State Bar of Texas International Law Section

INTERNATIONAL NEWSLETTER

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INAUGURAL ISSUE

The International Law Section celebrates Mexico's Independence Day in connection with its year of concentration on Mexican legal matters.

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

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INTERNATIONAL
LAW SECTION
THE STATE BAR OF TEXAS

TOM WILSON
ILS Chair

FOR INTERNATIONAL LAWYERS, INFORMATION IS KEY

MESSAGE FROM THE CHAIR

Twenty-four years ago, I received my first real international legal assignment. I was asked by a private equity firm to help it buy and manage a company with employees in 57 different countries. As an employment lawyer and a new partner at my firm, I was gung-ho to do it but I also knew I had a lot to learn. Among the lessons I learned are: 1) dealing with unions in Norway and Nigeria are two completely different experiences; 2) employment agreements in Brazil are quite dissimilar from employment agreements in Egypt; and 3) what employees expect from a new owner of a company in Russia is distinct from anywhere else, particularly Indonesia.

For international lawyers, information on legal systems and cultures around the world is key. It is this important point that leads us to the new International Newsletter of the International Law Section of the State Bar of Texas. Two primary goals of our Section are to enhance the legal skills and international knowledge of Texas lawyers and to promote awareness of best practices and international issues. This will be the challenge. Unlike many of our fellow Sections in the State Bar where all of their members practice in the same area, the International Law Section's lawyers cover many practice areas. ILS members are litigation and transaction attorneys; they practice immigration, compliance, oil and gas law, trade, arbitration and even, such as your Chair, employment law.

We have a lot of ground to cover. We need your help. Each of you has a special perspective on your area of practice and its international aspects. Please share that perspective in the pages of this Newsletter. Only with this interchange of ideas do we create a Newsletter that will help the Section achieve another of its important goals, which is to promote the reputation of Texas lawyers as world-class practitioners on international matters. We hope that soon, the International Newsletter of the Texas Bar's International Law Section will be a must read for lawyers outside of Texas also.

What is in it for you? This is where the Section's last significant goal comes to play. The Section intends to create relevant and meaningful networking opportunities for its members. Texas is a big state. The Section has around 1,000 members. It will be hard to get all of us in one place in body. However, in mind we can all come together in this Newsletter. Here is an opportunity for you to increase your network by the hundreds if not thousands. Please take that opportunity. Join us on this journey around the world by sharing your part of it in these pages. Start writing for our next edition, after you enjoy this first edition of the International Newsletter. •

JAMES W. SKELTON, JR.
Editor in Chief
International Newsletter

EDITOR IN CHIEF MESSAGE

This is the first issue of the International Newsletter published by the International Law Section (ILS) of the State Bar of Texas. If you're asking why we believe it is necessary to publish the Newsletter, there are several reasons. First is the fact that if Texas had been a nation in 2014, it would have had the 12th highest gross domestic product of all countries in the world. Second, Houston, Texas is home to one of the most significant ports in the United States and the world. Third, Texas shares a border with Mexico that is the second longest border of any U.S. state with a foreign country. Fourth, 52 of the Fortune 500 companies claim Texas as their headquarters. Fifth, a large number of companies operating in Texas have either foreign parent companies or have foreign operations. Sixth, Texas is also home for much of the energy industry, which carries out its operations on a worldwide basis. These facts form the basis for our belief that lawyers in Texas, whether they are in-house counsel, outside counsel advising corporations, counsel who advise or represent employees or indigenous people, or those who work for the government, have a high likelihood of being exposed to a large variety of international legal issues.

It is with this background in mind that we have decided that the Newsletter should include articles that are related to the following topics: cross border matters and business in Mexico; international litigation and arbitration; sanctions and trade; maritime and port regulations; and international human rights. We will, of course, remain willing to consider expanding our list of international topics, depending on the timeliness and quality of the article.

This year, Tom Wilson, Chair of the ILS, and the ILS Council have decided to concentrate the efforts of the ILS on Mexico, culminating in a planned trip to Mexico City from April 3-6, 2019. Consequently, we will endeavor to include articles about Mexican legal matters in each issue of the Newsletter. This edition of the Newsletter includes an article about the status of the Mexican energy industry reform movement, as well as articles about U.S. sanctions on the Russian oil industry, a hybrid due diligence approach, European international trade matters, and the legality of U.S. sanctions against Chinese corporations.

With respect to the articles we publish, it should be noted that none of the opinions expressed by any of the authors are opinions of either the ILS or the State Bar of Texas. •

HUMAN RIGHTS WRITING CONTEST

As part of the State Bar of Texas International Law Section's commitment to providing information and guidance on international human rights issues, the Section sponsors a writing contest that is open to individuals attending law school (including LL.M. programs) within the State of Texas and Texas residents in law school outside of Texas.

PRIZES

A first-place prize of $1,500 will be awarded for the best entry as judged by representatives from the Section. If sufficient entries are received, second and third place prizes may also be given. The winner(s) will also be recognized at the State Bar of Texas International Law Section Annual Institute, to be held on March 28-29, 2019, and the Section will provide the first-place winner round-trip airfare and accommodation to attend the Section's Annual Institute. Additionally, the winning essay(s) will be published in the Section's Newsletter and, depending on the topic of the paper, in the International Bar Association's Human Rights Newsletter.

SUBMISSION

Submissions are due on or before 11:59 PM (Central Time) on March 1, 2019 and should be sent by email attachment to Karla Pascarella at KPascarella@pecklaw.com. The email should have the subject header "State Bar of Texas International Law Section Writing Contest" and contain the contact information for the author(s). *The contestant's name and other identifying markings such as school name are not to be listed in the attachment.*

GUIDELINES

The essay may address any aspect of international human rights law that the contestant chooses. There are no minimum or maximum word limits, and papers should be double-spaced, with twelve-point font and one-inch margins.

RULES

The first-place winner will be required to submit a completed W-9 form prior to receiving the award, and is responsible for all taxes associated with the award. The ideas and work reflected by each entry must be the author's or authors' own. This contest is governed by U.S. law and all relevant federal, state, and local laws and regulations apply. The winner will be required to submit proof of eligibility.

UNIT 731 JUSTICE LONG OVERDUE

BY NICOLA S. HINES
SMU Dedman School of Law
Candidate for Juris Doctor, May 2019

The following article was declared the winner of the ILS International Human Rights Committee writing contest this year. This article first appeared on the website of the Human Rights Law Committee of the Section on Public and Professional Interest of the International Bar Association, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association.

Introduction

During the Second World War, a specialized team of the Japanese military known as "Unit 731" conducted heinous medical experiments on thousands of civilians and prisoners of war. This paper will examine those crimes in light of international criminal law, explain the long-term effects of the U.S. decision to grant immunity to the officers of Unit 731, and argue that justice and closure for the victims is long overdue.

Most people have heard of the horrendous experimentation carried out by Dr Josef Mengele during the Second World War. Not so his Japanese counterpart, Lieutenant-General Shiro Ishii. Given that Ishii's crimes were just as atrocious and even more widespread,[1] it raises the question: why was Ishii not subjected to the same public condemnation? The answer is because, when the United States discovered that Japan had used humans as guinea pigs for its biological weapons, it determined that obtaining the research data was more important than prosecuting Unit 731 members for war crimes or crimes against humanity.[2]

Consequently, the U.S. provided immunity from prosecution at the International Military Tribunal for the Far East (the "Tokyo Tribunal") to the Japanese officials in exchange for the results of their human experiments.[3] Unfortunately, this decision not only undermined the integrity of the Tokyo Tribunal,[4] but also deprived the victims of Unit 731 of any kind of justice, and its effects are still in evidence more than 70 years later. Until recently, Japan denied the very existence of Unit 731 and the crimes it committed on primarily Chinese, but also Korean, Russian and Allied prisoners of war.[5] This lack of accountability is evident in Japan's revisionist history, and relations between China and Japan are strained, in part due to Japan's refusal to acknowledge its wartime actions.[6] Many were outraged when the officers of Unit 731 escaped punishment and assumed successful and prominent roles upon their return to Japanese society.[7] Meanwhile, to this day, Chinese victims and their families are still fighting for some form of recognition and/or compensation from the Japanese government.[8]

Justice for the victims of Unit 731 is long past due. To this end, the Japanese government should formally recognize the existence and actions of Unit 731 and apologize to the victims. In conjunction with a formal apology, Japan should establish a compensation fund for those who suffered at the hands of Unit 731. Alternatively, or in addition, a truth commission would serve the important purposes of establishing an historical record and providing closure for the victims. Each of these approaches would be a step towards putting Unit 731 and its awful legacy to rest.

International law: ban on human experimentation and the use of bacteriological weapons

During the Second World War, Japan was bound by international law to treat prisoners of war humanely and to refrain from bacteriological warfare. Japan signed and ratified the 1907 Hague Convention (hereinafter "the Hague Convention"), which provides that prisoners of war must be treated humanely at all times.[9] In particular, experiments resulting in deaths of prisoners of war are grave violations of the Hague Convention.[10] The Hague Convention further provides that the use of poison and poisoned weapons is "especially forbidden," which presumably includes bacteria and chemical substances.[11] On this note, a separate declaration was issued as part of the Hague Convention banning the "use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases."[12] Although no such weapons existed at the time of drafting, the "framers of the Hague Convention recognized the rapid advancement of chemistry… and envisaged the potentials for its misuse."[13]

The 1925 Geneva Protocol ("the Geneva Protocol") is dedicated solely to the use of bacteriological weapons and condemns the use of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices," as well as the "use of bacteriological methods of warfare."[14] It does not, however, prohibit the research, development, testing, production, or stockpiling of biological weapons.[15] Japan signed the Geneva Protocol, but never ratified it.[16]

Similarly, Japan signed but failed to ratify the 1929 Geneva Convention ("the Geneva Convention"), which contains 97 provisions detailing the manner in which states must treat their prisoners of war.[17] It provides that prisoners are entitled to humane treatment, honor, respect, and medical care.[18] In 1942, the Japanese government assured the Allied governments that, although not a party to the Geneva Convention, Japan would abide by its terms.[19] Japan would later argue that it was not legally bound because it had not ratified the Geneva Convention.[20] However, "a state cannot sign a treaty and subsequently conduct itself as if it had no concern with it… a state is, pending ratification, under an obligation not to defeat the object and purpose of a treaty prior to its entry into force."[21] Indeed, Togo Shigenori, the Foreign Minister who had communicated the assurances to the Allied governments, admitted that Japan had an international responsibility to observe the Geneva Convention and understood that it would override Japanese domestic law if there was conflict between the two.[22]

> "Until recently, Japan denied the very existence of Unit 731 and the crimes it committed on primarily Chinese, but also Korean, Russian and Allied prisoners of war."

These treaties are recognized as evidence of customary international law.[23] As noted by one scholar, the law of war is not confined to treaties, but encompasses "the customs and practices which gradually obtained universal recognition, and from the general principles of justice."[24] In this regard, Article 98 of the Constitution of Japan provides that "[t]reaties concluded by Japan and established laws of nations shall be faithfully observed."[25] Thus, Japan was obligated to refrain from biological warfare and to treat its captives humanely during the Second World War.[26]

Unit 731: war crimes and crimes against humanity

Experiments on prisoners of war and civilians

The officers of Unit 731 conducted human experiments "on a systematic and large-scale basis," killing more than 3,000 captives at Ping Fan between 1940 and 1945, not including those who died before 1940 or at other facilities.[27] Indeed, some researchers believe that the total number of human subjects killed by experimentation is closer to 10,000 or more.[28] The Ping Fan facility, which has been referred to as the "Asian Auschwitz," was provided with human test subjects by the special Japanese army troops known as the Kenpeitai.[29] The prisoners were mostly Chinese, but also Korean, Mongolian, Soviet, and Allied prisoners who had fallen afoul of the Japanese authorities.[30] Innocent civilians (including mothers, pregnant women and children) were also the subjects of Unit 731's experiments, after they were lured into the Japanese Consulate in Harbin and held in the basement until they could be transferred to the Ping Fan facility.[31] Irrespective of their gender, nationality or age, victims were referred to equally as "*maruta*" or "logs."[32]

The "logs" were subjected to four main types of research: "(1) cholera testing and development; (2) epidemic hemorrhagic fever testing and development; (3) plague research; and (4) the effects of frostbite and its treatment."[33] Other prisoners were deliberately infected with typhoid, anthrax, smallpox, glanders, dysentery and venereal diseases or subjected to prolonged dehydration, prolonged heat exposure, burns, excision of vital organs, replacement of blood with seawater, ballistic injuries, prolonged malnutrition, sleep deprivation, electrocution, pressure extremes, boiling, prolonged x-ray exposure, infusion with various types of animal blood, or overdoses of heroin and Korean bindweed.[34]

> *"The prison was a vision of hell. Through a spyhole cut in the steel doors of each prison cell, the plight of the chained marutas could be seen. Some had rotting limbs, bits of bone protruding through skin blackened by necrosis. Others were sweating in high fever, writhing in agony or moaning in pain. Those who suffered from respiratory infections coughed incessantly. Some were bloated, some emaciated, and others were blistered or had open wounds. Many of the cells were communal. An infected person would be put with healthy marutas to see how easily diseases spread."*[35]

