The views, information, or opinions expressed in *International Law News* are solely and exclusively those of the authors and not those of the American Bar Association or the ABA Section of International Law. *International Law News* is intended for educational and informational purposes only.

**International Law News: Fall 2018**

**Contents**

**FEATURES**

Trends in Trade Remedies around the Globe  
*By Jonathan O’Hara, Renee Dopplick, and Lisa Page*  
3

Globalization of Legal Services: Navigating New Opportunities in China and Beyond  
*By Asen Velinov*  
9

*By Liz Cohen*  
16

Human Rights Defenders Face Increased Threats  
*By Juan Ramirez*  
20

**COLUMNS**

Chair’s Column  
*By Robert L. Brown*  
2

International Updates  
By Renee Dopplick  
23

Country Updates  
By Renee Dopplick  
25

Book Review: *Kiss, Bow, or Shake Hands: Courtrooms to Corporate Counsels*  
Reviewed by *Joshua M. Toman*  
27
The ABA Section of International Law provides several platforms for you as a member to stay informed of developments in the law affecting your practice. Section publications, such as the *International Law News* you are reading, are just one.

In addition, we offer a range of programs. For instance, in October 2018, the ABA Section of International Law sponsored a conference in Seoul on the Asian region and the impact of technology and innovation. Panels included sessions on the Korea-U.S. free trade agreement, the future possibility of doing business in North Korea, Committee on Foreign Investment in the United States (CFIUS) reviews, the FRAND patent debate, cryptocurrency, fintech in Asia, peer-to-peer digital platforms, the impact of artificial intelligence on the practice of law, cyber fraud, and equitable relief in arbitration. We also heard from the Chair of the American Chamber of Commerce in Seoul, and the new U.S. Ambassador to Korea, Harry Harris.

In November 2018, the ABA Section of International Law shifts its focus to Mexico with panels on USMCA/NAFTA, recent Latin American and U.S. elections, trade and investments in a time of heightened nationalism, trade protectionism, the future of investor-state dispute settlement (ISDS), special economic zones, the #MeToo movement, 3D remote printing, blockchain, merger control, and requirements under the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS). We will also have a panel of general counsels discussing issues important to them. Prominent speakers will include Gabriela Cuevas Barron, President of the Inter-Parliamentary Union; Rina Mussali Galante, anchorwoman and political analyst; Carlos Moeller, Inter-American Court of Human Rights Secretariat; and Edgar Manuel Bonilla Del Ángel, Vice President of Legal Affairs at the Comisión Nacional Bancaria y de Valores.

In Spring 2019, we will hold our Section’s Annual Conference in Washington, D.C., where the theme will be “Other Voices in Private and Public International Law.”

July 2019 will see us at Oxford University for a program on leadership and the law, with tracks on the impacts of inclusion and disruptive technology. Speakers will include a U.S. Supreme Court Justice, a U.K. Supreme Court Justice, and a former dean of Oxford Business School. We will open with a debate at Oxford Union on Sunday, June 30, and finish with dinner at Blenheim Palace on July 2. We will be saving July 1 for a pub crawl where we can learn about the history of Oxford and share a toast to celebrate being there. Attendees will stay at Oxford College in suite arrangements, so it is not like going back to college, and dine in halls reminiscent of those in the Harry Potter films.

So, after reading this edition of the *International Law News*, come join us at one of these programs by going to our Section’s [website](http://example.com) to learn more.
Tensions over global trade are rising, as is the attention on the role and effectiveness of the World Trade Organization (WTO) to reduce trade-distorting policies and strengthen international trade cooperation. The G20 countries, at their meeting in Argentina in September, reached consensus that there is an urgent need to reinvigorate the international trading system and reform the WTO. The WTO’s future will have significant impacts on the multilateral framework for trade. The WTO oversees global rules for trade and plays a core role in resolving international trade disputes among its 164 members. The United States is among the proponents for reforming the WTO, with President Trump threatening at the end of August to withdraw from the organization if improvements are not made. President Trump has also stated that the United States would block this year’s reappointment of four of the seven judges on the WTO Appellate Body, which resolves disputes of unfair trading practices, unless progress is made on its restructuring.

President Trump’s threat of potential withdrawal followed the United States launching five separate WTO disputes in July against China, the European Union (EU), Canada, Mexico, and Turkey for imposing new tariffs in response to U.S. tariffs on imports on steel and aluminum. The United States asserts that its steel and aluminum tariffs are consistent with its right to protect U.S. national security interests under international trade rules and that the other countries are responding with retaliatory tariffs in breach of the WTO’s General Agreement on Tariffs and Trade (GATT).

To help facilitate the path forward for negotiations of WTO reforms, Canada in September proposed a draft discussion paper, titled “Strengthening and Modernizing the WTO.” Canada will convene a ministerial group to discuss proposed reforms of the WTO on October 24 and 25, 2018, in Ottawa. The meeting will include trade ministers from Australia, Brazil, Chile, Japan, Kenya, Mexico, New Zealand, Norway, Singapore, South Korea, Switzerland, and the EU.

Among the major areas targeted for reforms is the WTO’s dispute settlement system. The policy rationale underlying trade remedies, such as anti-dumping measures, can be contentious. On the one hand, a government’s right to protect its industries from unfair trade seems laudable. On the other, trade remedies are sometimes alleged to have a protectionist element. The WTO dispute settlement process exists, in part, to help strike the appropriate balance pursuant to commitments under the WTO Agreement.

As stakeholders look at ways to strengthen and reform the WTO dispute settlement system, what can we learn from two decades of domestic anti-dumping investigations? Have investigations increased alongside the growing complexities of our global economic system? Are countries with emerging economies using trade remedy rules against larger trading countries, or do we find them largely disadvantaged, or even potentially absent? Are some countries more active than others incommencing
investigations or imposing trade remedy measures?

This article spotlights six key findings gleaned from the data of thousands of anti-dumping investigations from 1997 through 2017. Anti-dumping complaints, broadly speaking, are brought when products are being imported at an allegedly unfairly low price, generally lower than in the exporter's home market. The article takes an in-depth look anti-dumping investigations and WTO anti-dumping disputes for a sample of countries with developed and emerging economies. The study sample included eight G20 members: the United States, the EU, Canada, and the five so-called BRICS countries of Brazil, Russia, India, China, and South Africa. The BRICS countries have met as a group annually since 2009, with South Africa joining in 2010, and represent how emerging economies have adapted to international trade rules under the WTO.

To assess trends in anti-dumping proceedings by WTO members, we analyzed data from more than 4,500 anti-dumping investigations from 1997 through 2017, obtained from the WTO’s Integrated Trade Intelligence Portal. The analysis considers definitive anti-dumping measures brought by or that came into force for each of the eight jurisdictions by all WTO members. The analysis also includes WTO dispute resolution matters where the eight jurisdictions participated as a party, either as complainant or respondent. It does not include cases where they were only asserting their third-party rights.

The vast majority of the anti-dumping measures examined was initiated and concluded during the time period of 1997 until 2017; however, certain isolated cases were initiated prior to this period and were brought into force or withdrawn in the examined period. To help assess trends over time, the two decades were divided into three periods: 1997—2003, 2004—2010, and 2011—2017.

**Overview of Dumping and Anti-Dumping Proceedings**

“Dumping” occurs where a company exports a product at a lower price than the price it normally charges in its domestic market. Under the WTO Agreement, dumping is not illegal; however, members are allowed to take certain actions to counteract the dumping.

The country receiving the dumped product can implement an “anti-dumping measure,” which is a government’s response against dumping, usually through an extra duty on a particular product from the exporting country in order to bring the price to its “normal value.” A normal value generally reflects the selling price in the exporter’s domestic market. An anti-dumping duty aims to protect domestic industries by rectifying the trade-distortive effects of dumping and reestablishing fair trade.

Action against dumping is only permitted where there is material injury to the competing domestic industry. The member government must show that dumping is taking place, calculate the extent of the dumping by comparing the lower export price to the exporter’s domestic market price, and show that dumping is causing or threatening to cause injury. A detailed investigation is conducted into whether the alleged dumping is hurting the industry in the importing country, evaluating all relevant economic factors.

There are specified procedures for anti-dumping case initiations, investigations, and presentations of evidence from all interested parties. After five years from the date of imposition, an anti-dumping measure must expire unless there is evidence that ending the measure would lead to injury, which may lead to a renewal of the anti-dumping finding.
Finding #1: The Number of Anti-Dumping Proceedings Declined

The number of investigations initiated by the sample countries provides an interesting snapshot of how assertive their domestic industries are when it comes to combating allegedly unfair trade practices. The eight jurisdictions, as a group, experienced a downward trend in the number of anti-dumping investigations. In the third period of 2011 to 2017, there were 14% fewer proceedings brought across the eight jurisdictions than in the first period during 1997 to 2003. This suggests that the domestic industries in these jurisdictions became less assertive in their rights against unfair trade practices or that they faced fewer cases of unfair dumping into their economies. This decline in the number of proceedings, however, could see a reversal over the next several years in response to the recent increase in trade remedy cases in 2017 and 2018.

