz,* and Poland with the victory of the Law and Justice Party (*Prawo i Sprawiedliwość*, PiS), are the two countries that pose the greatest threat to the rule of law in Europe. Both countries have been the subject of numerous infringement proceedings brought by the European Commission (EC) in recent years, and the Court of Justice of the European Union (CJEU) has ruled on several occasions that these countries' judicial reforms undermine their independence.[3] The situation had become so critical that in February 2022 the CJEU issued a landmark ruling,[4] upholding the mechanism allowing European funds to be cut off in cases of violation of the rule of law. This ruling came in response to the actions brought by Hungary and Poland challenging the annulment of one of the most awaited European regulations:[5] a regulation which established a general regime of conditionality for the protection of the Union budget in the case of breaches of the principles of the rule of law in a member state. In its ruling, the CJEU stated that the sound financial management of the Union budget and the financial interest of the Union may be seriously compromised by breaches of the rule of law committed in a member state and that a "conditionality mechanism" falls within the power conferred by the treaties on the European Union to establish "financial rules" relating to the implementation of the Union budget.[6]

The following sections focus on the crisis of judicial systems, analyzing the latest Rule of Law Report issued by the EC on 5 July 2023, as well as case law of the Strasbourg Court, an institution that is part of the Council of Europe (CoE) whose role is proving to be essential in upholding the rule of law. Case law from three different countries will be used as a reference for this purpose; due to their differing intensity and level of breach, these cases will serve as a frame of reference to illustrate the various ways courts lack independence.

The European Commission's 2023 Rule of Law Report[7]

For the past four years, the European Commission has been playing a preventive role in the defense of the rule of law by publishing an annual report that examines rule of law developments in member states under four pillars (justice, anticorruption, media freedom, and pluralism) and broader institutional issues related to checks and balances. The main purposes are to build a series of recommendations in order to assist and support member states in their efforts to move forward reforms and to identify where improvements may be needed, based on a continuous dialogue. To do this, the EC considers the status of the rule of law in each member state and in the EU as a whole, detecting and hoping to prevent emerging challenges. To produce this report, the EC works in close collaboration with member states and relies on a variety of national and international sources, including written input received from member states, information produced by international organizations, and information received from national authorities. For example, when comparing justice systems, the EC uses sources[8] such as the EU Justice Scoreboard,[9] annual questionnaires to the group of contact persons on national justice systems, supreme courts and councils for the judiciary, and Eurobarometer surveys on how European citizens perceive judicial independence.[10] When the analysis is country-specific, the Commission relies on specific assessments in the European Semester,[11] on the implementation of relevant milestones and targets in members states' Recovery and Resilience Plans (RRF), and on the case law of the CJEU and the ECtHR.

The EC considers various functions of the judicial systems in order to analyze the level of judicial independence in European countries.

First, the EC considers the *Councils for the Judiciary*,[12] which act as an important safeguard for judicial independence, while serving as a nexus between the judiciary and the other branches of power. The EC lists Poland and Spain as

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WORLD ROUNDUP

AFRICA

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Economic development, good governance are key to preventing the next coup d'état in Africa.

The most critical crisis impacting the African continent thus far in 2023 appears to be the looming "military intervention/invasion" of the Republic of Niger by the Economic Community of West African States (ECOWAS) regional block to allegedly restore "democratic order" following the Nigerian military overthrow of President Mohammed Bazoum on 27 July 2023; thus, reversing the military coup d'état in the country. This coup d'état comes under the backdrop of recent successful military coup d'états in Mali, Burkina Faso, and Guinea-Conakry. This trend began in 2020 with the new military governments citing among other reasons, the harsh economic conditions of their respective citizens as one of their justifications for the coup d'états. As the consequences, both intended and unintended, of these events unfold, African leaders should take note of one critical, observable takeaway from these developments—economic development nurtured through a demonstrable practice of good governance is key to sustainable peace and stability.

The benefits to a country that adheres to good governance are not only real, but also measurable. Good governance as embodied, for example, in the control of corruption and the design and implementation of effective regulatory policies significantly improves the ability of people to participate in and benefit from economic growth.[1] As such, the most critical component of good governance is people. Governments and strong institutions need competent people to make good policies and implement them successfully. People are the means to accomplish good governance. That principle, when followed to its logical conclusion, shows that a government that effectively invests in its most important resource, its people, experiences economic development, which in turn produces measurable and sustainable peace and stability.

There are countless examples of economic growth catalyzed through investments in human capital. One such example is found in the rapid rise in economic development of the ten nations that make up the Association of Southeast Asian Nations (ASEAN) economic community. Excepting the recent crises in Myanmar, ASEAN's spectacular peace dividend has been achieved on the back of a relatively coherent state-led process of social and economic transformation tailored on the development of human capital capacity-building initiatives. One salient example is the economic growth experienced by Laos, one of the poorest countries in ASEAN, which was also one of the most heavily bombed countries in the region during the Vietnam war. Specifically since the 1990's, Laos' per capita income has increased from US$405 in 1988 to US$2,599 in 2019.[2] That economic growth has translated to relative political stability in the country, although the country's political environment remains dominated by one party under the control of the communist Lao People's Revolutionary Party (LPRP).[3]

Like in the ASEAN model, economic development, absent other internal factors, is key to sustainable peace and stability. The military putschists in Mali, Burkina Faso, Guinea-Conakry, and Niger confirmed this principle, citing the harsh economic conditions of their respective citizens as justification for their coup d'états. The apparent support from their respective citizenry for the military coup provides further support for a "people first" domestic policy as there is arguably no need to resort to unconstitutional coup d'états when economic conditions are favorable to a majority of citizenry. Given this reality, I would submit that the key to preventing the next coup d'état in Africa is a demonstrable practice of good governance.

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Endnotes

1 *UN-ESCAP: What is Good Governance?*, https://www.gdrc.org/u-gov/escap-governance.htm.

2 *Lao PDR GDP Per Capita 1984-2023*, https://www.macrotrends.net/countries/LAO/lao-pdr/gdp-per-capita#:~:text=Lao%20PDR%20gdp%20per%20capita%20for%202022%20was%20%242%2C088%2C%20a,a%201.77%25%20increase%20from%202018.

3 *Laos Country Report 2022*, https://bti-project.org/en/reports/country-report/LAO.

CARIBBEAN

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The Bahamas passes Business Licence Act, 2023.

Business Licence Act, 2023, which repeals and replaces the Business Licence Act, 2010 is now in force along with the ancillary Business Licence Regulations, 2023. The new act is a consolidation and amendment of the law relating to business licences from 2010 to 2022.

The applicability of the new act has not changed. The new act applies to persons carrying on business in or from within The Bahamas.

Exemptions

Entities that do not engage in commercial activities are not subject to the new act, such as holding of financial assets, holding of real estate assets, and pure equity holding. Foundations are not subject to this legislation.

The new act does not apply to the SMART Funds.

The new act does apply to financial services entities. Financial services entities are those subject to the payment of a licensing or other fee and are regulated in accordance with: the Banks and Trust Companies Regulation Act, 2020 (BTCRA); the Securities Industry Act, 2011 (SIA); the Financial and Corporate Services Providers Act, 2020 (FCSPA); the Investment Funds Act (IFA); the Digital Assets and Registered Exchanges Act, 2020 (DARE); the Insurance Act (Ch. 350); and the External Insurance Act (Ch. 348).

International business companies (IBCs) doing business from within The Bahamas (*meaning their operations are exclusively outside of The Bahamas*) are subject to the business licence taxes on revenue that is attributable to operations outside The Bahamas as shown in the table below.

Revenue of an IBC derived from the following activities is deemed to be from operations from within The Bahamas: professional services, including legal services, architectural services, consultancy services, engineering services, accountancy services, and advisory services/the export of goods.

The rate of annual business licence taxes are applicable to entities doing business in and from within The Bahamas. The rate varies between business types and there are specific rates for financial services entities and international business companies. The rates are based on turnover, which is defined as the total revenues in money and money's worth accruing to a person from their business activities in or from within The Bahamas during the year of assessment, without any deductions on account of the cost of property sold, the cost of materials used, the cost of services used, labour costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid, or any other deductions whatsoever.

Business licences expire on 31 December of each year and must be renewed no later than 31 January of each year, with the applicable business licence tax being paid no later than 31 March.

Turnover Per Annum	**Annual Tax**
Less than $1 million	$2,500
Greater than $1 million	0.25% of turnover up to a maximum tax of $100,000
Type of Business	**Annual Tax**
Proprietary Trading	A tax of the greater of $15,000 or 0.25% of revenues derived from proprietary trading up to a maximum of $100,000. On all revenues derived from activities other than proprietary trading, a tax at the applicable rate under Parts I to III of the Second Schedule based on the nature of the business and the amount of the revenue.
Family Office	A tax of the greater of $10,000 and 0.25% of turnover up to a maximum of $100,000.

Note: All dollar amounts are U.S. dollars.

Penalties

Offence	Penalty
Late filing of application for licence renewal or a return	$100
Late payment of tax	0.25% of turnover up to a maximum tax of $100,000
Interest rate per annum on payments made thirty days or more after the due date	5% of the tax liability

Note: All dollar amounts are U.S. dollars.

Directors are jointly and severally liable together with a company to pay tax payable by the company, together with interest and penalties in relation to such tax.

Please note the above is intended to be a general summary and not legal advice.

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CHINA

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AI regulation takes great leap forward.

Artificial Intelligence (AI) regulation in China has taken a great leap forward with the introduction of the Interim Measures for the Management of Generative AI Services (Interim Measures). Released on 10 July 2023 and in effect since 15 August 2023, the Interim Measures were jointly promulgated by the Cyberspace Administration of China (CAC) and other Chinese governmental agencies. As per Article 1, the Interim Measures seek to "promote the healthy development and standardized application of generative artificial intelligence, safeguard national security, and protect the legitimate rights and interests of citizens, legal persons, and other organizations."

Generative AI services intended for the Chinese public must abide by the new rules, regardless of whether the services are provided from within or outside Chinese territory. As issued, the Interim Measures scaled back on some of the controls required in their original draft, reflecting the regulators' objective of "attaching equal importance to development and security," as per Article 3. Technology designed for use abroad or within the confines of organizations such as companies or universities falls outside the scope of the Interim Measures.

Providers of generative AI services are required by regulation to "use data and basic models with legitimate sources." In addition, they must prevent infringements of intellectual property rights and obtain the consent of individuals whose personal information is used in the generative AI process. If AI technology is used to generate content-like images or videos (such as deepfakes), providers must adhere to the guidelines set out in the Provisions on the Administration of Deep Synthesis Internet Information Services, which regulate the use of deepfake technology.

The new regulations also mandate those providers with "public opinion attributes or social mobilization capabilities" to conduct security assessments in line with relevant other national regulations. Providers must comply with the algorithm filing, modification, and cancellation procedures stipulated in the Provisions on the Administration of Algorithmic Recommendation Services.

China's leadership has prioritized the country's role at the vanguard of AI development. The Interim Measures play a critical role in providing a regulatory framework for companies, particularly Chinese ones, looking to tap into the consumer market for AI services. Consequently, these new regulations represent not only a significant legal

advancement but also have profound implications for the business and technological landscape. AI watchers should closely monitor developments in China the months to come.

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INDIA

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India opens its doors to foreign lawyers and law firms.

On 10 March 2023, the Bar Council of India issued a notification for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022, allowing foreign lawyers to practice law in India when registered with the Bar Council of India. This notification put an end to a longstanding bar on any foreign law firms to operate in India even through a liaison office. The notification is not without restrictions. Foreign lawyers and law firms will not be permitted to appear before any court, tribunal, or regulatory authorities, or be permitted to do any work pertaining to the conveyancing of property. In addition, a lawyer licensed to practice in India who joins a foreign law firm cannot appear before Indian courts for such foreign firm. In addition, a significant price tag is attached to this privilege. The registration fee for individuals is US$40,000 (US$25,000 for registration and US$15,000 as a one-time guarantee amount) and US$90,000 (US$50,000 for registration and US$40,000 as a one-time guarantee amount) for law firms. The registration is valid for a period of five years, and renewal costs US$10,000 for individuals and US$20,000 for law firms.

The road to opening the legal market is not without obstacles. A subsequent press release issued by the Bar Council of India, however, stated "Foreign lawyers and Law Firms shall be allowed to advise their clients about Foreign laws and International laws only." This condition is entirely absent from the 10 March 2023 notification. Nevertheless, foreign lawyers and law firms that go through the rigorous registration process will be permitted to appear in international arbitration cases conducted in India. This will ultimately serve to advance a longstanding goal to make India a hub for international arbitration. And, despite the perceived difficulties ahead, the decision to allow foreign lawyers into the Indian legal market is a step in the right direction and one that has the potential to drive foreign investment and business to India.

India imposes import restrictions on laptops, tablets, and servers.

In a shocking move on 3 August 2023, the Directorate General of Foreign Trade issued a notification restricting imports of laptops, tablets, all-in-one personal computers, and ultra small form factor computers and servers, falling under the HSN 8471 category. Initially, the import restriction was set to be immediately effective but was later revised to go into effect on 1 November 2023. The new rule requires a special license for these products. Although no reason was cited in the operative notification, the move is likely designed to boost local manufacturing and Prime Minister Narendra Modi's "Make in India" campaign. The true impact of this decision and the potential complications from a licensing scheme remain to be seen once the import restrictions become effective in November 2023.

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MEXICO

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Forced or compulsory labor is a problem the world over. Per the 2022 International Labor Organization statistics, approximately 27.6 million people are forced to labor against their will or under threat of penalty. Of this estimated total, approximately 17.3 million individual cases of forced labor correspond to the private sector, and approximately 3.9 million individual cases of forced labor correspond to the public sector (with the balance of individual cases corresponding to forced commercial sexual exploitation). Most forced labor is concentrated in the formal and informal components of the manufacturing, construction,

and agricultural sectors. The Asian-Pacific region has the highest number of people subjected to forced labor (approximately 15.1 million), and the Arab states have the highest prevalence of forced labor (approximately 5.3 individuals per 1,000 people). While most governments have enacted laws that prohibit forced or compulsory labor, these countermeasures rarely extend to international trade.

Mexico has, for most of its existence as an independent state, come within the conventional global practice described above. It has, during this time, developed an extensive set of labor laws that addresses forced or compulsory labor (including, for example, the *Constitución Política de los Estados Unidos Mexicanos*, the ILO's Forced Labor Convention, the *Ley Federal del Trabajo*, the ILO's Worst Forms of Child Labor Convention, the *Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de Estos Delitos*, the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the ILO's 2014 Protocol to the Forced Labor Convention). The current administration has, in this regard, been proactive in advancing a strong, ESG-oriented labor agenda. Notwithstanding this progress, however, none of these laws actually bridged the gap between forced labor and international trade.

