

The Year in Review

Volume 51 *International Legal Developments*
Year in Review: 2016

Article 17

January 2017

International Investment and Development

Uche Ewelukwa Ofodile

Tamari Lagvilava

Qingqing Miao

Georg Daniel Birbaumer

Jonathan Burns

See next page for additional authors

Recommended Citation

Uche Ewelukwa Ofodile et al., *International Investment and Development*, 51 ABA/SIL YIR 261 (2017)
<https://scholar.smu.edu/yearinreview/vol51/iss1/17>

This Finance is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in The Year in Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Investment and Development

Authors

Uche Ewelukwa Ofodile, Tamari Lagvilava, Qingqing Miao, Georg Daniel Birbaumer, Jonathan Burns, Amgad Husein, William E. Thomson, Dylan Mefford, and Perlette Michèle Jura

International Investment and Development

UCHE EWELUKWA OFODILE, TAMARI LAGVILAVA, QINGQING MIAO, SARAH OLIAI, GEORG DANIEL BIRBAUMER, JONATHAN BURNS, AMGAD HUSEIN, WILLIAM E. THOMSON, DYLAN MEFFORD, AND PERLETTE MICHÈLE JURA*

I. Introduction

This Article reviews 2016 developments in the field of international investment law and development. In addition to reviewing significant overarching developments in international investment rulemaking, the article highlights developments in seven countries: Bolivia, China, Cuba, Paraguay, Saudi Arabia, South Africa, and the United States.

II. International Investment Policy and Investment Policymaking

The number of significant developments in the area of international investment policymaking that occurred in 2016 include the signing of comprehensive trade and investment agreements such as the Canada-European Union Comprehensive Economic and Trade Agreement, and the adoption of key policy instruments such as the *G-20 Guiding Principles for Investment Policymaking* and the *OECD/FAO Guidance for Responsible Agricultural Supply Chain*. As evident last year, 2016 was a continued push towards more responsible and more sustainable investment through the inclusion of sustainable development principles in investment agreements

* The Committee Co-Editors are Dr. Uche Ewelukwa Ofodile, the Arkansas Bar Foundation Professor of Law at the University of Arkansas School of Law in Fayetteville, Arkansas, and Zachary Walker, law clerk to the Honorable Delissa A. Ridgway, Judge of the U.S. Court of International Trade. Professor Uche Ofodile contributed Section II on International Investment Policy and Investment Policymaking and also Section VIII on South Africa. Tamari Lagvilava, law clerk to the Honorable Delissa A. Ridgway, Judge of the U.S. Court of International Trade, contributed Section III on the Trans-Pacific Partnership. Qingqing Miao, Associate at Lane Powell PC, contributed Section IV on China. Sarah Oliai, who recently completed a clerkship with the Honorable Delissa A. Ridgway, Judge of the U.S. Court of International Trade, contributed Section V on Cuba. Georg Daniel Birbaumer, Associate at Altra Legal in Asuncion, Paraguay and LLM Candidate at the Georgetown University Law Center, contributed Section VI on Paraguay. Jonathan Burns and Amgad Husein, both of Dentons, contributed Section VII on Saudi Arabia. William E. Thomson and Dylan Mefford, of Gibson Dunn & Crutcher LLP, contributed Section IX (A) on the United States of America. Perlette Michèle Jura and Dylan Mefford, of Gibson Dunn & Crutcher LLP, contributed Section IX(B) on the United States of America. Mauricio Becerra de la Roca Donoso, managing partner at Becerra de la Roca Donoso & Asociados, contributed a section on Bolivia that can be found in the Latin American Committee submission in this volume.

and the reaffirmation of the government's right to regulate investment for legitimate public-policy purposes.

A. THE G-20 GUIDING PRINCIPLES FOR INVESTMENT POLICYMAKING

In July 2016, G20 Trade Ministers agreed to the *G20 Guiding Principles on Global Investment Policymaking* (G20 Guiding Principles).¹ The G20 Guiding Principles are a set of nine non-binding principles developed with the objective of “fostering an open, transparent and conducive global policy environment for investment,” “promoting coherence in national and international investment policymaking,” and “promoting inclusive economic growth and sustainable development.”²

In the G20 Guiding Principles, Trade Ministers recognize the critical role of investment as an engine of economic growth in the global economy and urge Governments to avoid protectionism in relation to cross-border investment.³ The G20 Guiding Principles also declare that “[i]nvestment policies should establish open, non-discriminatory, transparent and predictable conditions for investment,”⁴ “[i]nvestment policies should provide legal certainty and strong protection to investors and investments,”⁵ dispute settlement procedures “should be fair, open and transparent, with appropriate safeguards to prevent abuse,”⁶ “[r]egulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate,”⁷ and “[i]nvestment policies and other policies that impact on investment should be coherent at both the national and international levels and aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth.”⁸ The Guiding Principles also state that Governments have the right to regulate investment for legitimate public policy purposes,⁹ “[p]olicies for investment promotion should . . . be effective and efficient, . . . and matched by facilitation efforts that promote transparency,”¹⁰ “[i]nvestment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance,”¹¹ and that the international community “should continue to cooperate and engage in

1. *Annex III: G20 Guiding Principles for Global Investment Policymaking*, <http://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>.

2. *Id.*

3. *Id.* principle I.

4. *Id.* principle II.

5. *Id.* principle III.

6. *Id.* principle IV.

7. *Id.* principle V.

8. *Id.* principle VI.

9. *Id.* principle VII.

10. *Id.* principle VIII.

11. *Id.* principle IX.

dialogue with a view to maintaining an open and conducive policy environment for investment, and to address shared investment policy challenges.”¹² Altogether, the G-20 Guiding Principles touch on a number of important themes in investment policymaking that include non-discrimination, transparency, the right to regulate, and responsible business conduct.