Finding #2: India, the United States, and the EU Ranked Among the Top WTO Members to Initiate Anti-Dumping Proceedings

The G20 members in this study initiated more than half the global total of anti-dumping proceedings since 1997. India was the world leader in initiating anti-dumping investigations, with 17% of the global total. The United States accounted for 12% of the global total, and the EU totaled 9%. Combined, the United States, the EU, and Canada initiated 25% of all anti-dumping investigations, whereas the BRICS countries initiated 35%.

Finding #3: The BRICS Countries Contributed Significantly to the Global Number of Anti-Dumping Proceedings

The BRICS countries collectively initiated just over one-third of the global total of all anti-dumping proceedings. Further, each of the BRICS countries initiated anti-dumping proceedings well above the WTO member average.

Interestingly, when looking at the breakdown of anti-dumping investigations initiated by the BRICS countries, the country with the largest economy and population, China, was third within the group in terms of proceedings initiated. Both India and Brazil, with much smaller gross domestic products (GDPs), initiated more anti-dumping proceedings than China. Russia also initiated disproportionately fewer investigations; however, that low number may have more to do with the country’s disproportionately high success rate and the fact that Russia only joined the WTO in August 2012.

Finding #4: Success Rates for the Initiating Party Remained High for Anti-Dumping Proceedings

Overall, the initiating parties have, more often than not, concluded that the dumping-related trade practices of exporters in another member state qualify as unfair. The average global success rate for WTO members was 70% across the twenty years.

Among the United States, the EU, and Canada, the increase in the number of investigations during 2011–2017 was not rewarded with a higher success rate; rather, the success rate further declined, falling to 60% and yielding an average twenty-year success rate of 68%, just below the global average. One possible contributing factor could be that proceedings became more contentious, with respondents to investigations becoming more sophisticated in defending themselves.

The BRICS countries, as a group, had an average success rate of 74%, above the global average, but the
trend has been consistently downward during the twenty years, dropping from 85% in the first period to 64% in the third period. Notably, Brazil, which was the country least likely to implement an anti-dumping measure following an investigation, still saw an average success rate above 60%. Given how often BRICS countries were targeted by anti-dumping investigations by developed countries, the group may become increasingly sensitive to anti-dumping measures.

**United States:** The 65% success rate for the United States for the twenty years was slightly below the average 68% for the United States, the EU, and Canada, as a group. When looking across the three time periods studied, the U.S. success rate fluctuated, whereas the group’s success rate trended downward. The U.S. success rate of 65% for the first period was well below the group average of 74%. However, in the second time period ending in 2010, its success rate rose to 80%, well above the group’s success rate of 67%. During the final period ending in 2017, the U.S. success rate of 55% was below the combined U.S., EU, and Canada average of 59%.

**European Union:** Both the success rate and the number of investigations steadily declined during the twenty years. The EU started strong with an 84% success rate through the end of 2003, well above the group average of 74%. The success rate then fell to a low of 58% for the period ending 2017. Despite the reported rise of EU populism and the Brexit decision from 2016, the EU has momentum in moving to trade liberalization, and, to that end, practitioners will want to monitor the EU-Canada Comprehensive and Economic Trade Agreement (CETA), which entered into force on September 27, 2017.

**Canada:** Canada had an average success rate of 71% across the twenty years, despite its significant drop to 50% during the period of 2004-2010. The rebound in the third period ending in 2017 suggests that Canadian industry may have become better at recognizing and documenting unfair dumping practices and then working more effectively with investigating authorities. Canada had a higher average success rate than the United States, yet Canada also initiated fewer investigations. Among the eight members analyzed, only South Africa and Russia initiated fewer investigations.

**Brazil:** Latin America’s largest country, in size and population, saw its anti-dumping investigations more than double, but it did not see a proportional increase in successful proceedings. Brazil’s relatively steady success rate of 63% was far below the BRICS group and global averages. The number of successful anti-dumping investigations, however, steadily rose. Whether it stays on that upward trend remains to be seen.

**Russia:** The true outlier among the BRICS countries, as far as anti-dumping investigations were concerned, was Russia. As stated earlier, Russia joined the WTO in August 2012. Thus, the absence of comparative data makes it difficult to compare Russia’s performance of success with the other countries. For the available data, Russia had a success rate of 93% on 41 investigations.

**India:** With an average success rate of 75%, India heavily influenced the BRICS countries’ average success rate of 74% because India initiated almost half of the anti-dumping investigations for the group. Yet, India’s success rate was not constant; rather, India’s success rate for the proceedings it initiated fell from 85% to 61% over the twenty years. India initiated roughly the same number of investigations during the second and third periods yet saw decreased success in each period.

**China:** China’s average success rate of 80% for complaints it initiated was above both the 74% average for the BRICS countries and the global average of 70%. China’s success rate started at a strong 89%, dipped slightly, yet continued to remain well above the global average.
South Africa: South Africa experienced a steep and steady decline in the number of anti-dumping proceedings brought during the twenty years and a fluctuating success rate. Its success rate of 96% plunged to 31% during 2004 to 2010 before climbing back to 59% in the third period ending in 2017. Among the BRICS countries, South Africa held the record for initiating the fewest proceedings in one of the time periods and the lowest success rate in one of the time periods. The strong decline in the number of proceedings suggests that the country decided to move away from anti-dumping investigations as a response to certain trade practices or was finding itself the victim of unfair practices far less often.

Finding #5: China Was the Most Frequently Targeted

Many WTO members have been the targets of diverse anti-dumping investigations. China, however, was targeted far more frequently, with a quarter of all anti-dumping investigations targeting China. In contrast, the other BRICS countries collectively were targeted in roughly a tenth of all investigations. The United States, the EU, and Canada collectively were targeted in only 4% of proceedings. Notably, countervailing proceedings were not included in the analysis. As such, given the frequency with which certain governmental investigating authorities have concluded that the Chinese government subsidized its domestic producers, China may well have been targeted in an even greater proportion of countervailing proceedings.

A deeper look at anti-dumping investigations brought by the other seven members analyzed in this study showed a notable dynamic. With the exception of South Africa and India, investigations saw a boost in success rates when the target was China. The United States enjoyed an especially pronounced boost of 15% in its success rate. Canada, which targeted China the least proportionally, still targeted China in a fifth of its proceedings, and those proceedings were successful in 81% of its proceedings against China. The other BRICS countries targeted China in a quarter of their proceedings, a combined percentage rate similar to the combined percentage rate of the United States, the EU, and Canada. Further, those four BRICS countries, on the whole, were more likely to impose definitive anti-dumping measures against China. South Africa was an outlier as the only one to see a reduced success rate against China, whereas India saw no difference in its success rate. India maintained its average success rate of 75% for its 193 proceedings against China. India initiated the most proceedings against China of any G20 member in this study and more than the other BRICS countries combined. Also of interest, Russia brought eleven proceedings against China, the fewest proceedings, but succeeded every time.

Also notable is that, while the United States, the EU, and Canada targeted China at a similar percentage rate as the global average, they targeted the other BRICS countries at a higher rate than the global average. They also targeted each other at a much lower rate than the global average. In a similar pattern, the BRICS countries, other than China, targeted the United States, the EU, and Canada at a rate well above the global average, with success rates slightly higher than the group average. Those four BRICS countries also rarely targeted each other, and, when they did, the success rates of the investigations considerably dropped. These patterns suggest a developed country versus developing country split.

Finding #6: The United States and the European Union Were More Likely to Be Respondents at the WTO Panel Stage

In proceedings where the first stage of consultations between the parties fails to settle the dispute, the WTO Dispute Resolution process provides members with the opportunity to bring the dispute before a panel, with members appearing as a complainant or a respondent. The panel stage has produced mixed results for the eight members analyzed in this study, with some leveraging the process for their benefit
and others needing to accept that their duties were found to be inconsistent with the WTO Agreement.

What immediately jumps out is that the United States, while having initiated only eight complaints relating to dumping at the panel stage, was brought in front of a panel on a dumping matter an additional fifty-two times by other WTO members. This was far more than the other members in this study. The EU ranked second, appearing thirty-one times as the respondent. WTO panels have upheld a significant number of complaints against U.S. and EU anti-dumping practices. Both the United States and the EU had a less than 50% success rate in WTO disputes where they were either the complainant or the respondent. In contrast, Canada and South Africa both had great success at the panel stage, winning more than two-thirds of the time when they appeared as a complainant or a respondent.