The renegotiation of the North American Free Trade Agreement (NAFTA) and subsequent 2020 entry into force of the United States-Mexico-Canada Agreement (USMCA) changed—in what represents a historic first for any free trade agreement—the aforementioned status quo for Mexico and Canada. In line with its emphasis on creating a "high standards" agreement that rebalances the interests of equity and efficiency, the USMCA sets forth provisions that strengthen the rights of workers, prohibit the importation of goods produced in whole or in part by forced or compulsory labor (including forced or compulsory child labor), and require the parties to establish cooperation for the identification and movement of goods produced by forced labor. These provisions represent a significant departure from NAFTA because they expressly link forced or compulsory labor and the cross-border movement of merchandise.

Mexico has, consistent with its Article 23.5.3 right to exercise reasonable enforcement discretion and to make bona fide decisions with regard to the allocation of enforcement resources, undertaken a number of measures designed to align its laws and practices with its forced labor-related obligations under the USMCA. The most important of these measures are the publication of the *Acuerdo que Establece las Mercancías cuya Importación Esta Sujeta a Regulación de la Secretaria del Trabajo y Previsión Social* (the *Acuerdo*), the publication of the companion *Guía para la Instrumentación del Mecanismo para Restringir la Importación de Mercancías Producidas con Trabajo Forzoso u Obligatorio* (the *Guía*), and the creation of a website for the publication of a list containing final resolutions and prohibited product information (forthcoming). Effective on 18 May 2023, These resources lay out the framework of laws and procedures in accordance with which Mexico will—on a global, non-country/region-specific level and in a manner that precludes the operation of any Uyghur Forced Labor Prevention Act (UFLPA)-like presumption—initiate, evaluate, and resolve concerns regarding the presence or absence of forced labor in imported merchandise. The principal stages associated with this framework can be summarized as follows:

Initiation – Forced labor reviews can be initiated via the filing of a petition by a private party (individual or corporate entity legally constituted in Mexico) or on a *de oficio* basis by the *Secretaria del Trabajo y Previsión Social* (*STPS*). The *Acuerdo* and the *Guía* flesh out the elements required in a petition (name of petitioner, name of importer, name of producer/exporter, Harmonized Tariff Schedule (HTS) code, documentation in support of claim, etc.) and the submission mechanism (*Ventanilla Única de Comercio Exterior Mexicano* [*VUCEM*] or email to *STPS*). The *STPS* has full discretion to admit, reject, or seek clarification of a petition.

Investigation – In the event the *STPS's* initial review identifies sufficient elements to presume that the merchandise specified in a petition was produced with forced labor, it will proceed to launch an investigation.

The first stage of the investigative process involves the *STPS* collaborating with the competent authority in the country of origin of the merchandise under investigation. Should said competent authority provide documentary proof confirming that forced labor was used in the production of the merchandise under investigation, the *STPS* will adopt that finding and publish a definitive resolution on its internet site. This action has the effect of (1) notifying importers that the article (identified by its HTS code) has been added to the *STPS's* list of merchandise that is prohibited entry for reasons relating to forced labor and (2) ending the investigation. Neither the *Acuerdo* nor the *Guía* prescribe a time limit for completing the initial stage of an investigation.

Where, alternatively, the initial investigation stage does not result in the publication of a definitive resolution, the *STPS* will notify the importer of record that it is opening an internal investigation focused on the presence or absence of forced labor in the merchandise specified in the petition. This notification opens a twenty-day period when the importer must present documentary proof demonstrating the absence of forced labor in its merchandise via the *VUCEM*. A broad range of information can be brought to bear at this second stage of the investigative process, including that supplied by civil society, interested parties (private sector), and, with the involvement of Mexico's *Secretaria de Relaciones*

Exteriores (*SRE*), labor authorities from foreign countries. The *STPS* will evaluate this information with reference to the ILO's forced labor indicators within a period of 180 days. This period of time can be extended on a one-time basis for an additional 180 days.

Resolution – The forced labor review process concludes with the *STPS's* issuance of a resolution that determines either (1) forced labor was used in the production of the investigated merchandise, in which case the HTS code associated with the article will be added to the list of prohibited goods published on an internet site maintained by the *STPS* and, concurrently, the *Agencia Nacional de Aduanas de México* (*ANAM*) will be notified for enforcement purposes or (2) forced labor was not used in the production of the investigated merchandise, in which case the file will be archived and the matter will be closed. Findings of no forced labor can, effectively, be challenged pursuant to the filing of a subsequent petition supported by new evidence. The *Acuerdo* and the *Guía* are silent on the issue of an importer of record's right to seek administrative or judicial review of a *STPS* finding that forced labor was used in the production of investigated merchandise.

The introduction of these measures place Mexico within a select group of nations that have committed to using trade policy and practice as a tool for combatting labor and human rights abuses. The United States trade representative (USTR) touches on this point when she notes how Mexico's actions will enable the USMCA partners to "work more closely . . . to eliminate forced labor from global supply chains and tackle transshipment." This message takes on a heightened significance given the fact that the U.S. Customs and Border Protection's (CBP's) UFLPA Dashboard has recently, for the first time since its launch, included Mexico as a point of origin for goods containing parts/components produced using the forced labor of workers in Xinjiang.

While these measures will likely lead Mexico's importers to exercise a greater degree of vigilance over their global supply chains, the current review of this new mechanism raises several questions regarding its nature, operation, and associated resources:

- What is the specific burden of proof that must be satisfied in making a forced labor determination?
- Does an importer have the right to present evidence and otherwise defend itself during the stage of an investigation in which the *STPS* is collaborating with the competent authority of a foreign government?
- What safeguards are built into this new mechanism to ensure that *STPS* determinations driven by the interpretive input of foreign governments are insulated from politically motivated calculations unrelated to the issue of forced labor?
- What happens to merchandise during the pendency of a forced labor detention or review? Will an importer be given the opportunity to export the merchandise? Will it be seized or destroyed?
- What organizational format should be used to efficiently and effectively convey the content of forced labor petitions, responses, and other communications?
- The *Acuerdo* and the *Guía* note that a *STPS* forced labor resolution will report the HTS code of the prohibited merchandise. Such an approach introduces the possibility of false positives insofar as a system keyed exclusively to HTS codes can end up discriminating against goods of the same subheading that were produced by foreign suppliers or producers whose manufacturing processes do not use forced labor. This approach can also give rise to bad faith misclassification practices.
- Will *STPS* resolutions disclose the identity of foreign suppliers or producers that are determined to use forced labor in the production of merchandise (in a way that is akin to the UFLPA's Entity List)?
- What administrative or judicial review options are available to an importer of record in connection with a *STPS* finding that forced labor was used in the production of investigated merchandise?
- Will importers be able to secure a forced labor-related binding ruling from the *ANAM* on a pre-importation basis?
- Will the *STPS* or the *ANAM* create and maintain a statistics portal similar to CBP's UFLPA Dashboard, thereby providing the trade with general insight into forced labor enforcement activities and tendencies?
- When and where will the internet site referenced in the *Acuerdo* and the *Guía* be published?

Mexico's forced labor review mechanism represents a positive step in the direction of using trade as a tool for creating better, more dignified conditions for workers the world over. Though it has yet to complete any enforcement actions, the expectation of the United States and Canada is that Mexico will harness the full power of the potential embodied in this new mechanism. As Mexico moves toward the realization of this potential, efforts made to address and clarify the open questions noted above will only strengthen the interests of the nation, the trade, and the victims of forced labor

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MIDDLE EAST

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French court upholds seizure of Lebanon's former central bank governor.

A French Court of Appeal has upheld seizure orders issued as part of a continuing investigation of Lebanon's central bank governor Riad Salameh. A European joint investigative team issued orders to freeze more than US$100 million worth of property and bank accounts across Europe belonging to Mr. Salameh and his relatives, which is suspected to have been acquired through extensive embezzlement from the Lebanese central bank.

ICC arbitral tribunal resolves Iraq-Turkey dispute.

As noted in the prior edition of the *ILQ*, Iraq filed a claim with the ICC against Turkey, claiming that Turkey violated a joint agreement by allowing the Kurdistan Regional Government (KRG) to export oil through a pipeline to the Turkish port of Ceyhan. Iraq deems illegal the KRG exports via Ceyhan. In March 2023, the tribunal ruled in favor of Iraq and ordered Turkey to pay Iraq damages relating to the transport of KRG oil through the export pipeline and the discount at which KRG oil was sold. However, Turkey won a counter-claim for Iraq to pay a pipeline throughput fee, the source said. After these offsets, the amount the tribunal awarded Iraq came out to US$1.5 billion. In addition, the award prevents Turkey from resuming exports of Kurdish crude oil directly through the KRG.

DIFC court won't restrain enforcement against Kurdistan.

In July 2023, a court in Dubai's financial free zone, the DIFC, refused to grant an injunction to prevent enforcement of a US$490 million judgment against Iraq's Kurdistan government pending an ICC arbitration against it.

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NORTH AMERICA

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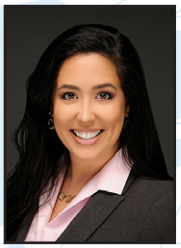
U.S. to send additional military aid to Ukraine.



The Pentagon announced in early August 2023 that the United States will provide Ukraine with US$200 million in weapons and ammunition, including missiles for the High-Mobility Artillery Rocket System and the Patriot air defense system, as well as munitions for tanks, rockets, mine-clearing equipment, and small arms. This spending comes on top of the approximately US$43 billion the United States has already provided in military and humanitarian aid to Ukraine since the start of the Russian invasion in February 2022.

The Biden administration has been funding aid to Ukraine through two programs: the Presidential Drawdown Authority, which pulls weapons from existing U.S. stockpiles; and the Ukraine Security Assistance Initiative, which funds long-term contracts for larger weapons systems. Both programs are nearly spent and expected to expire at the end of the fiscal year in September 2023, at which time the Biden administration will likely request a new aid package from Congress.

Mexico decries anti-migrant buoys on the Rio Grande.

Mexican President Andres Manuel López Obrador condemned the anti-migrant buoys installed on the Rio Grande river at the instruction of Texas Governor Greg Abbott as "inhumane." Texas installed the floating barrier in July 2023 without federal authorization to block migrants crossing from Mexico. The U.S. Justice Department responded by suing Texas over its installation and use of the buoys. Mexican Secretary of Foreign Relations Alicia Bárcena Ibarra also sent diplomatic notes complaining about the barriers, indicating they violate several treaties between the Mexico and the United States and that hundreds of meters of the floating barriers encroach on the Mexican side of the river.

Quebec enacts a tough new privacy law.

Modeled on the European Union's General Data Protection Regulation (GDPR), Quebec's new Law 25, which will come into effect over three years starting in September 2023, creates rules and enhances penalties for data privacy breaches. Also, like the GDPR, Law 25 is extraterritorial, meaning a company must comply with it if that company's actions affect consumers in Quebec. Potentially, anyone affected by a data privacy breach

in Quebec can be involved in a putative class action in Quebec, no matter where they reside.

Law 25, which has received comparably little media attention, gives consumers an automatic right to confidentiality over their personal information, meaning consumers must give express consent or "opt-in" to a company's data collection. It also requires companies collecting private data to conduct "privacy impact assessments." Quebec is likely to see a significant increase in data privacy class actions as companies attempt to comply with the new regulations.

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WESTERN EUROPE

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KLM discontinues ad after greenwashing lawsuit.

The Dutch airline KLM launched the "Fly responsibly" campaign in 2019, urging customers to help create a sustainable future for KLM and aviation by paying money for reforestation projects or by contributing to the cost of greener aviation fuels. KLM claims to have invested millions in a more sustainable fleet and is working toward the industry goal of net zero carbon emissions by 2050.

KLM had to stop their "Fly responsibly" advertising campaign after being accused of greenwashing.

Environmental lawyers argue there is no feasible way the aviation industry can reach climate goals on its current growth path and therefore KLM's sustainability advertising is misleading to consumers. They further claim the only way to fly sustainably is not to fly or to fly less.

The environmentalists set out to stop KLM's advertisements, claiming KLM violated the Dutch implementation of the EU's Unfair Consumer Practices Directive by giving the false impression its flights will not intensify the climate crisis. They have demanded that KLM publish a correction and discontinue similar advertising. KLM lawyers noted the campaign has already been discontinued and questioned this civil suit.

France adopts new law that regulates social media influencers.

Social media influencers with immense following can influence consumption behaviors, especially among the younger generation. The French Parliament adopted a bipartisan bill recently to regulate social media influencers' activities in an effort to protect consumers and control the promotion of dangerous products and trends.

Under the new law, influencers are defined as "individuals or legal entities who, for a fee, mobilize their notoriety with their audience" to promote goods and services online. The new law prohibits, for instance, the promotion of cosmetic surgery and therapeutic abstention. The law further regulates the promotion of several medical devices and bans the promotion of products containing nicotine. Another regulated area is sports betting and gambling. The law prohibits promoting subscriptions to sports forecasts, and only platforms that restrict access to minors will be allowed to promote money games. In addition, certain images must disclose whether they have been retouched or use a filter. The penalties for noncompliance include up to two years in prison and a fine of 300,000 euros. The French Consumer and Competition agency (Direction Générale de la Concurrence, de la Consommation et de la Repression des Fraudes or DGCCRF) will set up agents to monitor the activity of social media influencers.

The law also takes into account the rising trend of influencers to create their content from abroad, such as from Dubai. The law requires influencers that operate from outside the European Union, Switzerland, or the European Economic Area to appoint a legal representative in France and to take out civil liability insurance with an insurance company in the European Union.

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ILS – Milan & Bergamo Bars Strategic Meeting 10 May 2023 • Milan, Italy

ILS Chair-elect Richard Montes de Oca traveled to Milan in May to participate in strategic meetings with the Milano and Bergamo Bars. The ILS was pleased to sign a Cooperation Agreement with the Milano and Bergamo Bars in fall 2022, and Richard's visit highlighted the ILS's commitment to furthering these important relationships and our shared objectives and goals. We are looking forward to the progress we will make together!