B. OECD/FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAIN

For businesses, workers, local communities, governments and other stakeholders, risks arising along agricultural supply chains are many and growing. These risks include human rights, labour rights, health and safety, food security and nutrition, tenure rights over and access to natural resources, environmental protection, and governance. In March 2016, the Organization for Economic Co-operation and Development (OECD) and the Food and Agricultural Organization (FAO) jointly published the *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (Guidance).¹³ The Guidance was developed “to help enterprises observe existing standards for responsible business conduct along agricultural supply chains.” The Guidance comprises four sections. In *Model enterprise policy for responsible agricultural supply chains*,¹⁴ the Guidance provides “the major standards that enterprises should observe to build responsible agricultural supply chains.” In the *Five-step framework for risk-based due diligence along agricultural supply chains*,¹⁵ the Guidance offers a framework for enterprises to implement in order to undertake risk-based due diligence along agricultural supply chains. In *Measures for risk mitigation and prevention along agricultural supply chains*,¹⁶ the Guidance “identifies the risks of adverse impacts arising along agricultural supply chains and proposes measures to mitigate and prevent them.” Finally, in *Engagement with indigenous peoples*,¹⁷ the Guidance offers direction on how businesses can engage in good-faith, effective, and meaningful consultations with indigenous communities.

C. THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT

The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) was signed on 30 October, 2016, at the EU-Canada Summit in Brussels.¹⁸ Chapter 8, the investment chapter of CETA,

12. *Id.* principle X.

13. OECD/FAO, *OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS* (OECD Publishing 2016), <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>.

14. *Id.* § 2.

15. *Id.* § 3.

16. *Id.* Annex A.

17. *Id.* Annex B.

18. Canada-European Union Comprehensive Economic and Trade Agreement, Can. – E.U., Oct. 30, 2016, <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

addresses investment protection and promotion as well as the settlement of investment dispute. The investment chapter features standard rights and guarantees found in most bilateral investment treaties including, *inter alia*, the right to national treatment and most-favored nation (Articles 8.8 and 8.7), minimum standard of treatment for investors including “fair and equitable treatment” and “full protection and security” (Article 8.10), protection against expropriation or measures that are tantamount to expropriation (Article 8.12), and the right of investors to freely and without delay transfer capital and funds related to a covered investment (Article 8.13).¹⁹

Significantly, Chapter 8 of CETA includes an explicit reference to the right of State Parties to regulate in the public interest. In Article 8.9, State Parties explicitly “reaffirm[ed] their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.”²⁰

One of the most unique and innovative features of the investment chapter is the new Investment Court System that will operate through a tribunal established under Article 8.27. Article 8.27(2) declares that the CETA Joint Committee “shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.” CETA also establishes an Appellate Tribunal charged with the function of review awards rendered under CETA (Article 8.28). The establishment of that Tribunal is a marked departure from the standard investor-State dispute settlement mechanism found in most BITs.²¹

III. Trans-Pacific Partnership

While the text of the Trans-Pacific Partnership (TPP) was released in late 2015, the past year provided the public with time to understand more about the TPP’s many chapters and provisions.²² This section focuses on Chapter 9 of the TPP, which is the agreement’s investment chapter.²³

Similar to the NAFTA, the TPP’s investment chapter has a two-part structure where Section A (Articles 9.1-9.6) contains the substantive investment protection clauses, and Section B (Articles 9.17-9.29) sets out the

19. *Id.* arts. 8.7, 8.8, 8.10, 8.12, 8.13.

20. *Id.* art. 8.9.

21. *Id.* arts. 8.27, 8.28.

22. The following twelve states are signatories to the TPP: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and the Socialist Republic of Vietnam. *Summary of the Trans-Pacific Partnership*, OFFICE OF THE U. S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (last visited Apr. 4, 2017).

23. *See* Trans-Pacific Partnership, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpa-full-text>.

investor-state arbitration provisions. While the TPP's investment chapter builds on the framework of existing bilateral investment treaties (BITs), it also offers more comprehensive protections.

Section A includes standard investment provisions such as fair and equitable treatment (FET), and most favored nation (MFN) treatment, as well as protections against expropriation without compensation and performance requirements. Article 9.6 sets out the minimum standard of treatment that closely follows the United States Model BIT. That standard provides that each party must accord to covered investments fair and equitable treatment, full protection, and security under customary international law. The TPP limits state party's potential exposure to the violation of the fair and equitable treatment standard in two ways. First, Article 9.6(4) provides that a host state's failure to take an action that may be inconsistent with investor's expectations does not constitute a breach of FET, even if loss or damage to the covered investment is the result. Second, under Article 9.6(5), "[T]he mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of [FET], even if there is loss or damage to the covered investment as a result."²⁴

The MFN provision in Article 9.5 has standard language where the host state agrees not to give preferential treatment to investment from some states over others.²⁵ Article 9.8 on expropriation contains language against expropriation and nationalization of investment by the host state.²⁶ Like other BITs, TPP does not completely prohibit expropriation of investment by the host country, but does require any expropriation to be nondiscriminatory, for public purpose, and that investor be provided with due process and fair compensation. Unlike most treaties, TPP does not allow host states to "grandfather" nonconforming expropriation measures.

Article 9.10 prohibits the host state from imposing performance requirements to benefit its domestic industry. TPP provides an important protection of intellectual property by barring the host state from demanding that investors transfer technology, production processes, or other proprietary knowledge.²⁷

Section B of the TPP, the investor-State dispute settlement (ISDS) provisions, closely resembles the US Model BIT and the NAFTA, but provides a more sophisticated dispute settlement mechanism. The TPP allows the host state to bring a counterclaim in connection with the factual and legal basis of the claim. The counterclaim must not raise issues unrelated to the investor's original claim.

