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INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

Marissa Sandoval Rodriguez

ILS Chair

MESSAGE FROM ILS CHAIR

It is with great honor and enthusiasm that I assume the role of Chair for the 2024-2025 bar year. This is a particularly momentous time as we celebrate the 50th anniversary of our section. Over the past five decades, our community has grown and evolved, reflecting the dynamic landscape of international law and the vital role it plays in our global society.

As we embark on this milestone year, we have much to look forward to. I am committed to continuing our tradition of excellence by fostering collaboration, professional development, and innovative thinking within our membership. Together, we will explore the complexities and opportunities that international law presents, and ensure our voices and expertise resonate both within Texas and beyond.

Our 50th anniversary offers a unique opportunity to reflect on our achievements and chart a path for the future. Throughout the year, we will host special events and initiatives designed to celebrate our history, honor our pioneers, and inspire the next generation of international law professionals.

Thank you for your ongoing dedication to our section. I look forward to working with each of you to make this a memorable and impactful year.

Josh Newcomer

Editor-In-Chief

EDITOR-IN-CHIEF MESSAGE

The International Law Section is proud to publish its next (and final) edition of the International Newsletter. The heightened instability in the world today is a reminder of the significant impact that international law can have on the law practitioners in Texas. The current conflicts in Ukraine, Gaza and the Red Sea, along with tensions between the United States and China and the policies of the U.S.-Mexico border are issues now impacting our legal community.

Thus, this volume contains articles that provide a spectrum of the international law issues that are impacting members of the Texas Bar. Olga Torres, Derrick Kyle, and Camille Edwards summarize Executive Order 14105, which require screening of outbound investments made in critical technologies in China. Ryan Cantu analyzes Laredo's cross-border plan to improve the border through a binational river conservation project on the Rio Grande. Marissa Sandoval Rodriguez, our current Chairwoman, provides us with guidance on the use of U.S. situs wills to accomplish estate planning goals of foreign nationals. Gabriella Cate analyzes the application of intellectual property law to counterfeit "superfakes" that constitute a billion dollar market in the United States. And Gabby Ugarte reviews developments in United States trade policies directed toward China. From investments in and trade tensions with China and to the southern border, we believe these articles reflect the significant issues facing our community.

The State Bar of Texas International Law Section is also proud to announce that Hannah Askew is this year's winner of the Thomas H. Wilson Scholarship Award for her winning essay titled, "Russia's Forcible Transfer and Deportation of Ukrainian Children." Her entry is an insightful review of the advantages and limitations of the ICC, national governments, and NGOs in bringing an end to the forced transfer of Ukrainian children to Russia.

You probably noticed that I described this as the final edition of the Newsletter. That is because the International Law Section is launching an exciting new online resource for the legal community – the Global Law Review. This new online journal will replace the newsletter and serve as a platform for engaging discussion on key issues facing the international legal community. As careful review, we believe that the Global Law Review will better serve our members and community by providing more timely information, in sights, and discussion in an easier to digest format. We encourage our membership to participate in the platform. Details can be found later in this edition.

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U.S. Issues Unprecedented Order Restricting Investment in China

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> *"We now know China as the single largest national security threat of our time, and it's clear that United States entities are helping bankroll its rise."*
>
> *– John Cornyn, US Senator from Texas*[1]

Senator Cornyn made the above statement on the Senate floor on November 14, 2023, while advocating for his colleagues to pass the Outbound Investment Transparency Act as part of the 2024 National Defense Authorization Act ("NDAA").[2] However, Senator Cornyn could just as easily have made the statement in 2018 when he unsuccessfully advocated for subjecting certain outbound investments to government review as part of the Foreign Investment Risk Review Modernization Act ("FIRRMA"), which expanded the jurisdiction over foreign inbound investment for the Committee on Foreign Investment in the United States ("CFIUS").[3] More on the Outbound Investment Transparency Act later, but independent of Congressional action the United States has already begun setting up an outbound investment screening mechanism – one that gives the executive branch the ability to either prohibit or compel notification of certain investment transactions involving critical technologies in China.

On August 9, 2023, President Biden issued Executive Order ("EO") 14105, Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern, which requires the Department of the Treasury ("Treasury") to create rules for the screening of investments made by U.S. persons in critical technologies in China. But the EO goes beyond merely screening; Treasury is required to promulgate rules that will in some instances prohibit investment in China related to certain technologies.[4] Treasury has not yet finalized the rules implementing EO 14105, but investment firms, venture capitalists, and even parties to M&A transactions must proceed with caution regarding activities involving China or Chinese persons.

This article will provide a brief overview of EO 14105 and proposed implementing rules, as well as related legislative developments focused on outbound investment screening, and the outlook for outbound investment screening procedures.

EO 14105 and Proposed Regulations

President Biden ordered EO 14105 under the authority of the International Emergency Economic Powers Act ("IEEPA"), among other relevant statutory authority.[5] To facilitate the creation of the outbound investment screening

mechanism, President Biden declared a national emergency to deal with the "unusual and extraordinary threat to the national security of the United States" created by the "advancement of countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries." The "countries of concern" are identified in an annex to the EO and currently include only the People's Republic of China and its Special Administrative Regions of Hong Kong and Macau.

EO 14105 directs Treasury to issue regulations that require U.S. persons to provide information related to certain transactions ("notifiable transactions") and that prohibit United States persons from engaging in certain other transactions ("prohibited transactions"). The "covered national security technologies and products" identified in EO 14105 include semiconductors and microelectronics, quantum information technologies, and artificial intelligence sectors. Relevant definitions, proposed jurisdictional scope, and possible exceptions were described in more detail, and subjected to public comment, in the concurrently issued Advanced Notice of Public Rulemaking ("ANPRM").[6]

The ANPRM does the heavy lifting of describing the outbound investment screening mechanism in greater detail, but it quite literally creates more questions than it answers. The ANPRM included 83 numbered questions from Treasury directed at interested parties to assist Treasury in refining the scope of the final outbound investment regulations. Because the regulations may not be finalized for some months, Treasury's outbound investment ANPRM gives interested parties a general idea of the types of transactions that may be notifiable transactions or prohibited transactions and the parties that may be covered by or excepted from the forthcoming final regulations.

"Covered Foreign Person" and "Person of a Country of Concern"

Treasury's proposed definition of "covered foreign person" includes (1) a person of a country of concern, i.e., China, that is engaged in an activity defined in the regulations involving a covered national security technology or product, and (2) a person whose direct or indirect subsidiaries are a covered foreign person where those subsidiaries comprise more than 50% of the person's consolidated revenue, net income, capital expenditure, or operating expenses. Under EO 14105, the notification or prohibition requirements are triggered by the involvement of "covered foreign persons," so the final form of the above definition will be a critical component of future analyses of outbound investment in China.

Similarly, Treasury proposes to define "person of a country of concern" as (1) citizens or permanent residents of a country of concern; (2) an entity incorporated in, organized under the laws of, or having a principal place of business in a country of concern; (3) the government of a country of concern, including political subdivisions and agencies, and any person owned, controlled, or directed by, or acting for or on behalf of the government of a country of concern; and (4) any entity in which a person or persons of a country of concern have individually or in the aggregate, directly or indirectly, an ownership interest of 50% or more.

Identified "Covered National Security Technologies and Products"

Though subject to change during the rulemaking process, the ANPRM proposes the following types of technologies and products be defined as "covered national security technologies and products," organized based on Treasury's initial identification under either prohibited transactions or notifiable transactions:

Prohibited Transactions

- Technologies that Enable Advanced Integrated Circuits
  - Software for Electronic Design Automation
  - Integrated Circuit Manufacturing Equipment
- Advanced Integrated Circuit Design and Production
  - Advanced Integrated Circuit Design
  - Advanced Integrated Circuit Fabrication
  - Advanced Integrated Circuit Packaging
- Supercomputers
- Quantum Information Technologies
  - Quantum Computers and Components
  - Quantum Sensors
  - Quantum Networking and Quantum Communication Systems
- Military, Government Intelligence, or Mass Surveillance AI Systems

Notifiable Transactions

- Integrated Circuit Design, Fabrication, or packaging that do not meet the requirements of prohibited transactions involving such products or technologies.
- AI Systems for Cybersecurity, Robotics Control, Surreptitious Listening, Location Tracking, and Facial Recognition

Covered and Excepted Transactions

Transactions involving the above technologies or products will only be subject to prohibition or notification requirements, respectively, if the

transactions are "covered transactions" that are not "excepted transactions." Treasury has proposed the definition of a "covered transaction" to be the following actions of a U.S. person:

> (1) acquisition of an equity interest or contingent equity interest in a covered foreign person;
> (2) provision of debt financing to a covered foreign person where such debt financing is convertible to an equity interest;
> (3) greenfield investment that could result in the establishment of a covered foreign person; or
> (4) establishment of a joint venture, wherever located, that is formed with a covered foreign person or could result in the establishment of a covered foreign person.

The lengthy definition of "excepted transaction" under consideration by Treasury includes exceptions for investments in a publicly traded security; an investment in a mutual fund, index fund, exchange-traded fund ("ETF"), or a similar instrument; or investments made as a limited partner into a venture capital fund, private equity fund, fund of funds, or other pooled investment funds, subject to certain limitations. An excepted investment also prospectively includes complete acquisitions by U.S. persons of an entity or assets held by covered foreign persons, intracompany transfers of funds from a U.S. parent to a subsidiary in China, and a transaction made pursuant to a binding, uncalled capital commitment entered into before August 9, 2023.

Notification Requirements

For notifiable transactions, the proposed regulations contemplate that the notification be provided "no later than 30 days following the closing of a covered transaction." Examples of the type of information Treasury has proposed to collect for notifiable transactions include identity and nationality (for individuals) of persons involved in the transaction, beneficial ownership and key personnel of parties to the transaction, transaction documents, and description of due diligence conducted regarding the transaction. The proposed information to be collected has many similarities with information required in voluntary or mandatory filings with CFIUS. Also like CFIUS, the notifiable transaction information will be filed through an electronic portal on Treasury's website.