Few prisoners lived longer than a few weeks.[36] Each captive "was literally harvested for whatever experimental value he or she possessed and then, if the doctors called for it, dissected alive."[37] Vivisection without anesthetic was preferred, because a "live, unanesthetized body produced the purest experimental results."[38] Unit 731 often preserved its victims or parts of them, in formaldehyde so that they could be studied further.[39] The Unit 731 headquarters contained many such jars of heads, hands, feet, and internal organs, all neatly labeled, most of which indicated that the *maruta* were Chinese, Korean or Mongolian, but some were "American", "English" or "Frenchman".[40] Other victims were disposed of using large incinerators similar to those in the Nazi concentration camps.[41]

Attacks on civilians

In addition to the horrendous bacteriological experiments carried out at the headquarters in Ping Fan, Unit 731 conducted "field testing" on the Chinese population.[42] It is estimated that more than 200,000 Chinese died as a result of Unit 731's germ attacks during the Second World War.[43] After the war, an additional 30,000 locals in the Harbin area died after contracting plague from the infected animals released from Unit 731 headquarters when the facility was destroyed.[44]

Unit 731 used various methods to disseminate bacteria. Unit 731 officers dropped cholera cultures in wells to infect drinking water, gave anthrax-filled chocolates to children, and injected cholera and typhoid bacteria into ripe fruits, rice cakes and other food items.[45] Infected food was either handed directly to local residents or mixed in with their baskets of vegetables, often by Japanese soldiers disguised and dressed in everyday Chinese clothes.[46] Members of Unit 731 also administered tainted vaccines to children, and released disease-carrying rats, dogs, horses and birds on unsuspecting villagers.[47] Unit 731 doctors offered to assist afflicted villagers, then vivisected anyone who fell for their ruse.[48]

Unit 731 also carried out civilian attacks on a larger scale. Unit 731 executed a number of aerial assaults, using specially fitted planes to spray plague cultures and drop bombs containing plague-infested fleas over Chinese cities and villages.[49] Japanese aviators typically targeted metropolitan areas such as Shanghai, Ningpo, and Changteh.[50] "Bacteria-containing bombs made of fragmenting ceramic and glass were dropped on populated areas, balloons laden with lethal germs were sent aloft, and anthrax-carrying feathers were spread about farms and villages."[51]

Justice and closure overdue for victims of unit 731

It is past time that the victims of Unit 731 and their families gained justice and a sense of closure. "That these crimes occurred is a sordid and dismaying fact of history. That the human experiments and large-scale biological warfare have been denied and marginalized. . . is a second crime against humanity and a crime against history itself."[52]

Formal apology

A formal apology by the Japanese government would go a long way towards providing closure for the victims.[53] Since the war, Japanese officials have made several statements that they regarded as apologies for Japan's crimes in the Second World War.[54] However, these were received with little enthusiasm and regarded as wholly inadequate by other nations.[55] For example, in 1995, Prime Minister Tomiichi Murayama stated:

> *"During a certain period in the not too distant past, Japan, following a mistaken national policy, advanced along the road to war, only to ensnare the Japanese people in a fateful crisis, and through its colonial rule and aggression caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations. In the hope that no such mistake be made in the future, I regard, in a spirit of humility, these irrefutable facts of history, and express here once again my feelings of deep remorse and state my heartfelt apology."*[56]

Critics were quick to note that the apology was made in the first person, and not on behalf of Japan, indicating it was not endorsed by the Japanese government.[57]

Further, any positive effects of Japan's attempts to apologize have been ruined by Japanese politicians' insensitivity towards Japan's wartime enemies.[58] For example, Prime Minister Shinzo Abe stated that he did not agree with Murayama's apology and questioned whether Japan had actually committed "aggression" during the war.[59] Abe incited further anger throughout Asia when he was photographed in the cockpit of a military jet emblazoned with the number "731" shortly thereafter.[60]

An official apology by the Japanese government would constitute a positive step towards reconciliation and long-term peace by allowing Japan to address its past and show respect for the victims and their families.[61]

Compensation fund

In conjunction with a formal apology, Japan should establish a compensation fund for the victims of Unit 731 and their families. Under the Multilateral Treaty of Peace with Japan (which ended the war between Japan and the Allies), the Allies agreed to waive all reparation claims arising out of actions taken by Japan during the war.[62] As a result, Japanese courts have dismissed lawsuits filed against Japan on the basis that the peace treaty barred any further compensation to prisoners of war.[63] In direct contrast, as of 1998, Germany had paid the equivalent of over $60 billion in Second World War reparations.[64] Then, in 2000, Germany created the equivalent of an additional $5 billion claim fund to compensate victims of the Nazi regime, including slave and forced laborers, and the subjects of human experimentation.[65]

Despite Japan's position that it does not have a legal duty to compensate victims, Japan has recognized an obligation towards wartime "comfort women".[66] In this regard, Japan established the Asian Peace and Friendship Fund for Women to compensate victims.[67] A similar initiative should be established to compensate victims of Japan's biological warfare experiments. Even though Japan may find that victims are more concerned with an apology than a monetary award, it is important that Japan provide compensation.[68] In Japan, "an apology without accompanying reparation is often considered to be an empty gesture."[69] Therefore, it is vital that Japan provide some measure of compensation.[70]

Truth commission

Another option would be to establish a truth commission. Given that until the 1990s almost nothing was written or discussed publicly about Japanese biological warfare during the war,[71] a truth commission would serve the important purpose of creating an accurate historical record, while at the same time providing satisfaction for the victims and closure for Japan. Truth commissions typically deal with nations at a point of transition, when they are ready to break with the past, promote national reconciliation and obtain political legitimacy.[72]

Indeed, a truth commission may have any or all of the following five aims: "(1) to discover, clarify, and formally acknowledge past abuses; (2) to respond to specific needs of victims; (3) to contribute to justice and accountability; (4) to outline institutional responsibility and recommend reforms; and (5) to promote reconciliation and reduce conflict over the past."[73]

Perhaps Japan is finally ready to acknowledge its wartime atrocities, as the 2002 verdict in the Chinese class action was the first time that Japan acknowledged the existence of Unit 731 and the deaths of many Chinese as a result of its biological warfare.[74] Ideally, a truth commission would have the support of both the Japanese Prime Minister and the government.[75] This would help ensure a satisfactory outcome, as truth commissions are "most successful when they are sanctioned by the state within which they operate."[76]

Conclusion

Justice for the victims of Unit 731 is long overdue. Despite the fact that more than 70 years have passed since Japan carried out its horrendous biological experimentation, the terrible legacy of Unit 731 will not rest until Japan acknowledges its crimes and attempts to make amends. By formally apologizing, compensating victims, and/or establishing a truth commission, Japan will finally have taken a positive step towards providing some measure of justice and closure.

Endnotes

1 Ralph Blumenthal, *'The World: Revisiting World War II Atrocities; Comparing the Unspeakable to the Unthinkable'* The N.Y. Times (7 March 1999).

2 Peter Williams and David Wallace, *Unit 731: Japan's Secret Biological Warfare in World War II* (1989) 210.

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4 Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (2008) 248.

5 Daniel Barenblatt, *A Plague upon Humanity: The Secret Genocide of Axis Japan's Germ Warfare Operation* (2004) xviii.

6 Robert K. D. Peterson, *'Japan's Role in Developing Biological Weapons in World War II and its Effect on Contemporary Relations between Asian Countries'* (Montana State University) www.montana.edu/historybug/yersiniaessays/shama.html accessed 4 March 2017.

7 Gary Reynolds, *'U.S. Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan'* (2001) Cong. Research Serv., RL30606, 17.

8 Nicholas D. Kristof, *'Unmasking Horror – A special report; Japan Confronting Gruesome War Atrocity'* The N.Y. Times (17 March 1995) www.nytimes.com/1995/03/17/world/unmasking-horror-a-special-report-japan-confronting-gruesome-war-atrocity.html.

9 *Convention (IV) respecting the Laws and Customs of War on Land art.* 4, 18 Oct1907, 36 Stat. 2277, T.S. No. 539.

10 Kirsten Sellars (ed.), *Trials for International Crimes in Asia* (2016) 11.

11 The Hague Convention, *see* above at note 9, at art. 23(a); Barenblatt, *see* above at note 5, at 107.

12 *Declaration (IV,2) concerning Asphyxiating Gases*, 29 July1899; James Brown Scott (ed.), *Texts of the Peace Conferences at The Hague, 1899 and 1907* (1908) 81.

13 Barenblatt, *see* above at note 5, at 107.

14 *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, 17June 1925,26 U.S.T. 571, 94 L.N.T.S. 65.

15 George Bunn, *'Gas and Germ Warfare: International Legal History and Present Status'* (1970) 65(1) Proceedings of the National Academy of Sciences of the United States of America, 255.

16 *Trials for International Crimes in Asia*, *see* above at note 10.

17 *Convention relative to the Treatment of Prisoners of War*, 27 July 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

18 *Ibid*.

19 Totani, *see* above at note 4, at 100.

20 *Ibid*. at 99.

21 Sir Robert Jennings & Sir Arthur Watts (eds.) *Oppenheim's International Law* (9th edn, 1996). 1230-31 §605 Refusal of ratification.

22 Totani, *see* above at note 4, at 100.

23 *'The Conditions of Employment of Prisoners of War: The Geneva Convention of 1929 and Its Application'* (1943) 47Int'l Lab. Rev. 169, 172.

24 Totani, *see* above at note 4, at 86.

25 *Oppenheim's International Law*, *see* above at note 21, at 81: §19 International law and municipal law: the position in various states.

26 Totani, *see* above at note 4, at 99-100.

27 *Trials for International Crimes in Asia*, *see* above at note 10, at 127.

28 Reynolds, *see* above at note 7, at 14.

29 Patrick Fong, *'Inter Arma Enim Silent Leges: The Impunity of Japan's Secret Biological Warfare Unit'* (2000)6 New Eng. Int'l & Comp. L. Ann. 79, 81.

30 *Trials for International Crimes in Asia*, *see* above at note 10, at 127.

31 Williams & Wallace, *see* above at note 2, at 35.

32 *Trials for International Crimes in Asia*, *see* above at note 10, at 127. The local residents had been told that the Ping Fan facility was actually a lumber mill, so referring to the human subjects as '*maruta*' amused the researchers. Mangold & Goldberg, *see* above at note 32, at 18.

33 Fong, *see* above at note 47, at 81-82.

34 *See eg* Barenblatt, *see* above at note 5, at 28; Michael Bryant, *A World History of War Crimes: From Antiquity to the Present* (2016) 191; Fong, *see* above at note 47, at 82; *Trials for International Crimes in Asia*, *see* above at note 10, at 127.

35 Williams & Wallace, *see* above at note 2, at 36.

36 Mangold & Goldberg, *see* above at note 32, at 19.

37 Barenblatt, *see* above at note 5, at 50.

38 *Ibid*. at 44.

39 Kristof, *see* above at note 8.

40 *Ibid*. A former employee of Unit 731 testified that he once saw a six-foot-high glass jar which contained a Western man who had been cut into two pieces vertically and preserved in formaldehyde.

41 Fong, *see* above at note 47, at 83.

42 Bryant, *see* above at note 52, at 191; Kristof, *see* above at note 8.

43 Kristof, *see* above at note 8.

44 *Ibid*.

45 Barenblatt, *see* above at note 5; Richard John Galvin, *'The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes'* (2003) 11 Tul. J. Int'l & Comp. L. 59, 66.

46 Barenblatt, *see* above at note 5.

47 *Ibid*. at xxi.

48 Mangold & Goldberg, *see* above at note 32, at 23.

49 Kristof, *see* above at note 8.

50 Fong, *see* above at note 47, at 84-85 n.36 (quoting Iris Chang, *The Rape of Nanking* (1997) 216).

51 Barenblatt, *see* above at note 5, at xxi.

52 *Ibid*. at xxii.

53 In this regard, the US government should also apologise for its complicity in concealing the crimes of Unit 731. However, that is beyond the scope of this paper. *See* above, Fong, at note 47, at 90-91.

54 Reynolds, *see* above at note 7, at 19-20.

55 *Ibid*.

56 *Ibid*. at 20.

57 *Ibid*.

58 Galvin, *see* above at note 63, at 79.

59 Kirk Spitzer, *'Sorry, But Japan Still Can't Get the War Right'* (Time, 20 May 2013), http://nation.time.com/2013/05/20/sorry-but-japan-still-cant-get-the-war-right/.

60 *Ibid*.

61 Kaufman, *see* above at note 3, at 649.

62 Reynolds, *see* above at note 7, at 10. While the Peace Treaty was necessarily concerned with ending the hostilities and promoting peace, it unfortunately deprived Unit 731's victims of any compensation. *See* above, Barenblatt, at note 5.

63 Reynolds, *see* above at note 7, at 25.

64 *Ibid*.

65 *Ibid*. at 26.

66 Galvin, *see* above at note 63, at 110.

67 *Ibid*.

68 *Ibid*.

69 *Ibid*. at 113.

70 *Ibid*.