**What’s Ahead?**

An analysis of anti-dumping investigations from 1997 until the start of 2018 suggests that international economic developments over the period, including increased globalization and the global economic crisis in 2008, did not translate into a materially higher number of anti-dumping investigations. Rather than a rise in investigations initiated, or an increase in successful investigations, the overall number of proceedings had been falling, along with the overall success rate.

This study is based on data reported to the WTO from 1997 to 2017. Because of the time required to prepare and apply for, as well as complete, a trade remedy investigation, the full extent of sensitivity to trade remedy concerns may become apparent only over the next few years. These next few years are likely to be very different from the twenty-year average.

With the increasing trade tensions, international trade attorneys will want to follow WTO reform proposals. WTO Director-General Roberto Azevêdo has stated publicly, including in his remarks to the G20 trade ministers in September, that he welcomes initiatives to improve the WTO. The G20 members likely will further discuss WTO reforms at the G20 Leaders’ Summit to be held November 30–December 1, 2018, in Buenos Aires.

Given the changing trade environment, companies should consider structuring their operations and supply chains to minimize the impact of potential trade disruptions. Companies and their legal teams also should understand in advance the options for leveraging defensive trade measures available to them and include those in their risk management plans.
Globalization of Legal Services: Navigating New Opportunities in China and Beyond

By Asen Velinov

Asen Velinov (asen@co-effort.com) is a California-licensed Attorney at Law based in Shanghai, China. He cooperates with Co-Effort Law Firm LLP, and serves as an Overseas Investment Advisor at CONCANACO and as a consultant to the Oriental Financial Channel, a business media broadcast station that is part of the Shanghai Media Group.

China’s Belt and Road Initiative (BRI), a government-backed global investment plan involving trillions of dollars in the years ahead, is further fueling an already decade-long trend of record-breaking annual growth in outbound investments. More than 100 countries across Asia, Europe, Africa, and Oceania have joined the initiative. Combined, they represent roughly a third of the world’s GDP and two-thirds of its population. This aggressive internationalization strategy is driving opportunities for legal services to multinational corporations, investors, entrepreneurs, high-wealth individuals, and other clients in China and beyond.

Chinese law firms are leveraging this new version of a “going out” wave of outbound investment to provide cross-border legal services inside and outside China. Their efforts are supported by specific government policies designed to encourage the internationalization of law firms so that they can have the capacity to support and streamline BRI success stories. The result has been growth in the number and size of Chinese law firms, as they continue to ramp up by opening new offices and to enter into mergers, alliances, and innovative structures with foreign law firms. Chinese law firms now account for half of the world’s ten largest law firms by headcount. Their prominence is anticipated to increase as Chinese law firms continue to grow domestically and internationally in response to client needs, market competition, and China’s economic policy initiatives.

Foreign and global law firms similarly are following suit in their globalization strategies. They increasingly are developing China-related strategies and targeting growth opportunities in BRI countries and within China.

How can law firms position for BRI opportunities and their related innovations in cross-border law practice and competition for legal talent and clients? What challenges might law firms encounter as they expand their China-related business strategies? This article provides an overview of how Chinese law firms are internationalizing and how foreign and global law firms are adapting and responding to China’s expansion around the world. The article also includes insights from China-based law firms and Southeast Asian law firms working with Chinese law firms on BRI projects.

Chinese Law Firms Are Going Global

Chinese law firms are growing in revenues, profits per partner, and headcount. In global rankings, sixteen Chinese law firms ranked among the top 100 largest law firms by headcount, including the top two: Dacheng Dentons with 8,658 lawyers and Yingke with 7,438 lawyers. See Ben Seal, The 2018 Global 100 Ranked by Headcount, Am. L. (Sept. 24, 2018, 12:01 AM). Also in the top ten are King and Wood, Allbright, and DHH. Four Chinese firms entered the list for the first time in 2018: Jincheng Tongda and Neal, Duan and Duan, Kangda, and Tahota.
The strong growth is fueled by demand for domestic legal services and cross-border services for clients inside and outside China. Many Chinese law firms have opened one or more new domestic offices in the last two years and have plans for continued expansion during the next couple of years. Notably, law firms have been expanding offices in central and western China, where entrepreneurs have demonstrated the means and interest to invest internationally. Having closer geographic access to this pool of clients allows the law firms to understand and guide their clients’ outbound investment needs. Law firms also are ramping up their litigation practices in the cities where the six circuit courts were recently established: Chongqing, Nanjing, Shenyang, Shenzhen, Xi’an, and Zhengzhou.

Wealth management also is a driver of the growth. It has been a part of the services business in China for the last decade, but related services, such as international investment, were more the domain of smaller foreign law firms and other Chinese consultancies and of relatively low interest to the larger domestic law firms. That seems to be changing. At least some of the law firms are starting to pay attention to high-net-worth individuals, educating them about asset management, international opportunities, and the legal aspects of early-stage business development.

These days, the internationalization of Chinese law firms is chiefly aligned with BRI priorities and projects, yet many firms, including the ones most recognized for being international, do not have a very solid or defined strategy. Firms and individual partners largely use more than one approach to internationalization, including setting up new offices, merging with foreign firms, participating in alliances and other legal networks, engaging in “best friend” arrangements, and reaching out through marketing and business development activities. The key is being able to demonstrate international expertise and successes, particularly in key sectors. As such, firms with international ambitions are focusing on the in-demand areas of international trade, investment and corporate matters, infrastructure development, energy and mining, finance, banking, capital markets, labor and employment, intellectual property, and dispute resolution.

Notably, at this still relatively early stage of internationalization of Chinese investment and legal services, past similar unsuccessful deals do not seem to have much effect on reputation. This early stage has been characterized by virtual offices or very loose association with sole practitioners so that a foreign office could be mentioned in marketing materials. However, these “window dressing” approaches are being replaced by more meaningful presences and cooperation with capable legal teams in key jurisdictions. As clients are becoming more sophisticated, they also are inquiring about the track records of the legal teams and are demanding more options and better performance for legal support in foreign jurisdictions.

It is important to keep in mind that many Chinese firms are only loosely centralized, with individual partners able to make their own arrangements when assisting clients with their global legal needs. The greater flexibility is inspiring a substantial number of partners and lawyers to switch from international firms to Chinese ones. These career switches, however, are typically by Chinese nationals who are also licensed to practice in a foreign jurisdiction.

**How Can Foreign Law Firms Position for BRI?**

The major law firms with a global focus are thinking about their BRI readiness. This presents opportunities for law firms within China and overseas alike. Increasingly, Chinese and non-Chinese law firms are considering or pursuing a range of initial activities, including participating in and holding events, publishing BRI content on social media, creating dedicated semi-independent project matchmaking platforms, cooperating with government agencies, and setting up cooperation and
exchange initiatives with law firms in key BRI jurisdictions.

**New Destinations.** A noteworthy shift with BRI is the expansion to new destinations. While the majority of Chinese and global law firms have traditionally looked to the United States, Western Europe, and Japan for their international offices and other efforts, the BRI conversation is inspiring interest in new geographic regions. For example, after China recognized Latin America as a “natural extension” of BRI in 2017, multiple law firms held events on investment opportunities and risks in the region. Roadshows that domestic and foreign firms organize around China seem to be a preferred way to gauge market interest toward a region or industry. Some clients already are eager to be recognized as BRI success stories for the political desirability and the expansion into worthwhile opportunities in jurisdictions that were not on their radar before. Notably, when it comes to BRI projects, especially in the more unfamiliar countries, the early trend is for law firms to attempt to be even more of a one-stop shop—from sourcing viable projects for distribution among potentially interested clients, to seeing the deal through. In addition, as big infrastructure projects are carried out by large state-owned enterprises, companies that cannot be directly involved at this stage are looking to be well-positioned for the opportunities that improved connectivity with Chinese law firms or law firms with cross-border expertise in BRI projects might bring.

**Financial Services and Investment Management.** Legal services related to foreign investments will be a continued hot area. With the past decade of record-breaking outbound investments, many Chinese companies, both state-owned and private ones, now own substantial assets overseas. That trend will only continue as companies pursue BRI projects. That foreign investment seems to have led to the realization that the stakes are higher than before, with many investors no longer relying heavily on the relative comfort and insulation of having most assets in China when dealing with foreign parties. Whereas the more complex and politically charged international environment is generally not seen as a positive development for international business, it has helped Chinese investors realize that legal services and early-stage preparation are keys for later successes. The investment risk exposure has had a twofold impact. First, it is driving a more mature approach by Chinese investors as they gain experience and appreciation for how some of their assets might now be within the reach of foreign courts. Notably, Chinese courts have been sending a message to investors of a greater willingness to recognize and enforce foreign commercial court judgments. For example, Chinese courts recently have enforced foreign judgments from California (2017), based on preexisting reciprocity; Poland (2013), based on a bilateral legal cooperation treaty; and Singapore (2016), based on reciprocity. Second, the investment risk exposure is creating greater reliance on legal services to minimize financial risks going forward.