Penalties

Failure to notify Treasury of a notifiable transaction, entering into a prohibited transaction, or making material misstatements or omissions to Treasury could lead to up to $356,579 in civil penalties per violation. Like the CFIUS regulations, the biggest risk for companies entering into transactions prohibited by the outbound investment regulations may be Treasury's power, as granted by EO 14105, to "nullify, void, or otherwise compel the divestment of any prohibited transaction entered into after the effective date" of the implementing regulations. Criminal violations may be referred to the Department of Justice for criminal prosecution.

Treasury received comments on the ANPRM until September 28, 2023, and will next issue a Notice of Proposed Rulemaking, triggering a further public comment period. After review and possible revision, the final regulations will be implemented.

Proposed Outbound Investment Legislation

As referenced in the introduction, Senator Cornyn, along with several other legislators, is still advocating for the passage of some form of legislation to review outbound investments despite the implementation of EO 14105. Senator Cornyn's Outbound Investment Transparency Act was ultimately not included in the 2024 NDAA, but its provisions demonstrate the possible effects of Congressional passage of an outbound screening mechanism, namely codifying requirements and providing Congress with greater oversight of the regulatory process.

Congress may still codify the EO with modified language or pass other outbound screening legislation. For example, a bill titled the Preventing Adversaries from Developing Critical Capabilities Act was introduced in the House of Representatives in November 2023 by Representative Michael McCaul of Texas and Representative Gregory Meeks of New York (the "McCaul-Meeks Bill").[7] This bill tracks closely with EO 14105 by requiring the identification of certain categories of technologies and products of specific industries that may pose a threat to U.S. national security when developed or acquired by a country of concern. This list of categories of technologies and products would then be published in the Federal Register and reviewed annually to provide necessary updates. The McCaul-Meeks Bill imposes notification requirements for U.S. investments in covered technology sectors including hypersonics and supercomputing. Like EO 14105, the McCaul-Meeks Bill includes prohibitions on certain transactions.

It is also possible that EO 14105 remains the primary method for the United States to monitor or prohibit outbound investment in certain technologies. But the "covered national security technologies and products" could expand to include additional technologies contemplated by the proposed legislation discussed above or other technologies that have not yet been declared as part of the EO.

Additionally, US allies in G7 countries have provided commitments to also restricting certain investments in critical technologies in China.[8]

Impacts on Investors

Regardless of the various forms of outbound notification and restriction requirements, investors and practitioners should stay abreast of the forthcoming regulations and any relevant legislation. Under the proposed regulations, the responsibility for determining whether an outbound investment is prohibited or subject to a mandatory notification requirement will be borne by the parties to the transaction. Specifically, the ANPRM contemplates the outbound investment screening mechanism having a knowledge standard that will "condition a person's obligations on that person's knowledge of relevant circumstances." Under this standard, U.S. firms could be responsible for complying with the outbound investment rules when they know or have reason to know or believe that a covered foreign person is engaged in, or will foreseeably be engaged in, activities related to relevant sensitive technologies. The contemplated knowledge standard in the ANPRM does not allow those that willfully disregard relevant facts to escape liability. As a result, U.S. firms will need to adjust due diligence procedures related to outbound investments in China to ensure compliance with the final regulations once they are promulgated.

Investors will also need to be mindful of corporate structure details when determining whether and how the new outbound investment rules apply to a prospective transaction. For example, foreign branches of U.S. businesses will be regarded as U.S. persons under the proposed rules and will be responsible for compliance with the regulations. In addition, certain entities may be included under the definition of a covered foreign person based on the status of the parent entity. Subsidiary companies located in the U.S. may be subject to restrictions under the outbound investment rules when they are owned by a Chinese parent. Similar to analyses under the CFIUS regulations, compliance with the outbound investment rules may require investors to obtain detailed information on an entity's ownership structure and corporate family.

The rules governing outbound investments will be an addition to the already complex regulatory environment for international transactions. Investors will not only need to address new compliance risks associated with the outbound investment regime but also be aware of how these rules may overlap with other regulations governing transactions that involve certain actors and countries (e.g., China or Russia) that are of particular concern to the U.S. While a transaction may not always be caught under Treasury's outbound investment rules, it is possible that dealings with certain parties are subject to other U.S. compliance obligations, including economic sanctions and export controls.

Conclusion

The outbound investment review program as described in EO 14105 and the ANPRM constitutes an unprecedented move by the United States to address national security concerns. While the new rules on outbound investments in certain Chinese technology sectors could take several months to come into force, the rules will impact many classes of investors and present new compliance concerns for U.S. firms. Companies and investors that may be affected by these rules should begin taking steps now to ensure they have adequate internal compliance mechanisms in place.

Torres Trade Law is an international trade and national security law firm that assists clients with the import and export of goods, technology, and services. We have extensive experience with the various regimes and agencies governing national security and trade such as U.S. Customs and Border Protection, the Department of Commerce Bureau of Industry and Security, the Department of State Directorate of Defense Trade Controls, the Department of Treasury Office of Foreign Assets Control, the Committee on Foreign Investment in the United States, the Defense Counterintelligence and Security Agency, and others. Our firm provides clients with full support for all trade and national security law issues, including U.S. export control and economic sanctions laws, industrial security, and trade strategy and policy.

Endnotes

1 Senator John Cornyn, Discussing Outbound Investment Transparency Ahead of Biden-Xi Meeting, YouTube.com (Nov. 14, 2023), *available at* https://www.youtube.com/watch?v=HFmCbL4Kr48.

2 Outbound Investment Transparency Act, S. 2678, 118th Cong. (2023).

3 *See CFIUS Reform: Examining the Essential Elements: Hearing Before the S. Comm. On Banking, Housing, & Urban Affairs,* 115th Cong. 2 (2018), *available at* https://www.govinfo.gov/content/pkg/CHRG-115shrg29914/pdf/CHRG-115shrg29914.pdf.

4 Exec. Order No. 14,105, 88 Fed. Reg. 54867 (9 August 2023), *available at* https://www.govinfo.gov/content/pkg/FR-2023-08-11/pdf/2023-17449.pdf.

5 International Emergency Economic Powers Act, 50 U.S.C. § 1701.

6 Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 56 Fed. Reg. 54961 (proposed 9 August 2023), *available at* https://home.treasury.gov/system/files/206/Provisions%20Pertaining%20to%20U.S.%20Investments%20in%20Certain%20National%20Security%20Technologies%20and%20Products%20in%20Countries%20of%20Concern.pdf.

7 Preventing Adversaries from Developing Critical Capabilities Act, H.R. 6349, 118th Cong. (2023).

8 *See* Joint Communication to European Parliament, European Council, & the Council on "European Economic Security Strategy," European Commission (June 20, 2023), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023JC0020; *See also* Emily Benson, et. al., Transatlantic Approaches to Outbound Investment Screening, Ctr. for Strategic & Int'l Stud. (Jan. 17, 2023), *available at* https://www.csis.org/analysis/transatlantic-approaches-outbound-investment-screening.

How Foreign Investors Can Use U.S. Wills to Accomplish Their Estate Planning Goals

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When it comes to cross-border business ventures, the importance of estate planning often remains overshadowed by immediate investment pursuits. However, for international investors eyeing opportunities within the United States ("U.S."), prudent consideration of estate planning is paramount. While some may have made estate planning arrangements within their home jurisdictions, the adoption of a U.S. Situs Will is a strategic option that can be used to ensure the seamless transition of U.S.-based assets, including real estate holdings, financial portfolios, and tangible properties.

U.S. Situs Will; Its Structure & Usage

The U.S. Situs Will is an underutilized yet efficient legal instrument, offering foreign investors a streamlined avenue for implementing and executing estate plans involving U.S. probate assets in a cost-effective and expeditious manner, as compared to relying solely on foreign wills. Key benefits of the U.S. Situs Will include its drafting in English, ensuring clarity and comprehension by U.S. institutions, its adherence to local legal norms, engendering familiarity with local U.S. authorities, and the elimination of uncertainties inherent in foreign documents drafted under unfamiliar legal frameworks.

This testamentary tool grants foreign investors the ability to dictate asset distribution in line with their preferences and estate plans, in ways that may not be available within their home jurisdictions. Within a U.S. Situs Will, foreign investors can designate devisees of interests in real property, legatees of interests in personal property, and testamentary trust beneficiaries distinct from those stipulated in their foreign wills, establish trusts for minor heirs, and nominate executors for efficient estate administration in the U.S. An executor named in a U.S. Situs Will should be someone who is either in or can travel to the United States to handle estate matters. It is crucial to engage legal counsel with international estate planning proficiency to ensure seamless alignment with global objectives while avoiding the inadvertent revocation of existing testamentary instruments.

Importance of Having a Will

While many state laws, such as those of Texas, recognize the validity of foreign wills and provide for the probate of foreign wills in the U.S., probating a foreign will in the U.S. is typically more costly and time-consuming than probating a U.S. Situs Will. Heirs often must wait until the probate proceeding

is finalized in the foreign testator's home country before initiating probate in the U.S. and will have to navigate additional obstacles such as finding an attorney with experience in probating foreign wills, obtaining official authenticated probate records of the foreign probate proceeding, having them translated to English, and apostilled.

The estates of foreign investors who die without wills are subject to the intestate laws of their home jurisdiction as well as the intestate laws of the U.S. state in which the assets are located. In many cases, heirs will have to undertake duplicate intestate proceedings in the foreign investor's home country and in the U.S., which can be time consuming and costly. Most importantly, by not leaving a written will, the decedent has forfeited the right to designate an executor to represent the estate, and legatees, devisees, as well as trust beneficiaries specific to assets situated in the U.S., in line with the decedent's personal wishes. Accordingly, heirs will be left to follow default intestate succession laws, which often lead to unintended results, particularly when the decedent had children from different marriages or a blended family.

Tax Implications

Despite its advantages, the U.S. Situs Will does not shield against the impact of the U.S. Estate Tax, which can reach up to 40% and applies to both U.S. citizens and foreign investors. The tax implications, contingent upon domicile, necessitate strategic planning. With the current exemption at $13.61 million for U.S. domiciliaries versus $60,000 for non-U.S. domiciliaries, foreign investors should seek guidance from legal and tax experts well-versed in representing international clients.