71 Barenblatt, *see* above at note 5, at xx.

72 Galvin, *see* above at note 63, at 92.

73 Kaufman, *see* above at note 3, at 658.

74 Barenblatt, *see* above at note 5.

75 Galvin, *see* above at note 63, at 103.

76 Kaufman, *see* above at note 3, at 658.

INTERNATIONAL LAW SECTION
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A CRUDE AWAKENING

U.S. Sanctions on the Russian Oil Sector

BY

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Introduction

This article will discuss U.S. economic sanctions on Russia as enforced by the Office of Foreign Assets Control ("OFAC"), a government agency within the U.S. Department of the Treasury. Specifically, we will provide an overview of Directive 4 to Executive Order 13662 ("Directive 4"), which prohibits certain transactions related to the Russian oil sector.[1] While Directive 4 does not prohibit all oil sector transactions with companies in Russia, it does create many potential obstacles for U.S. businesses. We will also briefly discuss Russian oil sector prohibitions administered by the Department of Commerce Bureau of Industry and Security ("BIS").[2] Russia and Texas are two of the largest producers of oil and gas in the world, and, because many companies involved in the petroleum industry in Texas have dealings with Russian entities or individuals, they are likely to be faced with sanctions issues. Below we describe some of the issues that need to be addressed prior to the commencement of transactions involving Russian parties in the context of certain oil exploration and production activities.

Background

U.S. economic sanctions are a tool of foreign policy that target countries as well as activities related to national security and other foreign policy-based concerns, such as terrorism, narcotics trafficking, human rights, and cybersecurity. In 2014, the Obama Administration implemented various economic sanctions against Russia in response to Russia's occupation of the Crimea region of Ukraine. These sanctions programs included: 1) a trade embargo against Crimea; 2) blocking sanctions against persons listed on the Specially Designated Nationals and Blocked Persons ("SDN") List; and 3) sectoral sanctions prohibiting certain transactions with persons identified on the Sectoral Sanctions Identification ("SSI") List.[3] President Obama's sanctions were implemented primarily through a series of Executive Orders.

In August 2017, President Trump signed the Countering America's Adversaries Through Sanctions Act ("CAATSA"). This comprehensive, bipartisan sanctions regime targeted Russia, North Korea, and Iran. The part of CAATSA that focuses on Russia, the Countering Russian Influence in Europe and Eurasia Act of 2017 ("CRIEEA"), codified many of the Executive Orders implemented during the Obama Administration.[4] Additionally, CRIEEA expanded the existing scope of sanctions on Russia as well as implemented new secondary sanctions (sanctions that apply to activities by non-U.S. individuals and entities).[5] The sanctions on Russia were passed in response to Russia's cyber meddling in the 2016 elections as well as their continued occupation of the Crimea region of Ukraine.

Specifically, the relevant Russian sectoral sanctions are implemented through four directives. Directives 1 through 3 prohibit and impose restrictions on various kinds of financial transactions between U.S. persons and individuals or entities identified on the SSI List. Directive 4 is slightly different from the other Directives in that it provides more tangible restrictions on exports of goods and non-financial services related to the Russian oil industry.

Directive 4

Directive 4 prohibits:

The provision, exportation, or reexportation, directly or indirectly, of goods, services (except for financial services), or technology in support of exploration or production for deepwater, Arctic offshore, or shale projects that:

(1) have the potential to produce oil in the Russian Federation, or in a maritime area claimed by the Russian Federation and extending from its territory, and that involve any person determined to be subject to this Directive […]; or

(2) are initiated on or after January 29, 2018, that have the potential to produce oil in any location, and in which any person determined to be subject to this Directive… has (a) a 33% or greater ownership interest, or (b) ownership of a majority of the voting interests.[6]

There is a lot to unpack in Directive 4. To start, "persons subject to this Directive" means persons that are listed on the SSI List and specifically identified as subject to Directive 4. The list of parties subject to Directive 4 includes several prominent Russian energy companies, such as Gazprom, Lukoil, and Rosneft. Notably, OFAC's 50% rule applies for purposes of the SSI List. The 50% rule states that an entity that is owned 50% or more by an individual or entity on the SSI List will also be treated as being on the SSI List. So, if Company A is listed on the SSI List and owns 80% of Company B, then Company B will also be considered to be on the SSI List. OFAC also applies the 50% Rule in conjunction with aggregation rules when determining which transactions are prohibited. For example, Company A and Company B are both listed on the SSI List. Company A owns 30% of Company C, while Company B owns 25% of Company C. Company C would be considered to be on the SSI List, because it is owned 55% by entities on the SSI List.[7]

Further, Directive 4 was amended by CAATSA in October 2017 to add the second section of the directive related to oil produced in any location. This updated prohibition is interesting for a couple of reasons. First, the prohibition potentially now applies to oil projects anywhere in the world. Second, this part of the prohibition focuses on ownership of or voting interests in the project by a Directive 4-subject person, rather than just the involvement of a Directive 4-subject person. Importantly, this portion of the Directive 4 prohibition applies to listed persons having only a 33% ownership interest in the specified projects. Therefore, a project with a Russian company as a minority owner in a country other than Russia could be subject to the prohibitions of Directive 4.

Another important aspect of Directive 4 is the meaning of the terms used in the directive. As with many other sanctions regimes, the terms used do not necessarily carry their ordinary meanings. OFAC provided the definitions of some important terms in the Frequently Asked Questions ("FAQs") section of its website:

- **Initiated**. Part of Directive 4 applies only to projects initiated on or after January 29, 2018. According to OFAC, a project is initiated when, "a government or any of its political subdivisions, agencies, or instrumentalities (including any entity owned or controlled directly or indirectly by any of the foregoing) formally grants exploration, development, or production rights to any party."[8]
- **Services**. OFAC defines services to include, for example, drilling services, geophysical services, geological services, logistical services, management services, modeling capabilities, and mapping technologies. Importantly, for purposes of Directive 4, services does not include the provision of financial services, clearing transactions or providing insurance related to such activities.[9]
- **Deepwater**. OFAC defines deepwater as underwater activities at depths of 500 feet or more.[10]
- **Shale projects**. The term "shale projects" applies to projects that have the potential to produce oil from resources located in shale formations.[11]
- **Artic offshore projects**. This phrase applies to projects that have the potential to produce oil in areas that (1) involve operations originating offshore, and (2) are located above the Arctic Circle.[12]

While the above focuses on primary sanctions, CAATSA also implements secondary sanctions. Under Section 225 of CAATSA, the President is required to impose sanctions on non-U.S. persons that knowingly make a significant investment in a "special Russian crude oil project," which is a deepwater, Arctic offshore, or shale oil project in Russia.[13] The Department of State ("State") is tasked with administering Section 225 and has stated it will determine what is "significant" on a case-by-case basis. In published guidance,[14] State has explained that it will not consider an investment significant if a U.S. person would not require specific licenses from OFAC to participate in the same conduct.[15] Section 226 of CAATSA, administered by OFAC, also now requires the imposition of secondary sanctions on Russian or other foreign financial institutions that knowingly engage in or facilitate significant transactions involving Russian deepwater, Arctic offshore, or shale oil projects.[16]

The penalties for violations of Directive 4 can be steep. Civil penalties can be up to $295,141 per violation, or up to twice the value of the transaction that was the basis for the violation. Criminal, willful or knowing violations, can lead to penalties of up to $1 million per violation and imprisonment up to 20 years for individuals.

Screening of Parties

Because the Directive 4 prohibitions hinge on the involvement of a party on the SSI List, it is important that companies engage in the screening of all parties involved in potential transactions. Various government agencies maintain lists of entities and individuals with whom U.S. (and sometimes non-U.S.) persons are restricted or prohibited from transacting. These lists include, but are not limited to, OFAC's SSI and SDN Lists, and the BIS Entity List. Entering into a transaction with a party on a denied party list can have grave consequences, such as sanctions, fines, or the denial of export privileges.

As such, companies should ensure that all parties to a transaction are screened. The U.S. Government provides a free screening search function that consolidates multiple government screening lists, aptly named the Consolidated Screening List ("CSL").[17] By searching for the name and address of an individual or company on the CSL, parties are able to screen against multiple government lists at once.

Example

Because the minutia of the above can be complex, the following example aims to highlight the issues encountered during a Directive 4 analysis. Suppose Company A (a Texas company) plans to enter into an agreement to sell fracking fluid to Company B (a Russian company). Based on the sales agreement, Company A knows the fracking fluid will be used in a hydraulic fracturing project in Russia, and hydraulic fracturing is most often associated with shale projects. Company B is a subsidiary of Company C, which is on the SSI List and owns an unknown percentage of Company B. Finally, assume it is not clear from the sales agreement who the owner of the specific fracking project is. Company A should resolve several questions before exporting any fracking fluid to Company B in Russia. These questions include:

- Is Company B subject to Directive 4 based on Company C's listing on the SSI List?
- When was this project initiated?
- Who are the owners of the specific project, and how is this ownership structured? Is a 33% or greater owner listed on the SSI List?
- Is this project a shale project?

  Even if not, how can Company A be sure the fracking fluid will not be used in a shale project?

End-use statements and other assurances from Company B stating that the project is not a shale project or subject to any U.S. sanctions would be helpful to show due diligence on the part of Company A. But OFAC sanctions violations are viewed under a strict liability standard, so if OFAC determines the fracking fluid has been used in activities prohibited by Directive 4, Company A could face an enforcement action. Additionally, it is notoriously difficult to determine the ownership structure of some Russian companies and oil projects, so Company A may not be able to obtain a verifiable answer regarding the applicability of Directive 4 to Company B or the proposed transaction. Ultimately, companies working in this space must conduct a cost-benefit analysis with regards to each proposed transaction and determine the level of risk with which they are comfortable. A legal opinion from international trade counsel can be helpful in deciding whether or not a transaction is permissible.

BIS Rule

As if the above was not complicated enough, the Department of Commerce's export control agency, BIS, has its own prohibitions on exports to the Russian oil industry. Section 746.5 of the Export Administration Regulations ("EAR") imposes specific licensing requirements for certain parts identified in Supplement No. 2 to part 746 of the EAR as well as specific parts identified in the regulation.[18] These parts cannot be exported, reexported, or transferred without a license if the party knows the item will be used directly or indirectly in the exploration for, or production of, oil or gas in Russian deepwater or Arctic offshore locations or shale formations in Russia.[19]

Additionally, if the party is unable to determine whether the item will be used in such projects, then a BIS license is required for export. Parties should also be aware that BIS may inform persons individually or through amendment to the EAR that a license is required for a specific end-use or end-user because there is a high risk of use in the activities specified above. Any request for such a license will likely be denied as BIS maintains a general policy of denial for such license requests.

Latest Developments

In the latest string of Russian sanctions related developments, the State Department announced on August 8, 2018 that it would be imposing new sanctions on Russia pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act (CBWA), as a result of Russia's attempted assassination of former Russian intelligence officer Sergei Skripal and his daughter. A *Federal Register* notice was published on August 27, 2018 and more significant sanctions must be imposed in the next three months if the U.S. government finds that Russia does not meet certain conditions, absent a waiver by the President of the United States.[20] These potential additional sanctions should be closely monitored because there is an option for a very punitive track of sanctions depending on how the Russian government responds.

Conclusion

Overall, Directive 4, CAATSA sanctions, and other U.S. Government regulations impose a complex network of restrictions on U.S. parties seeking to do business with the Russian oil industry. Even when OFAC and other relevant agencies provide guidance, few bright line rules exist. Whether a transaction is covered by the specific authority is determined by the facts of the specific case.

As such, it is important that parties who want to engage in transactions with the Russian oil industry conduct their due diligence. All parties to the transaction should be screened against the SSI and SDN Lists, as well as any other denied party lists maintained by U.S. government agencies. The ownership of these parties and the interests held in oil projects must also be investigated to determine the potential involvement of sanctioned parties. Additionally, although this article focuses on Russian sanctions, other oil-producing nations, including Iran and Venezuela, among others, are subject to OFAC-administered sanctions. This means that any company engaged in oil and gas transactions with foreign companies or countries should make sure that there are no prohibitions on the transaction and conduct a review of any applicable sanctions programs.

Endnotes

1 Exec. Order No. 13,662, 79 Fed. Reg. 16,169 (Mar. 20, 2014). *Countering America's Adversaries Through Sanctions Act (CAATSA)*, Pub. L. No. 115-44, 131 Stat. 886 (2017).

2 *See* 15 C.F.R. § 746.5 (2018).

3 Briefly, the SDN List identifies individuals and entities that are targeted pursuant to U.S. sanctions programs, andthe assets of SDNs in the United States are blocked (frozen) by the Department of the Treasury. While U.S. Persons generally are prohibited from engaging in any transactions with SDNs, only certain types of transactions with SSI-Listed entities are prohibited. "U.S. Person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States. 31 C.F.R. § 560.314 (2018).

4 *See* CAATSA § 201.

5 *See* CAATSA §§ 201-259.

6 U.S. Dep't of the Treasury, Resource Center, Ukraine-/Russia-related Directives, Office of Foreign Assets Control, *Directive 4 (as Amended on October 31, 2017) Under Executive Order 13662*, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13662_directive4_20171031.pdf (last visited Aug. 31, 2018).

