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In a time when international business is difficult, we look closer to home for U.S., and Texas, relations with Canada and Mexico.

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

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TOM WILSON

Editor-in-Chief
International Newsletter

Editor-In-Chief Message

I thought publishing a newsletter in the midst of a pandemic was hard but then we had the election and attack on the U.S. government to make it just that much more difficult. It may come as no surprise that as the world turned its eyes toward the U.S., we have an edition of the ILS International Newsletter that is more about the U.S. borders and its immediate neighbors, Mexico and Canada. All of our articles are written at a time when there was even more uncertainty in terms of the future actions of the governments of the U.S. Canada and Mexico than there is now. What we see is that there are plenty of international legal matters close to home that are important for lawyers who practice international law to understand.

We also start two new sections of the Newsletter. First, going forward, unless the entire edition is dedicated to the topic (see more on that below), the Newsletter will have a section dedicated to issues of international human rights. The Texas bar was the first U.S. state bar association to create an International Human Rights Committee. As that Committee is going strong despite the pandemic, (see the article on page 20), it is only right that we dedicate a portion of the Newsletter to the topic.

We also start a section on country law summaries which will allow authors to summarize laws of countries outside of the U.S. for the benefit of our readers. We hope that this will also encourage many authors from outside the U.S. to contribute to the Newsletter in the future.

Speaking of the future, June 2021 will mark the 10 year anniversary of the adoption of the United Nations Guiding Principles on Business and Human Rights. To mark that anniversary, our summer edition will be dedicated to the topic of international human rights.

As our world changes, we know our Newsletter has to stay fresh and so we look for ways to continually improve it. If you have thoughts on how we can do so, please let us know.

Finally, I want to thank the full editorial team for their hard work on this edition. This Newsletter would not exist without the skills and effort of Abby Natividad, James Skelton, and Austin Pierce. ■

At the Borders of the Constitution

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President Donald J. Trump's immigration policies as outlined in Executive Order 13767 have drastically impacted landowners along the southern border. These landowners now face the prospect of a mass seizure of their private land for border wall construction. From President Trump's derogatory statements regarding Mexicans to a report calling into question the effectiveness of border walls released by the Department of Homeland Security ("DHS") Office of Inspector General ("OIG"), Trump's immigration policies have consistently trampled over the constitutional rights of U.S. citizens living at the southern border.

When legislation is not discriminatory on its face, racial animus can be established in one of three ways: (1) contemporary statements by members of the decision-making body, (2) departures from the normal procedural sequence, and (3) disparate impact on a particular group. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020).

When speaking about border walls, then-candidate Trump relied on racially-charged language to instill fear in U.S. citizens in order to build political support for border wall construction. Only days after his inauguration, President Trump issued Executive Order 13767 that called for a border wall along the entirety of the southern border with Mexico.

Border wall construction involves more than just attempting to stop illegal immigration. It involves a mass seizure of land, waiver of countless federal and state laws at the border, and severe damage to the environment and cultural history of U.S. citizens living on the southern border.

In South Texas, border walls are especially damaging as the cities and towns along the border will lose access to the only river they have, the Rio Grande. Additionally, many of the communities along the Rio Grande are hundreds of years old and are built up right along the river, with many historic buildings and cultural sites located along the path of the proposed border wall. In Mission, Texas, the border wall threatens La Lomita Chapel, an important and historic Catholic shrine listed in the National Register of Historic Places. In San Ygnacio, Texas, the small town's historic district has at least 115 sites and buildings designated as contributing historic sites, including the Treviño-Uribe Rancho, San Ygnacio's oldest structure and a National Historic Landmark — the same historic status as

the Golden Gate Bridge, the Statue of Liberty, the Alamo, and Mount Rushmore.

In Laredo, Texas, the border wall would result in the destruction of numerous homes and parks located along the river. The wall would even take land from the local community college. In addition to the environmental, recreational, and cultural harms of a border wall located along the Rio Grande, the wall could also affect drainage and cause flooding on both the American and Mexican sides of the river.

This paper outlines why Executive Order 13767 violates the Equal Protection Clause of the Fifth Amendment and shows how DHS and the U.S. Customs and Border Protection agency ("CBP") departed from the normal procedural sequence when seeking to meet the policy directives of Executive Order 13767. This paper concludes with a discussion on what president-elect Joseph Biden should do within his first 100 days in office.

As President Trump said in a different context, "[t]he cure cannot be worse than the problem itself. Can't. The cure cannot be worse." Eviscerating the U.S. Constitution at the southern border in order to attempt to stem illegal immigration is a cure that is far worse than the problem.

Contemporary Statements by Trump and the CBP Commissioner

When Trump infamously announced his candidacy for the presidency of the United States, the world witnessed the beginning of an assault on immigrants from Latin America resulting in a policy to construct a border wall along the entirety of the southern border. Then-candidate Trump said: "When Mexico sends its people, they're not sending their best. They are sending people that have lots of problems, and they're bringing those problems with [sic] us. They're bringing drugs. They're bringing crime. They're rapists."

Further, in June of 2016, then-candidate Trump questioned whether U.S. Federal District Court Judge Gonzalo Curiel — born in Indiana — could be impartial in a case where Trump was a litigant. Then-candidate Trump said: "We are building a wall. He's a Mexican." When asked to clarify, Trump doubled downed:

> TAPPER: You're invoking his race, talking about whether or not he can do his job.
>
> TRUMP: Jake, I'm building a wall. OK? I'm building a wall. I'm trying to keep business out of Mexico. Mexico's fine.
>
> TAPPER: But he's an American.
>
> TRUMP: He's of Mexican heritage and he's very proud of it, as I am where I come from, my parents.
>
> TAPPER: But he's an American. You keep talking about it's a conflict of interest because of Mexico.

Trump repeatedly demonized immigrants to justify border wall construction:

- On or about July 6, 2015, President Trump tweeted and subsequently deleted: "@RobHeilbron: @realDonaldTrump #JebBush has to like the Mexican Illegals because of his wife."
- On or about October 19, 2016, then-candidate Trump said: "We have some bad hombres here and we're gonna get them out."
- On or about June 24, 2018, President Trump tweeted: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order. Most children come without parents..."
- On or about March 13, 2019, President Trump said: "The massive, surging flow of illegal immigration, trafficking, drugs, and crime threaten the safety and security of all Americans."
- On or about August 19, 2019, President Trump tweeted: "Democrats want Open Borders and Crime. So dangerous for our Country. But we are building a big, beautiful, NEW Wall!"
- On or about December 6, 2019, President Trump tweeted: "Without the horror show that is the Radical Left, Do Nothing Democrats, the Stock Market and Economy would be even better, if that is possible, and the Border would be closed to the evil of Drugs, Gangs and all other problems! #2020"
- On or about December 30, 2019, President Trump said: "We believe our country should be a sanctuary for law abiding Americans, not for criminal aliens. The open borders agenda of the radical left causes profound harm to poor working-class Americans, their extreme policies overcrowd schools and hospitals, they drain vital public resources, deplete health care dollars, and place enormous burdens on taxpayers of every background."
- On or about June 25, 2019, CBP's Commissioner Mark Morgan echoed President Trump when he stated: "I've been to the detention facilities where I've walked up to these individuals that are, so called, minors, 17 or under, and I've looked at them

> and I've looked at their eyes, Tucker, and I said, that is a soon to be MS-13 gang member, it's unequivocal."

President Trump and Commissioner Morgan's statements reveal discriminatory motives against Latin Americans to justify border wall construction along the southern border.

Departure from Normal Procedural Sequences

President Trump issued Executive Order 13767, which states that the executive branch's policy is to:

> secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism . . .

The Executive Order further called for CBP to conduct a study within 180 days that included "a strategy to obtain and maintain complete operational control of the southern border."

On July 14, 2020, the United States Department of Homeland Security's Office of Inspector General ("DHS-OIG") issued a report ("OIG Report") questioning DHS and CBP's decision making process regarding where to build border walls. In the report, the DHS-OIG made the following findings:

- Specifically, CBP did not conduct an Analysis of Alternatives ("AoA") to assess and select the most effective, appropriate, and affordable solutions to obtain operational control of the southern border as directed, but instead relied on prior outdated border solutions to identify material alternatives for meeting its mission requirements.
- CBP did not use a sound, well-documented methodology to identify and prioritize investments in areas along the border that would best benefit from physical barriers.
- The Department also did not complete the required plan to execute the strategy to obtain and maintain control of the southern border, as required by its Comprehensive Southern Border Security Study and Strategy. Without an Analysis of Alternatives, a documented and reliable prioritization process, or a plan, the likelihood that CBP will be able to obtain and maintain complete operational control of the southern border with mission effective, appropriate, and affordable solutions is diminished.

The OIG Report revealed that CBP had failed to identify solutions for securing the southern border by reviewing alternatives to border walls. In its 2018 appropriations bill, Congress directed DHS to provide a risk-based plan ("2018 Risk Plan") within 180 days after the enactment of the bill into law. The risk-based plan called for the following:

- An identification of the planned locations, quantities, and types of resources, such as fencing, other physical barriers, or other tactical infrastructure and technology, under the plan; and
- A description of the methodology and analyses used to select specific resources for deployment to particular locations under the plan that includes—
  - (A) analyses of alternatives, including comparative costs and benefits;
  - (B) an assessment of effects on communities and property owners near areas of infrastructure deployment; and
  - (C) a description of other factors critical to the decision-making process.

On or about July 16, 2019, the U.S. Government Accountability Office ("GAO") issued an audit of DHS's 2018 Risk Plan, which contained the following findings:

- The [2018 Risk Plan] provides CBP's definition of an alternatives analysis, but otherwise provides only limited information on alternatives analyses it is conducting (or has conducted).
- Moreover, the plan does not include an assessment of the effects of infrastructure deployment on communities and property owners.
- The plan states that CBP has consulted with federal stakeholders concerning the environmental impacts of border barriers but provides no details on the results of those consultations. Finally, the plan does not include information on how it was reviewed and approved and does not include certification or confirmation that all activities conducted under the plan comply with federal acquisition rules, requirements, guidelines, and practices.

In its own report, the U.S. House of Representatives ("House") condemned DHS for its failure to comply with congressional mandates relating to Border Security Improvement Plans: "[w]ithout the comprehensive analysis Congress has required in law for the past four fiscal years, Congress lacks essential information for determining how best to invest scarce taxpayer dollars." The House

Report added: "[t]here are also significant concerns about the negative impacts of physical barriers on border communities and border area ecology."