The TPP's ISDS provisions focus on transparent and efficient resolution of disputes. For example, TPP allows acceptance of *amicus curiae*

24. *Id.* art. 9.6.

25. *Id.* art. 9.5.

26. *Id.* art. 9.8.

27. *Id.* art. 9.10.

submissions and provides more detailed guidelines for selection and codes of arbitrators's conduct. In addition, parties are required to make certain submissions available to the public. In an effort to streamline the arbitration procedure, the TPP provides for a speedy disposal of unmeritorious claims. Unlike some other investment treaties, under the TPP's ISDS mechanism, investors bears the burden of proving all elements of their claims.

The TPP's investment chapter is not without its critics. The focus of most of the controversy has been the host states' irrevocable consent to submit to investor-state arbitration. In the United States, many have lamented that the ISDS infringes on the sovereignty of host states because it provides no appeal procedure for national courts.²⁸ Some have been concerned about the host states' inability to hold the investors responsible for harm to the host state by bringing an arbitration claim.²⁹ Others assert that the TPP's investment chapter does not go far enough to promote sustainable investment, combat corruption, and support development.³⁰

The TPP was signed on February 4, 2016, in Auckland, New Zealand. Even with the signing, the TPP will likely face a two-year ratification period and much uncertainty. According to Article 30.5(1) of the TPP, the Agreement will enter into force sixty days after the date on which all original signatories have notified the Depositary in writing of the completion of their applicable legal procedures. Pursuant to Article 30.5(2), if all original signatories have not made the required notification within a period of two years of the date of signature of the Agreement, the Agreement will enter into force "if at least six of the original signatories, which together account for at least 85 percent of the combined gross domestic product of the original signatories in 2013 have notified the Depositary in writing of the completion of their applicable legal procedures within this period."³¹

IV. China

In 2016, China undertook various steps to simplify and streamline administrative control over foreign investment enterprises.

On September 3, 2016, the Standing Committee of the National People's Congress resolved to amend (the 2016 Amendments) four laws currently governing foreign-invested enterprises (FIEs) that include the Sino-Foreign Equity Joint Venture Law, the Sino-Foreign Cooperative Joint Venture Law, the Wholly Foreign-Owned Enterprise Law, and the Law on the

28. José E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard?"*, IILJ WORKING PAPER 2016/3, at 9, https://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/03/Alvarez_IILJ-MegaReg_2016-3.pdf.

29. *Id.*

30. Nathalie Bernasconi-Osterwalder, *How the Investment Chapter of the Trans-Pacific Partnership Falls Short*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT BLOG (Nov. 6, 2015), <https://www.iisd.org/blog/how-investment-chapter-trans-pacific-partnership-falls-short>.

31. Trans-Pacific Partnership, art. 30.5, Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Final-Provisions.pdf>.

Protection of Investments by Taiwan Compatriots.³² The Amendments were to take effect on October 1, 2016.³³

On the same day the 2016 Amendments were announced, the Ministry of Commerce of the People's Republic of China (MOFCOM) published the draft Interim Measures on Administering the Establishment and Filing of Corporate Change of Foreign Investment Enterprises (Interim Measures) to seek public comments. The final Interim Measures were promulgated on October 8, 2016.³⁴ The 2016 Amendments intend to streamline and relax administrative control over the establishment and operation of Foreign Invested Enterprises (FIE).

One should note that in January 19, 2015, the MOFCOM released for public comments the proposed Foreign Investment Law (the Draft Law) along with the official explanation of the Draft Law.³⁵ The Draft Law would have replaced the FIE Laws. Nevertheless, as of November 2016, the Draft Law still has not yet been passed and there is not a clear date for its passage.³⁶ The 2016 Amendments resemble some of the highlighted changes in the Draft Law.

32. *Shangwubu guanyu "Waishang Touzi Qiye Sheli ji Biangeng Bei'an Guanli Zanzing Banfa (zhengqiu yijian gao)" Gongkai Zhengqiu Yijian de Tongzhi*

(商务部关于《外商投资企业设立及变更备案管理暂行办法》(征求意见稿)公开征求意见的通知) [Ministry of Commerce of People's Republic of China's Call for Public Comments on "Interim Measures on Administering the Establishment and Filing of Corporate Change of Foreign Investment Enterprises (Draft for Public Comments)"], DEPT. OF TREATY AND LAW (June 9, 2016 12:00 PM), <http://tfs.mofcom.gov.cn/article/as/201609/20160901384826.shtml>.

33. *Id.*; *Quanguo Renmin Daibiao Dabui Changwu Weiyuanhui Guanyu Xiugai "Zhonghua renmin gongheguo Waiziqiyefa" Deng Sibufalv de Jieding*

(全国人民代表大会常务委员会关于修改《中华人民共和国外资企业法》等四部法律的决定) [the Standing Committee of the National People's Congress's Resolution on Amending the Law of Foreign Investment Enterprises and Three Other Laws], (promulgated by Standing Comm. Nat'l People's Cong., Sep. 3, 2016, effective Oct. 1, 2016), <http://law.npc.gov.cn/FLFG/flfgByID.action?flfgID=35942870&zlsxid=11> [hereinafter *the Consent*].

34. *Zhonghua Renmin Gonghe Guo Shangwu Bu Ling 2016 Nian di 3 Hao «Waishang Touzi Qiye Sheli ji Biangeng Beian Guanli Zanzing Banfa»*

(中华人民共和国商务部令2016年第3号《外商投资企业设立及变更备案管理暂行办法》) [Ministry of Commerce of People's Republic of China 2016 No.3 Order "Interim Measures on Administering the Establishment and Filing of Corporate Change of Foreign Investment Enterprises"], MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.mofcom.gov.cn/article/b/f/201610/20161001404974.shtml>.