7 *See* FAQ 399, U.S. Dep't of the Treasury, Resource Center, *OFAC FAQs: General Questions*, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx (last visited Aug. 31, 2018); U.S. Dep't of the Treasury, *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked* (2014), https://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf (last visited Aug. 31, 2018).

8 *See* FAQ 536, U.S. Dep't of the Treasury, Resource Center, *OFAC FAQs: Other Sanctions Programs*, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx (last visited Aug. 31, 2018).

9 *Id.* at FAQ 412.

10 *Id.* at FAQ 413.

11 *Id.* at FAQ 418.

12 *Id.* at FAQ 421.

13 *See* CAATSA § 225; *Ukraine Freedom Support Act of 2014*, Pub. L. No. 113-272, § 4(b), 128 Stat. 2954 (2014).

14 U.S. Dep't of State, Energy Sanctions, Section 225 Public Guidance, *CAATSA/CRIEEA Section 225 Public Guidance* (2017), https://www.state.gov/e/enr/275194.htm (last visited Aug. 31, 2018).

15 In general, licenses are required from OFAC to engage in a transaction that would otherwise be prohibited. There are two types of licenses: general licenses and specific licenses. A specific license is issued by OFAC to a particular person or entity to authorize that person or entity to engage in a particular transaction. Specific licenses are issued in response to written license applications. On the other hand, a general license authorizes a particular type of transaction for a class of persons without the need to apply for a license. So, conduct that does not require a specific license would be conduct authorized by a general license or not prohibited by OFAC.

16 *See* CAATSA § 226.

17 The CSL is found at https://www.export.gov/csl-search.

18 U.S. Dep't of Commerce Bureau of Industry and Security, Regulations, Export Administration Regulations, *Pt. 746 Embargoes and Other Special Controls*, § 746.5 Russian Industry Sector Sanctions; Supplement No. 2 to Part 746—Russian Industry Sector Sanction List (2017), https://www.bis.doc.gov/index.php/documents/regulation-docs/420-part-746-embargoes-and-other-special-controls/file (last visited Aug. 31, 2018).

19 *Id.*

20 *Determinations Regarding Use of Chemical Weapons by Russia Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991*, 83 Fed. Reg. 43723 (proposed Aug. 27, 2018) (to be codified in 22 U.S.C. § 5604).

HYBRID DUE DILIGENCE

International M&A and Litigation

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Introduction

"Know your customer" is a popular punchy phrase in sales and marketing organizations. This is equally true and growing in importance in conducting a thorough risk evaluation in international M&A transactions or litigation involving foreign partners and parties, particularly non-USA corporations with opaque ownership structures. After all, facts are friendly and knowledge leads to attorneys and professionals doing our best job, considering whether the means we have used lead to the correct conclusion regarding risks.

Many experienced international lawyers upon reading the above title are likely thinking either "I know, we do this all the time"...or "so what." Conduct a thorough and disciplined diligence, find the risks and legal issues, prepare a mitigation matrix or analysis, manage the risks through contracts, insurance, and deal structure, and everything will be fine.

In today's international law and business arenas, however, certain risks simply cannot be mitigated or structured away with contracts. We have a duty to clients to have knowledge of all relevant and legal risks. Knowledge requires data that is accurate, verifiable, and legally obtained. Our reliance on electronic devices, internet, and love of all things digital in our personal and professional lives means that we are aware there is a great deal of information available to attorneys and advisers in redefining what is the proper scope of due diligence for a particular case so that all quantitative and qualitative issues are discovered timely. Accessing all relevant data requires use of

traditional, digital, and cyber approaches, each conducted in a proper manner. Leveraging the data obtained will help attorneys advise their clients in negotiating a better deal in a transaction and/or commercial settlement of a dispute.

This article will compare the traditional conventional approach in due diligence typically practiced in America with a hybrid approach, along with a brief analysis of several real-life cases. Traditionally, risk mitigation strategies focus on commercial, legal, financial, and technical areas and issues (quantitative measures). However, the majority of projects and deals involving American and foreign partners run into problems (e.g., bankruptcy, litigation, non-compliance) that could have been avoided with a good (honest) partner, early active handling of business culture conflicts, and aligned business goals and values. Disagreements and disputes over money, financial rewards, and profit allocation can usually be worked out, if the management team and decision makers share the same business goals and ethical principles. If a deal is not going to work out, rational business people would prefer to have the knowledge required to make a decision not to go forward earlier than later so they can focus on the right deals with the right partners.

What is Hybrid Due Diligence?

Hybrid Due Diligence can be described visually as "360 degree due diligence." [1] Information is the real commodity (i.e., Data is King!). To think of due diligence as only consisting of gathering files, interviewing clients, taking oral statements, surveillance, and spending many hours in the data room on documents provided by the other side… are things of the past. In a hybrid due diligence, the traditional, digital, and cyber aspects of the case are conducted concurrently. This strategy allows for the attorneys, investigators, and technical team to contemporaneously share the information in real time and results in a much more thorough investigation that is completed faster and at less cost. While this approach seems logical, there are currently only a handful of firms using this strategy in deal making and dispute resolution. In the hybrid model, attorneys work with both traditional investigators who have the in-depth knowledge of digital forensics and macro appreciation for evidentiary rules, and technology experts who possess the knowhow on software and cyber tools. What follows is a comparison of how this would work in Transaction versus Litigation situations and how having this information earlier in the process is better for the client.

The transactional world

The traditional approach to due diligence in cross border transactions typically focuses on the corporate entities and/or assets involved, financing, economics, technology (i.e., is the technology the best available and proven) and the usual geo-political risks (i.e., is there a threat of expropriation, regime or law change that would be detrimental for the client). The traditional approach is, frankly speaking, single dimension and merely one layer of peeling away the onion. There is generally less attention given to the decision makers and significant people working within or for the business partners and counterparties. In the typical corporate approach and final investment decision process, it is common for the client to increase the internal hurdle rate for capital to reflect "local and country" risks that carry higher degrees of risk, also referred to as a risk adjusted rate of return. However, the right query should be - is the valuation correct? Even if the purchase price is "indicative" and subject to adjustments for material flaws found in due diligence, how do we know all flaws are found (and in time) to provide the client with leverage to negotiate a fair purchase price adjustment before financial close? If a full qualitative check has not been performed on the assets, foreign entities, and people with whom we are considering doing business, how can we really know all the facts that will affect our ability to provide sound advice in the best interests of our client?

Logically, in today's environment, a potential buyer should conduct a forensic investigation on digital and intellectual property assets in the very early stages of the deal chain, before negotiations begin, to obtain an accurate valuation of all deal components and potential exposures (e.g., has the IP already been stolen by employees or hackers, or internal systems compromised?).[2] In addition, early checks help predict potential pitfalls and stumbling blocks in deal progression, decreasing litigation risks.

Here are two examples of applying our talk to action in contemporary transactions:

1. At an international energy conference outside of the USA, Company A presented its multi-million dollar energy infrastructure project, seeking to raise capital and secure long-term contracts for the purchase of energy products. Company B, a multi-national petrochemical trading company, requested its adviser to attend the conference, evaluate Company A's project and prepare a feasibility study report. Due to inaccurate and misleading statements made by Company A at the conference, the adviser recommended that Company B should first investigate the project, business entity, and ownership chain, prior to beginning negotiations for investment and offtake. Using the hybrid approach to due diligence, the adviser discovered that none of the development or management team had energy experience or a track record of completing projects, contrary to representations. In addition, the site location did not exist, and the main investors originated from countries with a reputation for nefarious sources of funding and troubling political connections. In other words, the data uncovered relating to project development, investors, management team, and Board of Directors, raised serious concerns of compliance with federal and state law issues plus would lead reasonable people to conclude there was a strong likelihood the project would not be completed. The early stage investigation revealed major gaps between what was represented outside of the USA and the truth, and helped Company B "step back from the cliff" and analyze its approach to business goals.
2. Company A, a foreign investor and experienced power EPC company, received a solicitation from a well-known international investment bank representing Company B, owner of USA power projects in development. A project summary (a/k/a "teaser") was prepared by the investment bank and distributed to the bank's customers, including Company A. Believing the investment bank vetted the opportunity, Company A executed a confidentiality agreement and non-binding letter of intent with Company B, and hired external counsel and a commercial adviser to conduct due diligence, review project and company documents, prepare a financial model, and advise on acquisition and hedging strategies. During the traditional due diligence, several inconsistencies and gaps were uncovered between statements from Company B's management team and documents in the data room. A deeper hybrid investigation revealed that Company B's officers were sued by its private equity investors and reached a settlement of the civil suit; however, were under indict-

> ment by federal district court for embezzlement…and possess a track record of using different business entities to incur debt alleged to be on behalf of the project company. The investment bank's adviser informed Company A's advisers that these matters were known to the bank, however, as the transaction involved a sale of project assets only, the bank took the position their client's pending criminal case did not need to be disclosed. Based on its advisers' findings, Company A declined to proceed with negotiations as any dealings with Company B's team would damage their corporate and individual reputations, subject them to investigations from regulators in their home country, and render any asset valuation indefensible.

Our bottom line advice is to encourage clients to conduct comprehensive "360 degree due diligence" deploying traditional, digital, and cyber methods at the same time and as soon as possible in the early stages of considering a transaction – in other words, at the stage of determining initial economic feasibility. This will eliminate unexpected risks, and potential bad news for clients with schedules and budgets that need certainty and predictability of costs. The results hopefully speak for themselves – the client ends up with a good deal with the right partners in a long-term profitable business rather than a bitter experience.[3]

When litigation becomes a reality

A corporate client becomes aware of a threatened or pending litigation, and the sequence of events set forth below is what we normally see takes place. The company's executives informs internal counsel (hopefully as a first step) and launch an internal investigation, meaning all paper and electronic files are rounded up and centralized as employees figure out how to make sense of the massive amounts of information. The client and internal counsel hire external counsel. The legal team review results from the internal investigation and discover the investigation was not thorough and/or that the evidence gathered is insufficient for their purposes. External resources are brought in, attorneys with a specialty in the subject matter and traditional investigators, who may or may not have experience in dealing with complex cases requiring digital forensics and cyber tools. External counsel and investigator gather documents, take statements, might conduct surveillance, and prepare a report. Often, there is a comment in the report about potential cyber and digital evidence that needs collecting. The legal team then hires a company that specializes in collecting digital evidence and they submit their report on the data.

> "The longer you can look back, the farther you can look forward.
> – Winston Churchill"

When combining these two separate reports - the traditional (analog) investigation and the cyber/digital investigation - the attorney realizes there were missed opportunities to gather evidence due to the fact the investigations were conducted separately and at different periods. Often, they also realize the digital evidence is inadmissible due to accidental (or intentional) mishandling during the client's internal investigation by IT personnel and lack of coordination between attorneys and tech staff.

Another common problem encountered is to rely upon firms that specialize solely in digital forensics collection, excellent technically, but they lack the knowledge and experience in dealing with attorneys or professionals who work in compliance and law enforcement. As a consequence, their report lacks the thorough explanation needed to render evidence relevant to the case. If conducted concurrently early on (when there is a "whiff" of potential litigation), a hybrid approach is the most effective way to tackle complex issues. When all forms of evidence are synchronized and collated together, relevancy and leverage for the client is increased, naturally, assuming the disciplines are working together as a single cohesive unit.

Prevent against evidence spoliation

One often overlooked negative outcome of relying primarily on an internal or solely traditional investigation is the potential for accidental or intentional evidence spoliation. Accidental spoliation of evidence occurs because corporate executives and counsel task internal IT staff to gather and analyze digital evidence as part of the internal investigation. Not only do internal IT staff rarely have the training, experience, or certifications to properly handle digital evidence, state laws governing who can legally perform a digital forensic investigation vary widely. Traditional investigators may also inadvertently taint the evidence due to their lack of experience or understanding of the issues unique to handling and documenting digital evidence.

There is also the real possibility of intentional destruction of evidence. In cases involving digital wire fraud, breach of computer security, stolen data, or theft of intellectual property, internal IT staff should not be excluded… from those potentially involved in the destruction.

The typical corporate executive or officer, watching the bottom line, naturally relies upon the IT department to conduct internal investigations. However, is this wise? Probably not when viewed through conflict of interest lenses; compliance should not be conducted by those with potentially self-serving interests. Attorneys should advise clients to conduct such investigations through external resources to secure an unfiltered and neutral assessment of the situation.

Here is a brief summary of a recent corporate espionage case. Several disgruntled former employees claiming protection under federal whistleblower laws charged Company A, a privately owned remediation and hazardous waste disposal company, with environmental contamination. Attorneys and technical experts were hired to assist in the criminal defense. Under the hybrid model, evidence was gathered using traditional, cyber, and digital means at the same time. During discovery, Company B made an unsolicited offer to purchase all of Company A's assets and business. The criminal lawsuit against Company A had a direct and substantial impact on their business and assets valuation, yet Company B wanted to purchase Company A. Finding the timing of the offer odd, the attorneys tasked investigators with determining if the disgruntled employees and Company B were working in collusion for the purpose of intentionally degrading Company A's valuation for the benefit of Company B. Evidence was uncovered that confirmed the high probability of collusion; however, by this time, the financial and psychological pressures were too great for Company A and owners to survive…not a happy ending.