The OIG Report, GAO Report, and House Report provide evidence that DHS and CBP ignored the will of Congress and departed from normal procedural sequences by failing to conduct thorough analyses required by law before constructing border walls. DHS and CBP, marching in lockstep with President Trump, failed to conduct the required studies in order to expedite border wall construction and keep Trump's campaign promise to build "a big, beautiful, NEW Wall!"

Disparate Impacts

In Arizona, CBP is using dynamite to destroy mountainsides and desert landscapes in order to build the border wall. The contractors have added lights that allow crews to work round the clock in order to meet President Trump's promise of 450 miles of border wall before the end of the year.

In July 2020, Zapata County, Texas, along with several landowners, filed suit against President Trump challenging the constitutionality of Executive Order 13767 and the use of the REAL ID Act to waive various laws that include the National Environmental Policy Act and the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act). The purpose of the litigation is to protect San Ygnacio from losing its cultural heritage like the communities in Arizona. Border wall construction can have a devastating impact on the environment and identity of places along the southern border. The U.S. Department of the Interior stated that construction, maintenance of border walls, and Border Patrol activities would likely harm threatened and endangered species for years to come.

The Biden Promise

During his campaign, president-elect Joseph Biden promised that "there will not be another foot of wall constructed on [his] administration." Once he takes office, president-elect Biden should issue an executive order that rescinds Executive Order 13767 and places a hold on further border wall pre-construction activities, including a halt on the use of eminent domain to obtain temporary easements on private property and the use of eminent domain to seize fee title. All other construction activities should also cease.

> "There will not be another foot of wall constructed on my administration."

This stop in border wall construction will provide president-elect Biden with the opportunity to visit with the communities along the southern border and learn about the constitutional problems posed by Executive Order 13767. Biden should require that Alejandro Mayorkas, the incoming secretary of DHS, order CBP to complete the studies outlined in the OIG Report, GAO Report, and House Report in order to develop a plan that secures the southern border while also respecting the rights of U.S. citizens living along the southern border.

●●●

Carlos Evaristo Flores is an attorney, community activist, and educator born in Laredo, Texas, who has spent the last twenty-five years advocating for working-class families, border residents and students. Mr. Flores is best known for his work in Laredo to stop border wall construction, and currently serves as lead counsel in Zapata v. Trump, *a lawsuit challenging the constitutionality of President Trump's Executive Order 13767 on equal protection grounds. Mr. Flores is also currently an adjunct faculty member at Texas A&M International University. He is a graduate of the University of Texas School of Law.*

Jose "Chito" Vela III is originally from Laredo, Texas. He graduated from the University of Texas at Austin with a bachelor's in history, a master's in public affairs, and a law degree. Following law school, Mr. Chito worked in the Open Records Division of the Texas Attorney General's Office. In 2007, he became General Counsel to Texas State Rep. Solomon Ortiz, Jr. In 2011, he started his own law practice before joining forces with Jennifer Walker Gates in 2013 to form Walker Gates Vela. Mr. Chito focuses on criminal defense and immigration, particularly the relationship between the two.

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■

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Current Mexican Energy Policy and Developments

BY LARRY B. PASCAL AND NATALIA COSIO ONDIVIELA[1]
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Earlier this year, the Lopez Obrador administration released a new energy policy that in part modifies some of the principles of the 2013 energy reform. The underlying objective of this new energy policy is to prioritize the role of the national energy companies – the Federal Electric Commission ("CFE") and Petroleos Mexicanos ("PEMEX"), a policy that is consistent with his campaign promises.

Power

In April 2020, the Mexican national grid operator, the National Center for Energy Control ("CENACE"), issued an order suspending all pre-commissioning tests of intermittent wind and solar power plants, one of the final requirements before grid interconnection. Subsequently, in May 2020, the Ministry of Energy ("SENER") updated and consolidated this idea and released its "Policy on Reliability, Safety, Continuity, and Quality for the National Electric System" ("SENER Policy on Reliability") which, among other things, granted the Mexican Energy Regulatory Commission ("CRE") the authority to require from generation permit applicants a new interconnection feasibility opinion, to be issued by CENACE, thereby placing an additional obligation on power developers.

The current administration has also decided to favor CFE by prioritizing power generation in CFE hydroelectric power plants over other forms of power and other actors.[1] The current National Power Plan proposes increasing the generation capacity of the CFE plants, with a focus on the country's hydroelectric potential to increase the hydroelectric generation capacity by 26%, equivalent to 3,300 megawatts.[2]

In addition, the Lopez Obrador administration is also considering developing new sources of power generation. To this effect, the Secretary of Energy, Rocio Nahle, appeared before the Senate in October 2020, in which she announced that CFE will confirm and ratify the feasibility of constructing and installing new nuclear reactors with an approximate capacity of 1,400 megawatts in Baja California.[3] Furthermore, President López Obrador has indicated that he will continue to support Pemex and CFE even if this requires the development of coal resources (as opposed to renewable resources).[4] These regulatory developments may discourage investment in future renewable energy projects.

Overall, the new power policy has generated criticism and legal challenges. In 2019, the government began a series of renegotiations with five natural gas

pipeline companies that supply gas to CFE based on allegations that the contracts were poorly negotiated by the previous administration, forcing the CFE to pay extremely high rates. These out of court negotiations were finalized through private settlement agreements reached later that year and established fixed rates for 25 years and extended the contracts for an additional 10 years. President López Obrador said these negotiations saved the government 4.5 billion pesos (equivalent to approximately US$219 million).[5] However, the financial results report of the 2019 public account released by the Federal Superior Auditor of the country (*Auditoría Superior de la Federación*) commented that under the renegotiated gas supply agreements CFE will pay an additional Mex$6.836 billion (equivalent to approximately US$314 million) by the end of these contract terms.[6]

Furthermore, several environmental groups and private companies have challenged the SENER Policy on Reliability in numerous court actions. In October 2020, a federal judge ruled that this policy is unconstitutional.[7] The ruling has general effects, thereby applying to the entire country and not merely the parties who challenged it and is subject to appeal. Furthermore, the Mexican Supreme Court indefinitely suspended the SENER Policy on Reliability because of a constitutional challenge filed by the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*), in which the Mexican Competition Commission asserted that the Policy violated the fundamental principles of competition and open market contemplated in Article 28 of the Mexican Constitution. To date, the Mexican Supreme Court has not set a date to review the matter.

Also, in late October 2020, a bipartisan group of 43 U.S. lawmakers expressed their concerns to President Trump about Mexico's actions that could be undermining the spirit of the newly signed United States–Mexico–Canada Agreement ("USMCA"), threatening U.S. energy companies' investment and market access by giving preferential treatment to the state-owned energy companies. Finally, the Minister of Foreign Affairs of Spain traveled to Mexico in November 2020 to meet with several officials of the current administration to address concerns raised by Spanish companies due to the new energy policy.

> "Forty-three U.S. lawmakers expressed concerns about Mexico's actions."

Oil and Gas

As to the oil and gas sector, the current administration has also requested that the CRE, the National Hydrocarbons Commission ("CNH"), and CENACE adopt policies to favor PEMEX and CFE. To this effect, oil and gas bidding rounds have been cancelled since the beginning of the administration. During Rocio Nahle's Senate testimony in October, she said that the administration was not planning on holding new bidding rounds for exploration and production until the current 102 contracts show positive results. However, in that same Senate testimony, Secretary of Energy Nahle also stated that SENER will support farmouts if PEMEX is prepared for them.

In October 2020, the CNH Commissioners approved several amendments to the guidelines applicable to the bidding process for exploration and production farmouts with PEMEX, seeking to give PEMEX more voice in the selection process of its partners.[8] This will give PEMEX a greater role in future farmouts by allowing it to opine in the prequalification and selection processes, and in particular the Q&A process related to the terms of the bid with interested parties.[9] These amendments are expected to be published in the Mexican Federal Registry by the end of this year or early next year.

The administration has made increasing oil and gas production by PEMEX an important priority, given the long-term decline of the Cantarell Field, historically Mexico's most important field, discovered in 1976.[10] In October 2020, CNH also reported that national crude oil production reached 1.627 million barrels per day, of which PEMEX produced 97%. Overall for this period, the Mexican Association of Hydrocarbons (AMEXHI) reported in February 2020, that 22 private companies produced oil and gas in Mexico, contributing 112,946 barrels per day to the national production.

Per the same source, Mexican natural gas production reached 4,917 MMcf/d, which represents a 0.25% decrease in comparison to the same month in 2019. Increasing natural gas production is a pressing national concern because consumption of natural gas has increased 32% in the last 12 years,[11] and in August 2020, Mexico's energy dependence on the United States reached an all-time high, when Mexican imports of US natural gas reached 185,295 bcf/d, in accordance with the data reported by the U.S. Energy Information Administration.

With respect to oil and gas discoveries, during the 2015 – 2019

period,[12] CNH reported 41 new discoveries made through 112 exploratory wells drilled onshore, in shallow waters, and in deep water.[13] Of these discoveries, 37 were found in PEMEX allotments[14] and four in contracts granted to private operators.

Also, several discoveries were announced in 2020. ENI (Italy) announced a new shallow water oil discovery in Block 10 of the Saasken Exploration Prospect in the Salina basin. According to preliminary estimates, the new discovery may contain between 200 and 300 million barrels of oil.[15] In May 2020, Repsol (Spain), in association with PC Carigali Mexico Operations, Wintershall DEA, and PTTEP México E&P, announced two deep water discoveries. To achieve these results, Repsol invested in Mexico approximately US$765 million and announced the creation of more than 1,800 direct and indirect jobs.[16]

During the 3rd trimester of 2020, CNH ratified nine discoveries for approximately 324 million barrels per day. Six of the discoveries were made by PEMEX, two of them located in shallow waters and four onshore, and the other three discoveries were made by private operators. Shell Exploración y Extracción de México, S.A. de C.V., in association with Chevron Energía de México, S. de R.L. de C.V., made one oil and gas deep water discovery with an estimated production of 60 million barrels, and Newpek Exploración y Extracción, S.A. de C.V., reported two discoveries onshore, with an estimated 9.072 bcf.[17]

Mexico also has excellent (albeit untapped) potential for developing its unconventional hydrocarbon resources. A study published in September of 2015 by the U.S. Energy Information Administration ("EIA") estimated that Mexico has technically recoverable shale reserves of 545 Tcf of natural gas and 13.1 billion barrels of oil and condensate. In fact, the five-year Exploration and Production Plan issued by SENER in 2015, included 187 blocks equivalent to a 53,969 km^2 surface to be assigned through bidding processes. However, the new administration, in addition to stopping new bidding rounds, has banned fracking.