**China’s Free Trade Zones.** Although foreign investment in Chinese legal services remains prohibited, China’s economic “opening up” policies, which relax restrictions on foreign investment, now allow foreign firms to provide limited legal services in China’s Free Trade Zones (FTZs). Currently, there are eleven zones, with more planned. Shanghai, established as the first mainland FTZ five years ago, is the most well-known. Expanding on this internationalization strategy, China also is partnering with foreign countries to open Chinese-built and operated International FTZs, such as the Djibouti International FTZ in East Africa launched in July 2018.

**Cross-Border Legal Services.** Local governments in China, particularly those in a designated FTZ, also are encouraging law firms and legal professionals to improve their capacity to provide cross-border legal services. For example, Shanghai recently launched new initiatives to strengthen the ability of law firms to support the city’s growing stature in international finance, shipping, and trade. The Shanghai
Bureau of Justice reports that law firms in the city generated annual revenue of 3.5 billion yuan ($509 million) from cross-border legal services in 2017, accounting for 20 percent of its total legal services revenues; however, only about 1 percent of the city’s roughly 240,000 lawyers are capable of offering cross-border legal services. To help address this gap, in September 2018, the Shanghai Bureau of Justice and the Shanghai Bar Association jointly set up legal services centers to support the Shanghai Association for Corporate Compliance, the Shanghai Joint Training Center for Cross-Border Business Law, and the Research Center for Legal Practices on International Finance and Trade. The objective of each legal service center is to encourage exchanges and internationalization. Further, a special on-site legal services center, staffed by twenty attorneys with experience in cross-border issues, will be supporting the first-ever China International Import Expo to be held in Shanghai on November 5–10, 2018. The Expo will convene government officials, businesses, investors, and purchasers from around the world. Nearly 3,000 exhibitors from 130 countries are registered to attend.

### What Are Some Challenges for Foreign Law Firms?

The last two years have seen tightened controls from the Chinese government on outbound deals, a more complex international environment, and, more recently, rising trade concerns. These, in turn, are presenting both opportunities and challenges for the further internationalization of Chinese and foreign law firms. While some foreign firms seem to be feeling fatigue after the initial enthusiasm of expecting a huge influx of Chinese business that has not yet materialized in many jurisdictions, they should still consider developing a China strategy. As part of this analysis, they should consider whether they might want to position themselves as competitors or partners to internationalizing Chinese law firms expanding in their jurisdictions.

**Legal Work in China.** Foreign nationals are not permitted to sit for the Chinese bar exam, and, thus, foreign attorneys largely are excluded from meaningful participation in the internationalization decision-making of Chinese law firms.

**Finding New Ways to Collaborate.** It appears also that the government encourages Chinese companies, especially state-owned enterprises, to retain Chinese law firms for their international needs. Accordingly, foreign lawyers and law firms wishing to develop Chinese business might need to evaluate whether their business development efforts would be best served by directly communicating their capabilities to Chinese investors located within their firms’ jurisdictions. Another strategy could be to market the firm’s capabilities to Chinese lawyers and law firms, while making sure to address concerns about potential future competition.

**Business and Cultural Awareness.** Awareness about the intricacies of business culture and acceptable business and communication practices comes up in conversations more and more. Some prominent failed deals are being attributed to a lack of cultural preparedness during all stages of the deal. Among the strategies being used by law firms to minimize these risks are short-term trainings and lawyer exchanges.

**Disillusionment by Clients.** BRI started with some high-profile disappointments, delays, and bad publicity, potentially souring some clients. However, BRI is a key engine for China’s future global growth. Given that BRI was added to the Chinese Constitution in 2017, it is a safe bet that China is committed to it. Thus, packaging investments and activities around it, when appropriate, might be the right approach for businesses wishing to work with China. The same is true for Chinese ones.
Insights from Law Firms Working on BRI Projects

Law firms and attorneys looking to prepare for and participate in BRI and the growth of China’s influence in international legal practice should understand the driving forces, motivation, and key factors of China’s globalization. What makes business sense for domestic and foreign lawyers and law firms, as well as their clients, in this new and complicated environment will often vary because there are numerous factors to consider when going into new countries or regions and, especially, when globalizing. Recently, I asked attorneys at China-based and Southeast Asian law firms working on BRI projects to share their lessons learned and insights. As you will see, they highlight the risks and rewards when approaching international work with Chinese law firms. Their responses demonstrate that there is no single approach or clearly defined strategy. Further, they identify several factors to consider, including the legal practicability of internationalization, clients’ needs and future plans, and cultivating business and cultural awareness.

Additional insights on internationalization from the perspective of Chinese law firms can be found in my article in the last year’s Fall Edition. See Asen Velinov, Perspectives from the Field: Lessons from the Internationalization of Chinese Law Firms, 46 Int’l L. News 28 (ABA Fall 2017).

Dato Ricky Tan, Ricky Tan & Co, Kuala Lumpur, Malaysia

“Internalization of Chinese legal services is an uphill task for Chinese legal firms if they do not know how to assimilate and integrate with countries of different legal system and culture. It’s not about speaking the language but always about understanding the unspoken lines in between. Furthermore, it’s never about the size and number of lawyers but the integrity and mutual goal between two foreign firms working to serve the outward-bound Chinese client in the Belt and Road countries. We may not be as big as some Chinese firms, but we are able to deliver with our associated partner from Guangxi, the Tian Shi Ling Dong Law Firm [in] a province geographically closer to Malaysia, and many other lawyers who are willing to travel and not just sit behind a desk. Such cooperation between lawyers and firms has made cross-border legal services, which were once impossible, become a real possibility.”

Prashant Kumar, Senior Partner, Trinaya Legal, and President-Elect of the Bar Association of India, New Delhi, India

“It is for some time that I have been engaging with law firms in China. It all began with the acquisition of a Chinese company for my Indian client way back in 2006—2007. Instead of engaging a big U.K. law firm having an office in China, I persuaded them to engage a newly formed law firm in Shanghai established by a Chinese lawyer who had worked in a big U.S. law firm. It worked out well for my client and at a significant cost savings, but recent years have been a revelation. There has been a remarkable acceleration in growth in both size and sophistication of law firms in China. Participation and visibility at international fora has increased, and, from the level of presentations, one can see mastery of legal domains and marketing savvy. Younger lawyers who handle international desks are quite sensitive to the need of navigating cultural differences and keen to understand and find the right wavelength to collaborate. It is a very encouraging environment for internationalization of legal practice and the marquee Chinese law firms are acing the game right.”

Nguyen Phuoc Bao Tri, JLPW VINH AN LEGAL, Ho Chi Minh City, Vietnam

“JLPW VINH AN LEGAL has assisted Chinese ‘go out’ companies to maximize the opportunities in Vietnam and other Southeast Asia countries, especially in the manufacturing sector. Our legal practice...”
group, led by senior lawyers who were part of the regional cross-border team of a leading law firm in Southeast Asia, has extensive experience in cross-border investments, joint ventures, mergers and acquisitions, and capital markets. As a group of international affiliates, we have 110 professionals. The close liaison with local law firms in China offers us the intensive focus on Sino-ASEAN policies in trade and investment. China in the past decades was seen as the global factory of the world. Countless factories have been built over the years. Although China still remains focused on supply chains, China has gradually shifted from manufacturing to services in order to be a key player in the world economic market; however, not many Chinese companies are familiar with overseas investment, which our legal practice group has attempted to help these Chinese companies to understand, including their target destinations and how to gain the best opportunities."

Liu Yixing, Founding Partner and Chairman of the Global Management Committee, Landing Law Offices LLP, Shanghai, China

“Landing Law Offices is a quite young firm, established in 2015 with its main office in Shanghai, but, currently, it already has around thirty branches in China and abroad, especially in developing countries, including Bangladesh, Cambodia, Sudan, and Tunisia. Why internalization? With the development of globalization, we expect that global legal services [will be] led by Chinese lawyers. China’s manufacturing industry has emerged. Responding to the “One Belt, One Road” of the Chinese government and keeping up with the huge step of “go abroad” of Chinese enterprises are not only a great historical opportunity given by the era to this generation but also the mission of this generation.

When China contributes more than 30 percent to the world economy, lawyer groups will be closely related to the economy. This is very important and critical to the internationalization of our law firm. When China’s infrastructure, aircraft, and artificial intelligence are sold globally, Chinese lawyers definitely should be the performers on the international stage. When China is the leader of the Asian Investment Bank, the SCO, the ASEAN, the BRICS, and other national organizations, then Chinese lawyers should be the creators of these international rules.

Another reason for our firm’s internalization is that the traditional legal practice areas are already saturated. China has 0.33 million lawyers approximately, and more than 90 percent of lawyers battle for the domestic legal market. There are also obligations for me to open up a new road for our next lawyer generation.