35. *Shangwubu jiu "Zhonghua Renmin Gongheguo Waiguo Touzifa (cao'an zhengqiu yijian gao)" Gongkai Zhengqiu Yijian* (商务部就《中华人民共和国外国投资法(草案征求意见稿)》公开征求意见)

[Ministry of Commerce of the People's Republic of China's Call for Public Comments on the "People's Republic of China Foreign Investment Law (draft for public comments)"], DEPT. OF TREATY AND LAW, <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>.

36. Ming Liu (刘明), *Waishang Touzi Guanli Tizhi Yinglai Zhongda Biange (Xia)* (外商投资管理体制迎来重大变革(下)) [Major Changes Expected in Foreign Investment Regulatory Regime (Part II)], COMNEWS (Nov. 01, 2016, 9:12 PM), <http://www.comnews.cn/focus/581894aacd91896ccc23ed67?locale=zh-CN>.

A. THE 2016 AMENDMENTS

The 2016 Amendments replace the government approval procedure for all foreign investments with a more streamlined and simplified filing-only process.³⁷ For foreign invested enterprises (the “FIEs”) whose business scope does not fall into the industries that are restricted or prohibited (the “Negative List”), the establishment and certain corporate changes no longer need an application for preliminary approval from the authority.³⁸

The Catalogue of Industries for Guiding Foreign Investment, which underwent major revisions in 2015, sets forth the “Negative List” and other categories.³⁹

B. THE INTERIM MEASURES

The Interim Measures detail the filing procedure for companies whose business is not on the “Negative List.”⁴⁰ The preliminary approval requirement for the industries on the “Negative List” remains unchanged.

FIEs not on the “Negative List” can complete the record-filing online for corporate establishment or changes with the respective bureau of commerce with jurisdiction.⁴¹ Newly established FIEs should submit record-filing materials online either before obtaining their business license or within thirty days after the issuance of the business license.⁴² The record-filing of newly established enterprises should be completed before the issuance of a business license (but after pre-approval of the FIE’s name) or within thirty days after the issuance of a business license.⁴³

Corporate changes include name or registered address change, change in type of entity, change in duration of operations, change in business scope, capital change, organizational change, change in controlling person,

37. See the Consent, *supra* note 33.

38. Giovanni Pisacane, *Less Bureaucracy for Foreign Investments Will Make China Even More Competitive*, SHANGHAI DAILY (Sep. 29, 2016), <http://www.shanghaidaily.com/opinion/foreign-perspectives/Less-bureaucracy-for-foreign-investments-will-make-China-even-more-competitive/shdaily.shtml>.

39. See, *the Consent, supra* note 33; Zhonghua Renmin Gongheguo Guojia Fazhanhe Gaige Weiyuanhui Zhonghua Renmin Gongheguo Shangwubu Gonggao (中华人民共和国国家发展和改革委员会中华人民共和国商务部公告2016年第22号) [the MOFCOM and National Development and Reform Commission Joint 2016 No. 22 Announcement], NAT’L. DEV. AND REFORM COMM’N, http://www.ndrc.gov.cn/zcfb/zcfbgg/201610/t20161008_821973.html.

40. Ministry of Commerce of People’s Republic of China 2016 No.3 Order “Interim Measures on Administering the Establishment and Filing of Corporate Change of Foreign Investment Enterprises”, *supra* note 34, art. 2.

41. *Id.* arts. 5 – 6.

42. *Id.* art. 5.

43. *Id.*

dissolution, merger or division, or equity transfer.⁴⁴ The FIEs need to submit the online record-filing form within thirty days after the change.⁴⁵

When reviewing the record-filing submission, the bureau of commerce is only responsible for reviewing the completeness, accuracy, and authenticity of the submission, as well as determining whether the business falls in the “Negative List.”⁴⁶ The bureau of commerce is expected to complete their reviewing within three business days.⁴⁷ The FIEs may obtain Record-Filing Acknowledgement after the review is complete.⁴⁸

The bureaus of commerce reserve the authority to conduct random inspections and audits.⁴⁹ FIEs are subject to civil penalties for failing to comply with the requirements specified in the Interim Measures.⁵⁰

Although the 2016 Amendments and Interim Measures are less expansive than the Draft Law that would have overhauled the regulatory scheme of foreign investments in China, they effectively eliminate the preliminary administrative approval requirements for many FIEs. Amid uncertainties in the domestic and global economy, the Chinese government demonstrates its continued willingness to attract foreign investments.

V. Cuba

“‘Cultivo una rosa blanca’ . . . I have come here to bury the last remnant of the Cold War in the Americas.”⁵¹ Quoting the famous Cuban poet José Martí in his speech in Havana, President Barack Obama’s March 2016 visit to Cuba marked the first such visit by a sitting United States president in eighty-eight years.⁵² This past year also saw several regulatory changes on the path toward normalization between the United States and Cuba that focused on creating opportunities for investment and development in and trade with Cuba. Scheduled air services between the United States and Cuba resumed earlier this year.⁵³ The Obama administration also eased travel restrictions and limits of the use of American dollars in transactions

44. *Id.* art. 6.

45. *Id.*

46. *Id.* art. 19.

47. *Id.* art. 11.

48. *Id.* art. 12.

49. *Id.* art. 14.

50. *Id.* arts. 24 – 27.

51. *Remarks by President Obama to the People of Cuba*, WHITE HOUSE (Mar. 22, 2016, 10:10 AM), <https://www.whitehouse.gov/the-press-office/2016/03/22/remarks-president-obama-people-cuba>.