New projects have been recently announced in the natural gas supply sector. Sempra Energy[18] announced in November 2020 that its subsidiary ECA Liquefaction, a joint venture between Sempra LNG and Infraestructura Energética Nova, S.A.B. de C.V. (IEnova), has announced a new project valued at approximately $2 billion for the development, construction, and operation of a phase 1 natural gas liquefaction-export project sited in Baja California (*Energía Costa Azul*). Exports are expected to begin in 2024.[19] This project would represent the first LNG export project on the Pacific coast of North America and would target Asian markets.

Also, in October 2020, the administration announced a new natural gas pipeline crossing the Mexican isthmus.[20] This pipeline, to be carried out under a public-private partnership, will be part of the current transcontinental natural gas Jáltipan-Salina Cruz pipeline that runs from the State of Veracruz to Salina Cruz, Oaxaca. The pipeline is owned by the National Control Center for Natural Gas (CENAGAS). The objective of the project is to supply the industrial and domestic demand in the Mexican Isthmus Interoceanic Corridor (*Corredor Interoceánico del Istmo de Tehuantepec*).[21] The project has an estimated cost of 9 billion pesos (equivalent to approximately US$439 million) and will be financed primarily by CFE. Construction is expected to begin in 2021.[22]

As part of his energy self-sufficiency campaign platform objective, President López Obrador has called for the increase and improvement of the country's refining capacity.[23] To this effect, President Andrés Manuel López Obrador has stated that he wants the country to achieve gasoline and diesel refining self-sufficiency by 2023[24] and thereby eliminate the need to import these refined products (primarily from the U.S.), through the rehabilitation of the six existing refineries and the construction of a new one, the Dos Bocas Refinery located in the State of Tabasco.[25] The Dos Bocas Refinery project contemplates a refining capacity of up to 340,000 more barrels of oil per day.[26] As of September 2020, Mexico has invested approximately 16,561 million pesos (equivalent to approximately US$807 million) on the Dos Bocas refinery project and the project has created 34,042 direct and indirect jobs.[27]

The CRE has also issued additional regulatory changes to address President Andrés Manuel López Obrador's energy policy. In November 2020, the CRE published two amendments in the Mexican Federal Registry to establish that any modification, assignment, extension or any other authorization related to midstream, downstream, and power permits must be directly approved by the CRE Commissioners through their Government Board meetings.[28] Due to the current pandemic, these meetings have been less frequent, and more delays could occur.

Also, the president's party (Morena) has proposed a constitutional amendment[29] to repeal the 2013 energy reform, which is pending legislative debate. To this effect, President López Obrador said in his morning conference in October that he will prepare a bill to amend the Constitution to reaffirm the dominant role of the national energy companies in the energy sector. Lastly, the CRE 2020 regulatory program envisions additional changes to the power and oil and gas sector, respectively, which will give market actors an opportunity to comment on the proposed changes.

On the other hand, this administration successfully negotiated the new United States-Mexico-Canada Agreement (USMCA), which agreement was ratified in June 2019. Although, the agreement does not include a

fully developed energy chapter, other provisions in the treaty support the energy sector. Examples include duty-free treatment for hydrocarbons and refined products, more specific technical provisions that support duty-free trade, investor-state dispute resolution mechanism for the energy sector, and improved access to procurement contracts offered by Pemex and CFE.

Lastly, on December 11, 2020, the CFE issued a press release on their website announcing a 2021-2025 Business Plan (the "Plan").[30] With the intention to contribute in the fulfilment of Mexico's international obligations to reduce greenhouse gas emissions, the Plan seeks to diversify and modernize the generation of power through sustainable technologies. The press release mentions an expansion of CFE's generation capacity to 4,550 MW investing in combined cycle plants, carrying out strategic cogeneration projects with companies engaged in industrial activities, and the possibility of developing renewable energy projects with an estimated capacity of 500 MW, and an approximate investment of 12,180 million pesos.

Conclusion

President López Obrador campaigned on and is implementing a policy whereby the Mexican national energy companies play a more important role in the economy, which is in part premised on national self-sufficiency and which policy has placed more emphasis on carbon-based non-renewable energy sources.[31] As to upstream policy, the president has struck a balance in so much as it has not held new bid rounds, but has not carried out a wholesale policy of attempting to terminate the existing contracts with private sector actors. On refining, López Obrador is attempting to address a weak spot in the country's sector through the construction of the new Dos Bocas refinery and the rehabilitation of the six existing refineries in the country, although obstacles remain. LNG appears to be another bright spot with the Sempra announcement, the cross-border sale of natural gas continues to be strong, and new natural gas pipeline projects continue to be announced (e.g., the transcontinental pipeline). In short, Mexico's energy sector will continue to be a mix between state-owned actors and the private sector (as are many of its large Latin American peer countries) as Mexico works through these difficult global times.

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■

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1 Mexico has 86 hydroelectric plants with a capacity of 12,126 million kW in 2019, which represented as of such date 17% of the country's total installed capacity. As of 2019, the country had an estimated 27,000 MW of economically feasible hydropower potential. *See* International Hydropower Association, *Mexico Profile* (2019), https://www.hydropower.org/country-profiles/mexico.

2 See undated *CFE National Energy Plan*, https://www.cfe.mx/acercacfe/Quienes%20somos/Pages/plan-nacional-energia.aspx. Interestingly, the plan has since been removed from the CFE website, which might be an indication that CFE intends to update the plan.

3 Mexico has two nuclear reactors operated by the CFE - Laguna Verde power plant, located in the State of Veracruz, that began commercial operation in 1990 and unit 2 in 1995. The power plant includes two boiling water reactors with a combined generation capacity of 1,552 megawatts, accounting for 3% of Mexico's total electricity generation in 2019. U.S. Energy Information Administration (November 30, 2020). Mexico. Retrieved from: https://www.eia.gov/international/analysis/country/MEX.

4 In July 2020, the CFE said it would seek to purchase two metric tons of coal over the next 18 months from 60 producers in Coahuila, Mexico through direct adjudication processes. Arturo Solis, *CFE gastará 2,000 millones de pesos en carbón para generar electricidad*, Forbes Mexico (July 14, 2020), https://www.forbes.com.mx/negocios-cfe-carbon-electricidad/.

5 Leticia Hernández, *Gobierno de AMLO alcanza acuerdo con constructoras de gasoductos; dice que ahorrará 4,500 mdd*, El Financiero México (August 28, 2019), https://www.elfinanciero.com.mx/.

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7 Forbes staff, *Juez ampara a empresas de electricidad contra política de Sener*, Forbes Mexico (November 4, 2020), https://www.forbes.com.mx/negocios-juez-amparo-empresas-electricidad-politica-sener.

8 See amendments approved by the CNH Board of Commissioners on their 50th extraordinary meeting held on October 15, 2020.

9 This change is an enhancement of prior practice as to PEMEX's role in this process.

10 Currently, Mexico's most relevant proven reserves are found in the Ayatsil Field with an estimated 1.148 billion barrels crude oil equivalent, Maloob with 887 million barrels crude oil equivalent, and Akal that holds an estimated 513 million barrels crude oil equivalent. *See* Comisión Nacional de Hidrocarburos, *Reservas de Hidrocarburos y Recursos Prospectivos* (January 1, 2020), https://hidrocarburos.gob.mx/media/3652/reporte_reservas_recursos2020.pdf

11 Comisión Nacional de Hidrocarburos, *Prospectiva de la Producción Nacional de Gas Natural* (2019), https://www.gob.mx/.

12 President López Obrador assumed office in December 2018.

13 Comisión Nacional de Información de Hidrocarburos, *Descubrimientos en la industria petrolera en México en el periodo 2015-2019* (April 28, 2020), https://hidrocarburos.gob.mx/media/3426/descubrimientos-en-la-industria-petrolera-en-m%C3%A9xico-en-el-periodo-2015-2019.pdf.

14 Under the Mexican energy reforms, PEMEX was granted blocks in which it has exclusive operational control, and which were not subject to private investment participation. These blocks are called *asignaciones* (allotments). PEMEX was granted over time and currently holds 399 allotments. In contrast, under the reforms, 73 private operators hold 111 blocks.

15 *Our work in Mexico*, ENI (2020), https://www.eni.com/en-IT/global-presence/americas/mexico.html.

16 *Repsol realiza dos importantes descubrimientos de petróleo en México*, Repsol (May 4, 2020), https://www.repsol.com.mx/es/sala-prensa/notas-prensa/2020/repsol-realiza-dos-importantes-descubrimientos-de-petroleo-en-mexico.cshtml.

17 These discoveries were ratified by the CNH Board of Commissioners on their 21st extraordinary meeting held in May 14, 2020.

18 In December 2020, IEnova announced that Sempra Energy made a tender offer for the entirety of common shares of IEnova held by private investors, which represent 29.83% of the total amount of IEnova's common shares. The transaction is valued at $6.13 billion. See article found in Inter-American Dialogue Latin American Energy Advisor (December 4, 2020) entitled "Sempra Energy to Buy Remaining Stake in Mexico's Ienova" at 4, *Latin*

American Energy Advisor.

19 *Sempra Energy Announces FID for Landmark Energía Costa Azul LNG Export Project*, Sempra Energy (November 17, 2020), https://www.sempra.com/sempra-energy-announces-fid-landmark-energia-costa-azul-lng-export-project.

20 Located between the States of Veracruz, Oaxaca, Chiapas and Tabasco. It is the shortest distance between the Gulf of Mexico and the Pacific Ocean.

21 The Mexican Isthmus Interoceanic Corridor is a regional project that seeks to take advantage of the position of the isthmus to compete in the world markets for the transportation of goods, through the combined use of various means of transport, such as railway, shipping and highways. The new Regional Program issued based of the National Development Plan was released on August 2020. *See* https://www.gob.mx/ciit.

22 This information was announced by President Andrés Manuel López Obrador on November 30, 2020 during his morning conference.