In the era of globalization, the oriental value of the rule of law must have its advantages. Our Landing people will surely demonstrate the value on the international stage.

Our differences:
1. Most of our clients are Chinese companies.
2. We keep the quotation reasonable compared to most of the domestic firms who are practicing in overseas investment area.
3. We assign our professional Chinese lawyers to these countries where we have branches. Client will receive the legal services without language barriers and differences in cultural backgrounds.
4. The whole legal services team consists of local lawyers and Chinese lawyers, and they work in a collective manner.
5. We are efficient and keep up with our Chinese clients’ needs.
6. We already accumulated large international investment experiences through our practice.”
Lei Jing, Deputy Director of the Shanghai Office, Capital Equity Legal Group, Shanghai, China

“Capital Equity Legal Group (CELG) has twenty years of history and currently has more than 400 lawyers and staff and more than eighty partners in five offices in China. Our first overseas office—the internationalization of the firm—began in October 2018 in Vancouver, Canada. The Belt and Road Initiative is important to us because more and more clients of us want to join the B&R Initiative to set up their new companies and expand their overseas markets. We have organized Belt and Road legal services cooperation roadshows in Hangzhou and Shanghai in April 2018 in order to introduce our B&R legal services in ASEAN and India. Our most recent office opening was in Vancouver in early October because a lot of Chinese clients choose Vancouver as their new home, and they also expand their business in Canada. On the basis of that fact, we chose Vancouver as our first office place to provide our professional legal services to our clients in Canada.”

By Liz Cohen

Liz Cohen (liz.cohen@bristows.com) is Joint Managing Partner in the London office of Bristows LLP, where she practices patent litigation and jointly leads the life sciences team.

Enforcing patents throughout Europe is likely about to change with the Unitary Patent (UP) system and the forthcoming Unified Patent Court (UPC). This new approach will allow inventors and companies to apply for and obtain patent protection through a single procedure and then enforce their rights through a pan-European court. Currently, national and European patents are enforced in national courts. The new unitary system aims to simplify registration and renewal procedures, provide broad geographic patent protections, reduce direct and indirect costs, and end the need for parallel litigation. As such, companies could see significant reductions in their patent acquisition, maintenance, and enforcement costs for their cross-border and international patent portfolios.

The UPC, which is expected to start receiving cases in 2019, will have exclusive jurisdiction for future unitary patents and will provide a single-point mechanism for patent enforcement. The scope of patent protections and remedies for infringement will be valid in European Union (EU) countries that have ratified the UPC Agreement. Sixteen countries have ratified the agreement, including France and the United Kingdom as two of the three countries required because they have the most patents in force. The timeline now depends on ratification by Germany, as the remaining required country, with this in turn being dependent upon the timing and result of a constitutional challenge brought in March 2017, which is due for resolution later in 2018.

The impacts of Brexit are a few months away, and it now seems unlikely that the UPC will start operations before Brexit comes into effect on March 29, 2019. The United Kingdom is negotiating with the EU to enter into a Brexit treaty with a transition period, also referred to as an implementation period, which would mean that the United Kingdom would be able to participate in the UPC system during the transition/implementation period at least through the end of 2020. As a backup, the United Kingdom is continuing to explore a “no deal” scenario to join the UPC in any event following German ratification.

This article provides an overview of the new patent system and the court, how it would affect future and existing European patents, and why businesses and attorneys should prepare now.

The article is related to a panel program that I chaired on patent litigation at the ABA Section of International Law Life Sciences Conference held June 10–12, 2018 in Scandic, Copenhagen. The panel featured Alexander Ramsay, the Chair of the Unified Patent Court Preparatory Committee; Ettie-Ann Alder, a Senior Patent Attorney at Ericsson; and Nicolaj Bording, a Partner at Kromann Reumert.

What Is the Unified Patent Court?

The UPC represents the next stage for patent protections in Europe. Configured as an international court established by treaty, its specialized, one-stop-shop for patent litigation will offer an alternative to
enforcing or challenging patents in national courts. Central divisions will be located in Paris, Munich, and London, with additional local and regional divisions in various cities. The Court of Appeal will be located in Luxembourg. It is anticipated that parties will bring their infringement cases to the division where infringement occurred or where the defendant is domiciled; however, in many cases, parties will be able to choose where to bring the action. Cases will be litigated before a multinational panel of judges according to a blended procedural regime based on aspects of legal traditions from across Europe’s civil and common law systems.

EU countries are not required to participate in the UPC, but the major patent markets of France, Germany, and the United Kingdom are all mandatory participants under the UPC Agreement signed in 2013; therefore, ratification by all three countries is a necessary precursor of the system starting. Inventors and companies will have the option for future patents to be granted as a unitary right covering a subset of countries and including these major markets. Companies will want to monitor and consider which countries are participating. Conventional, also referred to as “classical,” European patents will still be available to cover the remaining EU countries outside the unitary system and the UPC, such as Switzerland.

As of September 2018, sixteen EU countries had submitted their ratifications of the UPC Agreement: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Sweden, and the United Kingdom. Additional countries are expected to ratify or accede to the UPC Agreement.

**When Is the UPC System Likely to Start?**

Whether the Court will open for business in the first half of 2019 or later depends on the timeline of Germany’s ratification of the UPC Agreement. When and whether Germany will be able to ratify the UPC Agreement depends on a ruling by the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) responsive to a constitutional complaint against Germany’s ratification filed by a German lawyer in March 2017. The Court has listed the case for hearing in 2018. If, as many commentators expect, the Constitutional Court rules that the complaint is inadmissible or is otherwise is rejected in short order on substantive grounds, Germany will be able to complete its ratification process. If any part of the complaint is admissible and not dismissed rapidly, then the case will probably proceed to a substantive hearing, further delaying the process, albeit hopeful that the listing of the case for hearing in 2018 indicates an intention to decide the case relatively soon. Further, the consensus view among commentators is that, even if the complaint is held admissible in whole or in part, it will nonetheless most likely fail; or, if upheld, a constitutional “fix” may be possible such that the project will not be derailed. If so, the question is one of timing and whether the political will for the project to succeed will remain strong enough for the system to go ahead notwithstanding the delay. At present, industry support and the political will in Germany to support the UPC show no sign of diminishing.

The UPC Agreement has a Protocol on Provisional Application to allow parts of the UPC Agreement to be applied early to support the logistical start of the UPC system, such as recruiting judges and staff. The provisional phase is expected to last roughly six to eight months, but, again, its start is dependent on Germany, which cannot approve this Protocol until the constitutional complaint is resolved.

**How Will It Affect Existing European Patents?**

Existing European patents will automatically come under the jurisdiction of the UPC, subject to
complex arrangements that allow for “opting out” during a seven-year transitional period. As such, the UPC will have a very important retrospective effect for those European patents in force in countries participating in the UPC. Now is the time to consider the full implications for opting out existing European patents, bearing in mind that there are advantages to opting out before the UPC opens and that considerable due diligence may be required.

Article 83(3) of the UPC Agreement will allow European patent holders to opt out of the UPC during the transition period and, thus, preserve their ability to litigate only in national courts. Where a patent is owned by two or more proprietors, all proprietors must submit an opt-out demand. Opting-out could be useful as a strategy to prevent broad blocking actions or central revocation. Even if the right to opt-out is invoked under Article 83(4), European patent holders can withdraw their opt-out demand if there have been no national actions. If the opt-out choice is not invoked during the transition period, both the UPC and national courts will have jurisdiction for cases brought by the patent holder or a potential defendant. Thus, inaction opens the door for everyone, not just the patent holder, to make the jurisdictional choice. This could result in “torpedo” actions, where a preemptive action is started in one court—in this case, a national court—so as to prevent the patentee starting a pan-European action in the UPC.

The new unitary system builds on the current operations of the European Patent Office (EPO) and its function to grant and revoke, in post-grant opposition proceedings, European patents. The EPO will continue to serve a vital role in the overall patent system, including these opposition proceedings. Notably, under Article 33(10) of the UPC Agreement, UPC judges will be able to request accelerated opposition proceedings before the EPO when relevant to UPC cases and to choose to continue with UPC proceedings despite any ongoing opposition.

Variations in the UPC divisions may help inform where to bring a case. Considerations could include the dominant language used in cases; nuanced procedural differences despite the uniform rules, similar to differences seen in U.S. District Courts; the nationalities of the judges; and the track records for preliminary injunctions and final injunctive relief.

**Why Should Businesses Prepare Now?**

There are a number of reasons why it is wise to prepare now for the new patent system and the UPC.