Omar Hegazi (Bergamo Bar delegate), Patrizia Romano (Milan International Section), Roberta Canevese (Milan International Section), Francesca Maria Zanasi (VP of Milan Bar; chair of International Section), and ILS Chair-elect Richard Montes de Oca

Richard Montes de Oca at the courthouse in Milan, Italy

Roberta Canevese, Patrizia Romano, Omar Hegazi, Richard Montes de Oca, and Francesca Maria Zanasi

ILS Chair-elect Richard Montes de Oca (right) meets with (L-R) Italian lawyers Andrea Cesana, Caterina Agnoli, Cristiano Bacchini (chair of the IP Section of the Milan Bar), and Ernesto Sarno (chair of EU Section of the Milan Bar).

ILS Chair's Reception • 22 June 2023
The Boca Raton

ILS Chair Jackie Villalba hosted a reception for ILS members and guests at the Beach Club Lounge at The Boca Raton during the annual Florida Bar Convention. Everyone enjoyed the chance to catch up with old friends and to meet new colleagues the evening before diving into their work on behalf of the International Law Section during ILS committee meetings and the ILS executive council meeting.

The 2022-23 ILS Executive Board:
Chair Jackie Villalba, Treasurer Cristina Vicens,
Chair-elect Richard Montes de Oca,
Secretary Ana Barton, and Vice Treasurer Laura Reich

Liz Hockensmith, Peter Quinter, David O'Stein,
Marc Hurwitz, Gilbert Squires, Veronica Williams,
and Ed Mullins

ILS chairs, past and present, gather for a photo:
Jim Meyer, Clarissa Rodriguez, Ed Mullins,
Jackie Villalba, Bob Becerra, Peter Quinter,
Gilbert Squires, Richard Montes de Oca, and Al Lindsay.

Tiany and Richard Montes de Oca, Carolina Obarrio,
and Javier Fernández-Samaniego

Joseph Wolsztyniak, Rustu Cenk Damgacioglu,
and Frederic Rocafort

Richard Montes de Oca, Jackie Villalba,
and Bob Becerra

ILS Committee Meetings & Executive Committee Meeting • 23 June 2023 The Boca Raton

ILS committees held "roundtable" meetings and the 2022-2023 ILS Executive Committee held its final meeting of the Bar year on 23 June 2023, in conjunction with the annual Florida Bar Convention. In addition to conducting the regular business of the section, the ILS honored outgoing Chair Jackie Villalba for her contributions to the section and recognized several other members for their work on behalf of the ILS.

Friday morning saw ILS committee members gathering to work on section business.

Asia committee members Neha Dagley and Frederic Rocafort and USMCA committee members Nouvelle Gonzalo, Jennifer Diaz, and Jennifer Mosquera

iLaw steering committee members Davide Macelloni and David O'Steen, and *ILS Gazette* editor Matt Akiba

The 2022-2023 ILS Executive Committee: Chair-elect Richard Montes de Oca, Secretary Ana Barton, Chair Jackie Villalba, Treasurer Cristina Vicens, and Vice Treasurer Laura Reich

Chair-elect Richard Montes de Oca expresses the section's appreciation to Chair Jackie Villalba for her service to the section.

Bob Becerra is recognized for spearheading the critical work of the Foreign Legal Consultant Committee.

Neha Dagley and Jeff Hagen are recognized for their work as co-editors-in-chief of the *International Law Quarterly*.

Matt Akiba is recognized for his work as editor of the weekly *ILS Gazette*.

The International Law Section is grateful to its generous sponsors and to Willie Mae Shepherd for stepping in to assist the ILS as Liz Hockensmith learns the ropes as the section's new administrator. Thank you, Willie Mae and Liz, for your expert assistance during the convention and throughout the year!

ILS Leadership Forum • 30 August 2023 Miami, Florida

The ILS leadership team (board members, executive council members, and committee chairs) came together for the ILS Leadership Forum on Wednesday, 30 August 2023 at Puttshack at Brickell City Centre in Miami, Florida. While the main purpose of the forum was to make plans to implement important section initiatives for the year, the leadership team also took some time to engage in team-building and to have some fun!

Secretary Cristina Vicens, Chair Richard de Montes Oca, and Chair-Elect Ana Barton discuss goals for the upcoming year.

Ana Barton, Omar Ibrahem, and Gary Birnberg make a pitch for programming.

Leadership Forum participants listen to a presentation from Ingage, the marketing partner of ILS.

Vice Treasurer Davide Macelloni lines up a shot as ILS Gazette Chair Matt Akiba awaits his turn to putt.

Best Practices: Cross-Border M&A Considerations for Inbound Investors

By Natalie Jacobs, Miami

Cross-border merger and acquisition (M&A) transactions can be among the most complex and challenging to execute for inbound investors but can also provide substantial benefits to companies seeking to enhance their competitive position in the global marketplace. This article focuses on best practices for acquisitions of U.S. companies by non-U.S. persons or companies (or "inbound" M&A), and more specifically, provides a condensed checklist of matters that should be carefully considered in advance of an acquisition or strategic investment in private U.S. companies by non-U.S. investors.

Securities. Under the U.S. Securities Exchange Act of 1933, as amended (Exchange Act), the offer and sale of securities must be registered with the U.S. Securities and Exchange Commission (SEC) unless the securities being offered and sold, or the related transaction pursuant to which they are offered and sold, is specifically exempted. In any inbound M&A transaction, among the first key factors to consider are whether the target is a public company or a private company and whether the consideration to be provided in the acquisition will consist solely of cash or whether it will also include securities.

Generally speaking, the acquisitions of a private U.S. company—or more technically, a company that does not have a class of securities registered under Section 12 of the Exchange Act—is more straightforward from a U.S. securities law perspective than the acquisition of a public U.S. company. If the acquired U.S. company has only one or a handful of shareholders, it often can be accomplished by the acquisition structures discussed in the following section, which typically implicate few federal securities law requirements other than the basic antifraud provisions of Exchange Act Section 10(b) and Rule 10b-5.

Similarly, acquisitions of a target company's securities solely for cash will generally subject the acquiror to fewer obligations under the U.S. federal securities laws than those securities the acquiror issues to the target company's shareholders for the acquisition, as such issuance will potentially trigger obligations under the Exchange Act.

Notably, the fact that an acquiror is a foreign person or entity does not itself exempt any offering from registration.

Acquisition Structure. Non-U.S. acquirors should consider a variety of potential transaction structures for their U.S. acquisition, the ultimate choice of which is typically driven by the characteristics of the entities involved in the transaction together with the unique tax considerations of the deal (which is the subject of the following section) and the parties' commercial objectives. Acquisitions of U.S. private companies often come in the form of a merger or direct acquisition of stock or assets.

Parties to a transaction that is structured as an asset acquisition have the ability to select the assets *and liabilities* to be transferred to the non-U.S. acquiror and to be retained by the seller. By contrast, parties to a transaction that is structured as a merger or an acquisition of stock do not have that ability, and as a result, the target company's historic liabilities, including liabilities for unpaid U.S. taxes, litigation, and outstanding debt, generally remain with the target company and in turn are inherited by the acquiror.

Certain transaction-specific characteristics that may call for preference of a stock or merger acquisition structure over an asset acquisition structure include transactions where the U.S. business in question has a number of copyrights or patents or significant government or corporate licenses or contracts that are difficult or time-consuming to assign.

Tax Considerations. U.S. tax laws and treatment will be a key consideration in an inbound M&A transaction from

Best Practices, continued

a variety of standpoints—from acquisition structure, where tax basis in the acquired assets is treated differently dependent on the chosen structure, to acquisition vehicles used by non-U.S. acquirors, which should be carefully considered in terms of the business post-closing and the transaction itself.

CFIUS: The Committee on Foreign Investment in the United States (CFIUS), which is chaired by the U.S. Secretary of the Treasury, is an interagency committee of the U.S. government that reviews the national security implications of foreign investments in U.S. companies or operations. Over the last decade, the scope and impact of regulatory security of foreign investments in the United States by CFIUS has increased significantly, particularly following the passage of the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018 by the U.S. Department of Treasury. Following FIRRMA's implementation, the need to factor CFIUS into deal planning and timing has increased given FIRRMA's introduction of mandatory notification requirements for certain transactions, including investments in U.S. businesses associated with critical technologies, critical infrastructure, or sensitive personal data of U.S. citizens where a foreign government has a "substantial interest" (e.g., 49% or more) in the acquiror.

Regulated Industries. In addition to the SEC and CFIUS, non-U.S. acquirors should be mindful of the various other U.S. federal and state regulatory filing and consent requirements that may apply to acquisitions of companies operating in particular sectors. These sectors include, for example, transportation, aviation, maritime, insurance, banking/financial institutions, registered investment funds and advisers, utilities, energy, power and natural resources, and communications. Complying with such filing and consent requirements can be both time-consuming and burdensome and should be taken into account when determining transaction timelines and planning.

Employee Compensation and Benefits Matters. Navigating U.S. labor and employment laws and considerations can be a challenge for non-U.S. acquirors who are accustomed to an entirely different set of employment laws and customs—with U.S. employment laws tending to be generally less prescriptive on compensation and benefit matters than the laws of many non-U.S. jurisdictions. In addition to more common labor and employment concerns, such as benefit plans and compensation issues, certain regions of the United States, including South Florida, come with the added consideration of employee immigration status. In light of recent developments in immigration laws heightening liability in connection with illegal workers, non-U.S. acquirors should assess a target's employees' immigration status as a key component of their due diligence process.

Due Diligence: Due diligence methods by non-U.S. acquirors must take the laws of a target's jurisdiction into account, as missing significant local issues for lack of jurisdiction-specific knowledge or understanding of local practices can be problematic and costly. From a federal perspective, non-U.S. acquirors should also be familiar with the U.S. legal and regulatory contexts for diligence areas of increasing focus. These include data privacy and protection, Foreign Corrupt Practices Act (FCPA) compliance, and other matters.

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Russia's ongoing military operation in Ukraine provided another platform for the yuan's expanded use. In response to Russia's military action, the United States and its allies imposed sanctions to severely restrict Russia's ability to engage in dollar-based transactions. To that end, several major Russian banks were disconnected from the SWIFT messaging platform, disrupting Russia's foreign trade relations.[18] With its access to the dollar drastically restricted, Russia gravitated further toward the yuan. In February 2023, the yuan overtook the dollar as the most traded currency on the Moscow exchange for the first time in its history.[19] Prior to the invasion, the yuan's trading volume on the Russian market was negligible.[20] Likewise, China dramatically increased use of the yuan to purchase Russian commodities over the past year, with nearly all of its purchases of Russian gas, oil, coal, and some metals in yuan instead of dollars.[21]

Aside from Russia, China engaged in yuan-centered trade to assist other nations targeted by U.S. and EU sanctions. In 2013, China entered into agreements with Belarus to facilitate the settlement of bilateral trade transactions in the yuan or Belarusian ruble.[22] In Zimbabwe, former President Robert Mugabe designated the yuan as legal tender in 2016 after Beijing announced it would cancel approximately 40 million dollars in Zimbabwean debt.[23] Economists in Zimbabwe expressly identified the avoidance of U.S. sanctions as a primary reason for adopting the yuan.[24]

While many of the countries described herein are U.S. geopolitical adversaries, not all countries embracing the yuan at the dollar's expense are U.S. foes. In April 2023, Argentina announced it will pay for Chinese imports—approximately one billion dollars' worth—in yuan rather than dollars.[25] Likewise, *Banco Central do Brasil*, Brazil's central bank, rapidly stockpiles the yuan, which surpassed the euro to become the second most dominant currency after the dollar in Brazil's foreign reserves at the end of 2022.[26] Most importantly for this article's examination is Bangladesh's recent agreement to pay Russian atomic power developer *Rosatam* the equivalent of US$318 million for the construction of a nuclear plant using the yuan. Previously, Bangladesh was unable to pay Russia for the power plant in dollars after Russia's central bank was disconnected from SWIFT in 2022.[27] The commercial transaction between Russia and Bangladesh confirms on a bilateral scale that the yuan has the practical ability to facilitate major economic transactions, confirming the practical utility of an alternative currency that transcends mere theoretical possibilities. Further, the Russo-Bangladeshi atomic deal is the very type of international transaction that U.S. sanctions seek to deter and punish.

The Cross-Border Inter-Bank Payments System (CIPS)

As described earlier, the SWIFT messaging system plays a crucial role in enabling OFAC's global surveillance and enforcement capabilities in dollar-centric transactions. Despite their disconnection from the SWIFT network, Russian banks currently finance a major international transaction with Bangladesh. The critical observation concerns the deal's consummation via an alternative payment network, the CIPS. Specifically, Bangladesh tenders payment to Russia through a Chinese bank, and the Russian beneficiaries receive payments through the CIPS network.[28]

The Ditching of the Dollar, continued

CIPS enables the transfer of international payments in yuan for cross-border trade, direct investments, financing, and personal remittances.[29] Developed by the People's Bank of China, China's central bank, to facilitate the use of the yuan in international business, CIPS entered into operation in fall 2015 and offers clearing and settlement services for its participants in cross-border yuan payments, similar to the U.S.'s Clearing House Interbank Payments System (CHIPS), a clearing system in cross-border dollar-denominated transactions.[30] Organizationally, CIPS operates under China's central bank, which could potentially insulate the CIPS network from U.S. political pressure. In November 2022, CIPS users spanned 107 countries and territories, including 77 directly participating banks and 1,276 indirect participants, according to its Shanghai-based operator, CIPS Co., Ltd.[31] At the end of October 2022, CIPS had processed nearly 3.49 million payment transactions for a total value of about 78.5 trillion yuan (US$10.9 trillion)—up 27% and 20%, respectively, from the preceding year.[32]

Multilateral Framework of BRICS

As the trend of *bilateral* trade in non-dollar currencies proceeds, the central question remains whether the aggregate effects of non-dollar trade on a *multilateral* scale will facilitate the circumvention of U.S. sanctions. For this reason, a brief examination of BRICS is critical for evaluating the longevity of sanctions as a punitive and deterrent instrument.

As a preliminary assessment, the preceding section described the successful consummation of a mere *bilateral* transaction between Russia and Bangladesh, which previously could not proceed due to the severance of Russian banks from SWIFT. The deal's effectuation was attributable to the viable operation of an independent cross-border payment system coupled with the usage of the yuan. Accordingly, it is reasonable to infer that a multilateral approach that integrates the collective resources and infrastructure of BRICS may potentially create a parallel financial architecture that is insulated and invulnerable from the reach of U.S. sanctions, thereby facilitating large-scale transactions among actors and entities in OFAC's crosshairs.