52. Claire Felter, Danielle Renwick, Brianna Lee & James McBride, *CFR Backgrounders: U.S.-Cuba Relations*, COUNCIL ON FOREIGN RELATIONS (Sept. 7, 2016), <http://www.cfr.org/cuba/us-cuba-relations/p11113>.

53. *Treasury and Commerce Announce Significant Amendments to the Cuba Sanctions Regulations Ahead of President Obama’s Historic Trip to Cuba*, U.S. DEPT. OF TREASURY (Mar. 15, 2016), <https://www.treasury.gov/press-center/press-releases/Pages/j10379.aspx>.

with Cuba and will allow travel to Cuba for “people to people” educational trips.⁵⁴

In addition to permitting certain types of United States-dollar transactions, the Treasury Department’s Office of Foreign Assets Control (OFAC) eased banking restrictions to permit United States banks to process “U-turn” transactions.⁵⁵ This easing of restrictions is important to promoting investment and development in Cuba because it allows third-country commerce involving Cuba or Cuban nationals to be processed in United States dollars and through the United States financial system via United States financial institutions located in the United States that serve as intermediary banks.⁵⁶ Certain types of goods and services may now also be imported to the United States provided they were produced by independent Cuban entrepreneurs. Such goods and services include Cuban-origin software and mobile apps.⁵⁷

Despite successful programs fighting hunger, food security remains a concern in many poorer regions of Cuba.⁵⁸ Recent developments may help alleviate these concerns. Earlier in 2016, OFAC approved the first American manufacturing plant in the country since 1959.⁵⁹ The company aims to begin production of small, low-maintenance tractors (with parts sourced from the United States) for small, private farmers in Cuba to increase agricultural production.⁶⁰

2016 has also seen important opportunities for information sharing and research collaboration between the United States and Cuba. OFAC authorized certain transactions related to Cuban-origin pharmaceuticals and joint medical research, and President Obama instructed the Department of Health and Human Services to partner with the Cuban Ministry of Public Health in joint research for developing vaccines and treatments, and

54. *Id.*; Julie Hirschfeld Davis, *U.S. Eases Restrictions on Travel to Cuba and Bank Transactions*, N.Y. TIMES (Mar. 15, 2016), <http://www.nytimes.com/2016/03/16/us/politics/white-house-cuba-restrictions.html>.

55. U.S. Department of the Treasury, *U.S. Department of the Treasury Frequently Asked Questions Related to Cuba*, at 12, 13 – 18, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf [hereinafter *Updated OFAC Cuba FAQs*].

56. *Id.* at 12.

57. *Id.* at 21 – 22.

58. Elena L. Pasquini, *Cuba’s Development Priorities in the New Landscape*, DEVEX (Feb. 19, 2016), <https://www.devex.com/news/cuba-s-development-priorities-in-the-new-landscape-87683>.

59. Susan Adams, *The Unlikely Entrepreneurs Behind Cuba’s First U.S. Factory Since the Revolution*, FORBES (Feb. 16, 2016, 4:11 PM), <https://www.forbes.com/sites/forbestreptalks/2016/02/16/the-unlikely-entrepreneurs-behind-cubas-first-u-s-factory-since-the-revolution/#433f6ab741dd>.

60. *See id.*; Harold Sirkin, *Entrepreneurs Find Fertile Ground in Cuba*, FORBES (Nov. 17, 2016, 9:31 AM), <https://www.forbes.com/sites/haroldsirkin/2016/11/17/entrepreneurs-find-fertile-ground-in-cuba/#883ded53c499>.

controlling cancer and infectious disease outbreaks.⁶¹ The United States Department of Agriculture further announced approval of industry-funded research programs between the United States and Cuban agricultural sectors to engage in cooperative research and information exchanges about agricultural productivity, food security, and sustainable natural resource management.⁶² OFAC also added a general license permitting provision of services related to repairing, maintaining, or enhancing Cuban infrastructure across multiple sectors.⁶³

While there are critics in the Cuban government who counter that these recent measures since 2014 have not made a positive impact on Cuba's economy,⁶⁴ the measures from this year alone remove significant barriers to trade with and development in Cuba.⁶⁵

VI. Paraguay

In 2016, Paraguay has continued its efforts to attract international investors. Compared to its neighbors, Brazil and Argentina, Paraguay is a small country geographically. Despite its relative small size, Paraguay has excelled in the World Bank's Doing Business Ranking.⁶⁶ Paraguay's performance in the Doing Business Ranking is the result of a diverse set of factors. Nevertheless, some of the most important ones are recent changes in law and policy, which have been carried out with an eye towards foreign investment.

The Government of Paraguay has encouraged companies to invest in Paraguay through the *maquila* regime.⁶⁷ The main feature of the *maquila* regime is the tax regime.⁶⁸ Between 2013 and 2016, over seventy-one

61. U.S. Dept. of Treasury, *Treasury and Commerce Announce Further Amendments to Cuba Sanctions Regulations* (Oct. 14, 2016), at 1 – 2, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_fact_sheet_10142016.pdf.

62. *Agriculture Secretary Vilsack Announces Historic Agreements for U.S.-Cuba Agriculture Sectors*, U.S. DEPT. OF AGRICULTURE (Mar. 21, 2016), <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2016/03/0069.xml>.

63. *Updated OFAC Cuba FAQs*, *supra* note 45, at 28.

64. Michael Weissenstein, *Cuba Says Obama's Easing of Embargo Hasn't Helped Economy*, THE BIG STORY (Sept. 9, 2016, 9:56 PM), <http://bigstory.ap.org/article/ae499dfddb549998cce488dd3021e90/cuba-says-obamas-easing-embargo-hasnt-helped-economy>.