Companies should consider how the UPC might influence their patent portfolios and long-term patent strategies. For example, companies need to be aware of and prepared for the possibility, which could be significant, of being sued in the UPC by competitors and/or non-practicing entities (NPEs). In the case of NPEs, the lack of track record in the early years may cause nervousness among defendants. Similarly, the projected time to trial of only twelve months in the UPC, the likelihood of relatively modest costs to take a case to trial, and the likelihood that final injunctions will be granted in almost all cases—certainly with no eBay-type rule and its four-factor injunction test—may all contribute to significant early NPE activity. The risk of injunctions having broad geographic effect could influence long-term investment decisions, such as where to locate research and development activities, manufacturing facilities, laboratories, and product development and testing activities. Furthermore, the increased risks could impact and shift cooperation with universities, joint ventures, and start-ups. In the category of opportunity, even though the UPC does not cover all EU countries, centralized UPC revocation actions may be a cost-effective and potentially powerful alternative and/or additional way to attack competitors’ patents.
A particular issue for patent litigation is how to balance the usefulness of central enforcement with the potential for central revocation and, hence, the loss in one action of a very valuable asset, bearing in mind the lack of track record of the newly created UPC. Making the right decisions requires considering several issues. Will the UPC have enough experienced judges to be a reliable forum of choice for litigants? If there are doubts, should patent owners delay using unitary patents and the UPC for existing and future patents for as long as they can, such as during the seven-year transition period after start-up, to avoid those early-adopter risks? Are the benefits of the cost savings greater than the risks of the new system? If patent holders within key sectors avoid the new system in its formative years, will other sectors do likewise? If so, will specific sectors dominate the UPC case law to the potential long-term detriment of those other sectors that chose to wait for the UPC to mature?

Individual inventors, small- and medium-sized companies, academic institutions, and nonprofit organizations should carefully consider the implications of the unitary patent and identify their plans of actions for future patenting strategies. These entities should review and update licensing, joint venture, and collaboration agreements. Importantly, these entities should consider whether obtaining broad patent coverage at the lowest possible price through unitary protection might prejudice their licensing prospects.

If the United Kingdom cannot participate after Brexit or if a transition/implementation period only extends through 2020, will the unitary patent and the UPC remain attractive options? Further, given the reliance on common law aspects of the new system, will those aspects be maintained in the absence of U.K. judges in the UPC?

While configured to have multiple divisions, the UPC will be a single court, and each division will be capable of giving UPC-zone-wide decisions. Will nuanced differences in approaches in these divisions lead to an uneven distribution of patent lawsuits across those divisions? If so, will we see the emergence of a European equivalent to the Eastern District of Texas? Might the sheer size of the market covered by the UPC and its specialized nature lead to a shift in the global forum of choice?

**Why Should Attorneys Prepare Now?**

Attorneys can make good use of the current delay by helping their clients understand the potential unitary patent system, how the new system might affect patenting and enforcement strategies, and what practical preparations are needed to take full advantage of timing and licensing prospects. In particular, they can advise clients on the question of whether, for the particular businesses concerned, opting out some or all existing patents in their portfolio is a sensible strategy. If so, preparations should be taken to ensure that the opt-out process can be completed during the provisional phase—the so-called “sunrise period” between ratification by Germany and the opening of the Court, on which day, of course, would-be defendants can proactively revoke any non-opted out patents. Even if the decision is to opt out all one’s patents, there is still a need to learn about the UPC and its system because adversaries, whether competitors or NPEs, may choose not to opt out their patents and sue in the new UPC. After all, even if it has not been cost-effective for some patentees to sue in individual European courts to date, the increased market size the UPC covers may completely change the equation, and UPC litigation may become a very attractive new option.
Human Rights Defenders Face Increased Threats

By Juan Ramirez

Juan Ramirez (juan.ramirez@americanbar.org) is the Staff Attorney for Latin America of the Justice Defenders Program of the ABA Center for Human Rights. The Justice Defenders Program supports at-risk human rights defenders worldwide through pro bono legal and advocacy efforts.

Attacks on lawyers, judges, human rights defenders, and journalists are not only growing around the world, but also such attacks are increasing in frequency and severity. Last year, Front Line Defenders, a Dublin-based organization with regional offices worldwide, documented the killing of more than 300 human rights defenders, with a sharp increase in Latin America during the past five years. Corruption and a lack of judicial independence and impartiality are among the barriers to accountability for the unlawful killing of activists and for the misuse of legal proceedings against human rights advocates. The ABA Center for Human Rights will be monitoring two high-profile human rights cases that highlight the significance of these challenges: the criminal case of those accused of killing Berta Cáceres, an advocate for indigenous people’s rights in Honduras, and the criminal trial of Milena Quiroz, a Colombian activist charged with rebellion in apparent retaliation for her social movement activism.

The monitoring of these two cases for their compliance with national and international standards is among the actions the ABA is taking to implement two policy resolutions adopted by the ABA House of Delegates in August 2018. The resolutions express concern with the growing attacks on legal professionals, human rights defenders, and journalists in countries around the world. Resolution 106A reaffirmed the ABA’s commitment to advance the rule of law and condemned “the harassment, arbitrary arrest and detention, arbitrary disbarment, denial of due process, other ill-treatment, and killings of judges, lawyers, other members of the legal profession, and their extended families throughout the world for serving in their designated capacities.” Resolution 106B recognized “the important role that non-lawyer human rights defenders, journalists, and others play in protecting justice and the rule of law” and deplored “attacks on those professions, as well as on individuals, aimed at silencing or intimidating human rights voices.” The ABA Section of International Law proposed both resolutions in cooperation with the ABA Center for Human Rights, the ABA Rule of Law Initiative, the ABA Representatives and Observers to the United Nations, and several other ABA entities.

Berta Cáceres, Advocate for Indigenous People’s Rights in Honduras

Berta Cáceres, an advocate for indigenous peoples’ rights and Goldman prize winner for environmental defenders, was murdered in her home in western Honduras on March 2, 2016. As coordinator of the Civic Council of Popular and Indigenous Organizations of Honduras (COPINH), Cáceres had been a vocal organizer of a grassroots movement to protest the building of hydroelectric dams on traditional indigenous lands. She is largely credited with successfully pressuring the world’s largest dam builder to pull out of a project where the local community raised significant concerns about corruption and human rights violations related to the proposed dam. Cáceres had long been the subject of harassment and death threats related to her work to protect the rights of indigenous communities. Her death was one of fourteen deaths of environmental activists recorded that year by Global Witness, a nonprofit focused on the linkages among natural resources, conflict, and corruption.

Cáceres is widely believed to be one of the emblematic cases that inspired the new Regional Agreement
on Access to Information, Public Participation, and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement). It is the world’s first treaty to include provisions specific to human rights defenders working in environmental matters. It requires governments to guarantee a safe and enabling environment for human rights defenders in environmental matters; to investigate attacks, threats, or intimidations of those defenders and punish those accountable; and to protect their rights to life, freedom of expression, peaceful assembly, and free movement. Fifteen countries from Latin America and the Caribbean signed the treaty within the first two days when it opened for signatures on September 27, 2018, at the United Nations. It will enter into force when eleven countries have ratified it. Honduras has not signed the agreement. The treaty complements existing obligations under the American Convention on Human Rights to investigate grave human rights abuses, such as extrajudicial killing.

The Cáceres case is illustrative of a broader trend in the region of the failure to fully investigate all those responsible for the killing of human rights defenders, including the indirect perpetrators who are involved but not at the scene, particularly the intellectual authors of these crimes.

In the Cáceres case, eight suspects have been implicated in her murder, including as direct perpetrators. The Cáceres family and local activists have raised concerns about irregularities in the pretrial proceedings of the criminal trial against the eight suspects and the mishandling of evidence. Among these concerns are allegations of unjustified decisions on the part of the court to reject potential witnesses and a failure to comply with a prior court order to share evidence and conclusions of the investigation with the Cáceres family. In September, an appellate court in Honduras suspended the trial of the eight defendants charged with her murder so that five related filings could be resolved first. Irregularities in the proceedings to date raise questions as to whether the criminal trials against the alleged perpetrators can adequately guarantee the rights of the victims and the accused and provide independent and impartial justice. The trial is currently suspended, pending the decision of the appellate court on the interlocutory appeals.

Earlier this year, authorities also arrested an alleged mastermind behind her murder, a former military intelligence officer and executive president of the company building a dam that she campaigned against. The company executive will have a separate trial. The Center will be monitoring both trials.

**Milena Quiroz, Social-Movement Activist in Colombia**

Authorities in Colombia have charged Milena Quiroz, a well-known Afro-Colombian activist, with rebellion and conspiracy to commit a crime. She is active in the social organization of Agrarian, Farmers, Ethnic and Popular Summit and the Peoples’ Congress and in social movements seeking to address the legacy of the country’s decades of armed conflict through the political process.