23 SENER has announced an ambitious goal of refining 1.2 million barrels per day by the end of 2020, a milestone that is unlikely to be timely achieved. In October 2020, according to the gasoline importation volumes reported by SENER's Energy Information System (*Sistema de Información Energética*), 484,720 barrels of gasoline and 187,997 barrels of diesel were imported into the country by PEMEX and private companies. Specifically, 126,406 barrels of gasoline and 93,806 barrels of diesel were imported by private companies.

24 PEMEX processed and average of 592,000 barrels of crude per day during 2019 at its six refineries.

25 Current Mexican refineries are not fully designed to handle Mexico's heavy oil production, which requires Mexico to export some of its crude production to the U.S. for refining and re-import back to Mexico of the refined product.

26 The Dos Bocas refinery will be operated by PEMEX. It is proposed to include 17 processing units. The engineering and construction work for the refinery is divided into six packages. The contractors for five work packages including packages 1-4 and package-8 with a combined value of US$7.5 billion, were selected in July 2019. *The Dos Bocas Refinery Project*, NS Energy, https://www.nsenergybusiness.com/ projects/dos-bocas-refinery-project/.

27 *Trabajos en la Refinería Dos Bocas han generado 34 mil 42 nuevos empleos*, Enercía Hoy (June 22, 2020), https://energiahoy.com/2020/06/06/trabajos-en-la-refineria-dos-bocas-han-generado-34-mil-42-nuevos-empleos/.

28 Before these amendments were adopted, these matters were analyzed and approved by the corresponding Chief of Unit to expedite the process.

29 Per Article 135 of the Mexican Constitution, any Constitutional amendment requires approval of at least 2/3 of the members of each house of Congress and a simple majority of the State legislatures.

30 CFE, *Plan De Negocios de CFE Contribuye al Cumplimiento de Compromisos del Estado Mexicano en Disminución de Emisiones* (December 11, 2020), prensa., https://app.cfe.mx/Aplicaciones/OTROS/Boletines/boletin?i=2059.

31 Mexico is a signatory to the Paris Climate Accord, and the president has not indicated any intention to withdraw the country from such accord.

The Midland-to-Guadalajara Pipeline: How the New North American Legal Framework Will Build a Better Continent Post-Pandemic

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Introduction

On October 2, 2020, natural gas from the Permian Basin began fueling Guadalajara's industrial sector through a completed pipeline called the Villa de Reyes-Aguascalientes-Guadalajara ("VAG").[1] Mexico's state-owned electricity company, CFE, announced the opening of VAG's operations six months into a global pandemic that tanked the global oil sector and sharply reduced energy consumption. A few months earlier, just days after the pandemic began shutting down North America, the United States-Mexico-Canada Agreement ("USMCA") replaced the North American Free Trade Agreement ("NAFTA"). This resulted in a collective sigh of relief among industry leaders shaken by Trump's trade wars and threats to terminate USMCA's predecessor NAFTA altogether.

The announcements regarding the VAG and USMCA during this chaotic era demonstrate the enduring importance of energy and cross-border commerce, even in the face of crisis. These events also highlight the various legal challenges and opportunities that await North America as the continent balances the need for sufficient energy supply and energy independence with a growing commitment to clean, renewable energy.

As severely as the 2020 global crisis has impacted North America, many recent legal developments, particularly in the energy sector, have the potential to build a better, cleaner, and more equitable North America once the dust settles. This article provides a general overview of the major legal moving parts that will define North America in the coming years, including: (1) Mexico's 2012 General Law on Climate Change; (2) Mexico's 2013 Energy Reform opening the sector to private investment for the first time in decades; (3) President-Elect Joe Biden's commitment to continue America's energy independence while also promoting renewable energy; and (4) a new North American trade deal that affirms national sovereignty while providing important mechanisms aimed at both keeping production within North America and improving labor conditions. Both lawyers and politicians have a unique opportunity to use this new framework to build a more equitable continent that benefits business, labor, and the environment.

NAFTA 2.0

After months of uncertainty and negotiation, the USMCA went into effect and replaced the 25-year-old NAFTA. The USMCA leaves the bulk of NAFTA unchanged, but there are some significant differences in the areas of automobile manufacturing, intellectual property, labor, and investor-state dispute resolution ("ISDR"), the latter of which will affect energy-related investor disputes in the coming years.

One of the USMCA's biggest changes affects the North American automotive sector. The USMCA will require that 75% of a vehicle's content be produced within North America, an increase from 60% to 62% under NAFTA.[2] It also mandates that 70% of vehicles' aluminum or steel come from the three countries and that 40% to 45% of auto content be made by workers who earned at least US$16 an hour—both provisions that were not included in the original NAFTA.[3]

The USMCA will also have a significant impact on Mexico's labor conditions. The deal requires that its member countries not only enforce their own labor laws but also adhere to international standards. In anticipation of the deal, Mexico passed labor reforms on May 1, 2019, giving workers more rights and unions more power to organize. While these changes could be a long-term success for Mexico's labor movements, corruption and difficulties in ensuring compliance make the short-term impact uncertain. Still, workers have already begun asserting their new rights, most notably in January of 2020 when Home Depot workers in Mexico cited the new labor laws while striking to demand better conditions, salary, and benefits.[4]

The new labor laws provide an important enforcement mechanism available to U.S. labor and manufacturing groups.[5] The so-called "rapid response" mechanism may be most utilized by companies and labor organizations in the United States if certain Mexican enterprises are not meeting the collective bargaining and other requirements, particularly in "priority sectors" like mining and manufacturing. Although no "rapid response" actions have yet been brought under the USMCA,[6] this could certainly change as manufacturing begins increasing as the global economy recovers.

Although the new country-of-origin requirements do not directly address the energy sector *per se*, they will undoubtedly impact energy by readjusting global supply chains towards a more regional focus. When considered with growing legal and political commitments to pursue renewable energy, the new origin requirements could also impact the development of electric vehicles. Tesla's CEO, Elon Musk, recently discussed the prospect of a new plant in Mexico with Guanajuato's governor.[7] Although the company ultimately decided to scrap this plan in favor of a new Austin facility, a combination of future demand, low overhead, and government incentives could make Mexico an enticing hotspot for future projects.

Finally, the USMCA significantly limits ISDR. The ISDR provisions in Chapter 11 of NAFTA have always been controversial, particularly in Mexico where there was a fear that U.S. multinational corporations would use private arbitration proceedings to undermine the ability of Mexico's government to regulate the environment and public safety. Because NAFTA allowed for ISDR proceedings even when a regulation was "tantamount to expropriation," a U.S. company could, for example, sue a Mexican government for attempting to regulate the company's dumping of pollutants into a water supply. Interestingly, David Gantz of Rice University's Baker Institute noted at a recent USMCA panel that the largest number of ISDR actions under NAFTA were actually brought against Canada.[8]

The USMCA completely eliminates the ISDR procedure against Canada within three years and limits it in Mexico to foreign investments in industries like hydrocarbons and utilities. These investor protections could encourage U.S. energy companies to continue investing in Mexico (which accelerated after Mexico's 2013 energy reform), with at least some assurance that their investments would not be jeopardized by President Andres Manuel López Obrador's ("AMLO") unpredictable anti-market policies (discussed in the next section).

Another important change in the USMCA is a new local litigation requirement as a prerequisite for bringing an ISDR claim. For instance, if an energy company in the United States wished to bring a claim against the Mexican government for jeopardizing a drilling venture or pipeline, it must first bring a lawsuit in a Mexican court. Once this requirement is fulfilled or 30 months have elapsed, USMCA limits the substantive claims that may be brought against the state. One notable limitation (a change from NAFTA) is that only claims for direct expropriation are allowed. Because NAFTA did not clearly define expropriation claims subject to ISDR, arbitration tribunals allowed indirect expropriation claims to proceed. The "tantamount to expropriation" wording in Chapter 11 of NAFTA meant claims similar to a regulatory taking in the United States. The USMCA precludes indirect expropriation claims, and specifically defines what does not constitute indirect expropriation, e.g., non-discriminatory regulatory actions that protect legitimate public welfare objectives, such as health, safety, and the environment.[9]

When President-elect Joe Biden takes office in 2021, he inherits a revamped North American trade deal that contains important new labor and manufacturing provisions. Although it will take some time for industries and their attorneys to sort through these changes, the changes may be good for

North America in the long run. Scholars like Dr. Tony Payan of the Rice University Baker Institute believe that a combination of U.S. tensions with China and the new North American regional requirements will result in significant "reshoring" of manufacturing from Asia to North America.[10] If Dr. Payan is correct, North America and its workers can expect many new economic opportunities in the years ahead.

AMLO's Energy Problem

In 2012, Mexico became one of the first nations on earth to enact comprehensive climate change legislation to reduce emissions.[11] Through this law, the government committed to reduce its greenhouse gas emissions by 30% by 2020, and by 50% by 2050, as compared to 2000 emissions.[12] The following year, Mexico enacted historic energy reforms through amendments to its Constitution that opened up the country's ailing oil sector to foreign investment.[13] For the first time since President Lázaro Cárdenas nationalized the oil industry in 1938, foreign companies would now be allowed to bid on joint-venture energy projects throughout Mexico.

These two major pieces of legislation promised to revamp and modernize Mexico's ailing energy while committing the country to a cleaner energy mix. Unfortunately, the optimism surrounding these measures has been thrown into question by the nationalistic policies of AMLO. Weeks after taking office, AMLO scrapped a $13 billion project to build a new international airport in Mexico City after punting the decision to a public referendum in which only 1% of the electorate voted.[14] In line with his commitment to revamp PEMEX and resist foreign interference with Mexico's hydrocarbons, AMLO also placed a moratorium on new deep-water oil exploration bids that were introduced in Mexico's 2013 energy reforms, exacerbating the country's 15-year decline in oil output.

On both sides of the border, there is an inherent tension between battling climate change and ensuring sufficient energy production and independence. Mexico's situation is particularly difficult, because despite years of declining production by PEMEX due to inefficiency and corruption, PEMEX remains the most polluting company in Latin America, contributing to 1.67% of the total greenhouse gas emissions in the world.[15]

> "Mexico scholars anticipate contentious relationship between Biden and AMLO."