In a global system with long-standing institutions, BRICS stands out as a young entity on the international stage. In its initial iteration in 2009, the "BRIC" acronym consisted of the four nation-states of Brazil, Russia, India, and China.[33] The bloc expanded to "BRICS" to incorporate South Africa's membership in 2010, believing an African presence was necessary to reflect an evolving global order.[34] Predictably, the member countries share a desire for a greater voice in global governance coupled with shared criticism of Western institutions such as the IMF and the World Bank for the latter's perceived improper stipulations on loans to developing nations with unjust political conditions.[35] To that end, BRICS has considered and launched a variety of remedial initiatives. In 2014 and 2015, the BRICS nations respectively established the New Development Bank (NDB) and a liquidity mechanism called the Contingent Reserve Arrangement (CRA) as alternatives to the World Bank and the IMF, respectively.[36]

Analysis: A BRICS Bloc Currency and OFAC Sanctions—Not So Fast

This article's primary inquiry addresses whether BRICS's potential development of a bloc currency will dilute the effects of OFAC's sanctions. Based on the foregoing, the short answer is "possibly," as multiple pivotal factors must be coordinated and aligned between individual nation-states to successfully create a common currency with sanctions-evading potential. As such, the answer to this question is not readily definitive and will require a period of time (i.e., years) to assess.

While most analysts universally acknowledge the existence of a BRICS currency will *potentially* threaten the dollar's dominance, and by extension the punitive power of OFAC sanctions, there are two fundamental realizations that will ultimately dictate the success of BRICS's efforts. As a bloc, BRICS consists of multiple countries. Nation-states ultimately pursue their own interests and craft their policies based on such interests. While shared interests between nations serve as powerful unifiers, fissures can and often do develop and undermine collective cooperation. For instance, in recent years the bilateral relationship between China and India—the two largest and most populous

The Ditching of the Dollar, continued

members of the bloc—endured considerable acrimony. Further, if and when BRICS's membership officially expands, the potential for inter-bloc friction will heighten as countries with unresolved conflicts will add their domestic strife to the mix.

Stated differently, the extent to which BRICS's individual member nations can relegate their long-standing bilateral disputes to prioritize the "greater good" of the collective group is material, as strong inter-bloc unity will harness the bloc's focus on advancing their common objectives. Given BRICS's multilateral composition and expanding membership, the analysis must acknowledge that the bloc's ability to successfully accomplish this task remains untested and is to be determined. Nonetheless, the analysis must conversely accept the unprecedented resentment toward the United States' increased and aggressive weaponization of its sanctions against BRICS members (current and potential). While the United States historically enforced its sanctions to varying degrees against its historic adversaries, the typical targets of OFAC sanctions were limited to nation-states with comparatively minor economic outputs on the global level. In contrast, recent U.S. sanctions against Russia, as well as the severance of Russia's central bank from SWIFT, herald the first deployment of the dollar and the SWIFT platform as weapons against a major global economy of a G20 nation.[37] Accordingly, the individual and collective motivations of BRICS and its member nations to develop an inter-bloc currency is real and potent, and extends beyond abstract wishful thinking.

The second determinative factor concerns the development and logistical integration of a bloc currency infrastructure. As discussed in the preceding sections, the SWIFT network facilitates the extraterritorial reach of OFAC's surveillance mechanisms as greater than 40% of global transactions on SWIFT platforms are denominated in U.S. dollars.[38] Since the majority of dollar transactions are processed by U.S. banks, OFAC can argue that such transactions traverse the United States, hence conferring jurisdiction upon OFAC.[39] Nonetheless, the CIPS network impressively facilitated the ground-breaking Russo-Bangladeshi nuclear plant transaction via yuan financing outside the reach of the dollar and the SWIFT. Accordingly, an effective BRICS bloc currency will require an equivalently robust currency platform (i.e., underlying parallel machinery) that is well integrated and accessible to the banking systems of all individual BRICS member nations. Secondarily, each component nation must maintain adequate reserves of the bloc currency within their domestic banking systems to facilitate payments via the centralized BRICS platform to process transactions in a manner that does not involve U.S. dollar payments.

Logistically, it is unclear how BRICS intends to institute the aforesaid mechanisms, and it is highly probable that the collective bloc and its member nations will encounter practical difficulties as they pursue this objective. The banking systems of current as well as potential bloc member nations—as is common among developing nations—differ in their configuration and structural development, which may potentially hinder their respective abilities to integrate their domestic banking networks to a centralized platform. Consequently, BRICS likely must assemble task forces to include economic, banking, legal, and IT data specialists to create synchronization measures to integrate the diverse banking systems of multiple nations to a central platform to support the processing of payments and transactions in the alternate currency. Stated otherwise, while BRICS certainly has the potential, it nonetheless has a difficult task ahead as the aforementioned measures will take time to operationalize.

Conclusion

The announcement of a potential bloc currency at the August 2023 BRICS summit in South Africa should not necessarily be a cause for *immediate* celebration among those who seek to sidestep OFAC sanctions. Likewise, a bloc currency does not entail the *immediate* end of the U.S. dollar as the de facto currency of global trade; the international financial ecosystem, while evolving, is still strongly entrenched and deeply formatted to its preexisting configuration with the dollar as the hegemon. As such, any shift to an alternative format in which nations can freely engage in international commercial transactions and tender payments in a BRICS currency, all while bypassing the SWIFT network via an alternate platform, will take time to develop.

The Ditching of the Dollar, continued

BRICS—in its capacity as a relatively young global actor comprised of multiple nations—and the implementation of the infrastructure necessary to effectuate such changes must initially surmount considerable challenges. Nonetheless, the trend of de-dollarization is significant and irreversible. Motivations among nation-states, collectively and individually, to create an alternative currency and to develop alternate payment platforms to bypass the reach of OFAC sanctions run high. For these reasons, the development of a BRICS currency should not be dismissed or taken lightly, as the potential to defang the dollar exists in the long-term, assuming the BRICS bloc remains unified and can succeed in creating a centralized banking platform and currency infrastructure.

In the immediate future, it is likely that BRICS nations will expand their non-dollar trade via the yuan utilizing the CIPS platform while simultaneously developing the underlying infrastructure to facilitate a centralized payment processing platform to accommodate the usage of a bloc currency in the long-term. For these reasons, it is critical that international trade and export compliance attorneys closely monitor progress relating to the development of a BRICS bloc currency, the expanding membership of BRICS, banking integration measures, modifications to the CIPS platform, as well as routine OFAC Compliance Communiques to apprise their clients effectively in this incessantly changing field.

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39 *See id.*

BRICS Space Alliance, continued from page 11

International Space Station (ISS) since 2011 pursuant to the Wolf Amendment, which prohibits NASA from using funds to develop, design, plan, promulgate, implement, or execute a bilateral policy, program, order, or contract of any kind to participate, collaborate, or coordinate bilaterally in any way with China or any Chinese-owned company unless authorized by a law.[23] China is now the third nation to operate a permanent space station, with the United States and Russia being the other two. Adding to the significance of the Tiangong space station is the fact that the ISS is expected to be decommissioned by 2031.[24]

Russia

In 2021, Russia announced plans for a space station following its threat to withdraw from the International Space Station sometime after 2024. This would end a decades-long partnership with the United States and the demise of perhaps the last remaining channel of cooperation between the two nations. In April 2023, Russia confirmed its intention to continue support of ISS operations through 2028.[25] Russia's plans for its orbital space station remain strong, however. In July 2023, the Russian state media reported that its space agency has offered its BRICS partners—Brazil, China, India, and South Africa—–an opportunity to participate in the project through the creation of a dedicated space module for the BRICS countries to conduct scientific research. Rocsomsos CEO Yuri Borisov made the following statement: "I would like to propose that our partners in BRICS consider the opportunity to take part in this project and create a full-fledged module through joint efforts, which would enable BRICS countries, as part of the ROS project, to use the opportunity offered by [the ROS'] low near-Earth orbit to carry out their respective national space programs."[26]

India

India reached a major milestone in 2023 through its Chandrayaan-3[27] mission. Following a launch on 14 July 2023 from the Satish Dhawan Space Centre in Sriharikota Range, the spacecraft successfully landed on the moon on 23 August 2023. India has now joined the ranks of the United States, Russia, and China, becoming the fourth nation to land on the moon. In an interesting timing

Credit: Indian Space Research Organisation (GODL-India), GODL-India, https://commons.wikimedia.org/w/index.php?curid=80159263

Vikram lander from the Chandrayaan-2 lunar exploration mission in India

of events, India's successful landing came days after it celebrated its seventy-seventh Independence Day on 15 August 2023. India's plans to achieve space superpower status extend far beyond the moon. The Aditya L1 will be India's first space-based mission to study the sun—according to the ISRO, "[t]he spacecraft is planned to be placed in a halo orbit around the Lagrangian point 1 (L1) of the Sun-Earth system, which is about 1.5 million km from the Earth."[28]

Conclusion

The BRICS countries have made significant progress in space collaboration in recent years. This is a sign of their growing importance in the global space race. They are committed to space exploration and are working together to develop the technologies and infrastructure needed to explore space. They are also committed to promoting the peaceful use of space and using space for the benefit of all humanity.

BRICS Space Alliance, continued

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Endnotes

1 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

2 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter the Rescue Agreement].

3 Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 861 U.N.T.S. 187 [hereinafter the Liability Convention].

4 Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter the Registration Convention].

5 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 18, 1979, 1363 U.N.T.S. 22 [hereinafter the Moon Agreement].

6 *See* Status of International Agreements relating to activities in outer space as at 1 January 2023, Sixty-second session Vienna, 20–31 March 2023, AC105_C2_2023_CRP03E.pdf (unoosa.org) (last visited 14 Aug. 2023).

7 Seventh BRICS Summit, Ufa Declaration, July 9, 2015, http://www.brics.utoronto.ca/docs/150709-ufa-declaration_en.html (last visited 14 Aug. 2023).

8 Ufa Declaration, ¶ 32.

9 *Id*.

10 GLONASS is the Russian counterpart to GPS using twenty-three operational satellites, with twenty-seven in the constellation including one in-orbit spare. Francis Lyall & Paul B. Larsen, *Space Law: A Treatise* 343 (2d. ed. 2018).

11 The BeiDou Navigation Satellite System is the Chinese global navigation satellite system and is also of military origin. *See* Lyall et al., *supra*, at 346.

12 Ufa Declaration, ¶ 32.

13 *Id*.

14 Agreement Among the Brazilian Space Agency, the State Space Corporation "Roscosmos," the Indian Space Research Organization, the China National Space Administration, and the South African National Space Agency on Cooperation on BRICS Remote Sensing Satellite Constellation, Aug. 18, 2021, http://www.inpe.br/institucional/sobre_inpe/relacoes_institucionais/arquivos/BRICS-Cooperacao_Satelite_Remoto.pdf (last visited 14 Aug. 2023) [hereinafter the Remote Sensing Satellite Agreement].

15 Remote Sensing Satellite Agreement, Art. II.

16 Remote Sensing Satellite Agreement, Art. VIII, § 8.1.

17 Remote Sensing Satellite Agreement, Art. XII, § 12.1.

18 Remote Sensing Satellite Agreement, Art. XII, §12.2.

19 XIII BRICS Summit, New Delhi Declaration, ¶ 28, Sep. 9, 2021, http://www.brics.utoronto.ca/docs/210909-New-Delhi-Declaration.html (last visited 14 Aug. 2023).

20 New Delhi Declaration, ¶ 36.

21 XIV BRICS Summit, Beijing Declaration, ¶ 29, June 23, 2022, http://www.brics.utoronto.ca/docs/220623-declaration.html (last visited 14 Aug. 2023).

22 https://brics2023.gov.za/

23 H.R. 1473, 112th Cong. (2011) (enacted).

24 On 27 Apr. 2023, NASA announced that the U.S., Canada, Japan, and participating countries of ESA have confirmed they will support continued space station operations through 2030, with Russia confirming its support through 2028. (https://blogs.nasa.gov/spacestation/2023/04/27/partners-extend-international-space-station-for-benefit-of-humanity/).

25 *See* n. 24, *supra.*

26 *See* https://tass.com/science/1651097.

27 Chandrayaan 3 is an ISRO mission with the primary objective of putting a lander and rover in the highlands near the south pole of the moon and demonstrating end-to-end landing and roving capabilities. (https://nssdc.gsfc.nasa.gov/nmc/spacecraft/display.action?id=CHANDRYN3).

28 *See* Aditya_L1_Booklet.pdf (isro.gov.in).

BRICS, the China Challenge in the Western Hemisphere, continued from page 13

trade, nonproliferation, intellectual property), overlooked the rampant acts of espionage, and offered nothing more than a public rebuke for the well-documented brutalities against citizens of Chinese mainland, Hong Kong, and the Chinese-occupied territories—Tibet, Xinjiang, and Inner Mongolia.

After the Reagan administration, successive U.S. presidents failed to write the rules of a new world order with an extant CCP-led ideological conflict between communism and the free world, a status quo remaining undisturbed long after the dissolution of the former Soviet Union obviated the need for a China counterweight.

George H. W. Bush, the first post-Soviet U.S. president, presided over an extraordinary growth of trade relations with China, fully controlled by the CCP. Except for ending direct military sales to China, all other sanctions lifted by 1991. Bill Clinton, who campaigned[11] against George H. W. Bush's "coddling the dictators in China" and "sending emissaries to raise a toast with those who crushed democracy," as president renewed China's Most Favored Nation (MFN) trade status, accelerated U.S. advanced technology transfers, and approved China's accession to the World Trade Organization.

Declaring China a strategic competitor, George W. Bush campaigned[12] to "stand tough and firm against Chinese threats" and promised "use of force" if needed to defend Taiwan. In office, however, he presided over China's entry into the World Trade Organization in 2001, unaudited Chinese corporate access to U.S. financial markets, ascendancy in the global supply chain, and its commensurate geopolitical influence. In 2001, the downing[13] of a U.S. EP-3E Aries II spy plane flying in the Taiwan Strait, an incident that should have sounded a national security alarm, instead ended with an official U.S. apology to China for landing on Hainan Island without permission. Worse still is that the apology failed

Great Hall of People and Tiananmen Square, Beijing, P.R.China

to reference the illegal maneuver by a Chinese pilot that caused the downing of a U.S. plane in international waters. The top-secret plane was returned disassembled to the United States. Later evidence suggests that the Chinese reverse-engineered the technology to build a similar plane that eerily looks like its U.S. version.

Barack Obama entered office promising to dial-down the United States' singular superpower standing, which he viewed as a barrier to advancing global goals such as reducing climate change. Even as the Obama administration spoke of China as a "free rider"[14] in a global system created by the United States, it pursued a cooperative economic partnership with China, unimpeded by emerging security concerns or a deteriorating record of human rights abuse. China's increasingly aggressive behavior against its neighbors in the South China Sea led to the Obama administration's "pivot to Asia"[15] aiming to strengthen regional ties. Such a transactional policy approach stumbled for lack of a coherent strategy or any discernable plan of action while China filled the void due to the absence of a U.S. countervailing force.