65. Meredith Rathbone, Peter Jeydel, Edward Krauland, Jack Hayes and Stephen Heifetz, *Partial Opening of US Financial System to Cuba and Easing of Other Trade Restrictions*, STEPTOE & JOHNSON LLP (Mar. 23, 2016), <http://www.steptoel.com/publications-11148.html>.

66. Paraguay is ranked 15 in the Latin American & Caribbean Ranking. Brazil and Argentina are ranked 22 and 18 respectively. See WORLD BANK GROUP, *DOING BUSINESS 2017 EQUAL OPPORTUNITY FOR ALL*, <http://www.doingbusiness.org/-/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf>.

67. See generally MAQUILA PARAGUAY, <http://maquila.gov.py/EN/> (last visited Dec. 4, 2016).

68. Law No. 1064, Jul. 2, 1997, at Chapter IX, Article 29 (Para.), <http://maquila.gov.py/EN/leyes-relacionadas-a-la-maquila.php>.

companies have begun operations under the *maquila* regime.⁶⁹ In addition, in recent years, new industries, including large slaughterhouses, have been opened, and the grain export business has been strengthened.

A. LAW 5542/2015

In the last several years, Paraguay has passed a number of new laws aimed at attracting foreign investors. The most recent, Law 5542/2015 on “*Guarantees for Investment and the Promotion to Job Creation and Economic and Social Development*,” was passed in December 2015.⁷⁰ The regulatory decree for Law 5542/2015 remains pending. The law will, however, improve the existing guarantees and benefits given by Law 117/1991 “[o]f Investments,” as well as those of Law 60/1990 that “[e]stablishes the Regime of Tax Incentives for Foreign and National Investment.” This section details investments covered by Law 5542/2015 and investor’s rights under it.

1. Covered Investments

The assets covered as investments under Law 5542/2015 are (a) national or foreign currency, and (b) tangible assets or technology. In order for the investor to enjoy the law’s benefits, there must be an investment agreement entered into between the investor and the company.⁷¹

2. Investor Rights

In the Second Chapter, the law spells out several specific rights that investors have under the legislation. But these rights can be divided into three main categories: (a) right to transfer abroad the capital—two years after the project initiated—and utilities that the project generates, (b) income tax rate stability, and (c) other rights.⁷²

a. Transfer of Capital and Profit

Capital gains may be sent abroad under Law 5542/2015 when they come from the selling of shares or representative rights. If the equity transfer leads to the Paraguayan based company’s liquidation, the investor must pay the tax exoneration that existed at the time of importation. If this requirement is met, however, the transfer will be exempt from any tax, levy, or any other fee up to the invested amount stated in the contract. Profits, on the other hand, can be transferred abroad at any time.⁷³

69. See MINISTERIO DE INDUSTRIA Y COMERCIO [Ministry of Industry and Commerce], *Consideraciones Sobre Informe del Banco Central del Paraguay acerca de flujos de Inversión Extranjera Directa* [Considerations regarding the Paraguay Central Bank Report about Foreign Direct Investment flow] (2016), http://www.mic.gov.py/mic/site/mic/pdf/destacados/INFORME_BCP_09_2016.pdf.

70. See generally Law No. 5542, Dec. 11, 2015 (Para.).

71. *Id.*

72. *Id.*

73. *Id.*

b. Income Tax Rate Stability

Among the major benefits or rights that the investor has under the new law is that the income tax levied on the activity shall remain stable. The length of time that the income tax shall remain stable depends on the invested amount. The general rule is ten years of income-tax stability if the investment is up to USD 50,000,000. The period shall extend to fifteen years for investments above USD 50,000,000 and less than USD 100,000,000. Finally, the income tax shall remain stable for twenty years if the investment is equal to or more than USD 100,000,000.⁷⁴

c. Other Rights

Investments with high social impact receive additional benefits under the law. Whether a particular investment meets the social impact criteria will be decided after reviewing a number of criteria that include the work force to be used, the industrialization level, and the environmental friendliness of the project. The benefits to industries with high social impact include: (1) an exemption of the 5 percent additional income tax rate on the distribution of profits; and (2) a decrease of the 15 percent additional tax rate applied on the remittance of profits abroad at a rate of 1 percent for every 100 employment positions directly created. The job creation tax benefit is capped at up to a maximum of 50 percent of the total value of the applicable rate.⁷⁵

Finally, the law provides the possibility to use arbitration, based on UNCITRAL Model Law, as a dispute resolution mechanism. Nevertheless, based on the drafting, one could argue that the arbitration seat must be Paraguay.⁷⁶

VII. Saudi Arabia

A. OWNERSHIP OF SECURITIES

Saudi Arabia's Capital Market Authority (CMA) has historically forbade trading on Saudi Arabia's sole securities exchange, *Tadawul*, and direct ownership of Saudi Arabian listed securities by non-citizens of Gulf Cooperation Council (GCC) member-states. Nonetheless, on May 4, 2015, the CMA issued Rules for Qualified Foreign Financial Institutions Investment in Listed Shares (the "QFI Rules"), which allowed "Qualified

74. *Id.*

75. *Id.*

76. See IBA, IBA SUBCOMMITTEE ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS, 2016 RESEARCH PROJECT: COMPARATIVE STUDY OF 'ARBITRABILITY' UNDER THE NEW YORK CONVENTION, QUESTIONNAIRE FOR THE COUNTRY REPORTERS – PARAGUAY (2016).