AMLO's nationalist policies designed to reduce foreign investment in both PEMEX and the state-owned electricity company CFE are exacerbating Mexico's energy woes and already leading to a significant amount of litigation. Most recently, a coalition of energy and utility companies have filed several lawsuits in Mexico to challenge new rules affecting the utilities sector.[16] AMLO's predecessor Enrique Peña Nieto created a market for bankable "clean energy certificates" ("CEL") to foster green power generation.[17] The CEL's obligated companies to obtain a certain amount of electricity from such sources to meet national climate goals. After the AMLO administration took action to favor state-owned plants over private entities, the companies responded to the rule change by filing "*amparo*" lawsuits (Mexican constitutional protection lawsuit) to overturn the new measures. Julio Valle, deputy director of the Mexican Association of Wind Energy ("AMDEE"), said the legal actions may cover over 50% of new clean energy projects pending in Mexico.[18]

More traditional oil-and-gas companies have not yet initiated significant litigation to challenge AMLO's moratorium on drilling. However, these disputes are likely in the coming years if AMLO continues to undermine the 2013 Energy Reform. In October 2020, a group of 43 U.S. lawmakers sent a letter to President Trump requesting action against AMLO's policies for undermining energy investment in the country.[19] Although the new rules against indirect expropriation may limit the ability to bring arbitration claims in Mexico, the USMCA will still allow for many energy related ISDR claims against the country.

In addition to investment-related litigation or arbitration, the Presidency of Joe Biden may also put pressure on a variety of AMLO's energy policies. Biden has committed to re-enter the Paris Climate Accords on day one (coincidentally, AMLO also joined the Accords).[20] Interestingly, Mexico scholars already anticipate a more contentious relationship between Biden and AMLO than during the Trump administration.[21] Whereas Trump and AMLO shared a similar nationalistic approach and indifference to renewables, Joe Biden will be under pressure from both sides of the energy spectrum. On the one hand, he will be under pressure to defend the U.S.'s recently obtained status as the world's largest petroleum producer. On the other, he is under intense pressure from the left wing of his party to "transition from oil," as he stated during the most recent debate.

Dr. Payan of the Rice Mexico Center recently told the Texas Standard that AMLO is headed for a "collision course" on that front when Biden takes office.[22] "I don't think he is going to get a pass the way he's getting a pass by Mr. Trump," he said. "Mr. Biden does not appear to me to be a kind of a vengeful, resentful politician. I think he's a man who understands American interests, and I think many of U.S. interests go through Mexico," Payan said. "I think the Biden administration will pursue those interests very systematically, very institutionally."[23]

The U.S. Shale Revolution has shown that meeting the world's energy demands is not necessarily at odds with the road to cleaner energy. Despite the criticisms against hydraulic fracturing, this system has led to an abundance of cleaner natural gas that is overtaking coal around the world while reducing the cost of transportation and manufacturing.[24] Similarly, a joint commitment by both Biden and AMLO to increase output with a cleaner mix of energy can satisfy a variety of stakeholders on both sides of the border and lead to a robust and diverse North American economy in the years ahead.

Conclusion

There is no doubt that the 2020 global crisis has devastated much of the world, and North America is no exception. Even before COVID became a household word, inequality and unrest was brewing on both sides of the border, and Mexicans faced record violence and declining economic output. However, this author is optimistic that the major legal developments discussed in this article have the potential to build an even better and more equitable continent than we had before. The readers of this newsletter, from litigators, to policymakers, to pro-bono immigration attorneys, have a unique opportunity to help shepherd a better era that involves better wages on both sides of the border, a more robust middle class, sensible immigration solutions, and greater energy and manufacturing independence.

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International Human Rights Day Recognized in International Event

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Buttar, Caldwell & Company

The Texas Bar's International Human Rights Committee ("IHRC") held its second event to recognize International Human Rights Day, December 10th. Human Rights Day is observed every year on December 10 — the day the United Nations General Assembly adopted, in 1948, the Universal Declaration of Human Rights. The Universal declaration is a milestone document that proclaims the inalienable rights which everyone is entitled to as a human being — regardless of race, color, religion, sex, language, political or other opinion, national or social origin, property, birth or other status. Available in more than 500 languages, it is the most translated document in the world. Also it is said to be the source for the phrase "rule of law". Certainly its adoption is an event that is appropriate to celebrate.

In 2020, the IHRC teamed up with the International Bar Association's Human Rights Law Committee and Business and Human Rights Committee to present three panels on the day, two moderated from IHRC members in Texas and a third by an IBA member in Sydney, Australia. Below are summaries of the discussions of these three panels with links to their recordings. Over 200 lawyers from 51 countries participated. Here is a list of those countries from which participants hailed:

Albania
Argentina
Australia
Austria
Bahrain
Belgium
Brazil
Cambodia
Canada
Colombia
Egypt
El Salvador
Finland
France
Fiji
Germany
Greece
India
Indonesia
Ireland
Italy
Japan
Korea, Republic of
Kuwait
Lebanon
Malaysia
Mexico
Montenegro
Myanmar
Netherlands
Nigeria
Pakistan
Panama
Romania
Russian Federation
Rwanda
South Africa
Spain
Sweden
Switzerland
Thailand
Turkey
Uganda
Ukraine
United Arab Emirates
United Kingdom
United States of America
Uzbekistan
Viet Nam

Session 1: Resolutions and Remedies, from Litigation to Ombudsman, and International Human Rights.

Link to recording: https://vimeo.com/489796328

This session explored litigation and dispute resolution options for international human rights issues. The panel discussed cases filed against corporations for human rights violations in their international operations. Matthew Certosimo, who is a partner at Borden Ladner Gervais (BLG), the largest firm headquartered in Canada, discussed the result of the Canadian Supreme Court's Canadian Nevsun decision on the law in Canada on litigation options. The panel then turned to the law in the United States with an introduction to the status of the *Doe v. Apple et al.* case pending in Washington, D.C. by the lead plaintiffs' attorney in that case, Terry Collingsworth. Mr. Collingsworth is the Executive Director of International Rights Advocates, a non-profit human rights advocacy organization in Washington, D.C. In 1996 he filed *Doe v. Unocal*, which was the first case against a corporation for human rights violations under the United States Alien Tort Statute. Since then, he has focused almost entirely on developing legal strategies to hold multinational companies accountable for serious human rights violations in their global operations.

The panel then turned its attention to these issues in the United Kingdom and India led by Krishnendu Mukherjee, an English barrister and Indian advocate at Doughty Street Chambers. Having litigated against corporations mostly in India, Mr. Mukherjee recognised the need for simpler, quicker and cheaper methods of remedying business-related human rights violations and welcomed the move to create mandatory non-judicial mechanisms, with effective sanctions.

Finally, the panel discussed policy issues related to various dispute mechanisms in a conversation led by Professor Anita Ramasastry who is Chair of the United Nations Working Group on Business and Human Rights, the group of experts responsible for working globally for implementation of the UN Guiding Principles on Business and Human Rights. She is the Henry M. Jackson Professor of Law and Director of the Graduate Program in Sustainable International Development at the University of Washington in Seattle. Professor Ramasastry discussed how the EU's move to develop a directive on mandatory human rights due diligence may impact the current situation with transnational litigation and access to remedy. She also addressed the use of arbitration in business and human rights related cases and the current negotiations for a binding treaty on business and human rights being held in Geneva.

Session 2: An Overlapping Maze: A Comparative Law View on How Multinationals Cope with Laws, Hard and Soft, Impacting Human Rights

Link to recording: https://vimeo.com/489791882

The session discussed trends in human rights regimes under both hard and soft law. After a brief discussion of regime proliferation by moderator Austin Pierce, an associate at Vinson & Elkins, the panel surveyed how such business and human rights regimes have developed. Professor Vivek Krishnamurthy of the University of Ottawa discussed the chronological development of such laws, categorizing them into three main classes: (1) the United Nations Guiding Principles on Business and Human Rights, and related supporting material ("UNGPs"); (2) sectoral transparency laws; and (3) due diligence requirements. Professor Krishnamurthy noted that although jussive regimes, such as the UNGPs, can have a major influence, there has recently been a push to incorporate principles from soft law into bodies of hard law. José Zapata, a partner in Holland & Knight's Bogotá office, applied this review of regimes to the context of companies operating in Latin America, particularly focusing on how companies maintain their social license to operate. Mr. Zapata discussed the recognition that the way law addresses social and environmental issues does not always align with current mores and noted how integration of regimes can help to provide a clearer message to companies and help guide them on how to operate.

Finally, Edie Hofmeister, former Executive Vice President and General Counsel of Tahoe Resources, discussed her practical experience in navigating such human rights regimes, discussing her experience during the past decade's development of business and human rights laws and best practices she has identified from that process. Ms. Hofmeister emphasized the importance of companies putting in forethought on business and human rights aspects of their business and engaging with such topics early, as well as involving outside experts in a company's assessment process.

Overall, the panel concluded that business and human rights regimes will continue to have an important impact on companies in the coming years and noted the need for companies to be prepared for greater involvement with this area of law, particularly if trying to balance the expectations of multiple jurisdictions.

Session 3: Lawyers at Risk: The Impact of Human Trafficking and Modern Slavery on Lawyers and Their Clients

Link to recording: https://vimeo.com/489797479

This was a session that was moderated by Wajiha Ahmed, Partner at Buttar, Caldwell & Co. lawyers in Sydney, Australia. She is the current secretary of the Human Rights Law Committee of the IBA. After her brief introductory remarks about the rise of the modern slavery legislative and other tools to create better working conditions for workers and other risk groups, as being just some of the issues lawyers may need to be aware of when advising on risk.

Anne O'Donoghue who is the Principal of Immigration Solutions in Sydney, Australia and the co-chair of the Nationality and Immigration Committee of the IBA began the discussion with her thoughts on the impact of modern slavery reporting, the introduction of the Modern Slavery Act in Australia and its limitations at this early stage.

Akiko Sato is a Business Human Rights specialist based in Tokyo, Japan with the Business & Human Rights Resource Centre. Ms. Sato explained the current situation in Japan in relation to modern slavery, noting there are very limited number of migrants in Japan. Despite such social construct, Ms. Sato explained the potential for modern slavery abuses such as poor working conditions and supply chain issues that may lead to human rights abuses. Ms. Sato explained Japan has instituted a National Action Plan to try and mitigate the human rights risk and this remains a work in progress.

Nicole D'Souza is a Business Human Rights advocate and the former Ethical Sourcing Manager for Konica Minolta Australia. Ms. D'Souza spoke about the human rights frameworks that corporations may consider a due diligence checklist to come up with a way to identify risk and therefore mitigation of human rights abuse. Ms. D'Souza described the risks include issues such as reputational. Corporations should also be considering collaborating with non-traditional partners such as trade union movements to create effective change.