"Trump," as Henry Kissinger in a 2018 *Financial Times* interview[16] observed, "may be one of those figures in history who appears from time to time to mark the end of an era and to force it to give up its old pretenses."

For the first time since the dissolution of the former Soviet Union during the Reagan presidency, the Trump administration's 2017 National Security Strategy[17] declared "Great Power Competition" as the primary focus of the United States' foreign and defense policy. A paradigm shift from past presidential administrations, security concerns took precedence over trade with China, with a clear policy delineation between the free world and authoritarian alternatives. The Trump administration[18] issued several pivotal policy directives and Executive Orders and presided over bipartisan Congressional passage of landmark legislation to address China's monopoly control of the global supply chain, its illegal trade practices, its theft and reproduction of U.S.-origin technology, its unaudited access to U.S. financial markets, its acquisition of critical technology innovation, and its historic scale military buildup to project power throughout the world.

Undiscouraged by the change in presidential administration, the Trump administration's policy framework remains intact to date, serving as a durable foundation to meet new challenges; however, the emergence of China's wolf warrior diplomats, escalation of Chinese threats and intimidation against its neighbors, and an expansion of Chinese-triggered conflict zones is absent a meaningful response.

Great Power Competition: Chinese Response

In the early days of the U.S.-China rapprochement, China understood that U.S. goodwill was based on China's counterweight to the former Soviet Union. Exploiting the United States' stake in China's success, China persevered over the next fifty years to achieve its twin goals of manufacturing preeminence and advanced technology acquisition by any means possible. Throughout this period, while kowtowing to U.S. politicians and business elites, the CCP carefully avoided public exposure of either its political, social, and economic practices or its fusion of civilian and military technology and production. Consequently, the CCP's ideological combat against the free world went unnoticed in the United States. CCP-aligned multilateral institutions and forums (such as BRICS) grew in importance as alternatives to the U.S.-led multilateral institutions and international order.

Chinese paramount leader Deng Xiaoping stated in a 1986 interview,[19] "opening the window, breathe fresh air" (i.e., liberalization) "and at the same time fight the flies and insects" (i.e., foreign reform ideas). During Deng's regime, the 1989 Tiananmen Square massacre may have been a CCP self-preservation maneuver, as it coincided with the fall of the Berlin Wall that same year. CCP analysts conducted numerous studies on the factors that led to the dissolution of the Soviet Union; none acknowledged the failed political and economic model.

Beginning in 1989, China started to close the window slowly while calibrating its geopolitical ambition based on its perceived risk of a U.S. countervailing force, whether or not this risk came to fruition. Avoiding direct confrontation with the United States, China's diplomatic apparatus launched an effective disinformation campaign and artful outreach to persuade U.S. politicians and business elites that China's

actions were innocuous and unlikely to challenge U.S. trade and military alliances. A complacent United States failed to apply a countervailing force as it once did to thwart Soviet expansionism during the Cold War.

Starting in 2021, China inexplicably dropped the diplomatic charade, choosing instead direct confrontation with the United States. In March 2021, during a two-day U.S.-China summit in Anchorage, Alaska, the public scolding of a U.S. secretary of state and a U.S. national security advisor by their Chinese counterparts was both startling and unprecedented. The confrontational tone has continued unabated, marked by periods of refusal to engage in bilateral meetings with U.S. counterparts unless Chinese demands are met. Specifically, China demanded a deregulation of Trump-era export control sanctions against advanced technology transfers and a reneging of the United States' commitment to defend Taiwan in the event of a Chinese invasion.

Intimidation tactics of Chinese diplomats accompanied by the Chinese military's frequent interference with U.S. Navy Freedom of Navigation operations in the South China Sea appear to be yielding some success[20] since U.S. security concerns have receded to the background in favor of reaching a bilateral climate accord, despite the scant chance of its negotiability or compliance success. Meanwhile, the Chinese military's gray zone campaign with its unprecedented deployment in the Taiwan Strait, stopping just short of war, tests the credibility of the United States' commitment to defend Taiwan. Concurrently, increased Chinese military deployments in Galwan Valley Kashmir could lead to Chinese aggression and incremental territorial gains, as India lacks a mutual defense treaty with the United States (or Russia). These Chinese tactics reassure its restive citizens of the military's strength and patriotism despite the country's dwindling economic prospects.

As discussed above, China is an increasingly assertive player in the economies of South and Central America, which in turn increases its relevance in the region's politics. The China challenge is, therefore, no longer contained in the Indo-Pacific. A recent spurt of Chinese military and intelligence presence in the Western Hemisphere, including a Chinese eavesdropping base and a joint military training facility in Cuba, which is 100 miles off the coast of Florida, represents by far the gravest national security threat to the United States.

Chinese control of strategic assets in the Western Hemisphere is rapidly expanding with political support from national and local governments. Further, Chinese leverage has deepened with the region's dependency on the Chinese market for its commodities exports and China's significant position as a creditor to the region's unsustainable debt. Thus far, China has intimidated a growing number of countries to renounce their recognition of Taiwan and is likely demanding exclusive access to the region's critical minerals (e.g., niobium, lithium), ports, airfields, factories, farms, and oilfields for sustaining future military operations in close proximity to mainland United States. Chinese military and intelligence personnel entering the United States through the porous southern border may further weaken the United States' response.

U.S. foreign affairs and military experts have opined that the current Chinese aggressive posturing is due to a Chinese perception of the United States' weakness. If that is the case, then the danger of accidental nuclear war due to a Chinese miscalculation—whether illegal Chinese encounters in the Taiwan Strait or a Chinese missile crisis in Havana—has never been higher.

U.S. Foreign Policy Future: China Threat

The time-tested U.S. foreign policy tools for countering the China sphere of influence, such as special trade preferences, foreign aid, and limited military engagement, have reached a point of diminishing return. These tools are also deeply unpopular with the U.S. citizenry, which demands a return on its decades of investments. On the other hand, negotiating a new agreement with China to regulate its misbehavior is ill advised. During a congressional hearing, Robert Lighthizer, U.S. trade representative under President Trump who negotiated the last trade agreement with China, conceded the difficulty of enforcing Chinese compliance.

A worse policy choice, recently under review by the European Union, is derisking[21] or deploying necessary security measures without decoupling from China and

interrupting the flow of trade and investments. Thus far ill-defined, derisking can create new enforcement challenges and risks to the global financial system. As the Russia sanctions have demonstrated, both dubious and legitimate actors are forced into unregulated channels, making specific risk assessment or security breach monitoring and detection extremely difficult.

At its core, the Chinese rivalry with the United States and the free world is neither economic nor military. Rather, it is ideological, and the inherent weakness of a CCP-controlled China and a China sphere of influence (such as BRICS) has not been considered in policymaking thus far. Most policymakers have overlooked the possibility that China's meteoric economic rise and military prowess are actually in spite of its flawed political and economic model, not because of them. Instead, they have responded to the China threat with expansive industrial policy, byzantine public spending in infrastructure and subsidies, creeping government censorship, and surveillance of citizens. It is as if they are capitulating to the inevitability of China's dominance.

China's economy exhibits troubling indicators of an upcoming deflationary recession: sluggish consumer spending, a moribund property market, flagging exports, a record youth unemployment, and government debt to gross domestic product (GDP) ratio at 76.9%. GDP growth has already slowed to low single digits. With decades of malinvestment intermediated by a state-controlled financial system, China's economy has gone through a structural deceleration in the past decade, producing diminished value for every dollar of investment. During this same period, CCP central planners' repetitive attempts to reengineer the Chinese economy into a consumer-driven model by stimulus spending have failed.

The Chinese economic "miracle" that distinguished the last two decades has brought about a CCP-friendly international community and a belief in China's projected superpower standing. China's economic influence based on this narrative and its outsized role in global trade further convinced multinational corporations and developing countries alike of the invincibility of the CCP-proffered political and economic model while concerns about Chinese intransigencies have been muted.

A looming Chinese recession, however, may force a realignment of developing countries that continue to flock to the China sphere of influence. Such a reckoning of the China economic miracle may also invigorate support for U.S.-led multilateral institutions and international order, provided that a U.S. countervailing force prevails.[22] Notably, the preeminence of the U.S. model rests not on fear and intimidation. Rather, the U.S.-led coalitions and partnerships are an alliance based on a shared mission and common purpose to defend a rules-based international order that benefits all.[23]

Can the next U.S. president write the rules of a new world order after the expiration of the Chinese economic miracle? The answer is no, unless policymakers rethink the misguided post-1989 presumptions about CCP-controlled China that thwarted (rather than furthered) a geopolitical realignment based on a U.S. political and economic model.

As a first step, critical defense investments to secure the United States' preeminence against twenty-second century threats as well as rectifying America's ballooning debt obligation are conditions precedent to any other policy prescription. Second, the strategic goals and tactical objectives of the United States' aid programs—humanitarian and military—require an overhaul and reframing to further the U.S. model. Third, U.S.-led multilateral institutions that have been hollowed by Chinese tampering require a reappraisal, with verifiable accountability consistent with the U.S. model. Fourth, mutual defense treaties as well as bilateral and multilateral trade agreements between the United States and its partners must be updated to require: harmonization with U.S. export control laws; new licensing procedures for utilization in foreign locations of emerging U.S.-origin technology (e.g., artificial intelligence (AI), quantum information and technology (QIST), biotechnology); and U.S.-administered monitoring protocols in foreign operations for controlled U.S.-origin technology. Fifth, managing the global repercussions of China's economic decline, including the eventual demise of China-founded multilateral institutions and forums (such as BRICS), will require policy prescriptions that reinforce the U.S. model.

BRICS, the China Challenge in the Western Hemisphere, continued

As in the past, the United States can remain a free society only if it is an effective countervailing force against autocratic regimes endeavoring to extinguish those freedoms. An organic decline of China, even with a powerful military, obviates the need for competition with or a containment of China. Rather, the next U.S. president will find greater success in securing U.S. leadership of the free world by strengthening the United States at home and U.S.-led multilateral alliances and institutions abroad.

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Endnotes

1 "BRIC" (Brazil, Russia, India, China) is an acronym created by Goldman Sachs economist Jim O'Neill in 2001, which grouped four emerging economies that were projected to dominate the global economy by 2050. Since 2009, BRIC has been an annual summit of the noted countries to secure their collective economic clout, aspiring to supersede the dominance of the G7 (the United States, Japan, United Kingdom, Canada, France, Germany, Italy are members and EU is a nonmember). In 2010, South Africa was added as a member of BRIC, and the forum was renamed "BRICS." New countries that have applied for BRIC membership include Algeria, Argentina, Bangladesh, Egypt, Ethiopia, Iran, Indonesia, Saudi Arabia, and United Arab Emirates. In addition, countries that have expressed strong interest in joining include Afghanistan, Angola, Belarus, Comoros, Cuba, Democratic Republic of Congo, Gabon, Guinea-Bissau, Honduras, Kazakhstan, Mexico, Nicaragua, Nigeria, Pakistan, Senegal, Sudan, Syria, Thailand, Tunisia, Turkey, Uganda, Uruguay, Venezuela, and Zimbabwe. To date BRICS has no formal institutional agreement and, other than the shared developmental concerns that set summit agendas, no binding organizational structure.

2 NDB is located in China, and an overwhelming majority of its funding is from the Chinese government. Project finance funded by the Chinese government sources will directly benefit China with higher than market rate interest and a requirement to hire Chinese contractors and China-sourced goods and services.

3 China's 2022 GDP is at $18 trillion; 2022 debt to GDP ratio at 76.9%, https://tradingeconomics.com/china/government-debt-to-gdp.

4 https://www.youtube.com/watch?v=ZZx7DAo7cBQ.

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13 http://www.cnn.com/2001/US/04/12/air.collision.04/index.html.

14 https://www.washingtonpost.com/graphics/national/obama-legacy/relations-with-china.html.

15 https://www.reuters.com/article/us-asia-usa-china-idUKBRE99501O20131006.

16 https://www.ft.com/content/926a66b0-8b49-11e8-bf9e-8771d5404543.

17 https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

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18 Notable policy directives, executive orders, and legislation (2017-2020): National Security Strategy; 2018 National Defense Strategy; 2019 Indo-Pacific Strategy Report; 2018 Section 232, Trade Expansion Act tariffs against Chinese exports; 2018 Executive Order 13806, Manufacturing and Defense Industrial Base and Supply Chain Resiliency, Assessment and Strengthening Efforts; 2019 Executive Order 13873, Securing the Information and Communications Technology and Services Supply Chain; 2020 Executive Order 13817 Ensure Secure and Reliable Supplies of Critical Minerals; 2020 Executive Orders 139942, 13943, addressing the risk of TikTok and WeChat; 2018 Foreign Investment Risk Review Modernization Act; 2018 Export Control Reform Act; 2020 Foreign Direct Product Rule (FDPR) expanded coverage of integrated circuits and semiconductor chips; 2018 Better Utilization of Investments Leading to Development Act (BUILD Act) reforming developmental project finance; 2018 EQUITABLE Act, delisting Chinese companies from U.S. exchanges without compliance with U.S. securities law; National Defense Authorization Act for FY 2021 (i.e., provisions include Manufacturing and Defense Supply Chain Resiliency; CHIPS America Act)—in-sourcing defense supply chain, export control sanction prohibiting sale of semiconductor chips and manufacturing equipment to China and in-sourcing of semiconductor chips to U.S. factories.

19 https://content.time.com/time/subscriber/article/0,33009,1074879-9,00.html.

20 A major concession to the Chinese under negotiation by the U.S. State Department is lifting the sanctions imposed against the Chinese Ministry of Public Security in 2020 for the well-documented human rights abuses against the Uighurs. In exchange, the United States wants cooperation on Chinese-produced fentanyl drugs in Mexico that are overwhelming the United States' southern border, with fentanyl-related death toll rising. Requiring no Chinese compliance guarantee, Mexican fentanyl is unlikely to stop since it is among China's most lucrative exports to the United States.

21 Derisking is a term originated by the U.S. Department of Treasury to apply sanctions under the 2020 Anti-Money Laundering/Countering the Financing of Terrorism Act (AML/CFT) requiring impacted financial institutions to terminate or restrict commercial relationship with broad categories of customers without assessing the specific risks posed by each customer. According to the Treasury Department, derisking has driven financial activity out of the regulated financial system, hampering remittances, preventing low- and middle-income segments of the population from efficiently accessing the financial system, and hindering the unencumbered transfer of humanitarian aid and disaster relief. https://home.treasury.gov/news/press-releases/jy1438.