Foreign Investors” (QFIs) to invest in listed shares that were subject to limits and restrictions.⁷⁷

The CMA issued Amended QFI Rules, which came into effect on September 4, 2016. The amended rules have decreased the burdens on QFIs seeking to invest in Saudi Arabian securities, including *inter alia*:

- (a) Changing all references from “shares” to “securities” – thereby clarifying that QFIs can also trade in listed debt instruments and the like;
- (b) Decreasing minimum assets-under-management requirement for QFI licensing from SAR 18,750,000,000 (about USD 5 billion) to SAR 3,750,000,000 (about USD 1 billion);
- (c) Expanding potential QFI status from financial institutions only to include governments and government bodies;

* * *

- (e) Increasing limitation on a QFI’s ownership in the listed shares of any single issuer from 5% to 10%;
- (f) Increasing limitation on QFIs’ ownership in the aggregate in the listed shares of any single issuer from 20% to 49%; and
- (g) Removing restrictions that limited QFIs’ ownership in the aggregate to 10% of all listed shares of all issuers listed on *Tadawul*.⁷⁸

Reports indicate that foreign investors have not responded with much enthusiasm because QFIs hold listed shares in an amount representing only 1.03 percent of the total market. It will be interesting, however, to see how QFIs react to increasing liberalization of Saudi Arabia’s capital markets, both now with the Amended QFI Rules, and in the future as further liberalizations take place in line with the goals of Saudi Arabia’s Vision 2030 to diversify its economy and create a sustainable future.⁷⁹

B. INITIAL PUBLIC OFFERINGS

On July 20, 2016, the CMA issued the Instructions of Book Building Process and Allocation Method in Initial Public Offerings (IPO Rules) to govern pre-IPO procedures including valuation of shares.⁸⁰ The new IPO Rules clarify that QFIs are among the types of institutions permitted to be

77. BOARD OF THE CAPITAL MARKET AUTHORITY, RULES FOR QUALIFIED FINANCIAL INSTITUTIONS INVESTMENT IN LISTED SECURITIES (2016), <https://beta.cma.org.sa/en/Market/QFI/Documents/QFI-EN-amended.pdf>.

78. *Id.*

79. See generally Full Text of Saudi Arabia’s Vision 2030, SAUDI GAZETTE (Apr. 26, 2016), <http://saudigazette.com.sa/saudi-arabia/full-text-saudi-arabias-vision-2030/>.

80. BOARD OF THE CAPITAL MARKET AUTHORITY, THE INSTRUCTIONS OF BOOK BUILDING PROCESS AND ALLOCATION METHOD IN INITIAL PUBLIC OFFERINGS (IPOS) (2016), <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/English.pdf>.

involved and bid in the book-building process that underwriters use to price and allocate shares in IPOs.⁸¹

VIII. South Africa

On December 13, 2015, the President of the Republic of South African, Jacob Zuma, assented to South Africa's *Protection of Investment Act, 2015* (Act No. 22 of 2015).⁸² The Protection of Investment Act is comprised of sixteen articles: Definitions (Article 1), Investment (Article 2), Interpretation of Act (Article 3), Purposes of Act (Article 4), Application of Act (Article 5), Fair Administrative Treatment (Article 6), Establishment (Article 7), National Treatment (Article 8), Physical Security of Property (Article 9), Legal Protection of Investment (Article 10), Transfer of Funds (Article 11), Right to Regulate (Article 12), Dispute Resolution (Article 13), Regulations (Article 14), Transitional Arrangements (Article 15), and Short Title and Commencement (Article 16).

This particular piece of legislation has proved very controversial. While the new law offers broad protection to foreign investors and foreign investments, it also seeks to preserve the state's right to regulate the public interest. Regarding protection, Article 8(1) declares that "Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances."⁸³ Article 9 states that the Republic "must accord foreign investors and their investments a level of physical security . . . in accordance with minimum standards of customary international law and subject to available resources and capacity."⁸⁴ Article 10 protects the right to property,⁸⁵ while Article 11 guarantees investors, in respect of an investment, the right to repatriate funds subject to taxation and other applicable legislation.⁸⁶

With respect to the right to regulate, one of the stated purposes of the Act is to "affirm the Republic's sovereign right to regulate investments in the public interest."⁸⁷ In furtherance of this right to regulate, Article 12(1) declares that

Notwithstanding anything to the contrary in this Act, the government or any organ of state may, in accordance with the Constitution and applicable legislation, take measures, which may include— (a) redressing historical, social and economic inequalities and injustices; . . . (c) upholding the rights guaranteed in the Constitution; (d) promoting and preserving cultural heritage and practices, indigenous knowledge

81. *Id.* at Part 5(f).

82. Protection of Investment Act, No. 22 of 2015 (S. Afr.), <https://www.thedti.gov.za/gazettes/39514.pdf>.

83. *Id.*, art. 8.1.

84. *Id.* art. 9.

85. *Id.* art. 10.

86. *Id.* art. 11.

87. *Id.* art 4(b).

and biological resources related thereto, or national heritage; (e) fostering economic development, industrialisation and beneficiation; (f) achieving the progressive realisation of socio-economic rights; or (g) protecting the environment and the conservation and sustainable use of natural resources.

IX. United States

A. INTERNATIONAL COMITY INSULATES OVERSEAS MANUFACTURERS' PRICE-FIXING

In a decision with potentially significant implications, the United States Court of Appeals for the Second Circuit vacated a \$147 million judgment against Chinese manufacturers of vitamin C, holding that principles of international comity required the court to defer to the Chinese government's interpretation of its own laws regarding price-fixing, and refrain from exercising jurisdiction over the case, even if the alleged conduct violated American antitrust laws and had a direct effect in the United States.⁸⁸

Plaintiffs, United States vitamin C purchasers, alleged that the defendants, Chinese vitamin C manufacturers, conspired to fix the price and supply of vitamin C sold to United States companies on the international market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 4, 16.⁸⁹ The defendants moved to dismiss and, subsequently, for summary judgment, on the grounds, *inter alia*, that principles of international comity precluded the district court from exercising jurisdiction over the claims because a conflict of law made it impossible for the defendants to comply with both Chinese and United States laws. Defendants did not deny the allegations, but asserted that Chinese government regulations required them to engage in the alleged conduct.⁹⁰

The defendants and the Ministry of Commerce of the People's Republic of China (as *amicus curiae*) filed an explanation of the relevant Chinese law: "According to the Ministry, the [defendants were] an instrumentality of the State that [were] required to implement the Ministry's administrative rules and regulations with respect to the vitamin C trade."⁹¹ The district court denied both motions, ruling that "'Chinese law did not compel defendants' anticompetitive conduct' in any of the relevant time periods."⁹² The district court later held a trial, found the Defendants liable under the Sherman Act,

88. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016).