Irregularities in the charging and detention of Quiroz raise concerns that she is being potentially targeted in retaliation for her organizing activities. The prosecutor cited her role in organizing “social protests” against local politicians in the charges. The judge then sent Quiroz to pretrial detention in a facility more than 500 miles away from her home and local counsel. Recently, her counsel alleged that the government failed to disclose all material evidence to the defense prior to a hearing on whether there was sufficient evidence to proceed to trial. Notably, the prosecutor who indicted Quiroz has since been convicted of corruption. Public opinion on whether Quiroz receives a fair trial could have a significant impact on whether communities affected by the armed conflict feel confident that they can participate in the political process without fear of reprisals by the government.
About the ABA Center for Human Rights

The ABA Center for Human Rights promotes and protects human rights worldwide—mobilizing lawyers to help threatened advocates, rallying thought leaders on vital issues, and holding abusive governments accountable. Without human rights defenders to hold governments and non-state actors accountable for violations, the rule of law cannot prevail.

The Center’s Justice Defenders Program supports at-risk human rights defenders worldwide through pro bono legal and advocacy efforts. Through its network of pro bono lawyers and law firms, the Center has supported hundreds of individual human rights defenders in more than sixty countries to defend themselves against frivolous charges, to access quality legal counsel, to assert their rights to form associations, to peacefully assemble, and to defend the rights of others. In Latin America, the Center has also provided assistance by reviewing the records of judicial nominees for the Supreme Courts of Guatemala and Honduras, as well as the judges of the Tribunal for Peace of the Special Jurisdiction for Peace in Colombia, in order to ensure merit-based judicial selection proceedings. The Center remains committed to supporting judicial independence in an effort to end impunity for the unlawful killing of activists and to prevent the misuse of legal proceedings against human rights advocates who are acting lawfully within their capacities.

We serve anyone who advocates for the protection of human rights, including attorneys, journalists, labor leaders, and environmental activists, and is the subject of retaliation for those efforts. These efforts enable and support the role of independent judiciaries to protect the rights of human rights advocates and marginalized communities so that they can seek redress for grievances without fear of reprisal.

Get Involved

ABA members and other legal professionals can help us enable and protect these individuals and organizations who are the champions for human rights in their countries and communities. You can help by monitoring cases, conducting legal research, providing legal assistance, and raising awareness of situations around the world. If you are interested in being involved in our activities, please email justicedefenders@americanbar.org.
INTERNATIONAL UPDATES

By Renee Dopplick

Renee Dopplick (dopplick@ilaw.news) is Editor-in-Chief of International Law News.

ICSID Invites Public Comments on Updates to Investment Dispute Settlement Rules
The International Centre for Settlement of Investment Disputes (ICSID) is seeking input from governments, the private sector, and other interested stakeholders on proposed changes to modernize its rules for resolving disputes between foreign investors and states. The proposed changes include increased reliance on e-filings, expedited proceedings, greater flexibility for bifurcation, and enhanced disclosures of potential conflicts of interest by arbitrators. To help avoid inadvertent conflicts of interest, parties would need to disclose third-party funding throughout the proceeding. A procedural change would promote enhanced transparency through public access to awards, decisions, and orders if the parties do not object within sixty days. The deadline for comments is December 28, 2018. Read the synopsis, the proposed amendments, working papers, and submissions on Proposals for Amendment of the ICSID Rules.

International Court of Justice Order on Iran Sanctions Prompts U.S. Withdrawal from 1955 Treaty with Iran
The International Court of Justice (ICJ) on October 3 unanimously ordered the United States to meet its obligations under the bilateral 1955 Treaty of Amity, Economic Relations, and Consular Rights with Iran and ensure that any sanctions against Iran not impede humanitarian-related exports and parts and services needed for civil aviation safety. The United States in May announced it would re-impose sanctions against Iran for its alleged violations of the Joint Comprehensive Plan of Action (JCPOA). In response to the ICJ order, the United States immediately reiterated its commitment to upholding existing exceptions for humanitarian-related transactions and flight safety. The United States also announced its withdrawal from the 1955 Treaty of Amity. The ICJ has set April 10, 2019, as the deadline for Iran’s filing and October 10, 2019, as the deadline for the U.S. filing. Read the Case Documents for Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America).

International Court of Justice Rules in Favor of Chile over Bolivia in Maritime Dispute
The International Court of Justice (ICJ) ruled twelve to three that Chile did not have a legal obligation to negotiate Bolivia’s access to the Pacific Ocean. The court considered whether the bilateral agreements invoked by Bolivia established an obligation and how to interpret non-treaty actions, such as political interactions. Among the findings, the ICJ found that a legal obligation arises neither as a general principle of international law nor from the provisions of the UN Charter and the Organization of American States (OAS) Charter invoked by Bolivia in its arguments. Bolivia brought the case in 2013. Read the Case Documents for Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile).

International Criminal Court Acquits Former Congolese Vice President Bemba of War Crimes and Crimes Against Humanity
The International Criminal Court (ICC) in June acquitted Jean-Pierre Bemba Gombo, the former commander of a rebel group and former Vice President of the Democratic Republic of the Congo (DRC),
of charges of war crimes and crimes against humanity related to militia intervention in the Central African Republic. His initial conviction in 2016 marked two milestones for the ICC. He had been the first commander to be held criminally responsible for the actions of subordinates and the first defendant to be convicted for the use of rape as a war crime and a crime against humanity. Although the ICC acquitted him of those criminal charges, the Trial Chamber in September re-sentenced him to one year in prison and imposed a fine for corruptly influencing witnesses’ testimonies in his war crimes trial. The ICC considered the time he already spent in detention as satisfying the sentence. On October 18, 2018, Bemba filed an appeal requesting the Appeals Chamber to reverse the sentence. Read the Court Records.

UNODC Global Judicial Integrity Network Offers Judicial Ethics Training Tools
The Global Judicial Integrity Network, launched this year by the UN Office on Drugs and Crime (UNODC), offers online resources to help judges and judicial professionals understand the international standards for judicial integrity, as consistent with Article 11 of the UN Convention Against Corruption. The online tools include videos, podcasts, and other resources on applying the Bangalore Principles of Judicial Conduct, judges’ uses of social media, gender-related issues in the judiciary, and tips for effective training programs for judges. Additional tools, practice guidance manuals, and capacity-building support are planned. Explore online resources of the UNODC Global Judicial Integrity Network.

UNISPACE+50 Results in Call to Action for a Space 2030 Agenda
The legal regime of outer space was a thematic priority of the fiftieth anniversary of the first UN Conference on the Exploration and Peaceful Uses of Outer Space (UNISPACE+50) held in June in Vienna. Among the discussions was whether the current five space treaties are sufficient for future space governance, including the expansion and diversification of government and commercial activities in outer space. To address these global challenges and the long-term sustainability of space activities, the outcome document adopted the recommendation by the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space that a working group should be established to develop a “Space2030” agenda and implementation plan. The newly formed working group will meet this fall and will be supported by the UN Office for Outer Space Affairs. The working group is to present its final draft to the Committee in 2020 for its consideration and, if approved, for consideration and adoption by the UN General Assembly at its seventy-fifth session. Read the UNISPACE+50 Thematic Priority Report on Legal Regime of Outer Space and Global Space Governance: Current and Future Perspectives. Learn more about the Working Group on the “Space2030” Agenda and Its Implementation Plan.

25th Anniversary of the Convention on Biological Diversity
This year marks the 25th anniversary of the entry into force of the Convention on Biological Diversity (CBD), also known as the UN Biodiversity Convention. The treaty opened for signatures at the 1992 Rio Earth Summit and entered into force the following year. With 196 Parties, it is one of the most-ratified international treaties. It is dedicated to the conservation of biodiversity, the sustainable management of natural resources and ecosystems, and the equitable sharing of benefits of genetic resources. Its two protocols address biosafety, reducing environmental risks of modern biotechnology, and technology transfer. The 14th meeting of the Conference of the Parties (COP 14) will be held November 17─29, 2018, in Sharm El-Sheikh, Egypt. Among the agenda items are the long-term strategic directions for the post-2020 global diversity framework, enhancing cooperation with other treaties, synthetic biology, climate change, and liability and redress. Learn more about the Convention on Biological Diversity.
COUNTRY UPDATES

By Renee Dopplick

Renee Dopplick (dopplick@ilaw.news) is Editor-in-Chief of International Law News.

Australia
Australia amended its Criminal Code Act 1995 to modernize and reform offenses for foreign interference, treason, espionage, sabotage of critical infrastructure, and interference with political rights and duties. Australia also adopted a new law establishing a registration system for individuals undertaking activities on behalf of foreign principles. Read the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 and the Foreign Influence Transparency Scheme Act 2018.