Conclusion

Our firm's 30 plus years of experience in Asia and America have led us to encourage our clients to perform "360 degree" due diligence at the earliest stage possible. This year, we are seeing a major shift in the winds rising from current events, international trade conflicts, growing geopolitical tensions, cyber security realities, and disruptive forces from technology advancements. The international law business is undergoing a metamorphosis as the unquantifiable risks that impact the client's investment or business strategy have increased and such risks cannot be uncovered through traditional methods. Not only is it business sensible to move diligence upfront to the beginning of the deal or litigation process, it is also our duty as attorneys to high grade and modernize our approach in order to be better advisers, considering only what is truly in the client's best interests.

Endnotes

1 John Shirley, Chief Investigator of Orchid Law PLLC

2 During negotiations with Verizon Communications on a $4.8 billion sale of its internet operations, Yahoo (seller) finally disclosed that 1 billion user accounts were compromised some time back. Three months prior to this disclosure, Yahoo stated that just 500 million user accounts were breached. We suggest that the buyer should initiate and advance the investigation, prior to negotiations and setting expectations on valuation with the seller.

3 In a case involving wind power development in the USA, a well-known equipment provider introduced the seller to a foreign buyer. The foreign buyer trusted the introduction, agreed to form a joint venture and signed a conditional purchase and sale agreement with diligence provisions. However, the seller then refused to respond to data requests and took money from the working capital account to pay debts not related to the project, and went "dark." During litigation, evidence collected using digital tools revealed the CEO of the seller as a "serial litigator," one who uses litigation as a strategy to make money. Eight years later, the parties remain in litigation.

MEXICO'S ENERGY INDUSTRY REFORM MOVEMENT

Is it sustainable?

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This article first appeared on the website of the Oil and Gas Law Committee of the Legal Practice Division of the International Bar Association, and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association.

Introduction

For the past seven decades it has been assumed that *Petroleos Mexicanos* (Pemex) would continue to dominate the Mexican oil and gas industry due to the Mexican Constitution's prohibition of the participation of private investors in the industry. On December 20, 2013, however, a decree of President Enrique Peña Nieto was published in the Mexican Official Gazette, which amended Articles 25, 27 and 28 of the Constitution, allowing such private investment in the energy industry.[1] In August 2014, the Constitutional amendments were approved by the Congress through implementing legislation, which opened the door to the creation of an entirely new kind of oil and gas industry in Mexico.[2] The legislation included the passage of nine new laws and the amendment of twelve existing laws in an effort to improve the way in which the energy industry was regulated. By so doing, the government hoped it would attract foreign and domestic private investment to its stagnant economy.

Much has been written about the reform movement, especially in terms of the differences between the old system and the new reform system's approach to the upstream, midstream and downstream sectors of the industry. The upstream segment is definitely the most important of the three, and it may well hold the most upside potential for the government, Pemex and both foreign and domestic private investors. There are several practical challenges contained in the details of the reform legislation, as well as some major social and political problems, all of which will be studied very closely by potential private investors.

Challenges to the Reform Movement

Several factors worked against the effectiveness of the reforms right from the beginning. For example, the free fall of oil prices in the latter half of 2014 served to make observers wonder whether the reforms could overcome the negative effect of the over-supply of oil throughout the world, especially in North America. On June 20, 2014, the price of a barrel of West Texas Intermediate (WTI) crude oil reached its peak at $107.26,[3] but no one could have predicted that it would decrease to $43.46 per barrel by March 17, 2015.[4] This represented an incredible and unforeseen plunge of 59.5%.

Some of the other problems were linked to the rule of law and were recently highlighted by the Mexico Center at Rice University's Baker Institute for Public Policy in a paper entitled "Security, the Rule of Law and Energy Reform in Mexico."[5] The paper refers to three issues that are related to the rule of law, as follows: "the capacity of the Mexican state to protect energy projects from the onslaught of organized crime; the capability to offer guarantees against the web of corruption that currently envelopes the country; and the ability to prevent and deal with social conflicts related to natural resource allocation, such as land and water."[6] Of these three, organized crime and corruption appear to be the most troubling and most difficult to address. Despite the government's gallant efforts to provide more security to fight organized crime throughout the country, the authors of the paper concluded that such activities have actually "increased the level of violence, further evidenced the weakness of the state and angered civil society,"[7] which is exactly the opposite of what one would expect. This apparent incongruity, coupled with the fact that "there is no agreement among the political parties on what type of anti-corruption system must be put in place,"[8] has caused uncertainty regarding the viability of the energy reforms.

Of course, the challenges to the implementation of the reforms are not limited to the rule of law issues described above. Indeed, there are a variety of practical problems that are directly related to oil and gas field operations, some of which have been described as including, "a lack of security, field mismanagement, corruption, water shortages for shale, infrastructure dearths, and pipeline bunkering (theft) just to name a few."[9] There is also the problem of dealing with the changes of government and policy in both Mexico and the United States.

The recent Forbes article quoted in the preceding paragraph went as far as to declare that the reforms were "perhaps the most comprehensive and complex energy rule changes in any nation, at any time; lifting strict state control over the oil/gas and electricity sectors, hoping for much more foreign investment."[10] The shadow of Pemex still hangs over the entire industry, which makes one wonder whether Pemex could actually be relegated to the level of just another participant in the industry rather than the monopolistic leader. Forbes' view is, "Although change won't be easy, the good news is that the Mexican government has lowered its overreliance on Pemex, with the company now accounting for 20% of the federal budget, down from 40% a few years ago."[11] Nevertheless, it may prove to be extremely difficult for Pemex to change its deep-seated corporate culture of monopolistic thinking, planning and operating.

In addition, a recent University of Texas Energy Institute paper asserted, "When you have an institution like Pemex that for 75 years has been a state monopoly, it is inherently corrupt in the way that it does business."[12] Moreover, the issue of pipeline bunkering (theft) mentioned above was highlighted in the same paper, claiming, "Some Pemex workers are almost certainly working with organized crime to steal oil. Pemex says the current gasoline shortage in Mexico, one that's sparking continuing outrage, is in part caused by oil theft. Pemex admits corruption is an issue."[13] If these statements are accurate, it will be extremely difficult to change Pemex's monopolistic corporate culture.

Some commentators are even more bullish and consider this extraordinary and historic attempt to reform the energy industry as creating "an unprecedented opportunity for oil companies looking to tap into Mexico's huge energy potential."[14] One CEO, Steve Hanson of International Frontier Resources, has gone so far as to declare that, "In short it is the largest energy opportunity in the world today - and the door has just been opened."[15] This positive approach is as encouraging as it is surprising considering the potential problems discussed in the preceding paragraphs.

Changes in Government and Policy

The election, on July 1, 2018, of Andrés Manuel López Obrador, the former mayor of Mexico City, as the next president of Mexico came as no surprise due to his widespread popularity and the overwhelming desire for change among the citizens of Mexico. López Obrador will take office on December 1, 2018, which provides a 5-month transition period during which observers should be able to determine whether he will behave like a zealous nationalist or take a more moderate approach.

On the campaign trail, López Obrador sharply criticized international oil companies and threatened "to cut off Mexican oil imports and freeze new foreign investment in Mexico's oil and gas fields."[16] On the eve of the election, however, he "…softened his tone, raising questions about how far the populist leader is willing to go on his promise to shake up the country's energy sector again."[17] Although he has promised to respect the market economy,[18] he has also "…promised to review dozens of outstanding oil and gas exploration contracts for corruption, potentially delaying hundreds of billions of dollars in foreign investment."[19] If some corrupt practices are uncovered during the process of reviewing those contracts, many investments may be at risk.

As for Pemex, López Obrador will probably "favor a larger role for Pemex and the national government in the energy industry. He is expected, for example, to direct Pemex to build new refineries in Mexico to reduce dependence on foreign gasoline which would have significant implications for U.S. refiners. Last year, more than half of U.S. gasoline exports went to Mexico, much of it coming from the Texas Gulf Coast."[20] Pemex's refineries have historically operated at two thirds of capacity, and in 2016 the level of refined products dropped to its lowest point since 1995 even though domestic sales were at record highs.[21] In addition, "Mexico has been forced to export its own crude to the U.S. Gulf area, have it refined, and then import it again as gasoline. The U.S has 2.5 times more people than Mexico, but it has 25 times more refineries."[22] Mexico's shortage of refining capacity is an anomaly that must be addressed in order to create a more efficient and self-sufficient national petroleum industry.

In terms of the status of government relations between Mexico and the U.S., President Trump appears to have chosen NAFTA and trade, immigration, and the construction of a wall along the border with Mexico as the most central of his rallying points against Mexico. It is clear, therefore, that, "Relations between Mexico and the United States are already tense, particularly over trade and the future of NAFTA…."[23] On the other hand, "López Obrador's overwhelming victory, built in part on his vow to oppose Trump, threatens to further undermine the relations between the two countries."[24] In fact, "López Obrador, who recently struck a conciliatory tone toward the United States after bitter campaign rhetoric, is nonetheless expected to counter Trump's America-first strategy with an equally nationalistic stance and push harder on negotiations than his predecessor."[25] Given the dynamics at work between the two nations, a professor of Latin American Studies at Rice University said, "The best we can probably hope for is a maintenance of the status quo."[26] As a result, one would expect the diplomatic relations between the two countries to continue to be very tense for the foreseeable future.

The Auction Process

Five rounds of auctions were scheduled to take place between 2014 and 2019 in order to jump start the reform movement and award available acreage to Pemex and private investors. Curiously, the first round was reserved for Pemex, which "would retain areas in which it already produced, and it was awarded 83% of proven and probable reserves in the first round, 'Round Zero.' Pemex was given 21% of prospective reserves, 67% of what it had requested."[27] The majority of the so-called Round Zero reserves were located in shallow water.

Five separate tenders were scheduled for Round One of the auction process, the first of which took place in December 2014 and included 14 blocks of reserves in shallow water in the Southern Gulf area.[28] Only two bids were successful, which was a reflection of both the low oil price scenario at the time and the harsh bid terms that were required by the Mexican government.[29] It was readily apparent that an easing of some of the auction terms would be needed in order to attract more bidders to the tenders.

The second tender in Round One occurred on September 30, 2015, and was more successful because the government conducted it under improved auction terms. This time, three out of the five shallow water blocks were granted to different bidders under production sharing contracts, one of the three new types of agreements permitted by the government.[30] Despite the fact that the price of oil had decreased to less than half the amount it was "when the government started planning for these auctions,"[31] there was a counter-balancing element at work, i.e., Mexico offered blocks with proven reserves rather than exploration areas.[32] The elimination of exploration risk made these projects much more attractive than the shallow water blocks in the first tender had been.

In contrast, the third tender of Round One that took place in December 2015 was focused on the licensing of small onshore fields and resulted in the award of all 25 licenses, 18 of which were won by Mexican entities.[33]

The fourth tender of Round One took place in December 2016 and was "considered the most lucrative one" because it offered 10 deep water blocks off the coast of Mexico.[34] Eight of the 10 blocks offered received bids and were awarded to several majors like ExxonMobil, Total, BP and CNOOC. It was apparent that the major oil companies were far more interested in the deep water opportunities than the other projects that had been offered. In fact, one newspaper went so far as to claim, "The sale was validation of Mexico's decision to open its former government-monopoly energy business to foreign investment and expertise."[35]

The first tender of Round Two took place in June 2017 and involved shallow water blocks that were located far from the deep water blocks offered in December 2016. Nevertheless, the results were far above expectations because "Mexico awarded 10 of the 15 blocks that were offered."[36] The most notable winners were Eni, Lukoil, Total and Shell, which marked Shell's first upstream investment in Mexico.[37] There were three more tenders in Round Two, the last of which awarded 19 offshore deep water blocks on January 31, 2018. With oil prices at a 3-year high, Shell dominated this fourth tender by outbidding all competitors on nine of the blocks awarded.[38] Only shallow water blocks were awarded in the first tender of Round Three, which occurred on March 27, 2018. This time, 16 blocks were awarded to 12 bidders under production sharing agreements, with a total potential investment value of $8.6 billion.[39] The second and third tenders for Round Three have been consolidated and postponed until September 27, 2018.[40]

Conclusion

Despite the fact that it appeared to get off to a slow start, the Mexican energy industry reform movement has gained momentum by virtue of the success of recent auctions. The rapid escalation of accomplishments in the auction process set a positive tone for future tenders and has made believers of those who doubted the reforms could succeed.

The results of three and a half years of auction activity have been mixed, but many oil companies have been willing to invest in Mexico despite the challenges and other risks enumerated above. Now, however, potential bidders will be watching and waiting until López Obrador's new government determines (i) whether there has been corruption in the auction process and, if not, (ii) if the bid terms should be changed drastically.

Although many positive improvements have occurred, the entire process of reform in the Mexican petroleum industry is threatened by both the recent election of López Obrador as president-elect and the deterioration of diplomatic relations between Mexico and the U.S. Nevertheless, it appears that, based on what we know now, the reform process has been successful enough to warrant its continuation in the current form.