> "The COVID19 pandemic will likely create even more modern slavery."

Dr. Harpeet Kaur is a Business Human Rights Specialist with the UNDP. Dr. Kaur is presently leading a regional project aimed at promoting responsible practices through regional partnerships in Asia. Dr. Kaur discussed the various mechanisms to address both human trafficking and modern slavery issues throughout Asia. She identified the most at risk groups are both children and women, with the COVID19 pandemic likely to create even more modern slavery. She discussed the future of business human rights is likely to be effected through the current gig economy workers such as ride sharing and other similar new ways of working, such as working from home. Lastly she discussed that the monitoring of ongoing human rights abuses in areas such as manufacturing in Asia, such as Bangladesh, is still lacking and a solitary approach through legislation will not fix the issues.

Michael Kirby was the last speaker for the panel. Mr. Kirby is a former Justice of the High Court of Australia and the current co-chair of the IBA Human Rights Institute (IBAHRI). Mr. Kirby sought to discuss the issue of sex slavery from his position as a Judge in a case of *Tang v. Queen* in relation to a conviction of engagement of modern slavery. Mr. Kirby discussed his insight in the case and complexities involved in the matter. Mr. Kirby also discussed the HIV pandemic and its impact on the most vulnerable groups such as gay men, women and children, sex workers, drug users and transgender persons and the spread of HIV. Mr. Kirby discussed the limitation of assisting people directly affected and the moralizing of rights by those creating policy. Lastly Mr. Kirby discussed the human rights conditions of those in North Korea and the escape line during winter to escape into China, especially noting that many of the escapees are women and are likely to be subjected to sex slavery.

The panel had a great discussion at the end of the presentations which ultimately opined that the ongoing human trafficking and modern slavery issues will remain a live corporate risk and their advisors should not turn a blind eye to the issue. The new approach from a legislative perspective is a mitigation approach, but not a catch all as yet.

Coming Up in the Summer ILS Issue

The Summer 2021 edition will be dedicated to the topic of international human rights in recognition of the 10th anniversary of the adoption of the United Nations Guiding Principles on Business and Human Rights.

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Tom Wilson graduated from Drake University, B.A. in 1982, and the University of Tennessee, J.D. in 1985 (Fraternity: Phi Eta Sigma). Admitted to Texas Bar in 1985. Board Certified-Labor and Employment Law-Texas Board of Legal Specialization. Tom came to the Firm in 1985 and was admitted to the partnership in January 1994. His principal areas of practice are traditional labor law (union relations), safety (OSHA), and international labor law.He was the first Chair of the Texas State Bar's International Human Rights Committee of which he was the founding member. He was also Chair of the Texas State Bar International Law Section (ILS) and is currently the Editor-in-Chief of the ILS International Newsletter. Further on the international front, Tom is an officer of the International Bar Association's Human Rights Law Committee.

Austin Pierce graduated from Washington & Lee University cum laude with a B.A. in Economics and Philosophy in 2015 and from Duke Law School with a J.D. and an LL.M in International & Comparative Law in 2018. He is a member of Phi Beta Kappa and Phi Sigma Tau. Austin is also an alumnus of the National Security Language Initiative, through which he has participated in both Arabic and Mandarin Chinese intensives. Austin joined the firm's ENR practice group in September 2018 and passed the Texas Bar that same Fall.

Wajiha has been practising with Buttar, Caldwell & Co. since 2001. She is an experienced civil litigator. Dispute resolution is her speciality in all civil areas including personal injury, family law, estate disputes, immigration and commercial matters. She is also able to offer her services as a panel lawyer in the area of family law through Legal Aid NSW.She is an accredited NMAS mediator along with also being a FDRP. She is presently on the EI and LI panels for Legal Aid NSW and she is also on the FLSS panel for the Law Society of NSW. She is available to be engaged privately as a mediator and/or FDRP. Wajiha is also able to provide public notary assistance for non-clients of the firm.Social justice is an important part of policy for Wajiha. She currently sits on the following committee's and/or Boards:*

- *Law Society of NSW – Human Rights Committee*
- *International Bar Association – Human Rights Committee - Asia Pacific Regional Forum Liaison Officer.*

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ATTENTION: LAW STUDENTS!

Human Rights Essay Contest

FIRST PRIZE: $1,500

The State Bar of Texas International Law Section is sponsoring an Essay Contest which is open to students enrolled in any Texas law school or Texas residents attending other law schools. Topic is any aspect of international human rights law. No minimum word count required. The winner will be recognized at a future ILS-sponsored event and the winning essay will be published in a future issue of our International Newsletter.

DEADLINE: APRIL 1, 2021

DOWNLOAD COMPLETE GUIDELINES:
HTTPS://ILSTEXAS.ORG/HUMAN-RIGHTS-ESSAY-CONTEST/

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

Blood Spilled on Foreign Soil: The Practice of Extraterritorial Extrajudicial Killings

BY KARL HORBERG
Senior Program Officer, Freedom Now

Introduction

Extrajudicial killings encompass a wide range of state-sponsored actions from the "salvaging" of drug dealers in the Philippines to security forces opening fire on peaceful protestors to drones targeting suspected militants. A full accounting of all types of extrajudicial killing would be nearly impossible. Moreover, the sheer breadth of activities under this rubric renders it difficult to accurately measure the scope of the practice worldwide.

However, in taking a micro-level approach to examining the practice, we see state-sponsored assassinations are a popular tool in the authoritarian toolbox, particularly when it comes to frustrating the efforts of dissidents abroad. An extrajudicial killing within an authoritarian state, while easily ignored or covered up, clearly places the blame and responsibility at the feet of that state. Extraterritorial extrajudicial killings shift blame to unknown assailants and allow an often flawed investigatory process to play out.

This article examines the responsibilities states have in preventing and investigating extraterritorial extrajudicial killings and how those responsibilities may make the practice more desirable for authoritarian states.

Extrajudicial killing and state sponsored assassinations in international law

Protection of individuals from actions of third parties

There are two key ways in which extrajudicial killing is a crime distinct from murder or other forms of deprivation of life. First, the act is not authorized by any legal process nor does it comply with the rule of law. Second, the act is ordered by a government agent acting in an official capacity and is carried out by a government agent.[1]

States are obligated to protect the human rights of all persons, including non-citizens, within the state's effective control.[2] This obligation requires states to protect individuals from abuses by third-party actors.[3] Failing to safeguard an individual's rights by "permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm" caused by third parties may lead to attribution of such violation to the state itself.[4]

While most states have criminalized murder through domestic law, prohibition of arbitrary deprivation of life is also codified in international law. Article 6(1) of the International Covenant on Civil and Political Rights ("ICCPR") provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[5] By extension, this prohibits extrajudicial killing.

States are obliged to protect individuals from criminal acts by third parties — particularly when an individual's right to life might be at risk.[6] For instance, in the case of *Gongadze v. Ukraine,* the European Court of Human Rights ("ECtHR") considered whether Ukraine's failure to take measures to protect a journalist who reported surveillance and who was subsequently disappeared and murdered constituted a substantive violation of its obligation to protect the journalist's right to life under Article 2 of the European Convention on Human Rights ("ECHR"). The ECtHR found that states have a primary duty to "[put] in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. [This duty] also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk from the criminal acts of another individual."[7] The ECtHR specified state liability may arise where the authorities knew or should have known of the existence of a real and immediate risk to an individual's life from the criminal acts of a third party and failed to take protective measures.[8]

In its General Comment 36, the Human Rights Committee concurred that states are "under a due diligence obligation to undertake reasonable positive measures . . . in response to foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State."[9] Such measures might include the assignment of around-the-clock police protection, the issuance of restraining orders,[10] as well as the punishment of perpetrators following a prompt, impartial, and comprehensive investigation.[11] The ECtHR has likewise noted that where vulnerable persons are concerned, states should take all steps that can be reasonably expected to prevent such real and immediate risks.[12]

> "Proper investigation is required in order for a remedy to be effective."

Moreover, the Human Rights Committee has indicated that the state obligation to protect an individual from criminal acts by a third party extends to abuses by a foreign state acting within its territory.[13] In *Garcia v. Ecuador,* the Committee found Ecuador to be liable where it refused to protect an individual against kidnapping from within its territory conducted by police "merely execut[ing] an 'order' coming from the Embassy of the United States."[14]

Responsibility to conduct effective investigations

States have an obligation under Article 2(3) of the ICCPR and Article 13 of the ECHR to provide an effective remedy to an individual for violations of their rights which occurred in any jurisdiction under the state's control.[15]

Both the ECtHR and the Human Rights Committee confirmed that a proper investigation is required in order for a remedy to be effective. The ECtHR has found that, in the case of alleged mistreatment by a state agent, the state must *sua sponte* carry out an official investigation, which requires a thorough attempt to determine what occurred.[16] During investigation, the authorities must take reasonable steps to secure evidence, such as eyewitness testimony or forensic evidence.[17] Any deficiency which undermines the investigation's ability to identify the persons responsible for the abuse may fatally endanger the ability of the investigation to provide an effective remedy.[18]

The Human Rights Committee has confirmed that similar guarantees of investigatory quality are necessary for a remedy to be effective. In General Comment 31, the Committee clarified that ensuring individuals have accessible and effective remedies requires states to "investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies."[19] Such an investigation must be expeditious, carried out by competent authorities, and effective.[20]

A state's failure to conduct an independent and impartial investigation can, in and of itself, give rise to a separate breach of the ICCPR, including a possible claim under Article 7 of the ICCPR (prohibition of torture and cruel, inhuman or degrading ill-treatment or punishment) if the state's failure to properly investigate a victim's maltreatment

leads to anguish for the victim's family.[21] Impunity for perpetrators of human rights violations can give rise to an additional breach of the ICCPR.[22] Finally, states must take measures to prevent the recurrence of such a violation.[23]

Two Deaths: The Murders of Umarali Quvvatov and Jamal Khashoggi

Umarali Quvvatov

Umarali Quvvatov was an opposition politician who fled Tajikistan in 2012 to escape government harassment. He eventually settled in Turkey, yet was still targeted by the Tajik government. On December 20, 2014, Turkish authorities arrested him for an alleged visa violation. However, the authorities ultimately refused to extradite him to Tajikistan.[24]