Conclusion

In summary, embracing U.S. Situs Wills presents a savvy approach for international investors seeking to safeguard their U.S. assets and optimize estate planning efficiencies. By proactively addressing legal nuances and tax considerations, investors can mitigate risks, preserve wealth, and ensure seamless asset transmission in line with their personal and business objectives.

Marissa Sandoval Rodriguez is a partner at Cacheaux, Cavazos & Newton based in McAllen, TX. Being on the border, Marissa understands the value of the relationship between the US and Mexico and the importance of cross-border business. For over 17 years, she has represented clients from the US and Mexico on domestic and international matters, including corporate, mergers and acquisitions, real estate, contractual, estate planning, and probate matters.

Binational Dream Project: Legal Implications for Laredo's Ambitious Plan to Remake the Border

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In August 2023, a group of Venezuelan migrants briefly shut down traffic on one of the international bridges, located in Laredo, Texas, to Mexico. As they held up signs stating queremos pasar (we want to pass), their chief complaint was that the CBS's asylum app was not working. Business resumed after the protest was quickly subdued by Mexican agents, in contrast to more persistent shutdowns in other border cities like Eagle Pass.[1]

Just two weeks before the protest, a group of dignitaries gathered on the banks of the Rio Grande just blocks from the bridge that would be soon shut down by the migrant protest. U.S. Ambassador to Mexico Ken Salazar, joined by leaders from both sides of the border, praised a great new era of binational cooperation. A subject of the event was the Binational River Conservation Project, a multi-year development that would span 6 miles down both sides of the Rio Grande and be modeled after similar developments like the San Antonio Riverwalk and Austin's Ladybird Lake Park.

The two events just weeks and blocks apart represent the two alternate realities of the U.S.-Mexico relationship in the 21st Century. In the media and political discourse, border cities like Laredo are defined by events like the migrant protest. Most Americans are unaware of the other side of the coin,

including statistics such as the nearly $1 billion worth of daily trade passing through Laredo in the aftermath of the COVID-19 pandemic. Such trade has caused Laredo to surpass the port of Los Angeles as America's busiest port.[2]

The Binational River Conservation Project ("BRCP") has the potential to finally reconcile the two alternate realities, addressing seemingly unrelated issues like border security, water sustainability, and economic development.

The conceptual renderings by architecture firm Overland Partners show a project that would transform Laredo. Though similar in layout to river developments in Texas's larger cities, the project is unique because it would be the only one of its kind that would span two different countries. It would also provide a welcome alternative to the metal grates and barbed wires that define almost every other southern border community from Tijuana, Mexico to Brownsville, Texas.

Despite widespread support from a coalition of business and environmental leaders, the BRCP implicates significant legal and financial challenges. This article covers three broad topics raised by the project: (1) international water law; (2) national security, since the project is largely targeted at improving border security in a manner that does not require a border wall; and (3) binational

finance, with an emphasis on the role of the North American Development Bank and related binational financing sources.

"It Starts at the River" – The Origins of the Binational River Conservation Project

The BRCP came to fruition shortly after Ambassador Salazar took office in September of 2021 and visited Laredo. During his visit, local leaders discussed existing plans for river restoration that had already been conceived by local environmental nonprofit, the Rio Grande International Study Center ("RGISC"), and a white paper published by the International Bank of Commerce CEO Dennis Nixon, titled Common Sense Border Management Solutions (the "White Paper"). In the White Paper, Nixon discusses how poor management of the riverbanks has made the city's sole drinking source unsustainable while also making border security more challenging for agents. The August 2021 issue proposed a binational park "re-populated with native prairie grasses that have limited growth potential and can be easily and economically maintained."[3]

The poor condition of the riverbanks is evident by just visually comparing the two sides of the Rio Grande in the Laredo sector. On the Mexican side, the heavily vegetated banks stand in stark contrast to the bare muddy banks of the Laredo side, which is the case along large portions of the Río Grande. Both features negatively impact the water supply for the approximately 6 million people who depend on it, albeit for different reasons. The vegetation along the banks consists largely of invasive species like carrizo cane and salt cedar that consume vast quantities of water from the river. By some estimates, a mature salt cedar plant can consume over 100 gallons of water from the river a day.[4] This is roughly equivalent to the daily water supply of one or two Laredo households.

According to RGISC's watershed director Martin Castro, on the U.S. side, the Border Patrol's stripping of vegetation from the banks to assist with apprehensions has caused large scale erosion and silting, making the river shallower and the water dirtier, which is exacerbated by the millions of gallons of sewage per day that Nuevo Laredo pours into the river. To illustrate this problem, Castro points to a large barren island near downtown, for which he stated, "The next major flood could completely erase that island because of a lack of native vegetation necessary to prevent erosion…." He further commented that, "This would make the siltation problem even worse and be a huge loss for the watershed."

In early 2022, the Laredo City Council (the "Council") authorized the creation of a Binational Working Group to advise the city on matters of "flood control, water conservation, and amenity improvements" along the river. The Council later granted Overland Partners, an architecture firm based in San Antonio, Texas, the authority to spearhead the project. The plan they devised was a 6.2-mile park on both sides of the river that would not only repair the banks but would include hiking trails, pedestrian bridges, a binational amphitheater, and a monarch sanctuary.

Although the BRCP has been criticized locally as an unnecessary municipal "park" with a big price tag, its origins have always been directed at repairing the river to make it more sustainable. As the South Texas border's population has doubled over the past few decades, the water supply has only shrunk.[5] This has led to increased disputes and litigation among U.S. states and their Mexican counterparts, including a recent case involving Texas, Colorado, and New Mexico, arising out of Texas's 2013 lawsuit claiming that New Mexico water users were siphoning disproportionate amounts of water before it reached Texas.[6]

Water disputes between the U.S. and Mexico add an international layer of complexity. The main treaty addressing water use and management between the two countries is the 1944 United States and Mexico Treaty of the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (the "1944 Treaty"). As scholars have noted, however, this treaty is severely outdate, as it was drafted before contemporary developments were realized, such as an increasingly volatile climate defined by drought and significant industrial water use associated with the maquiladora industry and unconventional fossil fuel drilling.[7]

The 1944 Treaty is the main legal mechanism that governs sovereignty over transboundary rivers like the Rio Grande. The 1944 Treaty created a binational agency called the International Boundary and Water Commission ("IBWC"), which has exclusive authority over the administration of transboundary rivers and maintaining the boundaries.[8]

An ongoing dispute before the IBCW is a provision of the 1944 Treaty that requires water allocation and delivery between Mexico and the U.S., including specific delivery amounts from Mexico to Texas in five-year cycles.[9] Specifically, one-third of the water that falls in the mountains of Northern Mexico must be delivered to Texas.[10]

In recent years, persistent drought in Mexico combined with increased industrial and agricultural use has caused Mexico to default on its delivery obligations. Demonstrations in 2020 in Chihuahua against water deliveries to the U.S. resulted in one death.[11] As drought conditions have worsened in recent years, Mexico is once again behind schedule and incompliant with

the 1944 Treaty, thereby leaving farms and cities in Texas deprived of water.[12] This issue has been exacerbated by a summer of record-breaking heat in Texas, meaning the region needs more water to maintain its crops and lawns.[13]

In 2021, Laredo's 50-year master water plan estimated that the city's population would outgrow its water supply by 2040.[14] "It starts at the river," Overland's Rick Archer said while explaining that much-needed improvements to plumbing infrastructure and wastewater treatment will make little difference if there is not a steady water supply.

The BRCP is a constructive plan to address these shortages that have their origins hundreds of miles upriver and in the mountains of Mexico. The IBWC will undoubtedly play a role in finding solutions to similar problems across the entire Rio Grande watershed. The agency is already working on a possible treaty addendum that would "grow the pie," to expand water supply in both countries and prevent future disputes.[15]

If the BRCP gains traction, it can serve as a good roadmap for the IBWC's ongoing efforts to "grow the pie" by promoting similar developments in other cities, developing procedures to streamline permitting and red tape that will undoubtedly arise.

National Security Challenges with Border Parks

In the White Paper, a secondary reason for restoring the Rio Grande is to provide Border Patrol agents with "a clear line of sight along the Rio Grande River," and better access to the river.[16] Members of Customs and Border Protection ("CBP") have been involved in discussions of the binational project since its inception. According to Rick Archer, CBP is largely on board with the plan as a more cost-effective solution to border security than a costly border wall.[17]

The BRCP will increase pedestrian traffic along the banks, which may even extend over the river through proposed pedestrian walkways that are part of Overland's renderings. Though the binational working group believes that the BRCP will deter illegal trafficking overall, the increased interactions will undoubtedly create national security challenges both for border agents and the IBWC.

The Friendship Park separating San Diego, California and Tijuana is the sole example of a binational park on the southern border, albeit one defined by militarized fencing that makes its name ironic. Today, this site is the only binational meeting place that is federally designated along the southern border.

Until the mid-1990s, there was no border fence at Friendship Park, and people in each country could freely visit under the supervision of nearby border agents. In 1994, a 14-mile fence divided the park, which has become increasingly militarized in the post-9/11 era. Today, visitors must show identification, and access is severely restricted, with the park sometimes closed altogether.

The security measures at the Friendship Park provide a preview of how things might work for the newly proposed park in Laredo. In addition to traditional border checks of pedestrians, border agents could also use new measures like facial biometric technology to manage pedestrians to the pedestrian bridges.

Whether the IBWC or other federal agencies are willing to facilitate something like the Laredo park concept depends on the president in charge. Like any international bridge, cross-border projects typically require presidential permits. This includes the Cross Border Xpress, an airport terminal spanning both San Diego and Tijuana that received a permit from the Obama Administration in 2010.[18] Given Ambassador Salazar's enthusiasm for the Laredo project, a presidential permit seems within reach with a second Biden administration, although recent comments on the Mexico-U.S. border from the Biden administration may call this into question. Another Trump term could possibly lead to another years-long push for a border wall that would likely put a binational park on the backburner.