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LEGALITY OF THE UNITED STATES' IMPOSITION OF UNILATERAL SANCTIONS ON CHINESE CORPORATIONS UNDER INTERNATIONAL LAW

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Introduction

North Korea's refusal to discontinue the testing of nuclear weapons has provoked the imposition of sanctions by the United Nations. Since the first round of sanctions in 2006, the United Nations has expanded the sanctions to, among other things, ban the export of North Korea's largest sources of revenue and forbid individuals and entities from entering in joint ventures that in any way support the country's nuclear program.[1] The United Nations intended that these sanctions would pressure North Korea to end conduct that poses a "clear threat to international peace and security."[2] The United Nations' economic sanctions forbid North Korea from acquiring funds through international trade in efforts to stop foreign funding from contributing to nuclear testing.[3] In addition to the sanctions imposed by the United Nations, the U.S. exercised its domestic long-arm statute to impose sanctions on Chinese companies that continue to conduct business with North Korea.[4] China is responsible for around 90% of North Korea's revenue; mainly North Korea's coal exports from the country's capital city, Pyongyang.[5] Banking services and technology provided by Chinese companies make transactions possible, and thus enable North Korea's nuclear program.[6]

Foreign policy and national security concerns prompted the U.S. to impose sanctions on these Chinese entities and individuals. These sanctions work to prevent any joint ventures that provide North Korea with revenue that could fund the country's nuclear program.[7] Because China holds a uniquely significant role in North Korea's trade, the U.S. has been dissatisfied with China's refusal to use this role as a method of pressure in the disarmament of Pyongyang.[8] The U.S. alleges that several Chinese corporations and individuals continue to do business with North Korea, causing the government to take action to strengthen and reinforce its foreign policy objectives.[9] The U.S. Attorney's office commented on the purpose of their complaint and imposition of sanctions:

> *[T]his complaint alleges that parties in China established and used a front company to surreptitiously move North Korean money through the United States…[s]anctions laws are critical to our national security and foreign policy interests…this case demonstrates that we will seek significant remedies for those companies that violate them.*[10]

For the U.S., the importance of initiating stern action against these Chinese corporations lies in pressuring China to choose business with the U.S. over North Korea - furthering the objective to disarm North Korea.[11] Because the U.S. dollar is prominent in international banking, the U.S. carries much influence over countries involved in international transactions.[12] Of the entities targeted by the sanctions, the U.S. plans to "cut off the Bank of Dandong from the international financial system by preventing U.S. institutions from maintaining accounts for or on its behalf."[13] When selecting targets, the U.S. Treasury Secretary, Steven Mnuchin, explained that sanctioning North Korea's "external enablers" furthers the central objective of disarming the regime.[14] Mnuchin said in a statement, "[t]reasury will continue to increase pressure on North Korea by targeting those who support the advancement of nuclear and ballistic missile programs, and isolating them from the American financial system."[15]

China strongly disapproves of the U.S. exercise of extraterritorial jurisdiction, contending that unilateral sanctions do nothing to deter North Korea's conduct.[16] Instead, China believes the U.S. is infringing on their domestic sovereignty, negatively effecting international trade, and wrongly causing economic harm to third parties.[17] As a result, China argues the U.S. unlawfully exercised extraterritorial jurisdiction and encroached on issues that should be "investigated and treated in accordance with China's domestic laws and regulations."[18] Ultimately, China fears the collapse of the North Korean regime and disturbing the economic interdependence and trade.[19]

Legal Background

The situation described above raises a jurisdictional issue bearing some similarity to previous fact patterns involving the United States' use of unilateral sanctions on foreign entities.[20] Unilateral sanctions are those imposed by one "sender" state, directed against a specific "target state."[21] When a state imposes unilateral sanctions, it also acts extraterritorially because the sanctions effect the conduct of other foreign states.[22] For example, as in the present facts, the U.S. uses sanctions to pressure China to become more restrictive in its economic interactions with North Korea, thus influencing international trade.

This exercise of jurisdiction to produce effects extraterritorially is criticized as violating rules of the World Trade Organization (WTO) and offending international law principles of state sovereignty and jurisdiction.[23] Critics argue that allowing powerful actors like the U.S. to impose sanctions to elicit a desired effect contradicts the ability of states to use domestic law in addressing conflicts involving nationals.[24] However, customary international law permits the imposition of unilateral sanctions, so long as they do not offend an existing treaty.[25] The real problem with a state's exercise of extraterritorial jurisdiction arises when the "sender" state's sanctions reach so far as to prohibit third party, non-citizen persons in non-citizen states from engaging in specified activities.[26] These are called "secondary sanctions," which are widely debated as to whether they are violations of the WTO's rules regarding the creation of domestic regulations.[27] Customary international law embodies the "well-established principles governing the authority of each [state] as against other [states]" and uses the "traditional tripartite authority" of every state to prescribe laws, enforce laws, and adjudicate laws.[28]

Currently, the consensus is that a state may utilize extraterritorial jurisdiction on a third party's conduct if that conduct violates the fundamentals of customary international law.[29] This suggests that the door for secondary sanctions has been left open for determining appropriate situations in extraterritorial jurisdiction may be properly applied. To that effect, the issue becomes locating the point at which foreign interests prevail over the "sender" state's interests in applying the secondary sanctions.

Developments and Problems

Though the dispute over the legality of applying extraterritorial jurisdiction is relatively uncharted, the implications of determining what constitutes an acceptable use of secondary sanctions would provide states with a guide to follow when confronted with such a situation. Conceivably, the issuance of these sanctions would prove beneficial in the context of compelling situations arising under international law. Economic sanctions may be a state's last resort before taking steps towards war and can serve as a vehicle to multilateral negotiations.[30] On the other hand, they can be "particularly controversial because they attempt to induce foreign persons abroad to forego economic activity in order to advance the foreign policy goals of the U.S. government."[31]

The United States' Case for Secondary Sanctions

Every state has their own domestic laws that govern jurisdictional reach and application in local and foreign situations. However, the U.S. interprets its jurisdictional authority much broader than most other states.[32] In part, this can be attributed to the "its strong position in the international market to extend its economic sanctions laws extraterritorially to third state parties."[33] The international business community consists of multi-national corporate groups that operate in several jurisdictions and such companies depend on their access to international markets including the markets in the U.S."[34] Most foreign companies and individuals do not possess such great power over the trading nations.[35] Thus, when these states fall victim to secondary sanctions, they cannot afford to continue a relationship with a target state and to become isolated from the market.[36] While Congress has the ability to countermand the limitations on jurisdiction imposed by international law, customary international law still plays an important role in U.S. courts.[37] For example, in

Hoffman, the Supreme Court refused to apply an ambiguous domestic law to the conduct of a foreign corporation when the conduct caused economic harm.[38] The Court explained it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[39] This construction was guided by the Court implicating principles of customary international law.[40]

The review of U.S. sanctions practices is subject to the shared responsibility of Congress, the Executive, and the courts.[41]

Developing International and Secondary Sanctions

Perhaps the most compelling case to be made for permitting states to impose secondary sanctions is when issues of fundamental international norms are at hand. This concept is grounded in the UN Charter itself, which "creates mutual obligations among states to respect human rights" and does not mention any restrictions on the imposition of economic sanctions for promoting this cause.[42] Additionally, the UN Charter authorizes states to prescribe and punish violations of international norms of *jus cogens* regardless if there is a direct commission of the acts, and with no restriction on location.[43] With this in mind, arguably secondary sanctions would be appropriate where a third-party state is violating compelling norms protected by international law.[44] The UN Charter's "goal of joint and separate action" to promote fundamental aspects of international norms seems to indicate state measures that "complement, rather than contradict, the multilateral remedies available" is permissible.[45] Regarding the *purpose* of invoking sanctions, the Charter discusses how "sanctions contribute to *domestic* internalization by incorporating attention to human rights concerns into the political processes of the sanctioning state."[46] Further, sanctions "contribute to transnational internalization by the broader international community by attracting foreign attention to human rights concerns and generating multilateral pressure on the target state."[47] The Restatement Third of Foreign Relations Law acknowledges the developing principle that "a state has jurisdiction to prescribe law with respect to… certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."[48]

There is an argument to be made in favor of allowing secondary sanctions in situations where the application is justified in sound policy and promotes international norms. To determine if the imposition of secondary sanctions is acceptable, "[t]he jurisdictional validity … should be measured in light of well-established principles governing the authority of each nation-state as against other nation-states to regulate the conduct of individuals, companies, and other sub-national actors."[49] Most academic commentary disproves of secondary sanctions, arguing they are "illegally 'extraterritorial,' exceeding the proper bounds of U.S. jurisdictional authority under customary international law."[50] However, secondary sanctions "apply to a smaller range of actors than conventional sanctions that are not restricted to the in-country conduct of a country's own nationals…[they] still extend the effect of primary sanctions and can do so without engendering crippling debate and countermeasures contesting their legal validity."[51] Further, secondary sanctions are implicitly limited by notions of both territorial and nationality jurisdiction.[52] Notably, both unilateral *and* secondary sanctions regulate the conduct of U.S. citizens.[53] Those who believe the sole purpose of sanctions lies in affecting extraterritorial conduct often overlook this particular aspect of secondary sanctions.[54] Accordingly, these sanctions "sensibly reconcile competing interests of the U.S. to control what its own citizens do in its own territory while not exposing foreign actors to liability for failure to comply with U.S. law."[55] Many protest that secondary sanctions encroach on principles of state sovereignty, and, therefore, violate customary international law.[56] While the U.S. does use these sanctions to extend jurisdictional reach, the resulting extraterritorial effect on third parties must be legitimate.[57] This is because U.S. sanctions practices are subject to the selective review of the three branches of government.[58] Further, a state's exercise of extraterritorial jurisdiction is subject to the regulations of the WTO.[59] Thus, "a state may still need to conform to the regulations of the offending WTO member state if they wish to trade in that WTO member state's jurisdiction."[60]

Conclusion

It cannot be denied that secondary sanctions are perhaps the best means for achieving an "ultimate goal of complete isolation of a target regime" because comprehensive multilateral sanctions are almost impossible to achieve where parties refuse to comply with UN goals.[61] In the present facts, it is well known that China "often impede[s] U.S. efforts to enact UN sanctions."[62] Indeed, China was doing just that when the U.S. decided to impose sanctions on the Chinese corporations and individuals.[63] In this case, China's fear that the North Korea regime will collapse if they respond to the U.S. pressure depicts a situation in which rationales of foreign policy and the goal of isolation support the use of secondary sanctions. Though legal and political issues undeniably stem from secondary sanctions, the U.S. continues to use its broad interpretation of jurisdiction to affect the conduct of third-party states.

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THE JONES ACT AND LNG

How a Century Old Law is Inhibiting American Energy Independence

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Introduction

Thanks to the shale boom, the U.S. finds itself as the world's top producer of oil and gas,[1] and may even be poised to realize domestic energy security and independence.[2] Yet parts of the U.S. such as the Northeast still depend on imports of LNG for up to 20% of their total natural gas supply.[3] Ironically, one of the obstacles to U.S. domestic energy security and independence lies in the Jones Act, a nearly century-old piece of legislation grounded in American protectionism.

The Purpose of the Jones Act

Section 27 of the Merchant Marine Act of 1920, more commonly known as "the Jones Act," was introduced shortly after World War I as an "America First" shipping law, which would "unshackle commerce" by making "100 Per Cent. American" vessels.[4] Responding to soaring costs and scarcity of commercial vessels during the War, the Jones Act sought to protect domestic shipping capabilities by ensuring the existence of a viable American fleet.[5]

As stated in the preamble to the Jones Act, the purpose of the law is to protect national security and promote the proper growth of U.S. foreign and domestic commerce by ensuring there is a readily available and sufficient merchant marine to "carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency."[6] The Jones Act thus aims to prevent dependence on foreign-flagged vessels for commercial trade and to ensure the U.S.'s ability to protect itself in times of conflict by permitting only U.S.-flagged vessels to conduct coastwise trade (or "cabotage"). Accordingly, with few exceptions, any vessel transporting cargo with commercial value by water, or a combination of land and water, in a voyage that begins at any point within the U.S. (or any of its territories) to any other point within the U.S. (or any of its territories) must be built in the U.S., owned by U.S. citizens, flagged under U.S. law, and crewed predominantly by U.S. citizens.[7]

The Jones Act in the 21st Century

Some 98 years after its implementation, the Jones Act has arguably outlived its usefulness. While defenders hold fast to the idea that the law is necessary to sustain the maritime industry and is thus essential for national security, especially in times of emergency,[8] the numbers tell a different story.