On the evening of March 5, 2015, Quvvatov, his wife Kumriniso Hafizova, and their two sons were having dinner at the home of Sulaymon Qayumov, a fellow Tajik expatriate who had settled in Turkey three months earlier.25 During the course of the meal, Hafizova and the children became ill after consuming food given to them by Qayumov. The family stepped outside to get fresh air and wait for an ambulance. At approximately 10:30 p.m., an unknown assailant approached Quvvatov and killed him with single gunshot to the back of the head.[26] Hafizova and her sons were taken to the hospital where they were treated for food poisoning.[27] The Istanbul-based Council of Forensic Medicine later confirmed that clozapine — a tranquilizer used to treat schizophrenia — was found in Quvvatov's blood.[28]

In the hours following Quvvatov's death, Turkish media reported Qayumov as the main suspect and described him as an associate of Shamsullo Sohibov, son-in-law of President Emomali Rahmon and a business rival to Quvvatov. It is unknown how the media made these connections and whether they were ever the subject of further investigation by the police.[29] In what later would be the closest official Tajik government statement, a member of parliament and former Interior Ministry official told the media that Quvvatov was murdered as an act of revenge by a business partner.[30]

Qayumov fled to Kazakhstan, but Kazakh authorities returned him to Istanbul. He was indicted with six other individuals for Quvvatov's murder, but was the only individual tried for the crime.[31] In February 2016, Qayumov was sentenced to life in prison for allegedly organizing the killing.[32]

Hafizova and her children have since resettled in Canada where they have been granted asylum. However, she does not believe her husband's killers have been found. She maintains that Qayumov did not act alone and that his accomplices returned to Tajikistan where they remain.[33]

Jamal Khashoggi

Jamal Khashoggi was a journalist who fled Saudi Arabia in 2017 and went into self-imposed exile in the United States. He was highly critical of the Saudi government and at the time of his death was actively pursuing a project to counter the Saudi government's far-reaching digital campaign against dissidents.[34] Amongst these activities, high-ranking officials of the Saudi government spent much of 2017 trying to persuade Khashoggi to return to Saudi Arabia.[35]

In September 2018, Khashoggi was finalizing paperwork to marry his Turkish fiancée. He visited the Saudi embassy in Washington, DC, but was instructed to complete the process in Istanbul. On September 28, 2018, Khashoggi visited the Saudi consulate in Istanbul and was instructed to return on October 2nd. Meanwhile, a team of more than a dozen Saudis arrived from Riyadh via commercial and private flights.[36] Khashoggi returned to the Saudi consulate on October 2nd, roughly an hour after Saudi agents entered the building. What exactly occurred inside the premises is not known, but there is one fact no longer under dispute — Khashoggi did not leave alive.[37]

Initially, the Saudi government claimed Khashoggi entered the consulate and exited shortly thereafter. Turkish police immediately refuted this claim after examining CCTV footage and denied that Khashoggi was seen leaving.[38] Over the next several weeks, official and unofficial reports of Khashoggi's death emerged. He allegedly was killed during a fight at the consulate,[39] was asphyxiated as Saudi officials attempted to restrain him in order to drug him,[40] was brutally dismembered while still alive,[41] or was accidentally killed in an interrogation.[42]

The investigation into Khashoggi's death was conducted by a joint Turkish-Saudi team.[43] However, it was not long before complaints emerged about the role of the Saudi investigators. Turkish investigators claimed they were barred from searching certain rooms in the consulate and initially were not granted permission to search a well at the consul-general's residence.[44] There were also allegations of evidence tampering, specifically that a Saudi chemist and toxicology expert were given unfettered access to key rooms in the consulate for at least four days before Turkish investigators were allowed access.[45]

Regardless of these allegations, Turkish investigators presented Saudi Arabia's Prosecutor General with an initial report on the investigation in late October which identified four prime suspects in the murder.[46] The Saudi government announced it had arrested 21 individuals in November 2018. It

ultimately indicted 11 individuals, with five facing the death penalty. However, the Saudi government never named the individuals it arrested or charged them, nor did it identify the specific charges. The first trial of the 11 alleged perpetrators began in January 2019 with final verdicts issued in September 2020. However, months earlier, Khashoggi's sons had publicly forgiven their father's killers, typically a precondition for legal reprieve.[47]

Conclusion

International law places an obligation on states to protect non-citizens within their jurisdiction and to conduct a thorough and effective investigation into human rights violations against those individuals. However, these obligations are rarely abided by in practice.

Authoritarian states are aware of this weakness in the international system and exploit it to target dissidents living abroad. Extraterritorial extrajudicial killings allow authoritarian states to distance themselves from the act and corresponding human rights violations. Furthermore, investigations into the killings provide the appearance of due process conducted by a third party.

In the case studies outlined above, the authoritarian governments were successful in eliminating dissidents without drawing direct connections to state involvement. Umarali Quvvatov's death was framed as a revenge killing by both the Turkish media and the Tajik government. A perpetrator was identified and punished, despite his family's misgivings, and the case appears to have been closed.

Jamal Khashoggi's murder was subjected to more scrutiny, but the general outcome remains the same. The Saudi government muddied the waters regarding the circumstances of the journalist's death. Beyond the media spin, the Saudi government was able to insert itself into the investigation. To this day, we do not know the exact circumstances of Khashoggi's death, the names of the alleged perpetrators, or if they were punished.

For decades dissidents have fled abroad, seeking safety in another state when their homes became too dangerous. The murders of Quvvatov, Khashoggi, and others demonstrate that borders no longer provide safety. What were once sanctuary states are now unwitting accomplices in serious human rights abuses.

States harbouring dissidents must strengthen their protections of vulnerable populations. They can achieve this by:

- Engaging regularly with dissidents to hear their concerns about safety and potential harassment by authoritarian states.
- Initiating investigations into these claims to mitigate potentially life-threatening actions against dissidents.
- Enacting sanctions against individuals who have perpetrated human rights abuses against dissidents abroad.
- These actions are good first steps to combatting extraterritorial extrajudicial killings and putting an end to authoritarianism across borders.

Karl Horberg is a Senior Program Officer at Freedom Now, a Washington-DC based human rights organization that protects individuals and communities from government repression and defends human rights through direct legal support, targeted high-leverage advocacy, and capacity-building analysis and assistance. khorberg@freedom-now.org.

Endnotes

1 William J. Aceves, When Death Becomes Murder: A Primer on Extrajudicial Killing, 50 COLUM. HUM. RTS. L. REV. 116 (2018), available at http://hrlr.law.columbia.edu/files/2019/01/HRLR-50.1-Aceves-A-Primer-on-Extrajudicial-Killing.pdf

2 Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, CCPR/C/21/Rev.1/Add. 1326 May 2004, ¶ 10, (29 March 2004) (hereinafter General Comment No. 31). See also, UN Office of the High Commissioner of Human Rights, International Human Rights Law, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx.

3 General Comment No. 31, ¶ 8, ("[T]he positive obligations on states parties to ensure Covenant rights will only be fully discharged if individuals are protected by the state, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.").

4 General Comment No. 31, ¶ 8.

5 International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6546 (1966), Article 6.

6 See e.g., D.F. v. Latvia, ECtHR, Application No. 11160/07, ¶ 83, (Oct. 29, 2013); Ahani v. Canada, UN Doc. CCPR/C/80/D/1051/2002, ¶ 10.7, (2004); Human Rights Committee, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 23, available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (hereinafter General Comment No. 36).

7 Gongadze v. Ukraine, ECtHR, Application No. 34056/02, ¶ 164, (Nov. 8, 2005).

8 Id, ¶¶ 165-171. See also Osman v. United Kingdom, ECtHR, Application No. 87/1997/871/1083, ¶ 116, (Oct. 28, 1998).

9 General Comment No. 36, ¶ 21.

10 Id.

11 Human Rights Committee Concluding observations on the third periodic report of Paraguay, UN Doc. No. CCPR/C.PRY/CO/3, ¶ 15, (April 29, 2013).

12 O'Keeffe v. Ireland, ECtHR, Application No. 35810/09, ¶ 144; See also, D.F. v. Latvia, ECtHR, Application No. 11160/07, ¶ 83, (Oct. 29, 2013).

13 General Comment No. 36, ¶ 30.

14 Garcia v. Ecuador, UN Doc. No. CCPR/C/43/D/319/1988, ¶¶ 2.2-2.4, 6.1, (1991).

15 General Comment No. 31, ¶ 10.

16 Aslakhanova and Ors. v. Russia, ECtHR, Applications Nos. 2944/06, 8300/07, 50184/07, 332/08, and 42509/10, ¶¶ 144-147, (18 Dec. 2012) (finding that where Russia failed to make a serious attempt to thoroughly investigate the ill treatment of detained person, including taking steps to obtain additional information about the alleged crime, it violated Article 3 of the ECHR in its procedural aspect); Husayn (Abu Zubaydah) v. Poland, ECtHR, Application No. 7511/13, ¶¶ 479-480, (24 July 2014) (noting that, where an individual has raised an arguable claim that he has been tortured by state agents or by foreign agents with the state's acquiescence, the state must conduct an effective official investigation); Gongadze v. Ukraine, ECtHR, Application No. 34056/02, ¶¶ 175, 177 (8 Nov. 2005) ("The authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigatory procedure .... There is also a requirement of promptness and reasonable expedition implicit in this context."). A lack of such effective investigation can lead to a finding of violations not only under Article 13 of the ECHR, but also Articles 2 and 3.

17 Aslakhanova and Ors. v. Russia, ECtHR, Applications Nos. 2944/06, 8300/07, 50184/07, 332/08, and 42509/10, ¶ 145, (Dec. 18, 2012). See also, e.g., Avsar v. Turkey, ECtHR, Application No. 25657/94, ¶ 394, (July 10, 2001); Husayn (Abu Zubaydah) v. Poland, ECtHR, Application No. 7511/13, ¶ 480, (July 24, 2014).

18 Aslakhanova and Ors. v. Russia, ECtHR, Applications Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, ¶ 145, (Dec. 18, 2012) ("Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard."). See also Husayn (Abu Zubaydah) v. Poland, ECtHR, Application No. 7511/13, ¶ 480, (July 24, 2014).

19 General Comment No. 31, ¶ 15.

20 Kalamiotis v. Greece, UN Doc. CCPR/C/93/D/1486/2006, ¶ 7.3, (Aug. 5, 2006). See also, Banda v. Sri Lanka, UN Doc. CCPR/C/91/D/1426/2005, ¶7.3, (Nov. 13, 2007).