89. *Id.* at 178.

90. *Id.* at 180.

91. *Id.* at 181.

92. *Id.* at 182.

and awarded approximately \$147 million in damages and a permanent injunction barring future violations.⁹³

The Second Circuit reversed, holding that “the district court abused its discretion by failing to abstain on international comity grounds from asserting jurisdiction”⁹⁴ The Second Circuit ruled that the district court erred by not deferring to the Chinese government’s explanation of Chinese law: “When, as in this instance, we receive from a foreign government an official statement explicating its own laws and regulations, we are bound to extend that explication the deference long accorded such proffers received from foreign governments.”⁹⁵ Because the Chinese government had “filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin C sold abroad,” and because the Defendants “could not simultaneously comply with Chinese law and United States antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case.”⁹⁶ The court concluded:

we reaffirm the principle that when a foreign government, acting through counsel or otherwise, directly participates in United States court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a United States court is bound to defer to those statements.⁹⁷

The decision may have significant implications for foreign relations and trade. Requiring deference to a foreign government’s interpretation of its own laws may, in some circumstances, permit foreign states to insulate conduct from the reach of United States courts that clearly violates United States law and has adverse effects in the United States, at least where the interpretation proffered “is reasonable under the circumstances presented.” Depending on how longstanding and well-established the evidence of the foreign government’s interpretation is required to be, the decision may prove important in future cases where the circumstances presented are more ambiguous than those the Second Circuit confronted.

B. AFTER *RJR*, THE DEBATE OVER THE “FOCUS” TEST IS OVER

The Supreme Court’s decision in *RJR Nabisco, Inc. v. European Community* ends the debate about whether *Morrison*’s “focus” test controls the extraterritoriality analysis in Alien Tort Statute (ATS) cases.⁹⁸ *RJR* confirms

93. *Id.*

94. *Id.* at 194.

95. *Id.* at 179.

96. *Id.*

97. *Id.* at 189.

98. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016); *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010).

that, in determining whether the application of a statute is impermissibly extraterritorial, courts must look to the statute's "focus."⁹⁹ The ruling displaces decisions that held *Kiobel* did not adopt the "focus" test for ATS cases.

In *Morrison*, the Court cautioned the mere existence of some domestic conduct was insufficient to determine whether Petitioners alleged a permissible domestic application: "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved . . ."¹⁰⁰ The Court held that, to determine whether application of a statute is permissible, it is necessary to examine the statute's "focus."¹⁰¹

In *Kiobel v. Royal Dutch Petroleum Co.*,¹⁰² the Court considered the extraterritorial application of the ATS. Holding the presumption against extraterritoriality applied to the ATS and nothing rebutted that presumption, the Court affirmed dismissal, concluding that "all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."¹⁰³ The Court's use of the language "touch and concern" led some courts to conclude, erroneously, that the Court called for a different test in ATS cases.

For example, the Ninth Circuit rejected the argument that the "focus" test should apply in ATS cases and concluded "*Kiobel II* articulates a new 'touch and concern' test for determining when it is permissible for an ATS claim to seek the extraterritorial application of federal law."¹⁰⁴ Similarly, the Fourth Circuit applied the "touch and concern" language rather than *Morrison*'s "focus" test.¹⁰⁵ And a district court in the Southern District of New York interpreted *Kiobel* to create a new "touch and concern" standard."¹⁰⁶

In *RJR*, the Court clarified that the analysis of whether a statute applies extraterritorially requires a "two-step framework": the court must first ask whether the normal "presumption against extraterritoriality" has been rebutted by a "clear, affirmative indication that [the statute] applies extraterritorially," and only if there is no such indication, then the court must ask whether the case otherwise involves a domestic application of the statute by looking to the statute's "focus."¹⁰⁷ Regarding the second step, the Court explained that if conduct relevant to the statute's focus occurred in the

99. *RJR Nabisco*, 136 S. Ct. at 2101.

100. *Morrison*, 561 U.S. at 266.

101. *Id.*

102. 133 S. Ct. 1659 (2013).

103. *Id.* at 1669 (citing *Morrison*, 561 U.S. at 264 – 274).

104. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1027 (9th Cir. 2014).

105. *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 529 (4th Cir. 2014).

106. *Tymoshenko v. Firtash*, No. 11-CV-2794, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013).

107. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

United States, then the case may involve a domestic application of the statute “even if other conduct occurred abroad.”¹⁰⁸ But if the conduct relevant to the statute’s focus occurred abroad, “then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.”¹⁰⁹ The Court also clarified what it implied in *Kiobel*: that where “‘all the relevant conduct’ regarding the[] violations ‘t[akes] place outside the United States,’” the claim may be dismissed without the need to apply the “focus” test.¹¹⁰

RJR reaffirms *Morrison*’s “focus” test is the controlling standard in analyzing whether application of a statute is impermissibly extraterritorial, in RICO, ATS, and other cases. *RJR* provides important course correction to courts that were interpreting *Kiobel* as creating a “touch and concern” test distinct from *Morrison*’s “focus” test.

108. *Id.*

109. *Id.*

110. *Id.*