Despite debates on the overall effects from both sides, one thing remains clear – the Jones Act has failed in its legally mandated purpose to protect the domestic maritime industry. Neither domestic shipbuilders nor shippers have seen the purported benefits of the Jones Act's protectionist policies. American output has more than quadrupled since 1960, yet the amount of freight carried in cabotage has dropped by nearly half.[9] U.S.-built ships cost six to eight times more to build than rail and barge equivalents; American container ports are much less efficient than foreign ones; and crew costs for U.S.-flagged vessels can be over five times more than comparable foreign-flagged ships.[10]

The percentage of Jones Act compliant vessels comprising the world fleet dropped precipitously from 17% in 1960 to less than 1% in 2016. U.S.-flagged oceangoing vessels decreased from 3,000 to a mere 169 in the same time period, with only 92 vessels actually performing cabotage.[11] The few ships remaining in the Jones Act fleet are more than twice as old on average as the global fleet: 33 years as compared to 13.[12] Moreover, the American shipbuilding industry has not fared any better; 90% of global deep-draft shipbuilding has moved to either China, South Korea, or Japan.[13] Although Japan builds the fewest ships of those three countries, it still produces twice as many ships annually as exist in the entire Jones Act fleet.[14] In the U.S., there remain only seven domestic shipyards of which four exclusively serve the military.[15]

For the rest of the economy, the story is much the same. Ostensibly, the U.S. maritime industry gains from excluding foreign competition. However, for each dollar gained by the limited protected parties, American consumers lose more than a dollar.[16] In fact, "[n]early all analytical studies of the Jones Act have found that it imposes net costs on the US economy;"[17] particularly for noncontiguous states and territories.[18] According to a joint study performed by economists from the University of Cambridge and University of Wisconsin-Madison, repealing the Jones Act would generate savings of $1.19 billion annually in shipping costs alone, even after taking into consideration broad-spectrum effects.[19] Additional studies estimate the Jones Act costs American consumers as much as $15 billion annually.[20]

The Jones Act and LNG

While the Jones Act does not technically prohibit LNG cabotage, in practice it does: there exists not a single Jones Act compliant LNG carrier.[21] The projected cost to build a Jones Act LNG carrier is between $400 and $675 million dollars;[22] an exponential increase over the estimated $182 million it costs to build a similar vessel in South Korea.[23] In addition to substantially increased construction costs, flagging and operating an LNG carrier under the Jones Act would cost nearly three times more than having the same carrier under an international flag.[24] Given these differential costs, it is not surprising that a Jones Act LNG carrier has not been built in four decades[25] – and there should be no realistic expectation that one will be built anytime soon, if ever.

The cost-prohibitive nature of building and operating Jones Act LNG carriers inhibits American energy independence by restricting the free-flow of natural gas throughout the U.S. and its territories. This is particularly harmful to noncontiguous states and territories which are unable to capitalize on the country's new-found LNG exports.[26] What is especially troubling is that Jones Act restrictions have kept the U.S. dependent on imports of LNG during times of peak need.

A Case Study in the Northeast

In January of 2018, after a cold snap struck the Northeast, curtailing regional gas supplies, demand for natural gas surged.[27] Unfortunately, this situation is not uncommon due to insufficient pipeline capacity and related infrastructure, leaving the region susceptible to severe shortages during periods of high demand.[28] A lack of indigenous natural resources, coupled with political and environmentalist objections,[29] have prevented investment in necessary infrastructure to handle such volatile influxes of demand.[30] Instead, the region must turn to extremely expensive imports of foreign-sourced LNG. During the winter of 2017-2018, New England paid the highest price for natural gas in the world at $35.35 per million Btu (MMBtu), as compared to the $3.50 per MMBtu pricing at the Henry Hub on the Gulf Coast during the same period.[31]

In this instance, those imports were brought to Boston Harbor by a French-flagged LNG carrier containing commingled Russian LNG from the Yamal facility. Although Novatek, the Yamal facility's majority owner and Russia's largest independent natural gas producer, was, and continues to be, subject to U.S. sanctions prohibiting financing for projects belonging to Novatek,[32] the sanctions apparently did not apply to the gas particles themselves. Russia was able to avoid the sanctions by unloading the gas in another country and to various companies before the gas arrived in the U.S.[33]

The controversial LNG came from the Yamal facility's first-ever shipment, made just weeks before it arrived in Boston.[34] If the Jones Act is not repealed or amended, there is likely more Russian gas on the way.

Exempt LNG from the Jones Act

Although repealing the Jones Act may arguably be the best decision in an overarching sense, the broader repercussions of such an action require analysis beyond the scope of this article. Assuming the goal is promoting American energy security and independence, amending the Jones Act to exempt LNG from coverage would serve that narrow purpose by unrestricting LNG cabotage without a full-scale repeal. For example, the definition of "merchandise" or "vessels" could be amended to exclude LNG or LNG carriers, respectively, or LNG cabotage could be added to the list of permanent exceptions to the Jones Act that currently exist.[35]Removing the cabotage restrictions on LNG would provide considerable economic and geopolitical benefits. As discussed in the case of the Northeast, allowing LNG to be shipped from domestic export terminals would reduce costs of natural gas for end-consumers by providing access to contracts tied to the Henry Hub which consistently holds the lowest global pricing benchmark.[36] Taking advantage of existing export/import facilities along the Gulf and Atlantic Coasts, respectively, without the need to make substantial investments in additional infrastructure, should further incentivize amending the Jones Act to allow LNG cabotage.[37] Additionally, removing the cabotage restrictions on LNG could encourage the development of import terminals in noncontiguous states and territories, allowing areas such as Puerto Rico and Hawaii to decrease dependence on coal and reduce energy costs overall.

Exempting LNG from the cabotage restrictions would not affect the framework of the Jones Act or the complex legal and regulatory web it comprises. For example, an LNG exemption would not interfere with the Jones Act's stated goal of maintaining a "merchant marine" capable of weathering times of war or emergency. LNG carriers were not envisioned by the Jones Act. They are extremely complex, highly-specialized vessels built to serve a singular purpose – transporting LNG. The hulls are specifically designed to carry only LNG; any other cargo, even other liquids, would jeopardize the integrity of the cargo tanks. These slow-moving vessels span the length of at least three football fields and would be useless as either military or commercial auxiliary.

Further, the unique technical aspects of LNG and the fact that no Jones Act LNG carriers currently exist – nor likely will – insulates this exemption from starting a "slippery slope" in terms of other industries seeking exemptions in the same vein. Amending the Jones Act would not disrupt other industries, let alone domestic maritime – there is no domestic LNG maritime industry to begin with. There would not be major rippling effects, as might happen with a full-repeal, because LNG cannot be economically transported in sufficient volume by other methods, given the technical complexities of both the product itself and corresponding transportation needs.

Conclusion

The U.S. may be on the cusp of unprecedented energy security and independence; however, the archaic Jones Act remains an obstacle to realizing these vital goals. While a complete repeal is possibly the best solution in terms of overall net-benefits, such drastic change is not necessary to achieve the sought-after effects for LNG. Instead, an amendment excluding LNG from Jones Act coverage would remove a barrier to energy independence without unsettling the framework or fundamental purpose of the law. Thus, the Jones Act should be amended to exempt LNG from its cabotage restrictions to promote the full economic and geopolitical benefits that follow from the free-flow of natural gas domestically, which would enhance the U.S.'s ability to capitalize on the shale boom, reduce costs for end-consumers, and remove dependency on imports.

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THE COLOMBIAN OIL AND GAS LEGAL REGIME

A Critique

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Introduction

Until 2003, the Colombian oil and gas business was dominated by Ecopetrol, the country's national petroleum company.[1] Under the Constitution, foreign investors interested in conducting exploration and production work were limited to executing joint venture agreements with Ecopetrol.[2] These agreements were valuable for the national petroleum company because a foreign party undertook the exploratory risk and shared the benefits of data acquired and potential discoveries. From a legal perspective, contracts executed by Ecopetrol were governed by private law and disputes solved by domestic courts.[3] In the more than fifty years in which this legal regime was applied, not a single contractual dispute regarding oil and gas contracts was ever litigated before Colombian courts.

In 2003, Colombia welcomed the copy-and-paste era when it adopted the Brazilian model.[4] Brazil established its National Petroleum Agency (NPA) in 1997,[5] following the federal economic regulatory model of the U.S. Tennessee Valley Authority, which was successful under the New Deal. Ironically, a state economic regulatory model has been in place in Texas since 1891 with the creation of the Railroad Commission of Texas.[6] Unlike Colombia, Brazil does have a federal system and the NPA serves as the oil and gas independent regulator. The NPA is responsible for the control and supervision of oil and gas operations and awards concession contracts.[7] The NPA enforces the national petroleum policy, protects consumers and makes sure that the country's domestic demand for hydrocarbons is met.[8] In Brazil, this change required a Constitutional Amendment and the promulgation of a law by Congress. In 1998, Brazil had proven oil reserves of 7 billion barrels of oil and 226 billion m3 of natural gas. Eighteen years later those figures had increased to 13 billion barrels of oil and 377 billion m3 of natural gas.[9] This is evidence of the effectiveness of the NPA as an independent regulator.

The Colombian Experience

In Colombia, the National Hydrocarbon Agency (ANH) was created during one of the industry's traditional downturns caused by lower prices for the purpose of enhancing the level of foreign investment.[10] Now that the ANH is fifteen years old, an assessment of the nature, purpose and accomplishments of the Colombian oil and gas "regulator" is well justified.

After fifteen years of ANH control, Colombia's top producer is Ecopetrol. This was not the consequence of innovative provisions of a new rights granting contract. Instead, it was the result of the requirement to automatically transfer assets of expiring joint ventures to the State. Thus, just as was the case in 1951 when Ecopetrol was created, expiring E&P terms were once more the driving force of the domestic hydrocarbon industry.[11] Today, the country's production of 853,000 bpd is lower than the 1,015,198 bpd produced five years ago.[12] Further, not one major international oil and gas company is a significant producer. Nevertheless, the nation's economic development has become dependent on oil exports.

The ANH is essentially an office that handles the paperwork to award E&P contracts in Colombia. While the ANH is referred to as the oil and gas regulator, it really does not operate as such. Since its inception, the ANH has not produced a single white paper on the Colombian oil and gas industry nor the basic premises for a comprehensive and long-term national hydrocarbon policy. Instead, the ANH simply reacts to fluctuating international oil prices when the number of exploratory wells is down. The agency has not even adopted decisions regarding unitization and does not enforce technical industry rules applicable to exploitation. The ANH does not allow itself to become involved in issues such as consultation processes with local communities. Further, compliance with environmental provisions is the role of a different state entity.[13] The many limitations of ANH's business are yet to be tested through international investment arbitration disputes.

Interestingly, Congress has not been involved in the process of designing oil and gas granting contracts, although it could challenge the constitutionality of agreements executed without its express authority. Agreements that define the commanding heights of the economy are decided by a handful of individuals behind closed doors. This is not what a true democracy demands. Even worse, what was once clearly a contract governed by private law has now become a contract to which multiple inconsistent legal provisions are applicable.

Conclusion

It is well known that foreign investors are attracted by transparent, straightforward and effective terms and conditions, but a State regime with little legal certainty, multiple State players and never ending paper work is just misplaced and unattractive. At this stage in the hydrocarbon era, countries need to be creative in order to attract foreign investment and to achieve tangible economic benefits for their populations. Therefore, one must ask whether a federal economic regulator that will solve the needs of a South American centralized State-owned oil and gas business is the model that should be emulated by Colombia.

The former Mexican closed legal system and Hugo Chavez's socialist approach may have been the most relevant factors that prompted interest in Colombia's oil and gas sector when Mexico and Venezuela were out of reach to foreign investors. History seems to indicate that those fortuitous circumstances may once more become applicable. It would be appropriate, therefore, to introduce transparent, simple and practical democratic rules instrumental to achieve results that would allow the people of Colombia to believe that a better future is possible. Whether the continued existence of the ANH makes any sense may be the first question to be asked.

Endnotes

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RECONCILING ECONOMIC INTERESTS

Trade and Investment Agreements in the European Union

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Introduction

The European Union (EU) currently utilizes an all-in approach when negotiating free trade agreements that include investment chapters.[1] Namely, the EU concludes free trade and investment agreements (FTIAs) simultaneously.[2] There is a debate, however, as to whether the current model is efficient. The Court of Justice of the European Union (CJEU) through its decision in Opinion 2/15 provided insight into whether the current model will survive its criticism.[3] This note will explore whether the EU should conclude separate trade and investment agreements, or keep the present model.