Brazil
Brazil enacted a new data privacy law. The General Personal Data Protection Law (LGPD) will come into effect in February 2020, giving time for companies to come into compliance. The law contains sixty-five articles and adopts provisions similar to the EU General Data Protection Regulation (GDPR). Its provisions cover the rights of data subjects, personal data processing, international transfers, data breach disclosure requirements, and penalties. Similar to the GDPR, the law includes the right of data erasure, known informally as the right to be forgotten. Read the News Release by the President’s Office (Aug. 16, 2018) and Law No. 13.709 of Aug. 14, 2018, published in the Official Gazette on Aug. 15, 2018 (in Portuguese).

China
Blockchain-enabled evidence is now admissible in China’s internet courts, according to the Supreme People’s Court. China currently has three specialized internet courts to address disputes related to e-commerce, smart contracts, intellectual property, digital assets, and other technology-related issues. Court proceedings are largely conducted online. China launched the Hangzhou Internet Court in August 2017. During its first year, it handled more than 10,000 cases. The Beijing Internet Court and the Guangzhou Internet Court opened in September 2018. Read the Supreme People’s Court’s Provisions on Certain Issues in Internet Court Trial Cases (adopted Sept. 3, 2018, effective Sept. 7, 2018) (in Chinese). In October, China established its first blockchain pilot zone in Hainan Province, as a joint initiative with Oxford University, to help accelerate the use of blockchain and other digital ledger systems in finance, credit reporting, supply-chain management, and cross-border trade. Read the announcement, China Launches Blockchain Pilot Zone, Xinhua (Oct. 9, 2018).

Egypt
Egypt recently enacted its first comprehensive cybercrime law. The Combating Information Technology Crimes Law criminalizes hacking into information systems, unauthorized use of wireless networks, and the creation of email accounts or websites using a different name or institution. The law allows the government to block websites that threaten the country’s national security or economy, subject to judicial approval. Individuals and internet service providers can appeal censorship decisions within seven days. Internet service providers have a duty to maintain the security of systems and personal data and not to disclose user information without a warrant. Read Law No. 175 of 2018 (Law on Combating

**European Union**
The European Court of Justice (CJEU) in October ordered Poland to suspend the provisions in its new law lowering the retirement age for Supreme Court judges and to reinstate those judges until the Court delivers its final judgment on whether Poland’s law infringes EU law. Poland’s law, adopted earlier this year, forced the retirement of roughly forty percent of Supreme Court judges in July, including the premature dismissal of the Supreme Court Chief Justice in contravention of the country’s Constitution specifying a six-year term. The European Commission brought the action before the CJEU, arguing that Poland has infringed on EU law. Read the Press Release by the European Court of Justice (Oct. 19, 2018).

**Japan**
Japan promulgated the Climate Change Adaptation Act on June 13, 2018. It will come into effect on December 1, 2018. The Act is organized around four pillars: a comprehensive adaptation program for climate change, the use of information platforms, the strengthening of efforts at the local and regional levels, and international cooperation, as well as assistance to the private sector to promote activities that will enhance climate change adaptation. The Act requires the government to prepare a climate change adaptation plan, containing the implementation details, such as the period for the plan, basic policies, actions to enrich and use scientific knowledge, procurement of an information platform, the role of the national environment research center, policies for the local and regional levels, promotion of activities in the private sector, international cooperation, and alliance among administrative bodies. It also requires the Ministry of Environment to assess climate change impacts every five years and revise the Climate Change Adaptation plan as necessary. Read the Climate Change Adaptation Act (Act No. 50) (in Japanese) and its summary (in Japanese).

*Contributed by Eriko Hayashi, Partner, Oh-Ebashi LPC & Partners, Tokyo, Japan*

**United States**
The U.S. President on October 17 announced that the United States will serve official notice to withdraw from the Universal Postal Union (UPU), which governs the international postal rate system. The United States will seek to negotiate new bilateral and multilateral agreements during the required one-year withdrawal process and is prepared to rescind its withdrawal if progress is made on reforming the UPU. The UPU, established on October 9, 1874, is the second oldest international organization. World Post Day is celebrated each year on October 9. Read the White House Statement from the Press Secretary.
BOOK REVIEW

*Kiss, Bow, or Shake Hands: Courtrooms to Corporate Counsels* (ABA Publishing, 2018)

Reviewed by Joshua M. Toman

*Joshua M. Toman is a consultant at Phoenix Legal Innovations, LLC. The author would like to thank Maegan Siscar, an intern with the ABA Section of International Law, for her assistance.*

This latest installment in the *Kiss, Bow, or Shake Hands* series of books by bestselling author Terri Morrison is a fantastic communication tool geared toward attorneys who practice in all segments of law and in varied settings, including in private, government, and corporate practice. Morrison does an excellent job of outlining why cultural sensitivity is so important in the legal profession and gives examples of situations where non-verbal communication, body language, and a personal relationship between a client and an attorney can either seal or sink the deal in many countries around the world.

As international law and cross-border transactions impact all major industry sectors, attorneys now are required to interact with and provide service to business professionals worldwide with varying local customs and business practices. It is essential that attorneys be skilled in diplomacy, tact, and the proper cultural norms of the region where they are doing business to gain respect, credibility, and trust, which are vital to establishing a successful business relationship. This book will educate attorneys on developing these intercultural communication and negotiation skills needed to increase their marketability and reputations in jurisdictions around the globe.

*Kiss, Bow, Shake Hands: Courtrooms to Corporate Counsels* is a must purchase for anyone involved in law, including the legal assistants, law clerks, and executive assistants who support attorneys in their jobs and who may interact with clients via phone, email, or in person. The book's first section provides a general overview of what to do and what not to do and how the concepts of time, silence, logic, and persuasion vary across cultures. Individual chapters cover cultural differences in more than forty countries, including tips on how close to stand, whether you should kiss, bow, or shake hands, and other important cultural information that will give attorneys and those in the legal field the skills to develop business on a global scale.

A truly engaging, practical, and essential addition to any law firm’s training resources for attorneys and staff. It is also a helpful resource for law libraries for use by students and faculty and for a range of legal professionals looking to expand their leadership and communication skills.

Every successful lawyer requires the knowledge and complex skills to communicate effectively with fellow citizens from a wide variety of ethnicities and belief systems. Understanding how an individual's culture can influence a case or a negotiation is not only a valuable skill but also an imperative. The original Kiss, Bow, or Shake Hands is one of Inc. magazine’s top seven books on negotiating and, as of this writing, has sold over 450,000 copies. This book in the Kiss, Bow, or Shake Hands series has been written specifically for legal professionals—to help you develop the tangible intercultural skills that will support your successful legal practice.

“Believe it or not, correct behavior has many faces. Terri Morrison provides tremendously useful tips on how to go about working in an international atmosphere, behaving as an authentic local player in every jurisdiction. A definite must read for the truly international practitioner who wants to play by the rules.”

—Marcelo Bombau, Partner, M. & M. Bomchil Abogados, Buenos Aires, Argentina, and former chair, Section of International Law, American Bar Association

“This book is touchstone for my senior level leadership in higher education, and her wisdom never fails to hit the mark. Terri Morrison once again leverages her considerable talent to ensure all cultures are accessible and fascinating for her readers. Bravo!”

—Dr. Robbin Chapman, Associate Dean for Diversity, Inclusion and Belonging, Harvard Kennedy School, Cambridge, MA

“I received a copy of the book from Wharton School’s Export Network Director, Hans Koehler. I still refer to it frequently when clients have deals in new countries. The legal focus is even more helpful in my international practice."

—Timothy Charlesworth, Partner, Fitzpatrick Lentz & Bubba, P.C., Center Valley, PA

ABOUT THE AUTHOR

Knowledge is power. Kiss, Bow, or Shake Hands is given to new hires at firms like Ernst & Young and Lockheed-Martin—and is recommended reading at NASA, the US Department of Defense, and the State Department.

The book is widely used in Universities, Private Industry, and Governments. It is on Inc. magazine’s 7 Best Books on How to Negotiate. Terri Morrison has appeared on news sources like CNN, and repeatedly on NPR and the BBC. She has been quoted or profiled in the WSJ, Asia Times, Investor’s Weekly, USA Today, The Washington Post, the Philadelphia Inquirer, Fast Company, National Geographic, Nature, ESPN, Fortune magazine, and many more.

ISBN: 9781641052498
Product Code: 5210305
2018, 286 pages, 6 x 9, Paperback and e-Book

List Price: $69.95 ..........Now Only: $59.95
ABA Member Price: $62.95 ....Now Only: $52.95
Section Member Price: $55.96 ....Now Only: $45.96

TWO EASY WAYS TO ORDER

CALL (800) 285-2221
VISIT ShopABA.org

Order by 12/31/2018 and save $10 off the list price. Must use promo code ‘KISSTM10’. Not applicable with other discounts.
Copyright

Published in International Law News: Volume 47, Number 1, ©2018 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.