The government of Texas could also try to impede the proposed park, though such efforts would be constrained by the IBWC's authority. Recently, when Governor Greg Abbott tried to install a buoy system near Del Rio, this was struck down by a federal court because the state failed to obtain approval by Congress and the Army Corps of Engineers, as required by 33 U.S.C. 403 for any obstruction of U.S. navigable waters.

Judge Alan Ezra noted that although the IBWC did not have authority itself to prevent the barriers, the "barrier also threatens to IBWC's ability to implement the core provisions of the 1944 Treaty between the United States and Mexico, which is crucial to allocation of waters in the Rio Grande."[19]

The $500 Million Dollar Question

On August 6, 2023, the North American Development Bank (NADB) announced an $81 million loan to Nuevo Laredo, Tamaulipas to upgrade its wastewater treatment facilities, increase treatment capacity, and improve deteriorating infrastructure.[20] These funds address a key impediment to water sustainability: the millions of gallons flowing from Nuevo Laredo into the river that places significant burdens on the wastewater capacities of both sister cities.

The loan is just one component of what is expected to be a multimillion-dollar endeavor over several years. Other potential funding options are illustrated by the San Diego/Tijauna Cross Border

Xpress, which was funded in part by a loan from Bancomext (Mexico's development bank) and Banco Invex. This was the first time that Mexico's development bank has made a loan to a U.S.-based developer for a U.S.-based project and collateralized by assets located in the U.S.[21]

The NADB loan complements the nearly $10 million in funds that a binational working group has already secured from city, county, and federal sources to begin the initial stages of the BRCP in repairing critical areas of the watershed. In August 2022, U.S. Representative Henry Cuellar secured more funding with a $2 million earmark for the Project. This was enough to prod the Council, which in early 2023 authorized a grant application to Texas Parks and Wildlife under the National Park Service for $2 million with a required 1:1 match, for a total estimated project cost of $4 million. Webb County then committed to match the city's $2 million investment. This of course only includes the U.S. side of the equation.

Though there is no hard groundbreaking scheduled, Martin Castro is optimistic that initial restoration work along the Zacate Creek area in Laredo will begin in 2024.

Conclusion

The Binational River Conservation Project is supported by a broad coalition of supporters, including the business community with commitments from IBC and Kansas City Southern Railroad, the federal government under the guidance of Ambassador Salazar and U.S. Rep. Henry Cuellar, and environmentalists led by the RGISC. Nevertheless, it faces immense challenges, including water disputes, national security, and local resistance in Laredo. In other words, many of the legal challenges presented in this article can only arise if many stars align in the midst of a volatile political and economic climate.

Despite these challenges, former Ambassador to Mexico Antonio Garza, a native of Brownsville currently based at the law firm White & Case in Mexico City, gave the example of the successful Cross Border Xpress that took 25 years from concept to reality. This project faced significant regulatory and national security hurdles because it allows passengers to park in one country and fly out of another country without leaving the airport.

> *"Amazing things are possible in the face of long odds where the private sector and the people living along the border stay focused, never faltering in the belief that future generations will be better for their efforts. So, si se puede!"*

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Fighting Fakes: International IP and 'Superfakes'

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In a world where authenticity is often overshadowed by deception, the rise of "superfake" products presents a menacing challenge to the very essence of intellectual property, especially on the international stage. These high-quality counterfeits blur the lines between genuine and imitation, forcing us to question the limits of legal protection. As far as products are concerned, three of the main reasons that consumers invest in luxury goods are (1) investing in a lifestyle, (2) a sense of status, and (3) a sense of exclusivity. In fact, studies show that consumers are willing to spend at least sixty percent more for products made by their favorite brands. As such, when counterfeit versions of those brands' products become available for purchase at such a discounted price, albeit through illicit channels, the value of luxury goods is diminished.

From a brand perspective, counterfeit goods can cause loss of profits and reputational damage. From a government standpoint, counterfeit goods can cause damage to economies of nations producing luxury goods, such as the United States ("U.S."). The rise of superfake products poses a threat to international intellectual property rights, challenging the existing frameworks of international intellectual property law and creating an imminent need for a global response that includes: (a) legal reform, (b) technological innovation, and (c) cooperation between governments, trademark holders, and consumers to protect the integrity of intellectual property on a global scale.

What are Superfakes and Why are they Bad?

Counterfeiting is a crime involving the unauthorized use of someone else's trademark or trade dress in order to unfairly profit from that person's reputation. In the United States, counterfeiting is a big market, with the U.S. Department of Homeland Security seizing "over 26,000 shipments of counterfeit goods valued at over $1.3 billion at U.S. borders" in 2020 alone.[1] In 2022, the total retail price of seized goods was close to $3 billion.[2] The top two economic segments of the seized goods were handbags/wallets and watches/jewelry, making up a combined total of 68.8% of all counterfeit goods.[3] Despite the detrimental effect of counterfeit goods, one can typically discern them from authentic ones based on quality, limiting their pervasiveness. Superfakes, however, are much more deceptive than typical counterfeit products.

Superfake products differ from traditional counterfeit in several important ways. First, the quality of materials is much higher; in fact, many superfake producers purchase

materials from the same suppliers as luxury brands to create an exact replica of their products and because luxury fashion is such a high-margin sector of the economy, they can charge lower prices and still make significant profits.[4] For example, a Birkin bag, which can retail for upwards of $20,000, costs approximately $800 to produce.[5] Second, the channels through which superfakes are bought and sold are not the cash-only New York street vendors that one typically imagines. Instead, these are sold using entirely digital channels, with hashtags and online groups being a main channel for circulation.[6] Finally, the target market of superfakes is much broader than

that of traditional counterfeit goods. Where the obvious inauthenticity of traditional counterfeited goods would drive away the status-oriented consumers, superfakes sacrifice nothing on quality, making them a viable option for those who seek the same status symbols for a more accessible price.[7] In examining potential legal remedies for the superfake problem, it is important to consider not only United States trademark laws such as the Lanham Act, but also international treaties on intellectual property and law regulating the global exchange of goods.

Important Legal Frameworks for Analyzing the Superfake Problem

United States Regulations

While brands can protect their marks through various avenues of intellectual property law, one key protective measure for luxury brands is trademark law. In order to be eligible for trademark protection under the Lanham Act, a mark must be distinctive and used in commerce.[8] In order to establish a trademark violation under this statute, the plaintiff must demonstrate that (1) the plaintiff has a valid and legally protectable mark; (2) the plaintiff owns the mark; and (3) the defendant's use of the mark to identify goods and services causes a likelihood of confusion.[9] In 1992, the Lanham Act was expanded to include trade dress, which is defined as "[t]he overall commercial image of a product or service[,]" which "may include the design or configuration of a product . . . [and] such elements as [the] size, shape, color" or overall consumer impression of a product, "to the extent [that] such elements are not functional."[10] Trade dress is divided into the categories of product packaging and product design, and in order to establish a trade dress infringement claim, the court applies the same test as a likelihood of confusion analysis. This test, however, focuses on the look and feel of the goods and services as a whole rather than a specific word or design element.[11]

Counterfeiting is a subset of trademark or trade dress infringement, in that all counterfeit marks are infringements, but not all infringements involve counterfeited marks. Counterfeiting is the process of "placing a false trademark on a product, often of inferior quality, in order to make the product superficially indistinguishable from the genuine article."[12] Under 18 U.S. Code section 2320, counterfeit marks are those that are spurious, or inauthentic, identical or substantially indistinguishable from a plaintiff's mark that is currently in use, and are applied to the same category of goods as the plaintiff's mark.[13] Additionally, the use of the mark must be unauthorized, and the counterfeit mark must cause confusion.[14]

International Protection of Intellectual Property

Early multilateral agreements on intellectual property included the 1883 Paris Convention for the Protection of Industrial Property (the "Paris Convention"), which created a Union of countries who policed domestic trademark registries on behalf of prominent trademark owners in other member countries. Soon thereafter, the 1891 Madrid Agreement Concerning the International Registration of Marks (the "Madrid Agreement") expanded on the provisions of the Paris Convention by creating a single registration scheme for trademark owners in member countries.[15]

In 1967, the World Intellectual Property Organization ("WIPO") was founded to facilitate cooperation between the Paris Convention member countries, and in 1989, the terms of the Madrid Agreement were updated and codified in the Madrid Protocol (the "Protocol"), which ensures "continued protection of marks registered through WIPO within the territories of all countries who join the [Madrid] Protocol."[16] Similar to the Madrid Agreement, the Madrid Protocol provides international trademark protection for marks registered in any member country.[17] Finally, the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights, or the TRIPS Agreement, was passed as a further expansion of the Madrid Protocol, adding obligations for member countries to prevent infringement.[18]

Inadequacies of the Current Framework

While the current intellectual property framework has evolved over time, it has much room for improvement. For example, the Lanham Act strives to encourage competition, prevent consumer confusion, and protect the goodwill of businesses, but does little to address the digital marketplace, leaving questions of intermediary liability unanswered. In terms of international law, the Madrid Protocol and its predecessors failed to create a comprehensive enforcement mechanism outside of domestic courts. These gaps in the legal system call into question the effectiveness of the current framework of international intellectual property law and necessitate a reform to account for the ways in which the internet is antiquating current regulations.

E-Commerce and Intermediary Liability

As of 2023, sixty-six percent of the global population are internet users and sixty-two percent are social media users. In the United States, ninety-two percent of the population are internet users, and of those users, almost every person has at least one form of social media[19]

The impetus of the internet has created a complex web of international legal issues. Every country has different laws to regulate online privacy and activity, which has created ambiguity over who regulates what digital activity. The addition of intermediaries like Google further complicates the assignment of liability for digital infringements.