Opinion 2/15's Effect on Trade and Investment Agreements

Opinion 2/15 explored the question of who is competent to make decisions concerning the EU's FTIA with Singapore.[4] The EU requested that the CJEU decide if the EU was competent to sign and conclude the FTIA with Singapore without Member States' approval.[5] The CJEU broke down this question into three sub-issues.[6] First, which provisions of the FTIA with Singapore fall within the EU's exclusive competence?[7] Second, which provisions of the FTIA with Singapore fall within the EU's shared competence?[8] Third, are there any provisions of the FTIA with Singapore that fall within the exclusive competence of the Member States?[9] Furthermore, the various commitments in the FTIA that the CJEU discusses in detail in its opinion concern market access, investment protection, intellectual property protection, competition, and sustainable development.[10]

The CJEU's opinion examined the status of the investor state dispute resolution (ISDS) in the FTIA with Singapore partially because it led to disagreement between European governments.[11] The European Commission and European Parliament concluded that signing and concluding the FTIA with Singapore is within the EU's exclusive competence.[12] Specifically, approval by the Member States would be unnecessary.[13] Conversely, the European Council and EU Member States asserted that the FTIA with Singapore constituted a mixed agreement, and consequently the FTIA with Singapore should be signed and concluded by both the EU and each Member State.[14]

The European Commission contended that the EU had exclusive competence to sign and conclude the agreement with Singapore.[15] It also claimed that apart from the cross-border transport services and non-direct foreign investment provisions of the agreement, the EU had exclusive competence pursuant to its Article 3(1)(e) and 3(2) of the Treaty on the Functioning of the European Union (TFEU) powers.[16]

Conversely, the European Council and Member States argued that the FTIA with Singapore constituted a mixed-agreement, whereby the EU and Member States had shared competence over various provisions.[17] For example, the European Council and Member States contended that the EU and Member States had shared competence over provisions regarding environmental protection, social protection, and intellectual property protection.[18] The European Council and the Member States argued that those provisions which lack a specific link with international trade fall within the EU and Member States' shared competence.[19]

The European Council further argued that certain provisions fall within competences of only the Member States.[20] For example, it argued that the non-direct foreign investment provision is within the Member States' exclusive competence.[21] The European Council argued that Chapter 9 of the FTIA with Singapore, which deals with investment, only relates to investment protection.[22] Therefore, the European Council and the Member States concluded that the EU, as it relates to foreign direct investment, cannot approve Chapter 9 without Member States' approval.[23] In support of the European Council and Member States' position, they rely heavily on the following provisions:

> *[T]hose relating to public order, public security and other public interests, to taxation, to compensation in the event of investments being destroyed by the armed forces, to the exceptions to the freedom to transfer funds that are justified on the basis of legislation concerning criminal or penal offences, social security or retirement, to expropriation and to the replacement, by the envisaged agreement, of the bilateral investment treaties concluded between the Member States and the Republic of Singapore.*[24]

The CJEU sided with the European Council and Member States, considering it a mixed agreement.[25] Specifically, the provisions concerning non-direct foreign investment and ISDS were within the EU and Member States' shared competence.[26] The ISDS constituted shared competence since it removes disputes that would ordinarily be in the Member States' courts, and are now not within those Member States' jurisdiction.[27] Additionally, the other provisions within the FTIA with Singapore were within the EU's exclusive competence.[28] The CJEU's opinion indicated that the FTIA with Singapore requires ratification by both EU and Member States.[29] The CJEU's decision also means that the European Commission requires ratification by each Member State for every FTA that includes ISDS and investment portfolios.[30] The CJEU's opinion could mean that regional governments in European countries that are parties to international trade and investment agreements must give approval to complete ratification.[31]

Moreover, the CJEU explained that there are areas where the EU has exclusive competence, as well as areas where the EU has shared competence with Member States.[32] For example, the CJEU held that according to Article 3(1)(e) 9 TFEU, the EU has exclusive competence over the common commercial policy, which extends to third parties.[33] The CJEU defends that position through case law:

> *It is settled case-law that the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.*[34]

As it relates to the various commitments in the FTIA with Singapore, the CJEU made several distinctions.[35] For example, the commitments relating to market access - Chapters 2-8, and 10 - are within the EU's exclusive competence.[36] The commitments relating to investment protection - Chapter 9 - fell within the common commercial policy in so far as they concern foreign direct investment between Singapore and the EU.[37] The commitments relating to intellectual property protection - Chapter 11 - are within the EU's exclusive competence pursuant to Article 3(1)(e) TFEU.[38] The commitments relating to competition - Chapter 12 - are within the EU's exclusive competence pursuant to Article 3(1)(e) TFEU.[39] Finally, the commitments regarding sustainable development - Chapter 13 - are within the EU's exclusive competence pursuant to Article 3(1)(e) TFEU.[40]

Moreover, it is possible that the EU will enter into Free Trade Agreement (FTA) negotiations where the EU has exclusive competence, and work with Member States to execute investment treaties with separate countries.[41] It is also possible that the EU would begin FTA negotiations where it enjoys exclusive competence, but ask Member States to join negotiations concerning ISDS and non-direct foreign investments.[42] However, it is possible that a combination of the two scenarios will unfold, but only time will tell what will happen.

Advantages and Disadvantages of Separating Trade and Investment Agreements

The European Commission believes that trade and investment agreements should be concluded at the same time rather than separately.[43] Szilárd Gáspár-Szilágyi argued in his blog post that the EU should follow a sector-based and sequential approach, and thus conclude two separate agreements, one on trade and another on investment.[44] Gáspár-Szilágyi's argument relies on the CJEU's decision in Opinion 2/15.[45] Gáspár-Szilágyi argues that the debate over competence signifies a clear split between the provisions relating to trade and those relating to investment, and that the CJEU is advising the European Commission to adopt a sector-based and sequential approach, thus splitting up trade and investment agreements.[46]

There are several advantages to separating trade and investments agreements. If trade agreements can be concluded without ISDS, then negotiations can be concluded quicker.[47] ISDS can cause serious delays in negotiating trade and investment agreements,[48] thus trade agreements could be negotiated quicker since ISDS provisions are typically only in investment agreements. The EU could appear as a more credible trade partner, and incentivize other countries to trade with the EU and its Member States.[49] Also, if the EU can unilaterally conclude these trade agreements on behalf of Member States, then there might be less backlash and opposition domestically.[50] Accordingly, the ratification process would be quicker and smoother if the EU could conclude trade agreements without Member States' approval.[51] The length of time it takes to have each Member States' approval to ratify trade agreements could become an issue. Therefore, if the EU can conclude trade agreements without having to obtain approval from each Member State, then negotiating trade agreements could take less time, which could result in more legal certainty.[52]

Another major advantage to separating trade and investment agreements is that investment agreements can be concluded after trade agreements are already in place.[53] Consequently, these investment agreements can take the form of mixed agreements, which the CJEU hinted towards in Opinion 2/15.[54] The CJEU concluded that portions of the investment agreements are within Member States' shared competence,[55] and thus Member States will be able to negotiate those investment agreements after a trade agreement is concluded. Furthermore, it should be noted that negotiations of the FTIA with Singapore were completed in October 2014, and the final agreement requires the European Commission's final approval, agreed upon by the Council of Ministers, and ratified by the European Parliament.[56]

However, there are disadvantages to separating trade and investment agreements. It may take longer to negotiate a trade agreement first, and then an investment agreement later.[57] Moreover, more resources might be expended to conclude a trade and investment agreement separately rather than simultaneously.[58] But a more concerning issue raised is that an investment agreement might not be concluded at all.[59] For example, a trade agreement might be concluded, but subsequently an investment agreement might not be concluded for a variety of reasons.[60] Contentious issues in the ISDS might delay ratification of the investment agreement, and consequently an investment agreement might either take too long to be ratified, or may not be ratified.[61] It is possible that a domestic backlash could stifle the ratification process, which would result in the investment agreement not being ratified.[62]

The disadvantages to concluding trade and investment agreements separately are speculative while the advantages are more tangible. Therefore, it would be wise to see how other countries who have adopted this sector-based and sequential approach have fared in international trade and investment agreements to determine if the EU should also adopt this model.

Concluding Separate Trade and Investment Agreements Practically

Since NAFTA was enacted in the mid-1990s, many countries have adopted a trade-agreement model similar to that of the EU.[63] For example, Japan, Canada, the United States, and Australia have included investment chapters in their preferential trade agreements (PTAs).[64] China and Chile are following that trend.[65] Gáspár-Szilágyi provided a variety of reasons for why countries adopt this approach:

> *[S]tates might want to export their norms, stronger parties might want to impose pre-existing templates on weaker parties, states might want to replace existing international economic agreements, or it might be more cost effective to conclude one set of negotiations, covering a vast array of fields, instead of having a sector-based approach.*[66]

Furthermore, there are several different agreements that demonstrate how the current model - concluding trade and investment agreements simultaneously - is successful.[67] For example, China and New Zealand were able to negotiate an FTIA, which included ISDS, in only three years.[68] The Bilateral Investment Treaty (BIT) between China and New Zealand took only three years to negotiate, which is a relatively short period of time.[69] Chile and Turkey entered into a FTA with each other.[70] Their agreement included an "anchor clause."[71] An anchor clause may be included so that countries entering into trade agreements with other countries may table conversations on investment protection, and later enter into a separate BIT covering the major investment protection provisions.[72]

Conversely, debate over the EU's external investment competence concerning the Treaty of Lisbon sparked political tensions.[73] Unsurprisingly, the argument was in part due to the ISDS contained in the Treaty.[74] Gáspár-Szilágyi raised this argument in that inclusion of ISDS in investment agreements can be a contentious issue, thus causing delays in ratification, and even result in the BIT not being ratified.[75] Debate surrounding the Treaty of Lisbon is in part due to the alleged expansion of the EU's competence over non-EU trade policy.[76]

Conclusion

The advantages to concluding separate trade and investment agreements outweigh the disadvantages to concluding separate trade and investment agreements. Opinion 2/15 indicated that the CJEU is suggesting that the EU conclude separate trade and investment agreements.[77] Therefore, it appears as though the EU might go in that direction, and conclude separate trade and investment agreements.[78] Gáspár-Szilágyi raises several reasonable arguments reflecting the advantages and disadvantages to concluding separate trade and investment agreements.[79] Accordingly, trade and investment agreements should be concluded separately to incentivize trade with the EU, simplify negotiations, and expedite ratification.

Endnotes

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4 *Id*.

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6 Gáspár-Szilágyi, *supra* note 2.

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45 *Id*.

46 *Id*.

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THE 2017-2018 ANNUAL REPORT TO THE STATE BAR OF TEXAS BY THE INTERNATIONAL LAW SECTION'S INTERNATIONAL HUMAN RIGHTS COMMITTEE

August 29, 2018

Introduction

In its third year of existence, the International Human Rights Committee of the International Law Section of the State Bar has continued to grow, conduct and promote activities in support of its goal to educate and inform Texas lawyers on issues related to internationally recognized human rights. To formalize its activities and accommodate growing interest, the Committee held its first biennial organization meeting in September of 2017. Officer positions and terms were created and the purposes stated on the Committee's website were reaffirmed.

This report is intended to fulfill the Committee's pledge to provide a report to the State Bar on an annual basis and outlines the Committee's key initiatives, speaking engagements and other efforts to advance its purpose.

Key Initiatives

The University of Texas Law School Human Rights Clinic reviewed the Texas Disciplinary Rules of Professional Conduct to determine what guidance, if any, the Rules provide to Texas Lawyers and created a report on their findings. The Committee presented an overview of those findings to the International Law Section (ILS) Council and is working on a submission to the Bar during the 2018-2019 year.

The Committee drafted a letter to Texas in-house counsel on the issue of awareness and efforts of organizations relating to international human rights, which includes a short on-line survey on the topic. The State Bar's legal department approved the letter in May of 2018. The letter was mailed and follow-up efforts regarding the survey and additional mailings are in process.

In conjunction with the ILS, the Committee sponsored an international human rights writing contest. The Committee awarded $1,500 to Nicola S. Hines, Candidate for Juris Doctor, May 2019, SMU Dedman School of Law, as part of the Committee's annual human rights essay contest. This included an awards presentation, round-trip airfare and accommodation to the Annual Institute, and an opportunity for her essay to be published in the newsletter of the International Bar Association's Human Rights Law Committee. The winning essay is entitled Unit 731: Justice Long Overdue. It examines crimes related to heinous medical experiments on thousands of civilians and prisoners of World War II in the light of international criminal law. The essay explores the long-term effects of the United States' decision to grant immunity to the officers of Unit 731, a specialized team of the Japanese military, and argues that it is past time the victims received justice and closure.

The Committee continued to update and expand upon the information and educational materials compiled on its website's Reference Library.

The Committee published an article in the July 2017 Texas Bar Journal titled "Global Thinking: Ethical Issues that May Come Into Play When Texas Lawyers Deal With Clients that have International Interests."

The Committee published an article in The International Bar Association's Human Rights Law Committee newsletter regarding the leadership role that the State Bar of Texas has taken among U.S. bar associations with respect to providing information about international human rights issues that are related to doing business in the international market.

Speaking Engagements

The 2017-2018 Committee Chair spoke at various events, including the Skelton Lecture Series sponsored by the University of Houston Law School International Journal and the State Bar of Texas' (SBOT) Asian Pacific Interest Section's annual seminar on the topic of "A World of Possibilities: International Human Rights and the International Lawyer." He also presented regarding the Committee at the October 2017 Council of Chairs.

Various Members of the Committee have made multiple presentations to other Bar sections and at the ILS Annual Nuts and Bolts in Dallas, Texas where they discussed the topic of "Human Rights and Transnational Business: The Ruggie Principles." The mission of the Committee and the letter to corporate counsel was addressed at the UT CLE Annual Corporate Counsel Institute.

The Committee sponsored a panel on international human rights at the ILS Annual Institute in Houston where speakers included lawyers from London and Washington, D.C. who introduced attendees to the topic and its application in other jurisdictions.

Membership Changes

In November of 2017, Karla Pascarella was elected Chair-Elect of the Committee, to become Chair in June of 2018, with a term of two (2) years. Cristina Lunders was elected Vice Chair-Elect, to become Vice Chair in June of 2018, with a term of two (2) years. The Committee's current detailed membership roster follows but note that additional members have been approved and will be added to the roster.

Respectfully submitted,
INTERNATIONAL HUMAN RIGHTS COMMITTEE INTERNATIONAL LAW SECTION STATE BAR OF TEXAS

Karla Pascarella
Human Rights Committee Chair
Chair SBOT International Law
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