21 General Comment No. 31, ¶ 15; Amirov v. Russian Federation, UN Doc. CCPR/C/95/D/1447/2006, ¶11.7, (April 22, 2009).

22 General Comment No. 31, ¶ 18.

23 General Comment No. 31, ¶ 17; Amirov v. Russian Federation, UN Doc. CCPR/C/95/D/1447/2006, ¶ 13, April 22, 2009) (noting that a state is

also under an obligation to prevent similar violations in the future.)

24 Vocal critic of Tajik president shot dead in Istanbul, REUTERS (March 6, 2015), available at https://www.reuters.com/article/us-turkey-tajikistan/vocal-critic-of-tajik-president-shot-dead-in-istanbul-idUSKBN0M20M920150306.

25 Tajik Opposition Tycoon Quvatov Killed In Istanbul, RADIO FREE EUROPE/RADIO LIBERTY (March 6, 2015), available at https://www.rferl.org/a/tajikistan-opposition-quvatov-killing/26885021.html.

26 Id.

27 Three Arrested As Tajik Opposition Tycoon Buried In Istanbul, RADIO FREE EUROPE/ RADIO LIBERTY (9 March), available at https://www.rferl.org/a/slain-tajik-opposition-tycoon-to-be-buried-in-istanbul/26889471.html.

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Canada: The Start-Up VISA Program for Entrepreneurs

BY SERGIO R. KARAS, B.A., J.D.

In 2013 Canada launched the Start Up Visa Program ("the program") to attract technology entrepreneurs with the know-how and ideas to establish new business ventures supported by capital pools of incubators and angel investors. The program was almost immediately popular because the foreign entrepreneur, and immediate family members, receives permanent residency regardless of the ultimate success of the business venture. Since its initial establishment, several hundred entrepreneurs have been granted permanent residency. The number of applications under the program has increased steadily, although the program remains relatively small compared to other immigration categories. Although the program is generally successful in recruiting foreign talent, it is often criticized for its complexity and cumbersome process. In the remainder of this article, I discuss the major components of this program in order to clarify the contours of its requirements.

PROGRAM OVERVIEW

The program is part of the Economic Class immigration category established by section 12(2) of Canada's *Immigration and Refugee Protection Act* ("IRPA").[1] Under subsection 14.1(1) of the IRPA, the Minister of Citizenship and Immigration may issue instructions creating a class of permanent residents as part of the Economic Class. Pursuant to that authority, the Minister established the Start-Up Visa Program and issued the *Ministerial Instructions Respecting the Start-up Business Class, 2017*.[2] The Ministerial Instructions have been incorporated into sections 98.01 to 99 of the *Immigration and Refugee Protection Regulations* ("IRPR").[3]

The Ministerial Instructions define the Start-Up Business Class as a class of foreign nationals who have the ability to become economically established in Canada and meet the following qualifications: (i) have obtained a commitment from either a designated business incubator, a designated angel investor group, or a designated venture capital fund; (ii) have attained a certain level of language proficiency; (iii) have a certain amount of transferable and available funds; and (iv) have a qualifying business. Failure to meet these requirements results in a refusal of an application.[4]

The program aims to attract immigrant entrepreneurs with the skill and potential to build high-growth businesses, capable of innovation and job-creation, that can compete on a global scale. Applicants under the program can apply either as a single entrepreneur or as an entrepreneurial team of up to five members.[5]

SUPPORT OF A DESIGNATED ORGANIZATION

A designated organization[6] is a business group that has been approved to invest in or support possible start-ups. It can be an angel investor group, a venture capital fund, or an incubator.

Angel investor groups are made up of members who invest their own capital in start-ups, usually in exchange for equity. Angel investor groups help their members in a variety of ways, which can include identifying investment opportunities, pooling their capital, and standardizing the investment process for angel investors.

Venture capital funds raise and manage capital to place equity investments in start-ups with high growth potential. Venture capital funds support start-ups through their investment and can also provide operational experience, technical knowledge, networks, and mentorship.

Business incubators are private organizations that help start-ups grow by offering a range of services, which include physical space and facilities, capital, business mentoring, and networking connections.[7]

Applicants need to obtain a letter of support from one or more of the designated organizations to be eligible for the program. The organization will also send a commitment certificate directly to Immigration, Refugees and Citizenship Canada ("IRCC"). If the organization is an angel investor, it must confirm that it will invest at least $75,000 in the start-up. If the organization is a venture capital fund, it must confirm that it will invest at least $200,000. If the organization is an incubator, it must confirm that the applicant's business is currently participating in or has been accepted into its business incubator program. To obtain a letter of support, applicants must contact the designated organization directly and convince them that they have a business idea that is worth supporting.

As a further requirement, a visa officer must be satisfied that an applicant's primary purpose is engaging in the business activity for which the commitment was intended and not for the purpose of acquiring a status or privilege under the IRPA.[8]

QUALIFYING BUSINESS

A qualifying business means a business that meets the following criteria:

- At the time the applicant obtains the commitment from a designated organization:
    - Each applicant holds 10% or more of the voting rights attached to all the shares of the corporation; and
    - The applicant(s) and the designated organization hold more than 50% of the total voting rights attached to all the shares of the corporation outstanding at that time.
- At the time the applicant receives permanent residence:
    - The applicant provides active and ongoing management of that business from within Canada;
    - An essential part of the operations of the business takes place in Canada; and
    - The business is incorporated in Canada.

LANGUAGE REQUIREMENT:

The ability to communicate in English or French is necessary for a business to be successful in Canada. Therefore, to be eligible for the program an applicant must meet a minimum level of the Canadian Language Benchmark ("CLB") in either English or French. If the minimum language skills are not met, the application will be rejected.

SETTLEMENT FUNDS IN CANADA

To be eligible under the program, the applicants must prove that they have enough funds to support themselves and their dependants after they arrive in Canada. These funds can not be borrowed. The amount that is required depends on the size of the family and is updated annually.[9]

MEDICAL AND CRIMINAL BACKGROUND CHECKS

In order to obtain permanent resident status under the program, applicants and their dependants must pass a medical examination. If they pose a danger to Canada's public health, or if their condition would cause too great a demand on health or social services in Canada, their application will be refused. In addition to the medical examination, applicants and all dependants over the age of 18 years, must provide police certificates from each country where they have lived for 6 months or more since the age of 18 to determine that they are not criminally inadmissible.

PEER REVIEW

A peer review is an independent assessment of a commitment by a panel of experts convened by the industry association that represents the lead designated entity on the commitment certificate.[10] The goal of the process is to make sure that the activities of the designated organization and the applicant are in line with industry standards and to protect against fraud.[11] The peer review examines the level of due diligence that was performed by the designated organization and ensures that the company has been or will be incorporated in Canada; the business ownership has been verified and satisfies program requirements; the designated organization has considered the viability of the proposed business model, assessed the business venture's management team and verified the ownership of the intellectual property; the focus of the business is on a high-growth potential product and/or service; and the business incubator applicants are validly accepted into an incubator program.

Visa officers who request an independent assessment are not bound by it.[12] If visa officers do not rely on the peer review for their decision, there is no obligation to bring the peer review to the attention of the applicant.[13]

The aim of the peer review process is to examine whether the designated organization conducted due diligence in accepting the applicant's proposal, and not to examine the conduct or intentions of the applicant. Therefore, the visa officer need not invite the applicant to attend the peer review.[14]

TEMPORARY WORK PERMIT

While waiting for permanent resident status under the program, applicants may apply for a Temporary Work Permit. This enables applicants to come to Canada and start building businesses. To be eligible for a temporary work permit, applicants must: plan to live in a province or territory other than Quebec; pay the Employer Compliance Fee; have received a letter of support from a designated entity indicating that they are essential and that there are urgent business reasons for them to come to Canada early; and have sufficient funds to meet the Low-Income Cut-Off ("LICO") for their family for 52 weeks.[15]

Once applicants are in possession of a valid work permit, they must engage in business development and activities in Canada.[16]

> "Applicants with a valid work permit must engage in business development and activities in Canada."

CONCLUSION

The program targets entrepreneurs who want and have the ability to establish high-growth businesses in Canada. Applicants cannot use the program for the purposes of acquiring immigration status or privilege under the Act. However, once an application has been approved and applicants have received permanent resident status, the failure of the start-up business will not affect their status. This is a marked departure from previous immigrant entrepreneur programs that made permanent residency conditional upon the success of the enterprise and the fulfilment of conditions that included job creation for Canadians and the achievement of financial targets. It is recognized that not all business ventures are successful.[18] Nevertheless, a visa officer must be satisfied that an applicant's participation in an agreement or arrangement in respect of a commitment is primarily for the purpose of engaging in the business activity for which the commitment was intended and not for the purpose of acquiring a status or privilege under the IRPA. The program capitalizes on the availability of private capital pools to launch technology ventures, on the desire of foreign entrepreneurs to establish their business in Canada as a launch pad for global growth, and on the difficult and slow processing of entrepreneur applications in other countries, notably the United States. Although the program still requires refinement and a better understanding of the success of enterprises approved under the program, it is an option that has increased Canada's appeal to many foreign entrepreneurs deciding on a business location.

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Endnotes

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2 (2017) C Caz I, 3523.
3 SOR/2002-227.
4 Bui v. Canada (Minister of Citizenship and Immigration) [2019] F.C.J. No. 417; Nguyen v. Canada (Minister of Citizenship and Immigration) [2019 F.C.J. No. 420].
5 If there is more than one applicant, every applicant must submit their own application separately. No application will be processed until all the applications have been received by IRCC.
6 A list of designated organizations can be accessed here: https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/designated-organizations.html.
7 https://www.canada.ca/en/services/immigration-citizenship/helpcentre/glossary.html.
8 Supra, Nguyen at para. 5.
9 https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/eligibility.html#money.
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11 Supra, Bui para. 31.
12 Supra, IRPR s. 90.09(1)(4).
13 See Kwan v. Canada (Minister of Citizenship and Immigration) [2019] F.C.J No. 86, where the peer review was neither relied upon by the visa officer nor was it disclosed. See also, Mourato Lopez v. Canada (Minister of Citizenship and Immigration) [2019] F.C.J No. 502.
14 Supra, Bui para. 36.
15 https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa/work-permits.html#6.2.
16 Supra, Kwan where the applicant stayed in Canada for only a week after receiving her work permit. The court held that as the applicant was not actively engaged with the business venture, it could be concluded that she was not committed to the business and was instead primarily seeking immigration status.
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