In the past two decades, the international counterfeit market has increased ten-thousand percent, due in large part to the inception of the internet and boom of e-commerce.[20] Superfakes are sold primarily through digital channels, such as Amazon, eBay, and Etsy. However, under United States and European Union law, intermediaries are typically free from liability in trademark and trade dress infringement cases.[21] The lack of uniform global regulations on e-commerce places an undue burden on intellectual property owners, leaving them to tediously track down infringements one by one after they occur. While privacy is an important facet to the digital world, technological reforms placing more responsibility on intermediaries to block the channels through which counterfeit goods are traded would create more barriers to trademark infringement and better protect intellectual property owners.

The excessive burden on trademark owners of policing infringement of their marks is evident in *Tiffany & Co. Inc. v. eBay Inc.*, where Tiffany & Co. brought suit against eBay when seventy-five percent of the "Tiffany" goods sold on the site were counterfeit.[22] The Court ruled that eBay had used the trademark in good faith and was therefore excused from liability as an intermediary

Since the *Tiffany* decision, it has been exceedingly difficult for brands to establish claims against intermediaries because they will generally not be found liable in the absence of intent to infringe.[23] In copyright law, intermediaries have a "statutory obligation to block infringing material," but trademark owners are expected to detect and investigate infringements after they have already occurred.[24] E-Commerce exponentially increases the possible channels for buying and selling counterfeit goods and provides a shield of relative anonymity for buyers and sellers. This, combined with a lack of culpability for intermediaries, makes the digital landscape a hotspot for widespread trademark infringement.

The Role of Stakeholders in the Superfake Problem

Perhaps equally as problematic as e-commerce and its lack of intellectual property regulations is the complacency of consumers. In the European Union ("EU"), ninety-six percent of consumers value intellectual property protection for designers and brands, yet, eighty percent report having purchased a counterfeit product at least once.[25] Ultimately, for consumers, status and value considerations outweigh concerns for trademark owners. This attitude shift is led in large part by Gen Z; those born between 1997 and 2012. With the rising prices of authentic luxury goods, improved quality and availability of superfakes, the stigma of purchasing superfakes among Gen Z consumers is significantly less than earlier generations.[26] But despite the perceived positives of superfakes for these Gen Z consumers, counterfeit is not a victimless crime, and consumer complacency in fueling this problem increases the burden on trademark owners to protect their intellectual property.

Similar to consumers, governments of the countries producing these counterfeit products are complacent in the problem. For example, China, which is the biggest producer of counterfeit goods, lacks motivation to stop their production because of benefits to the local economy, and because China's relationship with Western countries is becoming increasingly strained.[27] Additionally, some countries allow "trademark squatting," which allows an individual to "steal another's mark" and register it in his own country despite knowing that it belongs to someone else.[28] Trademark Squatting is prevalent in China due in part to its first-to-file system, and the fact that arbitrary and fanciful marks lack a direct equivalent translation to Chinese.[29] For that reason, transliterations which mimic the brand name in its original language and have a meaningful Chinese translation are often used.[30] For example, the transliteration of Coca Cola is "Ke Ko Kelu," which mimics the sound of Coca Cola and translates to "delicious happiness."[31] This widens the range of possible infringements and forces trademark owners to be that much more vigilant in detecting and stopping infringements.

Recommendations

As the global issue of superfakes continues to escalate, urgent action must be taken to protect intellectual property rights from production to consumption. These actions, as discussed below, will need to come in the form of legal reforms, technological innovation, and cooperation between trademark owners, governments, and consumers.

Legal Reforms

The current international framework for regulation of trademark infringements is inadequate for the digital age. Proposed bipartisan legislation in the United States aims to reform e-commerce and stop counterfeiters by (1) establishing trademark infringement liability for e-commerce platforms that fail to implement best practices, (2) requiring trademark owners to

provide e-commerce platforms such as eBay and Etsy with their protected mark and a point of contact so the platforms can implement proactive protective measures, and (3) providing a safe harbor for platforms that vet sellers and remove counterfeit listings and their sellers.[32] While the proposed legislation, the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce ("Shop Safe") Act, would still place a burden on trademark owners to provide platforms with notice of their trademarks, it would offset the burden of policing infringements to digital platforms.

In the EU, various states are imposing their own reforms on intermediaries interacting with consumers in their countries. For example, in *Cartier International AG v. British Telecommunications Plc.*, a landmark case in the United Kingdom, the High Court imposed liability on "intermediaries whose services are used by a third party to infringe an intellectual property right," and held that "[intermediaries] have an essential role in these infringements, since it is via the [intermediaries'] services that the advertisements and offers for sale are communicated to ninety-five percent of broadband users in the UK."[33] *Cartier* represents a modernization of intellectual property law, and will no doubt form the basis of further judicial decisions that will help curtail infringements.

In addition to individual state reforms, harmonization of international intellectual property law between Madrid Protocol member states is critical. Under the current framework, "the jurisdiction where a case is filed can dictate whether a claim for contributory infringement will be successful," leading to inconsistent protections for trademark owners across jurisdictions.[34] Therefore, the *Cartier* decision should be universally adopted to impose liability on intermediaries and harmonize trademark law across Madrid Protocol member states.

Technological Innovation

In addition to legal reform, technological innovation is essential to preventing trademark infringements. Two such technological innovations are (1) blockchain technology and (2) radio-frequency identification and near-field communication technology.

Blockchain is technology that creates a decentralized digital ledger enabling exchanges between multiple parties in a secure database. Due to its provision of a transparent record of the entire supply chain which cannot be tampered with, fraudulent activity can be more easily identified and stopped more proactively.[35] Because origin is one of the biggest hurdles to infringement detection, blockchain technology would provide proof of origin and track the supply chain.

Radio-frequency identification and near-field communication technology serves a similar function. These one-of-a-kind, impossible to replicate tags allow for real time authentication and tracking. The company that purchases the tags is the only one to have those identification numbers, which can be read and authenticated through smartphone technology.[36]

Cooperation between Stakeholders

Finally, cooperation between governments, consumers, and trademark owners is imperative to tackle the superfake problem. Governments should engage in international partnerships to share intelligence, coordinate policing efforts, and harmonize legal frameworks to create a uniform set of standards for trademark infringements and alleviate the burden on trademark owners. Additionally, they should invest in the creation of an international trademark database to facilitate the sharing of intellectual property data between companies and reduce the burden on trademark owners. Consumers should remember that counterfeiting is not a victimless crime and shop accordingly. Companies should continue to engage in proactive protection, including through implementing more advanced authentication technology as it becomes more available. Collaboration between stakeholders creates a robust, interconnected network of resources and expertise and fortifies global efforts to safeguard trademarks.

Conclusion

The rise of superfake goods puts an enormous strain on international intellectual property rights. From modernizing the legal frameworks that govern international intellectual property rights, to implementing cutting-edge technology, to the crucial role of collaboration between governments, consumers, and intellectual property owners, it is evident that the only solution to the superfake problem is a multi-faceted one.

Gabriella Cate is a law student at SMU Dedman School of Law interested in international law, intellectual property, and the intersection of such fields. Gabriella interned with RGP, a global consulting firm, her 1L summer and hopes to work in international intellectual property law after graduation.

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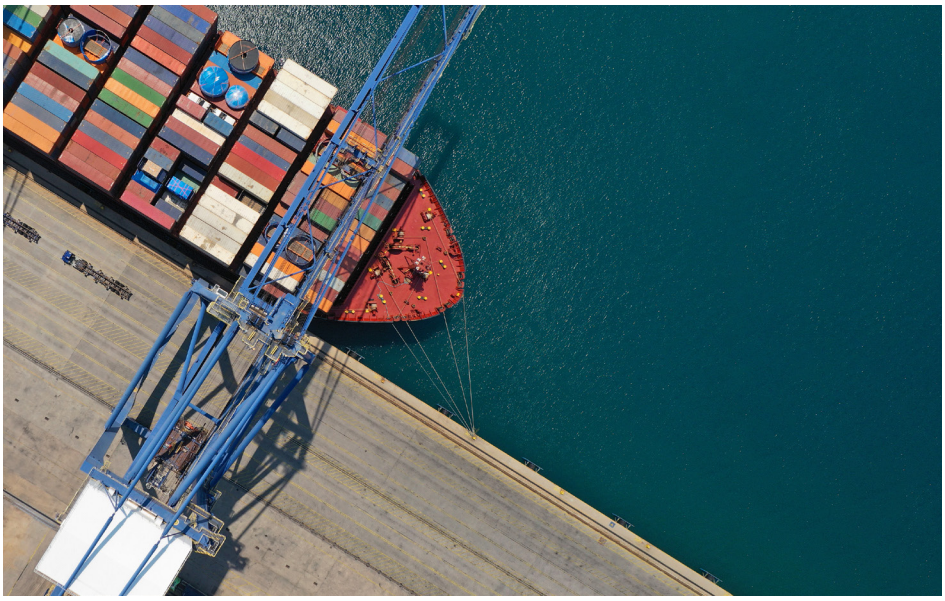
Tread Lightly: A Survey of Contemporary United States Trade Laws & Policies

GABBY UGARTE

Global sentiment towards international trade has shifted from warm acceptance to pessimism and cynicism. A long-standing world of unipolarity—where the United States ("U.S.") was the world's behemoth—has shifted and continues to shift closer to a dueling world state. The United States and China once appeared as strong trade partners. However, the impact of COVID-19, accusations going to and coming from both nations of the other violating international law, and geopolitical shocks have strained this partnership. This is most clearly recognized through an analysis of the United States' new trade policies and laws both towards China and other nations. This paper focuses on these policies and how the United States' shift to more protectionist and friend-shoring trade policies—risking alienating allies and developing new ones—while still facing a deep reliance on China's continuing trade might impact global trade in the coming years.



U.S.-China Relations & Policies

The United States' attempt at decoupling from China presents challenges to global efficiency in trade. Former President Trump introduced a series of tariffs that ultimately left no U.S. import untouched and acted as a stark reversal of the previously favored trade liberalization.[1] More recently, President Biden introduced comprehensive restrictions on the sale of semiconductors and chip-making equipment to China in an attempt to curtail its access to critical technologies.[2] The impact of these tariffs and restrictions did not go unnoticed. As of 2022, China has traded more with developing nations than the United States, Europe, and Japan combined since it started participating in global trade just four decades ago.[3] For example, German and Japanese automakers Volkswagen and Toyota, respectively, previously comprised fifty percent of China's auto market.[4] Now, those automakers make up thirty percent.[5] While automakers from U.S.-allied nations are not wholly indicative of tariff-induced tension between the United States and China, a deeper look into long-lasting strife between the United States and China may pose challenges to future trade.