22 China's wolf warrior diplomacy has ruptured trade ties with the EU and Indo-Pacific countries; the Chinese saber rattling has further elevated global security concerns, exemplified by two events in July 2023. The U.S.-Australia joint military exercises conducted every two years in locations throughout Australia attracted participation by more than 30 countries, with Germany as a surprise addition. Similarly, the NATO Summit was attended by Indo-Pacific nations seeking defense partnerships and included Japan, South Korea, Australia, and New Zealand.

23 The United States does not fight alone as observed recently by a young U.S. Navy surface warfare officer while underway: "I'm not going to lie; today's warfare is scary and brutal. We as a surface combatant can most certainly get wiped-off the face of the Earth in a matter of minutes without much warning. To be clear, we make it our mission to eliminate a proportionally greater amount of enemy material before we die, but we would not last long in such a conflict. We are not the top dogs on this globe. But the greatest advantage we do have over our peer adversaries (whether China or Russia) are our alliances and coalitions. Earlier this patrol, I was standing watch on the bridge. There are speaker boxes on the ceiling that we use to listen in on traffic on our tactical radio channels. Whenever the screen commander goes out over a channel to provide information or give orders to execute, all members of the formation have to go back out to acknowledge receipt of the transmission by saying "This is ____. Roger. Out." I would grab the phone and say "This is _____ (ship name). Roger. Out." After which, I would be followed by a long line of other foreign ships sailing with us rogering-out in a myriad of foreign accents: French, Australian, British, Japanese, Italian, and many other countries that are our allied partners. In my bridge team, we would play a game where we would try to tell which transmission came from which ship just by listening to the accent. It is truly remarkable; it demonstrates how all of these countries are united with us in mission and purpose."

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OFAC SDN Removal Process

OFAC states that it not only has power to designate and add persons to the SDN list, but also to remove persons from the SDN list if it is consistent with the law.[7] To seek administrative reconsideration of SDN placement, a listed party should submit to OFAC, Per 31 C.F.R. § 501.807, "arguments or evidence that the person believes establishes that insufficient basis exists for the designation" by "assert[ing] that the circumstances resulting in the designation no longer apply . . . following administrative procedures."

As noted above, the evidentiary threshold for listing a person on the SDN list is the very low "reasonable cause to believe" standard. Prior to Russia-Ukraine sanctions, OFAC insisted that its designations were accurate and far exceeded that threshold. With continuous numerous designations, however, it is likely that even an unverified newspaper article can create basis for such a designation, raising questions of capricious or, in some cases, even malicious designations.

Therefore, a request for reconsideration to OFAC may include arguments or evidence rebutting the "basis for the designation," or "assert that the circumstances resulting in the designation no longer apply."[8] In the removal petition, the SDN person must argue that whatever rationale led to the designation was never true or is no longer true.

OFAC guidance further explains that "[t]he ultimate goal of sanctions is not to punish, but to bring about a positive change in behavior." As such, a blocked person may propose remedial steps, such as corporate reorganization or the resignation of persons from positions in a blocked entity, that may negate the basis for designation.

OFAC guidance further lists circumstances that could lead to an entity's or individual's removal from the SDN list, such as the death of an SDN, the fact that a designation was based on mistaken identity, or a positive change in behavior.

After a party has petitioned for removal from the SDN list, OFAC reviews the petition and may request additional information. OFAC guidance states that if needed, OFAC typically endeavors to send the first questionnaire within ninety days from the date the petition is received by OFAC.

Moscow, Russia

Because these requests for information may result in further questions, "it is not uncommon for OFAC to send one or more follow-up questionnaires and to engage in additional research to verify claims made by a petitioner."[9] Parties seeking removal may also request a meeting with OFAC, although these meetings are not required and OFAC is not required to grant a meeting request. Further, as part of the agency's reconsideration process, designated individuals may request disclosure of the administrative record supporting the designation decision, and OFAC ultimately renders a decision in writing.

The length of the removal process varies on a case-by-case basis. The timing of a review depends on whether OFAC requires additional information, how timely and forthcoming the petitioner is in responding to OFAC's requests, and specific facts of the case. Incomplete answers to questionnaires or incomplete documentation may cause delays.

If OFAC rejects the SDN's petition for removal, a party may reapply "if the party provides new arguments or evidence, or shows a change in circumstances, the outcome will, in the absence of an independent decision to delist, remain the same." There is "no limit on the number of times a designated person can request delisting."[10]

Ultimately, according to OFAC guidance, each removal is based on a thorough review by OFAC.[11] Maintaining the integrity of U.S. sanctions is a high priority for OFAC and

is the driving principle behind its rigorous review process that evaluates every request for removal individually on its merits and applies consistent standards to each request.

Filing a Lawsuit Against OFAC

SDNs, in some cases, may have a statutory right to seek judicial review. The number of such challenges is rather limited and so is the judicial review process itself.

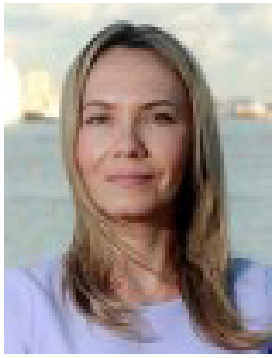
When OFAC denies a request for reconsideration or does not timely respond, the blocked person may challenge that determination under the Administrative Procedure Act in federal court. A listed party may even "bypass the administrative-delisting process altogether and immediately challenge the agency's designation."

It must be noted that the relevant judicial standard of review is a deferential one. Courts will set aside OFAC's designation only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This is a narrow standard of review as courts defer to the agency's expertise.[12] Thus, when there is evidence that provides adequate basis to justify Treasury's determination, courts will deny the petitioner's application for delisting. In cases where OFAC refused to provide evidence or adequate reasons for the investigation and designation, courts have found a due process violation.

Similar constitutional violations have been found where OFAC failed to obtain a warrant before seizing assets, violating the Fourth Amendment.[13] With respect to constitutional claims, however, the government's motion to dismiss has been granted when the court finds that a foreign national lacks standing to assert these claims.[14]

Conclusion

Sanctioned individuals and their attorneys face unique challenges when petitioning OFAC and going through the SDN removal process. The stigma of being placed on the SDN list results in significant reputational and business harm, and even if sanctions are lifted, the SDN stigma can linger if the party is not removed from the SDN list. The scarcity of information and resources as well as fear of legal counsel to take steps that could lead to their own issues with OFAC are barriers to removing an SDN designation. Still, OFAC has been known to remove parties from the SDN list, which in many cases is vital for a sanctioned individual.



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"equalize" Sarah's U.S. wages. Equalization, in theory, protects Sarah's purchasing power by increasing her U.S. wages in proportion to Acme's increased costs.

Under U.S. law, Sarah's equalized income is taxable as regular wages. So, Sarah will owe additional income tax. Then, Acme will pay that increased income tax, thereby again increasing Sarah's regular wages and income tax liabilities—and on and on.[13]

This pyramid effect—and effective tax rate of 44.2%—can be seen in Table Two.[14]

Remittance and Loss of Benefits

Fast-forward several years, near the end of Sarah's Big Apple assignment. As required, Acme withheld social security and EPF from Sarah's pay. Sarah's social security contributions are likely untouchable without paying in more wage credits. Also, recall that the U.S. Internal Revenue Service (IRS) expects Acme's U.S. establishment to file exemptions or refunds.[15] Most likely, by the time Acme and/or Sarah files the required forms, Sarah will have returned to India. Sarah's U.S. contributions are lost for all practical purposes.

Impact of U.S. Totalization Agreement

Recall that SSAs: (1) avoid double social security contributions; (2) simplify remittance; and (3) prevent loss of payments. Sarah probably would have these benefits under the potential India-U.S. SSA, according to a study by the International Labour Organization.[16] Of course, areas for improvement exist.

For one, competent institution technology needs to improve. End-to-end electronic Certificate processing[17] is needed for timely completion of Certificates. Significant challenges could exist if EPFO manually reviews and submits Certificates while U.S. tax authorities mandate electronic filing and recordkeeping.[18]

MNC Recommendations

SSAs are recognized for bilateral benefits with respect to enhancing trade, reducing costs, and attracting talent. As India's largest trading partner, it would be worthwhile for the United States to consider India's views.[19] [20]

Table Two: Pyramid Effect of Dual Contributions

Acme's Cost	Equalization Outcome
Base U.S. compensation	$80,000*
India EPF tax rate: 12% employee share + 12% MNC share = 24%	Sarah's share ($9,600) + Acme's share ($9,600) = $19,200
U.S. social security tax rate: 6.2% employee share + 6.2% MNC share = 12.4%	Sarah's share ($4,960) + Acme's share ($4,960) = $9,920
U.S. income tax withholding rate: 30% **	Acme increases Sarah's wages by the cost of her U.S. and India social security contribution shares ($9,600 + $4,960 = $14,560) plus income tax on the equalized wages
Income tax equalization	$14,560 multiplied by 30% = $4,368 $4,368 multiplied by 30% = $1,310.40 $1,310.40 multiplied by 30% = $393.12 $393.12 multiplied by 30% = $117.94 $117.94 multiplied by 30% = $35.38 $35.38 multiplied by 30% = $10.61 $8.14 multiplied by 30% = $3.18 Total = $6,238.63
Labor cost including equalized income	Base labor cost = $80,000 + Acme's social security contribution ($14,560) + Sarah's social security contribution ($14,560) + Income tax equalization = $6,238.63 Total = $115,358.63

** All dollar amounts are in U.S. dollars.*

*** Assumes: (1) Sarah doesn't qualify for "personal services" exemption under the India-U.S. Income Tax Treaty; and (2) Acme withholds the 30% NRA rate from Sarah's equalization income. Sarah's annualized income may qualify for a different withholding rate.*

India Pursues Equal Contributions to Social Security, continued

Competent authorities in the United States and India must disclose certain information thoroughly and transparently:

1. Data-sharing protocols will be required. Under the 2019 Foundations for Evidence-Based Policymaking Act, future social security agreements will be conditioned on data models proposed by the Social Security Administration and evaluated by the Government Accountability Office.[21]

2. The IRS and the U.S. Citizenship and Immigration Services (USCIS) require specific data-sharing protocols, with primary sourcing responsibilities with respect to employee data. U.S. stakeholders—especially those knowledgeable about IRS and USCIS proprietary data—could offer valuable technology guidance for India counterparts.

3. Finally, the Social Security Administration will require actuarial data regarding MNC U.S. benefit contributions.[22] (U.S. social security essentially operates as a defined benefit plan, backed with Uncle Sam's IOU.) Voluntary planning may expedite U.S. appropriations and also help MNCs receive tax benefits in lieu of the costly pyramid effect.[23]

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India Pursues Equal Contributions to Social Security, continued

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months.[31] The investment may be made in a new company or an existing/operating company. Investors are required to generate a minimum of twenty jobs for Indian residents per financial year in the investment.[32]

Initially, the investor is granted a business visa for eighteen months or thirty-six months, depending on the amount of the investment.[33] The investor's spouse and dependents also receive the business visa.[34] After complying with the terms of investment at the conclusion of the eighteen-month or thirty-six-month period, the foreign investor and his/her spouse and dependents can submit their applications for permanent residency.[35] Permanent residents are provided their status for ten years with multiple entries available and further extension possible for another ten years. The permanent residency status may be revoked if the company fails to provide the minimum of twenty jobs for Indian residents or the investor is found incompetent, becomes insolvent, or is convicted by a court of law for any offense.[36]

People's Republic of China

China is the second-largest economy in the world, with a GDP of over US$17 trillion.[37] The country has experienced rapid economic growth over the past few decades, thanks in part to its large population and abundant natural resources.[38] Investment by foreign companies in China tumbled to its lowest level in eighteen years in the second half of last year due to tensions with the United States, a dimming growth outlook, and fears of possible backsliding on economic reforms.[39]

Generally speaking, the Chinese government is more restrictive than other big economies in regard to foreign investment, with numerous sectors closed to foreign direct investment.[40] On 15 March 2019, the Foreign Investment Law of the People's Republic of China (Law) was approved, and it was implemented on 1 January 2020.[41] The Law requires that the foreign national make "direct and stable investments in China, with good tax payment records for three consecutive years."[42]

The Law also specifically prohibits the government and government officials from forcing transfer of technology and codifies that the state shall protect the intellectual property rights of foreign investors and foreign-funded enterprises.[43] For purposes of the Law, the investment may be in a foreign-funded enterprise; acquisition of shares, equities, or property shares of an enterprise; a new project independently or jointly with another investor; or any other investment activity authorized by law.[44] The government published an official "Catalogue for the Guidance of Foreign Investment Industries," which outlines industries that are encouraged, restricted, or prohibited.[45] In total, there are 348 encouraged industries, 63 industries listed as negative, 28 of which are in the prohibited category (not open to foreign investment), and 35 industries are in the restricted category (subject to government administrative approval).[46] China encourages foreign investment primarily in high technology, clean energy, and export-oriented sectors, and the businesses in the encouraged category require only a notification filing.[47]

An investment in Western China in any region requires at least US$500,000. The investment in Central China requires an amount of US$1 million, and outside of the two prior regions listed, the investment required is at least US$2 million.[48] Business plans must be submitted to government authorities for approval prior to the beginning of business activity.[49]

Permanent residence allows overseas nationals the right to reside in China on an indefinite basis. The investor's foreign spouse and unmarried children under eighteen years of age are eligible for permanent residence also.[50] Everyone applying for permanent residence must submit a biographic application, valid passport and visa, health certificate, non-criminal record abroad and in China, proof of familial relationship(s), the business license, capital verification report showing the company's registered capital (equity capital) has reached the standard, and an audit report showing equity capital meeting the standard for the last three consecutive years.[51]

Republic of South Africa

South Africa is ranked the thirty-eighth best economy in the world.[52] The South African economy grew by 0.4% between January and March of this year.[53] The country is facing rolling blackouts after years of mismanagement and

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aging coal-fired power stations of the state-owned utility, Eskom, "prompting the authorities to ease the registration process and licensing requirements for energy production to encourage private sector investment."[54]

Foreign investors seeking opportunities and investor visas in South Africa, unfortunately, are out of luck, as there is no investor visa available. However, there is an alternative solution—a financially independent permit. This permit program is designed to attract high-net-worth individuals to South Africa by granting them direct permanent residency. Successful applicants can work, retire, study, or manage their businesses in South Africa.