Global entities, like the World Trade Organization ("WTO") and International Monetary Fund ("IMF"), demonstrate similar unease towards the United States' trade policies towards China. Research from the IMF indicates that greater fractures between the United States and China could cost the global economy as much as seven percent of gross domestic product.[6] Such fractures include the results of increasing

instances of friend-shoring—a trade practice that favors sourcing goods and manufacturing from allies over untrusted nations—and protectionist trade policies applied by the United States to the exclusion of China. As will be discussed, members of the WTO similarly hold little faith in the United States' shift in trade policies.

Yet, President Biden's recent meeting with President Xi Jinping in San Francisco presented an attempt to salvage the relationship between their two nations. They demonstrated this effort through, for instance, a more substantive effort for military communications to mitigate the risk of miscommunication.[7] Notably absent from the series of promises and conversations between these two nations was talk of trade. Not to imply that their agreements to stifle the production of fentanyl and miscommunications are without meaning, but simply to state that substantive changes in U.S.-China trade patterns seem unlikely as a result of their meeting.

U.S. Protectionist & Friend-Shoring Policies

The United States' trade policies as of late demonstrate a departure from the longstanding rule of laisses-faire trade policies and shifted to protectionist and friend-shoring tendencies. The Inflation Reduction Act, the CHIPS and Science Act, and the Infrastructure Investment and Jobs Act show the emphasis on growing the domestic industrial sector and minimizing reliance on global ties. To be sure, strengthening the domestic industrial policy does not necessarily pose significant implications for economic relations with foreign partners and can be exclusively focused on developing domestic economic capacity.[8] But to the extent that domestic industrial policy "appears to encourage domestic production of goods" over foreign ones, that policy may give rise to allegations from trading partners that it runs afoul of long-standing principles of "national treatment" inherent to the WTO charter of which the United States has long been a part.[9]

Such allegations have already begun. Since the Inflation Reduction Act passed, the European Union and South Korea alike condemned the United States' actions and called several provisions of the Act a breach of international trade laws.[10] Notably, both allies of the United States consider the Inflation Reduction Act to contain protectionist provisions.[11] As noted earlier this year regarding the Biden administration's trade goals, it "seeks to relocate production and reallocate supply chains in what has been referred to as "near-shoring" or "friend-shoring" away from [China] and towards countries with shared values and more market-based economies."[12] In other words, the United States is moving trade to allied nations, so to speak.

Though this paper disagrees with the United States' shift to friend-shoring and protectionist policies, such policies are not without their benefits. The United States and its allies alike broadly support containing China and its attempt to become the next global behemoth.[13] The policies presented by the United States would result in diversification of trade, ultimately providing benefits to workers in Europe and elsewhere because of increased job opportunities.[14] Domestic U.S. workers and companies alike would see benefits in increased opportunities for employment and demand for production of goods otherwise produced overseas. Unfortunately, these benefits do not constitute a comprehensive list of the consequences resulting from adopting the policies championed by the United States.

This attempted friend-shoring approach is similarly not altogether favored by those allies, most notably, European nations. These nations fear the formation of favored blocs that, if this relocation and reallocation of trade prove successful, "would receive greater market access opportunities and less behind-the-border trade barriers."[15] Yet those on the outside of those blocs would experience diminished opportunities, increased costs, and deeper inefficiencies in trade.[16] This would ultimately lead the global economy to suffer, as production would contract, and costs to rise.

The United States' goal for protectionist and friend-shoring trade policies acts as a stark contrast to the diplomatic and peace-centric meeting between Presidents Biden and Xi. Yet, the United States faces difficulty in developing and maintaining a base of allies "to take on China and a 'friend-shoring' policy granting certain countries with priority supplier access to the US," while, in the same breath, promoting a protectionist industrial policy.[17] The United States, in short, wants to have its cake and eat it, too.

The Reality of U.S. Trade Policies

While the United States' policies over the last two presidencies indicate a sharp reversal of liberal trade policies, contemporary studies show how its new policies might affect future global trade. Recent global economic studies found that the reshaping of United States imports away from China may not have reduced dependence on China as much as import numbers suggest.[18] This is so because countries that had a deeper engagement in Chinese supply chains experienced the most rapid export growth to the United States.[19] That same evidence demonstrates that countries that saw faster export growth to the United States in certain sectors also had more intense intra-industry trade with

China in those same sectors.[20]

So, yes, the United States is attempting some semblance of de-coupling from China. That task simply proves easier said than done. While the United States has, in fact, relocated trade away from China, it has not, in reality, done so to the perceived degree. The reason is that countries that the United States has relocated trade to actually source the same materials from China. As discussed in an article published by the think-tank American Progress earlier this year, this tactic by the United States could give rise to its allies accusing it of allowing "double standards" as it seeks deeper economic connections with countries whose manufacturing practices mirror those of China.[21] The United States' trade policies, at present, risk frustrating allies and efficient international trade due to it creating and perpetuating a system that places a premium on trust rather than efficiency.

A Way Forward

A way forward for the United States may present itself through a variety of trade policies; however, outlined here are several examples of what the United States might do to mitigate the risk of global favoritism and continued disfavor in the eyes of its allies. Efforts by the United States to diversify supply chains and pursue friend-shoring may continue without issue, but the U.S. must "re-engage in the trade community, re-establish credibility in the WTO, and offer market access to partner countries" while obtaining greater market access opportunities in those countries.[22] This may be done by assuring allies that the protectionist policies at present are simply meant to bolster domestic abilities, not devalue established international connections. Moreover, given China's increased influence in Africa, meaningful engagement and partnerships with African nations would prove beneficial to the United States.[23] Similarly, continuing the cultivation of dualistically profitable trade agreements with Asian nations—aside from China—is encouraged.[24]

Regarding the United States' European allies, the U.S. may seek to cement its commitment by allocating "financial assistance, starting with what has already been committed—notably the Green Climate Fund and the Loss and Damage Fund..." created at the 27th U.N. Framework Convention on Climate Change Conference of the Parties.[25] Moreover, it would behoove the United States to work with its European counterparts on the sourcing of critical minerals and technology transfers to Global South countries due to their rising prominence in some of the most essential products to date.[26] To further strengthen its current international trade policies, the United States should create policies with the purpose of better "reflect[ing] the needs and aspirations of low-income countries in attracting overseas investment and strengthening their energy insecurity," and pursue a new trade agreement with an emerging economy like Kenya or South Africa.[27]

The United States need not aim for wholly globalist trade policies, but it must not, in the same vein, act only in protectionist self-interest and dismiss other means of successful trade. Put differently, the United States may develop strong domestic industrial policy while maintaining and building trade relationships with its allies, in the hopes that it can avoid a world where China has the strongest trade relations, and the United States has alienated its allies. The question now is whether it will do so.

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Hannah Askew

SMU Law Student

2024 Essay Contest Winner

The State Bar of Texas International Law Section is proud to announce that Hannah Askew is this year's winner of the Thomas H. Wilson Scholarship Award for her winning essay titled, "Russia's Forcible Transfer and Deportation of Ukrainian Children."

Hannah is currently a J.D. / M.B.A. candidate at SMU Dedman School of Law & Cox School of Business and will be graduating in 2026.

Originally from San Antonio, she attended UTSA for her undergraduate studies where she double majored in politics/law and psychology.

Hannah will receive a $1,500 cash prize and her essay has beeen published in this issue of the section's International Newsletter.

Named in honor of the late Thomas H. Wilson, a distinguished member of the Texas legal community and former chair of the International Law Section (2018-2019), this scholarship is awarded annually to deserving law students. Recipients are selected based on their submission of a compelling essay on any topic within the realm of human rights law.

"Hannah's essay was well regarded by our judges and stood out even amongst our strongest field of submissions ever," said Joshua Newcomer, chair of the section's International Human Rights Committee, which oversees the scholarship program.

Russia's Forcible Transfer and Deportation of Ukrainian Children

HANNAH ASKEW

Since Russia invaded Ukraine in February of 2022, thousands of Ukrainian children have been forcibly transferred from Ukraine to Russia and Russian-controlled territory.[1] Many of these children have been adopted by Russian families and become Russian citizens. Russia has stated that these are "evacuations" done for humanitarian purposes and claimed that the adoptions are done to save Ukrainian "orphans."[2] In reality, many if not most of these children have parents who are very much alive and want them back.[3] However, there are numerous challenges that these parents face when they attempt to do so. One of these challenges is the difficulty locating the children at all, due to a lack of records showing who went where.[4] Another is the barrier that Ukrainian parents face territorially and financially, as many of them are required to go to Russia or Russian-controlled territory in order to retrieve their child.[5] Additionally, there is the challenge that some children, having been given pro-Russia propaganda, do not want to return to Ukraine.[6]

In March of 2023, the International Criminal Court (ICC) charged President Vladimir Putin and Maria Lvova-Belova, his children's rights commissioner, with the war crimes of unlawful deportation and unlawful transfer of population (children) from Ukraine.[7] It has been eight months since the ICC issued arrest warrants for Putin and Lvova-Belova, yet no arrests have been made and the issue is ongoing.

Because the ICC does not have its own police force, it must rely on countries that are party to the Rome Statute to enforce its arrest warrants.[8] It is fair to expect that Putin and Lvova-Belova will not be arrested for two reasons. First, Russia is not a party to the Rome Statute, which established the ICC, so Putin and Lvova-Belova will not be arrested by their own country.[9] Second, they are unlikely to travel to a different country that *has* agreed to the Statute; it is also unlikely that, if they did do so, any of those countries would be willing to arrest them and deal with the controversy that would come with taking such action.[10]

However, this does not mean that the ICC's arrest warrants are simply symbolic or just a slap-on-the-wrist. In fact, there is evidence that suggests that the arrest warrants were influential in getting Russia to return some of the children.[11] The arrest warrants were a good start to holding Russia responsible, and sanctions imposed on Russia since then have put an increasing amount of pressure on Russia in this conflict, but there is more work to be done.[12] This paper argues that it is not the ICC, but national governments and international organizations that are better able and more likely to hold Putin and Lvova-

Belova accountable, and to end Russia's forcible transfer and deportation of Ukrainian children.

Section I of this paper will provide an explanation of how the forcible deportation and transfer of Ukrainian children takes place through two separate routes, which both end in the adoption of the children into Russian families. In Section II, the paper will describe the Russification of the children – a process in which they are stripped of their Ukrainian identity – through systematic reeducation efforts to have them identify as Russians and actions taken at the Russian government's legislative and executive levels to further this goal. Section III will summarize the ICC's involvement thus far– primarily, the ICC's decision to arrest warrants for Vladimir Putin and Maria Lvova-Belova for their roles in the forcible deportation and transfer of the children, as well as the impact of the ICC's decision. Then, Section IV will describe ongoing efforts to retrieve the children and hold Russia accountable, as well as expert recommendations for further efforts. Finally, Section V of the paper will propose how the ICC, Ukraine, and other states should act going forward to achieve these goals.

The Transfer & Deportation of Ukrainian Children

In the almost two years since Russia invaded Ukraine, thousands of Ukrainian children have been removed from their homes and transferred to Russia and Russian-controlled territories. While Russia claims that this is done for the "humanitarian" purpose of protecting Ukrainian "orphans," it is *actually* an organized effort to remove these children from their families and strip them of their Ukrainian identity.[13] This section of the paper aims to describe the two processes of how the transfer of these children takes place, depending on which category the child belongs in.[14]

Process 1: Deportations and Evacuations

The first process is for children who are purported orphans.[15] While some of these children are orphans, the majority of them have parents or guardians who are alive.[16] Russia's designation of "orphans" includes children who reside in Ukraine's state institutions or who are of uncertain custody.[17] Russia claims that some are simply orphans, and these children are deported to be fostered or adopted by Russian families directly.[18] Others in this category are allegedly "evacuated" from Ukraine due to 'safety concerns' or for 'medical care,' according to Russia.[19] They are sent to hospitals or other facilities in Russia-controlled areas and upon leaving these facilities, they are moved to family centers and ultimately fostered or adopted by Russian families as well.[20]

Process 2: Camps

The second process is for children with known parents or guardians; these children are sent to recreational camps in Russia, either with or without consent of the parent or guardian.[21] Some children do return to their families when they are scheduled to, but many of them have suspended returns.[22] Other children in these camps are completely cut off from their families, as the camp administrators restrict or forbid their communication.[23] Although some of the parents consented to their children going to these camps temporarily, the Russian camp officials will keep the children there for longer without the parents consent. Sometimes, the parents are not even informed of the delay.[24] These parents are often told by the camp officials that the children will not be returned to Ukraine because it is unsafe there.[25] Others are told that the children will not be released unless a parent/guardian comes to pick up the child in person – a journey that is very expensive and dangerous for most Ukrainian parents to take. [26] If the parents do not come get the children in person within a certain time frame, the children are placed in Russian families' homes to be fostered by or adopted by those families.[27]

After the Children are Adopted

Regardless of whichever process occurs, it is nearly impossible for the parents to retrieve their children after adoption has taken place because there is no formal system for having the children returned to Ukraine or reunited with their families.[28] To make things even more difficult, Russia does not keep records of where all of the children have gone.[29] This is a clear violation of Article 78 of Additional Protocol I of the Geneva Convention, which requires that when a country arranges for the evacuation of children, other than its own nationals, to a foreign country, that country must facilitate the return of those children to their families and work with the Red Cross to ensure that the location of the children can be traced.[30]

The Russification of Ukrainian Children

Russification is the erasure of the Ukrainian childrens' national identity and "[transformation of] their Ukrainian consciousness into Russian consciousness." [31] In addition to the already mentioned obstacles that Ukrainian parents face when attempting to retrieve their children, Russification presents an additional problem: after being exposed to Russian propaganda, some children do not want to return home.[32] This Russification occurs not only at the camps that the children are sent to, but also through placing the children

into Russian families and granting them Russian citizenship.[33] Russia has taken action at the executive and legislative levels to facilitate the childrens' adoption of a Russian identity: in March of 2023, Putin instructed the Russian legislature to simplify the procedure for Russian families to adopt Ukrainian children.[34] Russia has also accelerated the procedure for these children to gain Russian citizenship.[35]

Systematic Re-education Efforts

When the children are taken to the camps in Russia-controlled areas, they are exposed to Russia-centric academic, cultural, and patriotic education.[36] The children are taught lessons in Russian, made to sing the Russian national anthem, and educated in pro-Russia version of history.[37] Additionally, they are forbidden from speaking Ukrainian and forced to learn Russian instead.[38] Russia has stated that the goal of this re-education system is to get the children interested in attending Russian universities in the future.[39] However, it is argued that the true motivation is to brainwash the children to forget their Ukrainian identity.[40] Allegedly, children in some of the camps are being exposed to military education.[41] It is claimed that they are being taught how to handle military equipment, drive trucks, and use firearms.[42]

The re-education of these children appears to be quite effective in Russifying some children. Reporters at the New York Times have spoken to the parents of multiple children who attend these camps and have heard first-hand accounts of how their children believed the propaganda and as a result did not want to return home.[43] One mother said that when she went to collect her son, he told her that life was better in Russia and that he wished to stay there with his foster family.[44]

Legislative and Executive Action to Support Russification

Under Russian law, it is prohibited for foreign children to be adopted without the consent of their home country.[45] But Putin signed a decree in early 2023 which made it much simpler for Russia to adopt Ukrainian children and give them Russian citizenship without the consent of Ukraine.[46] In January 2024, he signed another decree which states that Ukrainian orphans and children without parental care are eligible for receiving Russian citizenship without satisfying all the requirements of federal legislation.[47] Additionally, there is a financial incentive for Russian citizens to adopt the children, because "receiving Russian citizenship entitles the children to social guarantees and access to government subsidies."[48] Russian law provides that the adopted children are equal to their parents' own children,[49] which means that the adoptive parents are allowed to change the children's names, surnames, dates of birth, and birthplaces.[50] This makes it even more challenging for Ukrainian parents to find their children, as it is more difficult to identify any relatives in Ukraine or to establish the status of the adopted children.[51]

ICC Involvement

The International Criminal Court (ICC) was established in 1998 under the Rome Statute. Though neither Ukraine nor Russia is party to the Rome Statute, the ICC can exercise jurisdiction over war crimes that have been committed in the conflict between Ukraine and Russia.[52] This is because Ukraine, pursuant to Article 12(3) of the Rome Statute, has accepted the *ad hoc* jurisdiction of the Court for alleged crimes committed by Russia throughout the territory of Ukraine from February 20, 2014.[53] These alleged crimes include the forcible transfer and deportation of Ukrainian children, which fall under Article 8 of the Rome Statute.

Relevant Articles of The Rome Statute

Article 8(2)(a)(vii) provides that "unlawful deportation or transfer" of persons is a war crime. The elements of the crime are:

1. The perpetrator deported or transferred one more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the actual factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[54]

Article 8(2)(b)(viii) provides that "the deportation or transfer of all or parts of the population of the occupied territory within or outside [the] territory [which is occupied by an Occupying Power]" is a war crime, as well. The elements of the crime are as follows:

1. The perpetrator:
    a. Transferred, directly or indirectly, parts of its own population into the territory it occupies; or
    b. Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[55]

The ICC Issues Arrest Warrants for Putin & Lvova-Belova

On March 17, 2023, the ICC issued arrest warrants for Putin and Lvova-Belova.[56] This action was taken based on the ICC's finding that there are reasonable grounds to believe that Russia's forcible transfer and deportation of Ukrainian children constituted war crimes, as defined in Article 8(a)(2)(a)(vii) and Article 8(2)(b)(viii).[57] In issuing the arrest warrant, the ICC said that Putin "bore individual criminal responsibility for the abduction and deportation of Ukrainian children since Russia's invasion [in 2022]."[58] The Court also issued the warrant for Maria Lvova-Belova as "the public face of the Kremlin-sponsored program that transfers the children out of Ukraine."[59]

Nearly a year has passed since the ICC issued the arrest warrants, but no arrests have yet been made. Because the ICC has no police force, "it must rely on the cooperation of its 123 member states to enforce its warrants, something they haven't always been willing to do."[60] While the threat of arrest limits both Putin and Lvova-Belova from traveling to member states, they are free to travel to states that are not parties to the ICC, as those states are not required to take action based on the arrest warrant.[61]

There are two other obstacles to their arrests. First, "even if Putin… [was] to lose power in Russia, a government that wanted to extradite him would face a major hurdle: the Russian constitution prohibits the extradition of Russian citizens to another state."[62] Second, the ICC would not try either party without first arresting them, as the Court does not conduct trials without the accused present.[63] Therefore, it is very unlikely that Putin or Lvova-Belova, while Putin remains in power, will be arrested and surrendered to the ICC.[64] Commentators have therefore questioned whether the ICC's arrest warrant from March of 2023 matters.[65]

The Impact of the ICC's Decision

Despite not leading to any arrests thus far, the warrants have been effective in other ways. Some speculate that it has prevented Putin from traveling.[66] Additionally, by issuing the warrants and making them public, "the ICC is relying on the symbolic function of international criminal law – it is publicly naming and shaming Putin and Lvova-Belova for the commission of serious atrocities, and it is sending a message to other leaders and the international community that such actions are not without consequence."[67] The message was definitely heard by the international community, as the ICC's decision led other countries to take action against Russia for their alleged war crimes.[68] For example, in August of 2023, the U.S. State Department imposed economic sanctions against a number of "people and entities it said are reportedly connected to the forced deportation and transfer of Ukraine's children."[69] Moreover, Ukraine has said the ICC's arrest warrants have proved useful in getting Russia to return at least some of the deported children.[70]