To qualify for permanent residency, the primary applicant must:

- Have a minimum net worth of ZAR 12,000,000 (US$640,000)
- Make payment in the amount of ZAR 12,000 (US$6,800) to the Director-General upon approval of the application
- Not be a "prohibited or undesirable person"
- Not have a criminal record
- Not have been refused entry into South Africa
- Not have entered or stayed illegally in South Africa[55]

To prove the applicant's net worth meets the minimum threshold, it is necessary to submit documentary evidence in the form of the applicant's property deeds with valuations, investments, financial statements, stock portfolios, and other evidence of the applicant's assets and liabilities.[56] The permanent residence permit granted by the government does not expire; however, holders of permanent residence permits are required to take up residence in South Africa within one year of issuance of the permit.[57] Additionally, they are required to enter South Africa at least once every three years.[58] The principal applicant's spouse and children up to twenty-one years of age are eligible to apply as derivatives after the principal applicant's approval.[59]

Conclusion

The BRICS group of countries, with the current exception of the Russian Federation, provides U.S. citizens seeking to invest abroad with various temporary and permanent options. It is important to keep in mind each country's specific documentary and procedural requirements and to consult immigration matters with local counsel to safeguard the investment and avoid any errors in the filing process.

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53 South Africa Team, IMF African Department, *South Africa's Economy Loses Momentum Amid Record Power Cuts,* International Monetary Fund, https://www.imf.org/en/News/Articles/2023/06/15/cf-south-africas-economy-loses-momentum-amid-record-power-cuts (last visited 26 July 2023).

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55 https://www.imidaily.com/south-africa-financial-independent-permit/ (last visited 26 July 2023).

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57 Immigration Act 13 of 2002 (South Africa), Section 28(d).

58 *Id.* at 28(c).

59 *Id.* at 26(b) and (c).

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nonmembers such as the United States. At some point, Mexico may have to choose to remain in the USMCA or cancel the free trade agreement and join a similar agreement with BRICS.

In conclusion, as an active practitioner of international law with a focus on international trade for the past thirty years, I am very concerned that the creation and evolution of BRICS and similar global developments will inevitably result in the decrease of influence and power held by the United States economically, culturally, and militarily. Barriers to international trade were reduced in the post World War II period, resulting in the greatest economic boom in the history of humans. During that time period, annual international trade statistics increased every year, but now these will slow and probably be reduced. Lower trade means higher risk of economic insecurity and higher risk of international conflict. The headline of an article in January 2023 asked "Is Globalization Dead? At Davos, That's the Big Question."[10] Author Michael O'Sullivan prognosticated in *The Economist* in late 2019, "Globalisation is already behind us. We should say goodbye to it and set our minds on the emerging multipolar world. This will be dominated by at least three large regions: America, the European Union and a China-centric Asia." If immediate action is not taken to reverse the trend, unfortunately, I agree with Mr. O'Sullivan's prediction.

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Endnotes

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3 *BRICS vs G7: Comparison, GDP, Military, Who is More Powerful?*, The Explained Post, 22 June 2023, https://explainedpost.com/education/brics-vs-g7-comparison-gdp-military-who-is-more-powerful/ (last visited 2 Aug. 2023). (Note: the GDP row is blank in the original).

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5 *Id.*

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7 Mukul Sharma, ed., *Argentina moves away from US dollar for trade in Chinese currency,* WION, 27 Apr. 2023, https://www.wionews.com/business-economy/argentina-moves-away-from-us-dollar-for-trade-in-chinese-currency-586465 (last visited 2 Aug. 2023).

8 Mihaela Papa, *How long will the dollar last as the world's default currency? The BRICS nations are gathering in South Africa this August with it on the agenda*, Fortune, 25 June 2023, https://fortune.com/2023/06/25/dollar-reserve-currency-brics-brazil-russia-india-china-south-africa/ (last visited 2 Aug. 2023).

9 *2020 Special 301 Report*, Office of the United States Trade Representative, April 2020, https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf (last visited 2 Aug. 2023).

10 John Power, *Is globalisation dead? At Davos, that's the big question*, Aljazeera, 20 Jan. 2023, https://www.aljazeera.com/economy/2023/1/20/is-globalisation-dead-at-davos-thats-the-big-question (last visited 2 Aug. 2023).

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EU countries where serious concerns persist concerning the adequacy of their Councils for the Judiciary according to European standards.[13] In Spain, the Council (the governing body of the Spanish judiciary) has not been renewed after nearly five years. This poses a threat to the health of democracy in the nation as no steps can be taken to adapt the appointment procedure for its judges-members. This also has an impact on the functioning of the judicial system as a whole. In fact, the lack of renewal of the Council is creating a large number of vacancies in the Supreme Court, where magistrates cannot stay in office on a temporary basis, while it also affects the number of sentences that can be effectively passed, as there are fewer magistrates trying cases. This, in turn, affects the work of lawyers in defending the interests of their clients, as many legal proceedings are being unduly delayed.[14]

The EC also addresses the *appointment and dismissal of judges* as a key safeguard for judicial independence. Poland has the biggest problem here, as there are serious doubts as to whether a number of Supreme Court judges comply with the requirements of a tribunal established by law. In this sense, Poland has been turning a blind eye to many of the CJEU's judgments, where the court has concluded that appointments of Polish magistrates took place in clear breach of fundamental rules of the Polish judicial system.[15]

Finally, when it comes to the *autonomy and independence of the prosecution service*, the EC highlights that neither Poland nor Spain are taking adequate institutional safeguards to ensure that prosecution is sufficiently autonomous so that effective and impartial investigations can be carried out. In Spain, the EC reports that no measures have been taken to strengthen the statute of the prosecutor general, or to address the separation of its office from that of the government.[16] In Poland, while some progress has been made to ensure the independence of the prosecution from the government, the EC states that the functions of the minister of justice and the prosecutor general have not been separated.[17]

The Role of the Strasbourg Court

The Strasbourg Court is part of the Council of Europe (CoE) and, unlike the CJEU, is an institution that acts solely within

Credit: Library of Congress, Geography and Map Division

the jurisdiction of the EU. The CoE is the continent's leading human rights organization and includes forty-six member states, twenty-seven of which are EU members. As a result, the wide scope of its application and the effects of its decisions cover many cultures. Considering that the CoE is an organization whose main purpose is to uphold human rights and democracy, it has influence with respect to the rule of law in Europe.[18]

In the context of the functions and nature of the CoE, the Strasbourg Court hears and decides cases on violations of the rule of law by applying the normative scope of the European Convention on Human Rights (ECHR) among the states that have ratified the Convention. The court's judges sit in their individual capacity and do not represent any state; their main task is to make sure the states respect the rights and guarantees set out in the Convention by examining complaints lodged by individuals or, sometimes, by states.

The court recently detected violations of the principle of judicial independence based on Article 6 of the Convention (the right to a fair trial and to an impartial judge) in Poland and in Spain, as well as in Russia (when it was a party to the Convention).

The Case of Spain: The Endless Struggle for the Renewal of the General Council of the Judiciary (GCJ)

Although there are several cases in which Spanish judges and magistrates have sued the Spanish government for having favored the appointment of judges who were

objectively less qualified in a public and presumably unbiased selection process, it is the recent case of *Lorenzo Bragado and Others v. Spain*[19] that best illustrates why the judiciary in Spain is flawed. In this case, six applicants, all serving magistrates, appealed to the ECtHR to condemn the Spanish Parliament's failure to pursue appointment of a new GCJ.

The applicants were included in the final list of candidates to be considered for the renewal of the composition of the GCJ, whose mandate expired at the end of that year (2018). The GCJ's composition had to be fully renewed every five years by Parliament; however, the appointments had not yet been carried out and the matter had not been submitted for a plenary vote, despite the requirements of domestic law. After exhausting all domestic judicial remedies,[20] the applicants lodged an appeal to the ECtHR on the basis of Article 6 of the ECHR. More precisely, they appealed by claiming their right to a lawful procedure in the timely examination of their admissible candidacies for access to public office.

The applicants' appeal to the Spanish Constitutional Court (CC), the last domestic instance of constitutional control, was declared to be inadmissible. According to the CC, it was filed outside the maximum period established by law. Consequently, the issue in this case was not a subjective right of the applicants to become members of the GCJ. Rather, the issues were their "preliminary" right to be subject to a procedure as set forth in the law for the examination of their candidacies for public office, and their right to obtain a result at the conclusion of the parliamentary procedure, as the court pointed out.[21]

In applying the general principles of the Convention to the case, the court reasoned that, due to the general importance of the matter and the apparent novelty and rareness of the legal issues raised before the CC, the national court should have at least provided an adequate reasoning to justify the rejection of the appeal based solely on noncompliance with the statutory time limit.[22] Consequently, it would have been essential for the CC to explain whether the three-month time limit[23] set by domestic law had been applicable to a situation concerning inaction or continuing omission (as it was in the case of the nonrenewal of the GCJ). If so, how it should have been calculated, as well as the rationale for the approach to be adopted, would have been essential to have been explained.

The court concluded that the adverse impact and the unpredictable interpretation of the statutory time limit failed to protect the fundamental right of access to a court for the protection of a civil right. In this case, such civil rights were the observance of the legal procedure for renewing the composition of the governing body of the judiciary and the proper functioning of the judicial system. Failure to protect these rights undermined the applicants' right of access to a court. The court declared by a majority of four votes to three that there had been a violation of Article 6 of the Convention in respect to each applicant.

This case constitutes a new reprimand to Spain by the ECtHR, recognizing the legal importance and the resulting guarantees that must be given to a proceeding in which the renewal of the governing body of the Spanish judiciary is at stake. The case also raises substantial doubts as to whether the CC is a body that is operating independently from the executive branch of government. Is the immediate dismissal of an appeal that questions the independence of the Council of the Judiciary, and reveals a continuing failure to comply with the renewal procedure, a sign of executive interference?

In a scenario where all of Europe except Spain seems to be aware of the shortcomings of the Spanish judiciary, it remains uncertain if this case and the many others to come will serve as a wake-up call to cause Spain to comply with European standards of judicial independence, or if the Commission will eventually have to intervene by bringing infringement proceedings before the CJEU to force Spain to comply, imposing financial penalties (and, in more extreme cases, withdrawing European funds), as it is already doing with Poland.

The Case of Poland: A Paradigmatic Example of a Judicial Decline

Poland currently faces the most infringement proceedings of any EU nation for failing to adhere to European standards regarding the independence of its courts. Beginning in

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2017, the European Commission started closely monitoring the movements of the Polish judiciary. Since then, in an effort by the executive power of Poland aimed at dismantling the judiciary system, an Amending Act was passed granting the Parliament of Poland (*Sejm*) the power to select the fifteen elective members of the National Council of the Judiciary (NCJ). This nomination terminated prematurely the terms of office of the judges who had been elected as members of the NCJ under the previous legal framework, and none of them had the opportunity to challenge their early dismissal or the election of the judges who subsequently took their place. The new regulation adopted by the *Sejm* precluded judicial review of the removals and appointments decided by the president of the Republic.[24]

This has opened a Pandora's box and has led both the CJEU and the ECtHR to make numerous judgments against Poland, dealing with the many controversial aspects of its judiciary.

One of the most commented rulings of the Strasbourg Court in relation to the independence of Polish courts and the one that triggered the reaction of its Constitutional Court (previously referred to as the K 3/21 judgment, where the court questioned the principle of primacy of the EU and refused to submit to European control) is known as the *Xero Flor* case.[25]

The case relates to grave irregularities in the election of a Constitutional Court judge sitting on a panel that examined the case applicant company's constitutional complaint. The applicant, a leading producer of turf, sought compensation for damage to its turf caused by game from a state-owned forest district. The legal dispute focused on the amount of compensation owed. A relevant Ordinance of the Minister of Environment was responsible for regulating the procedure for the assessment of damage and payment of compensation of crops. After its claims were rejected by the domestic courts, the applicant lodged a constitutional complaint challenging the constitutionality of the ordinance, which was dismissed by a panel composed of five judges. The applicant later complained that one of the judges who had examined its constitutional complaint had not been elected in accordance with domestic law.[26]

The ECtHR decided that a fundamental rule on the law of the election of constitutional tribunal judges had been violated in appointing the judge and that the appointment itself had been made to fill a vacancy that had already been filled.[27]

The court concluded that this was a violation of Article 6 of the ECHR and held that Polish law had been breached in the election of several judges of the CC as the participation of the legislature and the executive was considered to have exercised an unlawful external influence on the CC. The court further held that the CC was no longer a tribunal established by law and reasoned that the applicant company had been deprived of the right to have its case heard by a legally constituted court.

One of the most important lessons from the *Xero Flor* case is that when the composition of a court of law includes judges who were illegitimately appointed, these judges are not entitled to rule on a legal matter, and consequently, a plaintiff who took part in the legal proceeding and who is affected by the court's ruling is granted the protection provided in Article 6 of the ECHR, as the plaintiff did not receive a fair hearing by an impartial and independent tribunal established by law.

The *Xero Flor* ruling has been followed by multiple incidents within the Polish judiciary such as the dissolution of the NCJ before the end of the term, the unprecedented replacement of court presidents, the appointment of the Disciplinary Chamber, and the enactment of the "muzzle law" that prohibits Polish judges from questioning the status of improperly appointed judges and magistrates.

All these events are bringing Poland to the edge of a breakup with the EU. Three possible scenarios have emerged to address Poland's systematic violations of judicial independence: (1) change in Poland's Constitution; (2) change in EU law; or (3) Poland's withdrawal from the EU. The most reasonable would certainly be a change in Poland's Constitution (something that will not happen until there is a sufficient majority in Parliament). The EU is firm in its commitment to human dignity, freedom, democracy, equality, the rule of law, and human rights. This leaves only the third scenario, what many have already coined

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"Polexit" that is, Poland's withdrawal from the EU. This would be difficult considering Poland's heavy reliance on European funds, as it is a country that has always been in reconstruction, and now is even more reliant after the pandemic.[28]

The Case of Russia: A BRICS Country Where Doubts About the Independence of Its Judicial System Remain

Although Russia is not part of the European Union, it is one of the five economies that make up the BRICS countries that are identified as rising economic powers. Many of the BRICS countries, especially Russia and China, are autocratic regimes that are not openly respectful of the rule of law. Consequently, an almost natural connection arises between the rule of law and the BRICS countries.

Thus far, this article has addressed the crisis of the rule of law in Europe and issues regarding judicial independence. When considering a judiciary that is not independent and is subject to government influence, Russia is at the top of the list. Russia should be spotlighted in this context in particular, not only because of its obvious weight in the world economy or the recent invasion of Ukraine (something that accentuates the autocratic and imperialist trait of the country) but because of its connection to Europe, largely due to its geographical location.

Russia, as a member of the CoE, was also a party to the ECHR until 16 March 2022, when it ceased to be a party to the CoE and on 16 September of the same year also to the Convention. This means that the country was subject to the rulings of the Strasbourg Court and its control as to compliance with its policies regarding the rights and freedoms established in the Convention.

Although many of the existing Strasbourg Court cases against Russia concern attacks on freedom of expression, freedom of religion, and even family life, due to multiple cases of harassment, persecution, veto, and, in more extreme cases, imprisonment of journalists, politicians, or judges who do not align with the regime, the CoE identified four main problems that raise substantial doubts as to the independence of the Russian judicial system: issues related to non-enforcement of court

decisions, obstacles to the international system of human rights protection, insufficient judicial independence, and excessive prosecutorial powers. The delay in or absence of implementing decisions by international and national courts is one of the most recurrent injustices occurring in Russia.[29] From 2010 to 2015, the ECHR condemned Russia seventy-two times for the non-enforcement of national courts' judgments, a record-high number equaling almost 20% of all such violations found in the forty-seven CoE member states.

The CoE also noted that Russia had a tendency to pick judgments of the ECtHR depending on their acceptance by political authorities. As an example, the Council highlights the cases concerning actions of security forces in the North Caucasus.[30] Over the last decade, more than 200 judgments of the European Court have found the Russian Federation responsible for serious infringements of the European Convention on Human Rights. Although monetary compensation has generally been awarded to the victims of these violations, Russia has not yet fully implemented these judgments.[31]

Also, a federal law passed in December 2015 allowed the Constitutional Court to decide whether principles declared by an international tribunal can or cannot be applied in Russia. This did not mean that Russia would not implement ECtHR judgments; instead, if Russian judges discovered some inconsistencies between the Russian Constitution and an ECtHR ruling, they would be required to request a

constitutionality review from the Russian Constitutional Court (CC). Later, on 19 April 2016, the Russian CC ruled for the first time that a decision of the ECtHR could not be implemented in Russia because the measures that were necessary to further its implementation would contradict the Russian Constitution.[32]

Russia is not a European state and is no longer part of the Council of Europe. It is necessary that it takes measures to ensure the independence and transparency of its judiciary. This is something that, at this moment, seems difficult to achieve.

Final Thoughts

Recent developments across Europe show that these are challenging times for justice systems and the judiciaries of European countries. The rule of law is at the core of the European Union. It is one of the fundamental values upon which the EU is founded, together with democracy and fundamental rights.[33] It is still uncertain as to the most effective mechanism to address systematic violations of the rule of law. Would a potential reform of the EU treaties so as to "expel" the most frequent offending states be viable? Is the conditionality mechanism really effective, or does it condemn the most-needy states to a lack of development of their civil societies? How can states respond to the "cash for rule of law" mechanism? How can judiciaries stand together to command respect for the role and position of the judiciary? All these questions remain open to discussion.

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Endnotes

1 The powerful Article Two of the Treaty on European Union (TEU) is responsible for reflecting this set of values, making their protection a distinguishing feature that must be common to all member states.

2 Note that the vagueness of the concept of populism is counterbalanced by several authors by distinguishing between its types. Many of them differentiate between left-wing and right-wing populism according to what values are associated with their ideology or ambitions, or from which social group they expect electoral support. Mark Tushnet, "Comparing Right Wing and Left-Wing Populism," in Fruzsina Gárdos-Orosz & Zoltán Szente (eds.), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge, 2021).

3 As of the date of this contribution, the European Commission has brought five infringement proceedings against Poland before the CJEU on account of the organization of the judiciary. The last one was filed on 5 June 2023 (Case C-204/21, *European Commission v. Republic of Poland)*. This is what is called "an action for failure to fulfill obligations," and it allows the European Commission to bring the case before the Court of Justice to determine whether a particular member state has failed to fulfill its obligations under European Union Law. If the court finds that an obligation has not been fulfilled, the state must bring the failure to an end without delay. However, if the member state does not comply with its judgment, the court may impose on it a fixed or periodic financial penalty. With respect to Hungary, there are no actions for failure to fulfill obligations filed by the Commission regarding the independence of Hungarian courts; however, it has filed actions on other grounds of great relevance to the rule of law: for unduly obstructing the possibility of submitting asylum applications to applicants for international protection, for violating the academic freedom of universities that are not aligned with the *Orbán* regime, and for failing to provide adequate protection to individuals with regard to the processing of their personal data.

4 Case C-156/21, *Hungary v. European Parliament, Council of the European Union*, CJEU Judgement of 16 Feb. 2022 & Case C-157/21, *Republic of Poland v. European Parliament, Council of the European Union*, CJEU Judgment of 16 Feb. 2022.

5 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 Dec. 2020 on a general regime of conditionality for the protection of the Union budget. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0001.01.ENG.

6 Court of Justice of the European Union, Press Release No 28/22, *Judgments in Cases C-156/21 Hungary v. Parliament and Council and C-157/21 Poland v. Parliament and Council,* Luxembourg, 16 Feb. 2022.

7 European Commission (2023). *The Rule of Law situation in the European Union*. Brussels, COM (2023) 800 final.

8 European Commission files, *European Rule of Law Mechanism: Methodology for the preparation of the Annual Rule of Law Report*, 2023. https://commission.europa.eu/system/files/2023-07/63_1_52674_rol_methodology_en.pdf.

9 The EU Justice Scoreboard presents an annual overview of indicators on the efficiency, quality, and independence of justice systems. Its purpose is to assist the member states improve the effectiveness of their national justice systems by providing objective, reliable, and comparable data.

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10 In the latest survey conducted earlier this year, 36% of EU citizens rated the justice system in their countries as very or fairly bad. Among them, over three-quarters of respondents referred to the interference or pressure from the government and politicians as the main reason explaining their rating, while under three-quarters said the same about interference or pressure from economic or other specific interests. Six in ten referred to the status and position of judges as the reason explaining the lack of trust in their justice systems. According to the results, the EU countries with the lowest levels of public confidence in the independence of their judicial systems are (in descending order) Croatia, Poland, Bulgaria, Greece, and Spain, followed by Slovakia, Italy, and Romania. In contrast, the EU countries where judicial systems are given the utmost trust are Denmark, Sweden, and Finland, followed by Deutschland, the Netherlands, and Austria. Flash Eurobarometer 519, *Perceived independence of the national justice systems in the EU among the general public*, 2023. https://europa.eu/eurobarometer/surveys/detail/2667.

11 The European Semester is part of the EU's economic governance framework. It usually takes place annually from November until July and during this time, member states must align budgetary and economic policies with the rules agreed upon at EU level. Although it was initially conceived to be an economic exercise, it has evolved into integrating recommendations for social policy reforms at the national level. In the same way, the RRF is a key instrument that was conceived as a temporary recovery instrument designed to mitigate the economic and social impact of COVID-19; however, it has evolved through the years so as to serve as a mechanism to make European societies and economies more sustainable, resilient, and better prepared for the challenges and opportunities of green and digital transitions.

12 The European Network of Councils for the Judiciary (ENCJ) is an organization that aims to unite the national institutions in the member states of the EU that are independent of the executive and legislature, and are responsible for the support of the judiciaries in the independent delivery of justice. The ENCJ releases annual reports, strategy plans, and requests for cooperation to national institutions to promote a further development of judiciaries in Europe.

13 Note that an exhaustive analysis is made on the judicial systems of each EU country; however, with respect to this contribution, the focus is only on Poland and Spain.

14 The lack of renewal of the Spanish General Council of the Judiciary (GCJ) will be illustrated in a practical way through the analysis of the ECtHR most recent case of *Lorenzo Bragado and Others v. Spain. (Application no. 53193/21), ECtHR judgment, 22 June 2023. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-225331%22]}.*

15 An example of this is Case C-487/19 issued by the court on 6 Oct. 2021. It was a request for a preliminary ruling* from the Civil Chamber of the Polish Supreme Court concerning a transfer without consent of a judge of an ordinary Polish Court wherein a president of the Republic had appointed the judge despite a decision by the Supreme Administrative Court ordering that the effects of the resolution of the National Council of the Judiciary recommending the appointment of this judge be suspended pending a preliminary ruling of the CJEU. This ruling has so far not been implemented by Poland. *A preliminary ruling is a procedure where national courts of EU member states raise a question of interpretation to the CJEU that is often new and of general interest for the uniform application of EU law, or where existing case law does not give the necessary guidance to deal with the legal issue.

16 In Spain it is no surprise that the role of the prosecutor general is subject to the control of the executive. Although in the legal statute of the Public Prosecutor's Office it is stated that the prosecutor is a body of great constitutional relevance that has its own legal personality and is integrated into the judiciary with functional autonomy, the reality is that the system for its election is entirely in the hands of the government. In addition, the maintenance of budgetary control of the Public Prosecutor's Office continues to be attributed to the government, as well as its control over disciplinary matters, appointments, or workplace hazard preventions.

17 In Poland, the National Prosecutor's Office has constantly questioned the compatibility of CJEU judgments with the Polish Constitution. In the most recent CJEU judgment of 5 June 2023 (*Loc. Cit.* 3), brought by the EC against Poland in response to the introduction in 2019 of new legislation—dubbed the "muzzle law"—that implemented tough measures against Polish judges that refused to accept the validity of the government's judicial reforms, the Prosecutor's Office alleged the ruling violated a series of principles set in EU treaties and used as a justification of the judgment of the Polish Constitutional Court of 7 Oct. 2021 (see judgment K 3/21), an unprecedented judgment in which Poland questioned the basic principles of EU primacy* and delimited the scope of the UE's jurisdiction by clearly indicating that the Polish system of justice was not subject EU's control but only to national and regional control. *The principle of EU primacy (also referred as "precedence" or "supremacy") is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU member state (national law), EU law will prevail.

18 Due to the length of this contribution it is not possible to analyze its full content, but the secretary general of the Council of Europe has been issuing annual reports on the state of democracy, human rights, and the rule of law since 2021. The last report, issued in 2023, is available for consultation at https://rm.coe.int/secretary-general-report-2023/1680ab2226. Similarly, the European Commission for Democracy through Law – Venice Commission, is also a key advisory body of the Council of Europe when addressing rule of law issues. It first addressed the issue of the rule of law in a 2011 report, where the Commission reached the conclusion that the rule of law was indefinable and decided to concentrate on identifying the core elements of the rule of law (legality, legal certainty, prevention of abuse/misuse of powers, equality before the law and nondiscrimination, and access to justice).

19 *Lorenzo Bragado v. Others* (Application no. 53193/21), ECtHR judgment, 22 June 2023.

20 A prerequisite that all applicants must meet before submitting a case to the ECtHR is to have exhausted all judicial remedies in the country concerned. In the case of Spain, the last instance of constitutional control, and therefore the one to which applicants before appealing to the ECtHR, is the Constitutional Court.

21 Daniel Carmoni Rodríguez., *The (small) wake-up call of the European Court of Human Rights on the (non) renewal of the General Council of the Judiciary*, Manuel Giménez Abad Foundation blog (29 June 2023), https://www.fundacionmgimenezabad.es/es/blog.

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22 op. cit., par. 145.

23 Section 42 of Law no. 2/1979, of the Spanish Constitutional Court, establishes a three-month period to appeal to the Constitutional Court the decisions or acts emanating from the Parliament or any of its bodies that may be susceptible of violating rights and liberties prone to constitutional protection.

24 Susana Sanz Caballero, *The Appointment of Judges in Poland Revisited: The Doctrine of the European Court of Human Rights*, Oral communication at the XX Congress of the Association of Constitutionalist of Spain (ACOES) on the challenges facing the rule of law in the 21st century (2023). Available at https://www.acoes.es/wp-content/uploads/2023/03/Susana-Sanz-Cabellero_The-appointment-of-judges-in-Poland-revisited.pdf.

25 Case of *Xero Flor w Polsce sp. Z o.o. v. Poland* (Application no. 4907/18), ECtHR Judgment of 7 May 2021. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-210065%22]}.

26 During its last session in October 2015, the seventh-term *Sejm* (lower house of Parliament) had adopted resolutions electing five judges to replace those whose term of office was coming to an end (for three of those judges, their term of office came to an end during the seventh term of the *Sejm*). The president of the Republic did not receive an oath from them, and later, in November 2015, the new eight-term *Sejm* adopted resolutions declaring the lack of legal effect of the previous *Sejm*'s election of those five judges. In December, the eighth-term Sejm elected five new judges to the Constitutional Court (one of them was the judge that the applicant complained about) and this time, the president received their oath. Although in a series of subsequent rulings the CC held that this election was invalid, a legislation that included a provision that the judges in issue should be included in adjudicating benches, entered into force in 2017 and the judge was admitted to the bench of the CC. Finally, in October 2017, the CC held that this new legislative provision was compatible with the Constitution.

27 Adam Ploszka., *It Never Rains But it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, Hague Journal on the Rule of Law (4 June 2022). Available at SSRN: https://ssrn.com/abstract=4134662.

28 María Kubica Lubomira & Marcin Mrowicki.,Poland on the edge of breaking away from the EU: three possible scenarios, *The Conversation Journal* (2021): https://theconversation.com/polonia-se-situa-al-borde-de-la-ruptura-con-la-ue-tres-posibles-escenarios-169670.

29 *See* the Case of *Pridatchenko and Others v. Russia* (Applications nos. 2191/03, 3104/03, 16094/03, 24486/03), Judgment of the ECtHR of 21 June 2007. https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-81222&filename=001-81222.pdf.a20

30 See the Cases of *Tangiyev v. Russia* and *Aslakhanova and others v. Russia*.

31 All these data and information have been obtained in a report made by Nils Muižnieks, the current Council of Europe Commissioner for Human Rights on 25 Feb. 2016, and it is available in the Council of Europe portal: https://www.coe.int/fi/web/commissioner/-/as-long-as-the-judicial-system-of-the-russian-federation-does-not-become-more-independent-doubts-about-its-effectiveness-remain.

32 Roudik, P., *Russian Federation: Constitutional Court Allows Country to Ignore ECHR Rulings*. [Web Page] Retrieved from the Library of Congress (2016): https://www.loc.gov/item/global-legal-monitor/2016-05-18/russian-federation-constitutional-court-allows-country-to-ignore-echr-rulings/.

33 European Network of Councils of the Judiciary (ENCJ): https://www.encj.eu/.

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