The arrest warrants also help the victims of Russia's actions by affording them "some form of vindication or recognition for their suffering and hope for justice in the future."[71] Additionally, the warrants have been beneficial for the ICC's reputation, as "making the warrants public enables the ICC to reclaim itself as a key avenue for ensuring accountability for international crimes, following a wave of criticism and disenchantment about its work…."[72]

Despite the good that the ICC's arrest warrants have done, there is the risk that they could interfere with the ability to enter into peace negotiations with Putin.[73] Serbian President Aleksander Vucic argued that the warrants "will have bad political consequences" and create "a great reluctance to talk about peace (and) about truce" in Ukraine.[74] Specifically, Russia might "use [the ICC's decision] to raise the stakes of the war domestically and also to argue, when it wants, that any negotiations are just a smokescreen to the ultimate goal of toppling Putin."[75] It is also unlikely that the warrants have an impact on Putin domestically, aside from limiting his ability to travel, as Russian press coverage has "[described] the arrest warrant as 'a rotten political show and corrupt, opportunistic justice in the interests of the countries of the "golden billion," a reference to anti-Western Russian conspiracy.'"[76] However, there is a potential impact on the elites supporting Putin's maintenance of power: "the ICC warrant may complicate Putin's position by both increasing elites' unhappiness with him (the war crimes accusation could complicate their ability to travel freely abroad) and, as a result, by heightening his suspicion of the people around him."[77]

Ongoing Efforts and Recommendations for Future Action

The ICC's decision from last March was a good start to holding Russia accountable for the forced deportation and transfer of Ukrainian children. In addition to national governments putting pressure on Russia following the decision, ongoing efforts by groups like Save Ukraine, a charitable organization dedicated to retrieving the deported children, have been central to bringing the children back to Ukraine.[78] However, there still are many who have not been returned and Russia has continued to deport and transfer even more children.[79] While Kyiv says that 20,000 children have been taken from Ukraine to Russia or Russian-occupied territories,[80] it is estimated that only five hundred of these children have been returned to Ukraine as of late February 2024.[81] Clearly, there is much more work to be done. This section will

describe ongoing efforts to hold Russia accountable and recommendations that have been made for further actions to retrieve the children.

Ongoing Efforts: Putting Pressure on Russia and EU Actions

Since the ICC's decision back in March 2023, there has been an increase in pressure placed on Russia by national governments.[82] Some of this pressure has been in the form of economic sanctions imposed on Russia.[83] Notably, the European Union has imposed sanctions on 39 individuals responsible for the deportation and forced transfer of Ukrainian children.[84] Additional pressure has been placed on Russia through public condemnation of these actions. In April 2023, "a 'Joint Statement' was signed by the EU together with 22 other states... [which] stated ... that: 'we unequivocally condemn the actions of Russia in Ukraine, in particular the forced deportation of Ukrainian children, as well as other serious violations against children committed by Russian forces in Ukraine.'"[85] In June 2023, the U.S. Senate condemned Russia for these actions as well.[86] In March 2024, the U.S. went even further in demonstrating its support by "[announcing] it has joined the International Coalition for the Return of Ukrainian Children as a member state to support the safe return of all Ukrainian children who have been unlawfully deported or forcibly transferred by Russia, and to ensure those responsible face consequences."[87]

The arrest warrants catalyzed action at both the domestic and EU levels.[88] Following the issuance of the arrest warrants, the EU has actively supported the ICC and Ukraine in their efforts to retrieve the displaced children and to hold Russia accountable.[89] In addressing urgent concerns surrounding Ukrainian children forcibly deported to Russia, Dubravka Suica, Vice President of the European Commission, detailed how the EU has supported the ICC and Ukraine's efforts and how it intends to continue doing so:

- Seventeen Member States have so far opened investigations into international crimes committed in Ukraine, and the European Union is supporting these national investigations through strengthening judicial cooperation via Eurojust.
- Six Member States and Ukraine are members of the joint investigation team, to which the ICC and Europol are participants....[90]

The EU has also supported the ICC monetarily, "with over EUR 10 million since the beginning of the invasion."[91] Suica expressed the EU's belief that "the court is a key actor for consistency and enforcement of the international criminal justice system," and at the same time, the "EU intends to continue supporting the Prosecutor of General Office of Ukraine to strengthen its capacities to investigate and prosecute international crimes committed in Ukraine."[92] So far, this support has included the EU putting 4 million Euros toward financing the IT advancement of the Prosecutor General's Office.[93] Further, "the European Union is committed to improving the coordination of various support efforts to the Prosecutor General's Office through the international platform of the dialogue group."[94]

Recommendations for Further Action

With only five hundred of the estimated 20,000 children who were forcibly taken by Russia having been returned to Ukraine, there is much that must be done retrieve more children already in Russia or Russian-occupied territory, as well as to prevent further deportations from occurring.[95] In November of 2023, a workshop was organized on behalf of the European Parliament's Subcommittee on Human Rights (DROI).[96] At the workshop, academic experts Dr. Andreas Umland and Dr. Yulia Ioffe made recommendations for how to bring the Ukrainian children back home.[97]

Dr. Umland, an analyst at the Swedish Institute of International Affairs, first recommended two strategies for returning the children home: "firstly, a shaming and blaming campaign, and secondly, a backchannel diplomacy initiative."[98] The backchannel diplomacy that he advocates for "would use mediators, usually non-western states, neutral non-governmental organizations (NGO), religious and labor, and other groups to bring children back from Russia to Ukraine."[99] He also recommended that the European Parliament and the European Union work by in using their connections to both governmental and non-governmental actors in Russia to identify where the children are and which ones have been forcibly deported in order to facilitate their return.[100]

Additionally, Dr. Umland emphasized the importance of international organizations and national governments putting international pressure on Russia in order for a radical regime change to occur; "in that regard, he endorsed the recommendations of the Regional Center for Human Rights, a major Ukrainian NGO[,]" which suggests that ad hoc parliamentary resolutions should deal with the deportation and transfer of the children specifically, "rather than having this topic included to a subcomponent to a larger resolution by a national or international body."[101] He stated that the best and most important place for this to take place would be the United Nations (UN) General Assembly.[102] The Center also suggested that sanctions imposed on Russia due

to their deportation and Russification of Ukrainian children should be expanded beyond their current scope.[103]

Recognizing that a large challenge to finding the children is the lack of records showing who went where,[104] Dr. Umland emphasized that more research must be done to build a comprehensive register that documents the deported and displaced children.[105] In order to prevent even more children from being taken by Russia, he also recommended that an awareness-raising campaign be created for Ukrainian families about the holiday camps so they "do not fall victim to Russian traps[.]"[106]

Dr. Ioffe, an Assistant Professor in Law at University College London, also stressed the importance of prevention, noting that there is no mechanism in international law for the return of

children.[107] She emphasized "the need for close cooperation in evidence collection, an enhanced use of universal jurisdiction, and a coordinated approach to financing."[108]

In respect to Ioffe's recommendation for an enhanced use of universal jurisdiction, it has been suggested that other states should "pursue accountability for the forcible transfer of Ukrainian children at the national level pursuant to the principle of universal jurisdiction" to "[be part of the solution to addressing the … atrocities committed in Ukraine."[109] So far, four states – Germany, Sweden, Lithuania, and Spain – have commenced universal jurisdiction investigations into war crimes committed by Russians in Ukraine.[110] It is much more likely that a trial of a Russian defendant outside Ukraine will occur at the national level rather than at the ICC "because many states that have a civil-law system, such as Lithuania, permit trials [without the defendant present]."[111]

Conclusion

Unfortunately, the ICC is very limited in its ability to support efforts to prevent further deportations and transfers of Ukrainian children and to retrieve them from Russia. While the arrest warrants for Putin and Lvova-Belova demonstrate the importance of accountability efforts within the conflict between Russia and Ukraine,[112] they simply are not enough to produce the desired result. This is due to: (1) the lack of ICC power to enforce the warrants;[113] (2) the improbability of Putin or Lvova-Belova traveling to a state that is member to the Rome Statute,[114] which would have ability to enforce the warrants; (3) the low likelihood of a member state being willing to arrest Putin and Lvova-Belova, should they travel to one;[115] and (4) the ICC's inability to conduct trials without the accused present.[116] Additionally, there is the risk that further ICC action would push Russia to raise the stakes of the war domestically and frustrate any chance of Putin entering into peace negotiations.[117] However, the arrest warrants were a good start to holding Russia accountable for the taking of Ukrainian children, as Ukraine has said that they were influential to Russia returning some of the children.[118]

When offering recommendations on how to address the issue, experts have: emphasized the importance of international organizations and national governments putting international pressure on Russia;[119] stressed the need for organizations, such as the European Parliament and the European Union, to build a comprehensive register to document the deported and displaced children;[120] suggested that Ukraine create an awareness campaign about the holiday camps;[121] and advocated for a backchannel diplomacy that "would use mediators, usually non-western states, neutral non-governmental organizations (NGO), religious and labor, and other groups to bring children back from Russia to Ukraine."[122] Also, national governments placing sanctions on Russia following the issuance of the arrest warrants have been commended by those experts, who have further recommended that those sanctions be expanded beyond their current scope.[123]

Further, it is not likely that Putin and Lvova-Belova, or other actors involved in the forcible transfer and deportation of Ukrainian children, will be tried by the ICC. However, such a trial is much more likely to occur at the national level pursuant to the principle of universal jurisdiction, as states with civil-law systems permit trials without the defendant present.[124] While Ukraine has seemingly prioritized the litigation before the ICC,[125] it appears that the most effective actions to end Russia's forcible transfer and deportation of Ukrainian children are not likely to be taken by the ICC, but instead by national governments and international organizations.[126]

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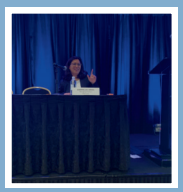

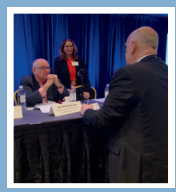
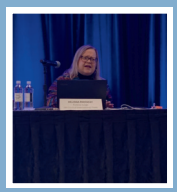







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